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IN THE SUPREME COURT OF THE UNITED STATES

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MONTANA, :

Plaintiff : No. 137, Orig.

v. :

WYOMING AND NORTH DAKOTA :

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Washington, D.C.

Monday, January 10, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

STEVE BULLOCK, ESQ., Attorney General, Helena, Montana; on behalf of Plaintiff.

PETER KENNETH MICHAEL, ESQ., Senior Assistant Attorney General, Cheyenne, Wyoming; on behalf of Defendant Wyoming.

WILLIAM M. JAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Defendants.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 137 on our original docket, Montana v. Wyoming and North Dakota.

General Bullock.

ORAL ARGUMENT OF STEVE BULLOCK

ON BEHALF OF THE PLAINTIFF

MR. BULLOCK: Mr. Chief Justice, and may it please the Court:

The Tongue and Powder Rivers are the only significant water supply in a 10,000-square-mile area in Montana and Wyoming, and this Court is being asked to decide whether the compact allows Wyoming to take the return flows that Montana farmers in that area have always relied on or, instead, affords protection to both States. Our exception should be sustained for three reasons.

First, the plain language of the compact preserves the water supply each State was receiving as of 1950. Second, contrary to the compact's purposes, the Master's interpretation would allow individual water users to alter those amounts. And, third, the Master's policy determinations about efficiency add ambiguity to the principles underlying a century of western water

1 law. On that --

2 JUSTICE GINSBURG: General Bullock, would  
3 you please point to the precise language of the compact  
4 that freezes consumption, as distinguished from the  
5 amount of water diverted -- which freezes consumption as  
6 of January 1st, 1950?

7 MR. BULLOCK: Yes, Your Honor. In the  
8 compact, it's at the appendix of the Master's first  
9 interim report. Two areas: first, the preamble  
10 provides for an equitable division/apportionment of the  
11 water; and then the operative provision, article V(A),  
12 states that the uses existing as of January 1st, 1950,  
13 in each signatory State shall continue to be enjoyed.

14 JUSTICE GINSBURG: Well, the uses existing  
15 is irrigation.

16 I don't see where it says -- and so I can  
17 understand, the amount of water diverted can't be  
18 increased.

19 MR. BULLOCK: Your Honor, the whole of  
20 article V(A) and V(B) -- I mean, no one contests that  
21 it's the full allocation of the water. So V(B) is water  
22 after 1950; V(A) is prior. And in order for the status  
23 quo to be -- remain -- for the appropriative right to  
24 beneficial uses existing in Montana as of 1950, there  
25 needs to be a water supply. And also operative to that,

1 it's within the definitions at article II(H), is  
2 beneficial use. And that's a derivation or departure  
3 from the general prior appropriation law, because it's  
4 that use by which a water supply is depleted  
5 when usefully used.

6 JUSTICE KENNEDY: But why doesn't the  
7 language in article V(A) -- and this is not too helpful  
8 -- simply restate the issue before us, what is a  
9 beneficial use by the upstream owner?

10 MR. BULLOCK: Well, Your Honor, it need not  
11 because in article II(H) it defines what a beneficial  
12 use is, and that's that use by which the water supply of  
13 a basin is depleted. And it's that depletion that -- as  
14 of 1950, so it wasn't a full consumption of water in  
15 Wyoming, and that depletion is the return flow upon  
16 which Montanans rely.

17 JUSTICE SOTOMAYOR: Well, that's the essence  
18 -- that's the essence of the argument before us. The  
19 depletion was the amount of water that was taken from  
20 this water source to irrigate the crops. The -- the  
21 issue now before us is whether beneficial use means  
22 consumption or it means use, isn't it?

23 I -- you're begging the question in my mind,  
24 because I don't -- what source do you have for the fact  
25 that a return flow is beneficial use?

1 MR. BULLOCK: Your Honor, the return flow is  
2 the basis of Montana's water right, so that the return  
3 flow under the compact isn't actually beneficial use.

4 JUSTICE SOTOMAYOR: That's not actually  
5 true. Their water right was the beneficial use that  
6 your pre-1950 consumers used, meaning you had consumers  
7 who were irrigating their own crops, who were doing  
8 other things with the water. The rights protected are  
9 their pre-1950 uses. You're putting -- you're -- you're  
10 still equating consumption as -- as being their use, but  
11 I don't know where you get that equation from.

12 MR. BULLOCK: The equation, Your Honor, that  
13 consumption is the same thing as --

14 JUSTICE SOTOMAYOR: As use.

15 MR. BULLOCK: -- as use?

16 JUSTICE SOTOMAYOR: Uh-huh.

17 MR. BULLOCK: Well, we could go actually to  
18 the Special Master, who himself had stated that when  
19 exploring -- I mean, the beneficial use reflects the  
20 historic consumptive use. It's from his own textbook.  
21 It's on page 82. The Master says that a senior's right  
22 is limited to the amount he originally beneficially  
23 applied and consumptively used; that is, the amount  
24 received at the point of use minus the runoff.

25 JUSTICE SOTOMAYOR: Could someone pre-1950

1 who irrigated crops change the crops?

2 MR. BULLOCK: It's -- it's an open question,  
3 Your Honor. Yes, they certainly could, but not if it  
4 impacted a downstream appropriator, as per this compact.

5 JUSTICE SOTOMAYOR: How in the world do any  
6 States monitor that? The change in crops, the change in  
7 irrigation methods, the change in anything that would  
8 cause a difference in return flow? Let's assume global  
9 warming in some form or another evaporated more water,  
10 and so some crop area did some solar heating that caused  
11 a greater evaporation. Is that a breach of the compact?

12 So two questions embedded in there. How  
13 does any State monitor that, the change in crops or  
14 change in irrigation methods? And, second, how far does  
15 it go in terms of the pre-1950s right to use their  
16 water?

17 MR. BULLOCK: To the first question, Your  
18 Honor, even as of 1950, the drafters recognized that  
19 this was a fully appropriated river; it had reached its  
20 maximum practical limit. So each individual downstream  
21 knows how much water they should be getting. I mean, we  
22 have 80 years of measurements on one of these rivers  
23 alone, and you could go online right now and find out  
24 what the flow is at the State line occurring as of this  
25 morning.

1                   So a piece of it that this is something  
2 we've been doing for a long time in the west as far as  
3 knowing what water is in the river, where it is, and  
4 throughout, you know, downstream appropriation.

5                   To the second question --

6                   JUSTICE GINSBURG: But would --

7                   JUSTICE KENNEDY: But all that shows is --  
8 or might show in a particular case, is that the amount  
9 of water is reduced. Now the -- then the question is  
10 have the senior appropriators or the upstream  
11 appropriators reduced it in a way that's inconsistent or  
12 that's an overuse of their beneficial rights, and you're  
13 right -- again right where we started from. And then  
14 you have to regulate exactly how each irrigator is using  
15 the appropriative right.

16                  MR. BULLOCK: And, Your Honor, you don't --

17                  JUSTICE KENNEDY: So the -- so the flows  
18 don't necessarily answer the question.

19                  MR. BULLOCK: Well, Your Honor, it's  
20 ultimately up to each State to administer their rights  
21 and their water intrastate. But this is a compact among  
22 sovereigns. So what we need, what Montana needs, is to  
23 get that supply of water that it was receiving as of  
24 1950.

25                  CHIEF JUSTICE ROBERTS: But you -- this is



1 where it's been talking about beneficial uses. What the  
2 compact said -- says is appropriative rights to  
3 beneficial uses. And to me that suggests, which I  
4 always understood to be the way water law worked in the  
5 west, is you have a right to pull out, you know, water,  
6 and the appropriative right is you have the right to  
7 take out however much you were taking out. And the fact  
8 that less comes back, that's something different. That  
9 doesn't affect your appropriation.

