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IN THE SUPREME COURT OF THE UNITED STATES

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MONTANA, :

Petitioner : No. 137, Orig.

v. :

WYOMING AND NORTH DAKOTA :

- - - - - x

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 will now 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 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 MR. BULLOCK: Um --

17 JUSTICE GINSBURG: I don't see where it
18 says, and so I can understand, the amount of water
19 diverted can't be increased.

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

1 needs to be a water supply. And also operative to that,
2 it's within the definitions at article II(A) to the
3 beneficial use. And that's a derivation or departure
4 from the general prior appropriation law, because it's
5 that use by which a water supply is depleted when --

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: That's the essence of
18 the argument before us. The depletion was the amount of
19 water that was taken from this water source to irrigate
20 the crops. The -- the issue now before us is whether
21 beneficial use means consumption or it means use, isn't
22 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 other
8 things with the water. The rights protected are their
9 pre-1950 uses. You're putting -- you're -- you're still
10 equating consumption as -- as being their use, but I
11 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 we
2 have 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 KENNEDY: But all that shows is --
7 or might show in a particular case, is that the amount
8 of water is reduced. Now -- then the question is have
9 the senior appropriators or the upstream appropriators
10 reduced it in a way that's inconsistent or that's an
11 overuse of their beneficial rights, and you're right --
12 again right where we started from. And then you have to
13 regulate exactly how each irrigator is using the
14 appropriative rights.

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

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

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

24 CHIEF JUSTICE ROBERTS: But if you've --
25 we've been talking about beneficial uses. What the

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

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

17 CHIEF JUSTICE ROBERTS: Well, isn't that
18 what's going on here? The beneficial use is the
19 irrigation of crops. They have an appropriative right
20 to take out so much flow for that. That's all they're
21 doing. They're doing it now, just as they were back
22 then. They just use up more of it once they've taken it
23 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 contract,
3 actually, among States. And also, though -- second of
4 which, though, that it's also a fundamental tenet of
5 prior appropriation law is the downstream irrigator
6 takes, given the same conditions as when he first got
7 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 would be very
18 interested if it's yes. And I think it would help you a
19 lot if it's yes, because I'm -- to tell you the truth,
20 I'm pretty skeptical of the fact that they're writing an
21 appropriation right into this about regulating something
22 they don't even know about.

23 MR. BULLOCK: Effectively, Your Honor, it
24 could be yes.

25 JUSTICE BREYER: Well, I didn't say it could

1 be yes. I would like you to tell me if the answer is
2 yes, and then of course I'm going to ask you where in
3 the record I find something that says that they knew how
4 much each individual landowner is putting back into this
5 river in Wyoming. And I think you can't answer that
6 question, can you?

7 MR. BULLOCK: I certainly can't answer that,
8 and they didn't need to know, from the perspective --

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

20 I mean, that's my basic question. Did you
21 see what it was? Was I clear? I'm saying, how can you
22 read this treaty to require landowners to put back
23 amounts into the river that they didn't even know what
24 they were?

25 MR. BULLOCK: First, Your Honor, the

1 individual landowner does not have to put water back in
2 that they didn't even know what they were. What they do
3 need to do is make sure that the beneficial -- the
4 appropriative rights to beneficial uses existing in both
5 States. The Solicitor General pointed out that we don't
6 break up V{A} A and V(B) and put one group priority over
7 the other, but existing as of 1950 in both States shall
8 continue to be enjoyed. So the only way that we can
9 continue to enjoy the rights in Montana downstream is to
10 ensure that we have the water supplies that we had --

11 JUSTICE SCALIA: So you say you get the same
12 amount of water and it's up to -- it's up to Wyoming to
13 figure out who they have to cut down for not putting
14 back enough to meet that amount? You don't care what
15 private owner it comes from? It's up to Wyoming to
16 figure out who has to be cut back?

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

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

19 MR. BULLOCK: Sorry?

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

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

25 JUSTICE SCALIA: Under like water supplies,

1 yes.

2 MR. BULLOCK: Yes.

3 Could you tell me the -- I didn't get the
4 page of the special master's report which you asserted
5 adopts your -- your definition of beneficial use. What
6 page was it?

7 JUSTICE KENNEDY: I thought you referred us,
8 just while you're going through your notes, to page 82,
9 and there's an intriguing footnote where the special
10 master talks about his own -- his own book. But that
11 doesn't seem to me to be conclusive on your point,
12 because he's saying the area is confused. And his point
13 it seems he brings up what the special -- I'm taking
14 over your answer to Justice Scalia's question. It is
15 page 282.

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

17 JUSTICE KENNEDY: The footnote on that page,
18 yes.

19 MR. BULLOCK: And there he's talking
20 about --

21 JUSTICE SCALIA: It seems to say what you
22 say it says.

23 JUSTICE ALITO: If your understanding is
24 correct, would the result be that landowners in Wyoming
25 would only be allowed to consume as much as they

1 consumed in 1950, but landowners in Montana could take
2 advantage of improved irrigation techniques and use much
3 more of the -- they could divert the same amount of
4 water, but they could use much more of it?

5 MR. BULLOCK: No, Your Honor, that would not
6 be the case.

7 JUSTICE ALITO: Why wouldn't it?

8 MR. BULLOCK: First, for the irrigators in
9 Montana -- I mean, one of the things -- Montana sought
10 to have a system of interstate administration. Montana
11 -- or Wyoming, through storage, through curtailing
12 consumption by post-'50 users, or otherwise can
13 administer its water rights in however it so deems. So
14 ultimately, that's a decision of the State of how it
15 administers the water rights and the consumption of that
16 amount that it has.

