

No. 137, Original
IN THE SUPREME COURT OF THE UNITED STATES
VOLUME 16 OF 25 VOLUMES
TRANSCRIPT OF TRIAL PROCEEDINGS

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

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 15, 2013

Vonni R. Bray, RPR, CRR
P.O. Box 125
Laurel, MT 59044
(406) 670-9533 Cell
(888) 277-9372 Fax
vonni.bray@gmail.com

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

1 APPEARANCES

2 FOR PLAINTIFF STATE OF MONTANA:

3 Mr. John B. Draper, Special Assistant AG
4 Montgomery & Andrews
5 325 Paseo de Peralta, 87501
6 P.O. Box 2307
7 Santa Fe, NM 87504-2307
8 Telephone: (505) 986-2525 Fax: (505) 982-4289
9 E-mail: jdraper@monand.com

7 Mr. Jeffrey J. Wechsler, Special Assistant AG
8 Montgomery & Andrews
9 325 Paseo de Peralta, 87501
10 P.O. Box 2307
11 Santa Fe, NM 87504-2307
12 Telephone: (505) 986-2637 Fax: (505) 982-4289
13 E-mail: djwechsler@montand.com

11 Mr. Cory Swanson
12 Deputy Attorney General
13 602 Sanders
14 P.O. Box 201401
15 Helena, MT 59624
16 Telephone: (406) 444-4774 Fax: (406) 444-3549
17 E-mail: coswanson@mt.gov

15 Ms. Anne Winfield Yates
16 DNRC Chief Legal Counsel
17 1625 Eleventh Avenue
18 P.O. Box 201601
19 Helena, MT 59620-1601
20 Telephone: (406) 444-0503 Fax: (406) 444-2684
21 E-mail: ayates@mt.gov

19 Mr. Kevin R. Peterson
20 DNRC Legal Counsel
21 1625 Eleventh Avenue
22 P.O. Box 201601
23 Helena MT 59620-1601
24 Telephone: (406) 444-5785 Fax: (406) 444-2684
25 E-mail: KevinPeterson@mt.gov

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APPEARANCES CONTINUED

FOR DEFENDANT STATE OF WYOMING:

Mr. James C. Kaste
Water & Natural Resources Division
Sr. Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-3535 Fax: (307) 777-3542
E-mail: james.kaste@wyo.gov

Mr. Chris Brown
Water & Natural Resources Division
Sr. Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-3406 Fax: (307) 777-3542
E-mail: chris.brown@wyo.gov

Mr. Andrew J. Kuhlmann
Water & Natural Resources Division
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-3537 Fax: (307) 777-3542
E-mail: andrew.kuhlmann@wyo.gov

FOR DEFENDANT STATE OF NORTH DAKOTA:

Ms. Jennifer L. Verleger
Assistant Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone: (701) 328-3640 Fax: (701) 328-4300
E-mail: jverleger@nd.gov

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Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 FRIDAY, NOVEMBER 15, 2013, 8:34 A.M.

2 SPECIAL MASTER: Okay. Everyone can be
3 seated. So welcome back, Mr. Gephart.

4 THE WITNESS: Good morning.

5 SPECIAL MASTER: So, Mr. Draper.

6 MR. DRAPER: Good morning, Your Honor. Thank
7 you very much.

8 CHARLES GEPHART (CONT.),
9 having been first duly sworn, testified as follows:

10 DIRECT EXAMINATION CONT.

11 BY MR. DRAPER:

12 Q. Good morning, Mr. Gephart.

13 A. Good morning.

14 Q. When we concluded yesterday, we were looking
15 at Exhibit M399. And I believe you have one there that
16 I just provided you a copy of; is that right?

17 A. I do, yes.

18 Q. Remind us what this document contains,
19 please.

20 A. This indicates this is a report that I sent
21 in to the clerk of court in Forsyth.

22 Q. Let me just check. Can everybody hear?

23 SPECIAL MASTER: I was going to say it sounds
24 like maybe the speaker is not on. It certainly is not
25 as loud as it was yesterday.

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 BY MR. WECHSLER:

2 Q. Let me ask my question again. Mr. Gephart,
3 generally, what kind of material is contained in this
4 exhibit?

5 A. These are the reports that I sent in to the
6 clerk of court for Judge Hegel in Forsyth. And it
7 indicates the water consumption during a period of June
8 through July that's on this sheet, the
9 June 25th through July 10th.

10 Q. And if we turn back into the exhibit two more
11 pages, I'd like to direct your attention to the table
12 that we see there on page -- it has the Bates No.
13 MT015549.

14 A. That is the same thing that was on the first
15 sheet, except that now I was using a spreadsheet. I
16 felt it was a little more convenient to use it.

17 Q. And could you show us what specifically is
18 contained in the spreadsheet?

19 A. Each one of the names of the irrigators, the
20 irrigation period, and the contract water that was used
21 during that period, and then the cumulative contract
22 water used in acre-feet, and then the contract water
23 that was remaining.

24 Q. And so this is the way in which you reported
25 your water administration to the court; is that right?

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 A. Yes.

2 Q. And the other documents contained in this
3 exhibit are similar; they're just for other periods
4 during 2006?

5 A. Yes.

6 Q. Thank you. I'd like to hand you a different
7 exhibit now. It's been marked M400. Mr. Gephart, do
8 you recognize the document that has been labeled
9 Exhibit M400?

10 A. Yes.

11 Q. What is that exhibit?

12 A. These are the field sheets that I use. Each
13 one of these sheets represents an irrigator. And these
14 are the sheets that I recorded the pumps that were at
15 the location where they were extracting water from the
16 Tongue and the dates and the CFS that was used at each
17 one of these pumps.

18 Q. And so you have a separate sheet for each
19 irrigator within your section of the river between the
20 Brandenburg gauge and the confluence?

21 A. Yes.

22 Q. And are these arranged generally from
23 downstream to upstream?

24 A. Yes. The first one would be the T & Y. That
25 would be the first location, first measurement that I

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 recorded was at the T & Y. And then subsequent
2 irrigators on up towards Brandenburg.

3 Q. And I see that the first sheet is even below
4 the T & Y. That's the Town & Country Club?

5 A. Yes, right.

6 Q. And did you also keep track of the important
7 gauge flows that were important for your
8 administration?

9 A. I did. That's in the back pages, on page
10 522. And I recorded it to the Tongue River flows.
11 These were something I used for my information so I
12 could see what was coming from the state line and then
13 what ended up coming through the Brandenburg Bridge
14 where my responsibilities started. 'Cause I wanted to
15 make sure that the flows coming under the Brandenburg
16 was adequate to satisfy the needs of the irrigators
17 north of there.

