

No. 137, Original  
IN THE SUPREME COURT OF THE UNITED STATES  
VOLUME 15 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  
8:34, Thursday, November 14, 2013

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Proceedings recorded by machine shorthand  
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1	INDEX		
2		VOLUME	PAGE
3	Proceedings .....	15	3221
4	Certificate of the Court Reporter .....	15	3528
5			
6	INDEX TO WITNESSES		
7	FOR THE PLAINTIFF:	VOLUME	PAGE
8	MIKE ROBERTS (CONT.)		
9	Direct Examination Cont. by Mr. Wechsler ..	15	3223
	Cross-Examination by Mr. Kaste .....	15	3273
10	Examination by the Special Master .....	15	3291
	Recross-Examination by Mr. Kaste .....	15	3298
11	Redirect Examination by Mr. Wechsler .....	15	3299
12	CHARLES KEPPEL		
13	Direct Examination by Mr. Wechsler .....	15	3306
	Cross-Examination by Mr. Kaste .....	15	3403
14	Examination by the Special Master .....	15	3430
	Recross-Examination by Mr. Kaste .....	15	3434
15	Redirect Examination by Mr. Wechsler .....	15	3436
16	GREG BENZEL		
17	Direct Examination by Mr. Wechsler .....	15	3445
	Cross-Examination by Mr. Brown .....	15	3495
18	Redirect Examination by Mr. Wechsler .....	15	3510
19	CHARLES GEPHART		
20	Direct Examination by Mr. Draper .....	15	3511
21			
22			
23			
24			
25			

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## INDEX TO EXHIBITS

EXHIBIT	VOLUME	PAGE
M229A Water Commissioner Training Manual, March 2009	.....15	3248
M378A Petition and Order to Appoint Tongue River Water Commissioner, Dated July 13, 2001 (Depo Ex. 208) (MT09967-09971)	.....15	3375
M380A Order Appointing Tongue River Water Commissioners, Dated May 2, 2002	.....15	3379
M380B Order Appointing Tongue River Water Commissioners, Dated May 2, 2002	.....15	3379
M381 Reports of Pump Measurements by Kepper and Fjell (Depo Ex. 217)	...15	3381
M382 Chuck Kepper to Clerk of Court Re: Listing of Stored Water Consumption by the TRWUA (Depo Ex. 218) (MT09980-09984)	....15	3387
M385 Case Register Report (Depo Ex. 223) (MT09986-09993)	....15	3388
M386 Chuck Kepper to Clerk of Court Re: Listing of Stored Water Consumption by the TRWUA (Depo Ex. 225) (MT015294-15304)	....15	3392
M388 Do List - Handwritten Notes (Depo Ex. 227) (MT01539-15320)	.....15	3358
M389 Letter from William Musgrave to Pat Helm, with CCs, Dated July 19, 2004 (Depo Ex. 228)	...15	3394

INDEX TO EXHIBITS (Cont.)			
EXHIBIT		VOLUME	PAGE
M390	Ball Ranch Irrigation Water Use Record to Mr. Kepper/Mr. Kepper's Handwritten Notes, Dated 2004 (Depo Ex. 229) (MT015339-015576)	...15	3391
M391	Case Register Report (Depo Ex. 230) (MT09996-10005)	....15	3514
M394	Case Register Report; Petition and Order Appointing Tongue River Water Commissioners; Report to the Court (Depo Ex. 233) (MT10015-10038)	....15	3396
M395	Handwritten Notes, Dates, Flow, Out Numbers (Depo Ex. 234) (MT015338, 015326)	...15	3333
M396	Kepper Daily Notes, Dated 2006 (Depo Ex. 235) (MT015353-015393)	....15	3399
M397	Handwritten Record of Producer Calls, by Charles Gephart (Depo Ex. 236) (MT015484-015481)	....15	3522
M398	Charlie Gephart to Clerk of Court Re: Listing of Stored Water Consumption (Depo Ex. 238) (MT015552-15555, 10008)	.....15	3524
M399	Charlie Gephart to Clerk of Court Re: Stored Water Consumption (7/16/06) (Depo Ex. 239) (MT015540-15550)	.....15	3525
M448	Farm 2004 (Depo Ex. 139)	.....15	3484
M449	2006 Report to the Board by Greg Benzel	..15	3452
M451	Letter to Padlock Ranch from Peter Hager Re: Analysis with Recommendations for Fivemile Flat Area (5/22/07) (Depo Ex. 142)	.....15	3474

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX TO EXHIBITS (Cont.)

EXHIBIT		VOLUME	PAGE
W285	Water Commissioner Training Manual, Produced by Montana DNRC (Depo Ex. 305)	.....15	3246

1 THURSDAY, NOVEMBER 14, 2013, 8:34 A.M.

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

4 Mr. Draper.

5 MR. DRAPER: Good morning, Your Honor.

6 SPECIAL MASTER: Good morning.

7 MR. DRAPER: I wanted to report that I did  
8 talk with Mr. Richmond, the director of the Montana  
9 Board of Oil & Gas Conservation. And he is happy to  
10 welcome us next week in his hearing room.

11 SPECIAL MASTER: That's good. It's nice to  
12 know that we're wanted somewhere in the city of  
13 Billings.

14 So as I said, at the moment I think it's  
15 90 percent likely that we will do that. What I have  
16 told the chief deputy here is that we can shift plans  
17 and stay here even up until the very last moment on  
18 Friday before we move the boxes. And so there are  
19 always settlements. And so hopefully one of the trials  
20 will settle and we'll be able to remain here. But at  
21 the moment it looks unlikely. So I appreciate you  
22 making that phone call.

23 As I said, what we'll plan to do tomorrow is  
24 break early enough so that we can load the boxes.

25 Now, I guess one question is do people want



1 to try to move the boxes over to the hearing room  
2 tomorrow rather than having to keep them in a hotel?

3 MR. DRAPER: Well, one factor I can mention,  
4 Your Honor, they do open that building before 8:00. So  
5 he said there's usually somebody around there after  
6 7:00. So I would think after 7:30 we're likely to get  
7 in there. They are open until 5:00 on Friday. If we  
8 got -- I think if we got one person over there before  
9 5:00, then it would be fine for that person to let the  
10 rest of us in with boxes if that was the best way to do  
11 it.

12 SPECIAL MASTER: So does either side have a  
13 preference?

14 MR. KASTE: Well, if they are open before  
15 8:00 on Monday, I think the best use of our time on  
16 Friday would be to get as much testimony in as possible  
17 and use that time before trial starts on Monday to set  
18 up.

19 MR. DRAPER: That sounds fine to me, Your  
20 Honor. We do want to see if we can get that last  
21 witness for sure on Friday. That would be a nice  
22 accomplishment to do that. So I'm happy to agree to  
23 that approach.

24 SPECIAL MASTER: Okay. Let's do that. And  
25 so any other administrative issues?

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 MR. DRAPER: No. We're ready to call our  
2 next witness.

3 SPECIAL MASTER: Sounds good. Let's do it.

4 MR. DRAPER: All right. We would call to the  
5 stand Mr. Mike Roberts. The examination will be by  
6 Mr. Wechsler.

7 (Mr. Roberts sworn.)

8 THE CLERK: Have a seat, please. Please  
9 state your name and spell it for the record.

10 THE WITNESS: My name is Mike Roberts,  
11 M-i-k-e R-o-b-e-r-t-s.

12 SPECIAL MASTER: Do you have a sense of déjà  
13 vu?

14 THE WITNESS: Little bit.

15 SPECIAL MASTER: I'm sorry, again, that there  
16 was such a gap between when you started and when you  
17 had to come back. But I very much appreciate you doing  
18 that.

19 Okay. Mr. Wechsler.

20 MIKE ROBERTS (CONT.),  
21 having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. WECHSLER:

24 Q. Welcome back to the stand, Mr. Roberts.

25 You've now spelled your name twice, so I'm sure we've

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 got it.

2 We talked about your background about a week  
3 ago. We also talked a little bit about what happened  
4 in Montana prior to having the water commissioner. So  
5 I think let's just delve right into what happens with  
6 water commissioners. And I want to just point out the  
7 statutes dealing with water commissioners. We have our  
8 statute book. Do you have one before you?

9 A. Yes, I do.

10 Q. If you'd look with me, please, at page 139.  
11 Do you have that before you?

12 A. I do, yes.

13 Q. If you look at 139, and spilling over onto  
14 page 140, there is Chapter 5 entitled "Water  
15 Commissioners and Water Mediators." What is that  
16 chapter about?

17 A. 85-5 is the statutes in the Montana Code that  
18 describe the appointment of water commissioners and  
19 what water commissioners' duties and responsibilities  
20 are.

21 Q. So I'm not going to get you to read a lot of  
22 these things. I am going to get you to look at them,  
23 and maybe we'll talk about a few of these sections and  
24 what they mean and how they are used. But for  
25 reference, that's where we could look to find the

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 statutes dealing with water commissioners.

2 Is this a statute you're familiar with?

3 A. Yes.

4 Q. Why is that?

5 A. In part of my duties for the DNRC, I put  
6 together the water commissioner training courses. So I  
7 have to know the statutes and responsibilities for  
8 water commissioners.

9 Q. You mentioned the training for water  
10 commissioners. Let's take a look real quick at that  
11 statute, which I think is 85-5-111 on page 143 here.  
12 Actually, it's on -- yeah, 143. And so that's entitled  
13 "Water Commissioner and Mediator Education."

14 Are you responsible for conducting that  
15 education on behalf of the DNRC?

16 A. Yes.

17 Q. And so what is your role in terms of  
18 producing those educations?

19 A. My role is to -- we're required by the  
20 statute to put on a training annually. So we put on at  
21 least one training a year. And my role is to put  
22 together an agenda that will try to meet the needs and  
23 requirements to train water commissioners for what they  
24 ought to do as water commissioners.

25 So I put together -- I get other speakers to

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 come in and address certain issues. And I invite the  
2 speakers. I invite the water commissioners. You know,  
3 I do everything from getting coffee and doughnuts to  
4 actually teaching part of the class.

5 Q. It's been some time since we talked about  
6 your background. Can you remind us what your position  
7 at the DNRC is?

8 A. I'm a surface water hydrologist.

9 Q. How long have you been in that position?

10 A. I've been in that position for just about 15  
11 years.

12 Q. How long have you been involved in the water  
13 commissioner training?

14 A. Since 2000.

15 Q. In order to put together these trainings, is  
16 it necessary for you to understand the statutes and  
17 rules governing water commissioners?

18 A. Yes.

19 Q. Is it necessary for you to understand the job  
20 responsibilities and duties of water commissioners?

21 A. Yes.

22 Q. Do you have an opportunity to talk with water  
23 commissioners in Montana throughout the state?

24 A. Yes, I do.

25 Q. Is that on a regular basis?

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1           A.    You know, certainly at the trainings we have  
2 a lot of discussions.  And some of my other work  
3 working in basins, I'm always interacting with water  
4 commissioners.  And then occasionally we are called on  
5 to work on hearings, water right hearings.  And that  
6 usually involves a water commissioner.  And I also get  
7 phone calls from commissioners that have been through  
8 the training and have questions, you know, whether it's  
9 about a measuring device or something that I could help  
10 them out so they could do their duty.

11           Q.    Let's talk generally about the duties and  
12 responsibilities of water commissioners.  And then  
13 we'll go on and talk a little more in detail on the  
14 training that you provide.  So what are the jobs and  
15 duties of water commissioners in Montana?

16           A.    At its most basic, their job is to administer  
17 and distribute water based on the priority system on a  
18 decree or if it's stored water on contract water, to  
19 distribute that water as described through an order  
20 from a district court judge and through that decree.

21           Q.    How do they go about doing that?

22           A.    Well, they go out and -- you know, there's a  
23 whole series of things that they have to do to be  
24 appointed as a water commissioner.  But once they're a  
25 water commissioner, they're out there in the field

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 usually on a daily basis, and they're checking  
2 diversions and making sure that the priority users on a  
3 decree are getting that water first and moving down  
4 that list. And with the stored water, they have to  
5 deliver that as well, if they're a water commissioner,  
6 for stored. But they are out there every day.

7 Q. You mentioned the process for appointing  
8 them. We have talked a little bit about that with  
9 Mr. Davis. But let's make sure we cover that issue.

10 First of all, you work for the DNRC. Does  
11 the DNRC oversee the water commissioners?

12 A. No, we do not.

13 Q. What governmental body does oversee the water  
14 commissioners?

15 A. The Montana District Court.

16 Q. Looking at Section 85-5-101, which is on page  
17 140 of our book here. This is entitled "Appointment of  
18 Water Commissioners." And so using this to the extent  
19 you need to, under what circumstances does a district  
20 court appoint a water commissioner?

21 A. They will appoint a water commissioner when  
22 at least 15 percent of the owners of water rights  
23 petition the district court. And then in the state  
24 statute, it describes the water commissioner being able  
25 to be appointed for stored water. And then actually,

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 if there's less than 15 percent, it does give some  
2 flexibility to a judge to use their discretion. If  
3 there's, you know, an issue on a stream, they can still  
4 appoint a water commissioner.

5 Q. If the judge is convinced that there's a  
6 reason for a water commissioner, even though there's  
7 not 15 percent, that can still be done?

8 A. Correct.

9 Q. You mentioned storage as one of the topics  
10 for which a water commissioner can be appointed. And  
11 so looking Section 3 and 5 are those -- I should say  
12 Subsection 3 and 5, are those relevant to the  
13 appointment of a water commissioner for storage water?

14 A. Yes.

15 Q. And does that -- in your experience, does  
16 that happen in Montana?

17 A. Yes, it does.

18 Q. Can you give us a couple of examples?

19 A. I could give you a lot of examples. But I'll  
20 just say the Musselshell River, Deadman's Basin would  
21 be an example, Nevada Reservoir in the Blackfoot. Just  
22 about every basin in Montana has stored water that gets  
23 distributed by water commissioners. And the Tongue  
24 River Reservoir as well.

25 Q. So if a water commissioner is assigned for



MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 the responsibility of distributing stored water, what  
2 are the commissioner's duties?

3 A. Their duties are to insure that water gets  
4 delivered to water users.

5 Q. In accomplishing that task, making sure the  
6 stored water gets to the water users, is it also  
7 necessary to know the direct flow?

8 A. Yes, it is.

9 Q. Why is that?

10 A. Because stored water and direct flow are what  
11 I call decreed water. It's -- well, they have the same  
12 authority as water commissioners for both those. They  
13 are treated differently. Stored water is measured at  
14 the reservoir. And then it's delivered downstream. So  
15 that water is separate than what's coming into the  
16 reservoir on a continual basis, which would be the  
17 direct flow.

18 So they are treated differently in that the  
19 decreed water is based on what's passing through.  
20 Whereas, the stored water is the water that's been  
21 stored there for the spring.

22 Q. You might have in a stream both direct-flow  
23 and stored water; is that right?

24 A. Correct.

25 Q. In making sure that the stored water gets to

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 the contract holders, is it also necessary to make sure  
2 that no other water users are taking that stored water?

3 A. Yes.

4 Q. If for some reason a water commissioner runs  
5 into a problem with an uncooperative water user,  
6 someone who won't do what they are -- they are supposed  
7 to do, what option does a water commissioner have in  
8 Montana?

9 A. They have a lot of different options. If  
10 they are administering that stored water and that  
11 decreed water, they can go in there and make those  
12 adjustments if they feel that water user's taking water  
13 beyond what -- their water right or their contract, for  
14 that matter.

15 Q. By making the adjustments, you mean  
16 physically control the headgate?

17 A. Controlling the headgate. And in some cases  
18 actually locking the headgate if they've got a water  
19 user that's not participating appropriately, I guess.

20 Q. So they have the ability to lock the headgate  
21 you just mentioned?

22 A. Yes.

23 Q. What other options are available to ensure  
24 that water users are following the rules?

25 A. Well, you know, what we try to tell them in

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 the training is to, first of all, talk to the water  
2 user and try to work something out or have some sort of  
3 agreement with them that, okay, I'm trying to get  
4 stored water past your headgate; you cannot take that  
5 water.

6           There's also the ability to petition or to  
7 talk to the judge personally and say, look, I've got a  
8 problem with this water user. There's also some other  
9 authorities, statutory authorities, such as they do  
10 have arrest power, which we don't recommend that they  
11 follow through on. And we make a real point of that  
12 even though it is on the books. That statute, I think,  
13 came out in 1911. So things are a little different  
14 these days.

15           Q. If a water commissioner didn't feel like  
16 making an arrest himself, could he also go to local law  
17 enforcement?

18           A. Yes. And that's what we encourage, is that  
19 if you have a problem and some water user is being  
20 aggressive or any type of situation like that, we  
21 suggest call the sheriff.

22           Q. And I'll just point out for the record that I  
23 think the options that you're talking about are found  
24 in Section 85-5-108.

25           And I want to actually turn to the section

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 just before that one, which is 85-5-107. And this is  
2 entitled "Record of Distribution of Waters." And so  
3 once a water commissioner is appointed, is he required  
4 to keep records?

5 A. Yes.

6 Q. What kind of records?

7 A. I believe the statute actually even says to  
8 keep a daily record. So every day, typically a water  
9 commissioner will go out into the field every day, make  
10 adjustments or at least check their diversions. And  
11 then they will write down for each water user what  
12 they're taking. They'll record that in some format,  
13 and then submit that to the clerk of court. That's how  
14 they get paid, is on that distribution of water.

15 Q. Do they also have reports that they have to  
16 make to the court?

17 A. You know, it varies with the different  
18 district courts and what the clerks of courts require.  
19 But typically the report is a record of the  
20 distribution of -- to the water users.

21 Q. And I'll point you to one section of  
22 85-5-107, under Subsection 1 there, it mentions in the  
23 first phrase, it talks about the daily records. And if  
24 you continue, it then says "shall file a summary of the  
25 record with the clerk of the court monthly or

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 seasonally." Do you see that?

2 A. Yes.

3 Q. And so it could be monthly or seasonally. It  
4 sounds like you're also saying some courts require  
5 different time periods?

6 A. Yeah. Well, usually it's either that, either  
7 monthly or seasonally. It just depends on the clerk.  
8 I think for the -- in most cases they do submit them  
9 seasonally. But, again, this is how they're getting  
10 paid. So if they need money up front, they may submit  
11 them in a finer interval.

12 Q. We're on page 142 here of this statute book.  
13 If you look at the next page, 143 at Section 85-5-109,  
14 there's something entitled "Failure to Perform Duty as  
15 Contempt of Court." Do you see that?

16 A. Yes.

17 Q. Are there consequences if a water  
18 commissioner doesn't perform his duties?

19 A. Yeah. Just what it says, they could be in  
20 contempt of court and they could be removed from that  
21 position.

22 Q. Who pays for the cost and expenses of the  
23 water commissioners?

24 A. The water users.

25 Q. That's also by statute?

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 A. Correct.

2 Q. Once the water commissioner is appointed, is  
3 there a way for, say, the water users who are  
4 dissatisfied or unhappy with that water commissioner to  
5 bring problems to the attention of the court?

6 A. Yes, there is.

7 Q. Describe that.

8 A. There's a statute that provides for -- to  
9 submit a complaint to the district court, a  
10 dissatisfied water user's complaint, if they don't  
11 think the water commissioner is upholding their duties  
12 correctly.

13 Q. I think that can be found in Section  
14 85-5-301. Is that right?

15 A. Correct.

16 Q. Do you understand the term "down the ditch"?

17 A. I think I understand what you mean by that.  
18 It's not a term that I use normally, but, yes.

19 Q. What do you understand that?

20 A. I think what you are referring to -- correct  
21 me if I'm wrong -- is that the ability for maybe a  
22 water commissioner to actually distribute water not  
23 necessarily right at the source but down the ditch to  
24 the various water users that are on that ditch.

25 Q. That is what I was referring to. Typically,

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 when a water commissioner is appointed, are they  
2 appointed to go down the ditch?

3 A. In my experience, in most cases they are  
4 distributing water at the source itself, meaning the  
5 stream. But there is, you know, with irrigation  
6 districts and whatnot, they can actually apply or  
7 petition to have a water commissioner be on the ditch  
8 itself and work down that ditch and distribute water to  
9 those users.

10 Q. So if the court or water users think it's  
11 necessary, that can be done under Montana law?

12 A. Yes.

13 Q. And, finally, if you could just explain the  
14 role of water mediators and how that works in Montana.

15 A. Sure. And that's also in that statute that  
16 you mentioned earlier. Water mediators provide a  
17 function if there's a dispute between water users. You  
18 know, like I said earlier, we try to encourage the  
19 water commissioners to work things out. The judges  
20 certainly don't want to have to deal with disputes and  
21 petty disputes. So if they can appoint a mediator,  
22 somebody to come in, a third party to discuss the  
23 issues between the commissioner and the water users and  
24 work it out so they don't end up in some sort of  
25 proceedings, then everybody is better off.

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1           So there's a statute that says that there  
2 will be mediator training as well so that those people  
3 are available for that.

4           Q.    This is an issue and topic that you've been  
5 working with professionally for a number of years.  
6 Have you ever been a water commissioner?

7           A.    No.

8           Q.    When water commissioners are appointed, do  
9 you have any responsibilities over them?

10          A.    No.

11          Q.    And this case is about the Tongue River and  
12 about particular years. Do you have any particular  
13 knowledge about the day-to-day operations of the water  
14 commissioners that were on the Tongue River?

15          A.    I -- prior to what I've heard in the last few  
16 days, my knowledge was basically based on a training  
17 that we did in Miles City in 2007 where I met several  
18 of the water commissioners. And the only thing I could  
19 recall from that training was that they use an  
20 ultrasonic pipe flow meter, which sort of stood out to  
21 me because that is a fairly sophisticated instrument,  
22 highly accurate. And I thought it was really  
23 interesting that they were using that. So that's what  
24 I remember about how they administer water on the  
25 Tongue River, other than what I've heard in recent



MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 days.

2 Q. Who would be the best source of information  
3 for the day-to-day operations of the water  
4 commissioners in Montana?

5 A. Well, certainly the district courts keep a  
6 record of what they do. But if you really want to know  
7 what they're doing, I guess talk to them individually.

8 Q. And we'll get just that opportunity because  
9 they will be sitting where you are later today.

10 So let's talk about the water commissioner  
11 training which you do have a lot of information about.  
12 Do people around the state attend the water  
13 commissioner training?

14 A. Yes.

15 Q. And so I assume that they come from different  
16 rivers; is that correct?

17 A. That's correct.

18 Q. And is there sort of a one-size-fits-all  
19 approach that works for those various rivers?

20 A. Well, there is in a sense that everybody has  
21 to follow the main statutory guidelines. And certainly  
22 with water measurement, the technology behind that  
23 doesn't change. But the issues between basins are  
24 certainly different depending on where you're at in  
25 Montana.

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 Q. There might be different ways of making sure  
2 you're complying with those statutes based on the  
3 particular rivers?

4 A. I'm not sure I quite understand the question.

5 Q. Do people have to adjust their approaches to  
6 being a water commissioner based on the basin that they  
7 are assigned to?

8 A. Yeah. Again, yeah, I think all basins are  
9 different in Montana. You know, on the western side  
10 you have, you know, snowmelt dominated. In the east  
11 you may have a different type of hydrologic regime.  
12 And so, yeah, the scheduling and how people get their  
13 water does differ amongst the basins.

14 Q. Do you try and tailor your trainings to take  
15 into account those differences?

16 A. You know, when we branch out, a lot of times  
17 we'll do the trainings in Helena where I live. But we  
18 will go out to different communities in the state if  
19 there's a lot of issues, there's a lot of commissioners  
20 being appointed. And we will in that case try to  
21 tailor it to what they're doing.

22 But the general training, we just try to put  
23 all that information out there. And we always give  
24 time for specific questions. And we always tell them,  
25 Okay. We'll be here over lunch. We'll stay as late in

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 the day if you have specific questions.

2 But we have so much information to get  
3 everybody to try to get everybody's needs met, that we  
4 try to just give sort of a general approach.

5 Q. You've been doing the training since the year  
6 2000?

7 A. Correct.

8 Q. How many water commissioner trainings are  
9 done a year?

10 A. Typically one, two -- the most I've done in  
11 one year is three. So usually one or possibly two.

12 Q. Those are held throughout the state, it  
13 sounds like?

14 A. Yeah. Most of them are held, I would say, in  
15 Helena, but we probably branched out to eight or ten  
16 different towns around the state as well.

17 Q. You mentioned there was one that was held in  
18 the Tongue River Basin?

19 A. Yes.

20 Q. And that was in 2007?

21 A. 2007, in Miles City.

22 Q. Do you keep lists of the people that attend  
23 water commissioner trainings?

24 A. I do.

25 Q. Did Mr. Kepper, Mr. Fjell, or Mr. Gephart

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 ever attend a water commissioner training?

2 A. Yes.

3 Q. When?

4 A. Mr. Fjell and Mr. Kepper attended in 2002 in  
5 Harlowton. And then Mr. Gephart and Mr. Kepper also  
6 attended in 2007, the Miles City training.

7 Q. How long do water commissioner trainings  
8 last?

9 A. We do it in a day and a half, typically in a  
10 day and a half.

11 Q. Do you have staff that's assisting you?

12 A. Yes.

13 Q. And when you're planning these trainings,  
14 what's your objective?

15 A. Our objective is to make sure that these guys  
16 get all the information they need, all the resources  
17 that are out there for them to do their job, whether  
18 it's understanding the legal framework in how they  
19 work, to the direction of the district courts, to the  
20 adjudication issues, to what I call the nuts and bolts,  
21 the water measurement, what's a proper plume and how do  
22 you measure water and what are the instrumentations out  
23 there, to the help they can get from our regional  
24 offices, to basic water rights information. So trying  
25 to get them all the information they would possibly

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 need to do their duties.

2 Q. How many people typically attend a water  
3 commissioner training?

4 A. Typically 30 to 40 folks.

5 Q. You've said that you do one or two a year.  
6 So since you've been doing water commissioner training,  
7 how many people would you estimate the DNRC has  
8 trained?

9 A. I would say probably between 500 and 800.  
10 And I'd like to qualify that number, in that we do get  
11 a lot of return folks that come every year. They maybe  
12 want to know about legislative updates or whatnot. Or  
13 they just want to talk with other people. So we get a  
14 lot of return customers. And not everybody in those  
15 trainings is necessarily a water commissioner.

16 Q. Are water commissioners required to attend a  
17 DNRC training?

18 A. No.

19 Q. Why not?

20 A. It's not statutorily required.

21 Q. Are there other sources of training that  
22 water commissioners can get?

23 A. You know, I do get calls from folks that miss  
24 the training. And if I have time or if our regional  
25 office engineers have time, they will go out with a

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 person and give them one-to-one training -- one-on-one  
2 training if they have the time. But other than that, I  
3 don't know of any structured trainings.

4 Q. Is it possible for a water commissioner to go  
5 out with another water commissioner and be trained in  
6 that means?

7 A. Yeah, that happens quite a bit.

8 Q. Do you have any handouts for the water  
9 commissioners?

10 A. We do.

11 Q. And what are those?

12 A. We give them -- we're actually required to  
13 have a Water Commissioner Training Manual. That's in  
14 the statute as well. So we developed a manual years  
15 ago for them, which gives them the duties and  
16 responsibilities and provides a bunch of different  
17 information. And we give them a water rights in  
18 Montana handout. We give them a little water  
19 measurement book. It's called the "Wyoming Guide for  
20 Water Measurement." And it provides all the rating  
21 tables and charts for flumes and weirs and some of the  
22 technical specifications. We used to hand out the  
23 Bureau of Reclamation Water Measurement Manual, which  
24 is a comprehensive textbook, basically on water  
25 measurements. And then we kind of ran out of those.

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 Q. I think you've got one of those there?

2 A. I do right here, yes.

3 Q. And so those you used to be giving out, they  
4 were produced by the Bureau of Reclamation?

5 A. That's correct. The Bureau of Reclamation  
6 used to assist us in the training early on. Early  
7 2000s when I was starting out, they helped with some of  
8 the water measurement stuff. And they would always  
9 bring a couple cases of these. And these are great. I  
10 guess I'm a nerd. I actually like reading this. But  
11 it's a wealth of information. And it's sort of the  
12 bible of water measurement, as I put it.

13 Q. Let's talk about a couple of the other  
14 materials you talked about that are handouts. If we  
15 could put on the screen Exhibit M230.

16 Do you see that, Mr. Roberts?

17 A. Yes.

18 Q. Is that the document that you're talking  
19 about that's given out?

20 A. Yes. That's correct.

21 Q. Now, this version is 2012. When you were  
22 doing training starting in 2000, was it a different  
23 version of this same document?

24 A. Yes.

25 Q. And then you talked about the Water

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 Commissioner Training Manual. And there's two things I  
2 want to make sure we point out here. And the first  
3 is -- do you have before you a copy of Exhibit W285?

4 A. Do I have a copy?

5 Q. Yes. Please look in the stack there.

6 Because there were not a number of exhibits we'll be  
7 looking at, that should be relatively easy for you to  
8 find. This is the May 1998 Water Commissioner Training  
9 Manual.

10 A. Yes.

11 Q. Is this a document that you're familiar with?

12 A. Yes.

13 Q. What is it?

14 A. This is an early version of the Water  
15 Commissioner Training Manual that was -- that we handed  
16 out to water commissioners. When I started taking over  
17 the training, this was the manual that we handed out.

18 Q. Would you take a look at it and make sure  
19 that this version is relatively complete?

20 A. Yeah. It looks right to me.

21 Q. This was produced by the Montana DNRC?

22 A. Correct.

23 Q. And it's something you used in the training  
24 that you did?

25 A. Yeah. I believe we used this for the first



MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 several years that I was doing the training until we  
2 eventually upgraded it.

3 MR. WECHSLER: Your Honor, we do have  
4 Exhibit 229 in the record. But because this is an  
5 earlier version, I would move the admission of W285.

6 MR. KASTE: No objection.

7 SPECIAL MASTER: Okay. Then Exhibit W285 is  
8 admitted into evidence.

9 (Exhibit W285 admitted.)

10 BY MR. WECHSLER:

11 Q. Mr. Roberts, I'm going to get you to look at  
12 Exhibit 229, too, in part because I think it's  
13 incomplete. And it's something that I want to make  
14 sure we corrected for the record. And then I'm going  
15 to ask you to please explain what might have evolved or  
16 changed over the time.

17 So could you first look at Exhibit M229?

18 A. Yes.

19 Q. And then please turn to the table of  
20 contents. How many pages does it look like this manual  
21 has?

22 A. 85. Well, 85 to the glossary.

23 Q. The version that you have, how many pages are  
24 there?

25 A. 97.

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 Q. Are you looking at one that's entitled  
2 "Replacement"? If you could look at the one that  
3 doesn't say replacement and says M229. How many pages  
4 are in that manual?

5 A. In this -- the table of contents indicates  
6 the same 85 to the glossary. In this manual, this  
7 exhibit, there's 39 pages.

8 MR. WECHSLER: And, unfortunately, Your  
9 Honor, we provided an incomplete copy for the record.  
10 And I think I've given the Court and Wyoming a  
11 replacement M229. And at this point, I would move that  
12 the record be corrected with this replacement M229.

13 SPECIAL MASTER: So let me just suggest, only  
14 because of the fact that we're going to be providing  
15 all of these exhibits in electronic form, to make sure  
16 there's no confusion down the line, we actually  
17 renumber this and simply refer to this exhibit instead  
18 of 229. So what I would say is that we make this 229A.  
19 Why don't we do that.

20 And then, I think -- actually, I've never  
21 done this before. But what I would suggest is we  
22 actually -- we will not have 229 marked as an exhibit,  
23 if Wyoming doesn't care, and instead, we will only have  
24 229A admitted into evidence.

25 MR. KASTE: That makes sense. I have no

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 objection.

2 SPECIAL MASTER: Okay. Great.

3 Off the record.

4 (Discussion held off the  
5 record.)

6 (Exhibit M229A admitted.)

7 BY MR. WECHSLER:

8 Q. Mr. Roberts, we have W285, which is the 1998  
9 version of the Water Commissioner Training Manual. And  
10 then we have Exhibit M229A, which is the complete  
11 version of the 2009 manual.

12 Were you involved in the changes that  
13 occurred?

14 A. Yes.

15 Q. Between the manuals? The versions the  
16 manual?

17 A. Yes.

18 Q. So could you just explain generally what  
19 evolution took place between 1998 and 2009 and why?

20 A. Well, after the first few years of doing the  
21 training, I realized that we wanted to make it a little  
22 more user friendly. A lot of this material is the  
23 same. The statutes do change, though, with each  
24 legislative session. Sometimes there's some new  
25 statutory requirements, so we wanted to make sure that

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 we covered those for each new training. So any time  
2 there was a change in the statute, we would submit an  
3 update once we started doing those updates.

4 I also felt compelled to put a glossary in  
5 here because we use a lot of terms. And I thought it  
6 would be easy for people to look up quickly either  
7 during the training or when we are out in the field.

8 We also put in some water distribution  
9 problems that we actually do in class, because I think  
10 it explains or shows graphically sort of how people  
11 distribute water on priority. And I think we also  
12 added a section in here -- I believe it was in this  
13 version -- where we talk specifically about some of the  
14 resources that are available, the contacts, Web sites,  
15 things like that that we thought would be useful.

16 And then there's a little section in here  
17 called Water Distribution and Measurement where  
18 verbally we just kind of go through some unique issues  
19 that they might run across like instream flow,  
20 temporary changes, road construction permits, things  
21 like that. We thought it would be useful to have that  
22 spelled out in a more easier way to understand than  
23 maybe they'd have to go through statutes to figure out.

24 Q. Those were the changes that were made between  
25 the 1998 version and the 2009 version. What I think

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 would be helpful is if you could take the 1998 version,  
2 which is Exhibit W285, and just briefly walk us through  
3 it, summarize what you consider to be the important  
4 features of the manual.

5 A. I think it's all important. We put a water  
6 conversion table in here. These guys are dealing with  
7 converting to inches, gallons per minute to cubic per  
8 second acre-feet. I think that's important.  
9 Obviously, the statutes are very important.

10 There's a few other things in here. Some  
11 examples of how the district courts might instruct  
12 water commissioners to carry out their duties. There's  
13 a placard in here that says, Warning, this diversion  
14 regulated by the Fourth Judicial District. I think,  
15 actually, we didn't continue that in the new version.  
16 We probably should have, because I think that's an  
17 important way for commissioners to represent their  
18 authority on headgates if they need to.

19 Q. Is that something you talk about in the  
20 trainings since 2009?

21 A. Yes, we do. And we have an example, I think,  
22 in our presentation that we give.

23 Some of this information may be a little  
24 superfluous at this time. We took out the land survey  
25 and description section, I believe. And I felt, I

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 think, you know, these days it's a little easier to  
2 just get online and look these things up.

3 But -- and then certainly the descriptions of  
4 the specs for water measuring devices, the flumes and  
5 the weirs in the back I think is very important. These  
6 particular circulars are put out -- were put out by  
7 Montana State University engineering department. And  
8 they describe in detail how these flumes and weirs work  
9 and what you have to do to install them. So I think  
10 that's very important as well.

11 Q. The version we're looking at here is a  
12 full-sized paper document. I'm holding up a document  
13 that's roughly, I don't know, 5 inches by 4 inches. Is  
14 that the size of the Water Commissioner Manual?

15 A. It is now, yes.

16 Q. Why is it that size?

17 A. Well, I think originally when I came on, they  
18 had these things in a big three-ring binder. And for  
19 the same reason we have the little Wyoming guides,  
20 these guys are out in the field. They are driving  
21 around and don't want to be lugging around a big  
22 binder. We just thought it would be easier to have,  
23 maybe I guess you'd call it, a pocket guide, something  
24 easy to reference that they can just grab and go.

25 Q. Let's talk about the trainings themselves.

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 So could you please describe a typical agenda for a  
2 water commissioner training?

3 A. What we typically do, and it's pretty much  
4 been the same through the years, I'll introduce the  
5 folks that are part of the training that are helping  
6 with the training. I will go through the statutes and  
7 responsibilities just briefly and talk about what's  
8 important for them to understand. And then we'll have  
9 a number of speakers, just a basic kind of Water Rights  
10 101 presentation from somebody that works at DNRC.

11 We'll have the Montana Water Court. And for  
12 years we got the water court judge. Judge Lobel would  
13 come and speak. Or we got one of their water masters  
14 to talk about -- they would kind of repeat the statutes  
15 and responsibilities, sort of that same section. We  
16 feel like it's important to kind of reinforce that, and  
17 certainly hearing it from the water court helps that.  
18 So they would talk about that. And they would talk  
19 about the status of adjudication.

20 Then we'd have a speaker from one of our  
21 regional offices talk about what sort of information  
22 they have available.

23 Then we would have somebody from Montana  
24 Fish, Wildlife and Parks discuss instream flow,  
25 beneficial uses, which are important for some

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 commissioners to know about.

2           And then we would take breaks in there so we  
3 could talk and talk about specific issues. And then  
4 the afternoon, the whole afternoon session is my  
5 favorite part because it's the water measurement.  
6 Because we talk about the technical aspects of what  
7 constitutes a suitable headgate, what constitutes a  
8 properly functioning flume or weir. You know, what are  
9 they required to have by statute to be able to  
10 accurately measure water? So we'll spend all afternoon  
11 talking about those things, go through a number of  
12 problems, sets, and examples.

13           And then the following day is a half day  
14 where we will go out into the field and do a  
15 demonstration, look at some of these devices, talk  
16 about the things that they need to be concerned about,  
17 and demonstrate basically in the field what we talked  
18 about the afternoon before. That's typical training.

19           Q. You've been doing the trainings since the  
20 year 2000. Have all of those subjects been covered  
21 since that time?

22           A. I don't think the first few years we did it  
23 that we talked about instream flow leases. Might have  
24 been a few years, early 2000s, when I started bringing  
25 in somebody from Fish, Wildlife and Parks to talk about



MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 that. But other than that, yes, it's pretty much been  
2 the same.