10 MR. BULLOCK: Your Honor, even at the time  
11 of the compact, that Wyoming recognized their paper  
12 rights, that appropriative right was much more than the  
13 actual use occurring. So you can't read beneficial use  
14 out of -- especially under this compact, but in any.  
15 Even under the general common law, you only have an  
16 appropriative right for the beneficial use, and all  
17 along --

18 CHIEF JUSTICE ROBERTS: Well, isn't that  
19 what's going on here? The beneficial use is irrigation  
20 of crops. They have an appropriative right to take out  
21 so much flow for that. That's all they're doing.  
22 They're doing it now, just as they were back then. They  
23 just use up more of it once they've taken it out.

24 MR. BULLOCK: Mr. Chief Justice, two things,  
25 the first of which, the beneficial use is -- I mean, we

1 can't read this definition of beneficial use out of the  
2 contract -- or out of the compact. And it is a  
3 contract, actually, among States. And, also, though --  
4 second of which, though, that it's also a fundamental  
5 tenet of prior appropriation law -- is the downstream  
6 irrigator takes, given the same conditions as when he  
7 first got his or her right.

8 JUSTICE BREYER: Given the same conditions.  
9 But is there any evidence, or can you say anything from  
10 the record or any other place, going back to 1950 -- I  
11 assume in 1950 people knew how much the different  
12 landowners were taking out of the stream of the river in  
13 Wyoming to use for irrigation and other such purposes.  
14 They knew that.

15 Is there any indication they knew at that  
16 time how much each individual landowner was putting  
17 back? I think the answer is "no." But I'd be very  
18 interested if it's "yes." And I think it would help you  
19 a lot if it's "yes," because I'm --

20 (Laughter.)

21 JUSTICE BREYER: To tell you the truth, I'm  
22 pretty skeptical of the fact that they're writing an  
23 appropriation right into this about regulating something  
24 they don't even know about.

25 MR. BULLOCK: Effectively, Your Honor, it

1 could be yes.

2 JUSTICE BREYER: Well, I didn't say it could  
3 be yes. I would like you to tell me if the answer is  
4 yes, and then, of course, I'm going to ask you --

5 MR. BULLOCK: Sure.

6 JUSTICE BREYER: -- where in the record I  
7 find something that says that they knew how much each  
8 individual landowner is putting back into this river in  
9 Wyoming. And I think you can't answer that question,  
10 can you?

11 MR. BULLOCK: I certainly cannot answer  
12 that, and they didn't need to know, from the  
13 perspective --

14 JUSTICE BREYER: Oh, they didn't? In other  
15 words, they didn't know how much is coming back, but  
16 you're coming in and saying what they were -- what they  
17 were regulating here is they're saying, not only you  
18 get -- you maintain a right to take out 100,000 units to  
19 do your irrigation, but you have to put back 80,000, but  
20 they didn't even know what the number was, whether it  
21 was 80, 70, or 60, and the appropriation law is  
22 ambiguous? I think -- I think I can go that far with  
23 you to say it's ambiguous, but I don't see how I can go  
24 further.

25 I mean, that's my basic question. It's --

1 did you see what it was? Was I clear? Not too?

2 MR. BULLOCK: I --

3 JUSTICE BREYER: I'm saying, how can you  
4 read this treaty to require landowners to put back  
5 amounts into the river that they didn't even know what  
6 they were?

7 MR. BULLOCK: First, Your Honor, the  
8 individual landowner does not have to put water back in  
9 that they didn't even know what they were. What they do  
10 need to do is make sure that the beneficial -- the  
11 appropriative right to beneficial use is existing in  
12 both States. The Solicitor General pointed out that we  
13 don't break up V(A) and V(B) and put one group priority  
14 over the other, but existing as of 1950 in both States  
15 shall continue to be enjoyed. So the only way that we  
16 can continue to enjoy the rights in Montana downstream  
17 is to ensure that we have the water supplies that we  
18 had --

19 JUSTICE SCALIA: You -- you say you get the  
20 same amount of water and it's up to -- it's up to  
21 Wyoming to figure out who they have to cut down for not  
22 putting back enough to meet that amount? You don't care  
23 what private owner it comes from? It's up to Wyoming to  
24 figure out who has to be cut back?

25 MR. BULLOCK: Your Honor, I don't say we --

1 JUSTICE SCALIA: I'm trying to help you.

2 (Laughter.)

3 MR. BULLOCK: Sorry?

4 JUSTICE BREYER: Yes, I think that is  
5 what -- the answer is yes, isn't it?

6 MR. BULLOCK: Yes, but -- but, Your Honor,  
7 we don't say the exact same quantity of water. We say  
8 under like water supplies.

9 JUSTICE SCALIA: Under like water supplies,  
10 yes.

11 MR. BULLOCK: Yes. And --

12 JUSTICE SCALIA: Could you tell me the -- I  
13 didn't get the page of the Special Master's report which  
14 you asserted adopts your -- your definition of  
15 beneficial use. What page was it?

16 JUSTICE KENNEDY: I thought you referred us,  
17 just while you're going through your notes, to page 82,  
18 and there's an intriguing footnote where the Special  
19 Master talks about his own -- his own book. But that  
20 doesn't seem to me to be conclusive on your point,  
21 because he's saying the area is confused. And his point  
22 -- it seems to me it brings up what the special -- I'm  
23 taking over your answer to Justice Scalia's question.  
24 It is page 82, footnote --

25 MR. BULLOCK: Footnote 15, yes, Your Honor.

1 JUSTICE KENNEDY: There's a footnote on that  
2 page, yes.

3 MR. BULLOCK: And there he's talking  
4 about --

5 JUSTICE SCALIA: It seems to say what you  
6 say it says.

7 JUSTICE ALITO: If your understanding is  
8 correct, would the result be that landowners in Wyoming  
9 would only be allowed to consume as much as they  
10 consumed in 1950, but landowners in Montana could take  
11 advantage of improved irrigation techniques and use much  
12 more of the -- they could divert the same amount of  
13 water, but they could use much more of it?

14 MR. BULLOCK: No, Your Honor, that would not  
15 be the case.

16 JUSTICE ALITO: Why wouldn't it?

17 MR. BULLOCK: First, for the irrigators in  
18 Montana -- I mean, one of the things -- Montana sought  
19 to have a system of interstate administration. Montana  
20 -- or Wyoming, through storage, through curtailing  
21 consumption by post-'50 users, or otherwise can  
22 administer its water rights in however it so deems. So,  
23 ultimately, that's a decision of the State of how it  
24 administers the water rights and the consumption of that  
25 amount that it has.

1                   For Montana, we can't increase consumption  
2 any more than the water that we would have received at  
3 that point. So to the extent that Montana allows an  
4 individual irrigator to go to 100 percent of consumption  
5 of its water right, then in our system in Montana, we  
6 have to deal with what's going to happen to the  
7 subsequent appropriator right downstream.

8                   JUSTICE GINSBURG: And what happens under  
9 Montana law?

10                   MR. BULLOCK: Under Montana law, if there's  
11 an injury, and that's -- that's actually -- and the  
12 Special Master pointed this out in another one of his  
13 footnotes, that that still would be actionable. Like a  
14 change from flood irrigation to sprinkler irrigation, to  
15 the extent that it deprives a downstream user of waters  
16 that they're relying on, that they could bring an  
17 action.

18                   JUSTICE SCALIA: Yes, but your people can do  
19 that. Your people can get more use out of the same  
20 amount of water diverted by going to sprinkler  
21 irrigation, whereas the people in Wyoming can't. That's  
22 a little unfair, it seems to me. Right?

