

No. 137, Original  
IN THE SUPREME COURT OF THE UNITED STATES  
VOLUME 12 OF 25 VOLUMES  
TRANSCRIPT OF TRIAL PROCEEDINGS

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STATE OF MONTANA  
v.  
STATE OF WYOMING  
and  
STATE OF NORTH DAKOTA  
Plaintiff,  
Defendants.

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BEFORE THE HONORABLE BARTON H. THOMPSON, JR.  
Special Master  
Stanford, California

James F. Battin United States Courthouse  
2601 2nd Avenue North  
Billings, Montana 59101  
8:39, Friday, November 1, 2013

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Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

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1 FRIDAY, NOVEMBER 1, 2013, 8:39 A.M.

2 SPECIAL MASTER: Okay. Good morning. Looks  
3 like I have Halloween candy on my desk. Suspicions as  
4 to where that might have come from. Wherever it came  
5 from, I'm appreciative. In fact, I even have a Kit Kat  
6 bar, which is my favorite.

7 I'm sorry. Everyone can be seated.

8 So, Mr. Draper, is Mr. Moy the first of the  
9 witnesses?

10 MR. DRAPER: Yes, indeed, Your Honor. With  
11 your permission, we'd go ahead and call Mr. Moy to the  
12 stand.

13 SPECIAL MASTER: That would be great.

14 MR. DRAPER: The examination will be by  
15 Mr. Wechsler.

16 (Richard Moy sworn).

17 THE CLERK: Have a seat, please. State your  
18 name and spell it.

19 THE WITNESS: My name is Richard Marshall  
20 Moy.

21 MR. WECHSLER: Your Honor, Mr. Moy is being  
22 offered for the purpose of describing the long dispute  
23 between Wyoming and Montana, Montana's efforts at  
24 developing a methodology, and then also the demand of  
25 water that Montana made to Wyoming in the 1980s and

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1 also in the 2000s.

2 SPECIAL MASTER: Okay. Thank you.

3 RICHARD MOY,

4 having been first duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. WECHSLER:

7 Q. Good morning, Mr. Moy. And I have told you  
8 this out of court, but I want to say on the record I  
9 very much appreciate your patience and willingness to  
10 stay over a little longer and be here today.

11 What is your current business address?

12 A. My current business address is 2000 L Street,  
13 Washington, D.C.

14 Q. By whom are you employed?

15 A. I'm actually employed -- I'm associated with  
16 the State Department. But I'm on -- one of the United  
17 States commissioners on the International Joint  
18 Commission. And we are actually independent of  
19 government.

20 Q. Could you please describe the International  
21 Joint Commission and what it does?

22 A. The International Joint Commissioner has its  
23 authority under the Boundary Waters Treaty of 1909 and  
24 the Great Lakes Quality Water Agreement. And some  
25 consider it a peace treaty. And we resolve conflicts



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1 and disputes along the common border from the San Croix  
2 to the Great Lakes all the way through to the Columbia  
3 River Basin and between Alaska and the Yukon.

4 We address all types of issues. Every issues  
5 from regulation of flows, hydropower, drought, floods,  
6 water quality, aquatic invasive species, endangered  
7 species, nuclear energy climate change. And the list  
8 goes on.

9 Q. You said you're a commissioner. How many  
10 commissioners are there on that --

11 A. There are six commissioners. Three appointed  
12 by the prime minister of Canada. Three are nominated  
13 by the president of the United States. And the U.S.  
14 Commissioners have to be confirmed by the Senate  
15 Foreign Relations Committee.

16 Q. How long have you been a commissioner?

17 A. This is my third year.

18 Q. So now I'd like to go back, and starting with  
19 your educational background, could you please describe  
20 your educational background, summarize your educational  
21 background?

22 A. I have a bachelor's and master's degree and  
23 almost a Ph.D. in animal ecology with a strong medical  
24 background. And I worked as an ecologist in Glacier  
25 National Park for a number of years.

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1 Q. When did you first start working for the  
2 Montana DNRC?

3 A. I started in 1976.

4 Q. What was your position?

5 A. I was the state director for the High Plains  
6 Research Experiment.

7 Q. All right. My understanding is in 1979 you  
8 took another position; is that right?

9 A. In 1979, I also took on the bureau chief  
10 position for the Clinical Services Bureau within the  
11 Department of Natural Resources in the DNRC.

12 Q. In that position, what were your  
13 responsibilities?

14 A. My responsibilities, I had all the clinical  
15 staff associated with water rights, environmental  
16 impact statements. I also had all responsibility for  
17 compacts, both reserved water rights compacts and the  
18 Yellowstone River Compact and transboundary issues with  
19 Canada.

20 Q. In 1981. I understand there was a  
21 reorganization. And so in 1981, did your position  
22 change?

23 A. We added on the Water Planning Bureau. So we  
24 had the Water Planning Bureau, the Technical Services  
25 Bureau, and by then the High Plains Research Experiment

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1 was dying out and we formed the Water Management  
2 Bureau.

3 Q. Beginning in 1981, did you still have  
4 responsibility over the compacts that Montana was a  
5 party to?

6 A. The Yellowstone River Compact?

7 Q. Yes.

8 A. That is correct.

9 Q. How long were you in that position?

10 A. Overseeing the Yellowstone River Compact, I  
11 was intimately involved up through the late 1990s,  
12 until I decided to take on other duties and  
13 responsibilities and a bit of frustration. And then I  
14 picked it up again in about 2000.

15 Q. You were not the commissioner for the  
16 Yellowstone River Compact on behalf of Montana; right?

17 A. I was not.

18 Q. But you say you had responsibility for that  
19 compact. Can you describe what those responsibilities  
20 were?

21 A. I had a number of responsibilities. I  
22 oversaw all the technical analysis, I addressed a lot  
23 of issues at the local level with the Tongue River  
24 water Users with the Powder River Water Users. I  
25 actually helped draft the rules and regulations where

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1 addressing interstate water rights where the water  
2 right's in one state and the use is in the other state.  
3 And I did that working with Larry Wolf. I oversaw, for  
4 quite extensively how to actually implement the compact  
5 to make it a workable document.

6 At that time I was also responsible for  
7 setting up the reserved water rights compact  
8 commission.

9 Q. Did you attend Yellowstone River Compact  
10 Commission meetings?

11 A. I did.

12 Q. And did you also attend various technical  
13 committee meetings?

14 A. I attended most all of them. The other thing  
15 I did, I lead the U.S. discussion and session in trying  
16 to resolve the issues associated with the Little Big  
17 Horn.

18 Q. Staying on the technical committee meetings,  
19 my understanding is during the period that you were in  
20 that position at the state of Montana, that the  
21 technical committee was very active; is that right?

22 A. Excuse me?

23 Q. Was the technical committee active during  
24 that time?

25 A. The technical committee was extremely active.

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1 We actually hired a full-time hydrologist technical  
2 support staff to work on the Yellowstone River Compact.

3 Q. And there were meetings throughout this  
4 period?

5 A. There were.

6 Q. Were there meetings throughout this period  
7 that you attended?

8 A. Yes, there were meetings.

9 Q. During your time at the DNRC, was working on  
10 the Yellowstone River Compact, was that one of your  
11 priorities?

12 A. I would say yes.

13 Q. Why?

14 A. Because one of the first things we try to set  
15 up was an administrative procedures, a process to  
16 actually make Article V work. And we felt, after the  
17 drought of '81, and even before that, after the '79,  
18 '80, that there was a need to actually develop  
19 administrative procedures to make the compact work.

20 Q. And you described this earlier, but I want to  
21 make sure we have our time frames correct. So you took  
22 over the responsibilities for the compact, including  
23 the Yellowstone River Compact in 1979; right?

24 A. That's correct.

25 Q. You stayed in that position until 2000 --

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1 remind me -- 2008? '9?

2 A. I retired in 2008.

3 Q. 2008. Thank you. But if I understood you  
4 correctly, you were very active in working on  
5 Yellowstone River Compact issues during the 1980s?

6 A. That's correct.

7 Q. In the '90s you were not very active on those  
8 issues?

9 A. No, I was not.

10 Q. All right. And somebody else from your staff  
11 handled the Yellowstone River Compact during that time?

12 A. That's correct.

13 Q. And then beginning in the 2000s, with the  
14 drought years, that's when you became actively involved  
15 again in Montana's administration of the Yellowstone  
16 River Compact?

17 A. Yes.

18 Q. So what I'd like to do, if it's okay with  
19 you, Mr. Moy, I'm going to ask you a number of  
20 questions about events that occurred during the time  
21 that you worked on the Yellowstone River Compact issues  
22 for Montana. And at the end of that, we're going to  
23 look at documents, and I think it will help inform some  
24 of the discussion that we have. And that way I will be  
25 as efficient as possible.

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1 Does that sound okay with you?

2 A. That's fine.

3 Q. So first I want to talk about your authority  
4 to work on Yellowstone River Compact issues. And so  
5 when you first began working at the DNRC in a position  
6 where you were involved with the Yellowstone River  
7 Compact Commission, which I understand to be technical  
8 services chief or something like that?

9 A. Yeah. It was chief of the Technical Services  
10 Bureau.

11 Q. So when you first began there, who was the  
12 administrator of the Water Resources Division?

13 A. Gary Fritz.

14 Q. At that time was he also the Yellowstone  
15 River Compact commissioner for Montana?

16 A. Yes, he was.

17 Q. When Mr. Fritz was the administrator of the  
18 Water Resources Division, were you authorized to have  
19 communication with the state of Wyoming concerning the  
20 Yellowstone River Compact?

21 A. Yes.

22 Q. How do you know that?

23 A. How do I know that I was given the authority?

24 Q. Yes.

25 A. Because I was responsible for overseeing the

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1 development of the administrative procedures.

2 Q. And you talked about that with Mr. Fritz?

3 A. Yes.

4 Q. Were you authorized to seek water that  
5 Montana was entitled to under the Yellowstone River  
6 Compact?

7 A. Yes.

8 Q. Somewhere around 1997, Mr. Stults became the  
9 administrator of the Water Resources Division. Is that  
10 consistent with your understanding?

11 A. That's correct.

12 Q. And was Mr. Stults also the commissioner at  
13 that time as well?

14 A. Was Jack Stults the commissioner?

15 Q. Yes.

16 A. Yes, he was.

17 Q. So then I have the same questions for  
18 Mr. Stults. When he was commissioner of the YRC, did  
19 you have the authority to have communications with  
20 Wyoming?

21 A. I did.

22 Q. And you had conversations with Mr. Stults  
23 about that?

24 A. Yes.

25 Q. And were you authorized to seek Montana's



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1 share of water under the compact when Mr. Stults was  
2 the commissioner?

3 A. Yes.

4 Q. Now you also had staff working for you; is  
5 that right?

6 A. That's correct.

7 Q. Who worked for you on Yellowstone River  
8 Compact issues?

9 A. I had number of staff working. I had Dan  
10 Ashenberg, his name is now Dan Buffalo; Chuck Dalby;  
11 Steve Hollenbeck; Jim Robinson. Probably were others  
12 too.

13 Q. That sounds like a list of people from the  
14 1980s; is that right?

15 A. Jim Robinson was in the 2000s. Mike Roberts  
16 may have done a little bit, and that was in 2000. And  
17 Chuck Dalby was in 2000, but also earlier.

18 Q. Was Mr. Kerbel on your staff?

19 A. Keith Kerbel was not on my staff. He was  
20 responsible for the Billings regional office and  
21 specifically primarily responsible for water rights.

22 Q. Did he work on some Yellowstone River Compact  
23 issues with you?

24 A. He attended the meetings with us, yes.

25 Q. And then in the 2000s, for example, he was

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1 active in investigating issues from water users in  
2 Montana?

3 A. That is correct.

4 Q. Were those individuals that you're  
5 describing, were they authorized to be having  
6 communications with the state of Wyoming?

7 A. Yes.

8 Q. And did you authorize that?

9 A. I think it was me and I think it was probably  
10 the division administrator, a combination of both.

11 Q. So that would be Mr. Fritz and Mr. Stults as  
12 well?

13 A. That's correct.

14 Q. That was going to be my next question. So  
15 let's move on. We've talked a little bit your  
16 authority, let's talk now about the communications that  
17 you had with water users in the Tongue River Basin.

18 And are you familiar, generally, with the  
19 Tongue River?

20 A. Yes.

21 Q. And with various issues that occur on the  
22 Tongue River in Montana?

23 A. Yes.

24 Q. When you were the Water Resources Management  
25 Bureau chief and before that the Technical Services

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1 director, were you in contact with water users on the  
2 Tongue River in Montana?

3 A. We were in contact with water users on the  
4 Tongue River.

5 Q. What kinds of issues and discussions would  
6 you have with those water users?

7 A. We had a number of -- I worked on a number of  
8 issues. I word on reserved water with the Northern  
9 Cheyenne. I worked on the operations of the Tongue  
10 River Reservoir. And I worked with the Yellowstone  
11 River Compact on the water users in trying to ensure  
12 that they received their entitlement under the compact.

13 Q. You mentioned some of your staff and  
14 Mr. Kerbel. Were those individuals also in touch with  
15 the water users in Montana on the Tongue River?

16 A. Yes.

17 Q. Did you try and keep informed on the water  
18 supply conditions in Montana on the Tongue River?

19 A. I generally had a very good grasp of the  
20 water supply conditions on the Tongue. In fact, across  
21 the state we probably had one of the best drought  
22 reports and drought statutes of any western state. And  
23 we put together monthly Palmer Drought Index, and the  
24 Surface Water Supply Index.

25 And the Surface Water Supply Index is an

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1 indication of irrigated agriculture and whether  
2 irrigated agriculture was receiving its entitlement or  
3 is there enough water to supply those lands within a  
4 drainage basin.

5           And then we also looked at the Tongue River  
6 gauge and the Tongue River Reservoir.

7           Q.   Were you generally aware of the water rights  
8 that were in Montana?

9           A.   I am aware of the water rights -- not the  
10 specific water rights, but generally.

11          Q.   So were you aware that there was a 1914  
12 decree?

13          A.   I was aware of the 1914 decree, yes.

14          Q.   You mentioned those indices of drought.  Were  
15 those things that you applied, you or your staff  
16 applied to the Tongue River Basin in Montana?

17          A.   They applied to the Tongue River Basin but  
18 applied to all the basins of the state.

19          Q.   That helped you figure out whether there were  
20 shortages?

21          A.   Yes.

22          Q.   Did you also look at the water levels in the  
23 Tongue River Reservoir?

24          A.   We did.

25          Q.   And then sounds like you and your staff had

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1 communications with water users in Montana. Was that  
2 also a source of information for knowing the water  
3 supply?

4 A. We had really close communications with water  
5 users. You know, Roger Muggli used come into my  
6 office. Art Hayes used to come into my office a lot  
7 and talk. And they would call me on the phone when  
8 times were bad. I also worked with local folks, such  
9 as the Northern Plains Resource Council, who also were  
10 agriculture and water users and farmers and ranchers in  
11 Powder and Tongue River Basin. And they would also  
12 call on their behalf.

13 Q. And so these communications that you're  
14 discussing, those occurred throughout your tenure,  
15 meaning, did those occur during the 1980s?

16 A. They occurred quite extensively in the 1980s.  
17 Because we were so intimately involved with issues in  
18 the Yellowstone at that time.

19 Q. And then, again, did those communications  
20 pick up and continue, beginning in the early 2000s and  
21 throughout that period?

22 A. That is correct.

23 Q. Let's talk a little about your counterparts  
24 in Wyoming. And so when you were working on YRC issues  
25 during the 1980s, focusing on that period first, who

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1 were your counterparts in Wyoming?

2 A. My counterparts -- I worked with everybody.  
3 I worked with Larry Wolf. I worked with George  
4 Christopulos, Clem Lord, Lou Allen, John Buyok,  
5 Shields, the Wyoming water commissioners locally, the  
6 district commissioners. I think Sue, toward end of  
7 1988, '89 and then the year 2000.

8 Q. When you say Sue, do you mean --

9 A. Sue Lowry.

10 Q. How would you describe your professional  
11 relationship, not with each individual, but with the  
12 Wyoming contingent in general?

13 A. My relationships -- it was probably rather  
14 tense at times. I mean, they had absolutely  
15 wonderful people, and they were very wonderful to work  
16 with. But it was -- there was high intensity at times.

17 Q. High intensity?

18 A. Because I was always the pusher, pusher to  
19 insure Montana received water from Wyoming.

20 Q. You were a thorn in their side?

21 A. Excuse me?

22 Q. A thorn in their side?

23 A. I know was the biggest thorn in some peoples'  
24 side.

25 Q. Moving to the 2000s, did you continue to be a

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1 pusher, as you describe it?

2 A. I was a pusher.

3 Q. And who -- during the 2000s, who were your  
4 counterparts in Wyoming?

5 A. I did talk to Sue Lowry quite a bit. I --  
6 oh, yeah. Early on there was Jeff Fassett too.  
7 Forgive me. But Pat.

8 Q. Pat Tyrrell?

9 A. Pat Tyrrell.

10 Q. Are you familiar with during sometime in  
11 there, and I don't have my dates exactly, but sometime  
12 in the early 2000s, there was an interim state engineer  
13 named Richard Stockdale; were you in communication with  
14 Mr. Stockdale?

15 A. I don't recall.

16 Q. And how was your professional relationship  
17 with the Wyoming contingent beginning in 2000s?

18 A. Intense.

19 Q. And why?

20 A. Because those are drought years. And those  
21 drought years, I was concerned about making sure  
22 Montana received some water across the border. And  
23 early on, Art Hayes came into my office, and I can't  
24 remember if it was 2000 or 2001, and they direly needed  
25 help because there was hardly any water going across

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1 the border. And I think in some cases, the Powder  
2 River was almost dry or was dry. So I was -- at that  
3 point I was determined to start preparing for  
4 litigation.

5 Q. As early as the early 2000s, 2000 or 2001?

6 A. That's correct.

7 Q. And so were you having communications  
8 throughout this period with the Wyoming contingent?

9 A. We had -- yeah, we had discussions. Most of  
10 our discussions were tied to the calls.

11 Q. And I think we'll talk about those in a  
12 moment. Were there opportunities to be communicating  
13 with them on a regular basis, first in the 1980s?

14 A. In the 1980s, there was so many issues that  
15 we had -- that we were trying to address that we had  
16 many opportunities for discussion.

17 Q. Was that also true in 2000?

18 A. In 2000, I think the overreaching issue was  
19 the drought.

20 Q. And you had communications with Wyoming --

21 A. That is correct.

22 Q. Were some of those communications during the  
23 spring or irrigation season?

24 A. I think they were, yes.

25 Q. Is that true for both the 19 --



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1           A.    I think the spring, summer -- can I recall  
2 when those meetings were held?  No.

3           Q.    But I just -- I understand that you don't  
4 remember an exact date.  But, generally, were they at a  
5 time where Wyoming was in a position to take some  
6 action to make sure water got to Montana?

7           A.    Yes.  I mean, I was continually challenging  
8 Wyoming to -- on their water usage.

9           Q.    Let's talk about the disputes that you had  
10 with Wyoming over water usage.  And I wanted to  
11 specifically focus on Article VA, and I think you said  
12 you were focused on making sure Montana got its share  
13 of water.

14                    So during your time as the Water Resources  
15 Management Bureau chief, when you were working on  
16 Yellowstone River Compact issues, did you have an  
17 opportunity to research the history of the compact?

18           A.    I did.

19           Q.    I understand you took some -- you had  
20 extensive research.  And if you would please describe  
21 that for me, that would be helpful.

22           A.    What I did, I went back to all the original  
23 records that we had from the '40s,s -- '30s, '40s, and  
24 '50s that I could find and read the documents and put  
25 together what I thought happened during that time

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1 period in the drought, so the compacts, before the  
2 final compact was reached.

3 Q. And so it sounds like you're looking at the  
4 documents before the compact even was entered. Did  
5 that help you develop an opinion as to how the compact  
6 was functioning for Montana?

7 A. I thought I had at that time a very good idea  
8 of how the compact was arrived at and the final compact  
9 was eventually signed. Also, there was a number of  
10 letters that I thought were very important between  
11 Leander and Governor Bonner.

12 Q. Did you also review documents that showed how  
13 the states were relating after the compact, meaning  
14 like, the '60s, '70s, and '80s?

15 A. I did.

16 Q. Why did do you that?

17 A. Because I wanted to have a good understanding  
18 historically of what actually happened with the  
19 administration of the compact.

20 Q. Did you go through all of Montana's files?

21 A. I went through all of Montana's files.

22 Q. We'll have a chance to look at some of the  
23 products of your research when we look at the  
24 documents.

25 Did you also have an opportunity to speak

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1 with any individuals about the relationships between  
2 Montana and Wyoming?

3 A. Those that were actually drafting the  
4 compact?

5 Q. No. People who were likely not alive --

6 A. Yeah.

7 Q. I mean, people who were involved in the  
8 relationship between the states after the compact was  
9 adopted.

10 A. Orrin Ferris, and those that I worked with on  
11 both sides of the border.

12 Q. How about Mr. Pike?

13 A. George Pike. I worked a lot with George Pike  
14 and actually traveled a lot with George Pike to  
15 meetings, technical committee meetings, George Pike was  
16 the district chief of the USGS for many years in  
17 Montana. And he had spent many years working on the  
18 Yellowstone River Compact and was very knowledgeable  
19 about the compact and provided great insight on the  
20 compact.

21 Q. So based on all of this research and analysis  
22 that you did, did you develop an opinion on whether  
23 pre-Compact rights in Montana were protected from  
24 post-Compact rights in Wyoming?

25 A. I thought it was extremely clear that

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1 pre-Compact rights in Montana were protected from any  
2 post-'50 uses in Wyoming.

3 Q. That opinion was based on all those documents  
4 and discussions that you had?

5 A. It was based on all those documents; that is  
6 correct.

7 Q. And did you -- you were familiar with the  
8 Article V, I think you mentioned?

9 A. Am I familiar with Article V?

10 Q. Were you at the time?

11 A. Yes.

12 Q. And was it your opinion that they were  
13 protected under Article V-A?

14 A. I thought so, yes.

15 Q. And I think some of those documents will  
16 confirm that, that we look at. Did you communicate  
17 that opinion to Mr. Fritz?

18 A. Yes.

19 Q. How about Mr. Stults?

20 A. Yes.

21 Q. And did those individuals, did they agree  
22 with your analysis?

23 A. Yes.

24 Q. Now, did you communicate your view of Article  
25 V-A and the protections for pre-Compact rights in

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1 Montana to Wyoming?

2 A. Many times.

3 Q. Throughout the 1980s?

4 A. Throughout the '80s.

5 Q. How about in the 2000s?

6 A. Yes.

7 Q. Many times?

8 A. Many times that led up to the litigation.

9 Q. Did Wyoming agree with your interpretation?

10 A. No.

11 Q. How do you know?

12 A. Well, I -- for the '80s, it was -- well,  
13 let's keep working on it. Let's keep figuring things  
14 out. And we never got anywhere. And can I give many  
15 examples.

16 And then in the 2000s, you can read Pat  
17 Tyrrell's letter.

18 Q. Did they tell you even earlier than 2004 that  
19 that was not their interpretation?

20 A. They did.

21 Q. What did you understand Wyoming's position to  
22 be with regard to the protection of pre-Compact rights  
23 in Montana?

24 A. About 1980. '81.

25 Q. And so that answers the question of when you

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1 first understood their, Wyoming's understanding. But  
2 when did you -- not when, but what did you understand  
3 Wyoming's position to be with regard to the protection  
4 of pre-Compact rights?

5 A. I -- through all the discussions in those  
6 early years and trying to put together a framework for  
7 actually administering the compact, I came -- it was  
8 pretty clear to me that Wyoming had no desire to  
9 actually administer the compact and had no desire to  
10 regulate post-'50 uses in Wyoming for the benefit of  
11 Montana pre-'50 uses.

12 Q. Was that frustrating to you?

13 A. Excuse me?

14 Q. Was that frustrating to you?

15 A. That was extremely frustrating.

16 Q. Why?

17 A. Why? Because there were a lot of Montana  
18 water users that were really getting hurt. And I would  
19 talk to them. And it was hard. It was very hard on me  
20 to see Montana water users getting hurt so badly and  
21 not having water and then seeing across the border how  
22 lush and green it was.

23 Q. You've talked about how you had numerous  
24 conversations throughout this entire period of the  
25 1980s and 2000s; right?

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1           A.    You know, when I first started, I was  
2 probably a little naive and optimistic.  And I don't  
3 think it really started to drill into me until 1981,  
4 '82 that we were barking up a tree that we probably  
5 were not going to get anywhere.  But we kept trying.

6           Q.    Were your communications with Wyoming  
7 sometimes heated?

8           A.    Generally, my conversations with Wyoming were  
9 rather heated at times, yes.

10          Q.    Was that because there was a dispute over  
11 this particular issue?

12          A.    These were all over disputes.  Disputes such  
13 as -- disputes on pre versus post.  Disputes in the  
14 Middle Fork project.  Disputes over the Little Big  
15 Horn.  Disputes over Article X.  Disputes over the  
16 administration, developing an administrative process to  
17 actually allocate flows.

18          Q.    I think we'll have a chance to talk about  
19 many of those disputes that you're talking about.  I  
20 wonder if you could very briefly tell us about the  
21 dispute about the Big Horn because I don't think we  
22 have any documents that reflect that.

23          A.    The Big Horn.  You know, the Big Horn is  
24 unique.  The Big Horn with Yellowtail and Boysen  
25 Reservoir upstream and all -- there were an enormous

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1 amount of development upstream in the Big Horn. And to  
2 the point that Yellowtail, at times, had a hard time  
3 filling and had a hard time even maintaining minimum  
4 instream flows from Yellowtail Reservoir downstream in  
5 Montana, it was an issue.

6 Q. That's another example of an issue where you  
7 were working to get water under the Yellowstone River  
8 Compact to Montana?

9 A. It was. But I guess my greatest focus has  
10 always been on the Tongue and the Powder.

11 Q. Let's talk more about that, then. Did your  
12 discussions with Wyoming continue all the way up to the  
13 lawsuit?

14 A. Yeah. Initially the attorney general's  
15 office took over and led the discussions.

16 Q. What time frame are you talking?

17 A. I think 2005.

18 Q. Up until 2005, did Wyoming's position, as you  
19 understood it, on whether Montana was entitled to  
20 pre-Compact water, did it change?

21 A. Was Montana entitled to pre-Compact rights?  
22 Absolutely.

23 Q. Did your understanding of Wyoming's position  
24 on that issue, did it change?

25 A. Wyoming's position had not changed.



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1 Q. Didn't change throughout this entire period?

2 A. Wyoming's position has never changed. And  
3 politically, it would be very hard for anybody in  
4 Wyoming to change that position.

5 Q. Now, we're talking generally about what led  
6 to these issues and my understanding is that there were  
7 a great number of efforts to develop a methodology for  
8 administering the compact. So let's talk about those.

9 In the beginning when you became involved  
10 with the Yellowstone River Compact issues in 1979, was  
11 there a methodology in place for administering the  
12 compact?