3 Q. You talked about the first item on the agenda  
4 is statutory requirements of the water commissioners,  
5 and you thought that was important. Could you briefly  
6 summarize what the content of that training is?

7 A. Sure. You know, first of all, we just tell  
8 them, you know, your job -- and a lot of these guys  
9 know that. But some of them are brand-new and they  
10 don't really know. Your job is to distribute water  
11 based on priority of the decree, in some cases stored  
12 water, that you are required to understand who you're  
13 delivering this water to, and they are required to have  
14 properly functioning conditions or they do not get  
15 their water.

16 And then we talk about, you know, what are  
17 some of the other aspects of it; you know, that they  
18 have to take an oath with the district court; they have  
19 to follow the order of the judge. We talk about how  
20 they get assigned, you know, the petition process, how  
21 they get paid, the fact that they need workers' comp  
22 insurance, and just sort of the day-to-day kind of  
23 things that they'll need to know.

24 And part of it, kind of setting up the rest  
25 of the course, sort of setting the table, saying, these

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 are all the things you need to know. And then we'll  
2 talk about these, and then we talk about them in more  
3 detail as we move through the course.

4 Q. The next item on the agenda you mentioned was  
5 water rights basics. We saw Exhibit M230, which is a  
6 handout on that topic. So could you please summarize  
7 the content that is provided to the water commissioners  
8 in the training on water rights basics?

9 A. Sure. You know, we talk about the Montana  
10 Water Use Act of 1973, which established the  
11 adjudication program and the permitting process. We  
12 talk about what a water right is in general. When I  
13 say "we," I mean the person that I've got to help me to  
14 explain this because they can do a much better job than  
15 I can. They talk about the prior appropriation  
16 doctrine, the priority system and just the real basic  
17 water rights, understanding how water rights work in  
18 Montana.

19 Q. The next item on the agenda, as I understood  
20 it, was the role of regional offices of the DNRC; is  
21 that right?

22 A. That's correct.

23 Q. Could you please summarize that part of the  
24 training?

25 A. Sure. And earlier in the 2000s, they would

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 talk a lot about the -- you know, all the information  
2 they have in their regional offices: paper copies,  
3 claim files, and ways to look up water rights. As  
4 we've gotten through this decade, we have a water right  
5 query system online that they can use. And they talk  
6 more about how you can access this data online and  
7 actually walk them through that process if they want to  
8 look at an individual water right.

9           But they still explain that you can come in  
10 and look at claim files, 'cause there's a lot of notes  
11 in claim files. And they also talk about the water  
12 resource surveys that have ditches on them, the access  
13 to old aerial photos, which might be helpful to water  
14 commissioners as well.

15           Q. Are the regional offices a resource for the  
16 water commissioners?

17           A. They are, yeah. Yes.

18           Q. Why is that?

19           A. Because they have -- all of our regional  
20 offices around the state have a new appropriation  
21 specialist, they have an engineer -- well, most of them  
22 have an engineer, and they have people that are  
23 familiar with the water rights system.

24           And so particularly the ones that have  
25 engineers, the engineers can help water commissioners

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 individually if they've got an issue with water  
2 measurement or a structure that's not working. And  
3 that happens quite often. But also just general  
4 questions. You know, our regional offices are out  
5 there for the public to access to get information on  
6 water rights and basically anything to do with water.  
7 It's kind of a starting point for the public.

8 Q. Do you know which of the regional offices has  
9 responsibility over the Tongue River?

10 A. Yes, that would be the Billings regional  
11 office.

12 Q. Has anyone from the Billings regional office  
13 attended your water commissioner training?

14 A. Yes.

15 Q. Who?

16 A. I may not get everybody that's attended  
17 because we encourage new employees that come through to  
18 come to the training. Because it provides a good  
19 foundation for new employees and a lot of resources.  
20 But Keith Kerbel, the former regional manager; Kim  
21 Overcast, the present regional manager; Chris Smith,  
22 who is one of their specialists; Melissa Brickell, one  
23 of their hydrologist specialists; Brandy -- I can't  
24 remember her last name. There's been some other folks  
25 from that office that have attended that have come and

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 gone. Again, we try to encourage everybody at the  
2 regional office level at some point to take that  
3 training.

4 Q. Turning to the next item on the agenda, I  
5 think you said it was instream flows. This case is  
6 really focused on issues -- on years that began before  
7 2006. Prior to 2006 were you including a discussion of  
8 instream flows in your training?

9 A. We were, yes.

10 Q. Could you please, then, summarize that  
11 portion of the training?

12 A. Sure. We would get somebody from Department  
13 of Fish, Wildlife and Parks because the FWP administers  
14 some instream flows in the state. They are not the  
15 only entity that has instream flow rights. But we  
16 would get them to explain to the commissioners that  
17 when you have an instream flow need, that it's the same  
18 as any other water right. It's a beneficial use that  
19 somebody's -- a lot of times they are paying for that  
20 lease, and that a commissioner has to adhere to that  
21 instream flow just like they would any other water  
22 right.

23 So if it's got a priority date and it's going  
24 by a diversion that has a junior date, they have to let  
25 that water go by. And we feel that's important that

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 the commissioners understand that, so that's what this  
2 person presents.

3 Q. Turning to the next item on the agenda, which  
4 is the Montana Water Court portion. And you mentioned  
5 a little bit about what they talk about. But could you  
6 please summarize, again, what that part of the training  
7 is about.

8 A. Sure. Early on, I mentioned Judge Lobel used  
9 to attend the training every year. After that, Colleen  
10 Coyle, one of his water masters, would attend. And,  
11 again, they kind of reiterate some of the  
12 responsibilities and duties that are important for  
13 water commissioners to understand.

14 I think, like I said earlier, it's important  
15 for them to hear it from the water court who  
16 administers these water court decrees. And --

17 Q. A lot of commissioner are actually under the  
18 water court; is that right? Or they're under the  
19 courts?

20 A. They are under the district court, yes.  
21 Yeah. But I mean, the water court decrees go through  
22 the district court, and then the water commissioners  
23 are appointed.

24 But I guess we've always felt having this  
25 entity provide information 'cause they are very

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 knowledgeable on the legal side of things. They're the  
2 ones that encourage the water commissioners to not  
3 arrest anybody. And Judge Lobel likes to tell some  
4 pretty funny stories about that. But again -- and they  
5 also talk about the status of adjudication in the state  
6 of Montana.

7 Q. Now turning to your favorite part, which I  
8 understand to essentially be the nuts and bolts of  
9 water measurement and administration. Can you please  
10 summarize the presentation on the nuts and bolts of  
11 water measurement and administration?

12 A. Sure. First of all, we talk about just water  
13 measurement basics: unit conversion, you know, how  
14 is water measured in Montana? You know, we use cubic  
15 feet per second, for example. But we use -- you know,  
16 I use cubic feet per second. But a lot of water  
17 commissioners might use miner's inches. So how do you  
18 make these conversions so everybody's on the same  
19 playing field? So we go through a discussion on that.

20 We go through how water -- just the basic  
21 mechanics of water, open-channel flow versus  
22 closed-conduit flow, you know, which would be pipe flow  
23 and how they are measured differently. We talk about  
24 the actual underground distribution of water.

25 And we give a few examples. You know, we

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 say, okay -- and we hand out a problem, and they get to  
2 look at it. And this water user has this much, this  
3 water user has this much with this priority date. And  
4 we let them all kind of work together and figure it  
5 out, and we go over it together as a class.

6 I really think -- and this part of the  
7 course, I will talk for a while. And then we'll do  
8 these problems. Because I think it helps them to work  
9 together and understand how to do these things. And  
10 it -- no one wants to listen to me talk for four hours.  
11 And so we mix it up a little. So we do these problems,  
12 problem solving.

13 And I get fairly detailed on the measuring  
14 devices themselves, from what constitutes a suitable  
15 headgate, the different types of headgates, what you  
16 need to kind of understand about making these  
17 adjustments to the actual water measuring devices  
18 themselves, the flumes and the weirs, standardized  
19 devices that are acceptable in the state of Montana for  
20 accurate water measurement.

21 And we'll go through those. I like to give  
22 them information on how these are installed. You know,  
23 these are very handy hands-on type folks. So between  
24 myself and the engineer, we really try to give them  
25 information they might need if they ever get in that



MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 situation where they have to install one.

2           Typically we talk about how you would  
3 recognize whether one is working properly and whether  
4 it's the right device. So that takes quite a bit of  
5 time to go through all of that.

6           Q. Do you discuss how to deal with difficult  
7 water users?

8           A. We do.

9           Q. What do you talk about?

10          A. I kind of alluded to this earlier. You know,  
11 we encourage communication at all levels, you know,  
12 talk to these folks on the ground. If that doesn't  
13 work, talk to your judge and get some direction from  
14 them. Sometimes they will call us at the DNRC and try  
15 to get some advice from us as well.

16           There is formal recourse with the difficult  
17 water user. That's to talk to the judge themselves.  
18 Or if somebody is not in the decree, they can actually  
19 petition to have that water, that much junior water  
20 right put into the decree. I guess I'm getting off on  
21 a different topic there.

22          Q. No, that's helpful. When you're doing the  
23 nuts and bolts and the discussion of these issues, do  
24 you typically have a presentation?

25          A. A presentation pertaining specific to dealing

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 with difficult issues?

2 Q. Well, I think maybe it will help clarify if  
3 we take a look at this Montana Demonstrative Exhibit 1.  
4 Do you have that before you?

5 A. I do, yes.

6 Q. And what is this particular document?

7 A. It looks like you have photocopied my  
8 250-slide presentation basically.

9 Q. This is a PowerPoint?

10 A. Correct. And this is from this last year's  
11 training.

12 Q. This one is dated April 4th and 5th, 2013.  
13 When you first began in 2000, was there also  
14 a PowerPoint presentation that was provided to the  
15 water users?

16 A. Individuals would use PowerPoint for their  
17 individual sections. For the water measurement  
18 section, there was a PowerPoint, yes. But it was  
19 actually originally developed by the U.S. Bureau of  
20 Reclamation engineer that assisted at that time.

21 Q. And when you put together your PowerPoint,  
22 did you adopt some of the materials that were in that  
23 presentation?

24 A. Yes. It's basically just kind of morphed  
25 over the years as new information legislatively came

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 about. And just things that I thought -- you know, as  
2 we're going throughout years, I pick up things that I  
3 think are going to be more helpful each year and maybe  
4 drop some things out. But it's basically the same  
5 format.

6 Q. Let's take a look at it then and point out a  
7 few things. If you'd take a look at the bottom of each  
8 page, in the lower right-hand corner there's what we  
9 call Bates numbers. And so if you look with me,  
10 please, at Bates No. MT20852. And we'll just go  
11 through a couple pages here, some that will be  
12 particularly relevant to what we'll be talking about in  
13 this case.

14 Here you have a water commissioner  
15 appointment. Do you see that?

16 A. Yes.

17 Q. So generally this is about the process for  
18 appointing a water commissioner that you talked about  
19 earlier?

20 A. Correct.

21 Q. And then if you'd turn to the next page or  
22 skip over one, there's MT20854. Do you see that?

23 A. Yes.

24 Q. And here it discusses water commissioner  
25 duties. And you talked about that, I think, a little

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 bit; is that right?

2 A. Correct.

3 Q. You mention the warning or the notice that  
4 was provided to people and put on headgates. And if  
5 you look, please, at MT20857, it looks like there is at  
6 least one of the pictures that you were referring to.

7 A. Yes.

8 Q. And this was actually in that 1998 version of  
9 the training; is that right?

10 A. Actually, this particular one was not. But  
11 there was one very similar to that that was in that '98  
12 version.

13 Q. Fair enough. If you look at MT20860. And  
14 here you talk about rights and duties of water users.  
15 And here's a discussion or at least a jumping off point  
16 for the duties of water users.

17 If you turn, please, to page 20899. And you  
18 mentioned that you go through a number of examples at  
19 these trainings; is that correct?

20 A. Correct.

21 Q. And you talked about how that would be  
22 helpful. So is this the type of thing that you would  
23 talk about at the training?

24 A. Yes.

25 Q. Could you walk us through this example and

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 how it works and what you're trying to accomplish?

2 A. Sure. As we talked about before, with stored  
3 water and decreed water the commissioner has the same  
4 authority, but they are treated differently in the  
5 system. And so this is at it's very simplest, a  
6 version of what they might see in the field.

7 And so we put this problem up there and have  
8 them work through delivering the decreed water and the  
9 contract or the stored water. And so to do that, they  
10 have to go through and figure out what their direct  
11 flow is, meaning the amount of water that's actually  
12 attributed to what's coming in and out of the  
13 reservoir, and then figure out what their stored water  
14 is and then distribute it appropriately.

15 Q. This is an example that you talked through  
16 with the water commissioners?

17 A. Yes. Well, first we turn them loose and say,  
18 okay, you guys figure this out. And then we'll have a  
19 discussion about it.

20 Q. Turning to page 20932, and I'm just trying to  
21 pick a few representative pages here. This is entitled  
22 "Flow Measurement Basics." So this is part of your  
23 presentation where you're showing them examples of some  
24 basics, and you're going through that discussion you  
25 described earlier; is that right?

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 A. Correct.

2 Q. There's one picture in particular that I  
3 wanted to make sure we looked at here. And so if you  
4 turn, please, to page MT21026. You have that before  
5 you?

6 A. I do.

7 Q. It should be 21026. I'm just waiting for it  
8 to come up. What is this a picture of?

9 A. This is a picture of during our training in  
10 2007 in Miles City. And the individuals are, I'm on  
11 the left there, and Keith Kerbel, our regional manager,  
12 on the right, and two gentlemen operating this  
13 instrument are Mr. Kepper and Mr. Gephart. And this  
14 was part of our field day. And because they had an  
15 ultrasonic pipe flow meter, we thought it would be  
16 great if they could demonstrate and show the class how  
17 it's being operated. So there's a bunch of people  
18 standing behind the camera watching this.

19 So here Mr. Kepper is programming the  
20 instrument, which is actually attached to this pipe  
21 down by my knee here. And we're just demonstrating  
22 this instrument.

23 Q. The page before that, 21025, is that also an  
24 ultrasonic meter?

25 A. No. On the left that's an inline impeller

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 meter that's actually doing the same thing an  
2 ultrasonic meter would do. It's also a flow totalizer.  
3 So it's got an impeller. So it's measuring velocity in  
4 the pipe, but it's more of a mechanical way of  
5 measuring velocity as opposed to the sound Doppler  
6 effect that the ultrasonic meters use.

7 Q. Like the picture that is shown there, the  
8 ultrasonic meter goes directly on the pipe; is that  
9 right?

10 A. Correct. This particular one is portable.

11 Q. How does it measure the water?

12 A. As I mentioned, it uses the Doppler effect.  
13 So it's shooting a sound pulse into the water as it's  
14 passing through the pipe. And there's actually two  
15 sensors that are attached to the pipe. And I'll see if  
16 I can explain this correctly.

17 The Doppler effect, as you know, as time  
18 moves -- excuse me. Sound is different as a function  
19 of distance, like a train coming and going. So what  
20 this does, it shoots a pulse out to these two sensors  
21 and it measures the difference between one sensor and  
22 another, which is proportionate to the velocity. I  
23 don't think I explained that very well, but it's  
24 employing that Doppler technology.

25 Q. In your work you get to deal with a number of

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 different types of measuring devices; right?

2 A. Correct.

3 Q. Do you consider the ultrasonic meters to be  
4 accurate?

5 A. I do, yes.

6 Q. I want to look at one other type of meter  
7 here because I think it was also used on the Tongue  
8 River. And that is, if you'd turn with me to page  
9 MT21117. So again, that's 21117. And at the top it  
10 says "Current Meters."

11 A. Okay.

12 Q. And then it mentioned here a Marsh-McBirney  
13 meter. Are you familiar with Marsh-McBirney meters?

14 A. Yes.

15 Q. What are those?

16 A. It's a current meter. It's a portable  
17 current meter. And it's used to measure velocity. And  
18 basically you develop a cross-section in a stream or a  
19 channel. And then you attach the probe of this meter  
20 to a weighting rod, and you measure the velocity across  
21 this cross-section and you apply that velocity of each  
22 cell to width and depth. So you get a cumulative -- a  
23 flow, a volumetric flow, cubic feet per second as  
24 you're moving across. It's what we use to do open  
25 channel flow measurements.



MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 Q. Are those common?

2 A. Yes.

3 Q. Do you consider those to be accurate?

4 A. I do, yes.

5 Q. You've actually brought one today?

6 A. I did.

7 Q. Could you show us what that is, a little bit  
8 of show and tell?

9 A. Sure. This is a much-used one. This is my  
10 personal Marsh-McBirney. This is the readout. This is  
11 the sandpaper. This is the probe that's attached to  
12 the weighting rod with the electromagnetic sensors on  
13 it. And it basically gives you a readout of velocity  
14 after a 40-second period. It averages that velocity  
15 for that period, which is the standard method that we  
16 use.

17 SPECIAL MASTER: How much longer do you think  
18 the direct is going to be?

19 MR. WECHSLER: Not very much longer.

20 SPECIAL MASTER: Okay.

21 BY MR. WECHSLER:

22 Q. We talked about the nuts and bolts part of  
23 the presentation and looked at your PowerPoint. I  
24 think the last section of the training is the field  
25 portion. So if you could summarize that, please.

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1           A.     Sure.  As I mentioned, we go out into the  
2 field.  And we look at a number of flumes and weirs.  
3 And we talk about issues associated with those flumes  
4 and weirs and measuring devices that commissioners use  
5 to measure open channel flow.  And we talk about, you  
6 know, the issues associated with making sure they're  
7 properly functioning.

8                     The message that I always give is just  
9 because you have a staff gauge or flume or weir out  
10 there, it doesn't mean that it's working properly.  
11 There's certain things about that you have to check in  
12 the field, you know, checking level and submergence  
13 conditions and things like that.

14           Q.     In that Demonstrative Exhibit 1, you have a  
15 number of pictures that show measuring weirs and  
16 leveling weirs; is that right?

17           A.     Correct.

18           Q.     In fact, there's a number of great pictures.  
19 I think it's a very good presentation.

20                     And then after a day and a half, you've  
21 completed the training.  Are the water commissioners or  
22 the attendees given any resource materials or places  
23 they can go to if they need help?

24           A.     Yeah.  All the handouts we give them, you  
25 know, they take with them.  And we encourage them to

MIKE ROBERTS - November 14, 2013  
Direct Examination Cont. by Mr. Wechsler

1 call us with questions, to call me. I give them my --  
2 if they want my business card, they can take it. We  
3 encourage them to contact the regional offices or the  
4 engineers. And I always have to put a caveat in there  
5 that if I have time, I will help you. And, you know,  
6 we have a lot of demands in our job. So we don't spend  
7 all of our time helping water commissioners. But we do  
8 get calls, and we encourage them to use all those  
9 resources that we talked about during the training.

10 Q. Have you personally received calls?

11 A. I have, yes.

12 Q. You receive calls every year?

13 A. I do. And usually it's kind of around that  
14 time we do the training, which is in the spring, which  
15 is we try to do it like post-calving, pre-irrigation  
16 when these guys are available. And usually when they  
17 first start up, they have a lot of questions. So a lot  
18 of times after the training I'll get a call or maybe a  
19 call from somebody that missed the training and has  
20 some questions. And either I'll answer it or I'll move  
21 that question on to somebody who can help.

22 MR. WECHSLER: Your Honor, I think I'm  
23 complete. It might be a good time for a break. And I  
24 can confer with my co-counsel and see if there's  
25 anything else.

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1           SPECIAL MASTER: Okay. That sounds fine.  
2 Why don't you do that. And then right after that,  
3 we'll do cross-examination and we'll get Mr. Roberts on  
4 his way. So let's take a ten-minute break. And so,  
5 again, just examine your own watches. Thanks.

6                               (Recess taken 9:42 to 9:53  
7                               a.m., November 14, 2013)

8           SPECIAL MASTER: Please be seated.  
9           Mr. Wechsler.

10          MR. WECHSLER: Your Honor, I have one  
11 question.

12 BY MR. WECHSLER:

13          Q. Mr. Roberts, if a water commissioner is  
14 appointed to administer stored water, do they  
15 administer all the way down to the last stored water  
16 user?

17          A. Yes.

18          MR. WECHSLER: Thank you.

19          SPECIAL MASTER: Mr. Kaste.

20                               CROSS-EXAMINATION

21 BY MR. KASTE:

22          Q. Good morning, Mr. Roberts.

23          A. Morning.

24          Q. I just have a few questions for you. I got  
25 the impression from your testimony earlier that the

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 training that you've conducted since 2000 has evolved  
2 over time and continues to evolve?

3 A. Correct.

4 Q. And each year I think you get a little bit  
5 better; right?

6 A. Yes, I would agree with that.

7 Q. And you talked about the commissioners  
8 receiving orders from the district court that appoints  
9 them; right?

10 A. Yes.

11 Q. And the commissioners actually get an order  
12 from the court. And it tells them what authority they  
13 are granted by the district judge; correct?

14 A. Correct. And it also usually sets their  
15 salary and that kind of thing.

16 Q. Sure. And their authority, then, is limited  
17 by the terms of the order of the court?

18 A. Yes, I would agree with that. As long as --  
19 and they also have to follow the decrees as well.

20 Q. All right. And do you have any knowledge of  
21 what the orders from the court were to the water  
22 commissioners on the Tongue River?

23 A. I've sort of heard a few things in recent  
24 days. But prior to that, I had no knowledge.

25 Q. Okay. If the orders from the court in 2004

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 and before said to the water commissioners you're  
2 authorized to distribute stored water and if that was  
3 the limit of their marching orders, then that would be  
4 the limit of their authority; right?

5 A. Correct.

6 Q. And subsequently, in 2006, if the order said,  
7 in addition to distributing stored water you are to  
8 administer the 1914 Miles City Decree, that would have  
9 expanded their authority; right?

10 A. Correct.

11 Q. Now, you talked with Mr. Wechsler about the  
12 training manuals, and you have the 1998 version of the  
13 training manual, which is Exhibit W285; correct?

14 A. Correct.

15 Q. And then, would that have been the manual  
16 that was in place, say, in 2002, when some of the water  
17 commissioners sitting here today received their  
18 training?

19 A. I'm going to say I'm almost sure of that.  
20 But I have a hard time remembering exactly. But I  
21 think that's the one we used.

22 Q. There may have been sort of an interim  
23 iteration of this manual at that time?

24 A. It's possible. I'm pretty sure that was it,  
25 though.

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 Q. And then you talked about the 2009 manual,  
2 which has been changed a little bit to make it more  
3 user friendly and more informative; right?

4 A. Correct.

5 Q. All right. Let's look at, I think, the 2009  
6 manual, which is Exhibit M229A. And I'm really  
7 interested in the sample problem on page 52.

8 A. Okay.

9 Q. Page 52 has a sample problem with a number of  
10 different diversions from a sample river, a sample  
11 tributary, I think. And the point of the problem is to  
12 teach the water commissioners how -- or who should get  
13 what water under these hypothetical circumstances;  
14 right?

15 A. Correct.

16 Q. And can we agree that on this particular  
17 problem, return flows are not a part of the problem?

18 A. That's correct. I have other versions of  
19 this that do include return flows. But on this one,  
20 correct.

21 Q. All right. Let's look at the 1998 manual,  
22 which is Exhibit W285. In my reading of the manual, I  
23 didn't see anything in there that directly addressed  
24 return flows in 1998. Is that correct?

25 A. Well, I'm not sure in your reading. I guess

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 you're asking me if there's anything in here regarding  
2 return flows?

3 Q. Yeah. Is there some portion of this manual  
4 that tells the water commissioners, here's how you deal  
5 with return flows? Here's how you calculate them?

6 A. You know, I don't think there is.

7 Q. And I think we can agree that you talked with  
8 Mr. Wechsler about reservoir releases and when you are  
9 trying to account for storage, that you might need a  
10 good handle on direct flows in order to do that  
11 properly; correct?

12 A. That's correct.

13 Q. And you'd need a good handle on your shortage  
14 releases in order to administer your direct flows  
15 properly; correct?

16 A. Correct.

17 Q. Let's look at the -- doesn't matter which  
18 manual. You understand the Montana statutes have  
19 provisions for not only appointing water commissioners  
20 on the stream, but to appoint a water commissioner to,  
21 as you discussed with Mr. Wechsler, go down to the  
22 ditch and administer within the confines of a ditch;  
23 right?

24 A. That's correct.

25 Q. And in order for the people who own the



MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 ditch -- and if I understand right, that statute talks  
2 about common owners of ditches or corporate owners. Is  
3 that right?

4 A. That's right.

5 Q. So everybody along the ditch owns a part of  
6 the ditch. But in order for the water commissioner to  
7 go down that ditch, there has to be, either as part of  
8 the original petition or a separate petition, a request  
9 by those water users to the court to have the water  
10 commissioner regulate within that ditch; right?

11 A. That's correct.

12 Q. Many petitions would limit the commissioner's  
13 responsibilities just to delivering the water to the  
14 headgate of a particular ditch and they wouldn't be  
15 necessarily authorized to go down that ditch; right?

16 A. To distribute the water for the decreed  
17 users, they would administer it at the source.

18 Q. Meaning the headgate of the ditch?

19 A. Correct.

20 Q. And all I'm getting at is that if somebody  
21 wants a water commissioner to go down that ditch, they  
22 have to ask the court to give the commissioner that  
23 authority; right?

24 A. If somebody would like to have a water  
25 commissioner administer water down the ditch, it would

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 have to go through the process of appointing them to do  
2 that.

3 Q. All right. And do you know if anybody on the  
4 Tongue River has ever done that?

5 A. Gone down a ditch and distributed amongst --  
6 I'm not aware of that.

7 Q. Or asked the court to give the commissioner  
8 authority to do that?

9 A. Authority to go down the ditch and administer  
10 to individual users on a ditch, I'm not aware of their  
11 specific practice there.

12 Q. All right.

13 A. That doesn't me -- I'm just saying I'm not  
14 aware what they actually do there.

15 Q. Sure. And I don't know is a good answer if  
16 you don't know.

17 I'd like to look at Montana Demonstrative  
18 Exhibit 1 for a moment. And you talked with  
19 Mr. Wechsler about page, I think it was, MT20899?

20 A. Yes.

21 Q. You have that in front of you now?

22 A. I do.

23 Q. And that's another one of the sort of  
24 hypothetical problems that you used to train the water  
25 commissioners; correct?

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 A. Correct.

2 Q. And in this particular problem, you have  
3 inflow to a reservoir, you have certain reservoir  
4 storage, and then you have certain diversions  
5 downstream from the reservoir; right?

6 A. Correct.

7 Q. And the diversions have certain priority  
8 dates. And in and amongst those diversions is an  
9 irrigation district canal; right?

10 A. Correct.

11 Q. All right. Now, can we agree that looking at  
12 this problem, if, for example, irrigator, I guess they  
13 called it decreed diversion B -- and let's just pick  
14 that one. For a certain period of time, diversion B  
15 doesn't take any of its water given -- or say, for  
16 example, because it's in the process of drying its  
17 field because it's haying. And we agree that happens;  
18 right?

19 A. Sure.

20 Q. People turn off their diversion to dry out  
21 their fields in order to harvest the hay. That happens  
22 routinely; right?

23 A. Correct.

24 Q. So if irrigator B is not on for a period of  
25 time, then the water that's identified here on your

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 example becomes available for a downstream user to use  
2 so long as they're in priority; right?

3 A. It becomes available for a downstream decreed  
4 user; correct.

5 Q. All right. And in this hypothetical, I think  
6 that wouldn't include your irrigation district because,  
7 supposedly, in terms of the hypothetical, it's only  
8 receiving stored water; right?

9 A. Correct.

10 Q. But any other user who may be on the stream,  
11 the actual irrigation practices of the appropriators  
12 above them can affect their ability to obtain water;  
13 right?

14 A. Correct.

15 Q. And the water commissioners need to be aware  
16 of those facts in a sort of contemporaneous fashion in  
17 order to do their job properly; right?

18 A. That's correct.

19 Q. All right. And I think we could probably  
20 agree that let's assume that irrigators A and B on that  
21 schematic are irrigating at a given time but that there  
22 is a process by which this water returns to the river  
23 called return flows; right?

24 A. Correct.

25 Q. And if these two folks are irrigating, some

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 portion of the water that they have originally diverted  
2 may make its way back to the stream and become  
3 available for another user downstream; right?

4 A. It is possible that that could happen, yes.

5 Q. And it would be important for the water  
6 commissioners to know that if they want to know what's  
7 available for appropriation by other folks downstream;  
8 right?

9 A. It would be good information to have, yes.

10 Q. And similarly, the irrigation canal or the  
11 irrigation district canal that's identified on your  
12 hypothetical, it receives water from the reservoir.  
13 But some of that water could make its way back into the  
14 stream after it's originally diverted; right?

15 A. It is possible, yes.

16 Q. And that water that may make its way back  
17 into the stream becomes appropriable by downstream  
18 appropriators; right?

19 A. Correct.

20 Q. So it's important for the water commissioners  
21 to take that into account?

22 A. It would be good information to have, yes.

23 Q. Sure. Now, I need to back up just a second  
24 because we have this irrigation district on your  
25 hypothetical. Let's change this hypothetical. And

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 let's call this just a regular old ditch, not an  
2 irrigation district, but a ditch with multiple  
3 priorities in it. So, for example, irrigator C may  
4 have an 1896 priority, and irrigator E may have a 1975  
5 priority.

6 And that happens sometimes, doesn't it? You  
7 have ditches with multiple priorities in them?

8 A. Yes, I believe that could happen.

9 Q. All right. Now, if I understand right, if  
10 the petition from the district court gives the water  
11 commissioner the authority to essentially administer  
12 the stream and it hasn't gone on to give the  
13 commissioner the authority to administer particular  
14 ditches internally, if something has gone awry in this  
15 ditch and the irrigator with the 1975 water right is  
16 actually receiving water, although, only the amount of  
17 water necessary to fulfill their 1896 right is coming  
18 in the headgate, the water commissioner wouldn't have  
19 anything to do with -- wouldn't have any responsibility  
20 for fixing that situation, would they?

21 A. Well, I think they would have responsibility  
22 for ensuring that the waters in the decree are  
23 delivered by priority. And if somebody is out of  
24 priority, it's their responsibility to make sure that  
25 that water, that that situation is taken care of.

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 Q. And let's assume that at the headgate of this  
2 shared ditch, the water commissioner is right on the  
3 money and he is only delivering water at that headgate  
4 sufficient to satisfy the earliest rights. But for  
5 some reason or another, the later right is actually  
6 using some of that water. In the absence of an order  
7 from the court, they wouldn't have the authority to go  
8 down that ditch?

9 A. Well, I think what would happen, if they --  
10 and I'm sure that situation probably happened. I know  
11 it happens. You know, junior users do take water out  
12 of priority. They would probably -- if nobody ever  
13 notified them or they didn't know that was going on,  
14 they probably would not be concerned with it. But if  
15 another water user complained about it, then they could  
16 talk to the judge and get authority to deal with the  
17 situation.

18 Q. So I guess what you're saying is, in the  
19 first instance, you'd rely on the people who are within  
20 that ditch to speak up and say, hey, something has gone  
21 wrong here. And this guy is diverting out of priority,  
22 and it hurts me.

23 A. I guess I'm saying that, yes. I'm not really  
24 familiar with a situation like this. I think when  
25 you're delivering decreed water, typically, the water

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 commissioner has the right to go to every single  
2 headgate that he's distributing decreed water.

3 Q. And maybe we're using the same term and maybe  
4 we're not. But my understanding would be the headgate  
5 for this ditch would be along the stream and that these  
6 other laterals would be different than that headgate  
7 that the water commissioner would visit?

8 A. Yeah. And in the example that you are  
9 explaining, yes. And, again, I guess it goes back to,  
10 like you mentioned, to how is it's explained in the  
11 order.

12 Q. All right. Fair enough. Now, typically  
13 these kind of shared ditches, oftentimes they will have  
14 a ditch rider employed by the shared owners to make  
15 sure that people are getting the water that they are  
16 supposed to within the ditch according to priority;  
17 right?

18 A. Correct.

19 Q. And that's a different person than the water  
20 commissioner?

21 A. Yes. A lot of times they use those terms  
22 interchangeably. But water commissioner is appointed  
23 by the district court. And a lot of times a ditch  
24 rider is just an employee of the irrigation district.

25 Q. All right. I think you talked -- we're done



MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 looking at the demonstrative exhibit.

2 I think you talked with Mr. Wechsler about  
3 the statute that requires the water commissioners to  
4 keep records of their activities; correct?

5 A. Correct.

6 Q. And I assume during the course of your  
7 training that you encourage them to keep very good  
8 comprehensive records of their activities; right?

9 A. We do.

10 Q. All right. And are you -- do you tell them  
11 that they should keep records of, what? Everything?  
12 Certain things?

13 A. Yeah. You know, they're getting paid for  
14 their time that they spend. So -- and they're getting  
15 paid for their mileage, for their insurance, for any  
16 expenses they incur while doing their duties. So we  
17 tell them to be sure to document everything you're  
18 doing so you're going to get appropriately paid. We  
19 want to make sure they're getting paid.

20 Q. Well, mileage is great, but I'm kind of  
21 talking about records of the activities on the river.  
22 Do you encourage them to keep records of streamflows?

23 A. Absolutely.

24 Q. All right.

25 A. Excuse me. Streamflows or diversionary

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 flows?

2 Q. Well, it seems you think there's a  
3 distinction. So tell me what you think the distinction  
4 is and whether or not you ask them to keep records of  
5 both.

6 A. What we ask them to do is keep track of how  
7 much water you are distributing from the source to each  
8 water user. Because they're paid by the water users  
9 proportionately, by how much those water users get. So  
10 that's what we tell them they need to do. And  
11 typically, it's on a daily basis. That might change  
12 from different district courts.

13 Now, we encourage them if -- we encourage  
14 them to try to have an understanding of how much water  
15 is in the source as well 'cause that helps them do  
16 their job. But the point we really drive home is, in  
17 terms of record keeping, you have to keep a record of  
18 how much water you're distributing.

19 Q. And that, I suppose, is why you spend so much  
20 time teaching them how to accurately measure the water  
21 coming out of the river at the various diversion  
22 points; right?

23 A. Correct.

24 Q. And that's the number that they typically  
25 write down and report to the court: This amount of

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 water that came out of the stream at this diversion and  
2 it went to this person?

3 A. Typically, yes.

4 Q. And what I'm getting is that you sort of  
5 encourage them to know what else is going on in the  
6 stream, but they are not required to keep records of  
7 other information that they could otherwise glean from  
8 the stream, such as flows at various points or  
9 diversions that might be outside the scope of their  
10 authority, or anything else?

11 A. Well, I would say we encourage them to write  
12 down anything and everything that's pertinent to them  
13 doing their job. And as far as them getting paid, they  
14 have to write down those diversionary amounts. But I  
15 think we encourage them to keep track of everything.

16 So does the water court when they -- Judge  
17 Lobel likes to say, write everything single thing down  
18 that you're doing out there. For some of these guys  
19 it's more important than others to know what the  
20 instream flow is. So they may or may not write that  
21 down depending on how important it is for their job.

22 Q. All right. If it was -- you would agree it  
23 would be important if you're trying to figure out what  
24 the natural flow is at any given point in the stream,  
25 in addition to the stored water that might be in there,

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 to note flows above certain diversions and measure that  
2 against the flows below certain diversions, and see how  
3 much water was delivered to this person, accurately  
4 subtracted that off? Water has come in by return  
5 flows. I've accurately added that in. All that kind  
6 of math is important to really understand what's going  
7 on in the streams?

8 A. I think it is important to understand that  
9 and to know all those things. Whether or not it's  
10 critical they write it down, you know, that's not  
11 necessarily required. But they do need to know those  
12 things.

13 Q. All right. It would help me a lot, and it  
14 would help us a lot if those things were written down  
15 so we could go back in time and look and say, aha, we  
16 know exactly what went on at this stream because we  
17 have all of the available data on a piece of paper;  
18 right?

19 A. That's correct. And, you know, that's one of  
20 the benefits of having 200 USGS realtime streamflow  
21 gauges around the state for a lot of these bigger  
22 rivers. That information, at least some of that  
23 information is available.

24 Q. All right. You talked with Mr. Wechsler  
25 about measuring devices and how they are used and how

MIKE ROBERTS - November 14, 2013  
Cross-Examination by Mr. Kaste

1 you train people. At one point I think you said that  
2 if people don't have a working measuring device,  
3 they're not supposed to get water. Is that right?

4 A. That's correct. The commissioner has the  
5 ability to withhold water from a water user if they do  
6 not have properly functioning headgate or measuring  
7 device.

8 Now, in practice, you know, not everybody  
9 follows that immediately 'cause they try to work with  
10 these people. They might say, look, you got to get a  
11 properly functioning flume in here or I'm going to have  
12 to turn you off. I think they got to work with their  
13 water users a little bit. But, yes, they could do  
14 that. And a lot of times, they will.

15 Q. Do you know if that's ever been done on the  
16 Tongue River?

17 A. I don't know.

18 Q. Do you know if the water commissioners on the  
19 Tongue River have ever actually shut anybody off?

20 A. You know, we had some conversations in the  
21 last couple days. And that may have come up. But I  
22 can't say definitively one way or the other right now.

23 Q. During periods where commissioners were  
24 appointed on the Tongue River -- and I don't think  
25 there's any dispute in this case, but the first one of

MIKE ROBERTS - November 14, 2013  
Examination by the Special Master

1 was about 2000 -- do you know if any of the water users  
2 have ever made a call for priority regulation on the  
3 stream?

4 A. I don't know.

5 Q. Thank you, Mr. Roberts.

6 A. Thank you.

7 SPECIAL MASTER: I have just a couple of  
8 questions. Because I think counsel for both Montana  
9 and Wyoming have done a good job of covering most of  
10 the subjects.

11 EXAMINATION

12 BY SPECIAL MASTER:

13 Q. But let me just ask three series of  
14 questions. First one goes, again, to the training. So  
15 you said that you, in a given year, will have between  
16 one and three trainings; is that correct?