23                   MR. BULLOCK: Both can, Your Honor. I mean,  
24 that -- that is -- I guess the presumption is that we  
25 would have the water to use it, and Wyoming is actually

1 getting a lot more production by consuming a lot more of  
2 the water within its right.

3 JUSTICE SCALIA: Your people are entitled to  
4 take out the same amount they took out before, right?  
5 Pre-1950?

6 MR. BULLOCK: Under like water supply  
7 conditions --

8 JUSTICE SCALIA: Whereas the people in  
9 Wyoming, you say, are not entitled to take out the same  
10 amount; they are entitled only net the same amount that  
11 they had before. Whereas downstream your people can  
12 take out the same amount and whereas before 20 percent  
13 of it used to go back into the stream, they can now make  
14 use of that whole 20 percent through sprinkler  
15 irrigation, right? It gives you a great advantage.

16 I mean, maybe that's the way it was written,  
17 but -- but don't tell me that this is even-handed,  
18 because it --

19 MR. BULLOCK: Your Honor, I don't think that  
20 it does give us a great advantage, because we still have  
21 to deal with the same amount of water supply that we  
22 would have had. So, at that point, if we switch to  
23 sprinkler irrigation, the first irrigator does that,  
24 there's going to be a shortage down river unless we make  
25 it up through additional storage or other causes. So --



1 JUSTICE KENNEDY: Do you have ultimate  
2 liability to Montana -- pardon me -- to North Dakota for  
3 -- for overuse?

4 MR. BULLOCK: We do a little bit, Your  
5 Honor. There's the picture of the basin in the first  
6 appendix.

7 JUSTICE KENNEDY: Well, I won't -- I won't  
8 get into that, but it does seem to me that the Chief  
9 Justice asked the question, if you're entitled to take  
10 the water, you can use it for any purpose. I -- I take  
11 it the answer to that is it has to be a beneficial use,  
12 it has to be for approximately the same crop, but that  
13 brings us to this -- to this gray area that the Special  
14 Master refers to on page 82 as confusing. And I  
15 think -- was it page 65 -- he talks about this is a  
16 confusing area of the law.

17 What is your best authority for your  
18 position? What is the best authority? Do you have a  
19 case or a -- a paragraph in a treatise that's --

20 MR. BULLOCK: Sure. Yes, Your Honor. In  
21 1992, the Utah Supreme Court framed the question: This  
22 court's called upon to determine the applicable law when  
23 the use of new technology impacts --

24 JUSTICE KENNEDY: The Utah case is your best  
25 case?

1                   MR. BULLOCK: That's -- that's the only case  
2 that any of the parties cited that actually deals with  
3 the change from sprinkler -- or flood to sprinkler  
4 irrigation. And what that said is if the return flow  
5 goes to the same river which it came from, that  
6 subsequent irrigators or downstream appropriators have  
7 the right to rely on that.

8                   And I guess I'd say that my second best case  
9 is the Special Master's own footnote. It's 69/12, where  
10 he says that, you know, even though State change  
11 procedures don't typically apply to crop or -- changes  
12 in crop irrigation techniques, this does not mean  
13 there's no way to challenge increases in efficiency.  
14 Downstream water users, for example, could sue to enjoin  
15 an upstream appropriator from increasing consumption or  
16 to force the upstream appropriator to replace lost  
17 runoff.

18                   JUSTICE SCALIA: I would think your best  
19 point is not all of that stuff, but simply the  
20 definition section, which very clearly makes a  
21 distinction between beneficial use and diversion. And  
22 your point is that what is guaranteed is not the  
23 diversion right that existed pre-1950, but the  
24 beneficial use right, which is the net use of the water,  
25 not -- not the total amount diverted.

1           If -- if there were not both of those  
2 definitions, it seems to me it would be a little -- your  
3 case would be a little harder. But with the two of  
4 those definitions there and with V(A) using beneficial  
5 use rather than -- it could have said diversion,  
6 appropriative right to diversion, but it didn't say  
7 that. It said to beneficial use.

8           Well, why -- why define beneficial use that  
9 way if you don't mean it? That's your best point, isn't  
10 it?

11           MR. BULLOCK: I -- I agree, Your Honor.

12           (Laughter.)

13           MR. BULLOCK: I was trying to -- I believe  
14 Justice Kennedy asked for a case or a treatise, so  
15 that's --

16           JUSTICE SCALIA: Well, all right.

17           MR. BULLOCK: But I agree that the plain  
18 language -- and especially in an area where there's so  
19 much ambiguities the Special Master acknowledges, why  
20 change the status quo of what was occurring? And  
21 that's --

22           CHIEF JUSTICE ROBERTS: I don't understand  
23 why that's a good -- good answer. I mean, the  
24 beneficial use is that use by which the water supply is  
25 depleted. Well, the use here is irrigation. It doesn't

1 say irrigation up to the technological development in  
2 1950. They're still taking out the same amount of water  
3 for that beneficial use. They're using it to irrigate.  
4 And if they get better at it so they use more, well,  
5 that's just too bad for you.

6 MR. BULLOCK: Your Honor, but they're  
7 depleting more from the basin, and that's -- I mean, you  
8 can have beneficial use for non-consumptive purposes.

9 JUSTICE BREYER: That's back where -- that's  
10 where I was here, too. See, I can't get too far -- I  
11 mean, you have the word "depletion" in that definition.  
12 I -- I -- that might help you. But I'm thinking in  
13 accordance with the doctrine of appropriation, what does  
14 that doctrine, that legal doctrine, say about use and  
15 return? And that's why we're -- we're -- why I was  
16 thinking it seems totally unclear.

17 It talks about seepage, the cases, which I  
18 gather is different from return. Okay. So could they  
19 have really meant net? And what struck me is that they  
20 couldn't, which -- which you were beginning to address,  
21 too, is that they couldn't have meant net because the  
22 water law at that time is unlikely to have meant net for  
23 the reason that they didn't -- you don't know what's  
24 coming back.

25 Do you see? It's not just -- I see your

1 point. Your point is, well, Wyoming knew how much was  
2 going into Wyoming. But that's not my point. My point  
3 is what -- what's the water law? What's the law of  
4 appropriation at that time in respect to return flows?  
5 And if people didn't measure return flows in general, I  
6 suspect in an ambiguous area they would have analogized  
7 it to seepage, which is what the -- what the Special  
8 Master thought.

9 MR. BULLOCK: Your Honor, the seepage cases,  
10 though, deal with adjoining landowners --

11 JUSTICE BREYER: Yes, they --

12 MR. BULLOCK: -- not the same river flow,  
13 and the Special Master acknowledged that.

14 JUSTICE BREYER: Uh-huh.

15 MR. BULLOCK: That -- and I guess what I was  
16 earlier trying to explain is certainly each appropriator  
17 knows how much water it would -- would be receiving,  
18 what the flows typically are, and they all basically  
19 judge on that. But I guess if there's any ambiguity --  
20 and the law wasn't necessarily clear as of 1950 on  
21 conversions from flood to sprinkler irrigation, but what  
22 we were trying to do is preserve those uses in both  
23 States existing as of January 1st, 1950, and we can't do  
24 that without a water supply.

25 Other than the text, I think that the next

1 place that one would look in interpreting the compact  
2 would be the legislative history. And I think that the  
3 report to the Senate was real good in saying that --  
4 and this is part of -- it's appended to motion --  
5 Montana's brief in response to the motion to dismiss the  
6 bill of complaint. At 3a it says, "It's clear then that  
7 the demand of one State upon another for a supply  
8 different from that now obtaining under present  
9 conditions of supply and diversion is not contemplated,  
10 nor would such a demand have a legal standing."