18 Q. You mentioned 522. Is that the Bates
19 No. MT01522?

20 A. That's correct. That would be the first day
21 starting in May.

22 Q. And can you describe in a little more detail
23 how you used the gauge flows at the state line and the
24 Brandenburg gauge to help you in your administration?

25 A. This was all taken off the website.

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 Q. And what kind of information were you looking
2 for, or what kind of use did you make of the -- say,
3 the Brandenburg gauge readings?

4 A. Well, on any one of these dates, there was a
5 certain amount of CFS that was required to satisfy the
6 needs of the irrigators below there. And I just wanted
7 to make sure there was adequate water coming through
8 the Brandenburg gauge that would satisfy the needs.
9 And that was something I checked just about every day.

10 Q. Did that include both direct flow water and
11 release of stored waters?

12 A. That's correct.

13 Q. And was it important for you to know and be
14 sure that the direct flow water was -- how much it was
15 and whether it was getting to where it should go?

16 A. That's correct.

17 Q. And then the stored water, you accounted for
18 that on top of the -- of whatever direct flow water
19 there might be?

20 A. Yes.

21 Q. Did you ever have to explain to new people in
22 the valley the difference between the direct flow and
23 stored water?

24 A. Do I have to explain that?

25 Q. To new people in the basin?

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 A. To new people, yes. They felt if there was
2 water in the Tongue, that they had water rights so they
3 could go ahead and use it.

4 Q. And, in general, did people take water that
5 they, in your view, were not supposed to take?

6 A. Not that I'm aware of. Most of the people I
7 did know. And most of the new people were below the
8 T & Y Dam. And that land kind of changes hands quite a
9 bit, you know, from new people moving into the valley.
10 They have small acreages there. And one of the first
11 things they do is file for water rights out of the
12 Tongue River. And, ultimately, it's overadjudicated.
13 But they feel if they have a water right that they can
14 go ahead and extract water. And I had to explain to
15 them that they couldn't do that.

16 Q. And so even they knew when they could take
17 water and when they could not take water; is that
18 right?

19 A. Pardon me?

20 Q. You explained to them, satisfactorily, when
21 they could take water and when they could not take
22 water?

23 A. Yes.

24 Q. And everybody cooperated with that; is that
25 right?

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 A. Once they understood, yes.

2 Q. Did you ever see any excessive amounts of
3 return flows coming off of irrigated fields as you
4 traveled up and down your section of the valley?

5 A. No.

6 Q. Say that again.

7 A. No.

8 Q. Did you ever see anything during your
9 administration that you considered to be waste?

10 A. No.

11 Q. Was there a procedure by which users or
12 contract holders of storage water could transfer their
13 stored water in a particular season to someone else to
14 use?

15 A. Yes.

16 Q. How did that occur?

17 A. Usually I was notified that one irrigator, I
18 think they referred to the term as leased their surplus
19 water to somebody that was in need of it. It had to go
20 through the water -- Tongue River Water Users'
21 Commission, through their board. And they are the ones
22 that approved it.

23 And then I was notified how much CFS was
24 being transferred under the lease to somebody else.

25 Q. Let me see if I can't point to an example

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 with your help. You have Exhibit M399, the first
2 document we talked about this morning.

3 A. Yes.

4 Q. If you turn to the fifth page of that, and I
5 think yours is double-sided. So the fifth side, it's a
6 page with the Bates -- Montana Bates number of 015546.

7 A. Yes, I have it.

8 Q. Does this spreadsheet of yours show an
9 indication, perhaps in the comments column to the far
10 right, of the kind of leasing of water that you just
11 described?

12 A. Yes.

13 Q. Would you show us where that appears?

14 A. In the comment -- well, this would be one
15 here.

16 Q. You're circling the second entry from the top
17 in the right-hand column?

18 A. That's correct.

19 Q. What does that show?

20 A. That shows that Muggli had a lease of 310
21 acre-feet from Peila and then 180 acre-feet from
22 Fortune.

23 Q. And do we see other examples as we go down
24 that same comments column?

25 A. Yes.

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 Q. Do you recall what the entry just above the
2 one you pointed out refers to, the one that says "3000
3 A-F bought from N. Cheyenne"?

4 A. Yes. The T & Y Irrigation District bought
5 300 -- I mean 3000 acre-feet from the Northern Cheyenne
6 to satisfy their needs. They were running out of
7 water.

8 Q. And you saw that that was delivered to the
9 T & Y?

10 A. Yes.

11 Q. Okay. And in your experience as a water
12 commissioner, were there times when water needed to go
13 by the T & Y Diversion Dam in order to supply users
14 downstream?

15 A. No.

16 Q. And are there users downstream of the T & Y
17 diversion?

18 A. Yes.

19 Q. That have storage rights?

20 A. Yes.

21 Q. Okay.

22 MR. DRAPER: If may have just a moment, Your
23 Honor.

24 SPECIAL MASTER: You may.

25 MR. DRAPER: Thank you, Your Honor.

Direct Examination Cont. by Mr. Draper
CHARLES GEPHART - November 15, 2013

1 BY MR. DRAPER:

2 Q. Mr. Gephart, one further question. During
3 your administration, did you observe what you
4 considered substantial amounts of water passing the
5 T & Y Diversion Dam?

6 A. No.

7 MR. DRAPER: Your Honor, I would --

8 THE WITNESS: May I ask for a clarification?

9 BY MR. DRAPER:

10 Q. Sure.

11 A. Could you ask that question again, please.

12 Q. I think you answered the question that I
13 asked, so I'm --

14 A. Okay. I just wanted to make sure I answered
15 that properly.

16 Q. Sure. Thank you.

17 MR. DRAPER: I was just turning to the
18 Special Master and asking if we could have admitted the
19 last exhibit that we have identified with Mr. Gephart,
20 and that is Exhibit M400, his field notes.

21 SPECIAL MASTER: Any objection?

22 MR. KASTE: No objection.

23 SPECIAL MASTER: Okay. Then Exhibit M400 is
24 admitted into evidence.

25 (Exhibit M400 admitted.)

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 SPECIAL MASTER: And so is that the end of
2 the direct?

3 MR. DRAPER: That is the end of the direct,
4 Your Honor. Thank you.

5 SPECIAL MASTER: Okay. Thank you,
6 Mr. Draper.

7 Mr. Kaste.

8 CROSS-EXAMINATION

9 BY MR. KASTE:

10 Q. Good morning, Mr. Gephart.

11 A. Good morning.

12 Q. You don't have to look at the exhibit that I
13 put up there quite yet.

14 My name is James Kaste. You and I have not
15 met before; correct?

16 A. I don't hear you very well.

17 Q. I'll try and do better to speak louder.

18 I just told you my name and asked you if we'd
19 ever met before.

20 A. No, we haven't.

21 Q. All right. I don't have a whole lot of
22 questions for you, but I have a few.

23 I think we can agree that during some years
24 not all of the irrigators along the Tongue River
25 irrigated their land; right?