17 A. That's correct.

18 Q. And so if somebody is appointed a  
19 commissioner after the training has occurred or for any  
20 other reason's not able to make a training when they  
21 are initially appointed, are they, as a usual course of  
22 matter, provided with any of the materials that we've  
23 seen today?

24 A. Your Honor, typically what happens is their  
25 clerk of court will say, call Mike Roberts or call the

MIKE ROBERTS - November 14, 2013  
Examination by the Special Master

1 DNRC, and they can give you some information. But I  
2 don't think there is -- necessarily that that happens  
3 in all cases. I try to keep the clerks in the loop of  
4 when the training is every year. But quite often, I  
5 would say every year I get a call from a couple folks  
6 that miss the training, and I will send them all the  
7 materials.

8 Q. When you say "all the materials," what is it  
9 that you normally send them?

10 A. I will send them -- usually it's just three  
11 things: the Water Commissioner Training Manual, the  
12 Wyoming Water Measurement Guide, and the water rights  
13 in Montana.

14 Q. Okay. So second series of questions go to  
15 the type of hypotheticals that Mr. Kaste was asking a  
16 moment ago. And I only want you to answer these  
17 questions if you know the normal practice. But I am  
18 curious as to what the normal practice is when somebody  
19 downstream who is senior makes a call on the river.

20 So let's start out. Let's assume there is  
21 somebody downstream who is within the jurisdiction of a  
22 water commissioner, makes a call on the river. What  
23 does the water commissioner do at that point?

24 A. In that -- well, typically, the water  
25 commissioner is already administering by priority. So

MIKE ROBERTS - November 14, 2013  
Examination by the Special Master

1 you would hope that situation wouldn't arise. But  
2 inevitably it does. And I have had experience with  
3 that. And typically what the senior will do is they'll  
4 just remind the water commissioner, you know, can you  
5 go shut so and so down 'cause I'm not getting my water,  
6 my high priority water. If there's not a water  
7 commissioner to sort of act as that in-between person,  
8 they'll call the junior directly, typically.

9 Q. So let's go actually back to the very first  
10 point you made. So you said that normally you would  
11 hope it wouldn't get to that particular point.

12 So could you explain what the water  
13 commissioners are doing that would prevent the senior  
14 appropriator from actually having to make a call on the  
15 river?

16 A. Sure. Their job is -- they have a list from  
17 highest priority to lowest priority. And they -- based  
18 on the water available, they start with the top person,  
19 and they deliver that water. And then they move on  
20 down the list until they're out of water. So at some  
21 point, in Montana, these are all water-short basins.  
22 Somebody is not going to be getting their water.  
23 Typically, most of what I'd say, is somebody's not  
24 going to get their water. The real junior folks may  
25 not be getting that water.



MIKE ROBERTS - November 14, 2013  
Examination by the Special Master

1           So if they are administering simply on  
2 priority, then you wouldn't expect a junior to be  
3 taking water that belongs to a senior. In practice and  
4 reality, in basins a lot of times these guys work  
5 together, neighbors, and they say, well, you can have a  
6 little bit of my water, and I'll work with the water  
7 commissioner. And you can have a little for your  
8 stock. But then I'm going to need it. There's a  
9 little bit of that that goes back and forth, but the  
10 water commissioner has to be in the loop on that as  
11 well.

12           Q.    Okay. And let's assume that the downstream  
13 senior actually does have to remind the commissioner or  
14 inform the commissioner that, in fact, they don't  
15 believe they're receiving their water. Is the  
16 commissioner's only responsibility to see whether or  
17 not, in fact, sufficient water is delivered? Or does  
18 the commissioner have any responsibility to make sure  
19 that, in fact, that senior needs the water that they're  
20 requesting?

21           A.    I would say the latter. It's their  
22 responsibility to deliver that water by priority. And  
23 they have to do what they have to do to get that water  
24 there. So I would say your latter explanation there.

25           Q.    But so let me reask the question again. Do

MIKE ROBERTS - November 14, 2013  
Examination by the Special Master

1 they need to check to make sure, then, in fact, the  
2 senior not only is not receiving the said amount of  
3 water that they are entitled to as a matter of priority  
4 but also whether or not that senior has a real need for  
5 the water that they are asking?

6 A. Oh, they don't have to check to see if that  
7 senior is putting that water to beneficial use. Their  
8 responsibility is to deliver that water, as long as  
9 it's within the flow rate and within the period of use  
10 of their water right, is just to deliver that water to  
11 the headgate. That's -- as I understand it and that's  
12 how it's described, that's what they have to do,  
13 deliver that water to the headgate.

14 Q. Okay. So that's helpful. Because when I was  
15 looking through the various materials, it looked to me  
16 as if the water commissioner's responsibility is making  
17 sure that, in fact, the correct amounts of water are  
18 delivered according to the priorities that have been  
19 set by the decree or by contract; is that correct?

20 A. Correct.

21 Q. And it did not look as if the water  
22 commissioners have a responsibility to oversee  
23 reasonable and beneficial use of the water.

24 A. Right. They do not have that responsibility.

25 Q. Okay. So now let's go back in sort of the

MIKE ROBERTS - November 14, 2013  
Examination by the Special Master

1 direction of some of the hypotheticals that Mr. Kaste  
2 asked.

3           And are there situations where there are  
4 water users on a river who will have, themselves,  
5 multiple rights? So we're not talking about a ditch.  
6 We're talking about just one person who has multiple  
7 rights.

8           A. Yes.

9           Q. And if there is somebody who is using -- who  
10 has, say, a 1900 right and a 1970 right and they are  
11 taking water in on their ditch but they're using it for  
12 their 1970 lands rather than their 1900 lands, does the  
13 water commissioner have a responsibility for  
14 determining whether or not they're using it on their  
15 1900 lands or 1970 lands?

16           A. That's a very good question. Their  
17 responsibility would be to deliver that 1900 water to  
18 the appropriate point of diversion associated with that  
19 water. They could not deliver that 1900 water to the  
20 point of diversion for the 1970 water.

21           Q. Okay. And so the assumption here is that  
22 there are going to be two separate diversion points?

23           A. Well, if you're telling me that. Now, if  
24 both those -- and it does happen where you have  
25 multiple water rights of different priority dates at

MIKE ROBERTS - November 14, 2013  
Examination by the Special Master

1 the same point of diversion. That does happen. What  
2 that water commissioner would do, is he'd deliver that  
3 1900 water right to that headgate and then go deliver  
4 everybody else until he or she came back and got to  
5 1970 and then deliver that additional 1970. Now, what  
6 happens past that point of diversion with that 1900  
7 water is not their responsibility, as long as they're  
8 delivering that water based on the decree at that  
9 point.

10 Q. Okay. Okay. Thank you. And then the third  
11 question is, how long actually is the Roe River?

12 A. The Rogue River?

13 Q. The -- I noticed that there were lessons in  
14 your --

15 A. Oh, the Roe River. The Roe River, I think,  
16 is, like, 200 feet long. The shortest river.

17 Q. I noticed there was a quiz inside of the  
18 slide deck. And one of them was what's the world -- I  
19 mean, it's not just Montana's shortest river, it was  
20 the world's.

21 A. It's one of our claims to fame, yes.

22 Q. Where is the Roe River?

23 A. It's the discharge of Giant Springs in Great  
24 Falls. And it comes out and flows literally 200 feet  
25 through a park and then goes right into the Missouri

Recross-Examination by Mr. Kaste  
MIKE ROBERTS - November 14, 2013

1 River at Great Falls.

2 SPECIAL MASTER: Thank you. So, Mr. Kaste,  
3 any recross?

4 RE CROSS-EXAMINATION

5 BY MR. KASTE:

6 Q. Why is it a river?

7 A. So we could have a record, I think.

8 Q. I was wondering if there's some  
9 classification that it meets in order to be a river,  
10 although only 200 feet long?

11 A. Not sure.

12 SPECIAL MASTER: There was a movie of the man  
13 who went up the hill, came down the mountain. I don't  
14 know if anyone ever has seen that. It's actually one  
15 of the great English movies. So anyway. So there must  
16 be a definition of a river somewhere.

17 BY MR. KASTE:

18 Q. I just want to follow up on one of the  
19 questions the Special Master asked you. Your answer  
20 led me to believe that in light of the fact that the  
21 water commissioner's authority is to deliver water by  
22 priority of the various headgates, do they have any  
23 responsibility to go, sort of follow the ditch to its  
24 end and ensure that the water that's being delivered  
25 there isn't sort of running off the end of the ditch

Redirect Examination by Mr. Wechsler  
MIKE ROBERTS - November 14, 2013

1 but rather is being applied to fields?

2 A. They -- well, I'm going to say unless it's  
3 specified in their order. And I haven't actually heard  
4 of that particular case. Correct, they deliver that  
5 water at the source, at the headgate, as it's defined  
6 within the decree.

7 Q. All right. Thank you very much.

8 SPECIAL MASTER: Mr. Wechsler.

9 REDIRECT EXAMINATION

10 BY MR. WECHSLER:

11 Q. Mr. Roberts, I'm going to cover a few of the  
12 topics that were discussed with you with Mr. Kaste and  
13 the Special Master. First, Mr. Kaste discussed with  
14 you the limits of a water commissioner's duties with  
15 respect to the order from the court. Do you recall  
16 that discussion?

17 A. Yes.

18 Q. And you talked about how the order of the  
19 court might govern the responsibilities of the water  
20 commissioner; is that right?

21 A. Correct.

22 Q. And the hypothetical was posed to you that  
23 what if it says you're only to do stored water. My  
24 question is: What happens if the district court order  
25 says that no water may be used except as distributed by

Redirect Examination by Mr. Wechsler  
MIKE ROBERTS - November 14, 2013

1 the water commissioner? Would that mean that the water  
2 commissioner was responsible for distributing all the  
3 water?

4 A. Yes.

5 Q. Let's look at Montana Demonstrative  
6 Exhibit 1. Do you still have that with you?

7 A. Yes.

8 Q. You talked with Mr. Kaste quite a bit about  
9 return flows. Let's look at the page labeled MT20894.

10 A. Okay.

11 Q. Do you have that?

12 A. Yes.

13 Q. And here you're posing an example where it  
14 seems to be return flows in that example; is that  
15 right?

16 A. Correct.

17 Q. Do you talk about return flows with water  
18 commissioners?

19 A. We do, yes.

20 Q. Are you familiar with the term "losing  
21 stream"?

22 A. Yes.

23 Q. And are there streams in Montana that are  
24 losing?

25 A. Yes.

Redirect Examination by Mr. Wechsler  
MIKE ROBERTS - November 14, 2013

1 Q. Let's look at the page MT20904.

2 A. Okay.

3 Q. And this is -- as I understand it, this is an  
4 evolution of the example that we looked at earlier;  
5 right?

6 A. Correct. It's -- we present both problems.

7 Q. And here you have highlighted in yellow the  
8 idea that the channel loses 1 CFS per mile; right?

9 A. Correct.

10 Q. And is that a losing stream?

11 A. Yes.

12 Q. And so if there's a losing stream, that means  
13 that while there might be return flows, ultimately  
14 there's less water as the river moves down the system;  
15 right?

16 A. Correct.

17 Q. And so in that situation, what the water  
18 commissioner is dealing with is less water, not more  
19 from return flows?

20 A. If there's no return flows, yes, correct.

21 Q. Or if there's return flows but still some  
22 seepage or other things, it might still be losing;  
23 right?

24 A. True.

25 Q. Let me get you to look at the statute on the



Redirect Examination by Mr. Wechsler  
MIKE ROBERTS - November 14, 2013

1 water commissioners at 85-5-107, which is at page 142.

2 Do you have that?

3 A. Yes. Just a second.

4 Q. And you talked with Mr. Kaste about records  
5 kept by the water commissioners; right?

6 A. Correct.

7 Q. And actually, you and I talked about that a  
8 little bit as well; right?

9 A. Yes.

10 Q. We talked about the fact that it does say  
11 here that each water commissioner shall keep a daily  
12 record; right?

13 A. Correct.

14 Q. Are daily records required to be submitted to  
15 the court?

16 A. Yes, I believe so.

17 Q. Well, if you read here, it says, shall file a  
18 summary of the court monthly or seasonally. Do you see  
19 that?

20 A. Yes.

21 Q. And so do you know if those include daily  
22 records or if it's simply a monthly report?

23 A. I think what that's referring to is they  
24 submit their daily records either on a monthly basis or  
25 they submit their daily records at the end of the

Redirect Examination by Mr. Wechsler  
MIKE ROBERTS - November 14, 2013

1 season.

2 Q. And is it possible that in some courts they  
3 are simply doing monthly reports or biweekly reports?

4 A. Yes, it's possible.

5 Q. And that would be at the discretion of the  
6 judge?

7 A. Yes.

8 Q. Those records are not submitted to the DNRC,  
9 are they?

10 A. No.

11 Q. Are you familiar with the term "imperfect  
12 science"?

13 A. I suppose, yes.

14 Q. Would you consider water administration to be  
15 an imperfect science?

16 A. It's a trick question. Well, yeah, I would  
17 say it's a difficult job that these folks have. And  
18 quantifying what's available on a daily basis is not an  
19 easy task. So we try to give them the best tools  
20 possible to be able to do that.

21 Q. And it might be important for a water  
22 commissioner to adjust to realtime situation  
23 conditions?

24 A. Absolutely.

25 Q. I want to talk a little bit about

Redirect Examination by Mr. Wechsler  
MIKE ROBERTS - November 14, 2013

1 hypotheticals. I heard a number of hypotheticals that  
2 you discussed with Mr. Kaste. And some of them,  
3 frankly, I couldn't quite follow.

4           So I want to give you a very simple  
5 hypothetical. Assume that you have a system in which  
6 at the top of the system you have a reservoir with  
7 stored water, and then below that you have a number of  
8 decreed rights; but coming into the reservoir, into the  
9 state of Montana, there's only enough water to satisfy  
10 two rights: one in the middle and one at the  
11 bottom -- the one in the middle is 10 CFS; the one at  
12 the bottom is a large right, 187 CFS -- but there's  
13 only enough water coming in to satisfy the first one,  
14 and then the remainder of the water would go to the --  
15 of the direct flow right would go to the one at the  
16 very bottom. You follow me?

17           A. I do, yeah.

18           Q. In that situation, would all the direct-flow  
19 water go to that right at the very bottom?

20           A. Well, it depends on the priority date.

21           Q. So if it's the second priority on the river?

22           A. And the one in the middle is the first  
23 priority?

24           Q. Right. So let's assume the first one gets  
25 satisfied. Would the remainder go to the one at the

Redirect Examination by Mr. Wechsler  
MIKE ROBERTS - November 14, 2013

1 bottom?

2 A. Yes.

3 Q. And then are all of the other users, are they  
4 essentially on stored water?

5 A. That depends. It -- that's -- the people  
6 that have stored water are on stored water. The  
7 decreed users are not on stored water.

8 Q. In that scenario, if you don't have a stored  
9 right and you're not one of the first two decreed right  
10 users, then you're not using water; right?

11 A. Correct.

12 Q. Do you know if you can lease or transfer  
13 stored water?

14 A. You know, I don't know offhand.

15 Q. Fair enough. We'll ask somebody who does.  
16 Are you aware of any ditches on the Tongue  
17 River that have multiple rights?

18 A. I'm not aware.

19 Q. Do people have an economic incentive to be  
20 efficient with their water use?

21 A. I would believe so, yes.

22 MR. WECHSLER: No further questions.

23 SPECIAL MASTER: Thank you. So, Mr. Roberts,  
24 you are finished. And thank you very much for your  
25 testimony.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 THE WITNESS: Thank you, Your Honor.

2 SPECIAL MASTER: So, Mr. Draper, I'd suggest  
3 we go on with your next witness before our second  
4 morning break.

5 MR. DRAPER: Very good, Your Honor. Our next  
6 witness we'd call to the stand is Mr. Charles Kepper.  
7 Mr. Wechsler will also be doing the examination.

8 SPECIAL MASTER: Okay. Thank you.

9 (Charles Kepper sworn.)

10 THE CLERK: Have a seat, please. And once  
11 seated, state your name and spell it for the record.

12 THE WITNESS: My name is Charles Kepper.  
13 C-h-a-r-l-e-s K-e-p-p-e-r.

14 SPECIAL MASTER: Good morning, Mr. Kepper.

15 THE WITNESS: Good morning, Judge.

16 SPECIAL MASTER: Mr. Wechsler.

17 MR. WECHSLER: Thank you, Your Honor.

18 CHARLES KEPPER,  
19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. WECHSLER:

22 Q. What's your current business address?

23 A. It's East Fork of Hanging Woman Creek Road  
24 out of Birney, Montana.

25 Q. What is your current employment?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. Right now I am a contract mail carrier for  
2 the postal service.

3 Q. What's your educational background?

4 A. I graduated high school, and I had a couple  
5 years of college.

6 Q. Can you summarize your prior work experience?

7 A. I'm retired from Shell Oil as a maintenance  
8 foreman for Deer Park Manufacturing Complex.

9 Q. How many years did you work for Shell Oil?

10 A. I worked for 16 years as a maintenance  
11 foreman for Shell.

12 Q. I want to talk primarily about your  
13 involvement as a water commissioner. And so have you  
14 previously served as a water commissioner on the Tongue  
15 River in Montana?

16 A. Yes, I have.

17 Q. When was that?

18 A. I started in, I think, '01 and all the way up  
19 to '08.

20 Q. Did you serve with other water commissioners?

21 A. Yes, I did.

22 Q. Who?

23 A. Alan Fjell, Rex Mongold, and Charlie Gephart.

24 Q. When did you serve with those individuals?

25 A. Served with Alan in '02. I think Rex Mongold

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 was in '04, I believe. And Charlie was '5 and '6.

2 Q. Some of those years you acted as a water  
3 commissioner by yourself?

4 A. Yes, I did.

5 Q. What years were those?

6 A. Those were --

7 Q. The remaining years?

8 A. Yeah, the remaining years. Yes.

9 Q. Now, you initially became a water  
10 commissioner in 2001. How did that happen? Who  
11 approached you?

12 A. Art Hayes approached me for the Tongue River  
13 Water Users' Association.

14 Q. Did he say why?

15 A. He said that they were about out of water and  
16 that they were going to try to buy some water from the  
17 tribe and they wanted to make sure the people that  
18 bought the water from the tribe was the ones that  
19 received it.

20 Q. Were you involved in drafting the petition to  
21 the court on behalf of the users?

22 A. No, I wasn't.

23 Q. So how were you notified that you had been  
24 appointed?

25 A. I got notified from -- that the judge had

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 appointed me, and that I needed to come be sworn in.

2 Q. Do you recall when that was?

3 A. That was in July, middle of July, I believe.  
4 Maybe a little later.

5 Q. Middle of July of 2001?

6 A. Right.

7 Q. Did you appear before the court?

8 A. Yes, I did.

9 Q. Did you take an oath?

10 A. Yes, I did.

11 Q. What was that oath?

12 A. That I would uphold the statutes of the --  
13 you know, of the water users of the -- you know, uphold  
14 the --

15 Q. Carry out the duties of a water commissioner?

16 A. Yeah. He gave me the handbook and said that  
17 those were my duties and that I had to take care of  
18 that.

19 Q. When you say "he," do you mean the judge?

20 A. Judge, yes.

21 Q. Did you have some conversations with the  
22 judge?

23 A. Yes, I did.

24 Q. What did the judge tell you?

25 A. He told me to go by the bylaws in the manual



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 and that he would back me, you know, if I had any  
2 problems, and that not to come with him with trivial  
3 stuff, just to take care of it, handle it.

4 Q. Did you understand that you were obligated to  
5 follow the order of the judge?

6 A. Yes.

7 Q. And we'll have a chance to look at that order  
8 and talk about what that means. In each of the years  
9 that you became a water commissioner, at the beginning  
10 of the year, was the process similar?

11 A. Yes.

12 Q. Were there some years that you were  
13 interviewed by the Tongue River Water Users'  
14 Association?

15 A. No.

16 Q. When you became a water commissioner, did you  
17 receive training on how to perform the duties of a  
18 water commissioner?

19 A. Yes. When they -- when I was first  
20 appointed, they sent me to Deadman's Basin for training  
21 for a day up there. And it was Teri Hice was the head  
22 water commissioner up there; and John Hunter, I  
23 believe, was the DNRC representative up there. And he  
24 helped me.

25 Q. So can you explain for us what kind of

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 training you had up on the Musselshell?

2 A. Basically, what they did was they took me out  
3 to where they were monitoring water. And they showed  
4 me how to, you know, monitor stations and how they  
5 measured it. And they gave me a little demonstration  
6 on Marsh-McBirney and showed me how that worked.

7 Q. Did you talk about what to do if water users  
8 were uncooperative?

9 A. Yes, they did go over that a little bit.

10 Q. Did you think that that training helped you  
11 to become or understand what you needed to know to be a  
12 water commissioner?

13 A. Yes, I did.

14 Q. We heard from Mr. Roberts that you attended a  
15 training in 2002 put on by the DNRC. Do you recall  
16 that training?

17 A. Yes, I do.

18 Q. What do you recall about it?

19 A. Basically, we went over all the measuring  
20 devices and scenarios about when the devices were  
21 reading true and how to compute the -- you know, they  
22 have gauges on them and how do you compute the gauge to  
23 an actual measurement of water. And we also went out  
24 in the field and demonstrated all the different water  
25 uses.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Did you think that that training was helpful  
2 in preparing you to be a water commissioner?

3 A. Yes, I did.

4 Q. You did a subsequent training, we learned  
5 from Mr. Roberts, in Miles City; is that right?

6 A. Yes, it is.

7 Q. Why did you attend that follow-up session?

8 A. Well, basically, to get a refresher course.  
9 And I had a new -- Charlie was just started. So I  
10 thought Charlie needed to --

11 Q. Thought it would be helpful for him to do  
12 that training?

13 A. Sure.

14 Q. When you say Charlie, you mean Charlie --

15 A. Charlie Gephart.

16 Q. When he first came on as a commissioner, did  
17 you help show him the ropes and train him?

18 A. Yes.

19 Q. Were you talking about -- I wanted to move to  
20 the tools and materials that you used as a water  
21 commissioner. So were you given any materials by the  
22 DNRC to assist you in your duties as a water  
23 commissioner?

24 A. Yes, I did. I received all their handouts  
25 and all their booklets.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Why don't we take a look at a couple of  
2 those. We'll just do it on the screen, if that's okay.  
3 If you look at W285. Do you see that on the screen?

4 A. Yes.

5 Q. Did you receive a copy of a training manual  
6 when you first became a commissioner in 2001?

7 A. Yes.

8 Q. Was that sent to you by the DNRC?

9 A. No. I actually got it when I went to the  
10 Deadman's Basin. John Hunter gave me his copy.

11 Q. Did you go through those materials?

12 A. Yes.

13 Q. Did you find them to be helpful?

14 A. Yes, I did.

15 Q. Looking at the document, Exhibit M230, is  
16 that a document you received?

17 A. Yes, it is.

18 Q. And when did you receive that?

19 A. I received that in '02.

20 Q. And where was that?

21 A. That was at the training center in Harlowton.

22 Q. Did you also review that material?

23 A. Yes, I did.

24 Q. Did you find that to be helpful?

25 A. Yes, I did.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. We heard from Mr. Roberts about something  
2 called the Wyoming manual. Do you know what that is?

3 A. Yes, I do.

4 Q. What is it?

5 A. It's a -- it basically goes over all the  
6 measuring devices and how you install them and how to  
7 read, you know, the gauges and -- you know, and  
8 basically it goes by streams, rivers, tells you all the  
9 measuring -- all the ways to measure.

10 Q. Did you have a copy of the Wyoming manual?

11 A. Yes, I did.

12 Q. Did you find that to be helpful?

13 A. Yes, I did.

14 Q. We also saw from Mr. Roberts' big black book  
15 that he referred to as the Bureau of Reclamation  
16 manual. Did you have a copy of that?

17 A. Yes, I did.

18 Q. Where did you get that?

19 A. I got that from Harlowton when I was up there  
20 at school, yes.

21 Q. The 2002 training?

22 A. The 2002, yes.

23 Q. Did you also find that to be helpful?

24 A. Very helpful.

25 Q. Why is that?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           A.    It basically did the same thing.  But it was  
2 a little -- had a little more information in it about  
3 Montana and, you know, all the different devices that  
4 you might come across.

5           Q.    Did you have other materials when you were a  
6 water commissioner that were specific to the Tongue  
7 River?

8           A.    Other materials?

9           Q.    For example, did you have a list of the water  
10 users?

11          A.    Oh, yes, I did.  I had a list of water users,  
12 and I had a list of the decree, the 1914 decree.

13          Q.    And where did you get that information from?

14          A.    I got that information from the Tongue River  
15 Water Users.  They gave me that information.

16          Q.    Did you also have a list of the storage right  
17 contract holders?

18          A.    Yes.

19          Q.    Where did you get that?

20          A.    That came from the Tongue River Water Users'  
21 Association.

22          Q.    You said you had the 1914 decree.  Why was it  
23 important for you to have the 1914 decree?

24          A.    It lists the priority dates for all the water  
25 users on the Tongue River.  So I have to have that to

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 administer the priority of the flow right.

2 Q. Did you administer the priority of the flow  
3 right of the decreed water?

4 A. Yes, I did.

5 Q. Was that true in every one of the years you  
6 were on the Tongue?

7 A. Yes, it was.

8 Q. You understand that that was your order from  
9 the judge?

10 A. Yes, I did.

11 Q. Did you talk about that with the judge?

12 A. Yes.

13 Q. And that's what he told you?

14 A. Yes.

15 Q. What did you understand your duties and  
16 responsibilities to be as a water commissioner?

17 A. My responsibilities are to get water to the  
18 headgates and measure the water that is used in the  
19 headgates by priority or if -- you know, if the -- if a  
20 priority ran out, then stored water, if they needed  
21 stored water, I'd deliver it as long as they had the  
22 shares -- they had shares coming.

23 Q. Did you have to make sure that nobody was  
24 using water that they weren't entitled to?

25 A. That's right.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Did you ever have to tell people they  
2 couldn't use water?

3 A. Yes.

4 Q. Did you ever have to shut down a headgate?

5 A. I have.

6 Q. How did you carry out those duties and  
7 responsibilities?

8 A. I basically was on the river every day. And  
9 so I always -- every day I would go on the computer and  
10 find out what the flow right was coming out of Wyoming.  
11 That was my flow right. And then I would find out what  
12 was coming out of the reservoir. And what the flow  
13 right was, I made sure that its priority that --  
14 whoever was in line got that water.

15 Q. Did you have any responsibilities related to  
16 the stored water?

17 A. Yes.

18 Q. What were those?

19 A. I had to measure -- everybody that was using  
20 stored water, I had to measure it daily. Because they  
21 have a share and, you know, if they run out of the  
22 shares, then I have to shut them off, but make sure --  
23 but if they ordered water, that I would get it to the  
24 headgate in time for them to irrigate.

25 Q. You have to make sure that nobody took that



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 stored water who wasn't entitled to it?

2 A. That's right.

3 Q. In order do that, do you also have to know  
4 the amount of direct flow in the river?

5 A. Yes.

6 Q. Would you know the amount of direct flow in  
7 the river?

8 A. Yes.

9 Q. How would you know that?

10 A. Every morning I'd go to the DNRC website and  
11 find out what's coming in at the state line, and that's  
12 their flow right. And that's what I delivered.

13 SPECIAL MASTER: Would this be a good time  
14 for the second morning break?

15 MR. WECHSLER: It would be a very good time.

16 SPECIAL MASTER: Great. So why don't we take  
17 the second morning break. We'll come back at just  
18 about the ten minutes.

19 (Recess taken 10:49 to 11:04  
20 a.m., November 14, 2013)

21 SPECIAL MASTER: Okay. Everyone can be  
22 seated.

23 Mr. Wechsler.

24 MR. WECHSLER: Thank you, Your Honor. Your  
25 Honor, again, I have a number of exhibits for

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Mr. Kepper, so I would ask leave to approach him  
2 freely.

3 SPECIAL MASTER: That sounds fine.

4 BY MR. WECHSLER:

5 Q. So, Mr. Kepper, I've handed you what we're  
6 referring to as Exhibit M229A, which is the Water  
7 Commissioner Training Manual from 2009. I'd like you  
8 to turn, please, to page 14. Actually, page 9, please.

9 A. Nine?

10 Q. Page 9. Do you have that?

11 A. Yes.

12 Q. And you mentioned that you had taken an oath  
13 to the court. Is this similar to the oath that you  
14 took?

15 A. This is, yes.

16 Q. Looking, then, at page 22 of that same  
17 document. Do you have that?

18 A. Yes.

19 Q. And I'm looking particularly at Section  
20 85-5-109. And before I do that, let me ask you: Did  
21 you become familiar with the laws and statutes that  
22 related to water commissioners?

23 A. Yes, I did.

24 Q. Why did you do that?

25 A. Well, that's the only way I can fulfill my

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 duties is to know all the statutes.

2 Q. Looking again at statute 85-5-109, it talks  
3 about the failure to perform your duty being a contempt  
4 of court. Was that your understanding when you were a  
5 water commissioner?

6 A. Yes. That was definitely my understanding.

7 Q. Was that in the back of your mind?

8 A. Yes.

9 Q. Why?

10 A. Well, I didn't want to be in contempt of  
11 court for sure. And, in fact, that's one of the things  
12 that he reiterated quite -- he said, you know, I needed  
13 to take care of my job for sure.

14 Q. When you say "he," do you mean the judge?

15 A. Judge Hegel, yes.

16 Q. Were you aware that water users could  
17 complain about your -- the way you were carrying out  
18 your duties?

19 A. Yes.

20 Q. Do you know if any of the water users did  
21 complain about the way you carried out your duties?

22 A. I'm sure they did.

23 Q. Did any complain -- it's a thankless job.

24 Did any of the water users, that you know of,  
25 complain to the court?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. No. No.

2 Q. And that was true the entire time that you  
3 were a water commissioner?

4 A. That's true.

5 Q. I want to talk a little bit about the  
6 characteristics of the Tongue River in Montana. And  
7 then we'll talk more about how you carried out your  
8 duties. And then we'll talk about some of the  
9 particular years that you were a water commissioner.

10 And so as a water commissioner, did you have  
11 the opportunity to become familiar with the Tongue  
12 River in Montana?

13 A. Yes.

14 Q. Did you become familiar with the points of  
15 diversion on the Tongue River in Montana?

16 A. Every one of them.

17 Q. How?

18 A. I physically visited every one of them. I  
19 got with every water user on the river and went with  
20 them to -- with their irrigator to every point of  
21 diversion.

22 Q. Did you do that when you were first appointed  
23 water commissioner?

24 A. Yes.

25 Q. Did you generally become familiar with the

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 irrigation practices on the Tongue River in Montana?

2 A. Yes.

3 Q. And based on your observations, generally,  
4 what crops were grown in the Tongue River during the  
5 years that you were a water commissioner?

6 A. Mostly alfalfa and grass, corn, some  
7 soybeans, and some millet.

8 Q. Some grains?

9 A. Some grain, yes.

10 Q. Does every water user grow the same crops?

11 A. No.

12 Q. Does every water user use the same type of  
13 diversion?

14 A. No.

15 Q. What were the main types of diversions that  
16 you dealt with on the Tongue River?

17 A. The main types were electric pumps and  
18 ditches, and there was some diesel pumps, tractors.  
19 Most of them were electric pumps and ditches.

20 Q. How many ditches were there?

21 A. The -- there were about five ditches when I  
22 first started administering water. But that later  
23 changed.

24 Q. That changed over time?

25 A. Yes.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. So the last year that you were a water  
2 commissioner was 2008; is that right?

3 A. Right.

4 Q. Were there ditches at that time?

5 A. There was only two ditches at that time.

6 Q. What were those ditches?

7 A. Well, actually, there were three. I take  
8 that back, because T & Y is a ditch too. But Jay  
9 Nance, and there was another ditch. Feltons. They had  
10 a ditch.

11 Q. So during the time that you were a water  
12 commissioner, some people stopped using their ditches?

13 A. Yes.

14 Q. Do you know who those were?

15 A. Yes. The Amish Ditch, what they call the  
16 Amish Ditch, that was closed. And the ditch at Bice's.

17 Q. Do you know when the Amish Ditch stopped  
18 being used?

19 A. I'm not sure which date it was, but it was a  
20 couple years after I started.

21 Q. Sometime around 2003, 2004?

22 A. Right.

23 Q. How about Bice?

24 A. Bice was about the same time. Fish and Game  
25 is the one that had them take them out. They paid them

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 to take them out, in other words.

2 Q. They went to a different type of diversion?

3 A. Different type of diversion, right.

4 Q. What kind of diversion did they go to?

5 A. The Amish Ditch, they went with the  
6 mechanical, diesel pumps. And Bice, he just bypassed  
7 it. He had other points of diversion.

8 Q. He used his other points of diversion to take  
9 his water?

10 A. Right.

11 Q. How many diesel pumps were there during the  
12 times that you were water commissioner?

13 A. There were about five diesel pumps and  
14 tractors, you know.

15 Q. When you first started?

16 A. When I first started.

17 Q. Did that number also change over the --

18 A. That number also changed. I think there's  
19 only two now. The last time I was out, there was about  
20 two.

21 Q. Three of them stopped being used?

22 A. Yes.

23 Q. The remainder of the points of diversion,  
24 were they electric pumps?

25 A. They were electric pumps.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. What do you mean by an electric pump? Can  
2 you describe that for the Special Master?

3 A. Yeah, they were, you know, you had your pump  
4 come out and into the water. And it was run by power,  
5 you know, electric power. And they go right out into  
6 the river itself. And they divert -- the intake goes  
7 out into the river, but the pump itself is sitting on  
8 dry land. And it's electric, usually 440.

9 Q. You mentioned there were diesel pumps. Are  
10 they similar to the electric pumps but they're powered  
11 by a diesel motor?

12 A. That's true.

13 Q. And then the ditches. We were talking about  
14 the various irrigation practices on the Tongue. Does  
15 every water user start irrigating at the same time?

16 A. No.

17 Q. So is there a general time when the  
18 irrigation starts to the Tongue River?

19 A. It depends on the weather, you know. If it's  
20 a wet spring, then they start irrigating later. But  
21 it's usually in April-May time period.

22 Q. Depending on the --

23 A. Depending on the weather.

24 Q. Does every water user end their irrigation at  
25 the same time?



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. No.

2 Q. And what factors go into what -- when  
3 irrigation ends?

4 A. It's usually -- the weather has something do  
5 with that too because, you know, you got to get -- some  
6 of the stuff has to come up before the frost. But corn  
7 has to be harvested and combined. And some of the  
8 crops need a -- like, soybeans, they need a shot of  
9 water before they are harvested.

10 Q. In a general sense, when does the irrigation  
11 season wind down in --

12 A. Usually September.

13 Q. Does every water user follow the same  
14 irrigation practices on the Tongue River?

15 A. No.

16 Q. For those water users who are using hay, do  
17 all the water users hay at the same time?

18 A. No.

19 Q. Do all the water users get the same number of  
20 cuttings of hay?

21 A. No.

22 Q. And so what are some of the reasons for those  
23 differences?

24 A. Some of the reasons are that some of them  
25 have more shares than others, so they can irrigate

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 longer.

2 Q. Given all this variation, are there water  
3 users in Montana that are irrigating every single day  
4 during the irrigation season in Montana?

5 A. Yes.

6 Q. Okay. Let's turn to the water rights, then,  
7 that are in the Tongue River in Montana. Was it  
8 important for you to be familiar with the water rights  
9 on the Tongue River in Montana?

10 A. Very important.

11 Q. Why?

12 A. You have to make sure that the first water  
13 right, second water right are getting their water. One  
14 of them, the second water right, is on the very end of  
15 the river. So it's important that you make sure that  
16 they get their water right because it has to travel the  
17 complete length of the river for him to get it.

18 Q. When you're talking about water right, you're  
19 talking about direct-flow water right or --

20 A. Direct flow, that's right.

21 Q. Sometimes called the decreed water right?

22 A. That's right.

23 Q. What's that water right that you're talking  
24 about at the end of the river?

25 A. It's the T & Y Ditch.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Do you know how much water the T & Y Ditch  
2 was entitled to?

3 A. I think it was 183 CFS or something similar  
4 to that.

5 Q. Maybe 187?

6 A. 187. That sounds right, yes.

7 Q. Was -- I think you said that was the second  
8 right on the river; is that right?

9 A. Second right on the river.

10 Q. What was the first?

11 A. The first was Jay Nance, and I think it's  
12 10.3 CFS, I believe.

13 Q. I'm going to show you a map here. And I want  
14 to get you to point out where those are located.

15 So can you point out to us where the Nance  
16 appropriation is?

17 A. Yeah. It would be probably right in here.

18 Q. Why don't you go ahead and mark where you  
19 think it is, with a marker.

20 A. (Witness complies.) Probably right in here.

21 Q. Can you mark for us where the T & Y is?

22 A. (Witness complies.) It's right there.

23 Q. What did you consider to be the main or  
24 important water rights in Montana on the Tongue River?

25 A. The main water rights would be the first and

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 second water right. Because during the -- after the  
2 runoff, spring runoff, then the water is going to get  
3 down to where it's probably only going to take care of  
4 those two water rights. So, you know, you got to make  
5 sure that the -- you know, at the end of the ditch, at  
6 the end of the river, that they're getting theirs. So  
7 it has to travel a long way to get down there.

8 Q. And when you talk about the end of the river,  
9 you're talking about down there at the --

10 A. 12-mile dam, yes.

11 Q. Which is actually north on the map?

12 A. Right.

13 Q. You talked about the runoff period.

14 Typically, when is that runoff period?

15 A. Well, it again depends on the weather and,  
16 you know, how much snowmelt we've had. But sometimes  
17 it only lasts, like, a couple of days and it's gone.  
18 So it can vary a great deal, which is -- which really  
19 puts a damper on the irrigation.