13 A. No. And I knew that there was efforts  
14 initiated in 1970s to try develop a methodology. But  
15 there was no methodology.

16 Q. Did you believe that there needed to be a  
17 methodology?

18 A. I believe we needed a methodology to make the  
19 compact work.

20 Q. Why?

21 A. Well, to see if we can actually protect  
22 pre-'50 uses and to allocate post-'50 flows between  
23 Montana and Wyoming.

24 Q. So in order to make sure pre-'50 rights are  
25 protected and also to divide the remainder of the

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1 water; is that right?

2 A. You cannot develop administrative process  
3 under Article V, I don't believe, until you understand  
4 you had to protect the pre-'50 uses first and quantify  
5 those and then have a basis to develop a procedures to  
6 allocate post-'50 flows.

7 Q. You talked a little bit about your review of  
8 efforts that occurred before your time in the 1970s to  
9 administer the compact. Which state initiated those  
10 efforts?

11 A. I believe Montana. But I think it might have  
12 also been George Pike working with the U.S. Geological  
13 Survey. But I'm not positive.

14 Q. So either Montana alone or Montana and the  
15 federal representative?

16 A. I also think Orrin Ferris was interested in  
17 doing that because that was the time of large energy  
18 development proposals both in Montana and Wyoming. And  
19 we had water right applications for over a million  
20 acre-feet of water out of the Yellowstone River system.

21 Q. Who is Orrin Ferris?

22 A. Orrin Ferris was the division administrator  
23 before Gary Fritz.

24 Q. In the 1980s, did you and your staff attempt  
25 to develop a methodology for administering the compact?

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1 A. We did.

2 Q. Why did you do that?

3 A. Because we wanted, first, to protect our  
4 pre-'50 rights. And we wanted, second, to determine  
5 how much allocable flow post-'50 Wyoming is entitled to  
6 and Montana is entitled to.

7 Q. We'll have a chance, again, to look at a  
8 couple of these documents. But can you generally  
9 describe the methodology that you were working on?

10 A. Okay. One of the major concerns is Article V  
11 is contingent upon large storage projects being built  
12 on the main stem. Because the apportionment period, if  
13 I recall correctly, goes from October 1 to any given  
14 date. And for that to work you need to make sure that  
15 there was stored water there that could release the  
16 water to meet the apportionment. Because the way it's  
17 set up is is that, for example, it could be August.  
18 And if you look at the total flows at the confluence of  
19 that river system and you add them all up in August,  
20 for example, there could be 200,000 acre-feet of water.  
21 Whereas, the flows in the river could be less than  
22 10,000. That would mean Wyoming's entitled to every  
23 single drop of it and Montana gets nothing.

24 So it did not make any sense, so we had to  
25 figure out a way to work through it. And we, quite

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1 frankly, I think Dan Ashenberg, Dan Buffalo, developed  
2 an very innovative approach to try to make the  
3 Yellowstone River Compact work. And one of the key  
4 things, we had to put everything in to depletable  
5 flows.

6 And -- because you got to compare apples with  
7 apples. If you're looking at industrial development  
8 with a diversion of depleted 100 percent, a sprinkler  
9 system with a depletion is maybe 80 percent versus a  
10 flood which is 50 percent. You need to talk about  
11 depletions.

12 We also had to break down the hydrograph from  
13 the rising limb to the following limb so you don't  
14 reallocate flows. Then you reallocate the rising limb  
15 and following limb. And I would have to go back and  
16 really review the methodology. Because it's been many,  
17 many years since I looked at it. But I recall back  
18 then that I thought this was really a workable  
19 methodology to actually allocate flows on a reasonable  
20 basis between Montana and Wyoming. And that it could  
21 work.

22 Q. Sounds like you are don't remember the  
23 specifics. And when we look at the documents I think  
24 we'll all appreciate that. But do you remember whether  
25 that methodology would have protected Montana's

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1 pre-1950 rights?

2 A. It's contingent upon protecting pre-'50  
3 rights.

4 Q. In your description there you mentioned both  
5 a Dan Ashenberg and a Dan Buffalo; is that one person?

6 A. That is one person.

7 Q. He changed his name to Dan Buffalo?

8 A. He changed his name.

9 Q. Did you communicate these efforts, present  
10 these efforts to the state of Wyoming?

11 A. We did. And we presented these -- and I  
12 can't remember the exact day. I think it was 1980,  
13 '81, '82, sometime in that period. And Wyoming said to  
14 us, hmm, looks reasonable. Develop it for the Tongue  
15 River as an example and then come back. So we went and  
16 spent an enormous amount of time, developed it  
17 completely for the Tongue River, as an example, and we  
18 came back to Wyoming and showed it to them. And the  
19 response was, well, we'll look it over.

20 And they looked it over and then they said to  
21 us, Well it's different than the actual apportionment  
22 measurements, the four measurements you need to make.  
23 They are different. So we don't know what we're going  
24 to do.

25 And from that point on it was like pulling

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1 teeth to get Wyoming to look at anything.

2 Q. Did you feel that Wyoming was cooperative  
3 with your efforts?

4 A. You know, Wyoming is always very nice and  
5 very courteous. But, quite frankly, no, they were not  
6 cooperative. They had no desire to really develop an  
7 administrative procedures that would work.

8 Q. That was your impression?

9 A. That was my impression.

10 Q. Were your efforts ultimately successful?

11 A. No.

12 Q. Why not?

13 A. Why not? Well, if one side thinks they'll  
14 work, the other side doesn't want to use them and  
15 doesn't think it's different than what's actually put  
16 in the compact. And I couldn't get them to move  
17 forward. Got extremely frustrating. I just could not  
18 get it to move forward.

19 And also at that time, Wyoming was -- the  
20 Water Development Commission, I mean it was very active  
21 in the Yellowstone. And they were proposing a lot of  
22 projects.

23 So putting in place an administrative process  
24 for pre- and post-'50 water, might have had an impact.  
25 I'm guessing. It might have had on the Water

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1 Development Program in Wyoming at the time.

2 Q. Is there a process in place for the  
3 Yellowstone River Compact Commission to make decisions?

4 A. There was a -- there is a process in place  
5 for the Yellowstone Compact to make decisions, yes.

6 Q. How are decisions made?

7 A. If there was an issue that needed to be  
8 resolved, it was up to the three commissioners to vote.

9 Q. Does -- in your experience, does the federal  
10 commissioner vote?

11 A. The federal commissioner decided he would not  
12 vote.

13 Q. He decided that during your tenure?

14 A. That is correct.

15 Q. Did you ever experience the federal  
16 commissioner ever voting?

17 A. Not to my knowledge.

18 Q. So was it possible for Montana to impose a  
19 methodology on Wyoming?

20 A. No, he could not do that.

21 Q. Was the -- you talked earlier about the  
22 disagreement between the states over the pre-Compact  
23 rights and what protection they had. And was that a  
24 problem, in your view, in developing a methodology or  
25 administering the compact?

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1           A.    I actually thought we had a pretty -- even  
2 though we had not completed the adjudication on the  
3 Tongue River, I thought they had a pretty good handle  
4 on the water rights in the Tongue River Basis.

5           Q.    I mean, was the dispute between Montana and  
6 Wyoming over what Article V-A meant, did that dispute  
7 have a place in preventing you from developing  
8 administrative methodology?

9           A.    You know, did somebody say specifically V-A?  
10 No. Can you assume that? Yes.

11          Q.    Did you ever agree on whether there was  
12 protection afforded for pre-Compact rights in Montana?

13          A.    I don't think Wyoming ever agreed to that.

14          Q.    When you're attempting to develop this  
15 methodology, was one of the reasons that you were doing  
16 that in order to make sure Montana got enough water  
17 under the compact?

18          A.    We wanted -- I mean, if you look at the  
19 history of the compact, the issue was, before 1940, I  
20 think, there was a feeling in both states that the --  
21 the Tongue River was fully appropriated. That Montana  
22 clearly wanted to receive its water. And its  
23 entitlement.

24          Q.    Did you inform Wyoming that one of the  
25 reasons you wanted to develop a methodology was to make



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1 sure that Montana received its share of water under the  
2 compact?

3 A. That was the reason we did it, yes.

4 Q. Did you also inform Wyoming that one of the  
5 reasons was to protect the pre-Compact rights?

6 A. Yes.

7 Q. When you were having these discussions about  
8 methodology, were you of the opinion that Wyoming was  
9 taking too much water?

10 A. I thought Wyoming was taking too much water.  
11 And I think through the Water Development Program were  
12 even going to take more water.

13 Q. Did you inform Wyoming that that was what you  
14 thought?

15 A. I think I informed Wyoming very clearly that  
16 that was an issue specifically with the Middle Fork  
17 project.

18 Q. I want to be clear that this was true. Under  
19 the methodology that you were developing, would Montana  
20 have received its water for pre-Compact rights?

21 A. I don't know.

22 Q. Under the methodology that you were  
23 developing?

24 A. We had hoped.

25 Q. Your intention was to receive pre-Compact

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1 rights?

2 A. Yes.

3 Q. And you designed it in such a way that you  
4 would have received it if it operated?

5 A. The methodology is contingent upon receiving  
6 pre-'50 rights.

7 SPECIAL MASTER: Just one quick  
8 clarification. A moment ago you mentioned Middle Fork  
9 project.

10 THE WITNESS: Excuse me?

11 SPECIAL MASTER: A moment ago you mentioned  
12 Middle Fork project.

13 THE WITNESS: On the Powder River.

14 SPECIAL MASTER: Thank you.

15 MR. WECHSLER: And I think we'll have a  
16 chance to look at a document that explains the  
17 relevance of that project to this dispute and this  
18 discussion that was ongoing.

19 SPECIAL MASTER: Thank you.

20 BY MR. WECHSLER:

21 Q. As part of your efforts to develop a  
22 methodology for administering the compact, did you  
23 provide information to the state of Wyoming about  
24 Montana's pre-1950 water rights?

25 A. We have. When we did that -- I mean, to me

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1 the three pieces of information that we had, we had the  
2 1914 decree. We had the contracts out of the Tongue  
3 River Reservoirs, and then we had a priority date in  
4 1937. And the information that was presented yesterday  
5 on the water resource survey information on the Tongue  
6 River which is done mostly by 1950, was absolutely  
7 excellent because all those acres were ground verified.

8 Q. You're talking about that water resources  
9 survey water that Mr. Littlefield testified to?

10 A. The water resources survey information.

11 Q. I think that's Exhibit M16. I don't have  
12 that up here.

13 MR. WECHSLER: Your Honor, may I retrieve  
14 that document?

15 SPECIAL MASTER: You certainly may.

16 MR. WECHSLER: And, Your Honor, I have a  
17 number of documents that I'll be showing. And I would  
18 ask permission to approach the witness freely.

19 SPECIAL MASTER: I think that's going to make  
20 a lot more sense than continually asking me.

21 MR. WECHSLER: And I also ask that you toggle  
22 to the -- oh. Thanks.

23 BY MR. WECHSLER:

24 Q. And so, Mr. Moy, I've just handed you what's  
25 been marked as Exhibit M16. You see that?

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1 A. Yes.

2 Q. Is this the water resources survey that you  
3 just identified?

4 A. Yes.

5 Q. Is this a document that you provided to  
6 Wyoming?

7 A. You know, can I tell you exactly when we  
8 provided it? No. But have we provided it and have we  
9 made it very clear that this information was available?  
10 Yes.

11 MR. WECHSLER: Your Honor, I think M16 is  
12 only admitted on a limited basis. And at this time, I  
13 would move for the admission of Exhibit M16 on an  
14 unlimited basis.

15 MR. KASTE: I have concerns about this  
16 witness's ability to provide foundation for a document  
17 created probably when he was a child. But I don't  
18 object.

19 SPECIAL MASTER: That's good. Because I  
20 don't think we're likely to get anyone in this room who  
21 is going to be able to actually lay a foundation  
22 regarding the development of this particular document.  
23 And it's a public document. So I will admit M16, then,  
24 on all general purposes.

25 (Exhibit M016 admitted.)

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1 BY MR. WECHSLER:

2 Q. Mr. Moy, you were talking about the documents  
3 that you provided. I lost track when we were talking  
4 about Exhibit M16. Did you also provide a copy of the  
5 1914 decree to Wyoming?

6 A. Okay. I think two things: One, when we were  
7 enlarging the Tongue River Reservoir, we had a  
8 technical committee. And John Buyok, we invited to be  
9 on that technical committee from Wyoming. And one of  
10 the key foundations, then, in looking at an enlarged  
11 Tongue River Reservoir was developed an hydrologic  
12 model for the basin. And this information was  
13 critically important for developing that model, so they  
14 did know, yes.

15 Q. Yes, you did provide a copy of the 1914  
16 decree?

17 A. Can I say who gave it to them? No. Can I  
18 say that information was in that model that they were  
19 intimately involved with because they were on the  
20 technical committee and it was provided to them? We  
21 did provide it to them later in 2000. But can I tell  
22 you specifically in the '80s. I can guarantee you when  
23 I was involved in the modeling effort on the Tongue  
24 River Dam that this information was historically  
25 important in building the model and they had a copy of

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1 it.

2 Q. "They" meaning Wyoming?

3 A. Wyoming.

4 SPECIAL MASTER: And also just for clarity.  
5 You're still talking about the 1914 decree?

6 THE WITNESS: 1914 decree, the 1937 contracts  
7 out of Tongue River Reservoir and the water, and I  
8 believe they also had a copy of the water resources  
9 survey information that was available.

10 SPECIAL MASTER: Thank you.

11 BY MR. WECHSLER:

12 Q. We were talking about your efforts to develop  
13 a methodology in the 1980s. And I wanted to  
14 fast-forward to the 2000s. During the early 2000s, the  
15 drought years, did you also attempt to work with  
16 Wyoming to develop a methodology during those years?

17 A. We had some initial discussions that -- about  
18 developing a methodology. And -- yes. But I was  
19 probably more concerned about post-'50 uses in Wyoming  
20 and the impacts those post-'50 uses were having on  
21 Montana's water use pre-'50 rights.

22 Q. Sounds like those efforts in the 2000s were  
23 not nearly as intensive as in the 1980s?

24 A. No.

25 Q. Let's talk about specific communications that

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1 you had in 1987, 1988, and 1989. Based on your  
2 recollection, were the years 1987, 1988, and 1989  
3 water-short years?

4 A. They were water-short years.

5 Q. Was Montana short of water in those years?

6 A. Montana was short of water in those years.

7 Q. Including the water rights on the Tongue  
8 River?

9 A. You know, it was a long time ago, but the  
10 answer, I believe, is yes.

11 Q. And we talked earlier about the indicators  
12 that you had for knowing when Montana was short. Were  
13 those the indicators that you used in those years, '87,  
14 '88, '89?

15 A. Yes. No. Because I don't think we developed  
16 the drought plan until 1988. So 1987, 1988, was the  
17 time period we actually developed the drought plan.  
18 1989, we probably had those, like the surface water  
19 supply index in place. But we did have flows at the  
20 interstate border. And we also had levels on the  
21 Tongue River Reservoir. We also had flow levels at the  
22 gauge near Miles City.

23 Q. Was your staff also in contact with water  
24 users in 1987, '88, and '89?

25 A. Yes.

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1 Q. And we've talked about your ongoing efforts  
2 to develop a methodology for administering the compact  
3 in the '80s. Were those discussions still active in  
4 '87, '88, '89?

5 A. No.

6 Q. So they had died down by that time?

7 A. Yes.

8 Q. Were there still technical committee meetings  
9 going on?

10 A. You know, I'm trying to recall. And I cannot  
11 recall specifically. All I know is it was really hard  
12 for the water users in the Tongue River Basin in  
13 Montana. And I was getting very frustrated.

14 Q. Were you in contact with Wyoming during that  
15 time period?

16 A. We were in contact with Wyoming. I was in  
17 contact with Wyoming, yes.

18 Q. During those years, did you inform Wyoming  
19 that Montana was short of water and not receiving  
20 sufficient water for its compact -- pre-compact rights?

21 MR. KASTE: I think this is important, so I  
22 would rather it wasn't leading. I'd like to hear the  
23 witness's description of his communications and not  
24 Mr. Wechsler's.

25



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1 BY MR. WECHSLER:

2 Q. Did you have any discussions with --

3 A. Okay. I will tell what you I think, if I  
4 remember correctly. What I remember is '87, '88, and  
5 '89 were the last three years of my efforts on the  
6 Yellowstone River Compact where I just got so  
7 frustrated that we were not doing anything to protect  
8 pre-'50 rights in Montana that I quit working on the  
9 compact for ten years. I mean, it was -- got to a  
10 point that the water users were getting hurt too badly  
11 on our side of the border, and I just had no desire to  
12 continue working on it, and I did not.

13 Q. And I think we'll see one of your last  
14 efforts at that in 1989; is that right?

15 A. Okay.

16 Q. Well, and so my question is: You have  
17 testified that you were frustrated about Montana not  
18 receiving enough water; did you have communications  
19 with Wyoming about that?

20 A. I had communications with Wyoming about that.  
21 I had communications with Montana commissioner about  
22 that.

23 Q. Was that in 1987, '88, and '89?

24 A. Yes.

25 Q. Did you demand that Wyoming stop using

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1 post-'50 water?

2 A. No. You can't demand.

3 Q. Did you ask them?

4 A. I asked.

5 Q. Did you tell --

6 A. Asked, talked.

7 Q. Did you ask them to stop using post-'50  
8 water?

9 A. I asked them to stop using post-'50 so we  
10 could get some water across the border to help Montana  
11 water users, yes.

12 Q. Were you talking about both the reservoir  
13 water and direct flow water?

14 A. Storage rights and direct flow rights  
15 pre-1950. The other thing is -- and you may want to  
16 discuss it later -- is that Wyoming Water Development  
17 Program was really going full guns at this time. And  
18 they were developing more storage to the detriment of  
19 potentially -- potential detriment of water users in  
20 Montana. And so I was very active.

21 Q. Did you get the impression that Wyoming  
22 understood what you were asking?

23 A. Of course they understood.

24 Q. I want to turn to the 2000 and 2002 period.  
25 And I'm going to ask you the same questions. So based

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1 on your recollection, were 2001 and 2002, were those  
2 water-short years?

3 A. They were water-short years.

4 Q. By that time you had the drought indices;  
5 right?

6 A. By that time what?

7 Q. You had those indicators of drought that you  
8 discussed?

9 A. We had all those indicators of drought in  
10 place; that is correct.

11 Q. And did you use those to determine --

12 A. We did.

13 Q. Did you also have communications with water  
14 users?

15 A. We did. In fact, at that point, I decided we  
16 were going to start preparing for litigation because we  
17 were trying to push water uphill, and it wasn't  
18 working. And there was no desire by Wyoming to do  
19 anything differently.

20 Q. And did you also have -- I guess that -- did  
21 you also have -- did you also check the flows at the  
22 state line?

23 A. We checked the flows at the state line and  
24 staff was coming in all the time telling me there was  
25 no flows on the Powder River. Flows in the Tongue

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1 River almost were really extremely low. One time it  
2 was 20 CFS, I thought, or 20, 40 CFS, I mean, at the  
3 time.

4 Q. During those years, 2001, 2002, did you  
5 explain that situation to Wyoming?

6 A. Yes. But it got to a point -- yes. But it  
7 got to a point where asking Wyoming to provide Montana  
8 pre-'50 water was like pushing water uphill. It was --  
9 they had no desire to do anything. And it wasn't until  
10 we started making a call that we actually laid the  
11 foundation.

12 Q. It sounds like it was difficult. But I want  
13 to make sure that we're clear. Did you ask Wyoming for  
14 pre-'50 water?

15 A. Did I say --

16 Q. I'm sorry. For post-'50 water? Did you ask  
17 Wyoming to shut down post-'50 uses so that Montana  
18 could get pre-'50 water?

19 A. Yes. Every year that we received little or  
20 no water across the border, we had discussions, verbal  
21 discussions.

22 Q. And that includes 2001 and 2002?

23 A. Yes.

24 Q. Was it your understanding in 2001 and 2002  
25 that Wyoming understood what you were asking for?

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1 A. Of course they did.

2 Q. Let's look at the documents.

3 SPECIAL MASTER: Would this be a good time  
4 for the first of the morning breaks?

5 MR. WECHSLER: Yes.

6 SPECIAL MASTER: I have a feeling the court  
7 reporter, in particular, has been typing furiously  
8 here. So let's take a ten-minute break then. So we'll  
9 come back at about 12 to the hour.

10 (Recess taken 9:37 to 9:48  
11 a.m., November 1, 2013)

12 SPECIAL MASTER: You can be seated.

13 Mr. Wechsler.

14 MR. WECHSLER: Thank you.

15 BY MR. WECHSLER:

16 Q. Mr. Moy, I just handed you what's been marked  
17 Exhibit M136. M136. Have you had a chance to look at  
18 that document?

19 A. I have.

20 Q. Now, we talked with Mr. Fritz about this  
21 document, and I'm not going to ask about it at length.  
22 But I do want to point a few things out to you to see  
23 it if refreshes your recollection. And I'd like you to  
24 turn with me, please, at the very bottom it's labeled  
25 WY048194. The last three digits are 194.

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1 A. Excuse me, which?

2 Q. 194 are the last three digits. At the top it  
3 has the No. 5.

4 A. Right.

5 Q. The date 5/7/81.

6 A. Yes.

7 Q. And so here, and I'll just -- I'll try not to  
8 read a lot of these documents, but this particular one  
9 I'll point you to this language: It says, "Discussed  
10 whether or not water rights pre-1950 in Wyoming,  
11 post-1939 could be regulated. Also can post-1950 in  
12 Wyoming be regulated for Montana 1939 right"; do you  
13 see that?

14 A. That is correct.

15 Q. And who do you understand G.L.C. to be?

16 A. George Christopulos.

17 Q. And this appears to be a discussion with  
18 Mr. Fritz?

19 A. That's correct.

20 Q. Having looked at this document, does this  
21 refresh your memory about this event occurring?

22 A. Back then, and most of these meetings, I was  
23 actually in the office, Gary's office, in these  
24 discussions. And Gary and I would have discussions  
25 prior to the phone call.

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1 Q. And when you talk about a phone call, you  
2 mean a phone call with Wyoming?

3 A. A phone call with Wyoming.

4 Q. And was it about shutting down rights in  
5 Wyoming to satisfy rights in Montana?

6 A. That is correct.

7 Q. Now, this talks about a 1939 right, is that  
8 the reservoir? Do you understand that to be the  
9 reservoir?

10 A. That is the reservoir, the Tongue River  
11 Reservoir.

12 Q. At this time were you only focused on the  
13 reservoir?

14 A. I think we were actually in the discussions.  
15 We were interested in all pre-1950 rights.

16 Q. And that would include the reservoir as well  
17 as --

18 A. That would include the reservoir and all the  
19 direct flow rights.

20 Q. I'm going to hand you now what's been marked  
21 as Exhibit M76. And, Mr. Moy, we'll try and get  
22 through these documents as quickly as possible and I'll  
23 try and highlight only the essential parts so that we  
24 can make sure everyone gets out of here today. But  
25 your testimony is very important.

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1           The previous document that I had already  
2 showed you was already admitted. I don't believe this  
3 one has been. So I'll ask you first, do you recognize  
4 this document, M76?

5           A. Yes.

6           Q. What is it?

7           A. It's a memo that I drafted June 1st, 1981, to  
8 Gary Fritz regarding the administration of the  
9 Yellowstone River Compact that talks about some of the  
10 historical perspective of the compact and my feeling  
11 regarding post-1950 rights in Wyoming.

12           MR. WECHSLER: Your Honor, I would move the  
13 admission of Exhibit M76.

14           SPECIAL MASTER: Any objection?

15           MR. KASTE: No objection.

16           SPECIAL MASTER: M76 is admitted.

17                           (Exhibit M076 admitted.)

18 BY MR. WECHSLER:

19           Q. Mr. Moy, the document that we just looked at,  
20 M136, there were notes of a conversation that occurred  
21 in May of 1982; do you remember that?

22           A. Yes.

23           Q. And this -- what's the date on this memo?

24           A. This -- the date is June 1st, 1981.

25           Q. Is this memo related to those discussions



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1 that were going on?

2 A. I believe so.

3 Q. Now, the point, it looks like you go through  
4 a history of the negotiations and the compact, as you  
5 described earlier. I want to direct our attention  
6 really to the conclusion here, which is on the third  
7 page of the document, MT -- labeled MT22577 and the  
8 second to last paragraph.

9 And could you read that, please?

10 A. Yes. "I think it is pretty clear that the  
11 compact commission has the power to administer  
12 post-1950 rights and to protect pre-1950 rights as  
13 stated in Article V paragraph A. This would strongly  
14 suggest to me that post-1950 rights in Wyoming could be  
15 shut down to satisfy pre-1950 rights in Montana. But  
16 junior pre-1950 rights in Wyoming could not be or it  
17 would be very difficult to shut them off to protect  
18 senior pre-1950 rights in Montana."

19 Q. And so you talked earlier about when you  
20 first developed your opinion about whether pre-compact  
21 rights were protected. And this confirmed that it was  
22 in the early '80s; right?

23 A. That's correct.

24 Q. And I think you said this is part of those  
25 discussions that were occurring in May of this same

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1 year. Your opinion in this particular memo is not  
2 limited to the Tongue River Reservoir. And so that  
3 also confirms your testimony that you were also  
4 concerned about direct flow rights?

5 A. This is --

6 SPECIAL MASTER: Wait one second. Mr. Kaste,  
7 just rose and probably is going to complain about  
8 leading.

9 MR. KASTE: Oh, very much so.

10 SPECIAL MASTER: So, I think you are getting  
11 on to the leading side. And I think you can probably  
12 get exactly the same information by having the  
13 questions just a little more open-ended.

14 MR. WECHSLER: I'd be happy to.

15 SPECIAL MASTER: Thank you.

16 BY MR. WECHSLER:

17 Q. When you were writing this memo, Mr. Moy,  
18 were you concerned about direct flow rights?

19 A. I was concerned about all rights on all  
20 tributaries in the Yellowstone.

21 Q. Was this memo related to the conversations  
22 that occurred in May of 1982?

23 A. It was.

24 Q. I'm going to show you now a final document  
25 from 1982, Exhibit J32. And if you'll turn with me,

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1 please, Mr. Moy, to page Roman IV, I-V, third paragraph  
2 from the bottom. Do you see that?

3 A. Yes.

4 Q. And, again, this is something we talked with  
5 Mr. Fritz. Actually the reservoir in 1982 filled; do  
6 you recall that?

7 A. You know, at my age, you have a tendency to  
8 mix up years. But I believe that's the case.

9 Q. Who is talking at this commission meeting, do  
10 you think?

11 A. This would be Gary Fritz, and this would be  
12 me.

13 Q. It indicates that you have a concern that  
14 during low-flow years, Wyoming needs to regulate its  
15 post-'50 rights. And was that your recollection?

16 A. That is correct.

17 Q. I've handed you now what's been marked  
18 Exhibit M82. You see that document, Mr. Moy?

19 A. Yes.

20 Q. Do you recognize this document?

21 A. I do.

22 Q. What is it?

23 A. It's a letter to George Christopoulos from  
24 Gary Fritz dealing with the apportionment methodology  
25 that we were developing.