17 For Montana, we can't increase consumption
18 any more than the water that we would have received at
19 that point. So to the extent that Montana allows an
20 individual irrigator to go to 100 percent of consumption
21 of its water right, then in our system in Montana, we
22 have to deal with what's going to happen to the
23 subsequent appropriator right downstream.

24 JUSTICE GINSBURG: And what happens under
25 Montana law?

1 MR. BULLOCK: Under Montana law, if there's
2 an injury, and that's -- that's actually -- and the
3 special master pointed this out in another one of his
4 footnotes, that that still would be actionable. Like a
5 change from flood irrigation to sprinkler irrigation, to
6 the extent that it deprives a downstream user of waters
7 that they're relying on, that they could bring an
8 action.

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

14 MR. BULLOCK: Both can, Your Honor. That --
15 that is -- I guess that presumption is that we would
16 have the water to use it, and Wyoming is actually
17 getting a lot more production by consuming a lot more of
18 the water within its right.

19 JUSTICE SCALIA: Your people are entitled to
20 take out the same amount they took out before, right?
21 Pre-1950?

22 MR. BULLOCK: Under like water supply
23 conditions.

24 JUSTICE SCALIA: Whereas the people in
25 Wyoming, you say, are not entitled to take out the same

1 amount; they are entitled only net the same amount that
2 they had before. Whereas downstream your people can
3 take out the same amount and whereas before 20 percent
4 of it used to go back into the stream, they can now make
5 use of that whole 20 percent through sprinkler
6 irrigation, right? It gives you a great advantage.

7 I mean, maybe that's the way it was written,
8 but -- but don't tell me that this is even-handed,
9 because I don't --

10 MR. BULLOCK: Your Honor, I don't think that
11 it does give us a great advantage, because we still have
12 to deal with the same amount of water supply that we
13 would have had. So at that point, if we switch to
14 sprinkler irrigation, the first irrigator does that,
15 there's going to be a shortage downriver unless we make
16 it up through additional storage or other causes. So --

17 JUSTICE KENNEDY: Do you have ultimate
18 liability to Montana -- pardon me, to North Dakota for
19 overuse?

20 MR. BULLOCK: We do a little bit, Your
21 Honor. There's the picture of the basin in the first
22 appendix.

23 JUSTICE KENNEDY: Well, I won't -- I won't
24 get into that, but it does seem to me that the Chief
25 Justice asked the question, if you're entitled to take

1 the water, you can use it for any purpose. I -- I -- I
2 take it the answer to that is it has to be a beneficial
3 use, it has to be for approximately the same crop, but
4 that brings us to this -- to this gray area that the
5 special master refers to on page 82 as confusing. And I
6 think, was it page 65 he talks about this is a confusing
7 area of the law?

8 What is your best authority for your
9 position? What is the -- do you have a case or a --
10 a -- a paragraph in a treatise that's --

11 MR. BULLOCK: Sure. Yes, Your Honor. In
12 1992 the Utah Supreme Court framed the question: This
13 court's called upon to determine the applicable law when
14 the use of new technology --

15 JUSTICE KENNEDY: The Utah case is your best
16 case?

17 MR. BULLOCK: That's -- that's the only case
18 that any of the parties cited that actually deals with
19 the change from sprinkler -- or flood to sprinkler
20 irrigation. And what that said is if the return flow
21 goes to the same river which it came from, that
22 subsequent irrigators or downstream appropriators have
23 the right to rely on that.

24 And I guess I would say that my second best
25 case is the special master's own footnote. It's 6912,

1 where he says that, you know, even though State change
2 procedures don't typically apply to crop or -- changes
3 in crop irrigation techniques, this does not mean
4 there's no way to challenge increases in efficiency.
5 Downstream water users, for example, could sue to enjoin
6 an upstream appropriator from increasing consumption or
7 to force the upstream appropriator to replace lost
8 runoff.

9 JUSTICE SCALIA: I would think your best
10 point is not all of that stuff, but simply the
11 definition section, which very clearly makes a
12 distinction between beneficial use and diversion. And
13 your point is that what is guaranteed is not the
14 diversion right that existed pre-1950, but the
15 beneficial use right, which is the net use of the water,
16 not -- not the total amount diverted.

17 If -- if there were not both of those
18 definitions, it seems to me it would be a little -- your
19 case would be a little harder. But with the two of
20 those definitions there and with V(A) using beneficial
21 use rather than -- it could have said diversion,
22 appropriative right to diversion, but it didn't say
23 that. It said to beneficial use.

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

1 it?

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

3 (Laughter.)

4 MR. BULLOCK: I was trying to -- I believe
5 Justice Kennedy asked for a case or a treatise, so
6 that's --

7 JUSTICE SCALIA: Well, all right.

8 MR. BULLOCK: But I agree that the plain
9 language -- and especially in an area where there's so
10 much ambiguities the special master acknowledges, why
11 change the status quo of what was occurring? And
12 that's --

13 CHIEF JUSTICE ROBERTS: I don't understand
14 why that's a good -- good answer. I mean, the
15 beneficial use is that use by which the water supply is
16 depleted. Well, the use here is irrigation. It doesn't
17 say irrigation up to the technological development in
18 1950. They're still taking out the same amount of water
19 for that beneficial use. They're using it to irrigate.
20 And if they get better at it so they use more, well,
21 that's just too bad for you.