20 Q. So I think you're talking about it -- or you  
21 just mentioned that after that spring runoff period,  
22 there's times where there's only enough water for the  
23 T & Y Ditch and for Nance?

24 A. Right. Sometimes not even that.

25 Q. Did that happen during the years that you

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 were a water commissioner?

2 A. Yes, it did.

3 Q. Did it happen every year that you were a  
4 water commissioner?

5 A. Not every year.

6 Q. Did it happen in 2001?

7 A. Yes.

8 Q. How about 2002?

9 A. Yes.

10 Q. 2004?

11 A. Yes.

12 Q. And 2006?

13 A. Yes.

14 Q. How much water was necessary at the state  
15 line in order to make sure that the Nance right and the  
16 T & Y right were satisfied?

17 A. It would be a little over 200 CFS -- or,  
18 pardon. Little under 200 CFS. I'm sorry.

19 Q. Are you familiar with the term "calling  
20 right"?

21 A. Yes.

22 Q. What would you consider to be the calling  
23 right on the Tongue River in Montana?

24 A. Calling right would be when, like I said, the  
25 T & Y decided that they needed their water right.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. So when you first became a water user [sic],  
2 and I want to talk a little bit about those  
3 communications that you had, was it important for you  
4 to be in communication with the water users on the  
5 Tongue River in Montana?

6 A. Yes.

7 Q. Why?

8 A. Well, you have to know where all the  
9 diversions are, for one thing. And you have to -- I  
10 have to physically go to their diversions almost every  
11 day. So I need to -- you know, need to be pretty  
12 familiar with them because I don't want to get thrown  
13 off their property.

14 So it's important that you know if they're  
15 irrigating, where they're irrigating and, you know --  
16 and also all the points of diversion.

17 Q. Important that you build some sort of  
18 relationship with each of the water users?

19 A. Right.

20 Q. Did you do that?

21 A. Yes, I did.

22 Q. You personally talked to every single one of  
23 them?

24 A. Yes, I did.

25 Q. Did you maintain that communication

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 throughout the years that you were a water  
2 commissioner?

3 A. Yes, I did.

4 Q. When you first met with the water users in  
5 2001, what did you tell them?

6 A. I basically showed them the judge's decree  
7 where I was appointed. And -- excuse me -- and I  
8 showed them, you know, that the Tongue River Water  
9 Users, they brought out the new rules. And I showed  
10 them that. And, basically, I told them they were out  
11 of water, basically. That was in '01.

12 Q. Did you tell them you'd be administering the  
13 water of the Tongue?

14 A. Yes.

15 Q. Did you tell that to the decreed water users  
16 as well?

17 A. Yes.

18 Q. Told it to all of them?

19 A. Right. Every one.

20 Q. So let's talk a little about the way that you  
21 controlled the water. Would you monitor the water  
22 levels at the state line?

23 A. Yes.

24 Q. How often?

25 A. Every day.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. I'm going to hand you what's been marked as  
2 Exhibit M395. Have you seen this document before?

3 A. Yes, I have.

4 Q. What is it?

5 A. It's the flow at the state line and the  
6 outflow at the reservoir, coming out of the reservoir.

7 Q. Is this your handwriting?

8 A. Yes, it is.

9 Q. Are these records that you kept in 2006?

10 A. Yes.

11 Q. Relating to your duties as a water  
12 commissioner?

13 A. Yes.

14 MR. WECHSLER: Your Honor, I'd move the  
15 admission of Exhibit M395.

16 MR. KASTE: No objection.

17 SPECIAL MASTER: Exhibit M395, then, is  
18 admitted into evidence.

19 (Exhibit M395 admitted.)

20 BY MR. WECHSLER:

21 Q. Mr. Kepper, here this particular page  
22 shows -- the first page shows from June 21st, 2006,  
23 through July 20th of 2006. Do you see that?

24 A. Yes.

25 Q. If you turn to the next page, and this shows



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 August 22nd of '06 and then September 18th of 2006. Do  
2 you see that?

3 A. Yes.

4 Q. So there's a gap. Do you have any way of  
5 knowing why there's a gap in these records?

6 A. The -- probably the reason is because it --  
7 you know, I have a daily record every day. And it's  
8 paper laying on my computer. So I just used -- you  
9 know, there were probably several pages under that and  
10 I probably turned it over when I ran out of paper and  
11 started on -- it's just a daily log I had every day  
12 beside my computer. It's not very -- but I have  
13 tablets, you know, spiral note tablets full of this. I  
14 used to. But they probably got thrown away.

15 Q. So these were records you kept when you were  
16 a water commissioner?

17 A. Right. I had one of these every day.

18 Q. You were required to submit these to the  
19 court by the judge?

20 A. No.

21 Q. And so these records were actually provided  
22 by you as part of this case?

23 A. Right.

24 Q. And so, unfortunately, some of them got  
25 thrown away?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           A.    Yes.  I'm sure most of them got thrown away  
2 because they were just spiral bound notebooks that were  
3 laying by the computer.  I'm quite sure they got thrown  
4 away.

5           Q.    Is this document, Exhibit M395, is it  
6 representative of the type of flow records that you  
7 kept every day?

8           A.    Yes.

9           Q.    Let's look at this document a little bit.  At  
10 the top here you indicate flow.  I'm looking at the  
11 first page of Exhibit M395, which is labeled MT015338.  
12 And at the very top it says "Flow."  Do you see that?

13          A.    Yes.

14          Q.    What does that indicate to you?

15          A.    That's at the state line.  That's the flow  
16 coming into Montana from Wyoming.

17          Q.    From the state line gauge?

18          A.    From the state line, yes, at the gauge.

19          Q.    And then next to that, there's a column that  
20 says "Out."  What does that mean?

21          A.    That's out of the reservoir.  That's the  
22 gauge at the reservoir that's the outflow coming out of  
23 the reservoir.

24          Q.    Okay.  And then here on 6/26/06, you are  
25 indicating that Jay Nance was off.  What does that

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 mean?

2 A. That means that he turned his ditch off,  
3 turned the headgate off. So that meant that his water  
4 went to somebody else because he's got the first right.  
5 So I noted it that he was off at that time. So that  
6 flow went to somebody else.

7 Q. And you've indicated that if there's around  
8 200 CFS or slightly less than that, it's only Nance and  
9 the T & Y getting water. So how much water was coming  
10 in on 6/26?

11 A. 191 CFS.

12 Q. So was it important for you, at that time, to  
13 be indicating that Nance was off?

14 A. Yes.

15 Q. And that meant --

16 A. That meant the T & Y got all of that water or  
17 most of that water. And that there was -- actually,  
18 there was somebody up above that could get some water  
19 then. Because the next water right is above Nance.

20 Q. So who is the next water right?

21 A. I believe it's Quarter Circle U.

22 Q. That's the No. 3 right. Do I have that  
23 right?

24 A. I think that's the No. 3 right, yes.

25 Q. So if the T & Y is getting the full 187 --

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 and it looks like they probably were?

2 A. Yes.

3 Q. Then you would make sure that, Okay. The  
4 next one gets its water right. And that was -- say  
5 again the name?

6 A. Quarter Circle U Ranch.

7 Q. You also have indicated in the couple places  
8 that the Amish were on. Who is that referred to?

9 A. That's the Amish ditch.

10 Q. Why is that important?

11 A. That was showing me how much water that they  
12 were taking at that time.

13 Q. But you're not indicating all of the water  
14 right?

15 A. No.

16 Q. If you look at the period here in June,  
17 you're looking at some flow rights out of the reservoir  
18 of -- let's look at an easy one because it's a whole  
19 number, is July 4th, which is an interesting day  
20 anyway. And on July 4th, how much water was coming  
21 into the state of Montana?

22 A. 100 CFS.

23 Q. And how much was coming out of the reservoir?

24 A. 424 CFS.

25 Q. And with 100 CFS coming in, who is getting

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 direct-flow rights on that day, July 4th, 2006?

2 A. At that particular time it's the T & Y ditch.

3 Q. Is Nance also getting his water?

4 A. He's still off.

5 Q. So he doesn't come on until the next day?

6 A. The next day he comes on, yes.

7 Q. So on that particular day, July 4th, we  
8 talked earlier that on June 26 that it was likely that  
9 the No. 3 right was getting water. But is that true on  
10 July 4th of 2006?

11 A. No.

12 Q. And so would you have gone to the No. 3 right  
13 and told them that?

14 A. Yes.

15 Q. Now, in 2006 did everybody have their full  
16 allotment of storage water?

17 A. In 2006, I don't believe they did.

18 Q. And if the reservoir doesn't fill, does  
19 everybody get their storage water?

20 A. No.

21 Q. It's cut back --

22 A. Cut back on the proportion to what the  
23 reservoir is down.

24 Q. So on that day that we were looking at,  
25 July 4th, you got 100 CFS. Nance is off, so T & Y is

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 getting that 100 CFS. Is the T & Y also getting  
2 reservoir water?

3 A. Yes.

4 Q. And they -- would they have told you how much  
5 water they were wanting to order?

6 A. Yes. They would notify me when they turned  
7 the ditch on.

8 Q. Would you keep track of how much was stored  
9 water for the T & Y and how much was decreed water?

10 A. Yes.

11 Q. How would you do that?

12 A. Well, that would go by log here. And I would  
13 deduct the hundred CFS, the 100 CFS, from their stored  
14 water. 'Cause I'd go to their gauge and see how much  
15 water they were taking. I would deduct the hundred CFS  
16 off of their stored water. And then that's how much  
17 stored water they were taking.

18 Q. And when you reported to the judge, would you  
19 report to him the amount of use that the T & Y was  
20 making of stored water?

21 A. Of stored water only.

22 Q. Only stored water. Why was that?

23 A. The judge only wants what the stored water  
24 that's being used. He does not want the flow right.

25 Q. In these days you can see there's an awful

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 lot of water coming out. In your experience, were the  
2 water users careful with the amount of stored water  
3 that they would use?

4 A. Most definitely.

5 Q. Why?

6 A. Well, they wanted to make sure they were  
7 going to have water later on in the season. If you use  
8 it all, you know, the first -- you're not going to have  
9 any for, you know, later on in the year when you're  
10 going to need it.

11 Q. That might impact your crops?

12 A. Big time.

13 Q. And, in fact, if you look here towards -- on  
14 the second page, which is labeled MT15326, these are  
15 some pretty low numbers in August coming out of the  
16 reservoir; right?

17 A. Yes.

18 Q. And so there was -- was there less water  
19 available for water users in 2006?

20 A. Yes.

21 Q. Does it look to you like they were running  
22 out of stored water at this time?

23 A. Looks like that, yes. When it's down to  
24 95 CFS coming out of the reservoir, it's definitely --

25 Q. And looking at these flow numbers in August.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 You're looking at somewhere between 31 and the low is  
2 12. Does that strike you as low?

3 A. That's low.

4 Q. Isn't that a hardship on the water users in  
5 Montana?

6 A. Most definitely.

7 Q. Why?

8 A. Well, when you only have 12 CFS coming in,  
9 even the flow -- that barely covers the first flow  
10 right, which is 10 CFS.

11 Q. Everybody else is having to --

12 A. Everybody else is on stored water. And it  
13 doesn't look like there's much of that left.

14 Q. As the water drops below that, you know,  
15 after the spring runoff, would you have to inform the  
16 water users that they no longer had direct flow?

17 A. Yes.

18 Q. Did you do that in every year?

19 A. Yes.

20 Q. How would you do it?

21 A. I would notify them by -- personally because  
22 I'm on the river every day. And so I personally  
23 notified everybody.

24 Q. Okay. Did the water users comply with your  
25 instructions?



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. And they did that voluntarily?

3 A. Most of them, yeah.

4 Q. Did you ever have any problems?

5 A. Not any big problems, but, yeah, I had  
6 problems.

7 Q. How would you deal with those?

8 A. They would just be noticed that I was going  
9 to lock their headgate out or whatever if they didn't.  
10 And most of them complied.

11 Q. Did you ever have to actually lock a  
12 headgate?

13 A. Yes, I did.

14 Q. When was that?

15 A. That was in, I believe it was, '02. I  
16 chained a headgate.

17 Q. Do you recall which one?

18 A. It was the Amish gate, yes.

19 Q. Why did you do that?

20 A. I got some complaints that they were opening  
21 the gate. I never saw the gate open, but I got  
22 complaints that they were opening their gate at night.  
23 So I went down and chained it shut so that I was the  
24 only one that could open it. And it...

25 Q. Did you ever have to go to the sheriff?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. No.

2 Q. Did you ever have to go back to the court?

3 A. Never.

4 Q. Did you find the water users to generally be  
5 cooperative?

6 A. Yes, I did.

7 Q. Did you find that the water users generally  
8 knew how much water they were entitled to?

9 A. Yes.

10 Q. And why is that?

11 A. Well, if they didn't know how much water they  
12 were entitled to, then, you know, they couldn't  
13 irrigate.

14 Q. One of the important factors in irrigating?

15 A. Right.

16 Q. Maybe the most important factor?

17 A. The most important.

18 Q. Did you find the water users to generally be  
19 honest?

20 A. Oh, yes.

21 Q. And during the time that you were a water  
22 commissioner, did you ever observe any water user using  
23 water out of priority?

24 A. Yes.

25 Q. What would you do when that happened?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           A.    I just notified them and that we would stop  
2 it, you know.

3           Q.    And they would stop?

4           A.    They would stop, yes.

5           Q.    In your experience, were most of the water  
6 users only taking the water that they were entitled to?

7           A.    Yes.

8           Q.    You mentioned that one of your  
9 responsibilities as a water commissioner was to measure  
10 the water in the Tongue River. So I want to talk about  
11 that. First, before we talk about measuring, I want to  
12 ask about monitoring the -- all the points of  
13 diversion.

14                   And did you monitor all of the points of  
15 diversion during the time that you were a water  
16 commissioner?

17           A.    Yes, I did.

18           Q.    There were some times that you had a water  
19 commissioner working with you; right?

20           A.    Yes.

21           Q.    I think you said '02, '04, '05, '06?

22           A.    Right.

23           Q.    During those times, how would you divide the  
24 responsibilities?

25           A.    At those times I would usually -- I had it

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 from the Tongue River Dam. And there was some  
2 irrigators a little above the reservoir. But from the  
3 reservoir to Brandenburg Bridge...

4 Q. Let's go ahead and mark that.

5 A. Okay. Here's Brandenburg. So I would have  
6 this section. And then the other commissioner --

7 SPECIAL MASTER: And just for the record, you  
8 might actually want to actually describe the area.  
9 Because somebody reading this later won't have you  
10 pointing to the map.

11 THE WITNESS: Okay. This is Brandenburg  
12 Bridge here.

13 BY MR. WECHSLER:

14 Q. Just north of Brandenburg?

15 A. Yes. It's just actually just a bridge that  
16 crosses the river there.

17 Q. And Brandenburg -- this is all on Figure 1,  
18 which is a figure in Exhibit M5, which is Mr. Book's  
19 original report.

20 A. Okay. And then the other commissioner would  
21 have it from the 12-mile Dam, which is to Brandenburg  
22 to T & Y ditch canal. He would have it from the  
23 Brandenburg Bridge to the T & Y ditch.

24 Q. Why did you use the Brandenburg Ditch as a  
25 dividing point?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           A.    It was just an easy way to divide it.  It's  
2 close to halfway.  Everything else would be on this  
3 side of the river.  And then he wouldn't have to cross  
4 the river.

5           Q.    Are there roughly the same number of users to  
6 the north and south of Brandenburg Bridge?

7           A.    There's probably more users on the south --  
8 south of Brandenburg than the north.

9           Q.    That was the section that you took?

10          A.    That was the section I took.

11          Q.    When you were pointing to the map, I think  
12 you mentioned that they would have the diversions up to  
13 T & Y ditch.  Were there storage water users below the  
14 T & Y?

15          A.    Yes.

16          Q.    Was it sometimes the responsibility of the  
17 water commissioner to make sure that that stored water  
18 got to those users?

19          A.    Yes, it was.

20          Q.    During the times that you were the only water  
21 commissioner, how far would you be able to travel on a  
22 typical day?

23          A.    I could probably travel half of the river in  
24 a day.

25          Q.    You said you were on the river every day?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. I was on the river every day, yes.

2 Q. Including Saturday and Sunday?

3 A. Including Saturday and Sunday.

4 Q. And holidays?

5 A. And holidays.

6 Q. During the times that you were working in  
7 tandem with another water commissioner, were you -- how  
8 far would you be able to get amongst your water users?

9 A. I could get all of them.

10 Q. You would check the entire length?

11 A. You know, I know who's irrigating, who's off,  
12 you know, just from my daily. So I didn't have -- if a  
13 guy is off and cutting hay, I don't have to check his  
14 pumps because he can't irrigate when he's cutting. So  
15 he's drying hay or cutting hay. You know, I don't  
16 check that. But I know exactly who is irrigating and  
17 who is not. And that's the ones I go to. So I don't  
18 have to visit every pump site. So -- but I can cover  
19 it in a day.

20 Q. Did you measure all of the water that was  
21 being diverted?

22 A. Yes. You know, not daily. Because it's --  
23 some of it is cumulative. I don't have to check it  
24 every day. If a guy is irrigating and I've got a  
25 cumulative measurement, I don't have to check it every

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 day. I just have to check it every so often. And I  
2 still know how much he's used because it's cumulative.

3 Q. When you say "cumulative," you're talking  
4 about the total amount of stored water that they're  
5 using over the course of an irrigation season?

6 A. Or a time period, a certain time period;  
7 right.

8 Q. And that's because that's what you needed to  
9 report to the judge?

10 A. So that's what I had to report. That's  
11 right. The judge, he required a report every two  
12 weeks.

13 Q. Of the amount of stored water?

14 A. Of the amount of stored water that was used.

15 Q. You were also monitoring all of the other  
16 diversions but not necessarily measuring?

17 A. Right.

18 Q. When you're looking at the stored water in  
19 that way, would it present a problem if someone had  
20 ordered stored water further down the stream but it was  
21 used upstream?

22 A. That would be a problem.

23 Q. So what would you do?

24 A. I would -- whoever was using it upstream that  
25 hadn't ordered it, we have to shut off.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. We heard from -- or we saw with Mr. Roberts a  
2 Marsh-McBirney device.

3 A. Right.

4 Q. Did you use a Marsh-McBirney device?

5 A. Yes, we did.

6 Q. When did you use that?

7 A. Every time we had to check, like, a ditch,  
8 you know, that didn't have a flume in it, we would  
9 check that to see how much water was actually in the  
10 ditch.

11 Q. So we talked about the number of ditches. I  
12 think you said there were five?

13 A. There were five to start with, yeah.

14 Q. That -- did that include the T & Y?

15 A. Yes.

16 Q. And did the T & Y also have an electronic  
17 meter on it that you were --

18 A. They have a mechanical meter.

19 Q. Would you also check that?

20 A. I would check that, yes.

21 Q. Every day?

22 A. Every day.

23 Q. Mr. Roberts also talked about the ultrasonic  
24 meter. Did you do the ultrasonic meter?

25 A. Yes.



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. We actually have it here. I want to --

2 MR. WECHSLER: If it's okay with the Special  
3 Master, have him take a look at that?

4 SPECIAL MASTER: Be fine.

5 BY MR. WECHSLER:

6 Q. Mr. Kepper, if you could take out the meter  
7 and show the Special Master how that meter works.

8 THE WITNESS: Basically what it looks like,  
9 Your Honor. And when you come to a piece of --

10 SPECIAL MASTER: Does anyone else want to  
11 look?

12 THE WITNESS: When you come to a piece of  
13 equipment, you have to measure the equipment to see  
14 what the diameter is, what kind of material it is, how  
15 thick it is. And you input that data into the machine.  
16 And the machine will tell you how far apart to put  
17 the -- there's little sensors that go underneath here.  
18 This is fitting on the pipe itself.

19 And you put the sensors to wherever the  
20 machine tells you that you need to -- spacing. And  
21 then you turn the machine on. And it sends out the  
22 ultrasonic waves and measures the flow and tells you  
23 the gallons per minute or whatever measurement you  
24 want. And this will tell you. And it's pretty  
25 accurate.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 SPECIAL MASTER: Thank you.

2 BY MR. WECHSLER:

3 Q. When you would start, during an irrigation  
4 season as a water commissioner, was it necessary for  
5 you to use the meters to take a baseline reading?

6 A. Yes.

7 Q. Why was that necessary?

8 A. Well, you know, I have to have something to  
9 start with. So I got to know what their pump is  
10 putting out. No matter when the pump is rated for,  
11 this will tell you the actual flow. Even if it's got a  
12 meter on it, sometimes the meters that are on, the  
13 mechanical meters, they got moss in them and  
14 everything, and they don't exactly read correctly. But  
15 this will give you the exact flow.

16 So I would put this every year, everybody got  
17 a -- you know, got a new reading. So, basically, I  
18 would start a baseline every year. And if he decided  
19 that he thought it was wrong, I would go back and take  
20 another reading.

21 Q. So during the year, there might be water  
22 users who said, Hey, I don't think my pump is taking as  
23 much water as you originally said it was. Is that  
24 right?

25 A. That's correct.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. What would you do then?

2 A. I would go set up the machine again and get  
3 him down there and show him what it was reading. And  
4 we would -- he would have to go by the reading.

5 Q. Did that happen every summer?

6 A. Yes.

7 Q. Why do you think the water users were  
8 concerned about that?

9 A. Well, they're always concerned with how much  
10 water they're using. Because the less they use, then  
11 the more they got to use.

12 Q. They didn't want to get overcharged --

13 A. Right.

14 Q. -- for stored water?

15 A. Right.

16 Q. Let's talk a little about the specific  
17 diversion and how you did that then. How would you do  
18 measurements on the headgates of the ditches?

19 A. If it had a ditch, you know, there's no pipe  
20 attached or anything like that. I would use the  
21 Marsh-McBirney, and it would be the same. You set it  
22 up to -- you know, like Mike was telling you, you set  
23 it up in the ditch at certain points along the ditch  
24 and certain levels. And then you take that reading and  
25 compute it out and it gives you the flow.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Then did you have to know how long the water  
2 user was irrigating?

3 A. Yes.

4 Q. How would you find out that?

5 A. If it was -- if it's a ditch with a  
6 mechanical gate on it, then I would check that ditch  
7 every day to see if, you know, it still had the same --  
8 you can measure this dam to see if it's been -- if they  
9 moved the gate or anything, you can tell whether it's  
10 been moved or anything like that.

11 Q. Were there some that didn't have that kind of  
12 meter?

13 A. No. All the gates were where I could measure  
14 them.

15 Q. How would you do measurements on electric  
16 pumps?

17 A. I would use this. 'Cause they've got a pipe  
18 attached to them, so I would measure the pipe.

19 Q. Using the ultrasonic meter to --

20 A. Using the ultrasonic.

21 Q. You'd take a baseline at the beginning of the  
22 year?

23 A. Yes.

24 Q. Then how would you figure out how long they  
25 were irrigating?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           A.    I would go by the electric meter that's on --  
2 running the pump.  I would take a reading on the pump  
3 when I checked it.  And then I'd -- you know, when I  
4 came back, I'd take another reading.  And the meter  
5 would tell me how long the pump ran.  I would have to  
6 compute it out, the computer reading -- I mean, the  
7 meter readings into minutes.  And that would tell me  
8 how long the pump ran.  And I would compute that in  
9 gallons per minute.

10           Q.    Approximately how many diversions were there  
11 on the Tongue River in Montana?  Over 70?

12           A.    Oh, yes.

13           Q.    Over 80?

14           A.    Closer to 200.

15           Q.    Closer to 200.  And did -- when we talked  
16 earlier, you said roughly ten to five of them were  
17 headgates and five of them diesel pumps?

18           A.    Right.

19           Q.    So the remainder, the vast majority were  
20 those electric pumps?

21           A.    Right.

22           Q.    We talked about the ditches and the electric  
23 pumps.  So how would you measure the ones that were  
24 diesel pumps?  Would you also take that and use that --

25           A.    I would use the ultrasonic because they have

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 pipe that's coming from the pump itself. The diesel  
2 engine just runs the pump. And it had a pipe. I would  
3 measure the pipe and get the same thing. And then I  
4 would -- if it was a diesel pump that -- some of them  
5 had meters on them to tell you how long the pump was  
6 running. And I would go by that meter. And if it  
7 didn't have that on it, then I would check the pump.  
8 And whoever was operating the pump, I would tell them,  
9 you know, you need to tell me when you turn the pump on  
10 and then when you cut it off.

11 But I would also check it. Every time I went  
12 by there I would check it to, you know, just for my  
13 information.

14 Q. Think those people were honest with you?

15 A. Yes.

16 Q. Did people ever call you on the telephone to  
17 tell you when they were turning on and turning off?

18 A. Yes.

19 Q. Did that happen often?

20 A. It had to happen often because I wouldn't  
21 release the water unless I knew they needed it.

22 Q. During the time you were a water  
23 commissioner, was there an order or a direction from  
24 the Tongue River Water Users' Association to require  
25 metering devices on all of the diversions?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. And did that -- when did that happen, do you  
3 know?

4 A. I'm not sure of the exact year that they put  
5 it out. But I am aware that they put it out.

6 Q. Early on in the time that you had become a  
7 water commissioner?

8 A. Yes.

9 Q. I think we can find that in some of the  
10 documents.

11 But did that happen over the course of the  
12 time that you were a water commissioner?

13 A. It was year to year they would increase it.  
14 You know, it didn't happen overnight, no.

15 Q. But by the end of the time, a lot more had --

16 A. Right. A lot more had measuring devices.

17 Q. Let's talk a little bit about stored water.

18 When you were a water commissioner, were you  
19 responsible for ordering stored water for water users?

20 A. Yes.

21 Q. So can you please describe how that would  
22 work?

23 A. The water user would contact me and tell me  
24 when he needed the water, you know, what time period he  
25 needed the water at. I would notify Art Hayes, which

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 would notify the gatekeeper that open and shut the  
2 gates on the river. And I would notify them when they  
3 needed to turn the water loose, and they would turn the  
4 water -- and by the time it got to whoever was asked  
5 for it, then it would be ready for them to irrigate  
6 with.

7 Q. I'm going to hand you what's been marked as  
8 Exhibit M388. I think this would be my wife's favorite  
9 exhibit.

10 A. Honey-do list.

11 Q. Do you recognize this document?

12 A. Yes, I do.

13 Q. What is it?

14 A. It's just where I wrote down where Lance  
15 called and he needed water on June 25th to July 8. He  
16 needed 60 CFS during that time period. And Bart Meged  
17 called and he needed --

18 Q. This is your handwriting?

19 A. This is my handwriting.

20 Q. That's true of both pages?

21 A. Yes.

22 Q. And, particularly, if you look at the second  
23 page, you can see this was in the year 2004?

24 A. Right.

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



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 admission of Exhibit M388.

2 MR. KASTE: No objection.

3 SPECIAL MASTER: Exhibit M388 is admitted.

4 (Exhibit M388 admitted.)

5 BY MR. WECHSLER:

6 Q. Mr. Kepper, I presume that these types of  
7 documents you would not be submitting to the Court?

8 A. That's correct.

9 Q. Did the water users have your telephone?

10 A. Yes, they did.

11 Q. Would they call you at various times to let  
12 you know when they needed stored water?

13 A. Yes.

14 Q. Is this a document that is indicative of the  
15 type of notes you would take when that would --

16 A. That's exactly right. This was by the phone,  
17 and that's why it was used at the time.

18 Q. This pad happened to be sitting there by the  
19 phone?

20 A. Yes.

21 Q. You mentioned -- we talked about the way you  
22 would look at the water coming into the state of  
23 Montana and then the water coming out of the reservoir.  
24 Now, why would you be looking at the water coming out  
25 of the reservoir?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           A.    Well, I would -- the water coming out of the  
2 reservoir would be stored water and flow right water.

3           Q.    You could figure out the amount of --

4           A.    I could figure out the difference so I could  
5 deliver the stored water to whoever wasn't getting, you  
6 know, their flow right.

7           Q.    And you could do that by subtracting the  
8 amount coming out of the river from -- the amount  
9 coming into the state from the amount coming out of the  
10 reservoir?

11          A.    That's correct.

12          Q.    If the Tongue River Reservoir fills  
13 completely, how much is one share of water worth?

14          A.    One acre-feet.

15          Q.    And if it doesn't fill, what happens?

16          A.    Well, however much it's reduced is what you  
17 get reduced on your shares. In other words, if it's  
18 60 percent storage in the reservoir, then you're going  
19 to get 60 percent of your shares.

20          Q.    I'm going to hand you an exhibit that's been  
21 marked as Exhibit M550. Exhibit M550 has not yet been  
22 admitted. I believe we'll be working on that with one  
23 of the subsequent witnesses. But there is something  
24 here that I think will help us illustrate a point.

25                   And so if you look at the bottom pages,

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 again, they're Bates stamped, there will be WY, and  
2 then there's a number. If you can turn to the  
3 No. WY037882.

4 A. Did you say 883?

5 Q. 882.

6 A. Okay.

7 Q. At the top it says Tongue River Water Users'  
8 June meeting. Do you see that?

9 A. Yes.

10 Q. Are the minutes from the Tongue River Water  
11 Users' Association, are those things that you would  
12 review as part of your work as a water commissioner?

13 A. Yes.

14 Q. Did you attend a lot of the meetings?

15 A. Yes, I did.

16 Q. What I really want to look at here is towards  
17 the bottom it says Policy 1. And it talks about the  
18 schedule, what is referred to as lag time. Do you see  
19 that?

20 A. Yes, I do.

21 Q. What did you understand lag time to be?

22 A. Lag time is the time that it took the water  
23 to reach that particular area.

24 Q. And so the Tongue River Water Users'  
25 Association actually divided the river into sections.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 And there was a certain amount of lag time to get the  
2 water from the reservoir to that location?

3 A. That's correct.

4 Q. And did you have responsibilities related to  
5 that?

6 A. Yes.

7 Q. What were those?

8 A. Well, if somebody ordered water, then I would  
9 have to know how long it would take to get to their  
10 location. So I would have to know the lag time so that  
11 I could order that much in advance.

12 Q. Those lag times were set by the Users'  
13 Association?

14 A. Yes.

15 Q. Did you find them to be generally accurate?

16 A. Fairly accurate, yes.

17 Q. The next -- at the bottom of the page there,  
18 it talks about Policy 11. And it talks about there  
19 being a loss along the river.

20 During the years that you were a water  
21 commissioner, did you observe a loss along the river?

22 A. Yes, I did.

23 Q. What do you mean by that?

24 A. Well, if you -- say you released a hundred  
25 CFS at the headgate of the river, and by the time it

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 got to the T & Y ditch, it might be 80 CFS, you know.

2 Q. Even if there were no diversions?

3 A. Right.

4 Q. The water would actually be losing as it went  
5 down the water course?

6 A. Yes.

7 Q. Here it says that the "water loss will be  
8 2 percent along each section of the river, with a max  
9 of 12 percent at the end of the river."

10 Where was the end of the river?

11 A. That would be at the T & Y ditch.

12 Q. Did you find that to be more or less  
13 accurate?

14 A. Yes.

15 Q. Later on, the Tongue River Water Users'  
16 Association, I think, ramped that up to 24 percent; is  
17 that right?

18 A. I think so, yes.

19 Q. Do you know why that happened?

20 A. I'm not sure. One of the -- why they went  
21 up.

22 Q. Would the amount of loss change from year to  
23 year depending on the conditions?

24 A. The hotter -- yeah. The hotter and dryer the  
25 summer, the more loss you're going to have; and the

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 less water that's in the river, you're going to have  
2 more of a loss on it.

3 Q. Did you have any responsibilities related to  
4 that loss from storage water?

5 A. My responsibility was just in the measuring  
6 of it.

7 Q. So you would keep track of that loss. So,  
8 again, let's say the T & Y ordered a hundred acre-feet  
9 or a hundred CFS of storage, equivalent of --

10 A. I would deduct that off what they were going  
11 to get.

12 Q. You'd have to deduct the 12 percent --

13 A. Right.

14 Q. -- and get it down to the T & Y?

15 Okay. I want to talk about a couple of the  
16 diversions here on the Tongue. And what I first want  
17 to do is talk about the diversions above the Tongue  
18 River Reservoir.

19 So were there any diversions above the Tongue  
20 River Reservoir between the reservoir and the state  
21 line?

22 A. Yes, there was.

23 Q. How many?

24 A. There were two.

25 Q. Who were they?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. They were Visborg.

2 Q. How do you spell that?

3 A. I don't know.

4 Q. V-i-s-b-o-r-g?

5 A. I think so.

6 Q. Is that a name of a woman?

7 A. That's the name of a woman, yeah.

8 Q. Do you recall her first name?

9 A. No, I don't.

10 Q. Who is the other diversion?

11 A. The other diversion was the -- it was the  
12 coal --

13 Q. Decker Coal?

14 A. Decker Coal. Sorry.

15 Q. Those were the only two diversions above the  
16 Tongue River Reservoir?

17 A. Yes.

18 Q. Did you actually physically go above the  
19 Tongue River Reservoir?

20 A. Yes.

21 Q. And that was part of your normal travels?

22 A. Yes.

23 Q. And so were you controlling the distribution  
24 of water from those water users above the Tongue River?

25 A. Yes. I was measuring all the water up there,

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 yes.

2 Q. From all of those diversions?

3 A. Yes.

4 Q. And so there was no water user above the  
5 Tongue River Reservoir using water that -- without your  
6 supervision?

7 A. No.

8 Q. Let's take a look at -- and we'll call it up  
9 on the screen here -- Exhibit M5 at Appendix A, which  
10 is page 19 of that document.

11 MR. WECHSLER: And then if you could enlarge  
12 the section below the Tongue River to the state line.  
13 Below the reservoir to the state line.

14 BY MR. WECHSLER:

15 Q. All right. Great. Do you recognize here,  
16 Mr. Kepper, the diversions that were used by Visborg?

17 A. Yes, I do.

18 Q. You can actually write on the screen with  
19 your finger. Can you circle those?

20 A. Okay.

21 Q. And is the Visborg diversion shown on this,  
22 or is it further south?

23 A. Visborg?

24 Q. Yes. Can you show us where Visborg was?

25 A. That's what I just circled.



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Those were Visborg. And then the other were  
2 Decker Coal?

3 A. Yeah, Decker Coal didn't actually irrigate.

4 Q. During those years they didn't irrigate?

5 A. Yeah.

6 Q. But you're aware that's where they --

7 A. Right.

8 Q. And there weren't any other users in, say,  
9 '01, '02, '04, '06 that were taking water?

10 A. No.

11 Q. Did Visborg and Decker Coal have water  
12 rights?

13 A. If they did, they were so far down that it  
14 wouldn't --

15 Q. They were junior?

16 A. Very junior.

17 Q. Did they have storage water?

18 A. They had storage rights, yes.

19 Q. Were they using storage rights?

20 A. This was storage water, whenever they used  
21 it, yes.

22 Q. How did you account for that?

23 A. How did I account for it?

24 Q. Well, they're above the reservoir.

25 A. Yeah, I just measured what they used and

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 deducted if from the stored water.

2 Q. So that's the top of the system, which is  
3 south from the Tongue River in Montana. So now moving  
4 down to the bottom of the system, which is north in the  
5 Tongue River in Montana, were there water users --  
6 you've marked the T & Y. Were there water users below  
7 that?

8 A. Yes.

9 Q. Did they have water rights?

10 A. Yes. Very, very junior.

11 Q. So, again, during most times of the year,  
12 were they using stored water?

13 A. Stored water, yes.

14 Q. And did you have to make sure some water got  
15 to them?

16 A. Yes.

17 Q. Were there times during the years that you  
18 were a water commissioner where the T & Y took all of  
19 the water in the river?

20 A. Yes.

21 Q. Was that common?

22 A. Very common.

23 Q. Did that happen every summer?

24 A. Yes, almost every summer. Yes.

25 Q. And even during those times that the Tongue

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 River -- I'm sorry -- the T & Y canal was taking all of  
2 the water in the river, was there still some water down  
3 below?

4 A. Yes. There was seepage underneath the dam.  
5 And also, they have a little bypass there that they can  
6 let the water -- he can let the little water out for --

7 Q. For those storage water users?

8 A. Yeah.

9 Q. There's also some tributaries that come in  
10 below the T & Y; right?

11 A. Yes.

12 Q. Did those have water during the irrigation  
13 season?

14 A. Yes.

15 Q. I want to talk about shortages on the Tongue  
16 River and how that impacted. So during the years that  
17 you were a water commissioner, do you remember there  
18 being water shortages?

19 A. Yes.

20 Q. What years?

21 A. '01, '02, '04, '06 -- '05, '06.

22 Q. Pretty long drought?

23 A. Yes.

24 Q. How about 2000? Was that a dry year?

25 A. That was a dry year too, but I wasn't on.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. You weren't a water commissioner?

2 A. I was not a water commissioner.

3 Q. You were the very first water commissioner on  
4 the Tongue River; is that right?

5 A. Yes.

6 Q. Now, if the river gets too low, does it  
7 create a problem for people to be able to use their  
8 diversions?

9 A. Yes. Their pumps are high and dry basically.  
10 There's no place for them to get water. You can't go  
11 out and dig a channel to your pump, you know. So when  
12 the river dries up, then it -- even the ditches, you  
13 can't get water into the ditches. Even the gravity  
14 flow ditches are high and dry.

15 Q. That happened during the years you mentioned?

16 A. Yes.

17 Q. You talked about storage rights being cut  
18 back on a pro rata basis. Based on your observations,  
19 was that difficult for people?

20 A. Yeah, very difficult.

21 Q. Why?

22 A. When -- well, when you can't irrigate, even  
23 if there's a little water in the river. And you can't  
24 deliver water when the river is that low, you know.

25 Q. So there's less decreed water and there's

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 also less storage water; right?

2 A. Nobody can irrigate, basically.

3 Q. When there's less water like that, does that  
4 impact the irrigators' decisions about their practices  
5 and crops?

6 A. Oh, yes. That's a big financial burden, yes.

7 Q. What are some of the things that they might  
8 do in order to get through?

9 A. They would just irrigate the field that they  
10 could get irrigated. There would be some pumps that  
11 you can't even irrigate with. So they would basically  
12 irrigate what they could get to.