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 A. Yes.

2 Q. And at certain points in any irrigation
3 season, certain irrigators would shut off their pumps
4 or other means of diversion in order to do activities
5 like haying; correct?

6 A. That's correct.

7 Q. All right. And if I understand your records
8 correctly, I didn't see that you measured direct flow
9 diversions.

10 A. The direct flow? Usually most all of it went
11 to the T & Y. And as far as the direct flow, we got
12 that when it came out of the dam actually. So we knew
13 it was coming down. And we knew that all that water
14 would be going into Tongue River. Once we got into the
15 irrigation season, everything was contract water after
16 that.

17 Q. Okay. And if I understand, basically your
18 marching orders from the court, you understood to be to
19 deliver the storage water to the Tongue River water
20 users?

21 A. The stored water, yes, Tongue River users.

22 Q. And your marching orders from the court
23 required you to report back to the court the storage
24 water that was used by the Tongue River water users?

25 A. Yes.

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 Q. All right. Now, there's a little bit of
2 difference between the marching orders from the court
3 in earlier years and in 2006 when you were a water
4 commissioner. In 2006 there's some new language that
5 talked about administering the 1914 Miles City Decree.

6 Did that language, in your view, require you
7 to do anything differently than you'd done before, say,
8 in 2005?

9 A. No.

10 Q. Okay. Now, when -- the direct flow changes
11 over the course of the year; right? It's variable?

12 A. Yes.

13 Q. Did you make any changes to anybody's
14 diversions based on variations in that direct flow?

15 A. No.

16 Q. And did you make any changes in anybody's
17 direct flow diversions based on, for example, a guy
18 like Mr. Nance turning on or off his particular direct
19 flow right?

20 A. I didn't, no.

21 Q. All right. Can we look at Exhibit M397?

22 A. I have 394. I don't have 397.

23 Q. That was one you talked about with Mr. Draper
24 yesterday, and I'll get you a copy.

25 A. No. 137?

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 Q. May I look?

2 A. I have Exhibit M394 -- or a No. 137.

3 Q. You don't have it up there with you right at
4 the moment. I'm sorry. We packed up all the things
5 you talked about yesterday at the end of the day, and
6 now we have to get them all back out.

7 So you have, now, Exhibit 397 in your hands;
8 right?

9 A. Yes, I do.

10 Q. And if I remember right, this is your notes
11 recording the calls that you received from irrigators
12 for their stored water?

13 A. Yes.

14 Q. So this would reflect all the times people
15 called you and said, I need a certain amount of my
16 stored water?

17 A. Yes.

18 Q. One of the things I noticed is, for example,
19 I don't see calls from Mr. Hayes or from the Brown
20 Cattle Company, and that leads me to conclude that this
21 reflects the orders for stored water just from your
22 portion of the river?

23 A. That's correct.

24 Q. So everybody south of the Brandenburg Bridge,
25 they would have called Mr. Kepper?

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 A. That's correct.

2 Q. All right. And one of the things you often
3 record is the number of days that the person calling in
4 would like to have their water; correct?

5 A. Yes.

6 Q. There are a number of entries where the
7 amount of time is not recorded in your notes. So, for
8 example, you would often say they would like their
9 water for five days. But in other notes, it just
10 records a flow rate of maybe 20 CFS without recording
11 how long they want it. And I can point you to a couple
12 if you'd like.

13 If you go down, for example, to June 21st on
14 the first page, you see an order -- I think that's from
15 Ray Muggli, and it says 20 CFS. And I don't know a
16 date associated with how long that water would be
17 delivered.

18 Do you see that one?

19 A. I do.

20 Q. Does it mean anything in particular if
21 there's not a date associated with a particular call?

22 A. I don't have an explanation for it. On that
23 particular one that you're asking, I took the call on
24 the 21st, and then I called it in on the same day.

25 Q. And what I'm trying to figure out, 'cause I

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 looked through these and I had somebody who is smarter
2 than me try and match this information up with certain
3 other records to see how well they corroborated, and
4 one of the things we couldn't figure out is how long
5 this 20 CFS would be delivered for.

6 A. Yeah. He would be in a different reach. And
7 that would be probably four days before he'd receive
8 it. But giving the dam the name -- or Art Hayes, the
9 name of the irrigator, he knew in what reach of the
10 river he was irrigating. So he would automatically go
11 ahead and give them the lead time that he needed to get
12 that water.

13 Q. And I certainly understand needing to take
14 into account the amount of time it takes the water to
15 travel to that particular irrigator. And then there is
16 an additional question about how long that water would
17 be delivered, for what period of time this 20 CFS would
18 go on. And I got the impression that sometimes you
19 recorded that and other times not.

20 A. I think that it was a call that -- and the
21 ones where I do have the dates, that would probably be
22 a week or maybe two weeks before they actually needed
23 it. And they felt that that would be the time to call
24 in the order. And so they would know that. But
25 usually, if I don't have a date there, they already

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 know that they are going to be receiving that water
2 within four days or six days or whatever. It was an
3 assumption there.

4 Q. Is there any way to determine from these
5 records how long that delivery lasted after it reached
6 the particular irrigator?

7 A. Usually most of these -- I have, for example,
8 on 5/22, for Ray Muggli, he needs 20 CFS from 5/27 to
9 6/1. And that was called in on the 22nd. So that gave
10 him five days' lead time before he started irrigating.

11 Most of the time, if they wanted it for a
12 specific period, then I would write that on my notes to
13 let the dam know when the water is to be released.

14 Q. So if there's not a specific period
15 associated with an entry in your notes, then it's fair
16 to conclude the irrigator didn't tell you how long they
17 wanted that delivered?

18 A. No. 'Cause this on 6/21, for example, 5 CFS
19 for ten days. So I knew that they needed 5 CFS for ten
20 days. So it would be 50 CFS. And I called that in on
21 the same day, as I mentioned, that I received the call.
22 So he knew right away when his water was going to be
23 there.

24 Q. All right.

25 A. There was some assumptions here.

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 Q. Okay. Now, if I understand right, so the
2 reservoir orders for 2006, your stretch of river began
3 on May 19 when Mr. Wade Olson called you. That's the
4 first entry on the exhibit?

5 A. Yes.

6 Q. And then they continue throughout the season?

7 A. That's correct.

8 Q. All right. Montana hired an expert in this
9 case. His name is Mr. Book, and he's a civil engineer.
10 And he prepared a report in this case. One of the
11 things he has in his report on Table 4D is a
12 quantification of how much storage water was released
13 at certain times.

14 And I'm just going to tell you, for May and
15 June of 2006, he doesn't record that any storage water
16 was released. Do you know why you would be taking
17 orders for storage water in May and June?