11 So what they were trying to do in 1950 is  
12 protect what each State was doing.

13 JUSTICE SCALIA: Where is that again --  
14 where at?

15 MR. BULLOCK: That's at 3a of the appendix,  
16 Montana's motion -- or the response to Wyoming's motion  
17 to dismiss the bill of complaint.

18 JUSTICE GINSBURG: General Bullock, assume  
19 that you're right, that what was guaranteed was the same  
20 amount of water flowing into Montana as in 1950, and  
21 I -- I take it you don't care how Wyoming deals with  
22 this, but what -- if you're right, what could Wyoming  
23 do? It can't tell the -- the farmers go back to the old  
24 way of irrigating or go back to a different crop?

25 MR. BULLOCK: No -- I mean, no, Justice

1 Ginsburg. Wyoming could choose to reduce groundwater  
2 pumping. They could choose to curtail irrigation on  
3 post-1950. They could choose to release storage. I  
4 mean, they've -- they've built, I think, 15 new  
5 reservoirs in Wyoming since the date of the compact.  
6 They could choose to release water from that to fulfill  
7 those rights.

8 JUSTICE GINSBURG: So, you say it doesn't --  
9 they don't -- Wyoming doesn't have to know whether  
10 farmer A or farmer B is taking more than they took in  
11 1950 -- I mean, is using more than they used in 1950;  
12 they just have to know what the total amount is, and  
13 Wyoming can make that up?

14 MR. BULLOCK: Yes, Your Honor.

15 JUSTICE SOTOMAYOR: So really -- I'm sorry.  
16 The issue is, are both of you -- both of you have pre-  
17 and post-1950 users?

18 MR. BULLOCK: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: All right. And I -- I  
20 guess this goes to the second question, which was sort  
21 of not really addressed. The Special Master said, well,  
22 you could cut back your post-1950 users and satisfy all  
23 of the needs of your pre-1950 users. Why isn't that the  
24 answer? Why isn't that an answer that should be  
25 respected, because you can satisfy all of the pre-1950

1 needs that you have potentially?

2 MR. BULLOCK: No, Your Honor, we can't  
3 necessarily satisfy all the needs. The drafters did say  
4 even as of 1950 that this basin reached its maximum  
5 practicable limit for irrigation, and that's from the  
6 October -- the last of the drafters meetings. So -- so,  
7 the water supply as of then, without additional storage,  
8 had already hit that limit. And, ultimately, what we  
9 need, though, is -- each State will administer  
10 intrastate, but we still should be able to rely on the  
11 ability to get a supply of water to meet those needs as  
12 of 1950 under like water supply conditions.

13 JUSTICE SOTOMAYOR: Before any 1950 use?  
14 Post-1950 users are permitted?

15 MR. BULLOCK: We're still at the stage of  
16 discovery, but, yes, likely that's how it would occur,  
17 Your Honor.

18 JUSTICE SOTOMAYOR: So why isn't this a  
19 premature lawsuit? Because I think really the essence  
20 of your claim is we need the pre-1950 water flow. We  
21 don't care who it comes from. And what -- all the  
22 Special Master said, in my mind, was the difference --  
23 you can't look to what the pre-1950s were doing in this  
24 situation, but I haven't addressed what the posts are  
25 going to do or have been doing and whether that's right,



1 and that's depriving you of the water flow.

2 I don't know if he answered that question.

3 Are you, in fact, entitled to a minimum amount of water  
4 flow? That's really what should be the point of the  
5 issue, isn't it?

6 MR. BULLOCK: It is, or that quantity under  
7 like water supply conditions. I don't think it's  
8 premature. We've tried to administer this compact,  
9 actually made calls in 2004 and 2006; and as a result of  
10 not getting the water, knowing -- believing we're in a  
11 water-short time, that's when we filed this action.

12 I'd like to reserve my time if I may.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Michael.

15 ORAL ARGUMENT OF PETER KENNETH MICHAEL

16 ON BEHALF OF DEFENDANT WYOMING

17 MR. MICHAEL: Mr. Chief Justice, and may it  
18 please the Court:

19 The Court has identified in previous  
20 questioning this case at this point in this issue  
21 involves whether a Wyoming or a Montana diverter may  
22 change cropping patterns, may change various  
23 technologies in irrigated agriculture, and change up and  
24 down, depending on the year and the fallowing of land  
25 and that sort of thing, the amount of water that is

1 actually consumed by crops. And I think the Court has  
2 identified the critical fact that a water right, a  
3 classic western water right, appropriative right as in  
4 article V(A), is made up of the right to divert an  
5 amount of water at a head gate in an irrigation  
6 situation, put it on a defined quantity of land, and use  
7 it for a purpose, irrigation, that's defined by the  
8 State. Wyoming has had such a -- a system in place for  
9 many years and controls those issues but does not and  
10 has not attempted to measure consumptive.

11 JUSTICE KENNEDY: But what is the  
12 controlling principle in answering the question that I  
13 think you properly put? Could these irrigators switch  
14 to something like rice, which absorbs a tremendous  
15 amount of water, or are they -- when they switch crops  
16 it must be reasonably close to the earlier beneficial  
17 use? What is -- what is the standard that we look to,  
18 to answer that question?

19 MR. MICHAEL: The standard is the standard  
20 of waste, practical irrigation.

21 JUSTICE KENNEDY: The standard of?

22 MR. MICHAEL: Waste, of not wasting water,  
23 practical irrigation. The irrigation right is a general  
24 right, and if rice were to double the amount of  
25 consumptive use by the crop, that would be permissible

1 if the previous use had not been affected by an  
2 abandonment action, because the amount of water was  
3 being reasonably used for the former crop and the crop  
4 has changed. So it's not a question of -- of percentage  
5 change.

6 JUSTICE SOTOMAYOR: I thought --

7 MR. MICHAEL: It's a question --

8 JUSTICE KENNEDY: Suppose the first --  
9 suppose the first crop absorbs 50 percent of the water  
10 and returns 50 percent by seepage. The second crop that  
11 they switch to still absorbs just 50 percent of the  
12 water but because of the -- of the pattern, the other 50  
13 percent just evaporates?

14 MR. MICHAEL: The -- the way that the water  
15 is -- there's -- there's a basket, Your Honor. There's  
16 a basket that starts with a quantity that's taken at the  
17 head gate, 4 cubic feet per second put on the -- on the  
18 field. And within that quantity there -- there's  
19 multiple -- two components, basically: the amount  
20 consumed by the crop -- I should say the amount consumed  
21 by the crop or depleted by other elements, ditches,  
22 seepage, other types of things, deep percolation into  
23 the ground -- and -- and the other component which is  
24 water that's not lost but can return or go somewhere.  
25 It's not evaporated; there's no transpiration. So

1 there's those two components.

2           And if that -- if that quantity, that  
3 division changes, that's perfectly permissible within  
4 the use of the water right. And the reason for that was  
5 set out in Wiel's -- Samuel Wiel's text in 1911, carried  
6 forward in texts and cases ever since, that -- and in  
7 the Binning case, a 1940 case in Wyoming; which is the  
8 water while it's in the stream in the public common is  
9 -- is not under the possession and control -- the  
10 personal property control of the irrigator.

11           JUSTICE SCALIA: But we're dealing here with  
12 a compact which has a text, and -- and what the water  
13 law of Wyoming or of Montana happened to be cannot  
14 overrule the text, and I am -- I'm hung up on the fact  
15 that article V(A) says appropriative rights to the  
16 beneficial uses of the water of the Yellowstone River  
17 System existing as of January 1, 1950. Appropriative  
18 rights not to diversion, not to diversion for beneficial  
19 uses, but appropriative rights to the beneficial uses,  
20 which is defined -- which is defined in the compact to  
21 say "that use by which the water supply of a drainage  
22 basin is depleted when usefully employed."