22 MR. BULLOCK: Your Honor, but they're
23 depleting more from the basin, and that's -- you can
24 have beneficial use for non-consumptive purposes.

25 JUSTICE BREYER: That's back where -- that's

1 where I was here. See, I can't get too far. I mean,
2 you have the word "depletion" in that definition. I --
3 I -- that might help you. But I'm thinking in
4 accordance with the doctrine of appropriation, what does
5 that doctrine, that legal doctrine, say about use and
6 return? That's why we're -- we're -- why I was thinking
7 it seems totally unclear.

8 It talks about seepage, the cases, which I
9 gather is different from return. Okay. So could they
10 have really meant net? And what struck me is that they
11 couldn't, which -- which you were beginning to address,
12 too, is that they couldn't have meant net because the
13 water law at that time is unlikely to have meant net for
14 the reason that they didn't -- you don't know what's
15 coming back.

16 Do you see? It's not just -- I see your
17 point. Your point is, well, Wyoming knew how much was
18 going into Wyoming. But that's not my point. My point
19 is what -- what's the water law? What's the law of
20 appropriation at that time in respect to return flows?
21 And if people didn't measure return flows in general, I
22 suspect in an ambiguous area they would have analogized
23 it to seepage, which is what the -- what the special
24 master thought.

25 MR. BULLOCK: Your Honor, the seepage cases,

1 though, deal with adjoining landowners --

2 JUSTICE BREYER: Yes, they --

3 MR. BULLOCK: -- not the same river flow,
4 and the special master acknowledged that.

5 JUSTICE BREYER: Uh-huh.

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

16 Other than the text, I think that the next
17 place that one would look in interpreting the compact
18 would be the legislative history. And I think that the
19 report to the Senate was real good in saying that --
20 and this is part of -- it's appended to motion --
21 Montana's brief in response to the motion to dismiss the
22 bill of complaint. At 3a it says: "It's clear then
23 that the demand of one State upon another for a supply
24 different from that now obtaining under present
25 conditions of supply and diversion is not contemplated,

1 nor would such a demand have a legal standing."

2 So what they were trying to do in 1950 was
3 protect what each State was doing.

4 JUSTICE SCALIA: Where was that again, where
5 at?

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

9 JUSTICE GINSBURG: General, assume that
10 you're right, that what was guaranteed was the same
11 amount of water flowing into Montana as in 1950, and
12 I -- I take it you don't care how Wyoming deals with
13 this, but what -- if you're right, what could Wyoming
14 do? It can't tell the -- the farmers, go back to the
15 old way of irrigating or go back to a different crop?

16 MR. BULLOCK: No -- I mean, no, Justice
17 Ginsburg. Wyoming could choose to reduce groundwater
18 pumping. They could choose to curtail irrigation on
19 post-1950. They could choose to release storage. I
20 mean, they've -- they've built, I think, 15 new
21 reservoirs in Wyoming since the date of the compact.
22 They could choose to release water from that to fulfill
23 those rights.

24 JUSTICE GINSBURG: So, you say it doesn't --
25 they don't -- Wyoming doesn't have to know whether

1 farmer A or farmer B is taking more than they took in
2 1950 -- I mean, is using more than they used in 1950;
3 they just have to know what the total amount is, and
4 Wyoming can make that up?

5 MR. BULLOCK: Yes, Your Honor.

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

9 MR. BULLOCK: Yes, Your Honor.

10 JUSTICE SOTOMAYOR: All right. And I -- I
11 guess this goes to the second question, which was sort
12 of not really addressed. The special master said, well,
13 you could cut back your post-1950 users and satisfy all
14 of the needs of your pre-1950 users. Why isn't that the
15 answer? Why isn't that an answer that should be
16 respected, because you can satisfy all of the pre-1950
17 needs that you have potentially?

18 MR. BULLOCK: No, Your Honor, we can't
19 necessarily satisfy all the needs. The drafters did say
20 even as of 1950 that this basin reached its maximum
21 practicable limit for irrigation, and that's from the
22 October -- the last of the drafters meetings. So -- so,
23 the water supply as of then, without additional storage,
24 had already hit that limit. And ultimately what we
25 need, though, is each State will administer intrastate,

1 but we still should be able to rely on the ability to
2 get a supply of water to meet those needs as of 1950
3 under like water supply conditions.

4 JUSTICE SOTOMAYOR: Before any 1950 use,
5 post-1950 users are permitted?

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

9 JUSTICE SOTOMAYOR: So why isn't this a
10 premature lawsuit? Because I think really the essence
11 of your claim is we need the pre-1950 water flow. We
12 don't care who it comes from. And what -- all the
13 special master said, in my mind, was the difference --
14 you can't look to what the pre-1950s were doing in this
15 situation, but I haven't addressed what the posts are
16 going to do or have been doing and whether that's right,
17 and that's depriving you of the water flow.

18 I don't know if he answered that question:
19 Are you in fact entitled to a minimum amount of water
20 flow? That's really what should be the point of the
21 issue, isn't it?

22 MR. BULLOCK: It is, or that quantity under
23 like water supply conditions. I don't think it's
24 premature. We have tried to administer this compact,
25 actually made calls in 2004 and 2006; and as a result of

1 not getting the water, knowing -- believing we're in a
2 water-short time, that's when we filed this action.