18 And I can tell you how he figured it out. He
19 looked at what went into and out of reservoir and
20 determined that storage water wasn't being released.
21 So his focus for analysis was on the reservoir
22 operation.

23 A. I actually don't understand the question. I
24 can't really hear you very well.

25 Q. I'm sorry. I'll try to do better.

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 Do you know why you would be taking reservoir
2 orders at a time when the reservoir is actually
3 storing?

4 A. When it's actually storing?

5 Q. Yeah.

6 A. I really can't answer that question. I
7 really don't know the answer.

8 Q. And I want you to look at a different exhibit
9 also. And I think that it will help a little bit.

10 Would you look with me at Exhibit M400, which
11 are your field notes. And towards the end of your
12 field notes, you've actually recorded river flows at
13 various gauges; right?

14 A. Yes.

15 Q. All right. If you'd turn with me to --
16 towards the back, on page -- the bottom it says
17 MT015527.

18 A. I have it.

19 Q. And at the top it says, "2006 Tongue River
20 Flows"; correct?

21 A. Yes.

22 Q. And the first date that you have recorded
23 there is May 12th, 2006?

24 A. Yes.

25 Q. All right. Let's look at, I think it was

Cross-Examination by Mr. Kaste
CHARLES GEPHART - November 15, 2013

1 May 19th, and see what the flows are at the state line.

2 Flows are 389 CFS; correct?

3 A. This was 5/19?

4 Q. Yes, sir.

5 A. Yes.

6 Q. And then the water coming out of the dam on

7 May 19th, which you have in the next row down under

8 Tongue River Dam, was 120 CFS; correct?

9 A. That's correct.

10 Q. And if we look, say, at the next day, the

11 state line flow's 351 CFS on May 20th?

12 A. Pardon me? What was the question again,

13 please.

14 Q. On May 20th, the state line flow was 351 CFS?

15 A. Yes.

16 Q. And the dam, the releases were 120 CFS?

17 A. Yes.

18 Q. And this pattern generally continues all

19 through this page. So, for example, if we move down to

20 about the halfway point on this page, you see that you

21 start repeating this information for later dates in May

22 and June; correct?

23 A. That's correct.

24 Q. So if we pick a date in there, say, May 29th,

25 since it doesn't have any scratched out, we see the

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1 state line flows of -- are 786 CFS; correct?

2 A. Yes.

3 Q. And at the same time, the Tongue River flows
4 from the dam are 175 CFS?

5 A. Yes.

6 Q. And that -- again, that pattern continues
7 throughout the page where the state line flows exceed
8 the flows coming out of the dam; correct?

9 A. Yes.

10 Q. So the reservoir technically is storing
11 during this period of time the difference between what
12 it releases and what's coming in?

13 A. Yes.

14 Q. And at the same time, people from the Tongue
15 River Water Users' Association are calling you and
16 asking for stored water; correct?

17 A. Yes.

18 Q. And if I understand right, you don't know why
19 that is?

20 A. I don't feel qualified to answer that
21 question.

22 Q. All right. I'd appreciate an "I don't know."

23 A. I know what the -- yeah.

24 Q. Did you ever give the information that you
25 recorded, say your reports to the court, your summaries

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1 of usage, to the actual irrigators during the course of
2 the season?

3 A. On this specific farm, they did -- they knew
4 exactly how much water they were using. But any time
5 that they requested how much water they were using and
6 how much was left, they -- I would certainly give it to
7 them.

8 Q. Was it your practice to give everybody a
9 piece of paper at the end of the year, sort of a
10 receipt kind of accounting?

11 A. No. That was their responsibility.

12 Q. In the course of your work as a commissioner,
13 had you ever heard that Mr. Hayes tries to run the dam
14 for 50 CFS at Miles City?

15 A. Would you repeat your question, please.

16 Q. In the course of your work as a water
17 commissioner, did you ever hear that Mr. Hayes tries to
18 run the dam for 50 CFS at Miles City?

19 A. I still don't understand the question.

20 Q. See it's not just you. Nobody can hear or
21 understand me.

22 And I'm just curious if you've ever heard
23 that Mr. Hayes attempted to run the dam in order to
24 keep about 50 CFS at Miles City?

25 A. I apologize. But I don't really understand

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1 the question.

2 Q. It's probably not a very good question. I
3 can move on.

4 When you were the water commissioner, was
5 there water being delivered down the river in order to
6 maintain a live stream for fish?

7 A. I don't believe that was ever -- I've
8 never -- I don't remember hearing it like that.

9 Q. All right. When you got your marching orders
10 from the court in 2006, you got your order from the
11 court, were you given any instructions about delivering
12 water other than stored water?

13 A. No.

14 Q. Were you familiar with the 1914 Miles City
15 Decree?

16 A. No.

17 Q. All right. Think back to your field notes.
18 You don't have to look at any of them. I'm not going
19 to ask you about any of the particular numbers here.
20 Although, I do appreciate you keeping them. What -- I
21 guess, what did you do with the information that you
22 reported in your field notes?

23 A. I recorded -- everything that I wrote down
24 pertaining to my job, I kept in a folder. And I had my
25 maps as well in there showing the locations of the

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1 purchases along the Tongue River. And when I no longer
2 was a water commissioner, all of that information I
3 turned in to the Tongue River Water Users' Association.

4 Q. And what I'm asking is, in the day-to-day
5 performance of your job as a water commissioner, what
6 did you do with the information that you recorded?

7 A. I kept that.

8 Q. And I get the impression that you recorded
9 the amount of water used at particular diversions;
10 right?

11 A. Yes.

12 Q. And then you incorporated that into the
13 summary that you sent in to the court; correct?

14 A. Yes.

15 Q. And so the summary you sent into the court
16 reflects the amount of water that you measured at each
17 diversion point?

18 A. Yes.

19 Q. Okay. And I don't get the impression that
20 you measured the water in any stream gauge after the
21 Brandenburg Bridge.

22 A. After the Brandenburg -- everything I
23 recorded was -- when I say "after" is from Brandenburg
24 to the mouth of the Yellowstone.

25 Q. Right. And so all I'm trying to figure out

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1 is after the Brandenburg Bridge -- and you recorded the
2 gauge data from the Brandenburg Bridge gauge; right?

3 A. Yes.

4 Q. After that, the only thing that you recorded
5 would be the actual diversions by the individual
6 irrigators?

7 A. That's correct.

8 Q. So you're not really measuring flows at any
9 other point after the Brandenburg Bridge?

10 A. No.

11 Q. So let's look at the reports that you sent to
12 the court. And I've -- you should have in front of you
13 Exhibit M394. And what I'd like you to look at is
14 the -- no, not the last. It's actually a page sort of
15 in the middle with the Bates stamp at the bottom
16 MT10027.