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1 Q. Is this a document that you helped to draft?

2 A. I helped draft the letter. The methodology  
3 was developed by Dan Ashenberg.

4 Q. Okay. When you say the "methodology," do you  
5 mean the last page of the document where there appear  
6 to be handwritten notes?

7 A. That's correct.

8 MR. WECHSLER: Your Honor, I move the  
9 admission of Exhibit M82.

10 MR. KASTE: No objection.

11 SPECIAL MASTER: Okay. Exhibit M82 is  
12 admitted.

13 (Exhibit M082 admitted.)

14 BY MR. WECHSLER:

15 Q. We talked earlier, Mr. Moy, about the  
16 methodology that you began to develop in the '80s, is  
17 this document reflective of that methodology?

18 A. That is correct.

19 Q. Was this methodology intended to make sure  
20 that Montana got its share of water?

21 A. What this methodology did was protect pre-'50  
22 rights of both states and then allocated post-'50  
23 water.

24 Q. Now, you talked earlier about the fact that a  
25 technical committee was formed. And if you look at the

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1 first paragraph it talked about a technical committee?

2 A. There was a technical committee.

3 Q. Was part of the methodology based on stream  
4 forecasting?

5 A. We were actually starting to consider looking  
6 at stream forecasting, yes.

7 Q. Why would that have been important?

8 A. Because you can't allocate flows after the  
9 fact, and you had to be able to transfer flows at the  
10 confluence to actually the boundary to make it  
11 significant to actually allocate flows between the two  
12 states.

13 Allocating flows at the confluence of the  
14 Yellowstone and the Tongue River, for example, makes  
15 absolutely no sense unless you have a large storage  
16 reservoir to guarantee those flows downstream at the  
17 border.

18 Q. When you talk about allocating flows, are you  
19 talking about pre-'50 rights or are you talking about  
20 percentage allocations?

21 A. I think I'm talking about both.

22 Q. Is that because Wyoming is the upstream  
23 state?

24 A. Wyoming is the upstream state. The reservoir  
25 could provide flows for pre-'50 rights and could also

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1 provide flows for the post-'50 allocation.

2 Q. And so once water has actually left Wyoming,  
3 the upstream state -- well, they can't get it back  
4 upstream; right?

5 A. That's correct. Unless they had additional  
6 storage which they had available.

7 Q. I'm going to show you the methodology itself,  
8 or the larger report. I'm not going to ask you too  
9 many questions about that. But this is Exhibit M97.

10 Mr. Moy, do you recognize Exhibit M97?

11 A. Yes.

12 Q. What is it?

13 A. This actually is the -- this is the  
14 methodology for actually administering Article V under  
15 the compact.

16 Q. What's the date on this document?

17 A. This is November 1983.

18 Q. Remind us, please, who Dan Ashenberg is.

19 A. Dan Ashenberg was my hydrologist that worked  
20 for me. Brilliant.

21 Q. Was this the document that is referred to in  
22 Exhibit M82?

23 A. That is correct.

24 Q. Was this a report that was drafted under your  
25 supervision?

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1 A. Yes.

2 MR. WECHSLER: Your Honor, at this point, I  
3 would move the admission of Exhibit M97.

4 MR. KASTE: No objection.

5 SPECIAL MASTER: Okay. Exhibit M97 is  
6 admitted into evidence.

7 (Exhibit M097 admitted.)

8 BY MR. WECHSLER:

9 Q. I promised I would point you to only parts of  
10 documents. This one in particular is very lengthy.  
11 And so I won't spend a lot of time on it. But if you  
12 could, Mr. Moy, turn to page 81. Do you have that?

13 A. Got it.

14 Q. So the previous page it says compact  
15 administration, the administration example. And the  
16 page I directed you to says Assumptions, on page 81.  
17 Could you read, please, the sixth assumption?

18 A. "All pre-1950 priorities in Montana must be  
19 satisfied prior to any post-1950 priorities in  
20 Wyoming."

21 Q. Was that your understanding of the compact?

22 A. Of course.

23 Q. And this methodology would have ensured that;  
24 is that right?

25 A. Yes. In fact, it would actually evaluate

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1 pre-'50 rights against pre-'50 rights to ensure there  
2 was no expansion of pre-'50 rights in Wyoming to affect  
3 pre-'50 rights in Montana as well as ensuring Montana  
4 received its pre-'50 rights against post-'50 uses in  
5 Wyoming.

6 Q. I don't want to revisit your earlier  
7 testimony about the ongoing discussions. But what I  
8 understood from you is that those discussions about  
9 methodology continued throughout the 1980s; do I  
10 understand that correctly?

11 A. We pushed it as long and as hard as we could  
12 push it. But sometimes you can't push water uphill,  
13 and then we finally just gave up.

14 Q. At what point was that?

15 A. You know, I can't tell you exactly the date.  
16 I'm going to guess '86, '87 sometime in that time  
17 frame. But I don't know for sure.

18 Q. We talked earlier about the Middle Fork  
19 project. I'm going to show you two documents related  
20 to that. These are Exhibit M64 and Exhibit M70.

21 Mr. Moy, if we could start first with M70  
22 because it is earlier in time than Exhibit M64. What  
23 is Exhibit M70?

24 A. This is a letter to Governor Herschler from  
25 Governor Ted Schwinden in Montana.



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1 Q. What's the date on that?

2 A. The date is January 3rd, 1984.

3 Q. Were you involved in the discussions that led  
4 up to this letter?

5 A. I initiated discussions on this issue.

6 Q. Were you involved in the drafting of this  
7 letter?

8 A. I probably drafted this letter.

9 MR. WECHSLER: Your Honor, I would move the  
10 admission of Exhibit M70.

11 SPECIAL MASTER: Any objection?

12 MR. KASTE: Well, I guess I have a  
13 foundational objection to "I probably drafted it."

14 THE WITNESS: I drafted this letter.

15 MR. KASTE: If I could finish.

16 THE WITNESS: Excuse me. I apologize.

17 MR. KASTE: I also don't object.

18 SPECIAL MASTER: It's okay. We also got a  
19 clearer answer in the process.

20 So Exhibit M70 is admitted into evidence.

21 (Exhibit M070 admitted.)

22 BY MR. WECHSLER:

23 Q. Mr. Moy, before we talk about Exhibit M70,  
24 can you look, please, at Exhibit M64.

25 A. Yes.

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1 Q. What is Exhibit M64?

2 A. It is a response letter from Governor  
3 Herschler to Governor Schwinden, dated April 10, 1984.

4 Q. Is this a document that you recognize?

5 A. Yes.

6 Q. Do you understand it to be a document that  
7 responds to Exhibit M70?

8 A. Yes.

9 Q. And did you see this document roughly at the  
10 time that it was received in Montana?

11 A. Excuse me? I'm sorry. My hearing is not the  
12 best.

13 Q. Exhibit M64, is this a document that you  
14 would have seen --

15 A. Yes.

16 Q. -- in 1984?

17 A. Yes.

18 MR. WECHSLER: Your Honor, I move the  
19 admission of Exhibit M64.

20 MR. KASTE: No objection.

21 SPECIAL MASTER: Okay. Exhibit M64 is  
22 admitted into evidence.

23 (Exhibit M064 admitted.)

24 BY MR. WECHSLER:

25 Q. Looking first at Exhibit M70, Mr. Moy, the

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1 Special Master asked a question about the Middle Fork  
2 project; can you describe your understanding of the  
3 Middle Fork project?

4 A. I'd be happy to. The Middle Fork project was  
5 a new project being proposed by Wyoming under the Water  
6 Development Program -- under the Water Development  
7 Commission. And it proposed to take high quality water  
8 of the Powder River and to build a storage reservoir.

9 And our concerns were this: In the Powder  
10 River Basin in Montana, the water quality is extremely  
11 poor. It has a very high TDS, and it has a very high  
12 chloride concentration. Chloride comes from two  
13 sources historically. One is secondary oil treaters or  
14 from geothermal activity. The chloride concentration  
15 increased five-fold from Salt Creek when they started  
16 putting secondary oil treaters in Salt Creek in  
17 Wyoming.

18 This water would flow across the border. We  
19 measured TDS in Salt Creek. It was extremely high.  
20 The way the irrigators in Montana on the Powder River  
21 irrigate is they're very lucky to get one full-service  
22 supply in low-flow years. And they have to irrigate  
23 when the water is dirty because when the water is dirty  
24 that's during the freshet. When the water is diluted  
25 enough where they can actually take the water and flood

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1 irrigate their lands.

2           And the issue is the TDS is so high that that  
3 is the only time they can use the water. Because in  
4 the flow -- because in the low-flow months, the water  
5 is clear, the TDS is so high they cannot use it for  
6 irrigation because the high sodium absorption ratio.

7           These people had a very hard time in the  
8 Powder River getting water for irrigation. And Wyoming  
9 had proposed to use a 1940 priority date water right in  
10 1980, so it's a pre-'50 water right to use in this  
11 storage project. And we were very concerned about the  
12 protection of pre-'50 rights in Montana on the Powder  
13 River.

14           And so, yes, we became -- and we were never  
15 advised of this process, which is very interesting.  
16 Because when we enlarged the Tongue River Reservoir, we  
17 invited Wyoming to participate in the process, and John  
18 Buyok sat on our technical committee. Everything we  
19 heard on this project we heard secondhand from other  
20 sources. And then we just got involved. And these  
21 are -- the letter that we resent and this is the  
22 response.

23           Q.    Who is Mr. Buyok?

24           A.    Excuse me?

25           Q.    Who is Mr. Buyok? You mentioned a Mr. Buyok?

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1 A. John Buyok was a technical person that worked  
2 for the state engineer's office.

3 Q. Of Wyoming?

4 A. Of Wyoming.

5 Q. The Middle Fork project had a water right of  
6 1940, I think you said. Was there a reservoir in  
7 existence related to that water right?

8 A. Was there a --

9 Q. An actual reservoir?

10 A. I knew at one time the specifics of the whole  
11 project. And it's been so many years, and I've been so  
12 involved with so many other stuff I can't remember the  
13 specifics of the size and the location and where it was  
14 and how it related to -- like DeSmet, I can't remember.

15 Q. My only question is my understanding is this  
16 was a proposed project in 1984?

17 A. This was a proposed project.

18 Q. There wasn't actually a reservoir in  
19 existence?

20 A. It's -- if I recall correctly, there was not  
21 a reservoir at that time.

22 Q. Let's --

23 SPECIAL MASTER: Mr. Wechsler, just to  
24 anticipate Mr. Kaste, you're again getting into leading  
25 questions.

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1 BY MR. WECHSLER:

2 Q. Looking at the first page, Mr. Moy, under  
3 Montana's allocable flow; do you see that?

4 A. Yes.

5 Q. And I'm looking at the first two sentences,  
6 which I'll read. "The Yellowstone River Compact  
7 provides for the protection of all pre-1950 irrigation  
8 water rights and the supplemental water associated with  
9 those rights. All pre-1950 rights and their  
10 supplemental supplies must be satisfied before  
11 streamflow is available for allocation on a percentage  
12 basis between the states."

13 Do you see that?

14 A. I do.

15 Q. What do you understand that to mean?

16 A. I understand it to mean exactly what it says.

17 Q. When they say "allocation," what do you  
18 understand that to mean?

19 A. The allocation is post-'50 allocation between  
20 the states.

21 Q. The percentage allocation?

22 A. Based on a percentage basis tied to irrigable  
23 acreage.

24 Q. Let's look at Wyoming's response. This is  
25 dated April 10th, 1984; you see that?

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1 A. Yes.

2 Q. Now I'll read to you the first sentence of  
3 the second paragraph. It says, "In general, the  
4 position I have taken in the past and will continue to  
5 take is that the state of Wyoming is entitled to  
6 develop its water in all of the tributaries of the  
7 Yellowstone River, provided its compact allocations are  
8 not exceeded."

9 What do you understand that to mean?

10 A. I'm not sure exactly what it means. But what  
11 its intended to say is --

12 MR. KASTE: Whoa. I want to object to this  
13 witness trying to describe what the letter from another  
14 governor outside his state is intending. He can tell  
15 you what he thinks it means. He can read it. But he  
16 cannot speculate about the intent of the drafter when  
17 it's not him.

18 SPECIAL MASTER: Yeah, I think just to be  
19 clear, what you can testify about and what's relevant  
20 here is what your understanding is of the language.

21 THE WITNESS: My --

22 SPECIAL MASTER: But not to speculate as to  
23 what the governor of Wyoming actually intended.

24 THE WITNESS: My understanding is Wyoming, on  
25 its own, has determined what they feel their post-'50

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1 water use could be on the tributaries of the  
2 Yellowstone and based on that analysis, assumes that  
3 this is their water. This is something they came up  
4 with independent of working with Montana.

5           And I did see one report, and I can't  
6 remember if it was a Heritage Foundation or who it was  
7 in Wyoming that actually came up with allocable flows,  
8 available to Wyoming to develop under the Yellowstone  
9 River Compact that was post-1950 uses.

10 BY MR. WECHSLER:

11           Q. Do you understand this phrase that I just  
12 read you to mean anything related to pre-1950 rights?

13           A. Please repeat that again.

14           Q. My question is: You talked about the  
15 percentage allocations. Do you understand this phrase  
16 to be making any point about pre-1950 rights in  
17 Montana?

18           A. It means two things. It means that it can  
19 take its compact allocation that is post-'50 water on a  
20 percentage basis. The other thing I understand at that  
21 time that I -- is that there were a lot of paper water  
22 rights in Wyoming that were pre-1950 that were flooded  
23 into the Wyoming system that were not developed. And  
24 this was one of those water rights that was pre-1950  
25 and that they were trying to develop in 1980.



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1 Q. Can you turn to the second page of that  
2 document, please? Here it mentions the Wyoming Water  
3 Development Commission, and you mentioned that earlier  
4 as well. I'm looking at the CCs.

5 What was the Wyoming Water Development  
6 Commission?

7 A. The Wyoming Water Development Commission was  
8 directed in Wyoming to develop water. All types of  
9 water, municipal water, storage, irrigation.

10 Q. By "develop water," what do you mean?

11 A. To develop and use water in Wyoming.

12 Q. Water that -- new water rights?

13 A. Most of it would be -- the Wyoming Water  
14 Development Program looked at municipal water -- future  
15 municipal water supplies, new storage, improved  
16 infrastructure. It looked at a variety of things for  
17 the betterment of the state of Wyoming in water use and  
18 development.

19 Q. Why was that a concern for you?

20 A. It applies water rights -- say that again.

21 Q. Why was that a concern for you?

22 A. Concern was that all this effort to develop  
23 water in Wyoming, based on their interpretation of what  
24 water was available to appropriate, without  
25 understanding how Montana water rights were being

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1 impacted, was a major concern.

2 Q. I'm going to hand you now what's been marked  
3 Exhibit M90. This letter comes chronologically after  
4 the governors' letters. And is this a document that  
5 you recognize?

6 A. Yes.

7 Q. What is this document?

8 A. When we presented the methodology to Wyoming  
9 in 1984, we presented it and gave examples. And what  
10 Wyoming asked us to do was to go back and develop it  
11 for the Tongue River. So we went back and spent a  
12 year -- not a year, but maybe a half a year developing  
13 this methodology for the Tongue River Basin as they  
14 requested. And this is the report of that methodology  
15 for the Tongue River Basin and how it would work.

16 Q. Would this methodology have protected  
17 Montana's pre-1950 rights?

18 A. This methodology would have protected  
19 Montana's pre-'50 rights; that is correct. And, in  
20 fact, it was our intent, with this methodology, to  
21 ensure that pre-'50 rights were pre-'50 rights and they  
22 weren't expanded. It would monitor pre-'50 rights in  
23 both states as well as allocate flows post-'50 rights.

24 Q. This is dated September 20th, 1984. Attached  
25 to it is a number of examples, as you say. Are these

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1 examples that were created under your direction?

2 A. Yes.

3 Q. Do you recall this letter being sent --

4 A. Yes.

5 Q. -- by Wyoming?

6 MR. WECHSLER: Your Honor, I would move the  
7 admission of Exhibit M90.

8 MR. KASTE: No objection.

9 SPECIAL MASTER: Exhibit M90 is admitted.

10 (Exhibit M090 admitted.)

11 BY MR. WECHSLER:

12 Q. What was Wyoming's response to Exhibit M90?

13 A. Actually, I was taken aback by their response  
14 after spending so much time and effort in moving  
15 forward with this. Wyoming's response was, we want to  
16 go back. We disagree with your assumptions and the  
17 methodology. Now we want to go back to the original  
18 interpretation of the compact of Article V.

19 Q. What was that original interpretation?

20 A. The four measurements under compact.

21 Q. The percentage allocation?

22 A. For the percentage allocation.

23 Q. Did you understand that to offer any  
24 protection for Montana's pre-1950 rights?

25 A. Did I understand that --

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1 Q. Did you understand that Wyoming's view would  
2 after any protection from Montana's pre-1950 rights?

3 A. No. They had no desire to protect Montana's  
4 pre-'50 rights.

5 Q. I'm going to hand you, Mr. Moy, a document  
6 that's been labeled as Exhibit M69. Mr. Moy, do you  
7 recognize Exhibit M69?

8 A. I do.

9 Q. What is it? What is Exhibit M69?

10 A. This is December 15th, 1986. And it's a memo  
11 from me to Gary Fritz regarding my thoughts for the  
12 Yellowstone River Compact annual meeting conference  
13 call which was 9:30 a.m. on December 16th, 1986.

14 Q. Do you recall writing this memo?

15 A. Do I recall -- I write so many. No. But did  
16 I write it? Yes.

17 Q. Well, looking at the from line, it says from  
18 you?

19 A. Yes.

20 Q. And it has some initials. Are those your  
21 initials?

22 A. That is my initials. I wrote the memo. It's  
23 my writing.

24 MR. WECHSLER: Your Honor, I would move the  
25 admission of Exhibit M69.

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1 MR. KASTE: No objection.

2 SPECIAL MASTER: Exhibit M69 is admitted.

3 (Exhibit M069 admitted.)

4 BY MR. WECHSLER:

5 Q. Looking first at exhibit -- I'm sorry -- at  
6 the point here. And point 2 and 3 talk about the early  
7 '70s and the necessity to develop a procedure; you see  
8 that?

9 A. I do.

10 Q. And you talked about that earlier; right?

11 A. I did.

12 Q. What did you understand those procedures to  
13 be? Or can you describe for us the efforts in the  
14 1970s to develop a methodology?

15 A. I know that in discussions with George Pike  
16 who was involved and Orrin Ferris, that there was  
17 discussions about trying to develop administrative  
18 procedures. And they even actually developed a format  
19 for those procedures. And they didn't go anywhere.

20 Q. Mr. Pike is the federal representative?

21 A. George Pike was not the chairman of the  
22 commission. But he was a federal representative from  
23 the State of Montana who was district chief of the U.S.  
24 Geological Survey and had over 20 -- I believe 20 years  
25 of experience with the Yellowstone River Compact.

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1 Q. Those efforts in the 1970s were not  
2 successful?

3 A. They were not successful.

4 Q. Do you know why?

5 A. I guess the same reason they weren't  
6 successful in the 1980s.

7 Q. Looking at point No. 4, Mr. Moy. It  
8 indicates that "Montana continually takes the  
9 initiative to work out our differences with Wyoming,  
10 but it appears to us that Wyoming always attempts to  
11 stifle the process." What did you mean by that?

12 A. Wyoming showed no desire, really, to move  
13 forward with developing a procedures to actually  
14 administer the compact. They had absolutely no desire  
15 to do so.

16 Q. Looking at point No. 5, I think that  
17 describes earlier what you testified to regarding  
18 Mr. Buyok; is that right?

19 A. That's correct.

20 Q. On page 2, point No. 7, I'll go ahead and  
21 read that one. "The perception in Montana is that  
22 Wyoming does not want to work with us. And I believe  
23 the facts support this statement. No progress has been  
24 made to date on finalizing an administrative process to  
25 apportion the waters of the Yellowstone tributaries,

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1 Wyoming Water Development activities proceed merrily  
2 along without communication or coordination with  
3 Montana officials."

4 Did I read that correctly?

5 A. Did I write that?

6 Q. Did I read that correctly?

7 A. You read that absolutely correctly.

8 Q. What did you mean by that?

9 A. What I meant by that is, again, Wyoming  
10 showed no desire to develop administrative procedures.  
11 And they were fully intent, through the Water  
12 Development Commission to develop more water in the  
13 Yellowstone tributaries of Wyoming.

14 Q. Looking at point No. 8, Mr. Moy, it indicates  
15 that "Montana feels that we may have been harmed." Let  
16 me stop there. What did you mean by you "may have been  
17 harmed"?

18 A. We may have been harmed in that our  
19 preexisting water rights were not being met.

20 Q. It continues "by the lack of an  
21 administrative process to apportion the flow of the  
22 interstate tributaries during low-flow years." And so  
23 I think -- does the remainder of that sentence change  
24 your understanding of it?

25 A. What it meant is exactly what it says. And I

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1 think the water users in the Powder and Tongue River  
2 Basin and some years in the Big Horn clearly felt the  
3 same way in Montana.

4 Q. I'm going to show you another document that's  
5 been labeled Exhibit M122. I'll give you a second to  
6 look at that one. It's a little thicker. You ready?

7 A. I know this document.

8 MR. WECHSLER: I want to make sure, Your  
9 Honor, I did offer Exhibit M69?

10 SPECIAL MASTER: Yes, you did, and it was  
11 admitted.

12 BY MR. WECHSLER:

13 Q. Looking at Exhibit M122, Mr. Moy, what is  
14 this document?

15 A. This document is -- I put this document  
16 together because this was a time I was going to get off  
17 the Yellowstone and stop working on the Yellowstone.  
18 And I wanted to put my thoughts together in a document  
19 for the future of water users and the future of  
20 managers in the state of Montana.

21 I felt, back then, very strongly that the  
22 only way we could get our water from Wyoming is through  
23 litigation. And I wanted to put my thoughts down in  
24 writing.

25 Q. Front page indicates that this was a document



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1 written by you. Did you write this document?

2 A. I did.

3 Q. And then it indicates it was, as I  
4 understand, it indicates it was first written -- or  
5 finished November 29th of 1989?

6 A. It was done in '89. The primary document was  
7 done in '89. And I set out updated October 10th. And  
8 what I really did is I hadn't read the document for,  
9 maybe, six, seven, eight years. And I saw it on my  
10 hard drive. So I decided to pick it up and just read  
11 it. And I saw some technical grammar mistakes and a  
12 few small updates. So I put it in in '97, and one day  
13 I had a -- that I wasn't doing anything in the office.

14 MR. WECHSLER: Your Honor, I would move the  
15 admission of Exhibit M122.

16 MR. KASTE: No objection.

17 SPECIAL MASTER: Exhibit M122 is admitted  
18 into evidence.

19 (Exhibit M122 admitted.)

20 BY MR. WECHSLER:

21 Q. Mr. Moy, again, we won't spend a long time on  
22 this document, which is a fairly lengthy document and  
23 we can look at. I do want to call your attention  
24 towards the back of the document and first starting at  
25 page 24. Here it indicates "issues"; do you see that?

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1 A. Yes.

2 Q. And then you go on to identify a number of  
3 issues. And I want to call your attention to the one  
4 on page 26. Here it says, administration of pre-1950  
5 water rights." And as I understand the issue here  
6 you're describing -- well, let me just read the last  
7 sentence of under the heading "issue." It says, "The  
8 question is, does the compact commission have  
9 jurisdiction to administer pre-1950...rights?"

10 I understand -- and I won't read into the  
11 record this entire thing -- but I understand this  
12 section to be talking about can Montana pre-'50 rights  
13 call out Wyoming pre-'50 rights; is that right?

14 MR. KASTE: Objection. Leading. Can we have  
15 the witness's understanding?

16 MR. WECHSLER: Your Honor, on this particular  
17 one, it's not a substantive question. I can have him  
18 read the entire thing, and so I would ask for a little  
19 latitude on a nonsubstantive question.

20 SPECIAL MASTER: I think you can actually  
21 probably ask it, though, in a way that's not leading.  
22 And it might take a little bit longer, but if Mr. Kaste  
23 would like to have it done that way, let's do it that  
24 way.

25

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1 BY MR. WECHSLER:

2 Q. All right. Let's read Montana's position on  
3 this issue. "Montana does not believe the issue is  
4 that simple. Throughout the 20 years of negotiating a  
5 compact the major stumbling block was the  
6 administration of pre-1950 water rights. A number of  
7 Montana negotiators continually argued for a provision  
8 that would allow the compact to administer pre-1950  
9 water rights. However, at the 11th hour of  
10 negotiations a provision to allow for administration of  
11 pre-1950 rights was rejected because it was the final  
12 hurdle before a compact could be agreed upon. Montana  
13 believes that since the negotiators could not agree on  
14 this issue it was left out of the compact and,  
15 therefore, not addressed or decided. Montana believes  
16 that Wyoming's interpretation of Article V for  
17 allocating flows on the interstate tributaries is too  
18 narrow and it does not provide for an equitable  
19 apportionment."

20 What do you understand that to mean?

21 A. What I understand that to mean -- and may I  
22 just spend a second from a historical perspective?

23 Q. Please.

24 A. In the engineer's report on the Yellowstone  
25 River Compact, there was 20 principles that were

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1 defined. And principle 7 through 11 was not supported  
2 by the Montana delegation. And those principles had to  
3 deal with the allocation of pre-'50 rights.

4           The -- Montana was not going to give up on  
5 the point of pre-'50 adjudication of all pre-'50 rights  
6 in the basin. And, in fact, the last draft of the  
7 compact, there was that provision that we recognize the  
8 rights in each state and beneficial use of waters,  
9 pre-1950 waters in both states under the appropriative  
10 state laws, and that's in the compact. But there was  
11 an additional sentence added on by Leonard from Montana  
12 that said, and these rights will be adjudicated by a  
13 priority as one river system.

14           The Montana delegation at that time agreed  
15 that if you were going to build this large storage  
16 project -- I think the only reason the Montana  
17 delegation agreed to sign off on the compact was that  
18 the compact was a way to really encourage the federal  
19 government to build a large storage project that would  
20 guarantee Montana's share at the border.

21           I truly believe today, if the Montana  
22 delegation looked back and saw that those large storage  
23 projects were not built and that Montana was not  
24 guaranteed to receive its water, that they would not  
25 have signed off on that compact.

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1 Q. Does this position that you're describing  
2 there represent an evolution in your thinking?

3 A. It does. It did. In 1981, I was still  
4 thinking about moving forward with some type of  
5 protection of pre-'50 rights. And the more I thought  
6 about it over time and when I put this thing together  
7 toward the end -- that my decade of working on the  
8 compact, in that time frame, this is what I felt.

9 Q. Did you still think that Montana's pre-1950  
10 rights were protected from Wyoming's post-1950 rights?

11 A. Absolutely.

12 Q. Turning to the conclusions page, Mr. Moy, on  
13 page 30, the first conclusion there says, "The compact  
14 has not been administered for over 40 years.  
15 Specifically, flows have not been apportioned between  
16 the two states. The basic reasons for developing a  
17 compact have not been met"; do you see that?