3 I would like to reserve my time if I may.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Michael.

6 ORAL ARGUMENT OF PETER KENNETH MICHAEL

7 ON BEHALF OF DEFENDANT WYOMING

8 MR. MICHAEL: Mr. Chief Justice, and may it
9 please the Court:

10 This Court has identified in previous
11 questioning, this case at this point in this issue
12 involves whether a Wyoming or a Montana diverter may
13 change cropping patterns, may change various
14 technologies in irrigated agriculture, and change up and
15 down depending on the year and the fouling of the land
16 and that sort of thing, the amount of water that is
17 actually consumed by crops; and I think the Court has
18 identified the critical fact that a water right, a
19 classic western water right, appropriate right as in
20 article V(A), is made up of the right to divert water at
21 a head gate in an irrigation situation, put it on a
22 defined quantity of land and use it for a purpose,
23 irrigation, that's defined by the State. Wyoming has
24 had such a -- a system in place for many years, and
25 controls those issues but does not and has not attempted

1 to measure consumptive.

2 JUSTICE KENNEDY: But what is the
3 controlling principle in answering the question that I
4 think you properly put? Could these irrigators switch
5 to something like rice which absorbs a tremendous amount
6 of water, or are they -- when they switch crops it must
7 be reasonably close to the earlier beneficial use? What
8 is -- what is the standard that we look to, to answer
9 that question?

10 MR. MICHAEL: The standard is the standard
11 of waste of practical irrigation.

12 JUSTICE KENNEDY: Standard of?

13 MR. MICHAEL: Waste, of not wasting water in
14 practical irrigation. The irrigation right is a general
15 right, and if rice were to double the amount of
16 consumptive use by the crop, that would be permissible
17 if the previous use had not been affected by an
18 abandonment action, because the amount of water was
19 being reasonably used for the former crop and the crop
20 has changed. So it's not a question of -- of percentage
21 change.

22 JUSTICE SOTOMAYOR: I thought --

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

24 JUSTICE KENNEDY: Suppose the first --
25 suppose the first crop absorbs 50 percent of the water

1 and returns 50 percent by seepage. The second crop that
2 they switch to still absorbs just 50 percent of the
3 water but because of the -- of the pattern, the other 50
4 percent just evaporates?

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

18 And if that -- if that quantity, that
19 division changes, that's perfectly permissible within
20 the use of the water right. And the reason for that was
21 set out in Wiel's -- Samuel Wiel's text in 1911, carried
22 forward in texts and cases ever since, that -- and in
23 the Binning case, a 1940 case in Wyoming; which is the
24 water while it's in the stream in the public common is
25 -- is not under the possession and control, the personal

1 property control of the irrigator.

2 JUSTICE SCALIA: But we're dealing here with
3 a compact which has a text, and -- and what the water
4 law of Wyoming or of Montana happened to be cannot
5 overrule the text, and I am -- I'm hung up on the fact
6 that article V(A) says appropriated rights to the
7 beneficial uses of the water of the Yellowstone River
8 System existing as of January 1, 1950: appropriated
9 rights not to diversion, not to diversion for beneficial
10 uses, but appropriated rights to the beneficial uses,
11 which is defined -- which is defined in the compact to
12 say that use by which the water supply of a drainage
13 basin is depleted when usefully employed.

14 And it could have said diversion, but it
15 didn't say that, and I notice that the government's
16 brief uses -- seems to use the words interchangeably,
17 depletion and diversion. They're not interchangeable.
18 They're defined quite separately in this thing; and
19 besides which I find it implausible that Montana signed
20 on to, "we don't know how much water we're going to get,
21 it depends, you know, upon how much stuff was -- was
22 flowing back before, but we're not guaranteed that that
23 will be flowing back again."

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

1 MR. MICHAEL: Your Honor, the definition has
2 two components, the classic beneficial -- the component
3 that would come from a classic beneficial use
4 definition, which is useful employment for activities of
5 man, a beneficial purpose, which -- a nonwasteful
6 purpose, that's a start.

7 JUSTICE SCALIA: That's not how it's
8 defined.

9 MR. MICHAEL: That's -- that's the last
10 portion, that's the second part.

11 JUSTICE SCALIA: Well, that's fine.

12 MR. MICHAEL: The first part is use by which
13 the water supply of a drainage basin is depleted. And
14 in the western United States a drainage basin,
15 appropriated water is not all the water in the air and
16 on the land and dropping from the sky; appropriated
17 water is water confined in a water course. The Binning
18 case made that clear, until the water returned from the
19 field into a water course it was not appropriable by the
20 downstream user. So this definition -- by using the --

21 JUSTICE KENNEDY: Are you addressing the
22 word depleted?

23 MR. MICHAEL: I'm addressing the word supply
24 of the drainage basin; and then it is depleted. Use by
25 which the supply, the water supply of a drainage basin

1 is depleted.

2 JUSTICE KENNEDY: Are you saying that
3 "depleted" means only what's withdrawn and it's not
4 calculated by -- with reference to what is returned?

5 MR. MICHAEL: That's correct.

6 JUSTICE BREYER: Obviously you're saying --
7 to read it with a different emphasis. Justice Scalia
8 read it with -- beneficial use is that use by which the
9 water supply of a drainage basin "is depleted" when
10 usefully employed by the activities of man.