17 A. I have it.

18 Q. And I picked this because I believe it to be
19 your final report to the court for 2006. There's
20 actually a cover letter on the preceding page that
21 seems to indicate this particular report was for the
22 period through September 30th.

23 And I looked at all your reports, and this
24 has the biggest numbers, which leads me to conclude
25 this was the last one. Is that a fair assumption, this

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1 is the last one for 2006?

2 A. Yes.

3 Q. All right. I have a couple of questions
4 about the contents of this particular report. First,
5 it's true, I think, that a number of the water users
6 identified on your report -- which only covers your
7 portion of the river; correct?

8 A. Yes.

9 Q. A number of them used less than the amount of
10 water that they have contracts for; correct?

11 A. Yes.

12 Q. All right. And there are a couple of users
13 that actually used a little bit more; right?

14 A. Yes.

15 Q. All right. In particular, the very first
16 one, the T & Y Irrigation District, if I read this
17 right, under the column "Contract water remaining
18 acre-feet," there is an asterisk in front of the number
19 there which corresponds to a notation in the comments
20 that says "Amount over contract"; right?

21 A. Yes.

22 Q. So we can agree that the Tongue River -- the
23 T & Y Canal, in 2006, used 1220 acre-feet more than it
24 had a contract for; right?

25 A. I think that's what I meant there, yes.

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1 Q. All right. And that's even 1200 more than
2 the amount that they purchased from the Northern
3 Cheyenne Tribe?

4 A. Yes.

5 Q. All right. We can see in the second to last
6 column the actual contract amount, which reflects a
7 10 percent pro rata reduction; right?

8 A. Yes.

9 Q. All right. 'Cause their full amount is
10 5280 shares. And they've been reduced to 4761; right?

11 A. I believe so, yes.

12 Q. And if we add 3000 acre-feet from the T & Y
13 Canal purchases from the Northern Cheyenne Tribe, we
14 get about 7700. And the difference between what they
15 used in the fourth column over and 7700 is about 1220
16 acre-feet; right?

17 A. I'm really not sure. I mean, this is seven
18 years ago, and I just -- a lot of times I look at my
19 notes and I kind of question what I did. But at the
20 time I did this, it made a lot of sense.

21 Q. I think it still does, but I've spent a lot
22 of time looking at it.

23 And here's basically my question about this
24 information. How is it possible, with you on the river
25 making sure people are diverting only what they are

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1 supposed to, that the T & Y Canal can divert 1220
2 acre-feet more than it's supposed to?

3 A. That was the stored water, is where it was
4 coming from, and that would be the Northern Cheyenne.

5 Q. No. I'm wondering how it's possible, with
6 the water commissioner on the river who is measuring
7 diversions every day, the T & Y Canal can use 1220
8 acre-feet of water over what it is supposed to be
9 diverting.

10 A. There is water in the dam. And at that
11 particular time -- I'm trying to remember, 'cause he
12 can also get the level -- what the water level was in
13 the dam, and there was adequate water there. But it
14 has to be accounted for and -- as far as the usage
15 goes, and to make up the shortfall, then the water had
16 to be purchased from the Northern Cheyenne to make up
17 the difference.

18 Now, there's a difference between what the
19 stored water is for the irrigation company or
20 organization and what the Northern Cheyenne has there,
21 and that is -- I really can't give you a good answer,
22 but somebody will give you a good answer.

23 Q. Well, I hope so.

24 When you say "dam" in the course of that last
25 answer, you're referring to the Tongue River Dam?

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1 A. That's correct.

2 Q. So this 1200 acre-feet of water was released
3 from that dam at some point during the irrigation
4 season, not pursuant to an order from the T & Y Canal,
5 and they used it?

6 A. I remember the time, and there was a lot of
7 panic going on because there was a demand for water.
8 And they were just running out of water to meet the
9 demands. And this was something that was taken care of
10 at that time, but I can't give you a good explanation
11 for it right now.

12 Q. But you measured the water that went into
13 T & Y Canal, and it included this 8981 acre-feet of
14 water?

15 A. On Exhibit 137, where I have a sheet on the
16 T & Y?

17 Q. I think that you need to look below the
18 No. 137. That's the docket number for this case. The
19 exhibit number is below that one.

20 A. I think the one I'm talking about is 400, the
21 one I have, for individual irrigator.

22 Q. Yes, sir.

23 A. Looking under that, there might be an
24 explanation there.

25 Q. Well, do you believe that you accurately

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1 recorded the amount of water that the T & Y Canal used
2 in 2006?

3 A. Yeah. This is accurate. But I'm --
4 unfortunately, I can't give you a good explanation for
5 this.

6 Q. That's okay. It was a long time ago. I
7 think in the course of answering one of Mr. Draper's
8 questions, you didn't see return flows coming back into
9 the stream off the fields in the course of your work;
10 right?

11 A. Yes.

12 Q. All right. Now, we can agree that return
13 flows often show up in the river as a result of
14 movement through the ground; right?

15 A. Yes.

16 Q. And you wouldn't be able to visually see
17 return flows in that instance; right?

18 A. Yes.

19 Q. And if I understand correctly, you weren't in
20 the business of calculating the effect of return flows
21 on the stream in 2006?

22 A. Yes, that's correct.

23 Q. And if I understand right, you didn't measure
24 or regulate any groundwater wells in the course of your
25 work?

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1 A. No, I had nothing to do with those.

2 Q. And that would include CBM wells as well?

3 A. That's correct.

4 Q. Okay. And if I understand right, your
5 regulatory duties did not extend out into the
6 tributaries of the Tongue River?

7 A. No, it didn't.

8 Q. And I assume -- I'm not even sure if this is
9 in your stretch of the river -- but I assume you didn't
10 measure any diversions that may have occurred on the
11 Northern Cheyenne Tribe Reservation?

12 A. No, I didn't.

13 Q. Did you ever make an attempt to measure the
14 amount of water that might be exiting the T & Y Canal
15 at any given time?

16 A. No.

17 Q. Your responsibilities wouldn't require you to
18 go down that canal and do anything; right?

19 A. Yes. But -- yeah. My responsibility was
20 just making sure that they received the water there at
21 the outtake.

22 Q. And isn't it true that quite often the T & Y
23 Canal uses less than its full right of 187.5 CFS?

24 A. Would you repeat the question, please.

25 Q. Sure. I think that the -- or the T & Y Canal

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1 has a water right to take 187.5 CFS out of the river?

2 A. Yes.

3 Q. Oftentimes, very often, they don't actually
4 take that much out of the river; correct?

5 A. At the beginning of the irrigation season, I
6 can see that they wouldn't. At the very beginning.

7 Q. And we'll have -- Mr. Muggli is going to
8 testify. He'll tell us how he runs the T & Y Canal.

9 But when the T & Y Canal is taking less than
10 its full appropriation or its full water right, do you
11 make any adjustments to the direct flow diversions of
12 anybody else on the stream?