18 A. Yes.

19 Q. What do you understand that to mean?

20 A. That means that I did not believe that the  
21 primary reason for putting a compact together to  
22 protect pre-'50 rights in both states and to allocate  
23 post-'50 waters had never been done.

24 Q. Was this a source of frustration for you?

25 A. It was extreme frustration. That's why I

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1 quit going to Yellowstone River Compact Commissions for  
2 a decade. I took on other issues.

3 Q. You stopped going somewhere after  
4 November 29, 1989?

5 A. I think '89 was probably close to the last  
6 year I went.

7 Q. I'm going to hand you what's been marked as  
8 Exhibit M133. Mr. Moy, what is Exhibit M133?

9 A. This is a summary of meeting between Montana  
10 and Wyoming where we actually had a discussion about  
11 water supply issues on the Tongue River Basin.

12 Q. You attended this meeting?

13 A. I did attend this meeting.

14 Q. Looking at the second page of the document,  
15 it indicates "Sue Lowry"; do you see that?

16 A. That's correct.

17 Q. That's Ms. Lowry that you referred to  
18 earlier?

19 A. Yes.

20 Q. Did you understand that to mean that she  
21 drafted these notes?

22 A. She drafted these notes.

23 Q. Is this a document that you received in 2002?

24 A. Yes.

25 MR. WECHSLER: Your Honor, I would move the

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1 admission of Exhibit M133.

2 MR. KASTE: No objection.

3 SPECIAL MASTER: Okay. Exhibit M133 is  
4 admitted.

5 (Exhibit M133 admitted.)

6 BY MR. WECHSLER:

7 Q. Mr. Moy, looking at the second sentence  
8 there, it indicates, "First, they are receiving  
9 inquiries from irrigators and other water users along  
10 the Tongue River and [sic] Wyoming's water use in  
11 Montana -- and [sic] Wyoming's water use and Montana is  
12 interested in understanding more about the upper system  
13 in order to answer these inquiries." Do you see that?

14 A. Yes.

15 Q. Did you receive any inquiries from  
16 irrigators?

17 A. I received irrigators that came actually into  
18 my office clearly complaining that they were receiving  
19 no water. Art Hayes was one. Roger Muggli with the  
20 T & Y ditch. Yeah, I had people in my office hurting.

21 Q. When did those irrigators go into your  
22 office?

23 A. You know, I thought it was in 2001, 2000.

24 Q. Did their discussions with you lead you to  
25 have any communications with Wyoming?

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1           A.    Well, this meeting was part of those  
2 discussions and trying to get a handle on what water  
3 was actually being used.  But post-1950 water was being  
4 used in Wyoming.

5           Q.    And you say part of the discussions.  Were  
6 there discussions prior to January 16, 2002?

7           A.    There were, yes.  But I can't remember  
8 specifically unless we have minutes.

9           Q.    You can't remember the specific dates?  Is  
10 that right?

11          A.    Excuse me?

12          Q.    You can't remember the specific dates?

13          A.    No.

14          Q.    Turning to page 2 of that document.  The  
15 second full paragraph that starts, "Montana then asked  
16 about the various storage facilities in the tributaries  
17 to the Tongue River"; do you see that?

18          A.    Yes, I do.

19          Q.    Why were you asking --

20          A.    I really wanted to get a handle on water  
21 usage in Wyoming and the priority dates and what was  
22 considered pre-50, supplemental, post-'50?  What was at  
23 one time flood irrigation?  What has changed to  
24 sprinkler irrigation?  I wanted to have a better grasp  
25 of what water has been regulated, what water has not



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1 been regulated.

2 Q. That included reservoirs?

3 A. That included reservoirs.

4 Q. Direct flow rights?

5 A. Direct flow rights.

6 Q. I'm going to hand you now what's been marked  
7 Exhibit M142. Mr. Moy, this is a document that's  
8 already been admitted. At the top it indicates in the  
9 upper right-hand corner "Rich, FYI, Jack." Who do you  
10 understand Rich to be?

11 A. Rich is me.

12 Q. How about Jack?

13 A. And Jack is Jack Stults.

14 Q. Is this a document you received in May of  
15 2002?

16 A. I did.

17 Q. And here, Mr. Hayes is expressing  
18 disappointment about funds; do you see that?

19 A. I do.

20 Q. What was that about?

21 A. Wyoming had got \$100,000 to start doing some  
22 analysis under the Yellowstone River Compact. And we  
23 initially proposed -- we initially tried to seek  
24 \$100,000 to -- and we were unable to obtain it.

25 Q. Second sentence of this line indicates that

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1 "Wyoming is expanding its irrigation on Tongue River  
2 yearly, mostly with new sprinkler systems"; do you see  
3 that?

4 A. Excuse me. Which sentence?

5 Q. Second sentence of the letter. Starting  
6 where "Wyoming is expanding."

7 A. Yeah. "These new sprinklers are not giving  
8 Montana return flows in late summer"?

9 Q. Was that your understanding at the time?

10 A. Yes. That was a big concern to me because  
11 one of the concerns I had is when you convert from  
12 flood to sprinkler irrigation, you have a better full  
13 coverage over the same acres. And you increase the  
14 yields. So when you increase the yields, you increase  
15 evapotranspiration. So the depletion goes up  
16 considerably. And one of the concerns I had is that  
17 the total depletion as of 1950 was far less than the  
18 depletion of those 1950 rights today because of  
19 increased yields and going from flood to sprinkler  
20 irrigation. This is something we have seen across the  
21 state of Montana too.

22 Q. Were you also concerned about expanded  
23 acreage?

24 A. Yes.

25 Q. Did you inform Wyoming of your concerns?

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1 A. Yes.

2 Q. I'm going to hand you what's been marked  
3 Exhibit M434. Again, Mr. Moy, this is a document that  
4 has already been admitted. Do you recognize this  
5 document?

6 A. I do.

7 Q. And this is a report from HKM Engineering,  
8 October 2002.

9 Sometime in the spring of 2002, did you have  
10 a part in initiating this --

11 A. Yeah, I did.

12 Q. -- study?

13 And when would that have been?

14 A. In probably -- this was October 2002.

15 Probably sometime in 2001 or early 2002.

16 Q. Why did you initiate it?

17 A. I was interested in the points I just  
18 identified above. I wanted to know what was irrigated  
19 as of 1950? What has changed on the ground since 1950?  
20 And what were the changes in depletions comparing 1950  
21 to 2000?

22 Q. Looking at the second paragraph of the  
23 introduction, Mr. Moy, it says, "The objective of the  
24 study is to determine if there have been significant  
25 changes in the extent of irrigation from the time the

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1 Yellowstone River Compact was signed in 1950 to [the]  
2 present"; you see that?

3 A. I do.

4 Q. Was that your understanding of the  
5 objectives?

6 A. That is correct.

7 Q. And that was something that you were talking  
8 about at DNRC?

9 A. They were.

10 Q. Why was that a concern to you?

11 A. Well, because my impression is that there was  
12 less water crossing the border. And my impression that  
13 there was increase in depletions and expansion of  
14 irrigation in Wyoming. And I wanted to try to get a  
15 handle on it.

16 Q. Did you tell that to Wyoming?

17 A. I don't know if I did at that time or not.

18 Q. You didn't use those specific words?

19 A. What's that?

20 Q. You did not use those specific words?

21 A. Did I tell Wyoming about this study? I don't  
22 think I did.

23 Q. Do you know if they got a copy?

24 A. Huh?

25 Q. Do you know if Wyoming got a copy?

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1 A. I do not know.

2 Q. Did you tell them, generally, about your  
3 concern about the increased --

4 A. Yes.

5 Q. -- irrigated acreage?

6 A. Yes. In our meetings, for example, in  
7 Wyoming on the previous that Sue Lowry actually wrote  
8 the minutes up, that was my primary concern was how  
9 things have changed.

10 Q. Were you concerned about less water getting  
11 into Montana?

12 A. I was concerned about less water, increased  
13 usage, and increased depletions.

14 Q. You told Wyoming that?

15 A. I tell everybody that.

16 Q. I'm going to hand you now, Mr. Moy, what's  
17 been marked Exhibit M189. What is Exhibit M189?

18 A. This is a resolution, House Joint Resolution  
19 that passed the Montana State legislature. I drafted  
20 this resolution. I drafted this resolution after Art  
21 Hayes came into my office and almost broke down because  
22 of lack of water. And at that point I decided we  
23 needed to start getting prepared for litigation.

24 Q. When did you draft it?

25 A. Excuse me?

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1 Q. When did you draft it?

2 A. This was a 2003rd session. This was January  
3 session of legislature it was introduced. Sometime in  
4 2001 or 2002 is when we first started thinking about  
5 putting this together.

6 Q. The first two pages is testimony before the  
7 senate. Whose testimony is that?

8 A. This is my testimony.

9 Q. Then there's a draft joint resolution; right?

10 A. Yes.

11 Q. And that's the draft that you put together?

12 A. Yes.

13 Q. Do you know if the language changed before it  
14 was passed?

15 A. I can't recall.

16 Q. We can check that.

17 A. Okay.

18 Q. Then there's a draft work plan at the back;  
19 do you see that?

20 A. Yes.

21 Q. Was that connected to your testimony?

22 A. Yes.

23 MR. WECHSLER: Your Honor, I move the  
24 admission of Exhibit M189.

25 SPECIAL MASTER: Any objection?

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1 MR. KASTE: No objection.

2 (Exhibit M189 admitted.)

3 BY MR. WECHSLER:

4 Q. You you spoke earlier today just a little  
5 bit, but can you tell me why you drafted this testimony  
6 and were proposing this joint resolution?

7 A. This was my -- this is the first step to  
8 start getting prepared for litigation with Wyoming.  
9 This is my intent when I did it.

10 Q. By this time, you had been dealing with  
11 Wyoming for many years?

12 A. And nothing changed.

13 Q. Is this the culmination of many years of  
14 efforts by you?

15 A. Many years of frustration.

16 Q. Again, turning to the second page, we see  
17 some familiar themes. And that the second from the  
18 bottom paragraph indicates, "Further Wyoming has  
19 continued to develop more storage and new water uses  
20 and to convert existing flood irrigation to sprinkler  
21 irrigation that depletes more water from these  
22 interstate rivers. These uses have decreased flows  
23 crossing the border to the detriment of Montana  
24 irrigators and instream uses." Do you see that?

25 A. Yes.

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1 Q. Is that consistent with the testimony that  
2 you have given here?

3 A. Yes.

4 Q. Will you look, please, at the draft work  
5 plan?

6 A. Excuse me?

7 Q. Can you look please at the draft work plan  
8 which is attached and is labeled MT01151? What was the  
9 purpose of the draft work plan?

10 A. The draft work plan was start to build the  
11 technical foundation for a case with regard to  
12 litigation. To start to have a better handle on water  
13 usage.

14 Q. Did you receive any money as a part of this  
15 effort?

16 A. And you know, I'm -- we didn't ask for any  
17 money because at that time the legislature said, no  
18 money. But they gave me money. I can't remember if  
19 they gave me 5000 or \$10,000 to begin the process.

20 Q. Looking on --

21 A. Which is remarkable for the Montana  
22 legislature.

23 Q. Looking at page MT1151, which is the first  
24 page of the draft work plan under the heading draft --  
25 I'm sorry. Under the heading "problem statement."



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1 Here it indicates the last two sentences of that  
2 paragraph, "Wyoming" -- I'm sorry. "Water developed  
3 after 1950 shall be allocated between the two states on  
4 a percentage basis as measured at the confluence with  
5 the main stem. Montana's position is that Wyoming has  
6 continued to develop water after 1950 at the expense of  
7 pre-1950 rights in Montana." What do you understand  
8 that to mean?

9 A. That means exactly what it says. I was very  
10 concerned that Wyoming's post-'50 continued development  
11 of waters would have an adverse detrimental effect on  
12 Montana's pre-'50 uses.

13 Q. Did you communicate that to Wyoming?

14 A. Have I communicated that to Wyoming? Yes.

15 Q. The next sentence reads: "Causes for the  
16 excess depletions may include: additional irrigated  
17 acres, conversion from flood to sprinkler irrigation,  
18 and increased storage." You you see that?

19 A. Yes.

20 Q. What did you understand that to mean?

21 A. What that means?

22 Q. Yeah.

23 A. What that means is that Wyoming has increased  
24 their acres irrigated and they have a lot of projects  
25 that were converted from flood to sprinkler irrigation.

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1 And some of the pictures we saw yesterday showed all  
2 those pivots, center pivots that actually deplete more  
3 water, and there was increased storage.

4 Q. Did you communicate those concerns to  
5 Wyoming?

6 A. In our technical committee, that was why I  
7 was down in Wyoming was to find out this information,  
8 and we were concerned, yes.

9 Q. I'm going to hand you a exhibit now that's  
10 been marked as Exhibit W71.

11 SPECIAL MASTER: Can I just ask before you do  
12 that, it's a really small point but so I don't have to  
13 deal with it later. So the testimony, the first two  
14 pages that are your testimony says 4/23/03. Is that  
15 when you testified?

16 THE WITNESS: April 23rd, Your Honor, I think  
17 it was. I can't remember exactly the dates I  
18 testified. But the legislation did pass 46 to 0 in the  
19 state senate.

20 SPECIAL MASTER: Okay. Thank you.

21 BY MR. WECHSLER:

22 Q. Mr. Moy, I've handed you now Exhibit W71; do  
23 you recognize this document?

24 A. Yes.

25 Q. What is it?

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1 A. These are some actions that we needed to do.

2 Q. Is this an e-mail?

3 A. This is an e-mail to staff, the things that  
4 need to be accomplished coming up.

5 Q. Is it an e-mail from you?

6 A. It's an e-mail from me.

7 Q. Who is it to?

8 A. Excuse me?

9 Q. Who is the e-mail addressed to?

10 A. It was addressed to -- it was Candy West, who  
11 was a legal -- chief legal counsel of DNRC; Sarah Bond,  
12 who was with the Attorney General's office; myself;  
13 Kevin Smith, who runs the water projects, including the  
14 Tongue River; Fred Robinson, who is an attorney with  
15 DNRC; and Art Hayes was on the phone.

16 Q. The actual two lines says "Yellowstone River  
17 Compact team." Are those the members of the -- what  
18 you call the Yellowstone River Compact team?

19 A. This was our committee, yes. I guess, yes.

20 Q. It then says, "Action items from YCC team  
21 May 12th meeting." Do you know when this e-mail was  
22 sent?

23 A. Somewhere between May 12th, I think, and to  
24 May 18th.

25 Q. Of what year?

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1 A. Of 2004.

2 MR. WECHSLER: Your Honor, I would move the  
3 admission of Exhibit W71.

4 MR. KASTE: No objection.

5 SPECIAL MASTER: Exhibit W71 is admitted into  
6 evidence.

7 (Exhibit W071 admitted.)

8 BY MR. WECHSLER:

9 Q. At this point, Mr. Moy, what was the  
10 Yellowstone River Compact team meeting for? Why were  
11 they meeting?

12 A. It was dealing with the call.

13 Q. When you say "call," you mean the written  
14 call that was sent in 2004?

15 A. A written call.

16 MR. KASTE: Objection. Leading.

17 SPECIAL MASTER: Okay.

18 MR. WECHSLER: I'm not sure what's leading.  
19 Simply because I ask a question that calls for a yes or  
20 no answer doesn't mean a question is leading.

21 MR. KASTE: He has -- well, my position is he  
22 characterized what a call is. It's a different  
23 question to ask him what he means when he uses that  
24 word.

25 SPECIAL MASTER: So it's minor. And you're

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1 actually excellent generally at asking questions, so I  
2 know you can do this. So I think you said "you mean,"  
3 and then you actually specifically said rather than  
4 asking the question.

5 MR. WECHSLER: Can I ask that the court  
6 reporter just read me back the question so I know what  
7 I was asking.

8 SPECIAL MASTER: Yes.

9 THE WITNESS: I guess -- can I respond?

10 MR. WECHSLER: Just hold on, Mr. Moy.

11 SPECIAL MASTER: He's going to actually  
12 rephrase the question, and then you can respond.

13 (The record was read as  
14 requested.)

15 BY MR. WECHSLER:

16 Q. Mr. Moy, in 2004, did you send -- did the  
17 State of Montana send a written call letter to Wyoming?

18 A. Yes. And I think the first item here that I  
19 wrote that says, "Jack will need to call Pat Tyrrell of  
20 Wyoming and to notify him that we are preparing to send  
21 him a letter to make a call on all pre-1950 water  
22 rights on interstate tributaries of the Yellowstone  
23 River Compact."

24 Q. So when you said "call" a moment ago, is that  
25 what you were referring to?

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1 A. That is correct.

2 Q. So if I understand you correctly, at this  
3 point the team was preparing for that letter?

4 A. We were preparing -- yes. We were in the  
5 process of preparing the letter, drafting the letter,  
6 and Jack, as a courtesy, was going to call Pat Tyrrell  
7 of Wyoming and let him know that we were going to do  
8 this.

9 Q. Were you also investigating the situation on  
10 the Tongue River?

11 A. And I asked Keith Kerbel to -- "We'll need to  
12 take the verification form and background information  
13 and establish how the rights in the four interstate  
14 tributaries are being impacted this year by water usage  
15 in Wyoming."

16 Q. When you say that, are you looking at point  
17 No. 5?

18 A. That's bullet No. 5.

19 Q. Then it goes on to indicate what pre- and --  
20 there's some writing done. But it seems to say  
21 post-1950; is that what you understand it to be saying?

22 A. What I said is "what pre- and post-'50 rights  
23 are being satisfied and who the key contact people are  
24 in these basins."

25 Q. Was that an investigation that was done?

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1 A. I believe it was.

2 Q. I'm going to show you, Mr. Moy, what's been  
3 marked Exhibit J64.

4 SPECIAL MASTER: And I'm thinking,  
5 Mr. Wechsler, maybe after this exhibit would be a good  
6 time to do the morning break or whenever you'd like to.  
7 But sometime in the next couple of minutes.

8 MR. WECHSLER: Yes, Your Honor, after this  
9 exhibit would be a perfect time.

10 SPECIAL MASTER: Okay.

11 BY MR. WECHSLER:

12 Q. Mr. Moy, have you seen Exhibit J64 before?

13 A. Yes.

14 Q. What is it?

15 A. This is actually the call for water on the  
16 Yellowstone River Compact to satisfy pre-'50 rights.

17 Q. What year was it made in?

18 A. This was May 18th, 2004.

19 Q. Earlier you described a number of verbal  
20 communications that you had with the state of Wyoming.  
21 Did you understand this letter to be the same as those  
22 verbal communications?

23 A. Yes. There's no difference. But this time  
24 it's in writing, and we're setting the process to move  
25 forward with litigation.

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1 Q. So what are the similarities between this  
2 letter and the one -- the verbal communications that  
3 you --

4 A. The verbal communications were clearly  
5 identifying our concerns with Wyoming water use  
6 post-1950 and the impacts they were having on our  
7 pre-'50 water rights and there was no mechanism to  
8 protect them.

9 Q. I'm sorry. Did you just describe the written  
10 one or the verbal one?

11 A. Before this?

12 Q. Yes.

13 A. They were verbal.

14 Q. And they were the same type of  
15 communications?

16 A. It was the same type of communication. But  
17 this was actually, now we'll put in writing.

18 Q. In your mind, what you were asking for, was  
19 it any different?

20 A. No.

21 MR. WECHSLER: Your Honor, this would be a  
22 good time to break.

23 SPECIAL MASTER: Okay. Sounds good. Why  
24 don't we break. And we'll come back at five after  
25 11:00.



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1 (Recess taken 10:56 to 11:08  
2 a.m., November 1, 2013)

3 SPECIAL MASTER: Okay. Everyone can be  
4 seated.

5 BY MR. WECHSLER:

6 Q. Mr. Moy, before the break we looked at  
7 Exhibit J64, which was the letter from Montana. I'd  
8 like to take a look at Wyoming's response, which is  
9 Exhibit J65. Do you have that before you?

10 A. Yes.

11 Q. This document is also in evidence, and I  
12 won't ask you to go through in detail. There's a  
13 couple places I want to point out to you. First, let  
14 me ask you: Was this a document that you saw in 2004?

15 A. I did.

16 Q. Looking at the first paragraph, it indicates  
17 third -- fourth sentence says, "We, too, are regulating  
18 water rights back to the 1880s in the Tongue and Powder  
19 River Basins and have numerous pre-1950 rights going  
20 unfilled." What did you understand that to mean?

21 A. What it says is that Wyoming is regulating  
22 its pre-1950 water rights back to 1980 [sic] from the  
23 Tongue and Powder River Basins and that there are many  
24 1950 water rights that are not being fulfilled.

25 Q. Had Wyoming told you that before?

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1 A. I had seen this before many times.

2 Q. Had they told you that verbally?

3 A. Verbally.

4 Q. Does it say anything about the main stem of  
5 the Tongue?

6 A. Never.

7 Q. Did you learn anything afterwards about the  
8 main stem of the Tongue?

9 A. What's interesting is we had a meeting during  
10 that year. And I remember flying up the Tongue River  
11 going to the meeting in Sheridan, Wyoming. And when we  
12 were flying up the Tongue River and our side of the  
13 border, it was dry, extremely dry. And then when I  
14 crossed the border it became an oasis. And so the  
15 first question I asked Pat, I said, do you administer  
16 rights on the main stem of the Tongue River or regulate  
17 any water rights? And the answer was, no.

18 Q. Did that surprise you?

19 A. Well, it's in contrast to what it says here  
20 in this letter.

21 Q. Was that the first time they told you that  
22 they did not --

23 A. It was the first time we actually heard it --  
24 I felt it for many years. But it was the first time  
25 actually saw where they actually admitted they cannot

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1 administer water rights on the main stem of the Tongue  
2 River.

3 Q. Look, please, with me to page 2 of that  
4 document. First line, second full paragraph, "As I  
5 stated earlier, the compact makes no provision for any  
6 state to make a call on a river"; do you see that?

7 A. Yes.

8 Q. What did you understand that to mean?

9 A. That means what Wyoming has said all along  
10 for all those years is that the compact -- we don't  
11 regulate the compact.

12 Q. Looking at the first line of the next  
13 paragraph, "When water is apportioned" -- "What water  
14 is apportioned is specified in Article V Section B,  
15 which allocates between the states any water that was  
16 not used and not appropriated as of January 1, 1950."

17 Did you understand that to be Wyoming's  
18 position?

19 A. That was Wyoming's position from day one.  
20 And I've known it from day one. And it's the first  
21 time I'd actually seen it in writing.

22 Q. I'm going to hand you what's been marked  
23 Exhibit 192, M192. Do you recognize this document?

24 A. I do.

25 Q. What is it?

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1           A.    It was a teleconference we had with Wyoming  
2 on June 30th of 2004 regarding the Yellowstone River  
3 Compact and the call.

4           Q.    Are these minutes from that meeting?

5           A.    Excuse me?

6           Q.    Are these minutes from that meeting?

7           A.    These are the minutes, the meeting summary.

8           Q.    Who drafted this?

9           A.    I'm almost positive it's me.  Because I say  
10 terms of reference.  I talk about transboundary, and  
11 I've been working so much with Canadians that I  
12 probably drafted it.  I did draft it.

13          Q.    You attended the meeting?

14          A.    Yes.

15                MR. WECHSLER:  Your Honor, I move the  
16 admission of Exhibit M192.

17                MR. KASTE:  No objection.

18                SPECIAL MASTER:  Exhibit M192 is admitted  
19 into evidence.

20                                (Exhibit M192 admitted.)

21 BY MR. WECHSLER:

22          Q.    The only thing I'm going ask you on this  
23 particular one, Mr. Moy, is -- well, I lie a little  
24 bit.  I'm going to ask you a couple different  
25 questions.

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1           The first, under the heading "perspective on  
2 the problem." Here it indicates that under the second  
3 sentence starts "while"; do you see that?

4           A.    Yes.

5           Q.    And it says "While it will take time and  
6 effort to develop a legally defensible technical  
7 argument, the current situation in Montana is  
8 undeniable; the only water rights being satisfied on  
9 the Tongue River in Montana have 1886 priority dates  
10 (T & Y Diversion, 187 CFS) and Nance Cattle"; you see  
11 that?

12          A.    Yes.

13          Q.    Was that your understanding of the situation?

14          A.    That was the situation.

15          Q.    How did you know that?

16          A.    Well, we checked the records and talked to  
17 Art Hayes and Keith Kerbel.

18          Q.    During this time after 2004, was Wyoming  
19 requesting information from you?

20          A.    They were.

21          Q.    Did you get the impression that if they gave  
22 you that information that they would honor your request  
23 for water?

24          A.    Of course not.

25          Q.    I'm going to hand you what's been marked as

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1 Exhibit J68. Mr. Moy, J68 is also already in evidence.

2 Do you recognize this document?

3 A. I do.

4 Q. And this is a letter from, I believe  
5 Mr. Stults to Mr. Tyrrell, dated July 28, 2006. Did  
6 you see this letter in 2006?

7 A. I did.

8 Q. Were you involved in the discussions in  
9 Montana leading up to this letter being sent?

10 A. I was -- at this point, I was secondary.  
11 Because we had established a legal team with the  
12 Attorney General's Office. And I think they hired a  
13 contractor at the time. And they were more involved in  
14 drafting this letter.

15 Q. Were you involved at some level?

16 A. Was I involved at what?

17 Q. In some level?

18 A. I was there. But I was not involved in  
19 drafting this letter, no.

20 Q. Not the specific language of the letter?

21 A. No.

22 Q. The first sentence says, "I am writing today  
23 to request that Wyoming administer the waters of the  
24 Tongue and Powder Rivers by curtailing post-1950  
25 diversions or storage to the extent required by the

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1 Yellowstone River Compact under the current  
2 conditions"; do you see that?

3 A. I do.

4 Q. We saw earlier that Wyoming had said there  
5 was no provision for a call. So why was this letter  
6 written?

7 A. Again, it was a dry year, again to build the  
8 case.

9 Q. Leading up to litigation?

10 A. The case for litigation.

11 Q. Now, do you still have J64 with you?

12 A. I do.

13 Q. That's the letter dated May 18th, 2004?

14 A. Yes.

15 Q. Looking at the second page of that document  
16 under the heading "Clarks Fork of the Yellowstone"  
17 there's a paragraph that begins "As compact  
18 commissioner for Montana"; do you see that?

19 A. Yes.

20 Q. This is the letter in 2004 and they said, "We  
21 are calling for all pre-1950 junior water in Wyoming to  
22 satisfy our junior pre-1950 water on the Tongue and  
23 Powder Rivers"; do you see that?

24 A. I do.

25 Q. Then if you look back at Exhibit J68, here it

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1 says, "I am writing today to request that Wyoming  
2 administer the waters of the Tongue and Powder Rivers  
3 by curtailing post-1950 diversions or storage." Did  
4 you understand these letters to be different?