11 And you read it, by which the water supply
12 of a drainage basin is depleted "when usefully employed
13 by the activities of man," so that it is a definition in
14 respect to how you use it, not amount.

15 But if you emphasize the word depleted, it
16 could be read as referring to amounts, and not quality
17 of use, not nature.

18 JUSTICE SCALIA: Why don't you emphasize
19 both of them? I'm willing to emphasize both, but you
20 can't write out the "depleted" out of the -- how does
21 your definition of depleted differ from -- from
22 diversion?

23 MR. MICHAEL: If you had a --

24 JUSTICE SCALIA: Is the diversion for a
25 beneficial use the same thing as a depletion?

1 MR. MICHAEL: May I give an example?

2 In a -- in a river, the Tongue River, if
3 there is a, if there is a water wheel -- Montana allows
4 water rights, 1912 case, Hennessy v. Featherman, allows
5 a water right to push a water wheel. That water flowing
6 down the river does not, does not -- is not diverted.
7 Nevertheless it -- it would allow a water right.

8 This definition differentiates that. In
9 this definition under the compact, water that is
10 diverted for agriculture that is diverted is a
11 beneficial use, but there's a small segment of -- of
12 what could be a legitimate water right that is excluded.

13 JUSTICE SCALIA: No, but I mean, to -- to do
14 that, the definition would have read the term beneficial
15 use is defined to be that use by which the water -- that
16 use by which the water -- that use "for which" the water
17 supply of a drainage basin is diverted, for useful
18 employment by the activities of man, and that's not what
19 it says. To the contrary, it makes a clear distinction
20 between depletion and the previous definition of
21 diversion.

22 MR. MICHAEL: I --

23 JUSTICE SCALIA: I was trying to give that
24 stark difference some effect in the later sections of
25 V(A).

1 MR. MICHAEL: Let me say this, Your Honor,
2 if I might. The -- you will find in -- in the compact,
3 in article V(B), the use of both diversion and
4 beneficial use.

5 JUSTICE SCALIA: Okay.

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

11 JUSTICE SCALIA: Where -- where -- what part
12 of V(B) are you talking about?

13 MR. MICHAEL: I'm talking about at the
14 bottom of V(B) where you're talking about the three --
15 the third-tier rights.

16 JUSTICE SCALIA: The point of measurement
17 shall be below the last diversion? No, no, 5B. In the
18 first text, the first paragraph of 5B, towards the
19 bottom, the text says: "And the remainder of the unused
20 and unappropriated water is allocated to each State for
21 storage and direct diversions for beneficial use on new
22 lands."

23 JUSTICE SOTOMAYOR: Excuse --

24 JUSTICE SCALIA: For -- exactly. I mean,
25 there it talks about diversions for beneficial use and

1 not depletion for beneficial use. I mean, I think
2 that's something different.

3 JUSTICE SOTOMAYOR: Counsel, could I --
4 could you answer, do you see a difference? Finish that,
5 and then could I just clarify something from what you
6 were just reading?

7 MR. MICHAEL: I think there's a difference
8 in that the -- in practical terms, the depletion -- the
9 depletion and the beneficial use definition, a diversion
10 would be the only way to deplete that. And that's --
11 that's the point. The only way to make it through a
12 depletion --

13 JUSTICE KENNEDY: So once again, you're
14 saying that depletion is a calculation of what is taken
15 without reference to what returns?

16 MR. MICHAEL: Yes, Your Honor.

17 JUSTICE KENNEDY: And your best authority
18 for that is?

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

1 CHIEF JUSTICE ROBERTS: Just to follow up on
2 Justice Kennedy's point, because I think it's important:
3 So you were reading -- when it says "is depleted," you
4 think all you have to show is that it's less than when
5 you started, and once that is shown, it is depleted.
6 Then you're saying, but we can deplete as much as we
7 want?

8 MR. MICHAEL: Yes, depletion would be moving
9 it from this glass of water, if that was the river, and
10 it reduces the quantity of water in the river. That
11 would be a depletion.

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

17 MR. MICHAEL: Yes. And of course --

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

20 MR. MICHAEL: It may well be, Your Honor.
21 There's some problems with this definition. It
22 self-defines itself using "usefully" twice, so we have
23 some drafting issues with this.

24 JUSTICE SOTOMAYOR: So could I go back to my
25 question, which is twofold? The first is, the solicitor

1 general recommends that we defer the decision on
2 remedies in this case, and Montana seems to agree. Do
3 you agree as well? The second question presented.

4 MR. MICHAEL: That has been deferred, is my
5 understanding.

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

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

22 That's how I read Article V. Am I reading
23 it wrong? Because it seems to me that the only time
24 that we get into a dispute -- and this is the part that
25 I think your adversary may be right about, ultimately --

1 is it's not a consumptive compact, but it's a use
2 compact, and both of you are entitled to get a full --
3 that's what I'm reading Article V to say, to get enough
4 water to satisfy the beneficial uses before anybody's
5 entitled to post-1950 water.

6 Tell me what in the language of Article V
7 suggests something different than that understanding.

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

17 JUSTICE SOTOMAYOR: But this is not
18 happening today, is it?

19 MR. MICHAEL: Oh, yes. It happened in 2004.

20 JUSTICE SOTOMAYOR: All right, but that's an
21 isolated year. In most years, are you putting water to
22 post-1950 use -- to post-1950 uses or not? Have you
23 been regularly putting water to post-1950 uses?