13 A. No.

14 Q. And if I understand right, during your time
15 as a commissioner, I don't think you ever had the need
16 to shut anybody's diversions off?

17 A. No.

18 Q. So that one might not be clear. Do you agree
19 that you didn't have to turn anyone off?

20 A. I agree.

21 Q. Thank you.

22 And can we agree -- and I know that this is
23 far from your area. But I assume that you looked at
24 the Tongue River Reservoir on a regular basis, as you
25 recorded the flows and things, Tongue River Reservoir

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1 always had water in it during your time as a water
2 commissioner?

3 A. Yes.

4 Q. Even late in the season?

5 A. There was water in the reservoir, yes.

6 Q. And the Northern Cheyenne Tribe had some of
7 that and at times sold it?

8 A. I knew it -- yes.

9 Q. And they still had more to sell at the end of
10 every year; right?

11 A. That, I don't know.

12 Q. And there was still a supply of water
13 available to irrigators in Montana at the end of every
14 year; right? There was water in the reservoir?

15 A. Yes.

16 Q. All right. Thank you, Mr. Gephart. I
17 appreciate your time.

18 A. Okay.

19 SPECIAL MASTER: So, Mr. Gephart, I just have
20 a couple of, I think, relatively short questions.

21 EXAMINATION

22 BY SPECIAL MASTER:

23 Q. So the first is, during some of the time that
24 you were acting as the water commissioner, the T & Y
25 irrigation canal would have had both contract water

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1 being delivered and direct flow; is that correct?

2 A. Yes.

3 Q. So for purposes of determining whether or not
4 they are taking the correct amount from the river, how
5 would you know what the direct flow amount was?

6 A. By knowing what came into the dam and then
7 what was being released from the dam. Like, the
8 difference between those two would know what would be
9 coming down to the T & Y. And it would be a loss on
10 its way down. I've recorded a couple instances there.

11 But the direct flow was in -- was if they
12 needed more than that, then they would order the
13 difference between direct flow and the contract water.

14 Q. And so to determine whether or not they were
15 taking the correct amount of contract rights, did you
16 also have to know what their direct flow rights were at
17 that time?

18 A. Yes.

19 Q. So when you would measure how much water they
20 were taking, would you compare that to your direct flow
21 rights and contract rights?

22 A. Yes.

23 Q. Okay. So I have a question, just so that I
24 understand it, on Exhibit M400, which are your field
25 notes.

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1 Do you have those in front of you?

2 A. Yes, I do.

3 Q. So if you could turn to the page that has the
4 Bates stamp that's Montana 015488, which is labeled at
5 the top "2006 T & Y Irrigation District Flows." And if
6 you want, I'd be happy to try and find that correct
7 page for you.

8 A. I have it.

9 Q. So as I understand the way in which this page
10 and a lot of the other pages -- or at least the way
11 this page is organized, it looks like you actually
12 started the first date on the right-hand side and moved
13 to the left?

14 A. See, I started using it like this.

15 Q. Okay.

16 A. And then I started using -- a spreadsheet
17 made more sense, and even it confused me when I
18 returned to these sheets. Then I finally -- it was
19 explained to me how I did it.

20 Q. Okay. And so just on the -- if we just look
21 at the right-hand column, you'll see that you have the
22 date on the far right column and then the next column
23 says "CFS."

24 And so here the first dates say decree, so I
25 assume that means that at that point they are using

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1 their direct flow decreed rights?

2 A. That's correct.

3 Q. Okay. And then, like starting on 5/17, I
4 began to see a number -- first couple of numbers are
5 122, and it goes down to 107 and then 106.

6 So what are those numbers?

7 A. Beginning in 5/23?

8 Q. 5/17 in the right-hand column.

9 A. Okay. 5/17, it says decree and then 122 CFS.

10 Q. Yes. So what is the 122 CFS measuring?

11 A. That would be contract water. And by
12 explanation, if you would drop down to 5/23, it has
13 decreed, .12, that was how much decreed water there
14 was. And then there was 107 added to it, which was
15 contract water.

16 Q. Okay.

17 A. That's what I got down here. And I thought
18 it would be a good idea to -- what was decreed, I
19 should have put what the CFS was. And I didn't do it.
20 It was not my responsibility to record the decreed
21 water.

22 Q. And let me just make sure there are not some
23 other pages that I need an explanation of. No. I
24 think that's fine.

25 SPECIAL MASTER: So those are my only

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1 questions.

2 Mr. Kaste?

3 MR. KASTE: I have nothing further.

4 SPECIAL MASTER: Okay. Thank you.

5 Mr. Draper?

6 REDIRECT EXAMINATION

7 BY MR. DRAPER:

8 Q. Mr. Gephart, you were asked by Mr. Kaste if
9 you were familiar with the Miles City Decree. And I
10 believe your answer was no. As a practical matter, did
11 you know what needed to be done with respect to direct
12 flow and deliveries to the T & Y?

13 A. Yes.

14 Q. And when you were in the period where the
15 T & Y was receiving both its direct flow and some of
16 its storage water, if I understand correctly, a certain
17 amount of water was ordered under those conditions to
18 be released from the reservoir. And that was reduced
19 by the agreed transit losses. And that allowed you to
20 determine how much contract storage water the T & Y was
21 receiving at any given time.

22 A. Uh-huh. Yes.

23 Q. And the rest of the water that was reaching
24 their headgate could be diverted, then, under their
25 direct flow right; is that right?

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1 A. Yes.

2 Q. And as part of your administration, you did
3 keep an eye on the gauges, not only at Brandenburg
4 Bridge, but on downstream to the confluence; isn't that
5 right?

6 A. Yes.

7 Q. You answered "yes"?

8 A. Yes.

9 Q. And, in fact, those are shown in your field
10 note tabulations, aren't they?

11 A. Yes.

12 Q. I believe you answered one question for
13 Mr. Kaste, that you never had to turn anyone off. Did
14 you ensure that when people needed to turn off their
15 pumps, having received all of their contract water that
16 they had ordered, that they did so?

17 A. Yes.

18 MR. DRAPER: No further questions, Your
19 Honor.

20 SPECIAL MASTER: Okay. Thank you very much,
21 Mr. Draper.

22 So thank you, Mr. Gephart, for testifying.

23 THE WITNESS: Thank you.

24 SPECIAL MASTER: And so you can now step down
25 from the witness box.

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1 So, Mr. Draper, we can take the first morning
2 break right now. I'm just wondering, if we are going
3 to have three witnesses this morning, maybe we can take
4 a break in between each one.