23           And it could have said diversion, but it  
24 didn't say that, and I notice that the Government's  
25 brief uses -- seems to use the words interchangeably,

1 "depletion" and "diversion." They're not  
2 interchangeable. They're defined quite separately in  
3 this thing. And besides which I find it implausible  
4 that Montana signed on to, well, we don't know how much  
5 water we're going to get; it depends, you know, upon how  
6 much stuff was -- was flowing back before, but we're not  
7 guaranteed that that will be flowing back again.

8           You combine those two things, and I -- I --  
9 what do you do about that definition?

10           MR. MICHAEL: Your Honor, the definition has  
11 two components, the classic beneficial -- the component  
12 that would come from a classic beneficial use  
13 definition, which is useful employment for the  
14 activities of man, a beneficial purpose, which -- a non-  
15 wasteful purpose. That's the start.

16           JUSTICE SCALIA: That's not how it's  
17 defined.

18           MR. MICHAEL: That's -- that's the last  
19 portion. That's the second part.

20           JUSTICE SCALIA: Well, that's fine.

21           MR. MICHAEL: The first part is use by which  
22 the water supply of a drainage basin is depleted. In  
23 the western United States, a drainage basin --  
24 appropriable water is not all the water in the air and  
25 on the land and dropping from the sky; appropriable

1 water is water confined in a water course. The Binning  
2 case made that clear. Until the water returned from the  
3 field into a water course, it was not appropriable by  
4 the downstream user. So this definition -- by using  
5 the --

6 JUSTICE KENNEDY: But are you addressing the  
7 word "depleted"?

8 MR. MICHAEL: I'm addressing the word  
9 "supply" of the drainage basin; and then it is depleted.  
10 Use by which the supply, the water supply of a drainage  
11 basin, is depleted.

12 JUSTICE KENNEDY: But are you saying that  
13 "depleted" means only what's withdrawn, and it's not  
14 calculated by -- with reference to what is returned?

15 MR. MICHAEL: That's correct.

16 JUSTICE BREYER: But you -- obviously,  
17 you're saying --

18 MR. MICHAEL: That is different from  
19 "diverted."

20 JUSTICE BREYER: You read it with a  
21 different emphasis. Justice Scalia read it with --  
22 beneficial use is that use by which the water supply of  
23 a drainage basin "is depleted" when usefully employed by  
24 the activities of man.

25 And you read it: By which the water supply

1 of a drainage basin is depleted "when usefully employed  
2 by the activities of man." So that it is a definition  
3 in respect to how you use it, not amounts.

4 But if you emphasize the word "depleted," it  
5 could be read as referring to amounts, and not quality  
6 of use, not nature. And --

7 JUSTICE SCALIA: Why don't you emphasize  
8 both of them?

9 JUSTICE BREYER: Yes, well --

10 JUSTICE SCALIA: I'm willing to emphasize  
11 both, but you can't write out the "depleted" out of the  
12 -- how does your definition of "depleted" differ from --  
13 from "diversion"?

14 MR. MICHAEL: If you had a broader --

15 JUSTICE SCALIA: Is the diversion for a  
16 beneficial use the same thing as a depletion?

17 MR. MICHAEL: May I give an example?

18 In a -- in a river, the Tongue River, if  
19 there is a -- if there is a waterwheel, Montana allows  
20 water rights. A 1912 case, *Hennessy v. Featherman*,  
21 allows a water right to push a waterwheel. That water  
22 flowing down the river does not -- does not -- is not  
23 diverted. And nevertheless it -- it would allow a water  
24 right.

25 This definition differentiates that. In

1 this definition under the compact, water that is  
2 diverted for agriculture, that is diverted is a  
3 beneficial use, but there's a small segment of -- of  
4 what could be a legitimate water right that is excluded  
5 under this definition.

6 JUSTICE SCALIA: No, but, I mean, to -- to  
7 do that, the definition would have read: The term  
8 "beneficial use" is defined to be that use by which the  
9 water -- that use "for which" the water supply of a  
10 drainage basin is diverted for useful employment by the  
11 activities of man, and that's not what it says. To the  
12 contrary, it makes a clear distinction between  
13 "depletion" and the previous definition of "diversion."

14 I just -- I was trying to give that stark  
15 difference some effect in the later section V(A).

16 MR. MICHAEL: Let me say this, Your Honor,  
17 if I might: The -- you will find in -- in the compact,  
18 in article V(B), the use of both "diversion" and  
19 "beneficial use."

20 JUSTICE SCALIA: Okay.

21 MR. MICHAEL: And so we have two -- those  
22 terms are both used. And in V(B) the drafters made a  
23 distinction; they said direct diversions or storage  
24 would be covered by V(B), and then they said how  
25 diversions are counted.



1 JUSTICE SCALIA: Where -- where --

2 MR. MICHAEL: In (C) they talk about the --

3 JUSTICE SCALIA: What part of V(B) are you  
4 talking about?

5 MR. MICHAEL: I'm talking about at the  
6 bottom of V(B), where you're talking about the three --  
7 the third-tier rights.

8 JUSTICE SCALIA: The point of measurement  
9 shall be below the last diversion?

10 MR. MICHAEL: No, V(B). In the first text,  
11 the first paragraph of V(B), towards the bottom, the  
12 text says: "And the remainder of the unused and  
13 unappropriated water is allocated to each State for  
14 storage and direct diversions for beneficial use on new  
15 lands."

16 JUSTICE SOTOMAYOR: Excuse me --

17 JUSTICE SCALIA: For -- exactly. I mean,  
18 there it talks about diversions for beneficial use and  
19 not depletion for beneficial use. I mean, I think  
20 that's something different.

21 JUSTICE SOTOMAYOR: Counsel, could I --

22 MR. MICHAEL: Your Honor.

23 JUSTICE SOTOMAYOR: Could you answer -- do  
24 you see a difference? Finish that, and then could I  
25 just clarify something from what you were just reading?

1                   MR. MICHAEL: I think there's a difference  
2 in that the -- in practical terms, the depletion -- in  
3 the depletion and the beneficial use definition, a  
4 diversion would be the only way to deplete that. And  
5 that's -- that's the point. The only way to make it  
6 through a depletion --

7                   JUSTICE KENNEDY: And so, once again, you're  
8 saying that depletion is a calculation of what is taken  
9 without reference to what returns?

10                  MR. MICHAEL: Yes, Your Honor. And --

11                  JUSTICE SCALIA: Oh, so when --

12                  JUSTICE KENNEDY: And your best authority  
13 for that is?

14                  MR. MICHAEL: The best authority, I think,  
15 is what the -- the Special Master's discussion of this,  
16 that the only practical way a water supply of the  
17 drainage basin would -- being the quantities of water in  
18 the rivers themselves, would be depleted would be  
19 through a diversion. So there's really no reason to  
20 make a distinction.

21                  CHIEF JUSTICE ROBERTS: Just to follow up on  
22 Justice Kennedy's point, because I think it's important:  
23 So you were reading -- when it says "is depleted," you  
24 think all you have to show is that it's less than when  
25 you started, and once that is shown, it is depleted.

1 Then you're saying, but we can deplete as much as we  
2 want?

3 MR. MICHAEL: Yes, depletion would be moving  
4 it from this glass of water, if that was the river --

5 CHIEF JUSTICE ROBERTS: Yes.

6 MR. MICHAEL: -- and it reduces the quantity  
7 of water in the river. That would be a depletion.

8 CHIEF JUSTICE ROBERTS: And you don't care  
9 how much? You're saying, well, this is a beneficial use  
10 because it depletes some of the water, it takes some  
11 away, and once we have gotten over that hurdle, all bets  
12 are off and we can deplete as much as we want.