24 MR. MICHAEL: Both States, at times. Yes,
25 last year, all post-1950 users got satisfied, very wide.

1 But the point is that only the appropriative rights,
2 which is not a guarantee of a quantity of water. So the
3 first clause of the compact, Article V(A), does not
4 establish a quantity of water, and there are many
5 compacts that do this. They establish a quantity of
6 water.

7 JUSTICE SOTOMAYOR: I don't disagree.

8 MR. MICHAEL: Quite simply --

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

17 Am I correct about that structure?

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

20 JUSTICE SOTOMAYOR: Exactly.

21 MR. MICHAEL: It's all done in a system
22 that's dynamic.

23 JUSTICE SOTOMAYOR: But that's why -- I do
24 understand the remedies were deferred, but to the extent
25 that we were to rule that appropriated rights included

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

8 MR. MICHAEL: No.

9 JUSTICE SOTOMAYOR: Before you can use
10 post-1950 water?

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

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

22 MR. MICHAEL: 60 percent.

23 JUSTICE SOTOMAYOR: Whatever it was. 60
24 percent; they're entitled to 40. Does that mean you can
25 take a hundred percent, because there happens to be more

1 water that they can satisfy the pre-1950's users with?
2 Why aren't they entitled to their 40 percent of whatever
3 that big basin is so they can give more water to
4 post-1950 users, that they can exploit their full 40
5 percent?

6 MR. MICHAEL: Your Honor, I'm not following,
7 because there's a distinction between each class of
8 water.

9 JUSTICE SOTOMAYOR: Yes, I understand that.

10 MR. MICHAEL: And in your -- in your
11 question, I'm not following which class you are
12 referring to.

13 JUSTICE SOTOMAYOR: I'm answering this
14 only -- I'm asking this because I know we've deferred
15 decision on the remedy, but for me that is so integral
16 to the issue here because when they talk about being
17 entitled to a water flow, I see that as being entitled
18 to a pre-1950 satisfaction of water needs or beneficial
19 uses before anybody gets 19 -- post-1950 water.

20 And, so, I see the only issue before us,
21 because remedies have been put aside, as to whether the
22 beneficial use includes some percentage increase because
23 of irrigation demands, but so why? It just means it's
24 going to limit post-1950 users. It's not going to limit
25 the rights of the pre-1950 users.

1 Everybody's entitled to change their
2 irrigation methods, everybody's entitled to change their
3 crops. They appear not to be entitled to put the water
4 to a new use, whatever -- however that's defined. We
5 don't need to get there today, but I'm not sure how
6 you're entitled to post-1950 uses while they're still
7 not satisfied in 1950 use.

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

12 JUSTICE SOTOMAYOR: The question is what?

13 MR. MICHAEL: He has -- the Special -- I'm
14 sorry. The Special Master has recommended that. The
15 Court actually has granted that.

16 CHIEF JUSTICE ROBERTS: Just before you sit
17 down, I don't know why you think we have deferred the
18 remedy question? It's presented. It's been briefed. I
19 don't know why you think we've deferred it. Whether or
20 not Montana has to take care of intrastate uses, that's
21 what I understand the remedy question to be. You
22 briefed it.

23 MR. MICHAEL: Well, no, my understanding was
24 the Court had simply sent it back to the Special Master
25 for consideration, that's all.

1 CHIEF JUSTICE ROBERTS: Well, thank you.
2 Thank you, counsel.

3 MR. MICHAEL: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Jay, maybe you
5 can help clarify something. The -- the second question
6 presented, which involves what Montana has to do before,
7 that's still before us, right?

8 ORAL ARGUMENT OF WILLIAM M. JAY,
9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING DEFENDANTS

11 MR. JAY: Mr. Chief Justice --

12 CHIEF JUSTICE ROBERTS: I know you want
13 us -- you don't want us to reach it, but it's still
14 before us.

15 MR. JAY: Mr. Chief Justice, and may it
16 please the Court:

17 The Court entered an order stating that it
18 would hold oral argument only on Montana's first
19 exception, and that the second exception would be
20 recommitted to the Special Master. So for that -- for
21 that reason the parties have addressed only the first
22 exception in this argument today.

23 JUSTICE SOTOMAYOR: Could you -- but your
24 brief, before we entered that order, said the Special
25 Master was right, that they have to satisfy their needs

1 from pre -- post-1950 users. Why? Aren't they entitled
2 to their 40 percent of how much excess water there may
3 be after their pre-1950 users have been satisfied in
4 full? Doesn't this compact say both of their pre-1950
5 users have to be satisfied first?

6 MR. JAY: Both of their pre-1950 users have
7 to be satisfied first, yes, we agree with that, so that
8 no one in Wyoming is supposed to be taking post-1950
9 water until pre-1950 users in Montana are satisfied. We
10 agree with that.

11 The -- the point on which -- that the Court
12 has sent back to the Special Master is what happens if
13 pre-1950 users in Montana are not satisfied but they
14 could be because Montana post-1950 users in Montana are
15 also diverting water. But what we think the -- the
16 question squarely before the Court here is whether the
17 right to recapture water gained from increased
18 efficiency is part of the pre-1950 appropriative right,
19 and that matters when there's not enough water in the
20 river for both states to satisfy their pre-1950
21 appropriative rights. Forget about post-1950's, there's
22 not enough water.