5 MR. DRAPER: Very good, Your Honor. That
6 would be, I think, a good way to approach it.

7 SPECIAL MASTER: That way you can make sure
8 the witness box is tidied up before the next one comes
9 on. Thank you.

10 MR. DRAPER: Thank you.

11 (Recess taken 9:31 to 9:41
12 a.m., November 15, 2013)

13 SPECIAL MASTER: Okay. Everyone can be
14 seated.

15 MR. SWANSON: Your Honor, we've lost
16 Mr. Draper.

17 SPECIAL MASTER: Oh, here he is.

18 MR. DRAPER: Sorry about that, Your Honor.
19 We are ready to call our next witness.

20 I wanted to inquire of Your Honor if there's
21 been any further notice about whether we're going to
22 need to be moving out of here.

23 SPECIAL MASTER: I think it looks like we're
24 going to be moving out. I haven't heard anything else.
25 So that looks like what we'll be doing.

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1 MR. DRAPER: Okay. And in that process, will
2 you be looking to us to pack up your boxes and make
3 sure that they get transported to the new location?

4 SPECIAL MASTER: That's a good question. I'm
5 glad you thought about it because I would have
6 forgotten entirely, and I would have had a lot of boxes
7 here I probably would have preferred to have over
8 there.

9 So, yes, it would be valuable if -- I guess
10 there's a total of six boxes up front here. So what
11 I'll make sure is -- I've been making sure that we've
12 repacked each of those boxes at the end of each day so
13 that we know exactly where the exhibits are. So I
14 would propose, at the end of today, I'll get these
15 boxes packed up with Suzie's help. And then if you
16 wouldn't mind transporting it, it would certainly be
17 easier for me.

18 MR. DRAPER: I thought that might be the
19 case. And the parties, I'm sure, will be glad to make
20 sure that happens.

21 SPECIAL MASTER: As long as we're on the
22 subject, so are we going to need help moving these
23 boxes back out of here? Why don't we go off the
24 record.

25 (Discussion held off the

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1 record.)

2 SPECIAL MASTER: So back on the record. Go
3 ahead and call your next witness.

4 MR. DRAPER: Your Honor, we would call as our
5 next witness Mr. Alan Fjell. Mr. Cory Swanson will be
6 doing the examination.

7 (Alan Fjell sworn.)

8 THE CLERK: Please have a seat. State your
9 name and spell it, please, for the court reporter.

10 THE WITNESS: Alan, A-l-a-n F-j-e-l-l.

11 SPECIAL MASTER: Good morning, Mr. Fjell.

12 THE WITNESS: Good morning.

13 SPECIAL MASTER: Mr. Swanson.

14 MR. SWANSON: Thank you, Your Honor.

15 ALAN FJELL,

16 having been first duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. SWANSON:

19 Q. Good morning, Mr. Fjell.

20 A. Good morning.

21 Q. I wonder if you could tell us where you
22 currently live.

23 A. I currently live in Birney, Montana.

24 Q. What's your current occupation?

25 A. Farm boss for the Diamond Cross.

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1 Q. And what's your responsibilities as the farm
2 boss for the Diamond Cross Ranch?

3 A. Taking care of all the farming, irrigating,
4 haying.

5 Q. How long have you been in that job?

6 A. I believe since 2005.

7 SPECIAL MASTER: Is that the Diamond Cross
8 brand there on your jacket?

9 THE WITNESS: Yes, sir.

10 BY MR. SWANSON:

11 Q. Can you tell us a little about your
12 background prior to working for the Diamond Cross, your
13 education and some of your work experience.

14 A. I have a bachelor's degree in secondary
15 education, biology. Did my stint in the Air Force,
16 taught school for a while. Worked for Peabody Coal
17 Company as a wildlife biologist for ten years. Ran the
18 Ashland Sawmill for the Cheyenne Tribe. And went back
19 into agriculture again.

20 Q. So did any of that work experience include
21 irrigation, and did you have any working knowledge of
22 irrigation before you became a water commissioner?

23 A. Oh, yes. Yes.

24 Q. Can you tell us about that?

25 A. Yeah. I grew up in the Birney community on

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1 the Diamond Cross Ranch -- or on the Three Circle
2 Ranch. Mr. Hayes' place now. My father was the
3 foreman there. It was all irrigated. I've worked on
4 several irrigated places growing up as a kid before the
5 child labor laws.

6 And I actually had my own place leased for a
7 while, and it was irrigated.

8 Q. So what kind of irrigation were you doing in
9 those previous years? Was it flood or sprinkler?

10 A. Back in those days, it was all flood.

11 Q. Open ditch flood?

12 A. Open ditch flood, yes.

13 Q. Have you ever served as a water commissioner?

14 A. Yes.

15 Q. And was that in the Tongue River Basin?

16 A. That was in the Tongue River Basin in 2002.

17 Q. How did you end up becoming a water
18 commissioner?

19 A. I was approached by Art Hayes, asked if I
20 could help them out. At that time, I was running a
21 little portable sawmill. The sawmill in Ashland was
22 down. And I told him yes, that I would do it.

23 Q. Did you receive any training before you
24 became a water commissioner?

25 A. Yes, we went through the training in

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1 Harlowton.

2 Q. So we heard from Mr. Roberts from DNRC
3 earlier this week, and he described the training. Is
4 that the type of training that you received?

5 A. Exactly. That was exactly what we went
6 through. And out in the field also, through weirs,
7 using Marsh-McBirney and that other kind of equipment
8 they use, pencil and paper.

9 Q. So the training included the measurement.
10 Did it also include any discussions of Montana water
11 law?

12 A. Yes, it did.

13 Q. And who -- who did you -- I apologize.

14 Do you recall who was helping put on that
15 training other than the DNRC folks?

16 A. Judge Lobel was there. And the district
17 court judge for that district, the Harlowton district
18 on the Musselshell River, was also there.

19 Q. Can you tell us who Judge Lobel is?

20 A. Judge Lobel was the state water judge.

21 Q. And who did you serve with as water
22 commissioner? Were you the only commissioner on that
23 year?

24 A. No, I was the junior commissioner. Chuck
25 Kepper was the senior commissioner.

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1 Q. I apologize. Go ahead. Finish that answer.
2 I didn't hear you.

3 A. I said, I worked with Chuck Kepper. He was
4 the senior commissioner; I was the junior.

5 Q. So did Mr. Kepper give you any training or
6 any additional guidance along the way?

7 A. Yes, he did. And he'd been a commissioner
8 the year before. And we went to all of the locations
9 checking all the pumps, looking over the whole Tongue
10 River run.

11 Q. So what year was this?

12 A. 2002.

13 Q. So when you said you went through all the
14 pumps on the river, you and Mr. Kepper did that
15 together; is that right?