13 MR. MICHAEL: Yes. And, of course, the  
14 water right --

15 CHIEF JUSTICE ROBERTS: Well, I guess to get  
16 back to the point, wouldn't the normal word be "divert"?

17 MR. MICHAEL: It may well be, Your Honor.  
18 There's -- there's some problems with this definition.  
19 It self-defines itself using "usefully" twice, so we  
20 have some drafting issues with -- with this -- in some  
21 of these.

22 JUSTICE SOTOMAYOR: Counsel, could I go back  
23 to my question, which is twofold? The first is the  
24 Solicitor General recommends that we defer the decision  
25 on remedies in this case, and Montana seems to agree.

1 Do you agree as well? The second question presented.

2 MR. MICHAEL: That has been deferred, is my  
3 understanding.

4 JUSTICE SOTOMAYOR: It has? My problem with  
5 this is -- and I think I need to understand what the  
6 fight is about here, or what the dispute is about -- it  
7 really does seem to me that it is a question of  
8 remedies, not about whether you're taking more water  
9 rights through irrigation or not.

10 If I understand this compact right, both of  
11 you are protected in your pre-1950 beneficial uses.  
12 Each of you appear, under the terms of article V, to be  
13 entitled to get enough water to fill those uses. The  
14 next section, the one that you read earlier, lets you  
15 use things in the future for post-1950 uses, but only if  
16 the water supply's protected pre-1950 beneficial uses  
17 have received all they're entitled to. Neither of you  
18 are entitled or -- to take anything post-1950 until  
19 pre-1950 is protected.

20 That's how I read article V. Am I reading  
21 it wrong? Because it seems to me that the only time  
22 that we get into a dispute -- and this is the part that  
23 I think your adversary may be right about, ultimately --  
24 is it's not a consumptive compact, but it's a use  
25 compact, and both of you are entitled to get a full --

1 that's what I'm reading article V to say, to get enough  
2 water to satisfy the beneficial uses before anybody's  
3 entitled to post-1950 water.

4 Tell me what in the language of article V  
5 suggests something different than that understanding.

6 MR. MICHAEL: I disagree -- the language in  
7 article V that disagrees with that is the very first few  
8 words, "appropriative rights." Appropriative rights do  
9 not guarantee that any water user or any group of water  
10 users will be satisfied. 1934 was a horrendously dry  
11 year in the basin, 50 percent -- flows were 50 percent  
12 less than normal. In those kinds of years, the river --  
13 the river dried up that year in parts of the river,  
14 so -- well --

15 JUSTICE SOTOMAYOR: But this is not  
16 happening today, is it? There's --

17 MR. MICHAEL: Oh, yes. It happened in 2004.  
18 It --

19 JUSTICE SOTOMAYOR: All right, but that's an  
20 isolated year.

21 MR. MICHAEL: Yes.

22 JUSTICE SOTOMAYOR: In most years, are you  
23 putting water to post-1950 use -- to post-1950 uses or  
24 not? Have you been regularly putting water to post-1950  
25 uses?

1           MR. MICHAEL: Both States, at times. Yes,  
2 last year, all post-1950 uses got satisfied. It varies  
3 widely. But the point is that only the appropriative  
4 right, which is not a guarantee of a quantity of  
5 water -- so the first clause of the compact, article  
6 V(A), does not establish a quantity of water, and there  
7 are many compacts that do this. They establish a  
8 quantity of water, and they do it --

9           JUSTICE SOTOMAYOR: I don't disagree.

10          MR. MICHAEL: -- quite simply.

11          JUSTICE SOTOMAYOR: I don't disagree, but as  
12 I read the article, it says, you put all the water  
13 that's available to pre-1950 appropriated uses. You  
14 then go, as I read the second part of this article, to  
15 any water supplies that each State has until you fulfill  
16 those 1950 appropriated uses. And then it apportions,  
17 between the two of you, post-1950 percentages of the  
18 excess water that you're entitled to have.

19                   Am I correct about that structure?

20          MR. MICHAEL: Yes, and on an ongoing basis.  
21 It's not a quantity. None of this is done in quantity.

22          JUSTICE SOTOMAYOR: Exactly.

23          MR. MICHAEL: It's all done in a system  
24 that's dynamic.

25          JUSTICE SOTOMAYOR: But that's why -- I do

1 understand the remedies were deferred, but to the extent  
2 that we were to rule that appropriated rights included  
3 the right to change irrigation methods or crops -- we  
4 don't have to reach crops, because that's not at issue  
5 here -- in the end, you're only entitled to take the  
6 appropriated uses, including irrigation rights, that  
7 existed pre-1950. Are they entitled to get as much  
8 water as necessary to satisfy their pre-1950 rights or  
9 not --

10 MR. MICHAEL: No.

11 JUSTICE SOTOMAYOR: -- before you can use  
12 post-1950 water?

13 MR. MICHAEL: Yes. Yes, before -- on these  
14 -- on those particular dates. On those particular  
15 dates, if there are pre-1950 rights in Montana that are  
16 not satisfied on that river and there's post-1950 rights  
17 in Wyoming, the Special Master has ruled, contrary to  
18 Wyoming's argument --

19 JUSTICE SOTOMAYOR: But how -- why aren't  
20 you taking more of the percentage that way of post-1950  
21 waters? The compact says, post-1950, you can take  
22 whatever percentage it was. I've forgotten what  
23 percentage that might have been.

24 MR. MICHAEL: 60 percent.

25 JUSTICE SOTOMAYOR: Whatever it was. 60

1 percent --

2 MR. MICHAEL: This might add on that.

3 JUSTICE SOTOMAYOR: They're entitled to 40.

4 Does that mean you can take a hundred percent, because  
5 there happens to be more water that they can satisfy the  
6 pre-1950s users with? Why aren't they entitled to their  
7 40 percent of whatever that big basin is so they can  
8 give more water to post-1950 users, that they can  
9 exploit their full 40 percent?

10 MR. MICHAEL: Your Honor, I'm not following,  
11 because there's a distinction between each class of  
12 water.

13 JUSTICE SOTOMAYOR: Yes, I understand that.

14 MR. MICHAEL: And in your -- in your  
15 question, I'm not following which class you are  
16 referring to.

17 JUSTICE SOTOMAYOR: Well, I -- I'm answering  
18 this only -- I'm asking this because I know we've  
19 deferred decision on the remedies --

20 MR. MICHAEL: Yes.

21 JUSTICE SOTOMAYOR: -- but for me that is so  
22 integral to the issue here because when they talk about  
23 being entitled to a water flow, I see that as being  
24 entitled to a pre-1950 satisfaction of water needs or  
25 beneficial uses before anybody gets post-1950 water.



1           And so, I see the only issue before us,  
2 because remedies have been put aside, as to whether the  
3 beneficial use includes some percentage increase because  
4 of irrigation demands, but so what? It just means it's  
5 going to limit post-1950 users. It's not going to limit  
6 the rights of the pre-1950 users.

7           Everybody's entitled to change their  
8 irrigation methods. Everybody's entitled to change  
9 their crops. They appear not to be entitled to put the  
10 water to a new use, whatever -- however that's defined.  
11 We don't need to get there today, but I'm not sure how  
12 you're entitled to post-1950 uses while they're still  
13 not satisfied in 1950 use.