23 JUSTICE BREYER: And so on your theory in
24 that situation where there isn't enough for all the
25 pre-1950 people, it's Wyoming that gets all the water?

1 And on their theory, it's surprising -- surprise,
2 surprise -- it's Montana that gets all the water?

3 (Laughter.)

4 JUSTICE BREYER: And there's no way to read
5 this contract -- this compact so it's share and share
6 alike?

7 MR. JAY: Both States have affirmatively
8 rejected the idea of a middle ground like that, Justice
9 Breyer --

10 JUSTICE BREYER: There's no fair way to
11 decide this case?

12 MR. JAY: Well -- well, Justice Breyer,
13 we -- we submit that enforcing the compact according
14 what -- what the States signed up for is --

15 JUSTICE SCALIA: Is fair.

16 MR. JAY: Precisely.

17 CHIEF JUSTICE ROBERTS: I thought that was
18 the way appropriation law works in the west, I mean, the
19 person who gets it, gets it?

20 (Laughter.)

21 MR. JAY: Provided they --

22 JUSTICE SCALIA: The person who doesn't get
23 it, gets it.

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Well, I mean, I

1 don't mean -- isn't that the difference between eastern
2 water law and western water law? In the east you try to
3 allocate everything fairly so everyone is treated
4 fairly, and I thought in the west, for reasons of
5 efficiency, it's first come first serve.

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

14 JUSTICE GINSBURG: Mr. Jay, I thought that
15 the Special Master, very important to him was the
16 meaning of a appropriate -- appropriative rights, and he
17 said that the Wyoming law is just as you've described,
18 that is, the farmer can use all that water; and he said
19 Montana law is uncertain, but Wyoming law is not out of
20 line with the general approach.

21 Suppose it had been a case, suppose Montana
22 law, instead of being uncertain, was diametrically
23 opposite Wyoming law, then what happens under this
24 compact?

25 MR. JAY: Under this compact, Justice

1 Ginsburg, the appropriative rights existing in each
2 signatory State as of January 1st, 1950 are water
3 preserved and carried for by article V(A). Each water
4 user in -- in each State has exactly the same rights
5 that he had on January 1st, 1950. Now, in Montana
6 perhaps that might not include the right to recapture
7 efficiencies; but we know, for example, that -- that a
8 Montana water user could divert more water per acre
9 because Montana had a more generous concept of
10 beneficial use for irrigation per acre than Wyoming did.

11 The compact simply carries forward all
12 existing appropriative rights, and the drafters
13 consciously rejected the idea that they should come up
14 with some kind of interstate administration system
15 putting the two States' rights on equal footing. They
16 carried forward each element in the bundle of sticks
17 that a rights holder had on January 1st, 1950, subject
18 to the single override of the definition of beneficial
19 use; and I would like to turn to that because Justice
20 Scalia's colloquy with Mr. Michael brought that out.

21 In article II(H) there's a definition of
22 beneficial use. What the compact's definition of
23 beneficial use does is specify that nondepletive uses
24 don't count. Hydropower is a classic example.
25 Hydropower in the main channel is something that one

1 could get an appropriative right for under some western
2 water law.

3 JUSTICE KENNEDY: Could you -- and this is
4 II --

5 MR. JAY: II(H), which is on page A4 to the
6 appendix to the special master's report. That's the
7 definition of beneficial use. What it does not do is
8 specify that depletion is the measure of beneficial use.
9 It says beneficial use is not the use to the extent that
10 the water supply is depleted; it's the use -- it's a use
11 by which the water supply is depleted.

12 Because irrigation means water goes out and
13 doesn't come -- and some of it doesn't come back,
14 irrigation is a depletive use. It's recognized by the
15 compact.

16 JUSTICE SCALIA: Well, hydropower would --
17 would not constitute a diversion.

18 MR. JAY: But a mill race would, Justice
19 Scalia. A mill race takes water out of the river. You
20 turn the wheel of your grist mill with it, and then the
21 water comes back to the river.

22 JUSTICE SCALIA: Well, but that -- that's a
23 diversion.

24 MR. JAY: Yes, that's a diversion, but not a
25 depletion.

1 JUSTICE SCALIA: It means the taking or
2 removing of water when the water so taken or removed is
3 not returned directly into the channel of the
4 Yellowstone River. So if you have a mill race, the
5 water comes through the mill race, goes right back; it's
6 -- it's not even a diversion. You don't have to qualify
7 as a beneficial use.

8 MR. JAY: But the -- the point, Justice
9 Scalia, article V(A) doesn't use diversion, and that --
10 that's precisely the point, it doesn't use diversion; it
11 uses -- it uses beneficial use. And any -- any --

12 JUSTICE SCALIA: Why doesn't it use
13 diversion if it means what you say?

14 MR. JAY: Because they -- it didn't use
15 diversion because it wasn't quantifying them. Where --
16 what diversion is used in article V(B) because the
17 diversion is --

18 JUSTICE SCALIA: Of course it's quantified.
19 I mean the whole purpose is you can't take any more than
20 you were taking before. It has to be quantified
21 somehow.

22 MR. JAY: It's not quantified in the
23 sense -- as Justice Breyer pointed out, no one -- they
24 didn't write down, especially in Montana, because as the
25 special master said on page 22, Montana didn't have a

1 centralized system of rights; they didn't know exactly
2 how much was being diverted in Montana. They certainly
3 didn't know how much was being consumed or how much was
4 being returned to the river.