13 Q. Some of them change their crops?

14 A. Some changed their crops. They went from  
15 corn to alfalfa so that they could -- they have enough  
16 water.

17 Q. And some of them irrigate less acreage?

18 A. Very -- most of them.

19 Q. Some of them have to sell some of their  
20 cattle?

21 A. Yes, that happened.

22 Q. Based on your observations, were the water  
23 users cautious with their stored water during those  
24 years?

25 A. Oh, very cautious.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Did they generally tend to manage their water  
2 so that it would last throughout the season?

3 A. Yes.

4 Q. And you know that because you'd be ordering  
5 stored water?

6 A. Right.

7 Q. During some of those years when you were a  
8 water commissioner, did the water users purchase water  
9 from the Northern Cheyenne?

10 A. Yes.

11 Q. Do you know why they did that?

12 A. They were out of stored water. And they  
13 needed more water to irrigate with.

14 Q. Did you have responsibilities for delivering  
15 that water?

16 A. Yes.

17 Q. How would you do that?

18 A. I'd have to know who actually bought the  
19 water. And when they released this water, then I'd  
20 have to make sure that they, whoever bought the water,  
21 was actually the one receiving it.

22 Q. There was typically some Northern Cheyenne  
23 water available. Were there times where water was  
24 short but people did not buy Northern Cheyenne water?

25 A. Yes, that's right.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Why was that?

2 A. It was actually too expensive. And, you  
3 know, if the river gets down real low, then you can't  
4 deliver it anyway. If you wait until the river gets  
5 real low, you can't deliver the water anyway. And it's  
6 expensive water.

7 MR. WECHSLER: And, Your Honor, it's 2:10  
8 [sic], but I don't have that many questions. I think I  
9 could get done certainly by 12:25 or 12:30.

10 SPECIAL MASTER: I think probably at this  
11 point, the major issue is the court reporter. Why  
12 don't we proceed under those circumstances.

13 BY MR. WECHSLER:

14 Q. Let's talk a little bit about waste in the  
15 Tongue River in Montana. Based on your observations,  
16 Mr. Kepper, did the water users on the Tongue River in  
17 Montana use water efficiently?

18 A. Yes.

19 Q. And what do you mean by that?

20 A. I mean, you know, it cost money to irrigate  
21 with. And nobody is going to -- you know, nobody is  
22 going to waste -- you know, waste money by  
23 irrigating -- you know, by wasting water. I mean, it  
24 cost too much to get it. So I didn't observe anybody  
25 wasting water, never.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. If you had observed somebody wasting water,  
2 what would you have done?

3 A. Well, I mean, you know, it's their water. I  
4 can't keep them from wasting it. But I could caution  
5 them, you know, that we don't have water to waste.  
6 But, basically, if they got it coming, I can't stop  
7 them. But I can advise them, sure.

8 Q. Did you ever observe that?

9 A. No, I never have.

10 Q. So we heard from Mr. Roberts that you were  
11 required to keep daily records. Did you keep daily  
12 records?

13 A. Yes.

14 Q. What kind of records?

15 A. I just -- just handwritten notes mostly. You  
16 know, when I would go -- if the pump was running, I  
17 would note it, that that day that the pump was running.  
18 Or, you know, I didn't have to measure every -- you  
19 know, I didn't have to measure every day because I had  
20 cumulative data. But I would check to see if they were  
21 irrigating.

22 Q. Keep notes of the things you did during the  
23 day?

24 A. Right.

25 Q. Did you have to submit those daily records to



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 the court?

2 A. No.

3 Q. And the judge didn't require you to do that?

4 A. No.

5 Q. So now we looked at -- there were also some  
6 reports, monthly reports, from the statute. Did you  
7 submit reports on a regular basis?

8 A. Every two weeks I submitted records to the  
9 court for cumulative uses of stored water.

10 Q. And that was what the judge had told you that  
11 he wanted to see?

12 A. That's correct.

13 Q. I want to look at some of the documents from  
14 the years that you were a commissioner, including some  
15 of the records that have been kept. I'm going to start  
16 with Exhibit 378.

17 MR. WECHSLER: And, Your Honor, it looks like  
18 there's a first page labeled 378. It's really just the  
19 second part of the Exhibit 378A that I'm looking at.

20 BY MR. WECHSLER:

21 Q. Mr. Kepper, do you recognize this document  
22 that's been labeled Exhibit M378A?

23 A. Yes.

24 Q. What is it?

25 A. It's a petition to appoint a water

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 commissioner.

2 Q. And it's a petition to appoint you as a water  
3 commissioner?

4 A. Right.

5 Q. This is a document that you used as part of  
6 your responsibilities?

7 A. Yes.

8 Q. And this is an order from the court; is that  
9 right?

10 A. That's right.

11 Q. In fact, it's signed by the district judge  
12 there on July 13th, 2001?

13 A. That's correct.

14 Q. And then at the end of it, there's a note  
15 that looks to be written by you. Is that right?

16 A. Yes. I signed it. I don't know whether I  
17 wrote it or not, but I signed it.

18 Q. That's your signature?

19 A. Yes.

20 MR. WECHSLER: Your Honor, I'd move the  
21 admission of Exhibit M378A.

22 MR. KASTE: No objection.

23 SPECIAL MASTER: Exhibit M378 is admitted.

24 (Exhibit M378A admitted.)

25

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 BY MR. WECHSLER:

2 Q. If you look, Mr. Kepper, please, at paragraph  
3 3, which is on the second page of this document. Well,  
4 first, let me get you to look at the first page. I  
5 think it would be helpful to start there. And it  
6 indicates that Charles Kepper is appointed chief water  
7 commissioner. And then it goes on to say that "shall  
8 deliver the stored water purchased by the Tongue River  
9 Water Users' Association." Do you see that?

10 A. Yes.

11 Q. And then you can see it is paragraph 3 that  
12 indicates at the very end of that, it indicates that  
13 "No water user may use any water flowing in the Tongue  
14 River except as distributed by the water commissioners  
15 when the prorated plan is in effect." You see that?

16 A. Yes.

17 Q. So did you understand that you were to  
18 control all of the water to be distributed on the  
19 Tongue River?

20 A. Yes.

21 Q. Including decreed water?

22 A. Yes.

23 Q. And that was the instructions you got from  
24 the judge?

25 A. Yes.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Let's take a look at Exhibit M380. Do you  
2 recognize this document?

3 A. Yes.

4 Q. So the first part of this document, starting  
5 with the label MT9972 and going through the, what looks  
6 to be MT9977, what is that document? Is that the  
7 petition from the Tongue River Water Users'  
8 Association?

9 A. Oh, yeah, it's a petition of commissioner.

10 Q. What's the date on that document?

11 A. The date is --

12 Q. I'm looking at the first page at the very  
13 top, upper right-hand corner.

14 A. Oh, May 2nd, 2002.

15 Q. And there it's signed by the clerk of the  
16 court?

17 A. Right.

18 Q. And then the last two pages of this document  
19 with the same date, what is that? Is that the order  
20 from Judge Hegel?

21 A. Right.

22 Q. It's got his signature on the second page of  
23 that?

24 A. Yes.

25 Q. These are documents that you used when you

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 were water commissioner in 2002?

2 A. Yes. I had -- in fact, I had a copy, several  
3 copies of these in the pickup with me. So when I went  
4 out to notify all the water users, I showed them this  
5 copy.

6 Q. And this is the document appointing you and  
7 Mr. Fjell the water commissioners in 2002?

8 A. Yes.

9 MR. WECHSLER: Your Honor, I'd move admission  
10 of Exhibit M380.

11 MR. KASTE: No objection.

12 SPECIAL MASTER: So, actually, let me just  
13 ask. So I assume you are here actually seeking the  
14 admission of M380A?

15 MR. WECHSLER: Your Honor, that is true.

16 SPECIAL MASTER: Okay. And similarly, the  
17 earlier one would have been 378A?

18 MR. WECHSLER: That's correct. And here this  
19 one also includes 380B, which is the second part of the  
20 order.

21 SPECIAL MASTER: Okay.

22 MR. WECHSLER: So I would move the admission  
23 of those documents.

24 SPECIAL MASTER: Okay.

25 MR. KASTE: And I don't object to either.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           SPECIAL MASTER: So, again, let's make sure  
2 the record is absolutely clear. So earlier when I  
3 admitted 378, it was actually 378A that was admitted.  
4 And then this time we're admitting 380A and 380B?

5           MR. WECHSLER: Yes, Your Honor.

6           SPECIAL MASTER: Okay. And 378 and 380 are  
7 simply sort of obsolescent versions of those exhibits  
8 that we can ignore?

9           MR. WECHSLER: Correct.

10          SPECIAL MASTER: Okay.

11                           (Exhibit M380A and M380B  
12                           admitted.

13 BY MR. WECHSLER:

14          Q. Mr. Kepper, again, looking at the order from  
15 2002, and I'm looking at the page that's labeled at the  
16 bottom MT9978, there it says in bold lettering again,  
17 "No water user may use any water flowing in the Tongue  
18 River except as distributed by the water  
19 commissioners." Was that your understanding in 2002?

20          A. Yes.

21          Q. And so were you, again, administering both  
22 decreed and stored water?

23          A. Yes.

24          Q. And that was your understanding of what the  
25 judge wanted?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. That's right.

2 Q. I'd like to look at a couple other documents  
3 from '02. So let's start with Exhibit M381.

4 Mr. Kepper, have you seen this document  
5 before, Exhibit M381?

6 A. Yes.

7 Q. What is this?

8 A. These are just reports where I went out to  
9 the pump meter and the pumps and took a measurement,  
10 took a reading, actually got the reading from the pump,  
11 how much was used at that time.

12 Q. Is some of the handwriting on this page your  
13 handwriting?

14 A. Some of it is mine.

15 Q. Do you know who the other's is?

16 A. Yes. It's Alan Fjell.

17 Q. Is this a document that you used in 2002 and  
18 2004 as part of your responsibilities?

19 A. Yes.

20 MR. WECHSLER: Your Honor, I'd move the  
21 admission of Exhibit M381.

22 MR. KASTE: No objection. Although, I think  
23 it'd be valuable for him to describe to the Court which  
24 handwriting is his and which is Mr. Fjell's.

25 SPECIAL MASTER: So two things: Number one,

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 we'll go ahead, so I don't forget, we'll admit Exhibit  
2 M381.

3 (Exhibit M381 admitted.)

4 SPECIAL MASTER: And then if the witness can  
5 describe which are his handwriting, which is  
6 Mr. Fjell's, and I don't know whether there's just a  
7 few that are Mr. Fjell's, if we can --

8 THE WITNESS: It's a combination of both.

9 SPECIAL MASTER: Is there a way in which you  
10 can describe --

11 THE WITNESS: Well, mine is --

12 SPECIAL MASTER: Maybe on the first page  
13 it --

14 THE WITNESS: Mine is usually on the bottom  
15 of the page. And it's --

16 BY MR. WECHSLER:

17 Q. Is it for 2004?

18 A. It's for 2004.

19 Q. On the first page it's 2004?

20 A. 6/5/04.

21 Q. The first page, the entries from 2002, those  
22 were Mr. Fjell?

23 A. That's right.

24 Q. During the year 2002, you served with  
25 Mr. Fjell?



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. Did you cover the entire length of the river  
3 with Mr. Fjell?

4 A. On the first year we both went up and down so  
5 we'd know the complete river, yes.

6 Q. So it wasn't until the subsequent years after  
7 2002 that you split it at the Brandenburg Bridge?

8 A. Right.

9 Q. And so was this a document that you would  
10 have had with you on a daily basis?

11 A. Yes.

12 Q. We talked about some of your daily records.  
13 Are these some of your daily records?

14 A. These are some of the daily records, yes.

15 Q. Do you think this is a complete set of those  
16 records?

17 A. No.

18 Q. Do you have any idea what happened to some of  
19 those records?

20 A. I sure don't. Some of them were in tablets  
21 that I had. And, you know, they got misplaced. You  
22 know, I didn't know that I was going to need to save  
23 them or I would have. But they were just daily  
24 records, and they were just on tablets, pads, you know,  
25 that I took with me.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. This is representative of some of the types  
2 of daily records that you would keep?

3 A. Right. This is what they would look like,  
4 yes.

5 Q. Let's look at the first page. Can you give  
6 us an idea of what this is showing?

7 A. Well, this is showing on -- you can't hardly  
8 read it up there. It says "Dick Hosford sprinkler  
9 pump" up above there.

10 Q. Where was this diversion?

11 A. His diversion was --

12 Q. Where is it in --

13 A. Well, it's above -- not too far below the  
14 dam, say 10 miles below the dam.

15 Q. Just north of the Tongue River Reservoir?

16 A. Yes, sir. And it says, Dick Hosford, it's  
17 his sprinkler pump. And it's 920 gallons a minute, is  
18 what he puts out. And these are the dates that --  
19 that's the meter number right there that we get the  
20 cumulative data off of. And that's the date, and  
21 that's the meter reading. And that's the date we  
22 checked it and the meter reading at the time.

23 Q. And then you can convert that to acre-feet?

24 A. Right.

25 Q. I want to look at the -- well, let me first

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 ask you, what kind of diversion did Mr. Hosford have?

2 A. It was electric pump.

3 Q. So this is one of the ones that you could  
4 look at the amount of time that it was on on the  
5 electric reading and determine how much water --

6 A. That's correct.

7 Q. So on the next page there's a different kind.  
8 And here's an indication from Bill Carrel. This is on  
9 page MT23787. This indicates that it's a nonmetered  
10 pump. Is this one of the diesel-type pumps?

11 A. This is a diesel pump, right.

12 Q. And here you indicate it was on the honor  
13 system. What was the honor system?

14 A. He would have to notify me when he was going  
15 to turn it on. And I would come out and check it to  
16 see what it was running, you know. And then he would  
17 notify me when he turned it off.

18 Q. Do you find his times that he was estimating  
19 to be relatively accurate?

20 A. Yes.

21 Q. Did Mr. Carrel keep records?

22 A. He did. He kept better records than I did.

23 Q. He share those with you?

24 A. Yes, he did.

25 Q. And then as you're looking through here,

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 there's various diversions along the Tongue River; is  
2 that right?

3 A. Right.

4 MR. WECHSLER: Your Honor, I still have  
5 about, I'd say, six to eight documents to go through.  
6 I won't spend long with each one, but time is getting  
7 longer.

8 SPECIAL MASTER: Let's keep going.

9 BY MR. WECHSLER:

10 Q. I'm going to hand you now what's been marked  
11 as Exhibit 382. Mr. Kepper, do you recognize this  
12 exhibit?

13 A. Yes, I do.

14 Q. What is it?

15 A. This is a report to the judge for this  
16 particular time period of the cumulative acreage for  
17 each water user that I've got listed.

18 Q. And each page is signed by you?

19 A. Each page is signed by me.

20 Q. Now, there's something funny going on with  
21 some of the dates here. So I want to talk about that.  
22 First page at the top there, it says August 13th, 2000.  
23 But then you look at the text, and it says that it's a  
24 listing through July 15th, 2002.

25 Can you explain that?

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1           A.    It was probably -- these are the records that  
2 I kept.  And it was just for the acre-feet.  You know,  
3 the one I sent to the judge was -- you know, I put the  
4 correct dates on them and everything, but this is  
5 giving you the cumulative acre-feet.  And you can -- if  
6 you go by, you know, accumulation, you can tell when it  
7 was sent.

8                        But this was just my record.  And sometimes I  
9 wrote over the same document, just to get the  
10 acre-feet.  And when I sent it to the judge, I correct  
11 the dates.

12           Q.    This is representative of the type of  
13 document you would send to the court?

14           A.    It would look just like this, except the  
15 dates would be correct.

16           Q.    You think this is the actual version that you  
17 sent to the court?

18           A.    It would be similar to this except that --  
19 yeah, except that the dates would be right for the time  
20 period.

21           Q.    And is this -- these documents came from your  
22 files; is that right?

23           A.    Correct, these are my files.

24                       MR. WECHSLER:  Your Honor, I'd move admission  
25 of Exhibit M382.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 MR. KASTE: No objection.

2 SPECIAL MASTER: Okay. Exhibit M382 is  
3 admitted.

4 (Exhibit M382 admitted.)

5 BY MR. WECHSLER:

6 Q. This -- other than having the dates  
7 incorrect, is this the type of document that you would  
8 send to the court?

9 A. It would look just like this, except that I  
10 would have the correct dates for the judge.

11 Q. You would send these in on a biweekly basis?

12 A. Every two weeks; that's right.

13 Q. You've got the cumulative usage here in  
14 acre-feet for various water users?

15 A. Yes.

16 Q. And that's stored water?

17 A. That's stored water.

18 Q. And, again, the judge didn't ask for --

19 A. Right. The judge didn't ask for it. He just  
20 wants stored water.

21 Q. Let's take a look at Exhibit M385.

22 Mr. Kepper, do you recognize this document?

23 A. Yes.

24 Q. So the first part says a Case Register  
25 Report. And then looking at the next five pages,

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 starting with MT9987 going to MT9991, is that the  
2 petition for the year 2004?

3 A. Yes, it is.

4 Q. And then looking at the last two pages of  
5 this document, MT9992, MT9993, is that the order  
6 appointing you as water commissioner?

7 A. Yes, it is.

8 Q. And is this a document that you're familiar  
9 with?

10 A. Yes.

11 MR. WECHSLER: Your Honor, I'd move admission  
12 of Exhibit M385.

13 MR. KASTE: No objection.

14 SPECIAL MASTER: Okay. Exhibit M385 is  
15 admitted into evidence.

16 (Exhibit M385 admitted.)

17 BY MR. WECHSLER:

18 Q. In the year 2004 was Mr. Mongold also a water  
19 commissioner?

20 A. Yes, I believe so.

21 Q. Was there a separate order for him?

22 A. Yes.

23 Q. So this particular order seems to be just for  
24 you; is that right?

25 A. That's correct.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. Okay. Looking at the bottom of paragraph 2,  
2 we see this familiar language, "Any water user claiming  
3 entitlement to more water than he/she is receiving, or  
4 to a prior right to receive water, may file a petition  
5 with the Court pursuant to Section 85-5-301, MCA,  
6 (2001). No water user shall use any water flowing in  
7 the Tongue River except as distributed by the  
8 commissioners." Do you see that?

9 A. Yes.

10 Q. Again, in 2004 were you distributing both  
11 stored and decreed water?

12 A. Yes.

13 Q. That was your understanding what the court  
14 wanted?

15 A. Exactly, yes.

16 Q. I'm going to hand you what's been marked as  
17 Exhibit M390. Mr. Kepper, do you recognize this  
18 document?

19 A. Yes.

20 Q. What is this?

21 A. This is from the Ball Ranch. This is the  
22 irrigator that was at the Ball Ranch. He gave me this  
23 information.

24 Q. Are these notes that you wrote?

25 A. No, these are not -- excuse me. These are



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 notes that he wrote.

2 Q. The first page is his notes?

3 A. First page is his notes.

4 Q. Who was the irrigator on the Ball Ranch?

5 A. At that time I don't remember his name. I  
6 don't remember what his name was.

7 Q. Somebody you worked with?

8 A. Yes.

9 Q. And this is something he --

10 A. This is something he gave me.

11 Q. Why did he give it to you?

12 A. Well, at that time, he was going around and  
13 taking readings off of his pumps. And I told him I'd  
14 already taken the readings. But anyway, he gave them  
15 to me.

16 Q. Looking at the remaining pages, is that your  
17 handwriting?

18 A. That's my notes.

19 Q. That's true for the remaining of these pages?

20 A. All of these came from me.

21 Q. And are those notes that you took in 2004?

22 A. Yes.

23 Q. Are these some of the daily records we talked  
24 about?

25 A. These are daily records. This was a pad I

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 had, a yellow pad. And this was some of my daily  
2 records.

3 Q. Again, these are some of the records that you  
4 actually kept at your house?

5 A. Yes.

6 MR. WECHSLER: Your Honor, I'd move the  
7 admission of Exhibit M390.

8 MR. KASTE: No objection.

9 SPECIAL MASTER: Okay. Exhibit M390 is  
10 admitted.

11 (Exhibit M390 admitted.)

12 BY MR. WECHSLER:

13 Q. Mr. Kepper, we've talked about other records.  
14 Is this a complete set of the records that you kept on  
15 a daily basis in 2004?

16 A. I'm sure it's not the complete set, but it's  
17 one of the tablets I had that got saved.

18 Q. So, again, it's representative of the --

19 A. It's representative of the -- that my daily  
20 record, yes, that's correct.

21 Q. Let's look at Exhibit M386. Mr. Kepper, do  
22 you recognize Exhibit M386?

23 A. Yes, I do.

24 Q. What is this?

25 A. It's a report for the judge for cumulative

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 acre-feet and water users, each water user used.

2 Q. You look a few pages in, you can see -- well,  
3 on page 3 there's your signature; right?

4 A. Yes.

5 Q. There it indicates the water commissioners  
6 were you and Mr. Mongold?

7 A. Yes.

8 Q. The next couple of pages have handwriting on  
9 it. Is that your handwriting?

10 A. That's my handwriting, yes.

11 Q. Are those records that were kept at your  
12 residence?

13 A. Yes. This is -- I was figuring out from  
14 one 2-week period to the next the extra cumulative  
15 acre-feet. And that's what I was doing. I was adding  
16 it in. It's just for my records.

17 Q. This is from 2004?

18 A. Right.

19 MR. WECHSLER: Your Honor, I would move the  
20 admission of Exhibit M386.

21 MR. KASTE: No objection.

22 SPECIAL MASTER: Okay. Exhibit M386 is  
23 admitted.

24 (Exhibit M386 admitted.)

25

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 BY MR. WECHSLER:

2 Q. Mr. Kepper, these are not the exact records  
3 that you submitted to the court; is that right?

4 A. That's right.

5 Q. Are they reasonably similar to the ones that  
6 you did submit to the court?

7 A. It would look similar to this, except maybe  
8 the dates are a little different. But, yes, this is  
9 exactly what this would look like.

10 Q. Would the records that you submitted to the  
11 court, would that have handwriting on it?

12 A. No.

13 Q. Do you know what happened to the records that  
14 you submitted to the court?

15 A. No.

16 Q. Let's look at Exhibit M389. Mr. Kepper, do  
17 you recognize Exhibit M389?

18 A. Yes, I do.

19 Q. What is this?

20 A. It's notifying me that Musgrave Ranch is  
21 giving their water to Bill Carrel.

22 Q. This is actually a letter from Mr. Musgrave  
23 to Mr. Helm?

24 A. This is from Pat Helm to me.

25 Q. I'm sorry. At the top you see the address it

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 says Pat Helm, secretary?

2 A. Yeah.

3 Q. And the signature is from Mr. Musgrave?

4 A. Okay. This is what I got. I'm sorry. This  
5 is --

6 Q. And there's a CC actually there?

7 A. Right.

8 Q. And the date is July 19th, 2004?

9 A. Right.

10 Q. This is a document that you recall seeing in  
11 July of 2004?

12 A. Yes.

13 Q. And it actually went to you?

14 A. It actually went to me from Pat.

15 MR. WECHSLER: Your Honor, I would move the  
16 admission of Exhibit M389.

17 MR. KASTE: No objection.

18 SPECIAL MASTER: Okay. Exhibit M389 is  
19 admitted.

20 (Exhibit M389 admitted.)

21 BY MR. WECHSLER:

22 Q. Mr. Kepper, when water users -- first of all,  
23 were water users allowed to lease stored water from  
24 other water users?

25 A. As long as it went through the board, yes.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. So they would have to first get approval from  
2 the board?

3 A. Had to get it approved from the board, yes.  
4 And then they notified me.

5 Q. How would they notify you?

6 A. Usually with a -- this type of letter.

7 Q. Why did they notify you?

8 A. Well, so that I -- you know, when Bill was  
9 getting extra water, I would need to know it. You  
10 know, Bill Carrel.

11 Q. That way you would know he was entitled to a  
12 little --

13 A. That he was entitled to that much water, yes.

14 Q. Let's look at Exhibit M394. The first  
15 several pages of this document look familiar. And so,  
16 again, we have the case register report on the first  
17 page, and then the next several pages is the petition;  
18 is that right?

19 A. That's right.

20 Q. And that's for 2006?

21 A. That's correct.

22 Q. These are, again, signed by the board members  
23 on page MT10020?

24 A. Yes.

25 Q. And then the next two pages, MT10021 and

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 10022, appear to be the order appointing the water  
2 commissioners; is that right?

3 A. That's right.

4 Q. And here it has both you and Mr. Gephart;  
5 right?

6 A. Correct.

7 Q. And then the last pages of this particular  
8 one actually have -- look to be some of these reports  
9 similar to the ones we've been looking at. Are these  
10 documents that were submitted by either you or  
11 Mr. Gephart in 2006?

12 A. Yes.

13 Q. And they're all stamped by the court; is that  
14 right?

15 A. That's right.

16 Q. And you can see stamping various throughout.

17 MR. WECHSLER: Your Honor, I would move the  
18 admission of Exhibit M394.

19 MR. KASTE: No objection.

20 SPECIAL MASTER: Exhibit M394 is admitted.

21 (Exhibit M394 admitted.)

22 BY MR. WECHSLER:

23 Q. Again, I just want to point out that similar  
24 language we've been looking at, end of paragraph 2 on  
25 page MT10022. Once again indicates, "No water users

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 shall use any water flowing in the Tongue River except  
2 as distributed by the water commissioners." Again, in  
3 2006 were you distributing both the storage and the  
4 decreed or direct-flow water?

5 A. Yes, I was.

6 Q. Was that your understanding of what the court  
7 wanted?

8 A. Yes.

9 Q. These records at the back, and I'm looking  
10 particularly at the ones 10023 and then going all way  
11 to 10037, but not the very last page of the document.  
12 We looked at a number of copies of reports to the court  
13 that you had done that you kept at your house; right?

14 A. Yes.

15 Q. Were these ones that were actually submitted  
16 to the court?

17 A. I would say yes.

18 Q. To the best of your knowledge?

19 A. Yes.

20 Q. You don't know for sure?

21 A. I don't know for sure, no.

22 Q. But this looks like the type of document that  
23 you --

24 A. Looks like the document that I sent to the  
25 court, yes.



Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. So the page that's marked MT10023, there it  
2 actually says Chuck Kepper. That's you; correct?

3 A. Right.

4 Q. And then the next several pages -- next two  
5 pages look similar. And then it looks like there's  
6 something a little different. And there's a letter  
7 from Charlie Gephart. And remind us who Mr. Gephart  
8 was.

9 A. Pardon? I didn't understand you.

10 Q. Remind us who Mr. Gephart was.

11 A. Yeah.

12 Q. Can you remind us who he was?

13 A. Oh, he was a water commissioner with me in  
14 2006.

15 Q. And I'm looking at the letter that he has as  
16 MT10026. Here it has a note that says there's a  
17 10 percent reduction in acre-feet due to the reservoir  
18 not filling to capacity. Do you see that?

19 A. Yes.

20 Q. Was that your recollection of 2006?

21 A. Yes.

22 Q. So there was a 10 percent reduction in  
23 shares?

24 A. That's right.

25 Q. And then next to that letter on MT10027 is a

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 different type of report. Is this one that was  
2 actually done by Mr. Gephart?

3 A. That's true.

4 Q. And so we'll let Mr. Gephart talk about those  
5 documents.

6 Just a couple more, Mr. Kepper. Exhibit  
7 M396. Mr. Kepper, do you recognize Exhibit M396?

8 A. Yes, I do.

9 Q. What is this?

10 A. This is a daily record that -- notes that I  
11 took.

12 Q. Is that your handwriting?

13 A. Yes, it is.

14 Q. And if you look with me on the third page of  
15 that document, it actually indicates 8/15/06. And you  
16 see some similar dates from '06. Are these notes that  
17 you took in 2006?

18 A. That's true.

19 MR. WECHSLER: Your Honor, I'd move admission  
20 of Exhibit M396.

21 MR. KASTE: No objection.

22 SPECIAL MASTER: Exhibit M396 is admitted.

23 (Exhibit M396 admitted.)

24 BY MR. WECHSLER:

25 Q. Mr. Kepper, we've talked throughout about not

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 having complete records. And so is this a complete set  
2 of records from 2006?

3 A. No.

4 Q. And, again, did you keep daily records in  
5 2006?

6 A. I did.

7 Q. Is M396, is this representative of some of  
8 the daily records that you had?

9 A. Yes, it would be. Yes.

10 Q. Last document. Exhibit J68. Mr. Kepper,  
11 have you ever seen Exhibit J68 before?

12 A. Yes, I have.

13 Q. When did you see it?

14 A. Before it was written, I saw a draft -- I  
15 mean, right after it was written, I saw a draft.

16 Q. Was that because there's actually an  
17 affidavit attached, from you, to it?

18 A. Yes.

19 Q. Let's take a look at that which is -- I  
20 believe that it's the last document of the J68. And  
21 also has attached to it the 1914 decree. That starts  
22 on page WY027314. Do you see that?

23 A. Fourteen?

24 Q. Yes. And then it's also labeled Affidavit of  
25 Charles Kepper, page 1 at the bottom.

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. Do you recall doing an affidavit in 2000  
3 and --

4 A. Yes, I do.

5 Q. And do you recall what the circumstances  
6 were?

7 A. Yes. We were out of water.

8 Q. Beginning in 2001, when you were a water  
9 commissioner -- when you were first made a water  
10 commissioner, were there discussions about whether  
11 Wyoming was overusing water?

12 A. Not with me.

13 Q. Were there discussions during the time that  
14 you were a water commissioner?

15 A. Yes.

16 Q. And when did those start?

17 A. They probably started in '01.

18 Q. Do you recall who approached you to write  
19 this affidavit?

20 A. It would have to be Art Hayes.

21 Q. What did you do in order to -- before you  
22 wrote this affidavit, did you do some investigation?

23 A. Oh, yes.

24 Q. What did you do?

25 A. Well, we investigated to see, you know, the

Direct Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 water that was coming in state line, you know.

2 Q. Did you also investigate the amount of water  
3 that was being used in Montana?

4 A. Yes.

5 Q. And is this -- based on your recollection, is  
6 this a copy of that affidavit?

7 A. Yes.

8 Q. Something that we can go back and take a look  
9 at?

10 A. Right.

11 MR. WECHSLER: Your Honor, I think I'm done.  
12 It might be a good idea, if it's okay with you, to take  
13 a lunch break. And I can check and see if there's  
14 anything else.

15 SPECIAL MASTER: That is fine with me.

16 So yesterday I gave myself and, therefore,  
17 everyone else a little bit more time for lunch. And  
18 I'm just wondering whether we can subtract lunch a  
19 little bit today, maybe to 50 minutes rather than an  
20 hour.

21 MR. KASTE: We can. But we live right across  
22 the street.

23 SPECIAL MASTER: I know. They have to find a  
24 fast restaurant. So do I.

25 MR. DRAPER: We're glad to conform to

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 whatever schedule you set, Your Honor.

2 SPECIAL MASTER: Okay.

3 MR. DRAPER: Fifty minutes would be fine.

4 SPECIAL MASTER: Thank you. Then why don't  
5 we plan to come back, then, at -- by that clock there,  
6 35 after the hour. So, again, it will be a 50-minute  
7 break today.

8 (Recess taken 12:45 to 1:37  
9 p.m., November 14, 2013)

10 MR. WECHSLER: Nothing further, Your Honor.

11 SPECIAL MASTER: Okay. Thank you.

12 So, Mr. Kaste.

13 CROSS-EXAMINATION

14 BY MR. KASTE:

15 Q. Good afternoon, Mr. Kepper.

16 A. Good afternoon.

17 Q. My name is James Kaste. You and I haven't  
18 met before; correct?

19 A. That's correct.

20 Q. I would say I have a few questions for you,  
21 but that would be a lie. I have a few more than a few.

22 A. Okay.

23 Q. If I understood your testimony correctly,  
24 what you typically do, pretty much throughout the  
25 irrigation season in order to assess what the direct

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 flow was on the Tongue River, is you would look at the  
2 state line gauge, and then you'd look at what was  
3 coming out of the dam. And then the difference -- or  
4 that amount coming into the state line, you said that's  
5 all direct flow; right?

6 A. That's right.

7 Q. And the difference would be storage water;  
8 right?

9 A. That's right.

10 Q. And then that water, typically, would go down  
11 to the direct-flow users in the order of priority;  
12 right?

13 A. That's right.

14 Q. All right. So it would start out, Mr. Nance  
15 would have the opportunity to take his 10 CFS; correct?

16 A. That's correct.

17 Q. And then T & Y would have their opportunity  
18 to take their water as well?

19 A. That's correct.

20 Q. And if there's extra water, then it would  
21 move on down the list by way of priority; right?

22 A. That's right.

23 Q. We can agree, I assume, that during various  
24 points in the year, certain irrigators are not  
25 irrigating for various reasons, including hay; right?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Right.

2 Q. And some irrigators in some years don't  
3 irrigate at all?

4 A. That's correct.

5 Q. All right. And did you make it a habit when  
6 you were the commissioner to take note of the  
7 direct-flow diversions that Mr. Nance was making?

8 A. Yes.

9 Q. So you would know whether or not he was  
10 taking, on any given day, his direct flow amount of 10  
11 CFS; right?

12 A. That's correct.

13 Q. All right. Now, sometimes during the course  
14 of the year Mr. Nance would shut that off in order to  
15 do haying on his fields; right?

16 A. That's right.

17 Q. I think you see that in some of the  
18 handwritten notes, it says Nance off; right?

19 A. That's right.

20 Q. Now, did you make changes to anybody else's  
21 diversions when Mr. Nance shut off?

22 A. The only change I ever made would be the  
23 T & Y would receive the 10 CFS, and then up the  
24 priority, you know, make sure they got their required  
25 water.



Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 Q. And let me make sure I understand. When you  
2 say "make sure they got their required water," I  
3 understand that quite a few of the diversions are  
4 actually done by a pump on the Tongue River; right?

5 A. Yes.

6 Q. And they pump at a constant rate. You turn  
7 them on and they pump their capacity; right?

8 A. Right.

9 Q. So when you say make changes, you're really  
10 saying it's an accounting change?

11 A. It's an accounting change; that's correct.  
12 If they're taking water, that's correct.

13 Q. All right. And you understand the T & Y  
14 doesn't always, in fact, kind of rarely takes its full  
15 187.5 CFS?

16 A. Correct.

17 Q. That's correct. So oftentimes they'll be  
18 actually taking -- pick a number below 187, say, 160 or  
19 even less, depending on the time of the year; right?

20 A. Right.

21 Q. Did you use that information in your  
22 accounting?

23 A. Sure.

24 Q. You did?

25 A. Yes.

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 Q. All right. Now, you told us about the  
2 records that you kept, the handwritten notes, and that  
3 many of them have been thrown away or just displaced?

4 A. Yes. Most of them, I'll tell you, have been  
5 displaced.

6 Q. Well, the ones we do have, however, I've  
7 looked them over as best as I can. And it's hard for  
8 me, of course, to try to figure out your handwritten  
9 notes that you made for your use. What I don't see in  
10 there is the math that you employed in order to do the  
11 accounting change that you just described.

12 Is it fair to say that that math isn't in  
13 your handwritten notes that we have in front of us?

14 A. Not all of the notes are there. That's  
15 correct.

16 Q. Right. And I'm saying the ones that we do  
17 have, I don't see the addition and subtraction that you  
18 would do to take into account changes in Mr. Nance's  
19 diversions.

20 A. Well, they are just not there, I guess.

21 Q. We can agree to that?

22 A. Okay.

23 Q. Now, looking at Mr. Nance's direct-flow  
24 diversions, he has a headgate off the river there;  
25 right?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Right. Right on the river. Right on the  
2 river.

3 Q. Right on the river, sure. He doesn't have a  
4 dam, but he has --

5 A. He's got a gate.

6 Q. So if the river gets too low, he can actually  
7 divert water sometimes?

8 A. Sometimes, that's true.

9 Q. And T & Y has a dam, so it can ensure that  
10 the water in the stream goes down its canal; right?

11 A. Right.

12 Q. And you're able to measure both of those  
13 because they have measuring devices?

14 A. That's right.

15 Q. Did you measure any other direct-flow  
16 diversions along the stream?

17 A. Yes.

18 Q. Okay. And did you do that by looking at the  
19 meters on the pumps and so forth?

20 A. Correct.

21 Q. Now, while you were serving as a  
22 commissioner, did anybody ever make a call for priority  
23 regulation during the time that you served?

24 A. Yes.

25 Q. How did they do that?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. They would notify me that they needed the  
2 water, their flow right.

3 Q. Who did that?

4 A. The T & Y has notified me that they needed a  
5 flow right.

6 Q. What did you do in response to that?

7 A. I made sure that they got it.

8 Q. How did you do that?

9 A. I would have to shut somebody off up above  
10 them to make sure that they had it.

11 Q. Now, you told us earlier in your testimony  
12 that you had shut some people off. Are you saying that  
13 you actually went out and turned off somebody's pump?

14 A. Usually I just notify them to turn their  
15 pumps off. I have turned pumps off, but usually I just  
16 notify them.

17 Q. Did you do any of that in 2004?

18 A. 2004, I don't know.

19 Q. Did you do any of that in 2006?

20 A. 2006, you know, I'm not sure. I'd be  
21 guessing if I told you. I don't know.

22 Q. We don't have a paper record that would  
23 memorialize that you did that at any given time; right?

24 A. No, no.

25 Q. Similarly, we looked at a couple of pages of

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 a honey-do list?

2 A. Yes.

3 Q. The little notepad beside your phone?

4 A. Yes.

5 Q. And on those two pages you had kind of  
6 written down one of the irrigators called and wanted  
7 some of their storage water; right?

8 A. That's right.

9 Q. And I've kind of looked, and as far as I can  
10 tell, those are the only two pages that we have that  
11 you created that memorialize calls for storage water.  
12 Am I right about that?