5 A. They are different.

6 Q. How so?

7 A. As I was intimately involved with drafting  
8 the first letter. And in the first letter, as I  
9 said -- stated earlier, I never thought the issue of  
10 pre-'50 rights was an issue that resolved between the  
11 two states. And that issue was still open for  
12 litigation.

13 Q. When you did the 2004 letter, were you also  
14 asking for the curtailment of post-1950 rights?

15 A. That is correct.

16 Q. Did you make that clear to Wyoming?

17 A. Yes. But also the issue of the adjudication  
18 of pre-'50 rights between the two states.

19 Q. That was an additional issue that you were --

20 A. That was an additional issue.

21 Q. I'm going to hand you what's been marked now  
22 as J69. J69 is also in evidence. This is a letter  
23 dated August 9, 2006. It's addressed to you. Is this  
24 a letter that you saw in August of 2006?

25 A. I did.



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1 Q. What is this document?

2 A. This is Pat's response to our call.

3 Q. Why is it that it was addressed to you?

4 A. Because Jack Stults had decided to retire and  
5 resign.

6 Q. Were you the acting division --

7 A. I was acting at the time.

8 Q. Looking at the bottom of the first page of  
9 Exhibit J69, in a partial paragraph, the second  
10 sentence indicates, "As the administration of the  
11 compact was being analyzed by the two states in 1980s,  
12 it was understood that the only water being apportioned  
13 was the post-1950, 'unused and unappropriated waters  
14 the interstate tributaries'"; do you see that?

15 A. Yes.

16 Q. Do you agree with that statement?

17 A. Do I agree with that statement?

18 Q. Yes.

19 A. What I believe is what we said in the  
20 May 18th, 2004, letter to Pat. That I personally had  
21 hoped that we could actually look at pre-'50 rights  
22 since there was no large storage projects ever built  
23 under the compact.

24 Q. So my question really is: Do you agree that  
25 in the 1980s that the understanding between the two

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1 states was that the only water apportioned was the  
2 post-1950 water?

3 A. The only water apportioned was the post-1950  
4 water under the compact.

5 Q. And by that, what do you mean?

6 A. That means the water that was not under  
7 rights prior to 1950 -- no, water that was actually not  
8 being used as of 1950 and -- in both states was to be  
9 allocated on a percentage basis after taking into  
10 account supplemental water.

11 Q. You testified earlier that you still felt  
12 that pre-'50 rights in Montana were protected; is that  
13 consistent?

14 A. That is consistent.

15 Q. On page 2 of the document it talks about  
16 Wyoming's long-held position. Do you see that up at  
17 the top?

18 A. Yeah.

19 Q. Was that your understanding of Wyoming's  
20 long-held position?

21 A. That is Wyoming's long-held position. "No  
22 obligation to change its long-held position regarding  
23 the administration of water rights in place as of the  
24 date of the compact."

25 Q. Finally, to close the loop here, looking at

Cross-Examination by Mr. Kaste  
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1 Exhibit J70. Exhibit J70 is a letter dated  
2 October 3rd, 2006. This time from a Mary Sexton. And  
3 sometime between August and October, was Ms. Sexton  
4 appointed as the DNRC director?

5 A. That is correct.

6 Q. Did you see this letter in 2006?

7 A. I did.

8 Q. Here at the bottom of the first page, last  
9 paragraph, it indicates, "Your assertion that Montana  
10 has changed its interpretation of the compact is  
11 incorrect." Do you see that?

12 A. Yes.

13 Q. Do you agree with that?

14 A. I agree with that.

15 MR. WECHSLER: Your Honor, one moment?

16 SPECIAL MASTER: That's fine.

17 MR. WECHSLER: No further questions.

18 SPECIAL MASTER: Okay. Thank you very much,  
19 Mr. Wechsler.

20 Mr. Kaste, cross-examination.

21 CROSS-EXAMINATION

22 BY MR. KASTE:

23 Q. I know that stack of stuff looks like a lot,  
24 but it's really not.

25 SPECIAL MASTER: Just several big documents.

Cross-Examination by Mr. Kaste  
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1 MR. KASTE: Yes.

2 BY MR. KASTE:

3 Q. Morning, Mr. Moy. My name's James Kaste.  
4 You and I have never met before now, have we?

5 A. No.

6 Q. I get a sense from the rapidity with which  
7 you answered Mr. Wechsler's questions that you and I  
8 might have trouble speaking over each other at times.  
9 Can we agree to try to do our best to let me finish the  
10 question, and I'll let you finish the answer.

11 A. Okay. Would you like to speak closer to the  
12 mic? My hearing is not the best.

13 Q. All right. I'll go my best to speak loudly.  
14 And I just want to make sure that the record is clear  
15 and we don't interrupt each other. All right?

16 A. That's fine.

17 Q. All right. The last document you were  
18 looking at with Mr. Wechsler was Exhibit J70; do you  
19 have that one?

20 A. J?

21 Q. Seventy.

22 A. Seventy?

23 Q. It's the October 3rd, 2006, letter from  
24 Ms. Sexton to Mr. Tyrrell. I was hoping it was on the  
25 top of your stack since it was the last one you talked

Cross-Examination by Mr. Kaste  
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1 about.

2 A. I do.

3 Q. Okay. Would you look with me at page 2 of  
4 Exhibit J70. And I'm interested in the second  
5 paragraph down that begins with the words "You also  
6 criticize." And what I'm interested in is the last  
7 sentence of that paragraph. Would you read that into  
8 the record, please.

9 A. "In any event, you need not concern yourself  
10 with the Montana's administration of water to which it  
11 is entitled under the Yellowstone River Compact."

12 Q. And that's a statement from Ms. Sexton to  
13 Mr. Tyrrell; correct?

14 A. That's correct.

15 Q. Do you agree with Ms. Sexton that Wyoming  
16 need not concern itself with what happens in Montana?

17 A. Since I no longer work for the DNRC, I think  
18 Wyoming has a strong interest in what Montana does, as  
19 much as Montana has an interest in what Wyoming does.

20 Q. Very good. Now, let's see if we can agree on  
21 a couple things that I don't think are terribly  
22 controversial. Prior to 2004, would you agree with me  
23 that the Yellowstone River Compact Commission meeting  
24 minutes do not reflect any calls from Montana on  
25 Wyoming?

Cross-Examination by Mr. Kaste  
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1           A.    Not in writing.  But no, I disagree with you  
2 on that point because I think in 1981 Gary Fritz  
3 clearly identified that he was making a call when he  
4 talked to George Christopoulos based on the notes that  
5 we were not getting flows to fill the Tongue River  
6 Reservoir.

7           Q.    And you're referring to the minutes that you  
8 looked at earlier with Mr. Wechsler?

9           A.    That is correct.

10          Q.    The minutes that say Montana understands it  
11 needs to notify Wyoming of shortages?

12          A.    Excuse me?

13          Q.    Do you have those in front of you?  Would be  
14 J32.

15          A.    Probably somewhere.

16                SPECIAL MASTER:  And it's page 4 of J32.

17 BY MR. KASTE:

18          Q.    I tell you what.  We won't have to talk about  
19 that.  Special Master is perfectly capable of reading  
20 the contents of those minutes and deciding for himself  
21 what they mean.  And we've gone over them before with  
22 Mr. Fritz.

23                Are you aware of any other places in the  
24 meeting -- or the minutes of the Yellowstone River  
25 Compact Commission prior to 2004 when calls would have

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1 been reflected in the minutes?

2 A. They were never actually reflected and put in  
3 minutes because a call at that time was felt -- a true  
4 call -- no, I do not believe they were in the minutes.

5 Q. Okay. They are in the minutes in -- for the  
6 years 2004 and 2006; correct?

7 A. They were the minutes because the letters  
8 were sent.

9 Q. Let's see if we can agree on this. For the  
10 years 1987, '88, '89, 2000 through 2003, those were  
11 years you were working on Yellowstone River Compact  
12 issues; correct?

13 A. That is correct.

14 Q. All right. Can we agree that there's not a  
15 piece of paper that reflects a call being made on the  
16 state of Wyoming in those years?

17 A. There is not a piece of paper out there that  
18 says the issue of call.

19 Q. All right. Did you have a boss in those  
20 years?

21 A. Excuse me?

22 Q. Did you have a boss in those years?

23 A. I did.

24 Q. And I think in '80s it would have been  
25 Mr. Fritz?

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1 A. That is correct.

2 Q. And in the 2000s it would have been  
3 Mr. Stults; is that fair?

4 A. That is correct.

5 Q. All right. Was it your practice to keep your  
6 boss informed of any of the sort of major activities  
7 you were undertaking?

8 A. Yes.

9 Q. If you were doing something important you'd  
10 want to let your superiors know; correct?

11 A. Yes.

12 Q. There's not a piece of paper anywhere out  
13 there where you told either of your bosses for these  
14 years that you made a call on Wyoming; correct?

15 A. No.

16 Q. Wouldn't you agree that making a call on a  
17 sovereign state is kind of important?

18 A. You know, the frustration at that time  
19 between Montana and Wyoming, and the fact that we were  
20 not getting any satisfaction with protection of  
21 pre-1950 rights, I don't think the word "call" came up.  
22 But the issue of protecting pre-'50 rights in Montana  
23 came up many, many, many times. And in discussions  
24 with both Jack, and in discussions with both Gary, and  
25 in discussions with Wyoming folks.



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1 Q. All right. I want you to look at an exhibit  
2 with me. I've handed you what's been marked as Montana  
3 Exhibit 112. And I'd like you to take a look through  
4 that real quickly if you might, and let me know when  
5 you're done.

6 A. Okay.

7 Q. Do you recognize that document?

8 A. You know, I don't.

9 Q. You don't?

10 A. No.

11 Q. Well, let me ask you you this: Isn't it true  
12 that throughout the 1980s and, frankly, early in the  
13 2000s, Montana was frustrated with the Yellowstone  
14 River Compact?

15 A. Yes.

16 Q. All right. And from your perspective, it  
17 doesn't really work very well because the point of  
18 measurement is in the wrong spot?

19 A. It doesn't work at all.

20 Q. Very good. And is it fair to say you thought  
21 it was a pretty bad deal for Montana?

22 A. Yes.

23 Q. And, in fact, what you wanted to do was  
24 either renegotiate the compact or develop an  
25 administrative scheme that would basically change the

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1 way that it operated so that it would work for Montana?

2 A. No.

3 Q. No. All right.

4 A. Let me explain. I never wanted to  
5 renegotiate the compact. And I never wanted to  
6 renegotiate the compact because we would never get it  
7 ratified through Congress. And we would be opening  
8 ourselves up to challenges by lower Missouri River  
9 basin states. But the compact, if I recall correctly,  
10 has a mechanism that you could actually work through  
11 the compact to find a way to make it workable.

12 Q. In fact, you referenced that provision in  
13 your 1989 report on the history and status of the  
14 compact that we looked at earlier; right?

15 A. Okay.

16 Q. At the very end of your report I believe you  
17 referenced that provision from the compact. And if I  
18 understand right, you thought that that's something  
19 that should be done?

20 A. Yes.

21 Q. And Wyoming said, no.

22 A. Yes.

23 Q. Okay. And you didn't like that answer;  
24 right?

25 A. No. And, again, because it impacted Montana

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1 water users on those tributaries.

2 Q. Now, back in the 1980s, and I think I  
3 understood your testimony to be that there were a range  
4 of issues that were in dispute amongst Montana and  
5 Wyoming with regard to the compact?

6 A. That is correct.

7 Q. One of those issues, of course, was your  
8 concern about the Middle Fork project?

9 A. Yes.

10 Q. One of those issues was your concern about  
11 the decision-making process of the commission?

12 A. Yes.

13 Q. Or to be more fair the lack of a  
14 decision-making process by the commission; right?

15 A. That's correct.

16 Q. All right. And another one of the big issues  
17 was, how are we supposed to make this 40/60 split work  
18 given the point of measurement and the reality of the  
19 hydrologic situation in this basin; right?

20 A. That's correct.

21 Q. And, in fact, isn't that what Mr. Ashenberg's  
22 methodology is designed to try and fix?

23 A. Yes.

24 Q. All right. Do you have Mr. Ashenberg's  
25 report in front of you? It is Exhibit M97. Should be

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1 one of the thicker documents that you have. All right.

2 Do you have that?

3 A. Yes.

4 Q. Would you turn to page 1? And remind us  
5 again, this was Mr. Ashenberg's attempt to create a  
6 workable methodology for administration of the compact;  
7 is that accurate?

8 A. That's correct.

9 Q. Would you read, very slowly, 'cause you have  
10 a tendency to really read fast, the last sentence on  
11 the page, please.

12 A. "Because agricultural and industrial  
13 development since 1950 has been minimal, the need to  
14 regulate post-1950 appropriations in Wyoming for the  
15 purpose of satisfying pre-1950 appropriations in  
16 Montana would also be minimal."

17 Q. And that's Mr. Ashenberg writing that;  
18 correct?

19 A. That is correct.

20 Q. All right. And isn't that true that both  
21 parties, back in the 1980s, understood that the  
22 development after 1950 to that point had been fairly  
23 minimal?

24 A. Up until, I believe, about 1980 that probably  
25 was true, except we did have significant drought years,

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1 yes.

2 Q. Well, what was the year of Mr. Ashenberg's  
3 report?

4 A. Up until then we didn't have equip. We  
5 didn't have a strong push with the Water Development  
6 Program ongoing in Wyoming as far as enhancing water  
7 development activities.

8 Q. My question was simply: What year was  
9 Mr. Ashenberg's report? I believe it was 1983; is that  
10 correct?

11 A. 1983.

12 Q. All right. Now, what I believe -- you tell  
13 me if I'm right or wrong -- is back in the 1980s both  
14 sides saw post-1950 development was minimal. And so  
15 the focus of their discussions related to the  
16 apportionment of the 40 and 60 percent?

17 A. No.

18 Q. All right.

19 A. Because how can you apportion waters that's  
20 available without knowing, as a fact, how much pre-'50  
21 rights are out there?

22 Q. That is an excellent question. And one  
23 you've made before; correct? Or one you've posed  
24 before?

25 A. Actually it's in a number of these documents.

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1 Q. In fact, I'm going to hand you one, which I  
2 believe has been previously admitted. It's Wyoming  
3 Exhibit 65. Unfortunately, I only have that page stuck  
4 in this book, so I'll hand it to you and take it back.  
5 It's not one you have in front of you.

6 A. So what is this?

7 SPECIAL MASTER: Can you hold on just one  
8 second?

9 BY MR. KASTE:

10 Q. It's an e-mail, and it's just that one page,  
11 sir.

12 SPECIAL MASTER: Can we just go back on the  
13 record? Can we verify, was M65 admitted into evidence?

14 MR. KASTE: W65.

15 SPECIAL MASTER: Oh, W65. Do we know if W65  
16 has been admitted?

17 MR. KASTE: I'll give you a copy.

18 SPECIAL MASTER: Okay.

19 MR. KASTE: The answer was yes, it has been  
20 admitted.

21 SPECIAL MASTER: No, it has not.

22 MR. KASTE: That's fine.

23 SPECIAL MASTER: Is that correct, it has not  
24 been admitted?

25 THE CLERK: Right. It has not.

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1           SPECIAL MASTER: It has not been admitted at  
2 this point in time, Mr. Kaste. So you can proceed with  
3 your questions.

4           MR. KASTE: Well, that's 'cause I, having  
5 told you it was W, I think it's M64.

6           SPECIAL MASTER: M64, which was actually part  
7 of the direct examination.

8           MR. KASTE: I thought it was in there.

9           SPECIAL MASTER: So this should be a document  
10 Mr. Moy has somewhere in front of him, but it may not  
11 be easily found.

12          MR. KASTE: I apologize.

13          SPECIAL MASTER: Did you give him a copy  
14 of --

15          MR. KASTE: I did.

16          SPECIAL MASTER: Just so we're very clear on  
17 the record at this point. We're talking about Exhibit  
18 M64, which is an April 10, 1984, document.

19          MR. KASTE: We're not very clear on the  
20 record. And it's all my fault.

21                 You have the right one.

22 BY MR. KASTE:

23           Q. Thank God this is the last day before I get a  
24 break and I can rest my brain a little bit.

25                 I actually handed you an exhibit marked W64;

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1 correct?

2 A. That is correct.

3 MR. KASTE: Has W64 been admitted into  
4 evidence?

5 THE CLERK: Not W65?

6 MR. KASTE: Not W65. W64.

7 THE CLERK: Okay. Let's check.

8 MR. KASTE: Which I thought it had.

9 SPECIAL MASTER: I'm sorry. I did not hear.

10 THE CLERK: W64 has been admitted.

11 SPECIAL MASTER: It has been admitted?

12 THE CLERK: Yep.

13 MR. KASTE: I'm sorry. This is an inordinate  
14 amount of confusion over the one sentence in there  
15 that's kind of important. And I'm sorry.

16 SPECIAL MASTER: Do you care if I have a copy  
17 in front of me?

18 MR. KASTE: Not in the least.

19 SPECIAL MASTER: Okay. Then we can proceed.

20 MR. KASTE: It has been admitted, and you  
21 have previously seen it with another witness.

22 SPECIAL MASTER: It's W64 we're talking  
23 about?

24 MR. KASTE: Yes.

25 SPECIAL MASTER: Okay.



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1 BY MR. KASTE:

2 Q. And what I would like you to do, again,  
3 slowly if you wouldn't mind, is read the sentence in --  
4 well, first this is an e-mail from yourself to  
5 Mr. Stults; is that correct?

6 A. Yes.

7 Q. And the date on it is? If you'd tell us the  
8 date on that?

9 A. The date is November 30th, 2001.

10 Q. Thank you. Would you read the sentence for  
11 us in the first paragraph that begins "further." It's,  
12 perhaps, the third sentence.

13 A. "Further, before you can divide the post-1950  
14 water, you need a handle on the pre-1950 water that has  
15 never been done. The only thing -- the only reason I  
16 think Montana agreed to the compact was because of the  
17 potential in 1950 for the USPR to build large storage  
18 projects on the Powder and Tongue River."

19 Q. All right. I'm interested in the first of  
20 those two sentences. You indicate to Mr. Stults that  
21 before you can divide the post-1950 water, you have to  
22 know what's going on with the pre-1950 water; correct?

23 A. Yes.

24 Q. And that's exactly what you testified to just  
25 a moment ago before I got very confused; right?

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1 A. Yes.

2 Q. Thank you. And I'm really interested in the  
3 last part of that sentence. And it says "and that has  
4 never been done"; correct?

5 A. That's probably is not absolutely correct.  
6 And I think that probably was a mischaracterization. I  
7 do believe that the Tongue River decree was accurate.  
8 I think the water contracts in 1937 are the Tongue  
9 River Reservoir are accurate. And I also think the  
10 Water Resource Survey Information is extremely accurate  
11 because it's on-ground verification. What has not been  
12 completed at that time, to my knowledge, was the  
13 adjudication on the Tongue River.

14 Q. So as of that date there was still  
15 information outstanding that you would like to have as  
16 you try to figure out to how to make the compact work?

17 A. We didn't have it. But we were collecting  
18 it. And I thought, based on remote sensing data and  
19 infrared data that we had and with the Water Resource  
20 Survey Information, we could get that data pretty  
21 quickly at the time. So that really, to my knowledge,  
22 was something we hadn't done but wasn't a significant  
23 issue.

24 Q. All right. We can agree that the letter that  
25 was sent in 2004 was a change from what had gone on in

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1 the past. That was a, we're taking it to another  
2 level; correct?

3 A. Yes.

4 Q. And letters like that had never been sent  
5 before?

6 A. No.

7 Q. I think there's a reference in there to  
8 Governor Martz directing Mr. Stults to send this  
9 letter. That had never happened before, had it?

10 A. No.

11 Q. Early on in your testimony --

12 A. That's not true. Regarding the call, that is  
13 true. But there had been letters, for example, from  
14 Governor Schwinden to Governor Herschler regarding the  
15 Little Big Horn water group and the Little Big Horn  
16 River system regarding the Powder River projects. So  
17 there was letters between the governors prior to that.  
18 But on a call letter, no.

19 Q. Thank you. I think early on in your  
20 testimony you talked about assigning a hydrologist to  
21 work on Yellowstone River Compact issues; do you  
22 remember that?

23 A. Say that again.

24 Q. Early on in your testimony you talked about  
25 assigning a full-time hydrologist to work on --

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1 A. I did.

2 Q. Who was that?

3 A. Well, it was first, Dan Ashenberg, then Steve  
4 Hollenbeck, and then Chuck Dalby.

5 Q. What years was Chuck Dalby assigned to work  
6 on Yellowstone River Compact issues?

7 A. Let's see, I can't recall directly. But I  
8 think it was '80, '84, '85, '86 was Dan Ashenberg.  
9 Steve Hollenbeck was in there with the Little Big Horn.  
10 And about '84 through '86 Chuck Dalby was on board  
11 starting -- somewhere in '87, '88, I'm guessing.  
12 Because I don't recall correctly.

13 Q. That's okay. Mr. Dalby was here and he  
14 testified. I was just trying to remind myself 'cause I  
15 can't remember the exact dates he testified to.

16 I also think I heard you say during your  
17 testimony -- and I wanted to confirm this -- you spoke  
18 about a conversation that you had in your office with  
19 Mr. Hayes in which he came in and described for you his  
20 circumstances and his need for water. I understood you  
21 to place that meeting at about 2000, 2001.

22 A. That is correct. Between 2000 and 2002.

23 Q. All right. Now, I have to ask you questions.  
24 Let me ask you if you had a piece of paper evidencing  
25 these communications that you've described in your

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1 testimony. I have to ask you, do you remember any  
2 specific dates, particularly in the years 1987 through  
3 '89 or 2000 through 2003, where you had communications  
4 with the folks in Wyoming during irrigation season?

5 A. No.

6 Q. It would be pretty remarkable if you did  
7 without a piece of paper to remind you; right?

8 A. I would guess that the discussions actually  
9 occurred when we had meetings, technical meetings or  
10 commission meetings.

11 Q. And technical meetings and commission  
12 meetings typically occur in November and April?

13 A. Sometime. And sometimes in the summertime.  
14 And those early years we had quite a few meetings. I  
15 cannot recall all the meetings but we had quite a few  
16 meetings ongoing because there was Powder River  
17 meetings, there was Tongue River meetings, there was  
18 apportionment meetings, and there was several  
19 commission meetings. So there was quite a few  
20 different meetings ongoing at the same time.

21 Q. And it was during these meetings that you'd  
22 had the opportunity to interact with your counterparts  
23 from Wyoming; is that right?

24 A. Yes.

25 Q. And in particular would you have

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1 opportunities to talk to the state engineer, whether it  
2 was Mr. Tyrrell later or Mr. Fassett earlier?

3 A. Not Pat, but George Christopoulos and Jeff  
4 Fassett.

5 Q. And you'd have opportunities to speak with  
6 Miss Lowry?

7 A. I talked to Sue Lowry primarily -- yes.  
8 Missouri River basin states any time -- yes.

9 Q. And did you have opportunities talk to  
10 Mr. Whitaker?

11 A. Yes.

12 Q. Is Mr. Whitaker one of the folks that you  
13 talked with about the Yellowstone River -- or Tongue  
14 River?

15 A. We didn't talk very well.

16 Q. All right. Now, I assume you know this is  
17 coming.

18 A. I do know it's coming.

19 Q. Your story in this case has changed over  
20 time, hasn't it?

21 A. No.

22 Q. No. All right. Do you recall giving a  
23 deposition in this case?

24 A. I said in the deposition that it was not in  
25 writing, that it was through discussions with Wyoming

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1 officials.

2 Q. And here's the part that I think has changed.

3 A. Excuse me?

4 Q. Here's the part that I think has changed. In  
5 your deposition, and we can read it if you would like,  
6 and I'm happy to do that, you said you didn't make  
7 communications during the irrigation season.

8 A. Let me make a clarification right now. One  
9 of the things in the deposition is that when I left the  
10 DNRC, I left the DNRC. And I never did any thinking  
11 about the Yellowstone River Compact. I never tried to  
12 go back and check the historical record. I didn't  
13 spend the time because I was so busy with my new job.

14 Q. Let's --

15 A. And so I didn't -- so I could not identify  
16 the dates at that time or think of the process.

17 But one of the key things that's -- came very  
18 clear to me, the reason I moved on and didn't spend  
19 time because there was -- and as I identified earlier,  
20 there was a lot of high intensity between me and the  
21 Wyoming folks and even with staff within DNRC over this  
22 issue of protecting pre-'50 rights and making a call.

23 Q. All right. Let's make the record clear. So  
24 I want to get this on the record what you said in your  
25 deposition. All right? I'm going to hand you a copy

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1 of your deposition.

2 A. Okay.

3 SPECIAL MASTER: Mr. Wechsler.

4 MR. WECHSLER: I would just request, as he's  
5 handing the deposition, which I obviously have no  
6 problem with, there's also another page that I would  
7 like to be read into the record, and it's probably  
8 easiest to just do it now. So I'll wait for Mr. Kaste  
9 to find the pages he's interested in, and I'll identify  
10 the page I would like.

11 SPECIAL MASTER: Okay.

12 BY MR. KASTE:

13 Q. I want you to look at page 106. And it will  
14 go on to page 107.

15 MR. WECHSLER: Your Honor, the page I'm  
16 interested in is page 226.

17 THE WITNESS: Excuse me? Where?

18 SPECIAL MASTER: So I think Mr. Kaste is  
19 going to start out by asking you about pages 106 to  
20 107.

21 BY MR. KASTE:

22 Q. Are you on page 106, sir?

23 A. I am on 106.

24 Q. Mr. Michael took your deposition; do you  
25 recall that? A very tall fella took your deposition?



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1 A. Okay. This talks about the call made in 2004  
2 and 2006.

3 Q. Listen carefully to the question I'm asking.  
4 Mr. Michael took your deposition; correct?

5 A. Yes.

6 Q. All right. And did he that on April 18th,  
7 2012?

8 A. Yes.

9 Q. All right. And now, can you turn to page  
10 106? Are you on page 106?

11 A. I am.

12 Q. All right. And if we need to go back a  
13 little further to develop some context, we can do that.  
14 But what I'd like you to do is starting with line 7 on  
15 page 106, read through that page and on to line 5 of  
16 page 107, identifying when questions were made and when  
17 answer were given.

18 A. Okay.

19 Q. Would you like -- I can read it out loud for  
20 everybody and I can go slower than you. How's that?

21 A. I'm actually trying to slow down.

22 Q. I can tell you're trying to slow down. But I  
23 can tell you you're not succeeding very well. You read  
24 very fast. Let me just read these lines out loud.

25 A. Please do.

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1 Q. All right. Page 106.

2 "Question: But was it done in a water year  
3 at a time when Wyoming, it was irrigation season, they  
4 could cut off somebody and provide more water at the  
5 border?

6 "Answer: Are you kidding me? They never  
7 would have off cut off any water.

8 "Question: No, my question is was -- I'm not  
9 asking you whether they would have done it or not. I'm  
10 asking was the call framed at a time when, if they had  
11 complied with it, it was the irrigation season --

12 "Answer. No.

13 "Question -- and water would now come?"