14           MR. MICHAEL: We -- Wyoming is not entitled  
15 on the same river to take post-1950 water when there is  
16 a pre-1950 use in Montana that's not satisfied. The  
17 Special Master has held that. Pre-1950s are --

18           JUSTICE SOTOMAYOR: The question is what?

19           MR. MICHAEL: He has -- the Special -- I'm  
20 sorry. The Special Master has recommended that, but --  
21 and the Court actually has granted that.

22           CHIEF JUSTICE ROBERTS: Counsel, just before  
23 you sit down, what makes you think we've deferred the  
24 remedy question? It's presented. It's been briefed. I  
25 don't know why you think we've deferred it. Whether or

1 not Montana has to take care of intrastate uses --  
2 that's what I understand the remedy question to be. You  
3 briefed it.

4 MR. MICHAEL: Well, no, my understanding was  
5 the Court had simply sent it back to the Special Master  
6 for further consideration. That's all.

7 CHIEF JUSTICE ROBERTS: Well, thank you.  
8 Thank you, counsel.

9 MR. MICHAEL: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Jay, maybe you  
11 can help clarify something. The -- the second question  
12 presented, which involves what Montana has to do before  
13 they -- that's still before us, right?

14 ORAL ARGUMENT OF WILLIAM M. JAY  
15 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
16 SUPPORTING DEFENDANTS

17 MR. JAY: Mr. Chief Justice --

18 CHIEF JUSTICE ROBERTS: I know you want  
19 us -- you don't want us to reach it, but it's still  
20 before us.

21 MR. JAY: Mr. Chief Justice, and may it  
22 please the Court:

23 The Court entered an order stating that it  
24 would hold oral argument only on Montana's first  
25 exception, and that the second exception would be

1 recommitted to the Special Master. So for that -- for  
2 that reason the parties have addressed only the first  
3 exception in this argument today.

4 JUSTICE SOTOMAYOR: Could you -- but your  
5 brief, before we entered that order, said the Special  
6 Master was right, that they have to satisfy their needs  
7 from pre -- post-1950 users. Why? Aren't they entitled  
8 to their 40 percent of how much excess water there may  
9 be after their pre-1950 users have been satisfied in  
10 full? Doesn't this compact say both of their pre-1950  
11 users have to be satisfied first?

12 MR. JAY: Both of their pre-1950 users have  
13 to be satisfied first, yes, we agree with that, so that  
14 no one in Wyoming is supposed to be taking post-1950  
15 water until pre-1950 users in Montana are satisfied. We  
16 agree with that.

17 The -- the point on which -- that the Court  
18 has sent back to the Special Master is what happens if  
19 pre-1950 users in Montana are not satisfied but they  
20 could be because Montana post-1950 users in Montana are  
21 also diverting water. But what we think the -- the  
22 question squarely before the Court here is whether the  
23 right to recapture water gained from increased  
24 efficiency is part of the pre-1950 appropriative right,  
25 and that matters when there's not enough water in the

1 river for both States to satisfy their pre-1950  
2 appropriative rights. Forget about post-1950s, there's  
3 not enough water for --

4 JUSTICE BREYER: And so, on your theory in  
5 that situation where there isn't enough for all the  
6 pre-1950 people, it's Wyoming that gets all the water?  
7 And on their theory, it's surprising -- surprise,  
8 surprise -- it's Montana that gets all the water?

9 (Laughter.)

10 JUSTICE BREYER: And there's no way to read  
11 this contract -- this compact so it's share and share  
12 alike?

13 MR. JAY: Both States have affirmatively  
14 rejected the idea of a middle ground like that, Justice  
15 Breyer, because --

16 JUSTICE BREYER: There's no fair way to  
17 decide this case?

18 MR. JAY: Well -- well, Justice Breyer,  
19 we -- we submit that enforcing the compact according  
20 what -- what the States signed up for --

21 JUSTICE SCALIA: It is fair.

22 MR. JAY: Precisely. And --

23 CHIEF JUSTICE ROBERTS: Well, I always  
24 thought in addition that's kind of the way appropriation  
25 law works in the west, right? I mean, the person who

1 gets it, gets it.

2 (Laughter.)

3 MR. JAY: Provided that --

4 JUSTICE SCALIA: The person who doesn't get  
5 it, gets it.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: Well, I mean, I  
8 don't mean -- I mean, isn't that the difference between  
9 eastern water law and western water law? In the east,  
10 you try to allocate everything fairly so everyone is  
11 treated fairly, and I thought in the west, for reasons  
12 of efficiency, it's first come, first served.

13 MR. JAY: And here the States decided not to  
14 do that on an interstate basis. They said that -- that  
15 all pre-1950 users would be on the same footing as  
16 between the States. So that Montana cannot complain  
17 if -- as long as Wyoming's water users pre-1950 are not  
18 exceeding their pre-1950 right, Montana has no remedy  
19 and there's no breach. They concede that on page 20 of  
20 their surreply.

21 JUSTICE GINSBURG: Mr. Jay, I thought that  
22 the Special Master -- very important to him was the  
23 meaning of "appropriative rights," and he said that the  
24 Wyoming law is just as you've described, that is, the  
25 farmer can use all that water; and he said Montana law

1 is uncertain, but Wyoming law is not out of line with  
2 the general approach.

3 Suppose this had been a case -- suppose  
4 Montana law, instead of being uncertain, was  
5 diametrically opposite Wyoming law, then what happens  
6 under this compact?

7 MR. JAY: Under this compact, Justice  
8 Ginsburg, the appropriative rights existing in each  
9 signatory State as of January 1st, 1950, are what are  
10 preserved and carried forward by article V(A). Each  
11 water user in -- in each State has exactly the same  
12 rights that he had on January 1st, 1950. Now, in  
13 Montana perhaps that might not include the right to  
14 recapture efficiencies, but we know, for example, that  
15 -- that a Montana water user could divert more water per  
16 acre because Montana had a more generous concept of  
17 beneficial use for irrigation per acre than Wyoming did.

18 The compact simply carries forward all  
19 existing appropriative rights, and the drafters  
20 consciously rejected the idea that they should come up  
21 with some kind of interstate administration system  
22 putting the two States' rights on an equal footing.  
23 They carried forward each element in the bundle of  
24 sticks that a rights holder had on January 1st, 1950,  
25 subject to the single override of the definition of

1 "beneficial use." And I'd like to turn to that because  
2 Justice Scalia's colloquy with Mr. Michael brought that  
3 out.

4 In article II(H), there is a definition of  
5 "beneficial use." What the compact's definition of  
6 "beneficial use" does is specify that non-depletive uses  
7 don't count. Hydropower is a classic example.  
8 Hydropower in the main channel is something that one  
9 could get an appropriative right for under some western  
10 water law.

11 JUSTICE KENNEDY: Could you -- and this is  
12 II --

13 MR. JAY: II(H), which is on page A-4 to the  
14 appendix of the Special Master's report. That's the  
15 definition of "beneficial use."

16 What it does not do is specify that  
17 depletion is the measure of beneficial use. It says  
18 beneficial use is not the use to the extent that the  
19 water supply is depleted; it's the use -- it's a use by  
20 which the water supply is depleted. Because irrigation  
21 means water goes out and doesn't come -- and some of it  
22 doesn't come back, irrigation is a depletive use. It's  
23 recognized by the compact.

24 JUSTICE SCALIA: Well, hydropower would --  
25 would not constitute a diversion.

1 MR. JAY: But a mill race would, Justice  
2 Scalia. A mill race takes water out of the river, and  
3 you turn -- you turn the wheel of your grist mill with  
4 it, but then -- and then the water comes back to the  
5 river.