13 A. That you have, that's right.

14 Q. When the irrigators would call you, I  
15 understood you would then relay that information to  
16 Mr. Hayes?

17 A. Right.

18 Q. And you relied on him to make changes in the  
19 operations of the dam so that water would come out;  
20 right?

21 A. That's right.

22 Q. And if I understand from your deposition,  
23 then after you made that call to Mr. Hayes, he didn't  
24 tell you when the storage water was then released;  
25 right?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1           A.    I told him when to release it.  But he didn't  
2 get back to me and say, "I released it on that date,"  
3 because that was up to the dam tender.

4           Q.    Do you still have Exhibit M395 in front of  
5 you?  It's just a couple of pages.  And it shows in  
6 2006 the flows into the reservoir and out of the  
7 reservoir.

8           SPECIAL MASTER:  It's this document.

9           THE WITNESS:  Okay.  Yeah, it's in here.  I'm  
10 familiar with it, yes.  Here it is.

11 BY MR. KASTE:

12          Q.    And, again, this shows the notes that you  
13 made when you looked online and looked at the stream  
14 gauge at the state line and then the releases from the  
15 dam; correct?

16          A.    Correct.

17          Q.    And that's for June, July, and August,  
18 September of 2006; right?

19          A.    Right.

20          Q.    And, again, these are the only records that  
21 you have of that particular activity you engaged in;  
22 right?

23          A.    That's the only ones you have, yes.

24          Q.    And there are other stream gauges along the  
25 Tongue River farther down from the reservoir; right?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. And I assume you didn't make it a habit,  
3 since this is representative of your notes, of those  
4 readings?

5 A. No. I did occasionally look at them. But  
6 this is -- I did this every morning. So that's why  
7 this -- yeah, I did look at them. But I just didn't  
8 record them.

9 Q. Sure. And I think that's because you just  
10 take the direct flow that you got off of these two  
11 gauges and assume that that's going to go into those  
12 diversions downstream sort of unmolested by any other  
13 activity; right?

14 A. Right.

15 Q. All right. Did you make it a habit to go and  
16 measure diversions and take a look around below the  
17 T & Y canal farther north towards Miles City?

18 A. No. There was some diversions that came off  
19 the river that I would go down there. But not on the  
20 T & Y. I did not go on the T & Y ditch at all.

21 Q. Well, that's sort of a different question. I  
22 did understand that once you got to the T & Y canal  
23 headgate, you didn't follow that canal all the way to  
24 its end; right?

25 A. No.

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 Q. So you would never have an opportunity to go  
2 to the end of that canal and see if there's water  
3 coming out of it?

4 A. No.

5 Q. Did you do that on any other diversions? Go  
6 and see if there was water that was coming either off  
7 the field or out the end of the canal?

8 A. No.

9 Q. And the tributaries that are below the T & Y  
10 canal, between the T & Y canal headgate and Miles City,  
11 those are basically ephemeral, aren't they?

12 A. Yes.

13 Q. They don't flow all the time or even very  
14 often?

15 A. Yes, just when there's a weather event.

16 Q. All right. Now, is there any way that we  
17 could look at your records and even the USGS stream  
18 gauges and be able to piece together on any given day  
19 where all that water that's coming out of the dam that  
20 day is supposed to go?

21 A. No. Not on my records. No.

22 Q. Is there any way, now that we're however many  
23 years past '04 and '06, we could go back in time and  
24 piece together on any given day where the water coming  
25 out of the reservoir is supposed to go?



Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. No.

2 Q. Now, is it -- it's my understanding that it's  
3 your belief everybody calls you when they want storage  
4 water.

5 A. That's right.

6 Q. Nobody takes water out of the river without  
7 having called you first?

8 A. That's right.

9 Q. All right. Have you ever heard that  
10 Mr. Hayes tries to run the dam for 50 CFS at Miles  
11 City?

12 A. No.

13 Q. Okay. Did you have an understanding, as a  
14 commissioner, that certain water was being released in  
15 order to keep the stream alive for fish?

16 A. No.

17 Q. Do you know when you started taking orders  
18 for reservoir water in 2006?

19 A. No.

20 Q. Let's look at a couple of exhibits. First  
21 M386 and then M394, and I kind of want to look at them  
22 together.

23 A. 386 you said?

24 Q. Yes, sir.

25 A. I don't know --

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 Q. Well, it's the 2004 summary reports that you  
2 gave to the Court.

3 SPECIAL MASTER: If Montana doesn't mind, I'd  
4 be perfectly happy, if you want to approach the witness  
5 and see if you can help the witness find those  
6 documents. Is that okay with you?

7 MR. WECHSLER: That's fine, Your Honor.

8 SPECIAL MASTER: Great. Thank you.

9 BY MR. KASTE:

10 Q. I want to look at M386 first. Those are the  
11 summaries from 2004; right?

12 A. Yeah.

13 Q. And I just want to go to the last page in  
14 there 'cause I think that's the last one for the year  
15 in 2004. Are you on the last page?

16 A. Yeah.

17 Q. It seems to be dated August 15th, 2004, and I  
18 didn't find one with a later date. Is there one with a  
19 later date?

20 A. There was one probably at a later date, but  
21 whether we got it, you know -- whether we got it saved  
22 or not, I don't know. 'Cause I didn't -- all these  
23 weren't saved. These are just random ones that I  
24 found. So, you know, they would go into the last of  
25 the irrigating season, which would probably be in

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 September.

2 Q. That's fine. I picked the last one 'cause I  
3 wanted to use the one that had, as far as I could tell,  
4 all of the irrigators who irrigated in 2004 on the  
5 list. And that would be this list; right?

6 A. Ones that I was -- yeah. The ones that I was  
7 monitoring, yes.

8 Q. It looks to me like this actually includes  
9 folks who are both above and below the Brandenburg  
10 Bridge; is that right?

11 A. Yes.

12 Q. So I got the impression this was everybody  
13 who irrigated in 2004.

14 A. Should be. At this particular time, yes.

15 Q. As of August 15th, I counted that there were  
16 32 irrigators on this list. Take my word for that one.

17 A. Yep.

18 Q. All right. Now, I want to look at M394. And  
19 there are two kinds of reports in 2006 in M394. About  
20 half of them are ones that you prepared, and about half  
21 of them are ones Mr. Gephart prepared; correct?

22 A. Correct.

23 Q. Now, I counted up from the last report that I  
24 could find in here, the number of irrigators for both  
25 Mr. Gephart and yourself. And I came up with 42.

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Okay.

2 Q. All right. So there's a ten irrigator  
3 difference between 2004 and 2006 based on your records,  
4 all right?

5 A. Okay.

6 Q. My question is: Is it true, then, that those  
7 ten irrigators didn't irrigate at all in 2004?

8 A. I don't know. I didn't make both lists. I  
9 don't know.

10 Q. Can you say with certainty that of those ten  
11 people, none of them -- that are on the 2006 list but  
12 not on the 2004, none of them took irrigation water?

13 A. I can't say with certainty, no.

14 Q. All right. You've looked at a map with  
15 Mr. Wechsler of the very northernmost portion of the  
16 Tongue River. And you looked at some irrigated lands  
17 above the Tongue River Reservoir. Do you remember  
18 that?

19 A. Yes.

20 Q. And there were four big -- big is a relative  
21 term -- but there were four parcels of irrigated lands;  
22 right?

23 A. Right.

24 Q. And you identified all four of those as  
25 belonging to the Visborgs. Do you remember that?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Right.

2 Q. Is it true that only two of those belong to  
3 the Visborgs and two of them belong to Decker Coal?  
4 And if you don't know, that's fine.

5 A. I don't know.

6 Q. I can tell you my understanding is two belong  
7 to the Visborgs, two belong to Decker Coal?

8 A. Okay.

9 Q. Do you know whether or not you measured all  
10 four of them?

11 A. Yes.

12 Q. All right. What about, there's a little tiny  
13 one even farther south, and I think that one belongs to  
14 the Conners?

15 A. No, I didn't measure that one, no.

16 Q. All right. Fair enough. Let's look at, I  
17 believe it's M394, again. And on the second page  
18 there's the petition to have a water commissioner  
19 appointed. And a little farther back there's the order  
20 appointing water commissioners. If you'd turn to the  
21 first page of order of appointing water commissioners.  
22 Are you there?

23 A. Yeah.

24 Q. And in paragraph 2 it says, "That the  
25 commissioners shall deliver and distribute 1914 decreed

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 water and Yellowstone Compact water in Big Horn County  
2 and the Association's stored water in Big Horn, Custer,  
3 and Rosebud Counties."

4 Do you see that?

5 A. Yes.

6 Q. And that was a change from the prior orders;  
7 right?

8 A. I didn't understand you.

9 Q. That language changed from the prior orders  
10 that said your job was to deliver the storage water to  
11 the Tongue River Water Users' Association; right?

12 A. Yes, I guess so.

13 Q. Do you have any idea why that language was  
14 added in 2006?

15 A. No, I don't.

16 Q. Did you do anything differently between 2004  
17 and 2006?

18 A. No, I didn't.

19 Q. So this new language from the court didn't  
20 affect you?

21 A. No.

22 Q. Okay.

23 A. Didn't affect how I did my job, no.

24 Q. If we move farther back in M394 to the  
25 reports you filed and Mr. Gephart filed, and if you

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 look, oh, about four pages from the back, the page  
2 number at the bottom, the Bates number is MT10035.

3 A. Yes.

4 Q. All right. And, again, I picked this report  
5 because it seemed like it was the last one. And it's  
6 dated June 21 through September 30th of 2006. And I  
7 also looked at the bottom number that you had totaled  
8 up, and it was the biggest one, so I assumed that that  
9 must be the last report. Okay?

10 A. Okay.

11 Q. And this is one of the ones of the two  
12 various reports filed with the court. This is one of  
13 the ones that you prepared; right?

14 A. Yes.

15 Q. And what I'm interested in is Brown Cattle.  
16 That's Mr. Hayes' ranch; right?

17 A. Yes.

18 Q. And in 2006, you recorded that he used 1200  
19 acre-feet of stored contract water; right?

20 A. Yes.

21 Q. All right. And my understanding is  
22 Mr. Hayes, Brown Cattle Company, has 1651 acre -- or  
23 shares in the Tongue River Reservoir; is that right?

24 A. That's right.

25 Q. All right. And he's got 1 for the garden for

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 his wife is what he told us.

2 A. Okay.

3 Q. In any event, I also understand that during  
4 2006, there was a 10 percent pro rata reduction among  
5 all the Tongue River water users because the reservoir  
6 didn't fill, and that's reflected on these letters that  
7 Mr. Gephart wrote earlier on in this exhibit; right?

8 A. Right.

9 Q. So that would mean Mr. Hayes' shares are  
10 reduced by 10 percent. And that would be the limit of  
11 his contract water that year; right?

12 A. Yes.

13 Q. 10 percent of 1651 is about 165. Well, I  
14 subtracted that from 1651, and I got 1486. You going  
15 to trust me on that?

16 A. Yeah, I trust you.

17 Q. That might not be wise, given my record with  
18 regard to math problems. So there's a difference there  
19 of 286 acre-feet between what Mr. Hayes' contract  
20 allowed him and what you recorded his use was in 2006;  
21 right?

22 A. Yeah.

23 Q. So he had 286 acre-feet of water he could  
24 have used in 2006; right?

25 A. Right.



Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 Q. And you understand that members of the Tongue  
2 River Water Users' Association, they purchased their  
3 water at the beginning of the year and they pay for the  
4 whole amount; right?

5 A. Right.

6 Q. So it wouldn't cost Mr. Hayes a nickel more  
7 to use 286 more acre-feet; right?

8 A. No.

9 Q. Sometimes folks in the Tongue River Water  
10 Users' Association sort of exchange water by way of  
11 leases; right?

12 A. Yes.

13 Q. Do they notify you when they do that?

14 A. They have to, yes.

15 Q. And you figure that into your accounting for  
16 both the water user who leased it and the one from whom  
17 they leased it; right?

18 A. Right.

19 Q. And sometimes some of the folks keep their  
20 own records of their water usage; right?

21 A. That's right.

22 Q. Including a guy like Mr. Carrel?

23 A. Yes.

24 Q. In fact, he told us that he gave his records  
25 to you; right?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. Do you know how his numbers compared to  
3 yours?

4 A. No, I don't.

5 Q. Would you be surprised if they were  
6 different?

7 A. Would I be surprised?

8 Q. Yeah.

9 A. No.

10 Q. Why wouldn't you be surprised?

11 A. Do you think I used his numbers? Is that  
12 what you're saying?

13 Q. No. No. I'm just wondering why it wouldn't  
14 surprise you if they were different.

15 A. Because I check daily. And that's the  
16 records he gave me.

17 Q. Now, I don't know if I want to ask you to  
18 look at some of Mr. Gephart's reports.

19 A. No, 'cause I don't know anything about them.

20 Q. All right. I'll tell you that I looked at  
21 them.

22 A. Okay.

23 Q. In 2006, some of his reports show some other  
24 folks, in addition to Mr. Hayes, didn't use their full  
25 amount of their contract water in 2006. Okay?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Okay.

2 Q. Are there other folks on your list who didn't  
3 use their full amount?

4 A. I don't know. I'd have to check. I don't  
5 know.

6 Q. You don't know as we sit here today?

7 A. No.

8 Q. Did anybody go over on your list that you  
9 have in 2006?

10 A. No.

11 Q. Now, because you watched the amount of water  
12 coming in at the state line and then that kind of  
13 proceeds directly to those early rights, Nance and  
14 T & Y and so forth, you don't have occasion, I don't  
15 think, during the course of your work to try and figure  
16 out what influence return flows might have on the  
17 amount of natural flow in the stream; right?

18 A. Right.

19 Q. That's not something you did?

20 A. That's not something I did, no.

21 Q. And I believe you never regulated or probably  
22 monitored any groundwater wells?

23 A. No.

24 Q. And I assume that would include, then, any  
25 CBM wells?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1           A.    Yes.  I didn't do any monitoring of  
2 groundwater, no.

3           Q.    All right.  And, again, I assume that you  
4 never regulated any of the tributaries or, frankly,  
5 measured any of the activities going on on any of the  
6 tributaries to the Tongue River?

7           A.    No.

8           Q.    And if I understand right, you didn't  
9 regulate or measure any diversions that may have  
10 occurred on the Northern Cheyenne Tribe Reservation?

11          A.    No.

12          Q.    There is some irrigation that occurs on the  
13 reservation; correct?

14          A.    There is some, yes.

15          Q.    And that -- you didn't go there and you  
16 didn't measure --

17          A.    No.  Don't go there.

18          Q.    All right.  Do you know if any member of the  
19 Tongue River Water Users' Association itself purchased  
20 any water from the Northern Cheyenne Tribe in 2004?

21          A.    Pardon?  I didn't --

22          Q.    Do you know if any individual member, or for  
23 the Tongue River Water Users' Association as a whole,  
24 purchased any water from the Northern Cheyenne Tribe in  
25 2004?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. I don't know for sure, no.

2 Q. And what about in 2006?

3 A. I don't know for sure, no.

4 Q. Can we agree that the Northern Cheyenne Tribe  
5 water had water in the -- the Northern Cheyenne Tribe  
6 had water in the reservoir in both '04 and '06?

7 A. Yes.

8 Q. So the supply was there?

9 A. Yes, it was there.

10 Q. Let's look at Exhibit J68. And it's the 2006  
11 letter that has your affidavit attached.

12 A. Yeah, I have it.

13 Q. And I just want to look at your affidavit, so  
14 you don't have to worry about the rest of the letter.  
15 You did not do an affidavit like this in 2004; correct?

16 A. That's correct.

17 Q. But you were, in fact, the water commissioner  
18 responsible for the Tongue River in 2004?

19 A. Yes.

20 Q. Now, I'm interested in paragraph 6 and  
21 paragraph 8. And in paragraph 6, it indicates at the  
22 beginning that on July 19th, 2006, there was only 15  
23 CFS coming into the reservoir; right?

24 A. Yes.

25 Q. All right. Are you on that page with me?

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. All right. And farther on in that paragraph,  
3 you indicate that 15 CFS is only enough to satisfy  
4 Mr. Nance's right with the remainder being available  
5 for the T & Y; correct?

6 A. Correct.

7 Q. All right. And then you say at the end, "Due  
8 to conveyance losses, T & Y is now receiving  
9 essentially no water at all from the decree"; correct?

10 A. Correct.

11 Q. And you say something very similar to that in  
12 paragraph 8 on the next page. In the last sentence of  
13 paragraph 8 it says, "If there were no stored water in  
14 the system, the river would be dry long before it  
15 reached Ashland, as the less than 5 CFS left after the  
16 first right is satisfied would be lost to seepage";  
17 correct?

18 A. Correct.

19 Q. All right. Now, let's assume Wyoming had  
20 approximately 3, maybe 4 CFS that it could have or  
21 should have sent down to Montana at that time. Do you  
22 have the same opinion that that amount of water  
23 wouldn't make it to T & Y either?

24 A. Do I have an opinion?

25 Q. Yeah.

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Some of it would.

2 Q. Some of it would?

3 A. Some of it would.

4 Q. Little tiny bit?

5 A. Yes, little tiny bit. Every little bit  
6 helps.

7 Q. Would maybe 1 or so CFS that made its way  
8 down make any real difference at all?

9 A. Probably not all the way to the ditch, no.

10 Q. All right. Now, you talked with Mr. Wechsler  
11 about how cautious the water users in Montana were with  
12 regard to their water; right?

13 A. Yes.

14 Q. And that they understand water is valuable  
15 and that they need to take good care of it; right?

16 A. True.

17 Q. And they need to make sure they have enough  
18 left for the end of the season, so they are cautious  
19 with it early on; right?

20 A. Right.

21 Q. Now, my understanding is, you're often  
22 appointed, say, in May before the irrigation season  
23 really gets going?

24 A. Right.

25 Q. You don't have any control or any input into

Cross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 how the reservoir is run over the course of, say,  
2 October through May; right?

3 A. Right.

4 Q. You don't have any influence on how the  
5 reservoir is run at all really?

6 A. Right.

7 Q. That's outside of you what you do. All  
8 right. So how much water is in the reservoir in any  
9 given year isn't up to you; right?

10 A. That's right.

11 Q. That's up to somebody else. And they should  
12 be cautious as well, shouldn't they?

13 A. True.

14 Q. Nevertheless, during the times that you were  
15 the water commissioner, particularly in 2004 and 2006,  
16 can we agree that that reservoir was never emptied  
17 during the course of the irrigation season?

18 A. Never emptied?

19 Q. Correct.

20 A. I don't understand about empty.

21 Q. Well, it means not full. It means there's no  
22 more left.

23 A. Well, there's always water left because  
24 there's -- the Indians, the tribe has water in the  
25 reservoir underneath the Tongue River.



Examination by the Special Master  
CHARLES KEPPER - November 14, 2013

1 Q. There's always water in the reservoir at the  
2 end of the year; right?

3 A. Sure.

4 Q. And that was true in 2004 and 2006?

5 A. Yes.

6 Q. I suspect you don't have the number off the  
7 top of your head?

8 A. No.

9 Q. Neither of those years?

10 A. No.

11 Q. I think that's all I have for you, sir.

12 EXAMINATION

13 BY SPECIAL MASTER:

14 Q. So I have just a couple questions here before  
15 the redirect examination. First of all, small point,  
16 but I just want to make sure I'm clear on one of your  
17 discussions with Mr. Kaste.

18 So as I understand it, you worry about how  
19 much water is diverted by the T & Y, but you then do  
20 not travel down the T & Y to look at the diversions off  
21 the canal itself?

22 A. Correct.

23 Q. So the other thing I was a little bit less  
24 clear on: Do you or one of the other water  
25 commissioners also check diversions which are downriver

Examination by the Special Master  
CHARLES KEPPER - November 14, 2013

1 from where the T & Y canal diverts?

2 A. There is one water user down there, yes.

3 Q. Okay. And do you go down there and check  
4 that diversion, you or your colleague?

5 A. Yes. If he calls and says he's going to  
6 irrigate, I do go down there and check, yes.

7 Q. Okay. Thanks. So I also wanted to just  
8 understand a couple of accounting questions. So first  
9 of all, Mr. Wechsler earlier showed you an exhibit,  
10 which I actually don't have right now because it hasn't  
11 been introduced yet, which talked about a policy  
12 adopted, which if I heard it correctly, provided for a  
13 provision for loss of stored water as it went  
14 downstream.

15 A. Yes.

16 Q. And if I remember correctly, when it got to  
17 the end of the river it was a 12 percent loss. So  
18 could you explain to me how, if at all, that's relevant  
19 to your accounting?

20 A. It's a loss that I have to take -- I have to  
21 take off of their -- their amount, in other words.

22 Q. Okay. So in other words, if they ask for 10  
23 acre-feet of release, then what they're entitled to  
24 take at their headgate would be, I guess, 8.8 acre-feet  
25 up there in the end of the river?

Examination by the Special Master  
CHARLES KEPPER - November 14, 2013

1 A. Correct.

2 Q. And so the instruction would be, then, to the  
3 reservoir operator to release 10 acre-feet ultimately.  
4 And what you're checking for is that they're not taking  
5 more than 8.8 at the other end?

6 A. Sure.

7 Q. Okay. Now, similarly on the direct flow, do  
8 you worry about transit loss in the direct flow?

9 A. No, sir. That's what they're entitled to by  
10 the court, to get that amount. So I can't deduct  
11 anything from that amount.

12 Q. Okay?

13 A. That's a decreed amount. So that's what they  
14 get.

15 Q. Okay. I just wanted to make sure that that  
16 was the case. But, presumably, if there's somebody  
17 downstream, like the T & Y canal, that needs water and  
18 you're looking at the amount of water at the state  
19 line, you want to make sure that people don't -- you  
20 want to make sure that ultimately the amount of water  
21 that is supposed to reach the T & Y canal ultimately  
22 gets there?

23 A. That's right.

24 Q. So do you ever have to -- I'm not sure  
25 whether this is relevant -- but do you ever have to

Examination by the Special Master  
CHARLES KEPPER - November 14, 2013

1 tell people upstream that they have to cut off their  
2 water even though, if you look at the amount of water  
3 coming over the state line, it would seem to be enough?  
4 Do you ever have to tell them that they have to cut off  
5 water because, in fact, by the time it gets downriver,  
6 there isn't enough for the T & Y canal?

7 A. Yes. Yes.

8 Q. And then my final question is: In the  
9 various reports that you submitted to the water court,  
10 did you -- how do you account for leases? So if, you  
11 know -- for example, if Nance Cattle were to lease  
12 their water to somebody else, does the amount of water  
13 that is used under that lease, does it appear under  
14 Nance Cattle, or does it appear under the amount of  
15 water that that person --

16 A. It would appear under Nance Cattle.

17 Q. It would appear under Nance Cattle. So the  
18 leases get tracked back to the actual person who holds  
19 that storage contract right?

20 A. Yes.

21 Q. Okay. Thank you.

22 SPECIAL MASTER: So those are my only  
23 questions.

24 Mr. Kaste?

25

Recross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1   RECROSS-EXAMINATION

2 BY MR. KASTE:

3           Q.    I better clear this up.  With regard to the  
4 transpiration losses, the Tongue River Water Users'  
5 Association assessed -- and you looked at an exhibit  
6 with Mr. Wechsler -- and in 2004 it was about  
7 12 percent all the way down at the bottom by T & Y, and  
8 2006 it was 24 percent down by T & Y; correct?

9           A.    Yes, sir.

10          Q.    And the river was broken up into six  
11 different sections.  And they were assessed, for  
12 example, in 2004, as you moved farther down the river,  
13 it went from 2 percent, 4 percent, all the way up to  
14 12; right?

15          A.    That's right.

16          Q.    And 2006, it kind of doubled that.  And so in  
17 each stretch you got assessed the different amount of  
18 transpiration loss; correct?

19          A.    Correct.

20          Q.    Mr. Hayes' ranch is by Birney; right?

21          A.    Right.

22          Q.    So he'd be in the first reach; right?

23          A.    Right.

24          Q.    And that would be either a 2 percent loss in  
25 2004 or a 4 percent loss in 2006?

Recross-Examination by Mr. Kaste  
CHARLES KEPPER - November 14, 2013

1 A. Right.

2 Q. Okay. Just wanted to make that clear to see  
3 how that may affect the calculation I had you go  
4 through earlier. It's not significant. Thank you.

5 SPECIAL MASTER: Although, actually, as long  
6 as we're on the calculation, let me follow up with one  
7 quick question, which is: As you pointed out, if  
8 somebody orders 10 acre-feet, then 8.8 acre-feet would  
9 be delivered, say, at the very bottom of the river.  
10 When you submit your reports to the court, does the  
11 amount that's shown there, does that represent the  
12 amount that was released from storage or the amount  
13 that was actually pumped or conveyed on to the  
14 property?

15 THE WITNESS: The amount released.

16 SPECIAL MASTER: The amount released from the  
17 reservoir?

18 THE WITNESS: Right. I released that for  
19 them, even though they couldn't get it all. Their loss  
20 was added to it. But it was -- what I released is what  
21 they were charged.

22 SPECIAL MASTER: Okay. Thank you.

23 MR. KASTE: Thank you.

24

25

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

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REDIRECT EXAMINATION

BY MR. WECHSLER:

Q. Good afternoon, Mr. Kepper. A couple of questions for you on the same subject you just talked about. First, Mr. Kaste had a discussion with you about whether or not the T & Y, in the years that you were a water commissioner, was taking the full 187.5 CFS. Remember that?

A. Yes.

Q. After the spring runoff, is it -- part of the T & Y's water storage water?

A. Yes.

Q. So part of the water that they're taking is stored water?

A. That's true.

Q. So it's not all direct flow?

A. Right.

Q. Mr. Kaste asked you about the honey-do list. And he noted that that was the only record showing that people had called you to request storage water. But did people call on a regular basis?

A. Yes. I had several lists that were -- people called in. And it had the most to do with where I was at at the time that I was taking the call to what I wrote it on.

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. We're fortunate that that was one of the  
2 documents that got saved?

3 A. You were very fortunate.

4 Q. Will you look, please, with me again at  
5 Exhibit 395? It's the one showing the level -- flow  
6 levels.

7 A. Yes.

8 Q. And I believe you had a discussion with  
9 Mr. Kaste about whether you checked other gauges. And  
10 what I want to ask you about on this particular gauge  
11 is after -- I'm sorry. This particular document, M395.  
12 At July 13th -- well, first of all, let's look at  
13 July 12. Here you have 446 coming out of the  
14 reservoir; is that right?

15 A. Let's see. Oh, out of the reservoir? Okay.  
16 Yes.

17 Q. And then the very next day there's a column  
18 of numbers that's sort of set off to the right. Do you  
19 see that?

20 A. Yes.

21 Q. And so on 7/13/06 there's a notation there,  
22 319 Birney Day School. Is there a gauge at the Birney  
23 Day School?

24 A. Yes.

25 Q. Is that one of the ones you would monitor?



Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. You think these numbers are talking about the  
3 Birney Day School gauge?

4 A. No.

5 Q. You don't think the ones to the right there  
6 are?

7 A. Oh, the ones off to the right?

8 Q. Yeah. The reason I ask --

9 A. Yes.

10 Q. Because it actually says Birney Day School.  
11 And then if you look at the remainder of that page,  
12 which is listed MT15338 -- and I'll finish my question.  
13 It shows a number of what look to be repeating symbols.  
14 So if you could please explain that.

15 A. I'll explain that. I didn't realize until  
16 you brought that to my attention. The gauge was out at  
17 the dam. It was inoperable.

18 Q. On this --

19 A. Yeah. So during this period. So I had to go  
20 to the next gauge downstream. And it was the Birney  
21 Day School. That's why I didn't realize that until you  
22 brought it to my attention. I'm sorry.

23 Q. You were asked about the Tongue River  
24 Reservoir and how it was run, including 50 CFS, and for  
25 fish. Do you recall that discussion?

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 A. Yes.

2 Q. During the years where you were a water  
3 commissioner, was any water released except under your  
4 direction?

5 A. No.

6 Q. Do you still have Exhibit 386 with you, M386?  
7 It's one of the ones that has your reports. And this  
8 particular one is 2004.

9 SPECIAL MASTER: You're also free to approach  
10 the witness and help find that.

11 MR. WECHSLER: Thank you.

12 BY MR. WECHSLER:

13 Q. Mr. Kepper, do you have Exhibit M386 before  
14 you now?

15 A. Yes, I do.

16 Q. These are documents that are your notes -- or  
17 copies of reports that you sent in; right?

18 A. Yes.

19 Q. In 2004 was Rex Mongold also a water  
20 commissioner?

21 A. Yes, he was.

22 Q. And is it possible that there are other  
23 reports that Mr. Mongold --

24 A. Very possible.

25 MR. KASTE: I have to object to speculation

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 whether he knows that or not.

2 BY MR. WECHSLER:

3 Q. Mr. Kepper, did Mr. Mongold do reports in  
4 2004?

5 A. Yes, he did.

6 Q. And they were separate reports from yours?

7 A. Yes.

8 Q. You were asked a couple questions about the  
9 irrigation above the Tongue River Reservoir. And by  
10 above, I mean upstream south of the reservoir. If we  
11 could take a look at Exhibit M5, Appendix A again, on  
12 the screen. And this is page 19 of 19. Sounded like  
13 there was a little confusion about the fields. And I  
14 just want to clear that up and have you, again, mark  
15 the ones that were Decker Coal and which ones were  
16 Visborg.

17 And while we're looking for that particular  
18 page, my understanding from your testimony earlier was  
19 that you were monitoring and administering water for  
20 all of the diversions upstream of the Tongue River  
21 Reservoir. Do I have that right?

22 A. Yes.

23 Q. So no water -- there was no water being used  
24 except under your direction?

25 A. Right.

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. And you would actually go up there; correct?

2 A. Correct.

3 Q. Mr. Kepper, we're looking now at the screen  
4 of diversions upstream of Tongue River Reservoir. So  
5 that we're clear, can you please -- let's circle the  
6 ones that are from Decker Coal. And then we'll put a  
7 square around the ones that are Visborg.

8 A. Square and then --

9 Q. Square around Visborg, circle around Decker  
10 Coal.

11 A. (Witness complies.)

12 Q. Were there any other diversions in the years  
13 you were commissioner?

14 A. No.

15 Q. So if you look at this exhibit, it shows  
16 some -- this is -- I'll represent to you this is from  
17 the year 2009. There's a teeny little piece of green  
18 about where I circled it off. I'm a little off. Do  
19 you see that?

20 A. Yes.

21 Q. Was there any diversion there when you were a  
22 water commissioner?

23 A. No.

24 Q. We looked at Exhibit M394. It was a list of  
25 some of the water users. We don't need to look at it

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 now. Mr. Kaste asked you about water use from Brown  
2 Cattle. Do you remember that discussion?

3 A. Yes.

4 Q. And the point, I think, was, hey, not all of  
5 the water use -- of the water was used by Mr. Hayes  
6 during that year. Do you recall that?

7 A. Yes.

8 Q. I think you testified earlier that sometimes  
9 during water-short years, irrigators won't irrigate all  
10 of their land; is that correct?

11 A. That's correct.

12 Q. So in that particular year, do you know,  
13 sitting here today, why Mr. Hayes did not use the  
14 remaining 200-plus acre-feet of water?

15 A. No.

16 Q. And would Mr. Hayes be the best person to  
17 ask?

18 A. Yes.

19 Q. You were asked about water use on the  
20 Northern Cheyenne Tribe Reservation. Do you recall  
21 that?

22 A. Yes.

23 Q. Was there someone on the Northern Cheyenne  
24 Tribe who was responsible for monitoring water use?

25 A. As far as I know, there wasn't.

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 Q. And would someone from the tribe be a better  
2 person to ask that of?

3 A. Yes.

4 Q. You were asked about whether or not water was  
5 purchased from the Northern Cheyenne Tribe, stored  
6 water, I mean. And so earlier when we were talking, I  
7 thought you said there were times when water was not  
8 purchased from the Northern Cheyenne Tribe, even though  
9 the water users were short.

10 Can you remind us why that occurred?

11 A. Mostly because the price of the water is just  
12 too expensive.

13 Q. And the irrigators are making business  
14 decisions based on the economics?

15 A. That's right.

16 Q. One last question, and that is, during one of  
17 the answers to a question from Mr. Kaste, you indicated  
18 that every drop counts. Do you remember that?

19 A. Yes.

20 Q. What did you mean by that?

21 A. Well, I meant that the more water that's in  
22 the river, the easier it is to deliver the water. In  
23 other words, if you cut back on anything, it cuts back  
24 on the amount of water that you can deliver.

25 Q. Would you agree with me that even small

Redirect Examination by Mr. Wechsler  
CHARLES KEPPER - November 14, 2013

1 amounts count in Montana?

2 A. Yes.

3 MR. WECHSLER: No further questions.

4 SPECIAL MASTER: Okay. Thank you. Given  
5 that, presumably, we need to clear up all the paperwork  
6 here before the next witness takes the stand, why don't  
7 we take the first of our afternoon breaks right now.  
8 So we'll come back when that clock says 20 minutes to  
9 the hour.

10 (Recess taken 2:29 to 2:40

11 p.m., November 14, 2013)

12 SPECIAL MASTER: Okay. Everyone can be  
13 seated.

14 So, Mr. Wechsler or Mr. Draper, who is going  
15 to announce the next witness?

16 MR. DRAPER: Your Honor, our next witness, in  
17 order to accommodate schedules, is going to be Mr. Greg  
18 Benzel. The direct examination will be by  
19 Mr. Wechsler.

20 SPECIAL MASTER: Okay. Thank you.

21 MR. WECHSLER: I have a new appreciation for  
22 Mr. Kaste being up here all day.

23 SPECIAL MASTER: So Mr. Benzel can approach.  
24 (Greg Benzel sworn.)

25 THE CLERK: Have a seat, please. When you're

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 seated, state your name and spell it for the record.

2 THE WITNESS: Greg B-e-n-z-e-l.

3 SPECIAL MASTER: So good afternoon,  
4 Mr. Benzel. I'm sorry. I think I just mispronounced  
5 your name.

6 Mr. Wechsler.

7 GREG BENZEL,  
8 having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. WECHSLER:

11 Q. Mr. Benzel, what's your current business  
12 address?

13 A. HC 64, Box 65, Rancheater.

14 Q. By whom are you employed?

15 A. Padlock Ranch.

16 Q. What is your current position?

17 A. I'm the farm manager.

18 Q. Before we get to what a farm manager at  
19 Padlock does, I'd like you to please describe your  
20 educational background.

21 A. I have a business degree from Montana State.

22 Q. When did you get that degree?

23 A. '82.

24 Q. Can you please summarize your educational  
25 background -- I mean, your prior professional work



GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 experience.

2 A. I ran my own farm for 20 years. Grew up on a  
3 farm outside of Hardin.

4 Q. You started as the farm manager in 1997?

5 A. That's correct.

6 Q. Can you please describe your responsibilities  
7 as farm manager?

8 A. I coordinate all aspects of the Padlock farm.

9 Q. You report directly to the CEO?

10 A. I do.

11 Q. Who is the CEO?

12 A. Wayne Fahsholtz.

13 Q. As farm manager, I understand, you're also  
14 part of the management team. Is that right?

15 A. That's correct.

16 Q. There are how many members of the management  
17 team?

18 A. Four.

19 Q. Who owns the Padlock Ranch?

20 A. The Scott family.

21 Q. Is there a holding company called the Scott  
22 Land and Livestock?

23 A. Correct. That holds the stock for Padlock.

24 Q. So there's actually shareholders?

25 A. Yes, that's correct.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. And the management team then reports directly  
2 to shareholders?

3 A. We do.

4 Q. As part of your responsibilities, you give a  
5 quarterly report to the Padlock Ranch board; is that  
6 correct?

7 A. That's correct.

8 Q. And your responsibilities include pretty much  
9 all aspects of irrigation and production; is that  
10 right?

11 A. Everything from crop mix, planting,  
12 irrigation, and harvest.

13 Q. All right. Is it accurate to say that you  
14 are the person at Padlock Ranch with the most  
15 familiarity with the water rights in Wyoming?

16 A. I am.

17 Q. So I want to talk a little bit about the  
18 Padlock Ranch. Where, generally, is the Padlock Ranch  
19 located?

20 A. Dayton, Ranchester are our basic  
21 headquarters. Two thirds of the ranch is in Montana.

22 Q. So it actually spills over into Montana?

23 A. Or it spills over into Wyoming.

24 Q. There's -- in fact, there's some irrigation  
25 in Montana; right?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. There is.

2 Q. Where is that located?

3 A. Bar V and Slater Creek.

4 Q. My understanding is you're not responsible  
5 for that irrigation?

6 A. No, I'm not.

7 Q. You're responsible for the Wyoming portion of  
8 the --

9 A. That's correct.

10 Q. I want to get a better sense of where Padlock  
11 Ranch is in Wyoming, the Wyoming portion. And I  
12 want -- to do that, I want to use Exhibit M5, which is  
13 an expert report in this case from a Montana expert.  
14 And I'd like to go to page 49, which is Figure 4A.  
15 We'll be showing it on the screen. I expect he's going  
16 to be enlarging it to make it a little easier. There  
17 we go.

18 Can you see the Padlock Ranch on this figure?

19 A. I can.

20 Q. If you actually touch the screen there,  
21 you'll be able to draw a line. Can you put -- I know  
22 you won't be able to do it exactly -- but approximately  
23 where the Padlock Ranch is in Wyoming?

24 A. (Witness complies.) That's the farm area.  
25 As far as the Montana line, something like with the

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 grass. The last block I dealt was the grass area that  
2 is in Wyoming.

3 Q. And so the second part that looks sort of  
4 like a triangle, that's not irrigated?

5 A. That's not irrigated, no.

6 Q. And the irrigation that the Padlock Ranch  
7 does in Wyoming, that's covered by the circled portion;  
8 is that right?