14 There was an interruption.

15 "Answer: No. Because most of our meetings  
16 were not tied to the irrigation season. Most of them  
17 were tied outside of the irrigation season, as far as I  
18 know. Did Gary Fritz have any direct correspondence  
19 with Jeff Fassett at the time and made that very  
20 specific in that irrigation season, you would need to  
21 ask him.

22 "Question: That helps me, that really helps  
23 me, because I had to understand that distinction  
24 between the two. The word call, we can get lost in  
25 that word. The word call could be a telephone call,

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1 and we don't want to use in that way.

2 "Answer: Yeah, most everything we did we  
3 reacted to a drought situation rather than within a  
4 drought situation."

5 Did I read those pieces correctly? Did I  
6 read those --

7 A. You read them very correctly, very well.

8 Q. Thank you. And you were under oath at that  
9 time; correct?

10 A. You know, in my response to the deposition --

11 Q. My question was simple: You were under oath?

12 A. Correct.

13 Q. All right. Now, I have a new question, if  
14 you'd try to answer that --

15 A. And I'm still under oath.

16 MR. WECHSLER: Your Honor, before we have any  
17 other questions, can I ask that the portion I'm  
18 interested in be read into the record?

19 MR. KASTE: That doesn't complete it.

20 SPECIAL MASTER: Yeah, I think actually

21 Mr. Wechsler is -- Mr. Kaste is correct in this  
22 particular case in that he's read the complete answer  
23 in this particular case.

24 MR. KASTE: It's --

25 SPECIAL MASTER: I will permit you to permit

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1 him to look at that on redirect.

2 MR. WECHSLER: That's fine.

3 BY MR. KASTE:

4 Q. I'll talk to you about it now. When  
5 Mr. Wechsler asked you essentially the same question  
6 you said, I think I did talk about it in the irrigation  
7 season.

8 A. There's a distinction between a call and  
9 protecting pre-'50 rights from Wyoming's post-'50 use.  
10 I doubt if the word "call," besides in 1981, was ever  
11 brought up as a word "call." The issue of protecting  
12 pre-'50 rights in Montana was an issue that was  
13 discussed almost at every meeting.

14 Q. And you've said yourself there's a  
15 distinction between making a call and talking about the  
16 issue of protecting pre-'50 use; right?

17 A. I don't --

18 MR. WECHSLER: I don't think that's exactly  
19 what he testified to.

20 THE WITNESS: I'm saying there's no  
21 distinction. One is a legal distinction; the other is  
22 the way you look at it hydrologically. And we were  
23 looking at protecting preexisting rights. Attorneys  
24 use the word call. I'm not an attorney.

25

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1 BY MR. KASTE:

2 Q. I thought you drafted the 2004 letter to  
3 Mr. Tyrrell.

4 A. I did. But, you know, I also had the help of  
5 the attorneys in making sure you use the correct  
6 language.

7 Q. So your attorney --

8 A. And I said -- excuse me.

9 Q. So your attorney put the word "call" in the  
10 letter?

11 A. The attorney put the word -- and as you just  
12 said, it was absolutely correct. It -- I was part of a  
13 team that drafted that letter.

14 Q. Don't farmers in Montana use the word call  
15 too?

16 A. I'm not a farmer. But, yes, they do  
17 probably.

18 Q. Probably. Doesn't everybody use the word  
19 call when they mean call?

20 A. I didn't.

21 Q. So you used a different word in your  
22 communications with the folks in Wyoming when you meant  
23 call?

24 A. I explained it.

25 Q. All right. And that was during these

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1 meetings outside of the irrigation season, wasn't it?

2 A. Was it outside the agency?

3 Q. Outside the irrigation season.

4 A. You know, again, as I said, I can't recall --  
5 all I can tell you is whenever we had a meeting and  
6 whenever there was a drought year, the issue came up  
7 and the issue was discussed.

8 Q. So it could have been in the irrigation  
9 season. It might not, depended on whether or not you  
10 were meeting?

11 A. You know, that is correct, but I cannot  
12 recall.

13 Q. All right. But you were able to recall when  
14 you signed some affidavits in this case that it did  
15 happen during the irrigation season, didn't it?

16 A. Because it happened. There's a distinction  
17 here. A distinction is, can I define and tell you the  
18 date and the time and to whom? The answer is no. Did  
19 I say it in most meetings and most times during drought  
20 conditions when we had the opportunity? Yes.

21 Q. All right. Is it fair to agree between us  
22 that your memory on this particular issue is a little  
23 bit fuzzy?

24 A. You know, most issues, at my age, are  
25 becoming fuzzy.

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1 Q. And this is one of them.

2 A. This is one of many.

3 Q. All right. One thing that I think you  
4 weren't fuzzy about in your direct testimony is that  
5 during years 1987, '88, and '89, those were years where  
6 you expressed concerns to Wyoming; right?

7 A. Because they were significant drought years.  
8 They were was real concern from local water users. So  
9 the answer is yes.

10 Q. Okay. I'm going to hand you Exhibit M5. And  
11 I'm going to open it to the table that I want because  
12 it's big.

13 SPECIAL MASTER: Mr. Kaste.

14 MR. KASTE: I'm almost done.

15 SPECIAL MASTER: Okay. That was the  
16 question.

17 BY MR. KASTE:

18 Q. I believe during your direct testimony -- you  
19 don't have to study the table now. But I believe in  
20 your direct testimony you said one of the indicators  
21 you were looking at was the flow at the state line  
22 going into Tongue River Reservoir; right?

23 A. Okay.

24 Q. Well, I'm not sure okay is a good answer.

25 SPECIAL MASTER: Can I just stop for a

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1 second? I assume that you actually turned Exhibit M5  
2 to a particular page?

3 MR. KASTE: I did.

4 SPECIAL MASTER: And are you going to  
5 identify it for the record.

6 MR. KASTE: I'm not going to tell you. It's  
7 a secret -- it's Table 1.

8 SPECIAL MASTER: Table 1. Thank you.

9 THE WITNESS: Yes, I have the information.

10 BY MR. KASTE:

11 Q. All right. And I will tell you what this is.  
12 This is a part of the expert report prepared by an  
13 engineer, Mr. Dale Book, for purposes of this case.  
14 He's been retained by the state of Montana. I asked  
15 you to look at Table 1 of his report, which reflects  
16 Tongue River state line flow from 1961 through 2007.  
17 And I'll just tell you, Mr. Book obtained this  
18 information, I believe, from the United States  
19 Geological Service, from their gauge.

20 A. Correct.

21 Q. And was kind enough to put it in a really  
22 handy table.

23 So what I'm interested in is your answer to  
24 my question about one of the things you relied on was  
25 that gauge data to help you know what the conditions



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1 were on the river? Isn't that true?

2 A. Yes.

3 Q. That gauge data is important in your analysis  
4 of the stream conditions; right?

5 A. Yes.

6 Q. All right. What I'm interested in is 1988,  
7 which is one of the years where you made these  
8 communications on Wyoming. And if you would tell us  
9 the state line flow -- and I'll tell you this is in  
10 acre-feet -- in May of 1988.

11 A. In May is 95,000 acre-feet.

12 Q. And in June?

13 A. June was 43,000 acre-feet.

14 Q. Are you familiar with the capacity of the  
15 Tongue River Reservoir?

16 A. Yes. I'm more concerned about July and  
17 August, when it was 5000 and 3000 acre-feet.

18 Q. I'm asking you a really simple question. Are  
19 you familiar with the capacity of the Tongue River  
20 Reservoir?

21 A. Familiar with what?

22 Q. The capacity of the Tongue River Reservoir.

23 A. At one time I could tell you, but I can't  
24 tell you right now.

25 Q. Well, in 1988, it had not yet been enlarged;

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1 correct?

2 A. Yes.

3 Q. And so it was approximately 69,000 acre-feet;  
4 does that sound fair?

5 A. That's correct.

6 Q. All right. So in May and June, you would  
7 agree with me that you got more than enough water to  
8 fill that reservoir; correct?

9 A. We did.

10 Q. Yeah. Does it make any sense at all that  
11 that would be a year you'd call on Wyoming?

12 A. Yes. Because look at July and August. Look  
13 at July and August. Because you get one cutting. And  
14 you got to look -- you look at direct flow rights. And  
15 you look in July and August when you have 6000. And  
16 July had 5962 acre-feet for the month. You had 3586  
17 acre-feet in August for the month. And then you had  
18 6500 acre-feet in September. Those are low flows.  
19 Extremely low flows.

20 Q. I hear you. And --

21 A. And so --

22 Q. Let me ask you another question.

23 A. Okay.

24 Q. I understand those are low flows. But if you  
25 had enough water in your reservoir, why would you need

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1 to make a call?

2 A. Because as naive as we were, we still, at  
3 some point, hoped to work out our differences with  
4 Wyoming on a positive administrative procedures. And  
5 so we never put it in writing.

6 Q. In fact, you never did it in 1988, did you?

7 A. We did. I did.

8 Q. All right. Do you know what they did with  
9 the water at the reservoir in 1988, all that 95,000  
10 acre-feet?

11 A. Probably was pretty full. But when you look  
12 at late season flows, they are as important as early  
13 season flows. And you got to look at the entire  
14 irrigation season. And you got to see what water is  
15 available for how many cuttings of alfalfa and how many  
16 that you get. And there's also water supply outside of  
17 the Tongue River contracts that we had at issue; direct  
18 flow downstream that had to be met.

19 Q. Did you ever -- and and there's a lot of  
20 paper during your tenure. Did you ever in the course  
21 of your developing your concerns about the Yellowstone  
22 River Compact and water from Wyoming, did you ever look  
23 at the operation of Tongue River Reservoir and say,  
24 hey, this might be the cause of our problems, the way  
25 we operate this reservoir?

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1           A.    Yes.  And never felt it was the problem.  I  
2 know Wyoming thinks that we need to dry up the Tongue  
3 River -- just -- the flows downstream in the wintertime  
4 to use stored water.  But there is a reason to keep  
5 rivers alive.  And we believe it's important to  
6 maintain a minimum streamflow downstream in the Tongue  
7 River.

8           Q.    For what purpose?

9           A.    What purpose?  Okay.  There are ice jams  
10 which has been a significant problem on the Tongue  
11 River.  There's stock water uses.  There's endangered  
12 species issues.  There's water quality issues under the  
13 Clean Water Act.  There are a number of issues and  
14 there's an instream flow reservation for protection of  
15 fish and wildlife.  One thing Montana strongly believes  
16 in is keeping rivers alive for fish and wildlife and  
17 water quality.

18          Q.    Is that why water was sent downstream during  
19 the winter in say 2000 through --

20               MR. WECHSLER:  I think he's --

21               THE WITNESS:  Now Wyoming and Montana --

22               MR. KASTE:  He's already answered --

23               SPECIAL MASTER:  You have to hold up because  
24 Mr. Wechsler is objecting.

25               MR. WECHSLER:  I think the answer that

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1 Mr. Moy just answered was why did they dry -- were  
2 there instream flows or were there flows through the  
3 reservoir. And Mr. Kaste is asking again.

4 BY MR. KASTE:

5 Q. I'm asking about a specific time period from  
6 2000 to 2006. Is that where -- were those the purposes  
7 for which water was being released from the reservoir?

8 A. You know, 2000 to 2006, we had some problems  
9 on the Tongue River Reservoir, is my understanding.  
10 And we tried not to fill it completely full because we  
11 were in the process of enlarging the reservoir. But we  
12 still needed provide instream flows downstream.

13 There's a strong belief in Montana that water  
14 from instream flows has a high value for fish and  
15 wildlife and recreation and hydropower generation water  
16 quality dilution.

17 Q. You've reviewed the Yellowstone River Compact  
18 and its history in detail; right?

19 A. I'm sorry. I didn't hear that.

20 Q. You've reviewed the Yellowstone River Compact  
21 and its history in detail; correct?

22 A. Did I review the Yellowstone River Compact  
23 history?

24 Q. Yes.

25 A. Yes.

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1 Q. And you've reviewed the compact; right?

2 A. I have.

3 Q. Is the word "fish" in it?

4 A. You know, it's interesting because we're  
5 working with the same issue under the Boundary Waters  
6 Treaty.

7 Q. It was a simple question --

8 A. Let me explain this. You asked the question.

9 Q. If you'd please first answer my question,  
10 then I'll give you an opportunity to explain.

11 A. Was instream flows identified in 1950  
12 compact; is that your question?

13 Q. My question was: Is the word "fish" in it?  
14 But I kind of like yours better.

15 A. Fish are not identified under the compact.  
16 The environment was not identified in the compact.  
17 Water quality was not identified in the compact. Which  
18 are these issues important for Montana and Wyoming to  
19 recognize? Of course. Were they ever recognized? We  
20 did.

21 Q. I have another question for you.

22 A. Okay.

23 Q. We talked about you not having a piece of  
24 paper that you would have written evidencing these  
25 communications before 2004. I apologize. If Montana

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1 would have received a call, say, from North Dakota,  
2 would that have generated paperwork from your agency?

3 MR. WECHSLER: Objection. Calls for  
4 speculation.

5 SPECIAL MASTER: Sustained.

6 THE WITNESS: A response?

7 SPECIAL MASTER: No, you don't have to  
8 answer. He has to reask a question.

9 BY MR. KASTE:

10 Q. Would it be in the ordinary course of your  
11 business at DNRC to generate a piece of paper in  
12 response to a communication from another sovereign?

13 A. From another sovereign? Depending upon the  
14 circumstances.

15 Q. When you went to these meetings, if you  
16 obtained important information from your counterparts,  
17 would you make a note of it and report it to the  
18 appropriate people?

19 A. Generally.

20 Q. Have you seen any notes from anyone in  
21 Wyoming reflecting that, my God, Mr. Moy asked us for  
22 water?

23 A. Asked -- did I ever ask anybody in Wyoming  
24 that they were taking too much water and we were not  
25 able to satisfy -- our pre-'50 uses? I think there was

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1 so much hostility between me and the Wyoming folks over  
2 this issue -- I think the answer is yes.

3 Q. You think there's a piece of paper out  
4 there --

5 A. That's no piece of paper. It's all  
6 discussion. I said there was no piece of paper. My  
7 testimony said there was no piece of paper. My  
8 deposition said there was no piece of paper.

9 Q. Do you think it's odd for such an important  
10 event not to be memorialized?

11 A. You know, the circumstances at that time in  
12 Montana were challenging for me. And I wish there was  
13 a piece of paper. I could not get a piece of paper.  
14 But I could get those pieces of paper in 2004 finally.  
15 And we did it.

16 Q. All right. In 2004, things changed, didn't  
17 they?

18 A. But it did take some changes in  
19 administration and folks for me to get it done. But  
20 did the message change? No. The message was out  
21 there.

22 MR. KASTE: I have no further questions.  
23 Thank you, Mr. Moy.

24 THE WITNESS: Thank you.

25 SPECIAL MASTER: So at this point, what I



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1 would suggest is we take the noon lunch break. I have  
2 some questions when you come back, Mr. Moy, from lunch.  
3 And then Mr. Wechsler will want to ask some redirect.  
4 And then you'll actually probably be able to go back to  
5 Washington, D.C.

6 THE WITNESS: Thank you.

7 SPECIAL MASTER: You're welcome. So we then  
8 will be in recess now until -- why don't we make it  
9 1:10.

10 (Recess taken 1:10 to 1:16  
11 p.m., November 1, 2013)

12 SPECIAL MASTER: So let's go back on the  
13 record again. And so, Mr. Moy, as I said, this is the  
14 time when I'm going to ask you some questions. And my  
15 role is somewhat different from counsel, in that what I  
16 want to make sure is that I have as full and as  
17 accurate of a record of what various witnesses said as  
18 I can have, both because I'm going to ultimately have  
19 to make a recommendation to the Supreme Court, and the  
20 Supreme Court is going to have to make a decision based  
21 on that.

22 So I'm not going to go over all the ground  
23 that Mr. Wechsler and Mr. Kaste went over earlier. But  
24 I may sometimes ask a question over again. And if so,  
25 just understand it's either because I missed part of

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1 the discussion or in listening to it I wasn't  
2 absolutely clear what was said. And I might also ask  
3 some general questions that I'm not even sure are  
4 always relevant. But, unfortunately, unlike counsel  
5 for both Montana and Wyoming, I don't know exactly  
6 where they're going at certain points in time. So I'm  
7 also trying just expand the full background.

8 EXAMINATION

9 BY SPECIAL MASTER:

10 Q. So let me actually start with a question  
11 which I'm still trying to get a sense of. And it  
12 follows through on Mr. Kaste's cross-examination. He  
13 showed you Exhibit M5 and the list of Tongue River  
14 state line flows. You don't have to look back at the  
15 record for that. But do you remember that part of your  
16 testimony?

17 A. I do.

18 Q. And he was showing you the flows in some  
19 months during the year 1987. And you had then gone on  
20 to say that what looked important to you were flows in  
21 July and August, where the flows had gotten down to  
22 about 6000 acre-feet and about 3600 acre-feet.

23 And my question is: From the standpoint of  
24 the state of Montana when you were there, did you care  
25 about both direct flows and the amount of water

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1 available on the reservoir?

2 A. Did I hear about direct flows?

3 Q. Did you care about --

4 A. Oh, absolutely.

5 Q. Okay. And why, if the reservoir is full --  
6 so there's plenty of water in the reservoir -- why do  
7 you care about direct flows?

8 A. Because there's more of the direct flows on  
9 the Tongue River Reservoir are contracted water. And  
10 there are rights that are not contracted water. There  
11 are rights that are senior to that project that need  
12 flow downstream to satisfy the senior rights that are  
13 senior to the 1937 priority date of the Tongue River  
14 Reservoir.

15 Q. And in your discussions with water users in  
16 Montana on the Tongue River, did they ever express  
17 concern about those direct flow rights?

18 A. Very much so.

19 Q. Okay.

20 A. Because there are some direct flow rights  
21 that are junior to the Tongue River Reservoir too. So,  
22 I mean, anything that's pre-'50 -- anybody that didn't  
23 get their water, obviously there was a concern.

24 Q. Okay. So now I want to go through a number  
25 of the documents. And if you can't find them

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1 immediately, I can hand them to you. But the first  
2 document is Exhibit J32, which was the 1982 Yellowstone  
3 River Compact Commission Report.

4 A. Okay. That I drafted?

5 Q. No. This is actually the minutes of the  
6 Yellowstone River Compact Commission meeting in 1982.

7 A. Okay.

8 Q. Which is Exhibit J32.

9 A. Okay.

10 Q. And what I'm going to ask about is page 4,  
11 which you were asked about before.

12 A. Yes.

13 Q. Okay. So on page 4, and I'm just going to  
14 read this, in the third paragraph it says, "Montana  
15 voiced its concern that during low-flow years Wyoming  
16 needs to regulate its post-1950 water rights more  
17 carefully so that Montana can use its pre-1950 water."  
18 And then it goes on to say, "Montana, in turn, must  
19 notify Wyoming when it is not able to obtain its  
20 pre-1950 right -- I'm sorry, its pre-1950 water."

21 And my question is about that sentence. And  
22 my question is whether you remember anything more about  
23 that particular discussion other than what is stated in  
24 that one sentence.

25 A. No. And one of the things is that before

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1 these minutes are approved, they have to be signed off  
2 by both the commissioner from Wyoming and from Montana.  
3 So any language in here that might be sensitive  
4 generally gets removed.

5 Now, your question is, we must notify Wyoming  
6 when it's not -- when we're not able -- Wyoming --  
7 excuse me. What was your question, sir?

8 Q. Yes. So I was looking at that specific  
9 sentence that, again, says, "Montana must notify  
10 Wyoming when it is not able to obtain its pre-1950  
11 water."

12 A. And I believe we did that, for example, in  
13 1981 when Gary Fritz tried talk to George Christopoulos  
14 saying, we were not getting our pre-'50 water.

15 Q. And my specific question was: Other than the  
16 sentence that basically says Montana must notify  
17 Wyoming when it's not able to obtain its pre-1950  
18 water, do you remember anything more about that  
19 discussion? For example, what the form of the notice  
20 must be?

21 A. The form of notice, no, was never discussed.  
22 It was never described. And Wyoming never said to us,  
23 if you want the water, you must submit a letter. And  
24 you need to identify it as, quote, a call. That was  
25 never discussed, no.

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1 Q. Okay. And you don't remember any specifics  
2 about what type of notice, if any, that people  
3 discussed at that point?

4 A. No one discussed the type of notice. To my  
5 knowledge.

6 Q. Okay. So next, just sort of a series of  
7 general questions, which, again, for me is just setting  
8 the background context. So you talked earlier about  
9 the efforts in the early 1980s to come up with an  
10 administrative plan for actually administering the  
11 compact. And we looked at a variety of documents,  
12 including some documents by Dan Ashenberg.

13 And I was noticing, for example, on the front  
14 cover of Exhibit M97, that it's a draft report that's  
15 labeled "A Cooperative Plan to Administer the  
16 Yellowstone River Compact." So, was this a -- although  
17 this was a document prepared by Dan Ashenberg, was it a  
18 document of both of the states, or was it something  
19 that Montana put together?

20 A. No. This was document only produced by the  
21 State of Montana. I would have loved, if Wyoming would  
22 have produced a document that tried to actually make  
23 the compact Article V work. But they never did.

24 Q. Okay.

25 A. We always took the initiative.

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1 Q. Okay. So the term "cooperative plan" here  
2 means?

3 A. The term cooperative means will we discuss  
4 the fact that needs to be done. They said go do it.  
5 We went and did it. We brought it back to them so we  
6 could then go through it. And they said, well, fine.  
7 Go do it for the Tongue River. Take your  
8 administrative -- I mean, your apportionment plan of  
9 Article V that you developed by Dan Ashenberg and then  
10 develop for the Tongue River. So then we took that  
11 plan and developed it for the entire Tongue River. As  
12 an example. So then we went and took it back to  
13 Wyoming. And then Wyoming just more or less shut us  
14 off.

15 Q. And when you say shut you off, could you just  
16 explain a little bit more what you mean?

17 A. You know, I think they then said to us, well,  
18 we think we need to go back to the original Article V  
19 for measurements. Well, they don't work. And we were  
20 trying to make them work. And so we were at a more of  
21 an impasse.

22 Q. So when you're talking about the original  
23 Article V for measurements, you're talking about the  
24 percentage allocations under Articles 5B and 5C?

25 A. We are talking two things: Identifying

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1 pre-'50 uses that you can then provide a foundation for  
2 actually going through an allocation for post-'50 uses.

3 Q. Okay. And at that point, was there, then,  
4 any further work on that administrative plan?

5 A. No. Basically, we were then -- no. Because  
6 they showed no effort to -- they wouldn't even agree to  
7 any of the assumptions that we had to include in that  
8 methodology. And so if we could not get the two  
9 commissioners to agree to basic methodologies and the  
10 chair decided he was not going to break any decisions,  
11 we are at a stalemate.

12 And also at that time, the Middle Fork  
13 project came an issue. The Little Big Horn project  
14 came an issue. And so we couldn't move forward with  
15 it.

16 And I think Pat sent his letter to Jack  
17 Stults in 2004, clearly states it. We really don't  
18 think the compact should be administered. We don't  
19 believe the compact should be administered.

20 Q. So actually, I want to ask you a question  
21 about that later on. But let me actually ask you right  
22 now. So one of the sentences that you looked at  
23 earlier in the 2004 letter from Mr. Tyrrell to  
24 Mr. Fritz says, "As I stated earlier, the compact makes  
25 no provision for any state to make a call on a river."



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1 And you had testified earlier that that confirmed in  
2 your mind what you thought Wyoming's position was.

3 But my question was, had Wyoming ever --

4 A. No.

5 Q. So number one, they never said that in  
6 writing to you before; is that correct?

7 A. They never said it in writing, no.

8 Q. Did they have say it orally to you?

9 A. No.

10 Q. Okay. Thank you.

11 A. And, sir, that was a real -- I mean, we spent  
12 all this effort, all this time, all this money thinking  
13 that they were willing to work with us on it. And I  
14 was really taken back when I read this.

15 Q. Okay. Thank you. So then after you were  
16 not -- after you did not move forward any further with  
17 the effort in the early 1980s to come up with an  
18 administrative procedure, during the period of time  
19 that you were involved with the Yellowstone River  
20 Compact, were there other efforts to come up with  
21 administrative procedures and plans for administering  
22 the compact?

23 A. To my knowledge, the answer is no.

24 Q. When Mr. Stults testified earlier, he talked  
25 about in the early 1980s -- I'm sorry. Not in the

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1 early 1980s -- in the early 2000s, pushing for an  
2 effort to administer the Tongue River hydrologically.  
3 Do you remember any effort from the early 2000s to  
4 administer the river hydrologically?

5 A. I do. I do. I guess how I approached that  
6 was that was more an understanding how water was being  
7 used in Wyoming. And in a way, on one side of my mind  
8 I was still optimistic that maybe, maybe we can  
9 actually come to an agreement on some type of  
10 administrator process.

11 Q. When was this that you were still optimistic?

12 A. With Wyoming.

13 Q. At what point in time were you still  
14 optimistic?

15 A. I guess in the early 2000s. You know, you  
16 always have that little door open that something could  
17 work out.

18 Q. Okay. And other than your reference to  
19 Wyoming's suggestion to go back and use the original  
20 Article V measurements, did Wyoming ever suggest any  
21 administrative procedures or plans for the river?

22 A. No.

23 Q. Okay. Then if you turn to Exhibit M189,  
24 which is the document that included your testimony, the  
25 draft of House Joint Resolution 35, and a draft work

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1 plan.

2 A. I have it, sir.

3 Q. At several points in this document, and  
4 probably the first place I noticed it, was on page --  
5 the second page of it which is Bates-stamped Montana  
6 01,148. It's in the second paragraph. You say here in  
7 your testimony, "Montana has never documented receipt  
8 of its pre-1950 water." Could you explain to me what  
9 documented receipt is? I sort of imagine somebody  
10 standing on the border and actually documenting their  
11 receipts. So I don't think that's what you meant.

12 A. Your Honor, I think the intent here when I  
13 wrote this was that we could never show where Wyoming  
14 was not taking post-'50 water to the detriment of  
15 pre-'50 uses and that they were able to satisfy all our  
16 pre-1950 uses. That's been no procedures to show that.

17 Q. Okay. So there was no -- there had been no  
18 procedure by which you could actually, at this point,  
19 have documented that?

20 A. That's correct.

21 Q. Okay. And then on page Montana 01151, which  
22 is the first page of the draft work plan, it says under  
23 work scope -- so it's the same document -- you'll see  
24 under work scope, the first sentence says, "The  
25 objective of this work is to determine if there have

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1 been any significant changes in the extent of  
2 irrigation (and thereby depletion) from the time the  
3 Yellowstone River Compact was signed in 1950 to  
4 present."

5           And my question, it might seem like an  
6 obvious answer, but give an answer to it. Why didn't  
7 you simply ask Wyoming for that information?

8           A.     Because actually we had tried for a long time  
9 to get accurate information from Wyoming on changes and  
10 water use. And, quite frankly, at that point in time,  
11 I just didn't trust the information.