6 JUSTICE SCALIA: Well, but that -- that's a  
7 diversion.

8 MR. JAY: Yes, that's a diversion, but not a  
9 depletion.

10 JUSTICE SCALIA: It means the taking or  
11 removing of water when the water so taken or removed is  
12 not returned directly into the channel of the  
13 Yellowstone River. So if you have a mill race, the  
14 water comes through the mill race, goes right back; it's  
15 -- it's not even a diversion. You don't have to qualify  
16 as a beneficial use.

17 MR. JAY: But the -- the point, Justice  
18 Scalia, article V(A) doesn't use diversion, and that --  
19 that's precisely the point. It doesn't use "diversion";  
20 it uses -- it uses "beneficial use." And any -- any --

21 JUSTICE SCALIA: Why doesn't it use  
22 "diversion" if it means what you say?

23 MR. JAY: Because they -- it didn't use  
24 "diversion" because it wasn't quantifying them. Whereas  
25 -- what -- "diversion" is used in article V(B) because



1 the diversion is the --

2 JUSTICE SCALIA: Of course it's quantified.  
3 I mean, the whole purpose is you can't take any more  
4 than you were taking before. It has to be quantified  
5 somehow.

6 MR. JAY: It's not quantified in the  
7 sense -- as Justice Breyer pointed out, no one -- they  
8 didn't write down, especially in Montana, because as the  
9 Special Master said on page 22, Montana didn't have a  
10 centralized system of rights; they didn't know exactly  
11 how much was being diverted in Montana. They certainly  
12 didn't know how much was being consumed or how much was  
13 being returned to the river.

14 At Joint Appendix 585, there's a Federal  
15 Power Commission report that says that it is almost  
16 impossible to make an accurate determination of return  
17 flow. So what -- what the drafters did was they -- for  
18 the pre-1950 rights, they said we're not going to cap --  
19 quantify them at all; we're going to grandfather them  
20 in, freeze them in place.

21 JUSTICE BREYER: So your linguistic argument  
22 is they didn't use the word "diversion" because they  
23 didn't want to throw the mill race example into the  
24 definition --

25 MR. JAY: My argument, Justice --

1 JUSTICE BREYER -- is that right?

2 MR. JAY: My argument, Justice Breyer, is  
3 that they didn't want mill races or hydropower to count.

4 JUSTICE BREYER: Yes, they didn't want mill  
5 races in the definition, so they purposely didn't use  
6 the word "diversion"; that's why they used the word  
7 "depletion."

8 MR. JAY: That's -- they used the word  
9 "depletion," but they didn't make the amount of  
10 depletion, the measurement of --

11 JUSTICE SCALIA: A mill race is not --

12 MR. JAY: That is the point.

13 JUSTICE SCALIA: A mill race is not a  
14 diversion.

15 JUSTICE BREYER: Correct, and they wanted  
16 that.

17 MR. JAY: A mill race is a diversion under  
18 the common understanding of that term, Justice Scalia.  
19 It may --

20 JUSTICE SCALIA: Not under the definition.

21 MR. JAY: Not under the special definition  
22 used for article V(B), but --

23 CHIEF JUSTICE ROBERTS: You keep saying  
24 everybody gets the same beneficial use they had prior to  
25 1950, but -- even though that may mean they can't do it.

1 In other words, they may have a right to get 50 cubic  
2 whatever for irrigation, but there may not be any water  
3 there for them to use it because of the increased  
4 efficiencies upstream.

5 MR. JAY: That -- that is true, Mr. Chief  
6 Justice, but that has always been the case under western  
7 water law that the appropriative right is a priority,  
8 that when it's your turn and there's enough water, you  
9 get to take the amount of water to which you have a  
10 right. But it was clear in Wyoming on January 1st,  
11 1950, that the appropriative right -- so long as you  
12 took the same quantity from the river, you took it from  
13 the same point on the river, you put it to the same use,  
14 irrigation, on the same acreage -- that you could then  
15 change crops, for example.

16 JUSTICE KENNEDY: In II -- in II(H), do you  
17 think "beneficial use is hereby defined to be that use  
18 by which water supply is depleted" -- and we're looking  
19 at "depleted." Do you define "depleted" as what is  
20 taken without any reference to what is returned?

21 MR. JAY: I -- I think that that's right. I  
22 think I agree, Justice Kennedy, but it has to be a  
23 depletive use in the sense that some water -- some water  
24 has to come out that doesn't come back. So it's not --  
25 it's not the same -- the mill -- a mill race is not a

1 depletion, even though some water -- some water comes  
2 out because it then -- because it then comes back. But  
3 what our --

4 JUSTICE KENNEDY: Well, I mean, that's --  
5 that's the key to this case, I take it. Wyoming is  
6 telling us that what goes back is irrelevant so long as  
7 what is taken is for a recognized beneficial use.

8 MR. JAY: The reason it's irrelevant,  
9 Justice Kennedy, is that -- for two reasons. Depletion  
10 is not the measure of beneficial use. It's a -- it is a  
11 criterion for beneficial use. The use has to be a  
12 depletive one; but it's not the measure of the  
13 beneficial use.

14 And the second point, Montana seeks to  
15 equate consumption with depletion, and that's -- that's  
16 not correct, either.

17 We urge the Court to overrule the exception.  
18 Thank you, Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.  
20 General, you have 2 minutes left.

21 REBUTTAL ARGUMENT OF STEVE BULLOCK

22 ON BEHALF OF THE PLAINTIFF

23 MR. BULLOCK: Mr. Chief Justice, members of  
24 the Court:

25 Briefly, that, as Justice Scalia pointed

1 out, this is a compact, and it's a compact between two  
2 different States, and Montana gave up things, a right of  
3 priority administration across State lines as a result  
4 of that.

5 Justice Breyer, as an issue of fairness, we  
6 don't get all the water. We only get water supply under  
7 like conditions. We are now the downstream  
8 appropriator, so -- but one example, if half the water  
9 is flowing now that it was, as of 1950, Montana may not  
10 get anything at that point, because just by the virtue  
11 of -- some say it's "highology," whoever is higher on  
12 the river gets to take first.

13 So we -- we don't get to fulfill our rights.  
14 All we get is to ensure that, given a like supply of  
15 water, that our right shall continue to be enjoyed as it  
16 existed as of 1950.

17 JUSTICE SOTOMAYOR: How many years has there  
18 been not enough water to fill all pre-19 -- forget about  
19 whether there was post-1950 use. How many years are we  
20 talking about in which there has been not enough water  
21 to fill everybody's?

22 MR. BULLOCK: And -- Your Honor, we've done  
23 no discovery at all. This is still at the motion to  
24 dismiss complaint. And that's what the hydraulics and  
25 the engineers will ultimately determine. We made calls

1 in 2004 and 2006.

2 We said: Wait a minute, we're not getting  
3 enough water here, and we believe it's the -- the  
4 pre-1950 uses that are depleting that. Will you give us  
5 water?

6 Ultimately, why we're here is to sort this  
7 out.

8 I guess I'd also point out that there was  
9 some discussion about an appropriative right is the  
10 right to use a quantity of water. That makes sense  
11 other than if you're in a compact, and Montana gets no  
12 water. The Solicitor General even pointed out then in  
13 his brief at a footnote -- he said, well, what we might  
14 do, then, is that Montana could bring an equitable  
15 apportionment action for the pre-1950 water.

16 That highlights the -- I think to me, the  
17 illogic of just focusing on the rights and not looking  
18 at the uses and how much each State was consuming,  
19 because at that point I'll be right back here saying we  
20 want the same water under like conditions that we had in  
21 1950.

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, General,  
24 counsel.

25 The case is submitted.

1                   (Whereupon, at 12:03 p.m., the case in the  
2 above-entitled matter was submitted.)

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