9 A. That's correct.

10 Q. How many acres is the Padlock Ranch?

11 A. Short of 500,000.

12 Q. How many of those are in Wyoming?

13 A. About 200.

14 Q. Big ranch.

15 A. Yes.

16 Q. In fact, there's over 20 buildings on the  
17 ranch; right?

18 A. That is correct.

19 Q. Including a convention center?

20 A. Yes.

21 Q. You have 10,000 head of cattle or more?

22 A. Yeah.

23 Q. How many acres are irrigated in Wyoming?

24 A. Just short of 4000.

25 Q. You also do some dry land farming; is that

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 right?

2 A. That's correct.

3 Q. How many acres of dry land?

4 A. Slightly more than 3000.

5 Q. I should ask you, what do you mean by dry  
6 land farming?

7 A. It's continuous crop, but unirrigated.

8 Q. What crops are grown on the Padlock?

9 A. Corn, barley, hay, grains.

10 Q. How do you choose how and -- how do you  
11 choose when and where those various crops are planted?

12 A. In late September, October, we sit down with  
13 the management team and decide what crops we need for  
14 the next year.

15 Q. Is that part of what you would call a farm  
16 plan?

17 A. That's correct.

18 Q. You finish that by sometime around November,  
19 is my recollection?

20 A. We do.

21 Q. Want to talk about the irrigated lands, which  
22 is the focus of this case. And to do that, I want to  
23 show you a document --

24 MR. WECHSLER: Your Honor, may I approach?

25 SPECIAL MASTER: You may.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 BY MR. WECHSLER:

2 Q. -- that has been labeled M449. Do you  
3 recognize M449?

4 A. I do.

5 Q. What is it? What is this document?

6 A. In 2006 we had an extremely poor year and our  
7 board wanted to know why. And this is the report.

8 Q. This a report that you prepared?

9 A. Yes, it is.

10 SPECIAL MASTER: Can I just pause for one  
11 second just for the people who are looking in the  
12 screen in back. Is there a way in which we can --  
13 perfect. Thanks.

14 BY MR. WECHSLER:

15 Q. I'm sorry. Mr. Benzel, you said that 2006;  
16 is that correct?

17 A. Yes.

18 Q. Do you recall what time of year in 2006?

19 A. It was late, but I don't recall.

20 Q. Sometime at the end of the irrigation season?

21 A. That's correct.

22 Q. The first six pages are text, and at the end  
23 it says your name on page 6. Do you see that?

24 A. I do.

25 Q. After that there's some charts and some

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 figures. Did you also put those together?

2 A. I did, yes.

3 Q. And this was all part of a report that you  
4 made to the board?

5 A. It is.

6 MR. WECHSLER: Your Honor, I'd move the  
7 admission of Exhibit M449.

8 MR. BROWN: No objection.

9 SPECIAL MASTER: Okay. Exhibit M449 is  
10 admitted.

11 (Exhibit M449 admitted.)

12 BY MR. WECHSLER:

13 Q. The title of this document is "Padlock Ranch  
14 and Its Irrigation Water"; is that right?

15 A. That's correct.

16 Q. And does this generally describe the way that  
17 Padlock irrigates in Wyoming?

18 A. It does for that time and period.

19 Q. And that's changed since then?

20 A. We've lost some leases, so it's not quite as  
21 extensive.

22 Q. When -- for the remainder of the time that  
23 you and I are talking, I really want to focus on the  
24 period 2006 and before that. Remind me again when you  
25 started as a Padlock farm manager.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. '97.

2 Q. So I want to focus on that period of  
3 '97 through the end of 2006. After that is not as  
4 relevant to this case. So I think this 2006 document  
5 does fall within that time frame; right?

6 A. Uh-huh.

7 Q. And it was accurate at the time you wrote it;  
8 is that right?

9 A. Yes.

10 Q. What I'd like to do, as you walk through  
11 this, Mr. Benzel, we see here on page -- starting on  
12 page 2, there's the Highline Ditch, the Green Ditch,  
13 and there's some other irrigation. What I'd like to  
14 ask my colleague to do is put back up that Exhibit M5,  
15 page 49. And then what I'd like to do, Mr. Benzel, is  
16 have you point out where these various areas are that  
17 are being described here, if you would, please. So we  
18 can wait until the figure comes up.

19 So, Mr. Benzel, do you see that on your  
20 screen now?

21 A. I do.

22 Q. On page 2 you talk here about the Highline  
23 Ditch listed. Is that one of the areas of irrigation  
24 of the Padlock Ranch?

25 A. It is.



GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. And then it looks to me, looking at the third  
2 paragraph, it indicates -- or irrigation starts at the  
3 Adamson, moves to the Horseshoe and Lower Kearney and  
4 continues describing -- are those fields it's  
5 describing?

6 A. That's correct. Our farms.

7 Q. Field or farms. So can you please indicate  
8 with -- put a circle around where those fields are?

9 A. (Witness complies.)

10 Q. Great. Moving then to the Green Ditch, it  
11 then talks about the Adamson, Hilton, P-19, and Home  
12 Place No. 5. Could you please indicate where that's  
13 located?

14 A. (Witness complies.)

15 Q. And there's a ditch there called the Green  
16 Ditch; is that right?

17 A. Tongue River Ditch No. 1.

18 Q. The South Side Tongue River Ditch is another  
19 irrigation point. And can you highlight where the  
20 irrigation is on the Padlock Ranch from that ditch?  
21 That's called the Brown Place?

22 A. (Witness complies.) Brown and Dienes.

23 Q. Next on page 4 on Exhibit M449, you show the  
24 Fivemile Ditch Company, Hilltop, Fivemile, and Rhodes  
25 Irrigation. And can you circle where that is located?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. (Witness complies.)

2 SPECIAL MASTER: Can we just go off the  
3 record for a second.

4 (Discussion held off the  
5 record.)

6 BY MR. WECHSLER:

7 Q. And so that's the area in the Fivemile Flats,  
8 sometimes you call it?

9 A. That's correct.

10 Q. Next, the OZ and Handover Ditch Company.

11 A. (Witness complies.)

12 Q. And the area from Ranchester to Monarch  
13 irrigated by the Tongue River Ditch.

14 A. (Witness complies.)

15 Q. And then the Monarch and Acme Irrigation, and  
16 I think that's the last one.

17 A. (Witness complies.) Somewhere over there.

18 Q. Close to the Montana state line?

19 A. Correct.

20 Q. For this -- for most of our discussion, we'll  
21 be focusing on the area in the Fivemile Ditch area.  
22 And I think you call that the Fivemile Flats. Is that  
23 right?

24 A. That's right.

25 Q. How many acres of irrigated land in the

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Fivemile area?

2 A. 2000.

3 Q. So that leaves roughly 37 -- 1700 acres in  
4 the other areas?

5 A. That's correct.

6 Q. Before we leave this Exhibit M449, a couple  
7 of things I want to make sure that we just touch upon.  
8 And the first starts on page 1. So if you'd look with  
9 me, please, at the second paragraph. And there you're  
10 first talking about the efficiency of a pivot. Is that  
11 a type of sprinkler?

12 A. It is.

13 Q. And there you indicate it's 85 percent  
14 efficient. Do you see that?

15 A. With low pressure.

16 Q. What do you mean by that?

17 A. High-pressure sprinklers aren't as efficient  
18 as low pressure.

19 Q. Are your sprinklers low pressure?

20 A. They are.

21 Q. So what do you mean by being 85 percent  
22 efficient?

23 A. That's the amount of water that gets to the  
24 field.

25 Q. The amount that's consumed by the plant?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. Correct.

2 Q. Second here, you're talking about a whole  
3 number of different types of irrigation equipment; is  
4 that right?

5 A. That's correct.

6 Q. So can you describe what the various types  
7 irrigation equipment are that you have on the Padlock?

8 A. We have the pivots, side rolls, k-Lines,  
9 handlines, contour flood. That's it.

10 Q. Pretty sophisticated operation. Would you  
11 agree?

12 A. Some of it.

13 Q. You indicate at the beginning of the next  
14 paragraph that "A properly leveled field with flood  
15 irrigation is still the best way to apply water."

16 Why do you say that?

17 A. That's 'cause I grew up with gated pipe and  
18 flat field. I still like that.

19 Q. Why do you like it?

20 A. It's a hell of a lot easier than the  
21 machinery.

22 Q. Good for the plants?

23 A. What's that?

24 Q. Is it good for the plants?

25 A. I think so.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. Next page you talk about, on page 2 -- if you  
2 could turn there, please -- first full paragraph, it  
3 says -- talks about 24-hour sets versus 12-hour sets.  
4 Do you see that?

5 A. I do.

6 Q. What does that mean?

7 A. When we're behind, we'll switch 12-hour sets  
8 and we're changing the side rolls morning and evening.  
9 But we have approximately 30 side rolls, so that  
10 becomes really difficult. And we basically boil down  
11 to running a 24-hour set and delivering 9 inches minus  
12 the efficiency factor.

13 Q. So there are times you're irrigating 24 hours  
14 a day?

15 A. We irrigate 24 hours a day.

16 Q. So somewhere on the Padlock Ranch is  
17 irrigating at all times?

18 A. Yes, sir.

19 Q. A couple things I noticed that I think will  
20 be relevant later when we have other discussions in  
21 this case. But if you turn to page 4, under the  
22 Fivemile Ditch Company, under that first full  
23 paragraph. The last sentence there, you indicate "Rain  
24 fall patterns have allowed for free water through  
25 July." You see that?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. What paragraph?

2 Q. Under the heading "The 5 Mile Ditch Company,"  
3 the first full paragraph, it's the last sentence of  
4 that paragraph. Starts "Rain fall patterns --

5 A. "Rain fall patterns."

6 Q. You recall that being true in 2006?

7 A. I don't recall.

8 Q. That's what it says; is that right?

9 A. Yeah, but -- you asked me if I recalled it.

10 Q. I understand that. I'm just pointing out  
11 that is what it says; correct?

12 A. That's what it says.

13 Q. Bottom of the page there, page 4, the last  
14 sentence says "a wet spring with free water." Do you  
15 see that?

16 A. I see that.

17 Q. What do you mean by "free water"?

18 A. We fill our reservoirs; we don't have to  
19 irrigate. And we're able to start irrigation later, so  
20 we look at it as free water.

21 Q. Taking whatever water you need?

22 A. No. We do not take water at that time.

23 Q. You don't take --

24 A. We're calling it free water because we don't  
25 have to irrigate.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. I see. You mean that there's plenty of water  
2 available?

3 A. Right. There's plenty of water available.

4 Q. Looking at the next page, page 5, says,  
5 "Monarch and Acme Irrigation." You see that?

6 A. I do.

7 Q. Here it indicates there's not any computation  
8 for water. Why is that?

9 A. We're the only irrigators there. The river  
10 is recharged.

11 Q. It's close to the Montana border?

12 A. There's always water there.

13 Q. There's no further irrigators in Wyoming?

14 A. Not that I know of.

15 Q. You no longer irrigate that acreage; is that  
16 right?

17 A. We still irrigate part of it.

18 Q. How much acreage was there in 2006?

19 A. Around a hundred acres.

20 Q. How much do you irrigate now?

21 A. Thirty-nine.

22 Q. Why did you stop irrigating the other 61?

23 A. The ranch turned into a pheasant habitat.

24 Q. Did you have water rights for that acreage?

25 A. They were Wyoming water rights. It was a

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 lease.

2 Q. Do you recall what the priority date was?

3 A. I do not. The Monarch is an 1895 priority  
4 date.

5 Q. How about the other one?

6 A. The Acme, I don't recall.

7 Q. Okay. Now, what I want to do is turn, then,  
8 to the Fivemile Flats area. And we looked at where  
9 those operations are on the Padlock. Could you -- I'll  
10 ask my colleague to turn to Figure 10 on page 62 of  
11 Exhibit M5. This is Mr. Book's original report.

12 Do you recognize this figure as being the  
13 Padlock Ranch?

14 A. Yes, I do.

15 Q. How many pivots are in this area?

16 A. Fifteen.

17 Q. And each is numbered on this diagram;  
18 correct?

19 A. That's correct.

20 Q. Are they numbered correctly?

21 A. They are.

22 Q. Also in the Fivemile Flat area there's  
23 another large ranch; is that correct?

24 A. That's correct.

25 Q. And it's owned by a family called the



GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Sheeleys? S-h-e-e-l-e-y.

2 A. That's also correct.

3 Q. Where is that ranch located?

4 A. You want me to draw it on here?

5 Q. Yes, please.

6 A. (Witness complies.)

7 Q. And so it's basically to the west of the line  
8 that you drew?

9 A. Yes.

10 Q. Do you know how many acres are irrigated by  
11 the Sheeleys?

12 A. I really don't.

13 Q. Over a thousand?

14 A. That's my understanding.

15 Q. It's a fairly large irrigated area?

16 A. It is.

17 Q. The source of water for both the Sheeley  
18 Ranch and the Padlock Ranch is Columbus Creek; correct?

19 A. It is.

20 Q. And so we can see the Columbus Creek shown at  
21 the northeast corner of this figure; correct?

22 A. It is.

23 Q. My understanding is that the Fivemile Ditch  
24 diverts the entire amount from the Columbus Creek; is  
25 that correct?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. That's correct.

2 Q. It's a little bit upstream of what's being  
3 shown on your --

4 A. Point of diversion is upstream, yeah.

5 Q. And it comes through the Fivemile Ditch,  
6 which is shown here on this figure; is that right?

7 A. It does.

8 Q. Now, on this particular figure, you can see  
9 the blue line, where the Fivemile Ditch sort of stops  
10 at the P-2. Does the Fivemile Ditch actually continue  
11 all the way to Fivemile Reservoir?

12 A. You want me to draw it?

13 Q. Yes, please.

14 A. (Witness complies.)

15 Q. So it does continue all the way to Fivemile  
16 Reservoir?

17 A. I was off a little.

18 Q. Is that right, it continues to Fivemile  
19 Reservoir?

20 A. Yes, it does.

21 Q. There is -- during the irrigation season  
22 there's not enough direct flow to satisfy the acreage  
23 of both the Sheeley Ranch and the Padlock; right?

24 A. No, there is not.

25 Q. And, in fact, if you have with you

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Exhibit M449, we can take a look at generally what  
2 those flows were. I'm looking at the back, there's a  
3 number of figures. And there's one in particular  
4 labeled "May cfs 1991 to 2005," labeled with the Bates  
5 No. MT24146. You can let me know when you have that  
6 before you.

7 A. May 1991 through 2005 CFS, is that the --

8 Q. Correct. Is this a figure that you put  
9 together?

10 A. It is.

11 Q. What was the source of your information?

12 A. State engineer's office.

13 Q. Annual hydrographer reports?

14 A. That's correct.

15 Q. And there's a gauge basically located at the  
16 place where the Fivemile Ditch diverts the water from  
17 Columbus Creek; is that right?

18 A. There is.

19 Q. So this is showing what I understand to be,  
20 as we look at the hydrographer reports, it's basically  
21 mean CFS for each of those years in the month of May;  
22 is that right?

23 A. It is.

24 Q. In Wyoming, do you know how much acreage a  
25 single CFS tends to irrigate?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. 70 acres to a CFS.

2 Q. So 1 CFS for 70 acres. So if you look at the  
3 largest amount of water in May was 21 CFS in 1993;  
4 right?

5 A. '93?

6 Q. Yes.

7 A. Yes.

8 Q. How many acres can 21 CFS irrigate in  
9 Wyoming?

10 A. 20 times 70.

11 Q. Roughly?

12 A. 1400.

13 Q. A little over 1400 acres?

14 A. Uh-huh.

15 Q. And the Padlock Ranch itself is 2,000 acres  
16 of irrigated land; right?

17 A. On this ditch.

18 Q. On this ditch. And the Sheeley is over a  
19 thousand; correct?

20 A. That's correct.

21 Q. May is an area -- a time of year when there's  
22 spring runoff; right?

23 A. Critical time.

24 Q. And typically, actually, the flows in  
25 Columbus Creek and the Fivemile Ditch are lower than

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 what's shown on this figure; correct?

2 A. Correct.

3 Q. So historically there was not enough water to  
4 satisfy both the Sheeley Ranch and the Padlock Ranch;  
5 right?

6 A. Historically.

7 Q. And that led to a dispute between the water  
8 users?

9 A. That happens.

10 Q. It does happen. And in this case, that  
11 happened; correct?

12 A. That's correct.

13 Q. And the way that was resolved was by deciding  
14 that what would happen was the Sheeley Ranch would  
15 irrigate during the irrigation season using the  
16 direct-flow right; right?

17 A. Correct.

18 Q. And the Padlock Ranch would irrigate using  
19 reservoirs; right?

20 A. Correct.

21 Q. So in order to make that happen, there were  
22 reservoirs that were enlarged, overbuilt; right?

23 A. That's correct.

24 Q. And that's the Fivemile and Wagner?

25 A. Correct.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. During the irrigation season, Padlock relies  
2 exclusively on storage to irrigate its pivots in the  
3 Fivemile area; right?

4 A. That's correct.

5 Q. And so that has led to an increased amount of  
6 production in this particular area; correct?

7 A. There is good production when we have water.

8 Q. It's increased from when there was no  
9 reservoirs?

10 A. That's correct. That's correct.

11 Q. And, in fact, it's quite efficient. It's a  
12 large amount of production for a small amount of water,  
13 would you agree?

14 A. I think it's very efficient.

15 Q. And it has also allowed more land to be  
16 irrigated in the Fivemile area than was irrigated prior  
17 to the reservoirs; right?

18 A. I do not know how much land was irrigated  
19 prior to the reservoirs.

20 Q. I think there's some documents that will help  
21 us get at that issue. With the reservoirs in place,  
22 there's somewhere over 3000 acres of irrigation in that  
23 area; right?

24 A. There is.

25 Q. And we looked at the direct flow. Just based

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 on the direct flow, there wasn't that much -- you could  
2 not irrigate over 3000 acres; is that right?

3 A. That's correct.

4 Q. Turning back to this figure, Figure 10 of M5,  
5 I want to talk about how the reservoirs are filled. So  
6 my understanding is in the -- in October, at the end of  
7 the irrigation season, you open up the Wagner  
8 Reservoir; is that right?

9 A. We open the Wagner and start filling the  
10 Fivemile. Usually March is when we fill the Fivemile.  
11 And then we start closing down the Wagner. And it  
12 usually fills by May.

13 Q. So the Wagner here is on the east side; it's  
14 upstream of the Fivemile; correct?

15 A. Yes, that's correct.

16 Q. So you fill the Fivemile first and then you  
17 shut down the Wagner and then you fill it?

18 A. That's correct.

19 Q. As I understand it, the reason you do that is  
20 because there are cattle that winter between the two  
21 reservoirs?

22 A. There are.

23 Q. So you have to have a flow of water to water  
24 those cattle; right?

25 A. That's correct.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. When it gets warmer in March, I think you  
2 said you can then get water to the cattle using pipes;  
3 right?

4 A. That's correct.

5 Q. So that's the time that you can shut down the  
6 Wagner?

7 A. That's also correct.

8 Q. These reservoirs fill almost every year;  
9 right?

10 A. Three out of the last fifteen, they did not  
11 fill.

12 Q. So every other year, other than those three,  
13 they filled?

14 A. That's correct.

15 Q. Those years were -- the years when they did  
16 not fill were 2004; right?

17 A. Yes.

18 Q. 2006?

19 A. Yes.

20 Q. We have records to show exactly how much they  
21 filled those years; right?

22 A. We do.

23 Q. And then there's one other year that they  
24 didn't fill; is that right?

25 A. That's correct.



GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. Do you know what year that was?

2 A. I'm guessing '02.

3 Q. So maybe '02. So then it filled in '01?

4 A. If it -- one or the other.

5 Q. So one of those years you think it filled,  
6 and the other it didn't fill?

7 A. That's correct.

8 Q. At the end of the irrigation season, the  
9 reservoirs are almost always empty; right?

10 A. That's correct also.

11 Q. You've used all of that irrigation water on  
12 the pivots in the Padlock Ranch?

13 A. We do, other than 55 acre-feet of the Wagner,  
14 or 63.

15 Q. And that's -- I think the number I saw was  
16 62. Does that sound possible?

17 A. That's correct.

18 Q. And that 62 acre-feet is, as I understand  
19 it -- is that owned by the Sheeleys?

20 A. It is.

21 Q. And is that water that's used basically for  
22 the watering during the winter?

23 A. I believe that's the case. I'm not familiar  
24 with how that was all set up.

25 Q. That's not water that you are responsible

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 for?

2 A. No.

3 Q. That's the Sheeleys?

4 During that same time the Sheeleys are using  
5 the direct flow from Columbus Creek through Fivemile  
6 Ditch on their irrigated acreage; right?

7 A. That's correct.

8 Q. Do you understand what the term "regulation"  
9 means in Wyoming?

10 A. I do.

11 Q. Neither the Fivemile nor the Wagner Reservoir  
12 have ever been regulated; right?

13 A. That's correct.

14 Q. And there's never been any regulation on  
15 Columbus Creek?

16 A. There is regulation.

17 Q. Where is that?

18 A. On -- I guess not on Columbus Creek, but we  
19 are regulated on the Highline, South Side Tongue, and  
20 Bar Five.

21 Q. We looked at that earlier. In the Fivemile  
22 Flat area, there's no regulation from the State of  
23 Wyoming; right?

24 A. Monitoring only.

25 Q. No regulation?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. No.

2 Q. Have you ever been required to release water  
3 from any of these reservoirs?

4 A. I have not.

5 Q. Ever been required to shut down any  
6 production or water use?

7 A. Are we talking about the Fivemile Flat, sir?

8 Q. Yes, sir.

9 A. Not on the Fivemile.

10 Q. And so those pivots are irrigated every year?

11 A. When the reservoirs fill.

12 Q. And even when the reservoirs don't fill, then  
13 you are using that water on the pivots in the Fivemile  
14 area?

15 A. On certain pivots we'll irrigate some of  
16 them.

17 Q. When they don't fill, you don't have enough  
18 water to irrigate all of the pivots?

19 A. I do not.

20 Q. Looking at this figure, I want to -- I'd like  
21 to get you to identify which reservoirs irrigate which  
22 pivots. So starting with the Fivemile, if you could  
23 put the No. 5 on each of the pivots and tell us what  
24 the numbers are.

25 A. Nine, ten, eleven, twelve. P-8, P-14, P-15.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 That's all Fivemile pivots.

2 Q. The remainder of those pivots are Wagner  
3 pivots?

4 A. Correct.

5 Q. And my understanding is, P-5 east can also be  
6 irrigated from what's labeled here as the Padlock Waste  
7 Water Reservoir; is that right?

8 A. That's correct.

9 Q. That particular pivot, you can get water from  
10 both the Wagner and from the Waste Water --

11 A. It can.

12 Q. I'm going to hand you what's been marked as  
13 Exhibit M451. And I'd like to talk a little bit about  
14 the water rights of these two reservoirs.

15 Have you seen this before?

16 A. I have.

17 Q. What is it?

18 A. It's an analysis of the Fivemile water rights  
19 for the Padlock Ranch.

20 Q. It's addressed to you; right?

21 A. It is.

22 Q. And this is an analysis that you had  
23 commissioned; correct?

24 A. That's correct.

25 Q. And it was performed and then given to you in

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 May of 2007; right?

2 A. That's correct.

3 Q. And the gentleman who transferred it to you  
4 is named Peter Hager; is that right?

5 A. That's also correct.

6 Q. He works for the Aqua Terra Consultants?

7 A. He did. He retired.

8 Q. One of the reasons that you had this  
9 commissioned was because of this case; correct?

10 A. That's correct.

11 MR. WECHSLER: Your Honor, I'd move the  
12 admission of M451.

13 MR. BROWN: No objection.

14 SPECIAL MASTER: Exhibit M451 is admitted  
15 into evidence.

16 (Exhibit M451 admitted.)

17 BY MR. WECHSLER:

18 Q. Mr. Benzel, could you turn, please, to page  
19 20 of Exhibit M451? Do you have that?

20 A. Page 20?

21 Q. Yes, please. At the top here it indicates  
22 "Padlock Ranch No. 1A Fivemile Reservoir and Columbus  
23 Creek." Do you see that?

24 A. I do.

25 Q. Is Padlock No. 1A another name for what we've

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 been talking about as the Fivemile Reservoir?

2 A. It is.

3 Q. Under the No. 1 here it lists some water  
4 right information; correct?

5 A. It does.

6 Q. You understand that to be accurate for the  
7 Fivemile Reservoir?

8 A. I do.

9 Q. So the total acre-feet that's permitted for  
10 it is 535.5 acre-feet; right?

11 A. It is.

12 Q. And the priority date on that reservoir is  
13 May 26, 1960; correct?

14 A. It is.

15 Q. And do you know when the reservoir was built?

16 A. I do not.

17 Q. Typically, this reservoir fills by May?

18 A. Oh, filled. I thought you said built.

19 Q. I did say built. I'm asking a different  
20 question now. Do you know, it typically fills by May;  
21 is that right?

22 A. It does.

23 Q. In your deposition, I think you said that 55  
24 acre-feet from the Fivemile Reservoir is unusable; is  
25 that right?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. It is.

2 Q. What do you mean by "unusable"?

3 A. There's a pool that we can't access below our  
4 pumps. And that's a Fish and Game thing when they  
5 built the reservoir.

6 Q. Other than that 55 acre-feet, the remainder  
7 of it is used for irrigation in the Padlock?

8 A. It is.

9 Q. Turning to page 19 of Exhibit M451, here we  
10 see the Wagner Reservoir storage water rights; correct?

11 A. Correct.

12 Q. And does this look accurate to you?

13 A. The '03?

14 Q. Well, I guess we can walk through each one of  
15 these. There's a number of things here. Let's start  
16 with 1F at the bottom there. And it talks about the  
17 Padlock Ranch enlargement. Do you see that?

18 A. I see that.

19 Q. And here it says the total capacity -- I'm  
20 sorry. Capacity gross is 883.75 acre-feet. Do you see  
21 that?

22 A. I do.

23 Q. Is that accurate?

24 A. That's accurate.

25 Q. And the priority date on that enlargement is

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 July 2nd, 1979; right?

2 A. That's correct.

3 Q. Now, it's a little more complicated than  
4 that. I think if you look at the Wagner, if we look  
5 first at the 1A, here it indicates -- and I'm looking  
6 at the last sentence of that paragraph -- that there's  
7 the original -- it talks about an original 65  
8 acre-feet; right?

9 A. It does.

10 Q. And the priority date on that is actually  
11 1903; right?

12 A. It is.

13 Q. And then if you go down and you look at  
14 paragraph 1D, there's 62 acre-feet with a priority date  
15 of 1607; right? 1907. You see that?

16 A. It was D?

17 Q. Yes, 1D. You see where I'm looking?

18 A. 1908, I don't see that.

19 Q. 1907. So do you see the paragraph marked 1D?

20 A. I do.

21 Q. And says Achenbach Reservoir?

22 A. I see.

23 Q. 1907 for 62 acre-feet; is that right?

24 A. Yes.

25 Q. Do you understand that to be correct?



GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. Yes.

2 Q. In this case we talked about 1950 as a  
3 particular date of reference because that's the date  
4 the Yellowstone River Compact was entered into. So do  
5 you agree with me, looking at 65 acre-feet and the 62  
6 acre-feet, that there are 127 acre-feet of pre-1950  
7 storage in Wagner Reservoir?

8 A. That's correct.

9 Q. And the remainder is post-1950; right?

10 A. That's also correct.

11 Q. And so taking the -- going to round  
12 numbers -- taking the roughly 884 acre-feet of storage  
13 and subtracting the 127, the number I came up with is  
14 757. Does that -- I don't want to ask you to do math,  
15 but does that sound right?

16 A. Works for me.

17 Q. If we could turn back to Figure 10, page 62  
18 of M5, that will be on your screen again. I just want  
19 to talk while we're looking at Exhibit M451 about the  
20 Padlock Waste Water Reservoir.

21 A. Which exhibit?

22 Q. Mr. Benzel, it should be coming up on your  
23 screen. I haven't given you a hard copy.

24 A. Oh.

25 Q. So just to remind us, the Padlock Waste Water

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Reservoir is down there in the southeastern part of the  
2 irrigation on the Padlock in the Fivemile Flat area?

3 A. It is. We call this the Hilltop area.

4 Q. I'm sorry. You call it the?

5 A. This is the Hilltop area; Fivemile Flats are  
6 through here.

7 Q. And then if you look at Figure M451 again, at  
8 page 10, that's the Aqua Terra report. And this is the  
9 summary of some of the water rights. And I just want  
10 to get you to confirm that -- the size of that  
11 reservoir.

12 A. Page 10. Okay.

13 Q. And there it indicates, under Padlock Ranch  
14 Company, that the Padlock Waste 104. Do you understand  
15 that to be talking about the Waste Water Reservoir?

16 A. That's correct.

17 Q. And that shows a water right of 50.67  
18 acre-feet; is that correct?

19 A. That's also correct.

20 Q. And that has a priority date of 1984?

21 A. That's correct.

22 Q. That reservoir captures rain; is that  
23 correct?

24 A. It does. And waste water runoff.

25 Q. It fills --

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. It captures rain and waste water runoff.

2 Q. What do you mean by "waste water runoff"?

3 A. From our irrigations that occur around it.

4 Q. It captures the flows that are coming off of  
5 those fields.

6 A. That's correct.

7 Q. It fills every year?

8 A. It does.

9 Q. Does it fill more than once every year?

10 A. Yes.

11 Q. Do you know how many times each year?

12 A. Twice.

13 Q. So we looked at these numbers. And, again,  
14 I'm going to talk in rough numbers. We saw 535  
15 acre-feet of post-1950 storage on the Fivemile; right?

16 A. That's correct.

17 Q. Roughly 750 acre-feet of post-1950 storage on  
18 the Wagner; right?

19 A. That's correct.

20 Q. And roughly 50 acre-feet of post-1950 storage  
21 on this Waste Water; correct?

22 A. That's correct.

23 Q. And so that -- can we agree that comes up to  
24 somewhere over 1300 acre-feet of post-1950 storage in  
25 this area?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. That would be correct.

2 Q. And now you -- we talked about the fact that  
3 these pivots in the Fivemile area are all irrigated  
4 from those reservoirs; correct?

5 A. They are.

6 Q. And that's the only source of supply for  
7 those pivots?

8 A. That's correct also.

9 Q. Now, there are some water rights that are  
10 assigned to those areas; correct?

11 A. There are.

12 Q. Those direct-flow water rights are not  
13 actually used; correct?

14 A. We do not.

15 Q. I do want to take a look at those. So if you  
16 look at that same exhibit, would be the Aqua Terra  
17 document, M451. And I'm looking at page 3. Are you  
18 there?

19 A. Yes, I am.

20 Q. This is a description of those water rights  
21 that are assigned to some of the pivots that you don't  
22 use; correct?

23 A. It is.

24 Q. At the top here on page 3, it indicates there  
25 is a total of 1593 acres of Padlock Ranch direct-flow

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 irrigation rights in the Fivemile Flat area. Do you  
2 see that?

3 A. I see that.

4 Q. Of that it then breaks out ten different  
5 rights; is that correct?

6 A. It is.

7 Q. No. 9 there is actually is 1984 right; is  
8 that correct?

9 A. It is.

10 Q. And then below there, above the next set of  
11 numbers, it indicates, "The following represent the  
12 currently existing five irrigation pivots that have no  
13 assigned direct-flow water rights." Do you see that?

14 A. I see that.

15 Q. So those pivots have no water rights assigned  
16 to them whatsoever; correct?

17 A. That's correct.

18 Q. Then the next sentence says, "The two  
19 additional pivots that have insufficient direct-flow  
20 water rights assigned are," and it lists two; correct?

21 A. P-5.

22 Q. And turning to page 4 there it also lists  
23 P-11; right? Is that right?

24 A. Yes.

25 Q. And then under there it indicates the total

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 area with existing pivots with unassigned direct-flow  
2 water rights is 830.5 acres; right?

3 A. That's correct.

4 Q. And no water rights assigned to those  
5 whatsoever?

6 A. There are no water rights assigned to those  
7 acres.

8 Q. I'd like to talk about some of the years that  
9 we are concerned with in this case, starting with 2004.  
10 And to do that, I'm going to hand you Exhibit M448.

11 Mr. Benzel, do you recognize this document?

12 A. I do.

13 Q. What is this?

14 A. It's a final year-end report to our board.

15 Q. This is a year-end report from you?

16 A. Yes.

17 Q. And you drafted this?

18 A. I did.

19 Q. Sometime after the irrigation season in 2004?

20 A. That's correct.

21 Q. Do you know when it was drafted?

22 A. November, December, maybe September.

23 Q. Sometime after you were through with  
24 irrigation?

25 A. End of the year.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 MR. WECHSLER: I would move the admission of  
2 Exhibit M448.

3 MR. BROWN: No objection.

4 SPECIAL MASTER: Then Exhibit M448 is  
5 admitted into evidence.

6 (Exhibit M448 admitted.)

7 BY MR. WECHSLER:

8 Q. We talked about the fact that the Wagner and  
9 Fivemile did not fill in 2004; correct?

10 A. That's correct.

11 Q. And we can see from this document how much it  
12 did fill; right?

13 A. That's also correct.

14 Q. So if you look nine lines down, there's a  
15 sentence -- I'm sorry -- ten lines down -- nine lines  
16 down there's a sentence that begins, "The corn fields  
17 weren't planted because our reservoirs did not fill  
18 up." Do you see that?

19 A. Yes.

20 Q. And then it continues, "The Wagner had 330  
21 acre-feet, and the Fivemile had 400 acre-feet"; is that  
22 right?

23 A. That's correct.

24 Q. And do you believe that's accurate?

25 A. I do.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. Did the Padlock Waste Water Reservoir fill in  
2 2004?

3 A. I don't remember that.

4 Q. The water, then, from the reservoirs was used  
5 on the pivots in the Padlock Ranch in 2004; is that  
6 right?

7 A. That's correct. What water we had.

8 Q. If you'd turn, please, Mr. Benzel, to Exhibit  
9 M449. And this is the document -- and I believe you  
10 said it was created in 2006; right?

11 A. Yes.

12 Q. If you'd turn with me, please, to the chart  
13 that is -- at the top it's labeled "Forage Maximization  
14 Model." And at the bottom it's labeled with Bates  
15 No. MT24142. Do you see that?

16 A. I see that.

17 Q. Can you tell us what the Forage Maximization  
18 Model is?

19 A. It was developed through -- well, because  
20 pivots start not filling. We had to be able to decide  
21 what fields were going to be irrigated. And we broke  
22 it down between either protein, which would go to the  
23 cattle, TDNs or value of the crop one way or the other.  
24 And then we could analyze which areas we'd plant or  
25 what we would buy.



GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. It's a very cool model. I think it also  
2 takes into account how you can maximize your profit;  
3 correct?

4 A. That's correct.

5 Q. And this was built by a consultant for  
6 Padlock?

7 A. To my knowledge. I didn't build this.

8 Q. You use it only in years when the reservoirs  
9 don't fill; right?

10 A. That's correct. If the reservoirs are full,  
11 I don't use this model.

12 Q. If the reservoirs aren't full, you would go  
13 by your farm plan?

14 A. No. If the reservoirs fill, we go to the  
15 farm plan.

16 Q. Thank you. And if the reservoirs don't  
17 fill --

18 A. Then we go to the model.

19 Q. And if you look at this particular sheet that  
20 we're looking at, MT24142, under the title Forage  
21 Maximization Model, it has a date May 9, 2006; right?

22 A. That's correct.

23 Q. So at that point you would have known that  
24 the reservoirs were not going to fill; correct?

25 A. That's correct.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. As I understand it, the way you know the  
2 reservoirs are not going to fill is when the Sheeley  
3 Ranch begins to irrigate, then you're no longer storing  
4 water; is that right?

5 A. That's also correct.

6 Q. So by May 9, 2006, we can infer that the  
7 Sheeley Ranch had begun irrigation?

8 A. That would be correct.

9 Q. And so is this the date that that model was  
10 run?

11 A. It is.

12 Q. And then it has information on this document  
13 about the amount of water that was stored in the Wagner  
14 and Fivemile; right?

15 A. It does.

16 Q. And so there's -- in the upper left-hand  
17 corner it indicates the Wagner Reservoir, and it talks  
18 about stored water at 428 acre-feet. Do you see that?

19 A. I do.

20 Q. Is that the amount that was in the Wagner?

21 A. It is.

22 Q. Under that it says "Water Used." Do you see  
23 that?

24 A. I do.

25 Q. That number is 656; right?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. That's correct.

2 Q. Why the discrepancy between the numbers?

3 A. Because we run the figures as if we were  
4 going to irrigate everything. And it shows us what  
5 we're short.

6 Q. Shows you the amount that you don't have?  
7 And that's that minus 228?

8 A. Correct.

9 Q. The Fivemile, moving over a column, indicates  
10 that the stored water was 577 acre-feet; right?

11 A. It does.

12 Q. And that was the amount in the Fivemile?

13 A. It was.

14 Q. The Fivemile was pretty much full?

15 A. It was.

16 Q. Under Water Used, it actually indicates 598,  
17 showing a deficit of minus 21. Why is the number for  
18 water used 598?

19 A. Because the pivots assigned to the Fivemile.  
20 If we had irrigated them completely as we were  
21 projecting, then we would have had a deficit of 21  
22 acre-feet.

23 Q. The water in 2006 from the Wagner and  
24 Fivemile were -- once again, they were used on the  
25 pivots on the Padlock Ranch; correct?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. That's correct.

2 Q. 2001 and 2000 we'll talk about collectively.  
3 One of those years you think it didn't fill; correct?

4 A. One of those years. Again, I could be wrong  
5 on that. '97 was when I got to the ranch. '06 was the  
6 year we're talking about now. In between that time,  
7 there were three events where it didn't fill, and I'm  
8 guessing on the third.

9 Q. Might not be 2001, 2002?

10 A. Like I said, I was guessing. I was just  
11 looking at the inflows, and I made the assumption.

12 Q. We do know that in one of those years the  
13 reservoirs did fill; correct?

14 A. That's correct.

15 Q. And so that would -- if they did fill, that  
16 would include that 1300 acre-feet of post-1950 storage?

17 A. That would be correct.

18 Q. Now, one topic that you and I didn't have a  
19 chance to talk about in our deposition, but I  
20 understand you know something about the Windy Draw  
21 Reservoir; is that right?