12          Q.     Okay. And do you recall when you asked for  
13 that information?

14          A.     When?

15          Q.     Yes.

16          A.     Well, it actually starts back to setting up  
17 the administrative apportionment way back in the early  
18 1980s.

19          Q.     And why were you seeking that information?

20          A.     Because Article A says you got to protect  
21 pre-'50 uses. And I needed to find out and how much --  
22 what were the pre-'50 uses? Not pre-'50 rights.  
23 Because once that we found -- and we were going through  
24 the State Water Adjudication in Montana and we found  
25 discrepancies. But we also we knew of significant

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1 discrepancies in the Wyoming Adjudication on their  
2 tributaries.

3           And I wanted to know what was said, what was  
4 the rights of 1950, the total depletions in 1950 if you  
5 have a beneficial water use at that time and what they  
6 are today because a lot of those parcels of land went  
7 from flood irrigation to sprinkler irrigation. So the  
8 depletion increased considerably. Then there was new  
9 acres added, and there was new storage added. So I  
10 needed -- I didn't have a grasp of what actually  
11 changed on the ground. And I wanted to have that  
12 understanding.

13           Q.    And did you explain to Wyoming why you wanted  
14 the information?

15           A.    You know, I think -- on this study here  
16 specifically?

17           Q.    No. No when you said you'd previously asked  
18 for information about pre-1950 --

19           A.    Oh, yes. Even our technical meetings in the  
20 '20s when we met with them, the interest was trying to  
21 establish an understanding of how they used water. We  
22 actually went to Wyoming to try to get that information  
23 and try to figure that out.

24           Q.    And when would that have been?

25           A.    When would that have been?

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1 Q. Yes.

2 A. 2001, 2002, 2000.

3 Q. Okay. Thank you. And then turning now to  
4 Exhibit W71, which is the e-mail from Art Hayes to the  
5 Yellowstone River Compact team. So Exhibit W71. And  
6 it will probably come up on your screen in a moment.  
7 But it's just a one-page document. Says Rich Moy in  
8 the upper left-hand corner on your screen?

9 A. I drafted that memo.

10 Q. You drafted --

11 A. I drafted that.

12 Q. It looks like there's a hole here. So you  
13 drafted this, and it's too, then, the Yellowstone River  
14 Compact team; is that correct?

15 A. It was a committee, Yellowstone River Compact  
16 Committee of Montana.

17 Q. Okay. So if you look at item No. 6, it says,  
18 "Find out if Keith, Jim Robinson, or anyone else that  
19 was at the April 16th technical meeting, documented the  
20 amount of post-1950 water that was stated by Wyoming  
21 was available to Montana."

22 And my first question is: The reference to  
23 the April 16th technical meeting, would that have been  
24 the April 16th technical meeting of the Yellowstone  
25 River Compact Commission?

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1 A. Yes.

2 Q. And do you recall, was there a discussion at  
3 the April 16th technical meeting of the amount of  
4 post-1950 water?

5 A. You know...

6 Q. Bottom line is do you remember Montana --

7 A. Yeah, I can't recollect. Even though I wrote  
8 this, I -- I can't recollect the specifics of it at  
9 this time.

10 Q. Okay. Do you remember anything else of the  
11 discussion of the April 16 technical meeting?  
12 Actually, let me ask you --

13 A. Do we have minutes of that?

14 Q. Go ahead.

15 A. If there are minutes of it, we could surely  
16 check the minutes.

17 Q. But actually it says, "Find out if Keith, Jim  
18 Robinson, or anyone else who was at it." Do you recall  
19 whether you were even at it?

20 A. It seems to suggest I was not at that  
21 meeting.

22 Q. Okay. Then under 5 it says, "Keith Kerbel  
23 will need to take the verification form and background  
24 information and establish how the rise in the four  
25 Interstate tributaries are being impacted this year."

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1 Do you know whether that was done?

2 A. In my understanding, it was done. But I  
3 would almost have to refer to Keith Kerbel.

4 Q. Okay. And then finally, under 7, it says,  
5 "Keith and the regional office folks will need to  
6 document Wyoming's water usage. Especially post-1950  
7 water use, they will need to take digitized photos" and  
8 it goes on. Do you know whether any of that was done?

9 A. Yeah, we were, again, trying to document what  
10 the -- what the post-1950 uses, again, in Wyoming.

11 Q. Do you know whether any of that was done?

12 A. I don't think we actually got that done, to  
13 my knowledge. I had some information that was done.  
14 But I did not think it was acceptable.

15 Q. Okay.

16 A. And what we had started to do is we started  
17 to use remote sensing. And we were starting to get  
18 really good GIS data and infrared information on  
19 irrigation acres. And I don't think we had done that  
20 yet.

21 Q. Okay. And then if you turn to Exhibit M192.

22 A. What is 192, sir?

23 Q. I'm sorry. It's the draft, not for  
24 distribution, meeting summary Montana/Wyoming  
25 Yellowstone River Compact via teleconference. So it's



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1 notes from the -- notes dated June 30, 2004. One-page  
2 document with two sides. And, again, it's up on the  
3 screen now.

4 A. 192?

5 Q. Yes, 192.

6 A. Okay. I have it, sir.

7 Q. Okay. So just two, again, quick questions  
8 here. And they're on the second page. There is a  
9 paragraph that says irrigated acreage. And it noted,  
10 "In addition, Wyoming stated a request for Montana's  
11 mapped 1950's irrigated acreage, as well as any  
12 irrigation mapping done in the 1960/1970 time frame."  
13 And then it says, "Montana agreed to supply this  
14 information, available through the Water Resource  
15 survey reports prepared in the 1950s and 1960s."

16 So first of all, do you know what the  
17 reference is to the Water Resource survey reports are?

18 A. Yes, sir. These are them.

19 Q. Okay. So it's the document -- if you  
20 actually hand that to me for one second.

21 A. This is Water Resource survey.

22 Q. So it's the document that's labeled Exhibit  
23 M16 earlier; is that correct?

24 A. That's correct.

25 Q. And do you know whether that was furnished?

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1 A. Excuse me, sir.

2 Q. Do you know whether that was furnished?

3 A. I would have to ask the attorneys. We --

4 Q. You can't ask them.

5 A. We gave this -- this was easily readily  
6 available to Wyoming.

7 Q. Okay. And then it says, "Montana asked for  
8 the same information from Wyoming. Wyoming indicated  
9 that it's having difficulty located such information."  
10 Do you remember anything about what Wyoming stated at  
11 that point? Other than what's said here?

12 A. No, I don't.

13 Q. Okay. And then in the next one it talks  
14 about aerial imagery. And it basically starts out  
15 says, "Montana stated its intent to gather aerial  
16 imagery of the Tongue, Powder, and major tributaries."  
17 And then skipping down a sentence, says, "Montana asked  
18 if Wyoming would be willing to share in the cost of  
19 such an endeavor." It says, "Wyoming stated that it  
20 would not being willing, citing the lack of funds and  
21 the fact that they had recently acquired the entire  
22 state in high resolution color infrared digital  
23 photography in either August 2001 or 2002."

24 Do you remember anything about that  
25 discussion other than what's stated there?

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1 A. No.

2 Q. Okay.

3 A. Just what it says here. And what it says  
4 here appears to be correct.

5 Q. Okay. And then last document I'm going to  
6 turn to is Exhibit M122.

7 A. 122.

8 Q. Which is the analysis that you prepared of  
9 the Yellowstone River Compact.

10 A. Okay, go ahead. Yes, sir.

11 Q. On page 30 of that, conclusion 2 says, "Data  
12 necessary to apportion the flows based on Article V  
13 would be very difficult and expensive to collect.  
14 Article V would also be very cumbersome and expensive  
15 to administer."

16 Can you explain what you meant by that?

17 A. Because it's based on diversions.  
18 Diversionary flows, you had to have gauges on every  
19 single diversionary flow in the drainage.

20 Q. So are you taking here about the Article 5B  
21 and 5C allocation of the 60/40 percent?

22 A. That is correct.

23 Q. Okay. Go ahead.

24 A. But the other point is, to identify pre-'50,  
25 too, you also need to have that information for pre-50

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1 rights to know what you can allocate on post-'50  
2 rights. So you have to have both -- you need not only  
3 the diversion, you also need the depletion.

4 Q. Okay. And so at the point you wrote this,  
5 did you then believe that it would be very difficult  
6 and expensive to collect information about the pre-1950  
7 rights?

8 A. It wasn't difficult to collect the  
9 information. It was actually difficult to actually  
10 apportion and to administer the compact as written. I  
11 mean, I think the Water Resource survey information is  
12 excellent foundation as of 1950, and it's very  
13 accurate. I think they have methodologies today that  
14 are so -- with infrared, that we can establish number  
15 of acre-feet for water used per parcel of land and  
16 identify that parcel of land very carefully. What is  
17 so difficult is actually trying to take that  
18 administrative formula that's in this compact and make  
19 it work. And that is the reason Dan Ashenberg  
20 developed that methodology to start moving that  
21 forward.

22 Q. Okay. So let me just -- I just have two  
23 other areas of inquiry. Actually, one which is very  
24 short. You had talked earlier about the fact that  
25 there was a representative of Wyoming who's John Buyok?

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1 Is that how you pronounce the name? B-u-y-o-k.

2 A. Oh, Buyok.

3 Q. Buyok, I'm sorry. That he was a member of  
4 the technical committee for the Tongue River Reservoir;  
5 is that correct?

6 A. That's correct.

7 Q. And could you explain what, first of all, the  
8 technical committee did?

9 A. Well, the technical committee was working on  
10 assumptions and a modeling of the Tongue River  
11 Reservoir and its operations in relationship to  
12 existing rights and the compact.

13 Q. Did that committee have an official title, or  
14 was it just the technical committee?

15 A. I think was called the Tongue River Technical  
16 Committee.

17 Q. Okay. And do you know what his role was on  
18 that committee?

19 A. He was to represent Wyoming's interests.

20 Q. Okay. And were you -- did you participate in  
21 that --

22 A. I did not participate on that committee.

23 Q. So one last area. And this is one that, as  
24 you know from both your direct and cross-examination,  
25 is important to both sides. And this is what

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1 conversations there were in the 1987, 1988, and 1989  
2 period. And I know this is a long time ago. And I  
3 know you don't remember the dates of any specific  
4 conversations that may have occurred.

5 But I just want to ask you several questions  
6 to go over some of the territory. So you stated  
7 earlier you did not demand any water of Wyoming. But  
8 is it your testimony that you asked?

9 A. I never demand -- the issue was asking for  
10 the protection of pre-'50 rights in Montana and Wyoming  
11 to shut off post-'50 uses.

12 Q. And do you recall -- I realize you didn't --  
13 don't recall specific dates. But do you recall whether  
14 you made a request of that nature in 1987, 1988, and  
15 1989?

16 A. I made it in those years, yes. Can I tell  
17 you specifically when I made those? No. Did I make  
18 them? Yes. And did I think I did it all three years?  
19 I do.

20 Q. And given that memories are fuzzy that far  
21 back, what is it that leads you to believe that you  
22 made those requests in those years?

23 A. Because in '89 I decided to move on from the  
24 Yellowstone River Compact because of pure frustration  
25 and not seeing anything done to protect Montana's

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1 pre-'50 uses.

2 Q. And so the fact that you got frustrated at  
3 that point suggests -- is why you believe you made the  
4 requests in those years?

5 A. And I drafted this document at the same time,  
6 that you just identified, Exhibit 122. I reached a  
7 point where I felt we were going to be successful with  
8 Wyoming to protect any of Montana's pre-'50 uses. And  
9 the frustration was high enough that I decided to move  
10 on to other issues.

11 Q. And -- go ahead.

12 A. Your comment, did I -- all I can tell you is  
13 I made -- I pushed very hard to protect Montana's water  
14 users during those drought years. And I had -- I was  
15 in contact with those water users a lot. And they were  
16 hurting. And anybody that would listen, I would talk  
17 to.

18 Q. And there's a -- let me distinguish between  
19 two different types of conversation. One type of  
20 conversation would be, you know, you'd just be talking  
21 to somebody about an issue. And it would sort of come  
22 up, you know, we really need some more water. Another  
23 would be a very specific request that, we really need  
24 the water down there, and you need to permit more water  
25 to come down.

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1           So do you recall at all as to how specific  
2 requests would have been?

3           A.    I think it was pretty specific.  And the  
4 reason I'm saying that today is because in 1981, we  
5 were very specific.  And those -- that time frame still  
6 reflected my thought process during those drought  
7 years.  So I would probably say the same type of thing  
8 that we said in 1981 and that was, we need to have you  
9 shut down your post-'50 uses to protect Montana's  
10 pre-'50 uses.

11           Now, had I known Wyoming's position that they  
12 stated in 2004 in 19 -- in the '80s, any time in the  
13 '80s, if I had known that was their position, I can  
14 guarantee you we would have had the Attorney General's  
15 Office involved.

16           Q.    Okay.  And one of the questions that you  
17 discussed with Mr. Kaste was whether or not any of the  
18 discussions in '87, '88, and '89 were during the  
19 irrigation season.  And so I just want to give you an  
20 opportunity to just explain what you currently  
21 remember.

22           A.    What I remember, I remember -- I remember  
23 how -- I remember the concerns of the agricultural  
24 water users.  I remember them calling and talking to  
25 me.  And I never made a specific phone call to Wyoming.



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1 But if I was talking to a Wyoming staff person during  
2 that time, if we had a technical meeting during that  
3 time, had a commission meeting, the answer is yes.

4 Q. So you would not have independently reached  
5 out to Wyoming?

6 A. No.

7 Q. So any conversations that you had would have  
8 been at a meeting that you had with Wyoming officials?

9 A. At a meeting. There might have been some  
10 calls. I mean, can I remember? No.

11 Q. Okay on. Those are my only questions.

12 SPECIAL MASTER: Mr. Kaste, I do believe I  
13 owe you the opportunity to ask any additional  
14 cross-examination questions on the ones I asked.

15 MR. KASTE: Just as an informational piece,  
16 we do have minutes from that April 2004 meeting and  
17 we'll introduce those through, I hope, an appropriate  
18 witness. I did just look at them, and I think it  
19 confirms that Mr. Moy wasn't present. But we'll bring  
20 that in with somebody who was present at that technical  
21 meeting.

22 RECROSS-EXAMINATION

23 BY MR. KASTE:

24 Q. I just have basically one question. And it  
25 relates to your discussion about Mr. Ashenberg's

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1 proposed methodology.

2 Do you recall that Wyoming created an  
3 alternative proposed methodology, and a man named Lou  
4 Allen did that?

5 A. Oh, yes. Lou Allen. He did not do that. He  
6 did talk about doing it. He put some information  
7 together, but he did not do that. What he was pushing  
8 for was going back to the original what is stated in  
9 the actual language of the compact, to my knowledge.  
10 And he was trying to figure out a way to make the  
11 original language of the compact work, and it did not  
12 work.

13 Q. So Wyoming's position throughout the course  
14 of the 1980s was we had to live with and abide by the  
15 language of the compact?

16 A. Yes.

17 MR. KASTE: Thank you.

18 REDIRECT EXAMINATION

19 BY MR. WECHSLER:

20 Q. Good afternoon, Mr. Moy. I just have a few  
21 questions. I'm going to cover some of the same ground  
22 that Mr. Kaste covered in his cross-examination.

23 The first, and I think you talked about this  
24 a little with the Special Master, but you were asked  
25 about the minutes of the Yellowstone River Compact

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1 commission meetings. Did everything that happened at  
2 those meetings get recorded on the written minutes?

3 A. No.

4 Q. And I think you explained to the Special  
5 Master why; right?

6 A. Yes. Because for a number of reasons: One,  
7 the USGS does not like controversy. The second thing  
8 is, those minutes had to be approved in advanced by  
9 both commissioner from Montana and Wyoming. And  
10 generally speaking, issues of controversy were taken  
11 out of the minutes.

12 Q. In 2004 and 2006, it did show up in the  
13 minutes. During those years, were the letters  
14 requesting water copied to the Yellowstone River  
15 Compact Commission member from the federal government?

16 A. Excuse me?

17 Q. Do you know if the 2004 letter was copied to  
18 the federal representative of the compact commission?

19 A. What 2004 letter?

20 Q. The letter to Mr. Tyrrell requesting water  
21 from Montana.

22 A. Was he CC'd? I can't recall.

23 Q. We can check.

24 Different question. Mr. Kaste asked you  
25 about whether you had a fuzzy memory about dates; do

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1 you recall that?

2 A. Yes.

3 Q. And are you fuzzy on whether or not you made  
4 calls during the years?

5 A. No.

6 Q. And did you?

7 A. Yes. Well, not the word call.

8 Q. Did you make requests for water?

9 A. Yes.

10 Q. Did you inform Wyoming that Montana was short  
11 of water?

12 A. Yes.

13 Q. Did you request them to shut down post-1950  
14 uses?

15 A. I challenged their post-1950 uses, yes.

16 Q. You were asked about the methodology of -- by  
17 Mr. Kaste, that Montana developed in 1985. Would that  
18 methodology have protected Montana's pre-1950 rights?

19 A. Yes.

20 Q. Did you communicate that fact to Wyoming?

21 A. Yes.

22 Q. Do you have Exhibit W64 before you still?

23 And while you're looking, if you also come across W434  
24 [sic], which is the reconnaissance study, if you could  
25 pull that out as well. So you're looking for W64 and

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1 M434.

2 SPECIAL MASTER: And W64 is the May letter  
3 from Jack Stults to Mr. Tyrrell.

4 MR. WECHSLER: Thank you.

5 THE WITNESS: I can see it up here.

6 BY MR. WECHSLER:

7 Q. I believe the language that Mr. Kaste pointed  
8 out you to says, "Further, before you can divide the  
9 post-1950 water, you need a handle on pre-1950 water  
10 and that has never been done."

11 My question to you is: Does that also apply  
12 to your knowledge of Wyoming pre-1950 water?

13 A. That is correct.

14 Q. And that also applied in 2001?

15 A. Yes.

16 Q. And so looking at the reconnaissance study,  
17 then, it was October of 2002. Were you -- was Wyoming,  
18 during this period, attempting to understand Wyoming's  
19 post-1950 and pre-1950 uses?

20 A. That is correct.

21 Q. Mr. Kaste asked you about a conversation you  
22 had with Mr. Hayes. Was there only one time or was  
23 there more than one time that Mr. Hayes --

24 A. Art Hayes?

25 Q. Art Hayes, yes.

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1 A. Many times.

2 Q. Many times? During what period?

3 A. With Art Hayes, Mark Fix, Roger Muggli, yes.

4 SPECIAL MASTER: So can I just ask, by the  
5 way, you're beginning to answer really quickly. So as  
6 a result of that, I'm just looking at the transcript,  
7 there's not always a question before there's an answer.  
8 So if you can just wait for Mr. Wechsler to finish his  
9 question.

10 THE WITNESS: I apologize.

11 SPECIAL MASTER: No problem.

12 BY MR. WECHSLER:

13 Q. My question is: You were talking about  
14 conversations, as I understood it, with Mr. Muggli,  
15 Mr. Fix, and Mr. Hayes. Did those conversations take  
16 place between the years 2000 and 2003?

17 A. Yes.

18 Q. Were there multiple conversations with those  
19 individuals?

20 A. Yes.

21 Q. Were some of those conversation in person?

22 A. Yes.

23 Q. Were some by phone?

24 A. Yes.

25 Q. You mentioned that many of your

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1 communications were at technical meetings or meetings  
2 of the Commission. My understanding is there were  
3 technical meetings throughout this period; is that  
4 right?

5 A. Yes.

6 Q. And when you're planning those technical  
7 meetings or you're involved in one of the technical  
8 committees, was it also necessary to be communicating  
9 with Wyoming officials on a regular basis?

10 A. Yes. As far as setting agendas, figuring out  
11 what we're going to do, setting up the location, yes.

12 Q. Did you talk to Wyoming about Montana's water  
13 needs during those discussions?

14 A. Yes.

15 Q. You talked with both the Special Master and  
16 Mr. Kaste about Wyoming's desire to go back to the  
17 original allocation, I think you said, or what was in  
18 the compact; do you remember that discussion?

19 A. Yes.

20 Q. By that, are you talking about Article 5B and  
21 C?

22 A. Lou Allen was more interested in Article 5B  
23 and C, is my understanding thinking back. All I  
24 remember -- I mean, I have a clear perception in my  
25 mind that we were having a very difficult time moving

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1 forward at all with Lou Allen.

2 Q. Do you know if Mr. Allen's methodology or  
3 Wyoming's desired methodology, would it have protected  
4 Montana's pre-1950 rights against post-1950 use in  
5 Wyoming?

6 A. I think -- I have a hard time recalling Lou  
7 Allen's methodology because we did not take it very  
8 seriously. Because somehow we felt it did not work.  
9 And I believe, but I am not sure, that it did not  
10 include the protection of pre-'50 rights in Montana.

11 Q. Last, I promised I would read you a portion  
12 of your deposition that had to do with the irrigation  
13 season; do you have that before you?

14 A. My deposition?

15 Q. Do you have that?

16 A. The deposition, yes.

17 Q. Can you look, please, with me starting at  
18 page 225? Do you have that page?

19 A. Yes.

20 Q. I'll read it, and then I'll get you to  
21 confirm that I read it correctly. So this is actually  
22 an examination by Ms. Anders. Do you understand that  
23 to be Ms. Jennifer Anders, formerly with the Montana  
24 Attorney General's Office?

25 A. That's correct.



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1 Q. "Question: Rich, in your direct testimony  
2 this morning, there was some discussion of some verbal  
3 calls that were made between the years of 1981 and  
4 2008; is that correct?

5 "Answer. Yes.

6 "Question: Verbal calls, okay. And then in  
7 response to a question from Mr. Michael, you indicated  
8 that there was -- there were no calls made during the  
9 irrigation seasons. Is that a fact that you know  
10 about?

11 "Answer: No. I think there were probably  
12 calls made during the irrigation season. Verbal calls  
13 and discussions at meetings that we had with Wyoming  
14 during those times is what I think, because I'm not a  
15 shy person, and if we were suffering a severe drought  
16 and we are in a meeting with Wyoming, I would probably  
17 be pushing for a call verbally.

18 "Question: And so certainly the opportunity  
19 for that exchange was there for you to make it known to  
20 Wyoming that Montana was not receiving water or had  
21 problems in any given year?"

22 There's an objection here from Mr. Michael:  
23 "Objection, leading. You can answer."

24 "Answer: I heard enough from the Powder  
25 River water users the Tongue River water users all the

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1 time how severe the drought was for them. So, yes,  
2 when I met with them, I always strongly indicated that  
3 we needed more water, we needed to protect our pre-'50  
4 rights."

5 Ms. Anders then says, "Very good. That's all  
6 the questions I have.

7 Mr. Moy, sitting here today, do you believe  
8 that you made calls to Wyoming during the irrigation  
9 season?

10 A. Yes.

11 Q. And I said this would be the last question.  
12 I actually did have one more issue that I wanted to ask  
13 about. Do you still have Exhibit M5 before you?

14 A. Yes.

15 Q. If you'll turn to page 26, that was the Table  
16 1 with the state line flow.

17 A. I have it.

18 Q. I believe Mr. Kaste had you look at water  
19 year 1988; right?

20 A. That's correct.

21 Q. And he pointed out May and June had 95,000  
22 and 43,000 respectively acre-feet.

23 What were the flows in July, August, and  
24 September?

25 A. July, August, and September were 6900 in

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1 July, 3500 in August, 3600 in September acre-feet.

2 Q. Do you consider those to be low flows?

3 A. Those are low flows.

4 Q. Also, looking back to the winter months, the  
5 period that during which the Tongue River Reservoir  
6 would be filling, do you consider those to be low  
7 flows?

8 A. Yes, I see them.

9 Q. Do you consider them to be low flows?

10 A. 6400 in December. The lowest flow on record  
11 for that month is 6200. 6000 in January. 7900 in  
12 February. Yes, those are very low flows, considering  
13 that the maximum for those months, for example, in  
14 December is 16,600. And the flows were 6000.

15 Q. And that --

16 A. And in January, it was 20,000 is the average.  
17 And the flow was 6000.

18 Q. So you're reading at the bottom of the chart  
19 there where --

20 A. That is correct.

21 Q. -- comparing the average?

22 A. Comparing the average to what the actual flow  
23 was. So it was a very low flow.

24 Q. I believe at one point when you were speaking  
25 with Mr. Kaste, you talked about the reservoir

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1 enlargement. And you referred on that enlargement  
2 taking place during the 2000s. Do you happen to  
3 remember that?

4 A. That is correct. And it actually occurred --  
5 the actual enlargement occurred in the 1990s. But the  
6 reservoir was held a little bit low because of the  
7 damage earlier.

8 Q. And so that discussion that you were having  
9 with Mr. Kaste about the enlargement had to do with the  
10 1990s and not the 2000s?

11 A. That's correct.

12 MR. WECHSLER: No further questions.

13 SPECIAL MASTER: Okay. Thank you.

14 And thank you, Mr. Moy. I know you've been  
15 here several days and are probably anxious get back to  
16 Washington, D.C.

17 THE WITNESS: No, but thank you.

18 SPECIAL MASTER: I was going to say earlier  
19 you're one of the few people who've actually been  
20 confirmed by the senate.

21 THE WITNESS: First Montanan.

22 SPECIAL MASTER: Really?

23 THE WITNESS: Yeah. First Montanan ever to  
24 be on the International Joint Commission. And we're  
25 the only state that shares boundary with three Canadian

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1 provinces of Alberta, Saskatchewan, and British  
2 Columbia.

3 SPECIAL MASTER: Good luck on your work  
4 there. Actually, I've given tours in the Great Lakes  
5 region both in the last two summers and spent a lot of  
6 time talking about the work of the Commission in that  
7 area. So you're doing a great job.

8 THE WITNESS: Very good. Thank you.

9 SPECIAL MASTER: You're welcome.

10 Mr. Draper, would this be a good time to take  
11 about a five-minute break, I'm thinking. And that way  
12 people can get sorted in terms of the various exhibits  
13 and we can clean up the witness box.

14 MR. DRAPER: That would be fine, Your Honor.

15 SPECIAL MASTER: Okay. Sounds good.

16 (Recess taken 2:09 to 2:16  
17 p.m., November 1, 2013).

18 SPECIAL MASTER: So, Mr. Draper.

19 MR. DRAPER: Thank you, Your Honor. We'd  
20 call as the next witness Mr. John Engels to the stand.

21 (John Engels sworn.)

22 THE CLERK: Have a seat, please. State your  
23 name and spell it once you're seated.

24 THE WITNESS: My name is John Engels, J-o-h-n  
25 E-n-g-e-l-s.

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1           SPECIAL MASTER: So let me just welcome you  
2 this afternoon and apologize to you and all other  
3 witnesses who have had to wait listening to other  
4 witnesses. It's probably even worse than at a doctor's  
5 office, except you don't get magazines to read here.