5 Joint appendix 585 there's a Federal Power
6 Commission report that says that it is almost impossible
7 to make an accurate determination of return flow. So
8 what -- what the drafters did was they, for the pre-1950
9 rights, they said we're not going to cap -- quantify
10 them at all, we're going to grandfather them in, freeze
11 them in place.

12 JUSTICE BREYER: So your linguistic argument
13 is they didn't use the word diversion because they
14 didn't want to throw the mill race example into the
15 definition; is that right?

16 MR. JAY: My argument, Justice -- my
17 argument, Justice Breyer, is that they didn't want mill
18 races or hydropower to count.

19 JUSTICE BREYER: They didn't want mill races
20 in the definition, so they didn't purposely use
21 diversion, that's why they used the word depletion.

22 MR. JAY: They used the word depletion, but
23 they didn't make the amount of depletion the
24 measurement -- that is the point.

25 JUSTICE SCALIA: A mill race is not a

1 diversion.

2 JUSTICE BREYER: Correct, and they wanted
3 that.

4 MR. JAY: A mill race is a diversion under
5 the common understanding of that term, Justice Scalia.
6 It may --

7 JUSTICE SCALIA: Not under the definition.

8 MR. JAY: No, not under the special
9 definition used for Article V(B), but --

10 CHIEF JUSTICE ROBERTS: You keep saying
11 everybody gets the same beneficial use they had prior to
12 1950, but -- even though that may mean they can't do it.
13 In other words they may have a right to get 50 cubic
14 whatever for irrigation, but there may not be any water
15 there for them to use it because of the increased
16 efficiencies upstream.

17 MR. JAY: That -- that is true, Mr. Chief
18 Justice, but that has always been the case under western
19 water law that the appropriative right is a priority,
20 that when it's your turn and there's enough water, you
21 get to take the amount of water to which you have a
22 right. But it was clear in Wyoming on January 1st, 1950
23 that the appropriative right -- so long as you took the
24 same quantity from the river, you took it from the same
25 point on the river, you put it to the same use,

1 irrigation, on the same acreage -- that you could then
2 change crops, for example.

3 JUSTICE KENNEDY: In II -- in II(H), do you
4 think beneficial use is hereby defined as -- by which
5 water supply is depleted -- we're looking at "depleted."
6 Do you define depleted as what is taken without any
7 reference to what is returned?

8 MR. JAY: I -- I think that that's right. I
9 think I agree, Justice Kennedy, but it has to be a
10 depletive use in the sense that some water -- some water
11 has to come out that doesn't come back. So it's not --
12 it's not the same -- the mill -- a mill race is not a
13 depletion, even though some water, some water comes out
14 because it then -- because it then comes back.

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

19 MR. JAY: The reason it's irrelevant,
20 Justice Kennedy, is that -- for two reasons. Depletion
21 is not the measure of beneficial use. It's a -- it is a
22 criterion for beneficial use. The use has to be a
23 depletive one; but it's not the measure of the
24 beneficial use.

25 And the second point, Montana seeks to

1 equate consumption with depletion, and that's just --
2 that's not correct, either. We urge the Court to
3 overrule the exception. Thank you, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.
5 General, you have two minutes left.

6 REBUTTAL ARGUMENT OF STEVE BULLOCK

7 ON BEHALF OF PLAINTIFF

8 MR. BULLOCK: Mr. Chief Justice, members of
9 the Court:

10 Briefly, as Justice Scalia pointed out this
11 is a compact, and it's a compact between two different
12 States, and Montana gave up things, a right of priority
13 administration across State lines as a result of that.

14 Justice Breyer, as an issue of fairness, we
15 don't get all the water. We only get water supply under
16 like conditions. We are now the downstream
17 appropriator, so -- but one example, if half the water
18 is flowing now that it was, as of 1950, Montana may not
19 get anything at that point, because just by the virtue
20 of some say it's "highology," whoever is higher on the
21 river gets to take first.

22 So we -- we don't get to fulfill our rights.
23 All we get is to ensure that given a like supply of
24 water, that our rights shall continue to be enjoyed as
25 it existed as of 1950.

1 JUSTICE SOTOMAYOR: How many years has there
2 been not enough water to fill all pre-19 -- forget about
3 whether there was post-1950 use. How many years are we
4 talking about in which there has been not enough water
5 to fill everybody's?

6 MR. BULLOCK: And -- Your Honor, we have
7 done no discovery at all. This is still at the motion
8 to dismiss the complaint. That's what the hydraulics
9 and the engineers will ultimately determine. We made
10 calls in 2004 and 2006.

11 We said, wait a minute, we're not getting
12 enough water here, and we believe it's the -- the
13 pre-1950 uses that are depleting that. Will you give us
14 water? Ultimately why we're here is to sort this out.

15 I guess, I would also point out that there
16 was some discussion about an appropriative right is the
17 right to use a quantity of water. That makes sense
18 other than if you're in a compact, and Montana gets no
19 water. The Solicitor General even pointed out then in
20 his brief at a footnote; he said well, what we might do,
21 then, is that Montana could bring an equitable
22 apportionment action for the pre-1950 water.

23 That highlights the, I think to me, the
24 illogic of just focusing on the rights and not looking
25 at the uses and how much each State was consuming,

1 because at that point I'll be right back here saying we
2 want the same water under like conditions that we had in
3 1950. Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, General,
5 counsel. The case is submitted.

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

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