22 A. Which one?

23 Q. Windy Draw?

24 A. Windy Draw.

25 Q. Are you familiar with the term Windy Draw

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Reservoir?

2 A. Apparently not.

3 Q. I'm going to ask you just to refresh your  
4 recollection. If you look -- if we could put on the  
5 screen what's Exhibit W2, I believe. W2 at page 69.

6 Do you know Mr. Doyl Fritz?

7 A. I do.

8 Q. Did you speak to Mr. Fritz as part of his  
9 preparation of an expert report in this case?

10 A. I gave him the same information that I gave  
11 you.

12 Q. Looking at page 69. Do you see that? And  
13 I'm looking at the first part of the paragraph. At the  
14 end it says, "Windy Draw Reservoir is somewhat unique  
15 in that it is refilled each year by moving water  
16 downstream from Park via Big Goose Creek, the P K  
17 Ditch, and Soldier Creek. This was confirmed by the  
18 hydrologist for Districts 4 and 5 and also by Greg  
19 Benzel, who manages the Windy Draw Reservoir on behalf  
20 of the Padlock Ranch." Do you see that?

21 A. I see that. I know where this is at. This  
22 is the Rice Wrench Ranch. We call it the Rice Ranch;  
23 it's actually the Wrench Ranch. It's by Sheridan.

24 Q. Is this a reservoir that you manage?

25 A. I do manage this.

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 Q. And is it used for irrigation?

2 A. It is.

3 Q. What's the capacity of that?

4 A. I do not know. I didn't know that was the  
5 name.

6 Q. Do you know what that name comes from?

7 A. I do not. But I know where the water is  
8 coming from: the Big Goose Creek, the PK Ditch, and  
9 the Soldier Creek. So I know which reservoir that is.

10 Q. If we could put on the screen Exhibit M5 at  
11 page 39. This is a table, again, from one of the  
12 Montana experts' reports. And I want to see if this  
13 refreshes your recollection about the Windy Draw  
14 Reservoir.

15 A. I'm not arguing about the reservoir. I just  
16 don't know the name.

17 Q. Oh, no, I understand. I just want to see if  
18 we can confirm the size of it and the priority date.  
19 You don't know the size of the reservoir?

20 A. I do not.

21 Q. Looking at Table 9 there on your screen. You  
22 see at the bottom of that table that it indicates a  
23 capacity of 533 acre-feet?

24 A. I do.

25 Q. Does that refresh your recollection?

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 A. Not if I didn't know it.

2 Q. Does it sound accurate as you sit here today?

3 A. Yes.

4 Q. And then it shows a priority date of 1961;  
5 right?

6 A. It does.

7 Q. Does that seem accurate to you?

8 A. I can't answer that.

9 Q. You don't know the answer?

10 A. Because I don't know the answer on -- we just  
11 lease that piece. And we use the reservoir from -- the  
12 owner is Neltje.

13 Q. I'm sorry. Who?

14 A. The owner is Neltje.

15 Q. Are you familiar with the water rights  
16 associated with the Windy Draw Reservoir?

17 A. I'm not.

18 Q. So we looked at a table from Mr. Fritz's  
19 report where he indicated there was water coming from  
20 some ditches and from some reservoir. And that's not  
21 information that you gave Mr. Fritz; is that right?

22 A. No, I did not give him that information.

23 MR. WECHSLER: May I have a moment, Your  
24 Honor?

25 SPECIAL MASTER: You certainly may. In fact,

GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 I wonder if this is a good time -- if you think you're  
2 probably finished, why don't we take the second of the  
3 afternoon breaks right now. But we'll get you off the  
4 stand today. Let's take a ten-minute break then, and  
5 we'll come back about eight minutes to the hour.

6 (Recess taken 3:42 to 3:52

7 p.m., November 14, 2013)

8 SPECIAL MASTER: Okay.

9 BY MR. WECHSLER:

10 Q. Mr. Benzel, before the break we were talking  
11 about what I was referring to as the Windy Draw  
12 Reservoir. I understood you to call it the Rice  
13 Reservoir; is that right?

14 A. That's correct.

15 Q. Is that because it's on the Rice Ranch?

16 A. That's correct.

17 Q. How long have you been associated with the  
18 Rice Reservoir?

19 A. Off and on for 15 years.

20 Q. Since 1997 off and on?

21 A. Correct.

22 Q. Do you know how many of the years since --

23 A. We occasionally don't agree on a lease price.  
24 And they will farm it for a year or two, and then we  
25 come back around and rewrite another lease. And so



GREG BENZEL - November 14, 2013  
Direct Examination by Mr. Wechsler

1 it's been kind of shaky for most of 15 years. Couple  
2 years we didn't.

3 Q. Is the water from the Rice Reservoir used for  
4 a particular set of acres?

5 A. It is.

6 Q. And it's used to irrigate that acreage?

7 A. Again?

8 Q. It's used to irrigate that acreage?

9 A. There are two pivots.

10 Q. Do you know how many acres?

11 A. 275.

12 Q. Does the Rice Reservoir fill every year?

13 A. It does.

14 Q. And then water is used on those pivots?

15 A. It is.

16 Q. Does it fill one time?

17 A. It's continuous.

18 Q. It fills throughout the year?

19 A. It is.

20 Q. What's the -- we talked about, you don't know  
21 the source of that water; correct? Is that correct?

22 A. On Soldier Creek.

23 Q. You don't know the details?

24 A. I don't know the details. I don't do -- the  
25 owners that manage it, they do the filling. And we

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 just irrigate.

2 Q. In the years when you were not associated  
3 with the Rice Reservoir, was it irrigated by the Rice  
4 family?

5 A. No. In '79, an individual by the name of  
6 Neltje brought it from the Rice family. And their  
7 manager, Butch Jellis, has done the managing since  
8 then.

9 Q. To your knowledge, since 1997, has that  
10 acreage been irrigated every year?

11 A. Yes.

12 MR. WECHSLER: No further questions, Your  
13 Honor. Thank you, Mr. Benzel.

14 SPECIAL MASTER: Okay. Thank you very much,  
15 Mr. Wechsler.

16 Mr. Brown.

17 CROSS-EXAMINATION

18 BY MR. BROWN:

19 Q. Hello, Mr. Benzel. Good afternoon. How are  
20 you?

21 A. Good.

22 Q. Good. I only have a few questions.  
23 Mr. Wechsler did a pretty good job, I think, of going  
24 through with you what might be relevant to this case.  
25 So I've just got a few things that I want to take a

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 look at again.

2 And up on the screen right now is a diagram  
3 similar to what Mr. Wechsler had up. And that's, looks  
4 like, page 47 from Exhibit M. It's kind of the --

5 SPECIAL MASTER: From Exhibit M?

6 MR. BROWN: Five.

7 SPECIAL MASTER: Five, thank you.

8 MR. BROWN: Sorry.

9 SPECIAL MASTER: That's one huge Montana  
10 exhibit.

11 MR. BROWN: That's a couple of huge Montana  
12 exhibits.

13 BY MR. BROWN:

14 Q. Do you recognize what's depicted by this?

15 A. I do.

16 Q. And it's similar to what you were looking at  
17 with Mr. Wechsler; right?

18 A. It is.

19 Q. And if you recall, with him you were  
20 identifying the ditches that Padlock Ranch uses; right?

21 A. Correct.

22 Q. And I think when he was asking you questions,  
23 I thought he'd asked you to identify the land that was  
24 serviced by those ditches that was owned by Padlock.  
25 And you were making indications for the Highline and

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 the Hanover and the Tongue River No. 1 Ditch. Were you  
2 identifying the ditches or the Padlock land?

3 A. I identified the ditches which basically  
4 covered the land where I was drawing my finger through.

5 Q. Sure. And the only thing I want to clear up  
6 is that there are other users besides Padlock on the  
7 Highline Ditch; right?

8 A. There are.

9 Q. And there's other users on the South Side  
10 Ditch?

11 A. There are.

12 Q. And Padlock might be the only user on the  
13 Green Ditch; right?

14 A. There's one other.

15 Q. One other.

16 A. Small. The Green Ditch, and it's a small  
17 amount.

18 Q. So Padlock has the majority of the Green  
19 Ditch; right?

20 A. We do.

21 Q. And what was the other one? The Hanover  
22 Ditch. There's other users on it; right?

23 A. Correct.

24 Q. I just wanted to clear that up, that all that  
25 ground wasn't Padlock ground; right?

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 A. That's correct.

2 Q. Show us again where the Green Ditch is at.

3 A. (Witness complies.)

4 Q. And that's also referred to as the Tongue  
5 River No. 1 Ditch; right?

6 A. Tongue River No. 1.

7 Q. Is that, to your knowledge, the No. 1 water  
8 right in Wyoming on the Tongue River?

9 A. 1882.

10 Q. And is the No. 1; right?

11 A. Correct.

12 Q. Have you ever made a call for the benefit of  
13 that ditch?

14 A. I have not.

15 Q. You also have rights out of -- did you have  
16 rights out of the Tongue River Ditch? I don't recall.  
17 It's --

18 A. Yes.

19 Q. -- Tongue River Ditch Company?

20 A. Yes, sir. That's correct. We do have rights  
21 on it.

22 Q. Show us where that one is at on this diagram.

23 A. (Witness complies.)

24 Q. So that comes out right in Ranchester; right?

25 A. Starts in Ranchester.

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 Q. Right. And to your knowledge, has Padlock  
2 ever made a call for the benefit of that ditch?

3 A. We have not.

4 Q. Okay. I think Mr. Wechsler had asked you --  
5 of course, the focus with regard to Padlock in this  
6 case is the Fivemile Flat area; right?

7 A. It is.

8 Q. And the Wagner and Fivemile reservoirs  
9 predominately; right?

10 A. Yes.

11 Q. And he asked you to identify that on a  
12 smaller map. He'd asked you to show the distinction  
13 between the Padlock land on Fivemile and the Sheeley  
14 land on Fivemile. Could you do the same thing for us  
15 on this larger map?

16 A. (Witness complies.)

17 Q. It's kind of hard to tell. It doesn't have  
18 to be perfect. So in a very general sense, at least  
19 for those lands that are on the Fivemile Ditch,  
20 everything to the east of that line is Padlock; right?

21 A. Correct.

22 Q. And everything to the west of that line is  
23 Sheeley?

24 A. Correct.

25 Q. Okay. Just wanted to give us a better sense

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 of what that looked like. Can you identify generally  
2 the location where Fivemile Ditch diverts out of  
3 Columbus Creek, utilizing this map?

4 A. Somewhere in this area.

5 Q. Okay. And I think you told Mr. Wechsler that  
6 during irrigation season, or maybe the whole year, that  
7 Fivemile Ditch diverts the entire flow of Columbus  
8 Creek at that location?

9 A. Other than high water.

10 Q. So other than high water in the spring, it  
11 diverts the entire amount of Columbus Creek?

12 A. Correct.

13 Q. And I think you also told Mr. Wechsler that  
14 there's a state engineer's office recording station  
15 there?

16 A. There is.

17 Q. And it's actually on the ditch; right?

18 A. It is 10 feet off of the Columbus Creek in  
19 the ditch; correct.

20 Q. So it -- it's a continuous monitor; right?

21 A. It is.

22 Q. So it continuously monitors what Fivemile  
23 Ditch is taking; right?

24 A. It does.

25 Q. Mr. Wechsler had asked you to also identify

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 some of the other -- and I think it was the Monarch  
2 Irrigation that was further down or further east on the  
3 Tongue River; right?

4 A. Yes.

5 Q. Can you show us again where that's at?

6 A. (Witness complies.) It's right in here  
7 somewhere.

8 Q. And I think Mr. Wechsler asked you, it's  
9 close to the Montana state line, and you said right?

10 A. Yes.

11 Q. And I think -- I think he might have asked  
12 you, is that the last irrigation on the Tongue River in  
13 Wyoming? And I think you said yes.

14 A. I did say yes; that's incorrect.

15 Q. You're aware of additional irrigation below  
16 that point; right?

17 A. Yes, I am.

18 Q. Okay. And what was the priority date of the  
19 Monarch Irrigation?

20 A. 1897.

21 Q. And have you ever made a call for the benefit  
22 of that water right?

23 A. I have not.

24 Q. And I apologize. I just don't want to plow  
25 the same ground that Mr. Wechsler did.



GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1           I think you told Mr. Wechsler that with  
2 regard to the South Side and the Highline ditches --  
3 and those divert out of the Tongue River main stem;  
4 right?

5           A.     South side and Highline, that's correct.

6           Q.     And I think you told Mr. Wechsler that those  
7 ditches had, in fact, been regulated in the past by the  
8 State of Wyoming; right?

9           A.     They have, 2006.

10          Q.     I think prior to 2006, or maybe it was 2007,  
11 the Tongue River No. 1, which is the No. 1 water right  
12 on the Tongue, didn't have a measuring device prior to  
13 2006; is that right?

14          A.     That's correct.

15          Q.     Does it have a measuring device now?

16          A.     Does now.

17          Q.     Let's look at Exhibit M5, page 62, which I  
18 believe is the photo that Mr. Wechsler was looking at  
19 with you; isn't that right?

20          A.     That's correct.

21          Q.     And I think when you were describing the  
22 Padlock pivots on this particular aerial photograph,  
23 you had said all the pivots in that aerial belonged to  
24 Padlock; right?

25          A.     I did.

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 Q. Is that entirely accurate?

2 A. That's incorrect again.

3 Q. Okay. Now, there's one pivot on here that  
4 doesn't belong to Padlock; right?

5 A. There is. It's the Sheeley pistol.

6 Q. Could you identify that for us, please?

7 A. (Witness complies.)

8 Q. So the one that's not numbered in that  
9 photograph is not owned by Padlock?

10 A. No, it's not.

11 Q. And, hence, it's not a P, Padlock, something  
12 pivot; right?

13 A. Correct.

14 Q. And do you know how or what the source of  
15 water is that is used to irrigate Sheeley's pivot?

16 A. Direct flow, Fivemile.

17 Q. And you had mentioned that Padlock Ranch runs  
18 approximately 10,000 head of cattle; right?

19 A. That's correct.

20 Q. And there's a feedlot on this property as  
21 well; right?

22 A. There is.

23 Q. Can you just identify that so we know exactly  
24 what that is?

25 A. (Witness complies.)

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 Q. Mr. Wechsler asked you just generally  
2 questions with regard to how the operations work up on  
3 the Fivemile Flat area and your relationship with the  
4 Sheeleys. Do you remember that?

5 A. Yes.

6 Q. When I say "your," I mean Padlock Ranch  
7 relationship with the Sheeleys.

8 A. Uh-huh.

9 Q. Can you just walk me through -- and I want to  
10 start at the beginning of a water year. So start me  
11 off at October 1. So it would be the end of one  
12 irrigation season going into the winter. And just kind  
13 of describe for me Padlock's operation as it relates to  
14 the Fivemile Flat area and Fivemile-Wagner Reservoirs?

15 A. Starting in October we start filling our  
16 reservoirs. And by May, April, March -- March, the  
17 Fivemile Reservoir generally fills. And then we try to  
18 start filling the Wagner Reservoir. Generally, that  
19 occurs by May.

20 When Sheeleys start irrigating, which is  
21 April, May, June, somewhere in there, the inflow,  
22 instream flows stop. That's generally how we function.

23 We start irrigating then. Our corn ground is  
24 July, August. We're putting water in June on the hay  
25 ground, also our grain ground. We generally can get

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 away with two months of irrigation on corn. But our  
2 alfalfa ground is a June, July, August, takes quite a  
3 bit of water. We don't always irrigate the third. The  
4 grain is again a one-, two-month schedule: June and  
5 July.

6 Q. And just with regard to your relationship  
7 with Sheeley, and I think you described for  
8 Mr. Wechsler the fact that Padlock and Sheeley kind of  
9 share a large number of early water rights; is that  
10 right?

11 A. We do.

12 Q. Do you know the priority date of that water  
13 right?

14 A. 1882.

15 Q. And do you know how many acres are under that  
16 water right?

17 A. 1600, 17 --

18 Q. Approximately?

19 A. Yeah.

20 Q. So the way I understand it is that when -- or  
21 as in resolution of a previous dispute between those  
22 two large ranching operations and there wasn't enough  
23 water to irrigate all of it; right?

24 A. That's correct.

25 Q. The resolution was that the upstream Sheeley

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 Ranch would use the direct flow?

2 A. That's correct.

3 Q. And the downstream Padlock would build the  
4 reservoirs and use the storage during the irrigation  
5 season?

6 A. That did occur.

7 Q. Okay. So after the irrigation season starts,  
8 is there water in Fivemile Ditch available for Padlock  
9 to use?

10 A. We don't see it.

11 Q. What do you mean when you say that?

12 A. When the water -- we have a place that we  
13 watch. Everybody has a place they watch. Ours happens  
14 to be where we drive on a road and look down over the  
15 edge. And there's where the water enters our  
16 reservoir. And we don't see it anyway.

17 Q. Okay. And I think I wanted to make this  
18 clear. There are a couple of things with regard to a  
19 couple of responses you had for Mr. Wechsler.

20 I think he had asked you whether or not you  
21 used your direct-flow rights, whether or not Padlock  
22 Ranch used its direct-flow rights out of Fivemile  
23 Ditch. And I think you said no. And I want to make  
24 sure it's clear why. Why does Padlock Ranch not use  
25 its direct-flow rights?

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 A. Because there's not enough water.

2 Q. Okay.

3 A. If we were to use our direct-flow rights,  
4 then both Sheeley and ourselves would have a water war.

5 Q. Sure. So it's not that Padlock doesn't want  
6 to use it?

7 A. That's correct.

8 Q. If the direct-flow right was there and  
9 available, Padlock would use it; right?

10 A. That's correct.

11 Q. And if the water was there and available, you  
12 would use it with the same system that you use through  
13 the reservoirs; right?

14 A. That's correct.

15 Q. Because the Fivemile Ditch passes through  
16 those reservoirs?

17 A. That's correct.

18 Q. Mr. Wechsler -- well, let me ask you a  
19 question that's kind of related to that. He had asked  
20 you, when looking at the Aqua Terra report, about some  
21 of these pivots that don't have -- I think the term  
22 used in the Aqua Terra report was, direct-flow rights  
23 assigned to them; right?

24 A. That's correct.

25 Q. Is it your understanding that the water

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 stored in Fivemile Reservoir and Wagner Reservoir has  
2 to be assigned somewhere for you to use it there?

3 A. No.

4 Q. What's your understanding?

5 A. I can take storage -- stored water anywhere I  
6 need to.

7 Q. Say that again.

8 A. I can take stored water anywhere I need to.

9 Q. Okay. So just because there's no direct-flow  
10 rights assigned to certain pivots doesn't mean that you  
11 can't use your stored water there; right?

12 A. That's correct.

13 Q. It's just if you were using the direct flow,  
14 you would have to use it on those pivots where those  
15 direct-flow rights were assigned?

16 A. That's correct.

17 Q. And Mr. Wechsler showed you the two documents  
18 from 2004 and 2006 that you had created for your board  
19 of directors. Do you recall that?

20 A. Yes.

21 Q. And the one from 2004 was just a one-page  
22 document, and it was just a summary of your year?

23 A. Yes.

24 Q. In that document you identified how much had  
25 been stored in Wagner and Fivemile Reservoirs for that

GREG BENZEL - November 14, 2013  
Cross-Examination by Mr. Brown

1 year?

2 A. Yes.

3 Q. Can you tell me when it was that those  
4 reservoirs reached those maximum amounts?

5 A. Would have to have been prior to May.

6 Q. Prior to May?

7 A. Yes.

8 Q. And now the end of 2006 was associated with  
9 the larger report; right?

10 A. Correct.

11 Q. And within that larger report, it was the  
12 Forge Maximization Model?

13 A. Yes.

14 Q. And can you tell me when in 2006 Wagner and  
15 Fivemile Reservoirs finished filling to whatever they  
16 filled to?

17 A. May 9th report on the -- the date on the  
18 report.

19 Q. So May 9th would have been the last date  
20 those two reservoirs stored any water?

21 A. That's correct.

22 MR. BROWN: That's all I have.

23 SPECIAL MASTER: Okay. Thank you. I do not  
24 have any questions.

25 Mr. Wechsler?



GREG BENZEL - November 14, 2013  
Redirect Examination by Mr. Wechsler

1 MR. WECHSLER: Can we toggle back to our  
2 side?

3 REDIRECT EXAMINATION

4 BY MR. WECHSLER:

5 Q. Mr. Benzel, I actually don't have a lot of  
6 questions, but I like pictures. This is a  
7 demonstrative exhibit in this case. Montana  
8 Demonstrative Exhibit 2L. Do you recognize this?

9 A. I do.

10 Q. What is that?

11 A. It's the Wagner Reservoir.

12 Q. Turning to the next one. Do you recognize  
13 that? This is Montana Demonstrative 2M.

14 A. Fivemile.

15 MR. WECHSLER: No further questions.

16 SPECIAL MASTER: Okay. Thank you. So,  
17 Mr. Benzel, you are free to step down from the stand.

18 THE WITNESS: Thank you.

19 SPECIAL MASTER: So we still have, I think,  
20 at least 25, 30 minutes that we can use for additional  
21 testimony if you have your next witness.

22 MR. DRAPER: Yes, Your Honor. As soon as  
23 we're ready, we are -- as soon as you're ready, we're  
24 ready to call our next witness.

25 Our next witness is Mr. Charles Gephart. And

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 we would call him to the stand at this time, Your  
2 Honor.

3 SPECIAL MASTER: Okay. Thank you.

4 (Charles Gephart sworn.)

5 THE CLERK: Have a seat, please. When you're  
6 seated, state your name and spell it for the record.

7 THE WITNESS: My name is Charles Gephart.  
8 Last name is spelled G-e-p, as in Paul, h-a-r-t.

9 SPECIAL MASTER: Good afternoon.

10 THE WITNESS: Good afternoon, Judge.

11 SPECIAL MASTER: Okay. Mr. Draper.

12 MR. DRAPER: Thank you, Your Honor.

13 CHARLES GEPHART,  
14 having been first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. DRAPER:

17 Q. Good afternoon, Mr. Gephart.

18 A. Good afternoon, John.

19 Q. Please state your name for the record.

20 A. My name is Charles Gephart.

21 Q. And what is your address?

22 A. It's Post Office Box 653, Miles City, Montana  
23 59301.

24 Q. What is your current occupation?

25 A. I'm retired.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 Q. Did you grow up in Montana?

2 A. No, I didn't. I grew up back east in Maine.

3 Q. When did you move to Montana?

4 A. In 1970.

5 Q. What, generally, have been your occupations  
6 during your professional career?

7 A. Pardon me?

8 Q. What have been your occupations during your  
9 professional career?

10 A. I started out in the aircraft industry, and  
11 from the aircraft industry, moved to Montana. I got  
12 laid off from the Boeing Company and went to college,  
13 got a degree in ag science, majored in soils and  
14 minored in agronomy, and started my career with the  
15 Natural Resources Conservation Services as a soil  
16 scientist.

17 Q. So you went to college once you arrived in  
18 Montana?

19 A. That's correct. A year later.

20 Q. And after that you took a position with the  
21 federal agency, the Natural Resources Conservation  
22 Services?

23 A. That's correct.

24 Q. And you were employed there until when?

25 A. Until I retired in '98.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 Q. Have you been appointed as a water  
2 commissioner in this state?

3 A. Yes, I was.

4 Q. When did that occur?

5 A. In 2005.

6 MR. DRAPER: If I may, Your Honor, I'd like  
7 to provide -- during his testimony, provide the witness  
8 some exhibits. If I may have your permission to do  
9 that as the occasion arises?

10 SPECIAL MASTER: I think that's perfectly  
11 appropriate.

12 MR. DRAPER: Thank you.

13 BY MR. DRAPER:

14 Q. I'd like to call your attention to the  
15 exhibit I've just handed you, which is marked Exhibit  
16 M391. If you'd take a look at that.

17 Can you identify what this document is,  
18 Mr. Gephart?

19 A. Yes, this is a petition to appoint me as  
20 water commissioner. Or at least a -- the headline is  
21 water commissioner to distribute irrigation water,  
22 stored water.

23 Q. Does this appear to be the petition and  
24 orders appointing water commissioners in 2005?

25 A. Yes.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 Q. If you'd turn to the last two pages of the  
2 document. It's actually two-sided in the copy that  
3 I've given you. Is that the order appointing you as  
4 water commissioner in 2005?

5 A. I didn't understand the question.

6 Q. Is the last document that's part of this  
7 exhibit --

8 A. Yes.

9 Q. -- the one that says in the first paragraph  
10 on the page "That commissioner Charles Gephart  
11 appointed water commissioner for the 2005 irrigation  
12 season," and continues on, is that document, to your  
13 understanding, the order appointing you as a water  
14 commissioner in that year?

15 A. Yes.

16 MR. DRAPER: Your Honor, I'd move the  
17 admission of Exhibit M391.

18 MR. KASTE: No objection.

19 SPECIAL MASTER: Okay. Exhibit M391 is  
20 admitted into evidence.

21 (Exhibit M391 admitted.)

22 MR. DRAPER: Thank you.

23 BY MR. DRAPER:

24 Q. Mr. Gephart, I've given you an exhibit marked  
25 as M394. And I believe this -- at least the beginning

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 documents in this exhibit are similar to the ones we've  
2 just looked at, except that this one is for the year  
3 2006. Does that appear to be correct?

4 A. Yes.

5 Q. And attached behind the order appointing you  
6 as water commissioner, there are certain additional  
7 documents that have been attached; correct?

8 A. Yes.

9 Q. We'll come back to this, but generally, what  
10 are these attachments in this exhibit?

11 A. The one I'm looking at right now, the  
12 attachment is the one you were referring to is -- I  
13 think this one here is by Chuck Kepper. And I have one  
14 in here too, I believe. Is that what you're referring  
15 to?

16 Q. Yes. Are these submittals to the court by  
17 you and Mr. Kepper?

18 A. Yes, the ones in the back are, yes, that are  
19 attached to the attachment, the last four sheets.

20 Q. So looking at all of the sheets attached to  
21 the order, are these submittals you and Mr. Kepper made  
22 to the court as part of your water commissioner duties?

23 A. Yes.

24 MR. DRAPER: Your Honor, I'd move the  
25 admission of Exhibit M394.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1           SPECIAL MASTER: I believe it's already been  
2 admitted.

3           MR. DRAPER: I think you're right, now that  
4 you mention it. I think it was previously admitted.

5           SPECIAL MASTER: Okay.

6           MR. DRAPER: Thank you.

7 BY MR. DRAPER:

8           Q. So, Mr. Gephart, you served with Mr. Kepper  
9 as a water commissioner in 2005 and 2006?

10          A. Yes.

11          Q. Did you divide up your duties as water  
12 commissioners on a geographical basis?

13          A. Yes.

14          Q. How did you do that? What areas did you  
15 take?

16          A. I took the -- more or less the northern half  
17 of the river from Brandenburg Bridge to the Yellowstone  
18 River.

19          Q. We have here on an easel next to you an  
20 enlarged map from Mr. Book's expert report, Figure 1  
21 from his report, M5. Could you show us on that map the  
22 area that you were responsible for?

23          A. Brandenburg is here. And I believe this goes  
24 to the Yellowstone.

25          Q. So you're indicating from where it says

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 Brandenburg on the map, northward until the confluence  
2 of the Tongue River with the Yellowstone River?

3 A. Yes.

4 Q. Thank you. Had Mr. Kepper been a water  
5 commissioner prior to 2005 when you started?

6 A. Yes.

7 Q. Did Mr. Kepper show you the ropes in terms of  
8 what was necessary to carry out your duties as a water  
9 commissioner?

10 A. Yes.

11 Q. Did you also take a training course?

12 A. I did.

13 Q. Is that one of the training courses offered  
14 by Mr. Roberts from the Department of Natural Resources  
15 and Conservation?

16 A. Yes.

17 Q. And your answer was "yes"?

18 A. Yes.

19 Q. In your experience as a water commissioner,  
20 was there a period at the beginning of the irrigation  
21 season where there was enough water for all of the  
22 irrigators?

23 A. I'm not sure what the question was.

24 Q. In your experience as a water commissioner,  
25 early in the season, was there a period when there was



Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 enough water, typically, for all water users to take at  
2 least some water?

3 A. Yes.

4 Q. And this was in a period prior to you and  
5 Mr. Kepper beginning to regulate the water?

6 A. Yes.

7 Q. And did that situation change at some early  
8 point as you went through that spring runoff season?

9 A. In 2006 was the change from 2005.

10 Q. What happened in --

11 A. We had a 10 percent reduction in all of the  
12 water users, what they had stored, that they were going  
13 to have to reduce their use by 10 percent.

14 Q. All right. And I'd like to -- before we get  
15 to discussion of the storage right distribution, I'd  
16 just like to understand your experience in terms of the  
17 water flows available to serve irrigation. And I think  
18 you just confirmed that there is a period when  
19 everybody could take some water from the river. But  
20 then that changed in May or June; correct?

21 A. Uh-huh.

22 Q. And did that change rather quickly?

23 A. I think when we started in 2006, it was just  
24 that before the season even started, everybody was  
25 notified there would be a 10 percent reduction.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 Q. And in 2005, when there was not a 10 percent  
2 reduction, the flows of the river, did they fall off  
3 precipitously at some point during May or June?

4 A. Not that I'm aware of.

5 Q. Was there a period when you changed from most  
6 of the direct-flow rights getting water to where people  
7 either had to be a very good priority or they had to  
8 start taking storage water?

9 A. That usually happened very early in the  
10 irrigation season, yes. Usually shortly after we start  
11 irrigating, then everybody, at least in my reach of the  
12 river, the T & Y took most of the water coming into the  
13 Tongue River Drainage.

14 Q. And the T & Y, that's the T & Y Irrigation  
15 District?

16 A. Yes, that's correct.

17 Q. And if I understand you, they took most of  
18 the water that was available as direct-flow water?

19 A. As direct flow? Yes.

20 Q. And all other water deliveries were  
21 deliveries of stored water; is that right?

22 A. That's correct.

23 Q. Can you describe, generally, how you went  
24 about carrying out your duties as water commissioner?

25 A. Starting the season, I was notified when the

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 date would be when we'd start the irrigation season.  
2 And everybody who needed their water would call me and  
3 tell me how much they needed and what period they  
4 needed it. And then I would notify Art Hayes, and he  
5 would release the water to satisfy to the needs and the  
6 times that the producers needed their water.

7 Q. I'm going to hand you what's been marked  
8 Exhibit 397. Do you recognize Exhibit M397?

9 A. I do.

10 Q. What is it?

11 A. This is a record that I kept whenever I  
12 received a call from a producer. They would tell me  
13 how many -- how much -- what the CFS that they needed  
14 and for what dates.

15 Q. Can you give us an example from the list on  
16 this page of what kind of information is shown here?

17 A. It would be the date that it was -- that I  
18 received the call. That would be the date ordered.  
19 The name and the amount and the days that they wanted  
20 the water. And then I put down the date that I called  
21 it in.

22 Q. So if we take, for instance, the -- looks  
23 like the second entry, or at least the first entry  
24 that's not marked out there. It's dated 5/19. Do you  
25 see that?

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 A. Yes, Wade Olson.

2 Q. The name is Wade Olson. And what does it  
3 show on that line?

4 A. It said that he needs 4 CFS for 5 -- for the  
5 month of May, the 22nd through the 27th. And I called  
6 that in on 5/19 at 6:30.

7 Q. Who did you call that in to?

8 A. Art Hayes.

9 Q. And what would happen as a result of your  
10 calling in that order?

11 A. That he was scheduled to release that amount  
12 of water that would be available for Wade Olson for  
13 irrigation.

14 Q. And did you check to see if that water was  
15 actually delivered in the correct amount?

16 A. Well, what I would do is it was just an  
17 assumption that it would be there. And then on those  
18 dates I would check Wade's pump at the point --  
19 wherever he had his pumps in the river. And he would  
20 have those pumps turned on. I'd take -- actually take  
21 a reading of his pump prior to starting at the  
22 irrigation season and, you know, what the starting  
23 number was on the -- on his meter. And then I would  
24 check it to make sure that he received his 4 CFS and no  
25 more.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 Q. So in each of these cases, you would actually  
2 confirm that the water user was receiving what he was  
3 entitled to but no more?

4 A. Right. He would be -- he would turn on on  
5 the 22nd, and he would turn off on the 27th. And  
6 during that period of time, he should have received his  
7 4 CFS.

8 Q. And you made sure that his pump or pumps were  
9 running at the 4 CFS rate; is that right?

10 A. That's correct.

11 Q. Okay. And that's true of all of the entries  
12 that you have here, that same type of process?

13 A. Yeah, do the same thing on everybody.

14 Q. Again, this is a document that was created by  
15 you as part of your water commissioner duties; is that  
16 right?

17 A. That's correct.

18 Q. Okay.

19 MR. DRAPER: Your Honor, I'd move the  
20 admission of Exhibit M397.

21 SPECIAL MASTER: Any objection?

22 MR. KASTE: No objection.

23 SPECIAL MASTER: So Exhibit M397 is admitted.

24 (Exhibit M397 admitted.).

25 MR. DRAPER: Thank you.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 BY MR. DRAPER:

2 Q. I'm now going to hand you what's been marked  
3 Exhibit M398. If you've had a chance to look this  
4 over, Mr. Gephart, do you recognize the documents  
5 contained in this exhibit?

6 A. Yes.

7 Q. What are they?

8 A. These are the reports that I sent in to the  
9 clerk of court in Forsyth. These go to Judge Hegel.  
10 And it's a record of what the water users in my stretch  
11 of river, what they used for a period of July 18th,  
12 through July 27th.

13 Q. And then looking at the second page, you have  
14 a similar report for the succeeding period?

15 A. Yes. July 28th through August 11.

16 Q. And so on through the document?

17 A. Right.

18 Q. These documents were prepared by you?

19 A. They were.

20 MR. DRAPER: Your Honor, I move the admission  
21 of Exhibit M398.

22 MR. KASTE: I don't understand how 2005  
23 reports are at all relevant to the years in issue. But  
24 it is of no moment. I don't object that strongly.

25 SPECIAL MASTER: Okay. So I'm also sort of

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 wondering whether it will ultimately be relevant. But  
2 I don't see any problem at this stage of admitting this  
3 as an exhibit. So I'm going to admit Exhibit M398.

4 MR. DRAPER: Thank you, Your Honor.

5 (Exhibit M398 admitted.)

6 BY MR. DRAPER:

7 Q. Mr. Gephart, is this the kind of exhibit that  
8 you submitted during your tenure as water commissioner?

9 A. Yes.

10 Q. I'm going to hand you now what is  
11 Exhibit 399. This is also an M exhibit, Exhibit M399.  
12 Do you recognize the documents contained in this  
13 exhibit?

14 A. Yes.

15 Q. And what are they?

16 A. This is what the consumptive use was by the  
17 irrigators.

18 Q. Are these documents that you prepared?

19 A. Yes, they are.

20 Q. And did you submit these to the district  
21 court?

22 A. I did.

23 Q. And it looks like the top page has -- or was  
24 corrected; is that correct? In hand?

25 A. Yes.

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 Q. You have attached behind that first two  
2 sheets a table. Does this show detail with regard to  
3 water deliveries that were administered by you in 2006?

4 A. Yes.

5 Q. Is that true with regard to the other  
6 attachments here in the exhibit just covering similar  
7 information?

8 A. Yes. Each sheet is for a different period  
9 during the irrigation season.

10 Q. Thank you.

11 MR. DRAPER: Your Honor, I would move the  
12 admission of Exhibit M399.

13 MR. KASTE: No objection.

14 SPECIAL MASTER: So Exhibit M399 is admitted  
15 into evidence.

16 MR. DRAPER: Thank you.

17 SPECIAL MASTER: You're welcome.

18 (Exhibit M399 admitted.)

19 MR. DRAPER: Now, Your Honor, I'm planning to  
20 go into the detail of these exhibits at this point. Do  
21 you want me to continue to do so, or is this a proper  
22 time to break for the day?

23 SPECIAL MASTER: Well, people are going to  
24 have to get out of this building before you're locked  
25 in, which might be a fate no one appreciates. So



Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 unless you think that the detail is going to take you  
2 about five minutes, this is probably a good time to  
3 break.

4 MR. DRAPER: I would support that decision.

5 SPECIAL MASTER: Okay. So tomorrow I propose  
6 we start again at 8:30 in the morning.

7 MR. DRAPER: Very good, Your Honor.

8 SPECIAL MASTER: And so just to sort of check  
9 where we are right now, so it looks to me as if we  
10 should be able to finish Mr. Gephart, Mr. Fjell,  
11 Mr. Nance all tomorrow morning.

12 MR. DRAPER: I think so, Your Honor.

13 SPECIAL MASTER: Yeah. Maybe even before  
14 that would be great. And then have Mr. Muggli tomorrow  
15 afternoon. Mr. Hirsch and Mr. Hamilton are looking  
16 increasingly doubtful at this particular stage. One  
17 thing I don't want to do is lose time tomorrow. So it  
18 might very well be Mr. Hirsch should be here tomorrow  
19 afternoon. I think it is probably unlikely that  
20 Mr. Hamilton is the last witness, that we will get to  
21 him.

22 MR. DRAPER: We'll be prepared to use all of  
23 the time available, Your Honor.

24 SPECIAL MASTER: Okay. That sounds good. So  
25 then we are recessed for today. And we will be back in

Direct Examination by Mr. Draper  
CHARLES GEPHART - November 14, 2013

1 session at 8:30 a.m. tomorrow morning.

2 And thank you very much, Mr. Gephart.

3 Unfortunately, you'll have to come back tomorrow.

4 THE WITNESS: Yes.

5 SPECIAL MASTER: Okay.

6 (Trial Proceedings recessed at

7 4:42 p.m., November 14, 2013.)

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## REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 314, 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 12th day of February, 2013.



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