6           THE WITNESS: Actually it was kind of  
7 interesting.

8           SPECIAL MASTER: Good. That's what I wanted  
9 to hear.

10          MR. DRAPER: Welcome, Mr. Engels. I'd like  
11 to ask just a few background questions. And I might  
12 explain to the Special Master that Mr. Engels is  
13 appearing at our request to describe the operations of  
14 the Interstate Ditch.

15          SPECIAL MASTER: Thank you.

16                                 JOHN ENGELS,  
17 having been first duly sworn, testified as follows:

18                                 DIRECT EXAMINATION

19 BY MR. DRAPER:

20           Q. Mr. Engels, where do you live?

21           A. Sheridan, Wyoming.

22           Q. And where do you work?

23           A. Well, I'm retired basically, but I have a  
24 summer job as a ditch rider on the Interstate Ditch.

25           Q. Now, ditch rider is -- I think what we call

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1 in New Mexico mayordomo, a respected member of the  
2 community who makes sure that water's in the ditch. So  
3 we're very pleased to have you here.

4 How long have you held that position of ditch  
5 rider?

6 A. I started in May of 2009. So I guess this  
7 would be my fifth year.

8 Q. Do you have a college degree?

9 A. No. I graduated from the New York State  
10 Ranger School, which is part of Syracuse University  
11 College of Forestry. But at that time they did not  
12 give a degree. But later on they did.

13 Q. So you graduated from that college program?

14 A. Yes.

15 Q. Good. Okay. What kind of work have you done  
16 since you graduated from college?

17 A. Land surveyor for a while. And then I spent  
18 33 years with the Pittsburg & Midway Coal Mining  
19 Company as a landman.

20 Q. Did that include some time in New Mexico?

21 A. Yes.

22 Q. I'd like to ask you a few questions about the  
23 Interstate Ditch. Do you know if the ditch is governed  
24 by a board?

25 A. I don't know if you call it a board. It's

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1 people that use the water have a annual meeting. And  
2 whether they call themselves a board or not, I don't  
3 know.

4 Q. Okay. And so the owners of the right to  
5 irrigate the lands under the ditch, they meet once a  
6 year?

7 A. At least once a year, yes.

8 Q. Do you know how many members of that group  
9 there are?

10 A. Well, there's -- let's see. I think there's  
11 four now.

12 Q. As I recall from your deposition, you said  
13 six at that time?

14 A. Well, there was two coal companies that were  
15 involved originally. And then they were bought out by  
16 one coal company. So the two became one. And let's  
17 see, the Ouellettes, Tana, her father, and Mike Helvey,  
18 and the coal company. Is that five?

19 Q. I think that's five.

20 And do you attend the annual meeting?

21 A. Yes.

22 Q. Do you make a report there?

23 A. I don't make much of a report. Usually I do  
24 draw up a little chart showing the flows that I've  
25 measured in the Parshall flume for the year and give



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1 that to them.

2 Q. And do you keep records of what you do during  
3 the year?

4 A. Yes.

5 Q. Do you have a diary that you keep that in,  
6 that information?

7 A. Yes, it's right here.

8 Q. Okay. Would you describe briefly your duties  
9 as ditch rider, if you please?

10 A. Well, I operate the headgates out of the  
11 Tongue River so that we have our appropriate flow down  
12 the ditch. I clean out the siphons. There's three  
13 siphons that get clogged up and need to be cleaned out  
14 on a pretty much an every-other-day basis and look for  
15 any problems with the ditch, such as leaks or things  
16 getting ready to fall apart that we need look at  
17 fixing.

18 Q. And are your activities confined to the  
19 irrigation season?

20 A. Yeah. From May until usually October.

21 Q. What do you do at the beginning of the  
22 irrigation season?

23 A. Well, the first thing we do is have a ditch  
24 cleaning day where we all get together and walk up the  
25 ditch and throw all the limbs and junk and trash that

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1 have fallen in it over the winter. And once we get  
2 that cleaned up, I start to open the headgates. I  
3 usually start kind of slow and get the ditch wetted  
4 down. And I then open it up to our maximum flow.

5 Q. I'd like to show you a collection of pictures  
6 that we've identified for the record as Montana  
7 Demonstrative Exhibit 2.

8 MR. DRAPER: Your Honor, I'd like your  
9 permission to hand the witness a copy.

10 SPECIAL MASTER: You certainly may. And I'll  
11 do the same thing that I did with Mr. Wechsler. You're  
12 free to approach the witness with any exhibit without  
13 asking first.

14 MR. DRAPER: Thank you.

15 SPECIAL MASTER: You're welcome.

16 BY MR. DRAPER:

17 Q. Mr. Engels, these pictures are labeled  
18 typically in the lower right-hand corner with a No. 2  
19 dash a letter. I wonder if you could turn to the page  
20 that is labeled 2-R. So it's more or less halfway  
21 through.

22 A. I found it.

23 Q. It also has a small number at the bottom,  
24 MT-21192. Does that show the headgate of the  
25 Interstate Ditch?

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1 A. Yes.

2 Q. Would you describe what we're looking at  
3 there in a little bit more detail?

4 A. Well, as you can see, there's basically two  
5 headgates in the same structure. And this is right at  
6 the dam, which is, in this picture, would be off to the  
7 right. Looks like I have one headgate completely  
8 closed, and the other one maybe half open. And it's  
9 looking down the ditch.

10 Q. So the water is flowing away from us beyond  
11 the headgate there?

12 A. Yes. Also under -- you can't really see it,  
13 where that looks like a two by ten and a two by six is  
14 laying across the top there. There's a waste water  
15 area right there underneath that where any water not  
16 going through the headgate goes back into the river.

17 Q. I see. Let me ask you to turn to the next  
18 page, the next picture labeled 2-S. What is shown in  
19 that picture?

20 A. That's a diversion dam right there by the  
21 headgate and -- on the Tongue River. And you can see  
22 we probably just put the boards up. As you can see  
23 there's boards there held by pipes. Also there's two  
24 cutouts in that dam where water is always flowing  
25 through there. And that's about it.

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1 Q. And the Tongue River in this stretch is a  
2 perennial stream that flows all the time; is that  
3 right?

4 A. Yes.

5 Q. Did you say yes?

6 A. Well, it's always been flowing since I've  
7 been there.

8 Q. All right. And the purpose of the boards in  
9 the dam is what?

10 A. Oh, about -- usually about the middle of  
11 July, the water gets low enough that I can't get the  
12 allotted amount of water down the ditch. And so we put  
13 the boards up there to raise the water levels so I get  
14 a little more head, which -- so I can get enough water  
15 down the ditch that we're allocated.

16 Q. If you turn back towards the front two pages,  
17 you get to the picture that's labeled 2-Q.

18 A. Yes.

19 Q. What does that picture show?

20 A. That's looking at the dam from the downstream  
21 side. You can see the boards up there and the two  
22 cutouts in the dam where the water is coming through.

23 Q. So there's some leakage in the diversion  
24 structure there?

25 A. Yes.

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1 Q. And that's the way it normally is?

2 A. The way it was designed, yeah. You can't --  
3 well, I guess you could put some boards in there, but  
4 we never do.

5 Q. All right. Now, what happens to the water  
6 when it flows down the ditch? Do you measure it, for  
7 instance?

8 A. Yes. About 3-quarters of a mile down from  
9 the headgates there's a Parshall flume that was, I  
10 believe, put in in 2007 or 2008. And there's a  
11 measuring device on that flume. And that's where I  
12 determine if we have the right amount of water in the  
13 ditch.

14 Q. If you'd turn one more page to the -- towards  
15 the front picture 2-P, does that show the flume you're  
16 referring to?

17 A. Yes.

18 Q. And, Mr. Engels, again, how do you use this  
19 flume?

20 A. It's a measuring device. And the Interstate  
21 Ditch is allotted, on a scale on the side of the ditch,  
22 .92 feet of water. And so I look at that. And if we  
23 have .92 feet, that's the max that we're allowed to  
24 have. If it's more than that, well, then I go up and  
25 turn the headgate down so that it gets back down to the

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1 correct amount.

2           If we don't have, that I open the headgate  
3 until we get -- try to stay around the .92 mark.

4           Q.    And you try to stay around the .29 mark from  
5 as soon as you can make that happen at the beginning of  
6 the irrigation all the way through the irrigation  
7 season?

8           A.    Yes.   And in the spring we can have more  
9 water than that with the runoff.   And it might run a  
10 little bit more than .92.   But, like I said, I think we  
11 can have what they call double water.   But the ditch  
12 cannot hold double water.   It would be running out all  
13 over the place.

14                    So if I get close to, say, 1.1 or 1.2 that's  
15 about as much water you can put down the ditch without  
16 it overflowing.   But our normal allotment is .92, which  
17 I believe is 16.84 cubic feet per second.

18           Q.    Did someone in the state engineer's office  
19 tell you could you take double water in the spring?

20           A.    Yes.

21           Q.    And you can't actually take double your  
22 water --

23           A.    No.

24           Q.    -- but you can take more up to the capacity  
25 of the ditch?

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1           A.    Yeah.  It -- and in the springtime, it's  
2 usually pretty wet, and we don't need it anyways.  But  
3 I might run it a little bit above .92.

4           Q.    Now, if I understand correctly, you don't  
5 regulate who takes -- which of the water users takes  
6 how much water from the ditch; right?

7           A.    No, I don't.

8           Q.    You don't get involved in that at all?

9           A.    That's not my job.

10          Q.    And as I understand it, maybe once a year you  
11 see somebody from the state engineer's office?

12          A.    Yeah, I see Pat Boyd out there wandering  
13 around every now and then.

14          Q.    That might be once a year, or some years you  
15 don't see him?

16          A.    Well, I seen him twice this year.  I think  
17 last year I seen him once.

18          Q.    One of those might have been when we were  
19 there with him on the basin tour in July.

20          A.    Yeah.  That was one time.  And then there was  
21 a time later than that.

22          Q.    In fact -- let me ask you to turn towards the  
23 front of the pictures to the one labeled 2-0.  I  
24 believe that's a picture we took of you -- or someone  
25 in our group took of you at the time of your visit.

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1 Does that look like you?

2 A. That's definitely my hat.

3 Q. Good. Well, that's one of the main  
4 identifying features. Are you standing there near the  
5 Parshall flume in the ditch?

6 A. Yes, I am. And it looks like I've got my  
7 field book there and I'm writing down what I'm reading  
8 on the flume.

9 Q. As I understand it, you don't ever have  
10 someone, Mr. Boyd or anyone else from the state  
11 engineer's office coming down to regulate your ditch to  
12 less than the .92?

13 A. To regulate it less than .92?

14 Q. Nobody comes and tells you you can't take  
15 .92?

16 A. Not yet nobody has told me that.

17 Q. Okay. And in your experience, does the ditch  
18 operate every year?

19 A. Yes, I believe so, since I've been there.

20 Q. Just as a matter of interest, what are the  
21 crops grown, if you know, under your ditch?

22 A. Oh, it's mostly alfalfa and hay. And the  
23 Larsons, which lease the coal property, they grow some  
24 barley and some oats.

25 Q. There's a section of the ditch that



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1 actually goes across the state line into Montana; is  
2 that right?

3 A. Yes.

4 Q. And as I understand it, you have boards there  
5 that can turn the water back to the stream when those  
6 lower users are not taking water?

7 A. That's true. There's a division box just  
8 before the Montana line.

9 Q. What are the irrigation methods? Gravity  
10 furrow irrigation, sprinklers, side roll, center  
11 pivots? What kind of irrigation do you see there?

12 A. Well, there's four center pivots and there's  
13 side rolls. And there is just some flood irrigation.  
14 The flood irrigation is mostly where there's pastures  
15 and stuff. And most of the hay and alfalfa and grain  
16 are under side rolls or center pivots.

17 MR. DRAPER: Great. That's all my questions  
18 at this time.

19 SPECIAL MASTER: Okay. Thank you,  
20 Mr. Draper.

21 Mr. Kaste, it's great to see you again.

22 CROSS-EXAMINATION

23 BY MR. BROWN:

24 Q. Hello, Mr. Engels. We're going to look at  
25 Exhibit J71, just because I get lost. And when we look

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1 at this map, when you're pointing at it, say north and  
2 south not up and down. Okay?

3 A. Okay.

4 Q. This is from yesterday. Mr. Draper actually  
5 asked you most of the questions that I had. So I  
6 really have very little for you. But what I want to  
7 do, if you'll look at that screen that's right next to  
8 you, Mr. Engels. You'll see that I put a map up there.  
9 And what it is is actually an aerial photograph.

10 And do you recognize, generally, what's  
11 depicted there in that aerial photograph?

12 A. Yes.

13 Q. And you see there's a label that says  
14 "Interstate Ditch"; do you see that?

15 A. Yes.

16 Q. Does that look like the accurate location for  
17 the headgate of the Interstate Ditch? Just  
18 approximately.

19 A. Yeah, that -- right there where you have the  
20 little dot, sure.

21 Q. What I want you to do is, with your finger  
22 just kind of draw along the course of the Interstate  
23 Ditch. It doesn't have to be perfect. Just -- I just  
24 want to get a general sense for the Special Master of  
25 how that ditch runs, where it goes. If you can just

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1 enlarge it a little bit maybe that will help.

2 A. This is the state line right here.

3 Q. Yes, sir.

4 A. Oh, wow.

5 Q. And so if you start at the headgate of the  
6 Interstate Ditch, you can use your finger and actually  
7 draw a line on that screen following the course of the  
8 Interstate Ditch.

9 A. Let's see, I'm trying to find highway here.

10 Q. The red line is the road.

11 A. The red is the highway?

12 Q. Yes, sir. And do see there's a label for the  
13 headgate of the Interstate Ditch? Does that look like  
14 it's about in the right spot?

15 A. The little Interstate Ditch label?

16 Q. Yes, sir.

17 A. Yeah, that's on the ditch. And the big,  
18 green line here is the river. Okay. The dam is  
19 probably up here someplace. Right there.

20 Q. Okay. And it doesn't have to be exact. I  
21 just want you to draw the course of the ditch as it  
22 goes towards Montana, just generally.

23 A. Isn't that beautiful.

24 Q. That's perfect.

25 SPECIAL MASTER: So can I just ask, I mean --

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1 I love maps. So it looks like the ditch sort of moves  
2 along basically sort of parallel to the river but on  
3 the west side.

4 THE WITNESS: On the west side, yes.

5 SPECIAL MASTER: Okay.

6 BY MR. BROWN:

7 Q. And it appears through your drawing it  
8 doesn't get into Montana very far before it terminates?

9 A. Oh, I'd say about a mile if you're following  
10 the course of the ditch which wanders a little bit.

11 Q. Okay. Could you just identify really  
12 quickly, just draw you a line that follows the course  
13 of Ash Creek for me, just so we know where Ash Creek  
14 is.

15 A. Probably right here.

16 Q. How about Young's Creek?

17 A. This is probably Young's Creek right there.

18 Q. With regard to Ash Creek and Young's Creek,  
19 they converge with the path of the Interstate Ditch, do  
20 they not?

21 A. Yes, they cross it.

22 Q. Okay. And so do they feed any water into the  
23 Interstate Ditch?

24 A. No. Ash Creek, there's a siphon under Ash  
25 Creek. And on Young's Creek we have a flume going over

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1 Young's Creek.

2 Q. Okay. When you were talking with Mr. Draper,  
3 you said that once you get your spring cleaning done,  
4 you like to bring the ditch up to the amount of the  
5 allotment, .92 on the flume; right?

6 A. Right.

7 Q. And that, your understanding is, is 16.84  
8 CFS?

9 A. That's correct.

10 Q. Okay. And then you try to keep it at that  
11 level; is that right?

12 A. Yes.

13 Q. Does it always stay at that level?

14 A. No.

15 Q. Why not?

16 A. Well, the river goes down.

17 Q. Okay. And so what's that do for you?

18 A. Well, the water in the ditch goes down. And  
19 even though put in the boards across to try to raise  
20 the water level a little bit, usually in August, I may  
21 be down to 7, 8/10 instead of .92.

22 Q. So even with the boards across the river like  
23 we saw in the photos, you're not able to get the full  
24 16.84 CFS?

25 A. Not in the five years that I've been there.

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1 Q. Okay. And at that time during the year that  
2 you're not able to get your full appropriation, do you  
3 make a call?

4 A. I've never done that, no.

5 Q. Let's go back. I think you described for  
6 Mr. Draper a diversion box near the Montana line?

7 A. Yes.

8 Q. Could you just mark it on there for us, I  
9 suppose, somewhere around the state line?

10 A. Oh, about right there. Right there.

11 Q. And during the time of the irrigation season  
12 where you are able to take the full appropriation, do  
13 the water users always use that full amount?

14 A. No.

15 Q. What happens to the water if they don't use  
16 the full amount?

17 A. Goes back in the river.

18 Q. Where does it go back in the river?

19 A. Right here at that division box. You can put  
20 boards in there to either make it go on into Montana,  
21 or you can put boards on the Montana side and make it  
22 go back into the river right there. The only time  
23 that -- it's usually going back to the river unless the  
24 guys at Montana want to irrigate. Because if they're  
25 not wanting down there, that's where they're going to

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1 have to shut it off.

2 Q. Okay. Do the Montana irrigators actually  
3 control the boards in that box?

4 A. Yeah, they come up and switch them when they  
5 need to.

6 Q. And they don't need the water all the time?

7 A. No.

8 Q. Do you have occasion to take any measurements  
9 in that diversion box to figure out how much is going  
10 back to the river?

11 A. Yeah, I did -- I started doing that this  
12 year. And I've seen as much as 6 cubic feet per second  
13 going back into the river when Montana was shut off.  
14 And it was probably at a point when everybody had hay  
15 down and they weren't running any of their center  
16 pistols or side rolls.

17 Q. Mr. Draper had asked you a couple questions  
18 with regard to double water. And I think you had  
19 explained to him that you couldn't take double water  
20 because the ditch wouldn't hold it?

21 A. Right.

22 Q. And I think you said that you couldn't -- you  
23 don't think the ditch could take more than about 1.2 on  
24 the measurement on the Parshall flume; is that right?

25 A. That's right.

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1 Q. How do you know that?

2 A. Well, because it's been up that high when  
3 we've had storms. And just in September we got -- we  
4 had a big storm on a Saturday night. And Tana, who  
5 lives down there, called me and said there's water  
6 going all over the place and I better get out there and  
7 shut the headgate down.

8 Q. Okay. You had a chance to check the flume at  
9 that time?

10 A. Yeah. At that time it was at 1.3.

11 Q. Okay.

12 A. And water was running out of the ditch. It  
13 was up under her bridge where her pumps are. It was  
14 flooded out down there where her pumps were.

15 Q. And do you know what the CFS is in the ditch  
16 when the Parshall flume is reading 1.2? Do you know  
17 off the top of your head?

18 A. Off the top of my head?

19 Q. Yes, sir.

20 A. No, but I could look.

21 Q. Would it refresh your recollection to look at  
22 your book?

23 A. Yes.

24 Q. Okay. Go ahead.

25 A. 1.2 would equal 25.34 cubic feet per second.



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1 Q. Okay. And so at least with your experiences  
2 with the ditch, that's the most it could carry?

3 A. Yes. With the condition of the ditch right  
4 now, which I think it's been in that condition for a  
5 while. If they had the money and they cleaned the  
6 ditch from one end to the other, it could probably take  
7 more. But I don't see that happening in the near  
8 future.

9 Q. Okay. And I guess just to clarify, you  
10 weren't the ditch rider in 2004 or 2006, were you?

11 A. No.

12 Q. And you don't have any knowledge of how the  
13 ditch was run then, do you?

14 A. I wasn't even living in Wyoming then.

15 Q. Okay. Thank you.

16 SPECIAL MASTER: I have no questions. Maybe  
17 I should.

18 REDIRECT EXAMINATION

19 BY MR. DRAPER:

20 Q. I just have a few follow-up questions,  
21 Mr. Engels. The records you have in your book go back  
22 to the time that you started; is that right?

23 A. Yes.

24 Q. Which was in what year?

25 A. May of 2009.

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1 Q. Are you aware of any records before that  
2 time?

3 A. Not that I know of, no.

4 Q. And the Parshall flume, as you mentioned, had  
5 that been recently put in when you started?

6 A. Yes. I believe it was put in either 2007 or  
7 2008.

8 Q. And was that the first measuring device they  
9 had?

10 A. As far as I know, yes.

11 Q. You mentioned also that the flow in the ditch  
12 decreases later in the season?

13 A. Yes.

14 Q. And the reason for that is simply that the  
15 flow in the river decreases; isn't that right?

16 A. Yeah, it decreases, and we just can't get  
17 enough head to push enough water down the ditch.

18 Q. But if you -- as much water as you can get,  
19 you do take?

20 A. Yeah. At that point in time, I have both  
21 headgates wide open. And I can maybe get .7, .8 on my  
22 gauge.

23 Q. So you're taking everything you can take?

24 A. Yes.

25 MR. DRAPER: No further questions. Thank you

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1 very much, Mr. Engels.

2 SPECIAL MASTER: So, Mr. Engels, you are now  
3 excused.

4 THE WITNESS: Thank you.

5 SPECIAL MASTER: You're welcome. Thank you  
6 very much for coming in and testifying.

7 THE WITNESS: It's been an experience.

8 SPECIAL MASTER: Mr. Draper.

9 MR. DRAPER: Your Honor, it's now ten minutes  
10 of 3:00. We've come to the point where if we had two  
11 or more hours left we would offer to put on another  
12 witness. Our next witness is Mike Roberts. He's come  
13 down to provide testimony. My recommendation is that  
14 at this point we've gotten within ten minutes of our  
15 appointed time and that we bring him back at a later  
16 time when we can fit him in the schedule.

17 SPECIAL MASTER: I wonder whether there's any  
18 way of at least getting sort of the introductory  
19 comments in.

20 MR. DRAPER: We can do whatever your desire  
21 is. We would hope to make the airplane after we get  
22 things cleaned up, though.

23 SPECIAL MASTER: I'm on the same airplane.  
24 I'm pretty sure you'll be able to make it. And it will  
25 only save us ten minutes, but that's ten more minutes

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1 that we won't have next week. And I understand the  
2 concern about sort of getting into the substance and  
3 then stopping because we might not remember where that  
4 is. But, again, if there are just some preliminary  
5 introduction as to background and the like, I think we  
6 could probably usefully do that in the next ten  
7 minutes.

8 MR. DRAPER: Very good, Your Honor. We  
9 would, therefore, call Mr. Mike Roberts to the stand.

10 (Mike Roberts sworn.)

11 THE CLERK: State your name and spell it,  
12 please.

13 THE WITNESS: My name is Mike Roberts,  
14 M-i-k-e R-o-b-e-r-t-s.

15 SPECIAL MASTER: Okay. Let me just say,  
16 before Mr. Wechsler comes on, thank you very much for  
17 coming on down here. I'm sorry we are not able to get  
18 you on entirely today. But hopefully ten minutes will  
19 also save you a little bit of time. Next time you'll  
20 be able to head back a little faster.

21 MR. WECHSLER: Your Honor, I was just looking  
22 to see how far I might be able to push it, and I'll do  
23 my best to get as much as we can.

24 SPECIAL MASTER: Right. But at the same  
25 time, don't feel as if you need to take five minutes of

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1 material and stretch it out ten minutes so that I feel  
2 satisfied.

3 MR. WECHSLER: Understood.

4 SPECIAL MASTER: Wherever there's a natural  
5 break before you get into substance that you think  
6 should go with everything else.

7 MR. WECHSLER: Fair enough.

8 MIKE ROBERTS,  
9 having been first duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. WECHSLER:

12 Q. And so, Mr. Roberts, by whom are you  
13 currently employed?

14 A. With Montana DNRC.

15 Q. In what capacity?

16 A. I'm a surface water hydrologist.

17 Q. What do you do as a surface water  
18 hydrologist?

19 A. We do a number of things. We work in  
20 watersheds with water users and do water availability  
21 studies with surface and groundwater. I work with  
22 irrigators on the ground with infrastructure. I do --  
23 I review new appropriation changes and permits,  
24 applications for physical availability. And I do a lot  
25 of training for water measurements, a lot of streamflow

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1 gauging. And then I also set up the water commissioner  
2 training courses for the state of Montana and gather  
3 folks for that annual training.

4 MR. WECHSLER: I'll stop there a second and  
5 mention to the Special Master that the reason we have  
6 Mr. Roberts is to talk about the water commissioner  
7 training, a little bit about the background that he --  
8 the training that he provides, what it is that the DNRC  
9 is explaining to the water commissioners that they do.

10 After the break we'll hear from the three  
11 commissioners who were actually appointed on the Tongue  
12 River in 2001, 2002, 2003, '4, and '6 I believe is when  
13 they were appointed.

14 BY MR. WECHSLER:

15 Q. I skipped to your current position. I do  
16 want to make sure that we talk about your education.  
17 So what's your educational background?

18 A. I have a bachelor's degree in geology and a  
19 master's degree in forest hydrology.

20 Q. Prior to coming to the DNRC, did you have any  
21 other positions?

22 A. I did. I worked in Helena for a consulting  
23 firm as a geologist for about ten years.

24 Q. What I'd like to do is talk a little bit  
25 about administration and distribution of water in

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1 Montana. And what I'll do is I'll stop right before we  
2 get to the part where we're talking about water  
3 commissioners. And so it's just a couple of questions.  
4 It makes sense to me to basically hold off and talk  
5 about the water commissioners and then the training all  
6 at the same time.

7 So as part of your job, is it necessary to be  
8 familiar with water administration in Montana?

9 A. Yes.

10 Q. Why?

11 A. Well, as I mentioned, we do work in basins.  
12 And we work with water users. And we try to determine  
13 water availability and how to meet all the demands of  
14 water, especially in drought years. So understanding  
15 how water rights work and how people use their water  
16 and priority dates work in a basin is very helpful to  
17 us in determining how to work with users to maybe  
18 manage that water better.

19 Also, in the context of water commissioner  
20 training course, you know, we have understand how water  
21 rights work because we are working under prior  
22 appropriations doctrine for our water commissioners.  
23 And that's obviously a big part of water rights.

24 Q. Before you get a water commissioner on a  
25 creek, how is water distributed amongst the users?

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1           A.    You mean if there's not a water commissioner  
2 assigned to a creek?

3           Q.    Yes, that's --

4           A.    Through the prior appropriations doctrine  
5 first in time, first in right.

6           Q.    And if one water user has a problem getting  
7 water, what do they do?

8           A.    Well, if they're the senior is user, then --  
9 and the junior user may be taking that water, then they  
10 can make a call on that junior for that water.

11          Q.    Now, I don't want to go into the details of a  
12 call. We heard from Mr. Davis earlier in the trial  
13 that in Montana those calls are basically on an  
14 informal communication basis; is that your  
15 understanding?

16          A.    Yes, it is.

17          Q.    And in your experience, is that an effective  
18 system?

19          A.    In my experience, in the basins that I've  
20 worked with, it works out pretty well, yes.

21                MR. WECHSLER: Your Honor, I'm happy to keep  
22 going forward. This is a point where I think it makes  
23 sense to start talking to him about the duties of water  
24 commissioners themselves and how they are appointed and  
25 what their responsibilities are.





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## REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 217, is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Laurel, Montana, this 11th day of February, 2014.



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