16 A. Together, yes. And I should have said
17 diversion points, not pumps.

18 Q. Was that at the beginning of the irrigation
19 season?

20 A. Yes, it was.

21 Q. And then after that, did you two operate
22 together the whole year, or did you split up?

23 A. No. We split up after we got our baseline
24 put down. We got introduced to the new equipment, the
25 measuring device, I don't know, ultrasound or Doppler,

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1 or whatever it was.

2 And there were people irrigating before we
3 were put on. So some pumps were running, and we used
4 it to establish baseline. They were still on flow
5 right at that time, I believe. We kind of set a basis
6 if water was going over the T & Y Dam, it was flow
7 right. Because beyond there, there were no extraction
8 points that I knew of, or Chuck also, I guess. Because
9 we never monitored anything below the T & Y Dam.

10 Q. So you mentioned the ultrasound device. And
11 Mr. Kepper actually demonstrated that device either
12 yesterday or the day before.

13 Is that the same one?

14 A. Yes, it is. But we didn't have any training
15 on that. We learned it by the manual. And we did
16 check it against some flow meters, and it was accurate.
17 We were evidently setting it up right.

18 Q. Had you had any experience in dealing with
19 the technical electronic or scientific instruments
20 before in your life?

21 A. Yes. When I was going to college, I worked
22 in the microbiology lab. We used a lot of instruments
23 and stuff in there. Also, I did an independent study
24 for Yellowstone County Air Pollution Control Board.

25 Q. And what did you study in that independent

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1 study?

2 A. We were doing fluoride analysis of air and
3 grass samples.

4 Q. And then you mentioned you worked for Peabody
5 Coal as -- what was that job?

6 A. I was the foreman of the sawmill. No, I'm
7 sorry. Peabody Coal, I was an environmental scientist.

8 Q. Did you do any water or soil measurements on
9 that job?

10 A. I did help John Wheaton, who was at the DNRC.
11 He was the hydrologist working for Peabody at that
12 time, and I helped him with the Marsh-McBirney a couple
13 times on the flows on Rosebud Creek. And we did water
14 sampling, pHs, stuff like that, yes.

15 Q. So it wasn't particularly challenging for you
16 to figure out how to use the devices?

17 A. No. And it had a good manual with it.

18 MR. SWANSON: Your Honor, I've got a number
19 of documents I want to hand him. May I approach freely
20 to do that?

21 SPECIAL MASTER: You may.

22 BY MR. SWANSON:

23 Q. I've just been admonished by the court
24 reporter to slow down a bit.

25 A. Okay.

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1 Q. Mr. Fjell, I've handed you a document that's
2 marked Montana 380A. And if you'd turn a couple pages,
3 you'll see 380B.

4 Do you recognize this document?

5 A. Yes. This is the order appointing me as the
6 water commissioner.

7 Q. So the first couple pages are the petition,
8 and then the order is at the end, the 380B; is that
9 accurate?

10 A. Yes, 380B.

11 Q. I'd like you to look at a couple of items on
12 this document. So going to the 380A, the second page
13 there, the number at the bottom is MT09973. And we're
14 going to look at those bottom two paragraphs of that
15 page.

16 A. Yes.

17 Q. You see, in the second paragraph from the
18 bottom, about halfway through that paragraph, it starts
19 out "In times of shortage."

20 Do you see that?

21 A. Yes, I do.

22 Q. Could you just read that sentence for us
23 please.

24 A. "In times of shortage, the Tongue River Water
25 Users' Association has interpreted the 'equal and

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1 ratable right to water' language in Section 8 of the
2 Water Purchase Contract as requiring delivery to the
3 water users on a pro rata basis."

4 Q. So did you understand that in 2002 water
5 users were receiving water on a reduced or pro rata
6 basis?

7 A. Yes, sir.

8 Q. Do you remember what the percentage reduction
9 was approximately?

10 A. It was approximately 50 percent.

11 Q. So if you took a water user who had, say, 200
12 acre-feet of shares in the reservoir, would he or she
13 get about a hundred acre-feet? Is that right?

14 A. (Witness nods head.)

15 Q. And did you apply that evenly across the
16 board to all water users?

17 A. Yes, we did.

18 Q. I want to look at the next paragraph. And it
19 actually carries over to the following page a little
20 bit. And here the court is discussing measuring all
21 water users.

22 And I believe you just testified that you and
23 Mr. Kepper actually did do that measurement for all
24 water users?

25 A. Yes, we did.

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1 Q. Is it true not all the water users that had a
2 measuring device set up at that point?

3 A. Yes, it is true.

4 Q. And so looking at the following page, it
5 mentions the electronic ultrasound measuring device.
6 And you testified a minute ago that you used that to
7 measure the diversion points. My question is: Did you
8 do that just at the beginning, or did you ever do
9 additional measurements throughout the season to
10 double-check people's pumps, for example?

11 A. If they requested that we measure again, we
12 did. Otherwise, we used the reading from the beginning
13 of the season.

14 Q. And that device was only for something that
15 had a pipe; is that correct?

16 A. Correct.

17 Q. So it's limited to pumps or some kind of a
18 tube?

19 A. Yes.

20 Q. What did you do for diversions that didn't
21 have a pump? And maybe you could tell us what other
22 diversions that would be out there that didn't have a
23 pump.

24 A. Some of the diversions were a dam gravity
25 flow diversion. Two of them had flumes. The Amish

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1 ditch had nothing. So we measured that one with the
2 Marsh-McBirney to determine the flow.

3 I'm trying to think. There was one other
4 ditch that we had to use the Marsh-McBirney on. It was
5 a Peabody property down by the Brandenburg Bridge. And
6 if memory serves, he only irrigated one time. It was a
7 Crisafulli pump. And we couldn't get a reading off of
8 it with the ultrasound machine. So we did a
9 Marsh-McBirney cross-section across his ditch to
10 determine the flow.

11 Q. And you said he only irrigated one time?

12 A. That's all I remember him irrigating on that,
13 yes.

14 Q. If we stay on that third page there and go
15 down to about the middle of the page, there's a number
16 of indented items that are noted A, B, C, D.

17 Do you see those?

18 A. Yes, I do.

19 Q. Looking at item A there, it references
20 contract holders providing maps to the location of
21 their points of diversion and measuring devices.

22 Did you receive maps from any of these water
23 users?

24 A. No, I did not.

25 Q. How did you find their points of diversion

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1 and keep track of it?

2 A. You could tell, more or less, where the
3 points of diversion were. It's not hard if you follow
4 a ditch or you see a wheel line or a pivot. And you
5 can find that point of diversion. Also, they helped.
6 They would show you where their points of diversion
7 were.

8 And we recorded all the points with a GPS
9 that year for the Tongue River Water Users' Association
10 so that they could establish a map.

11 Q. So do you think you missed any points of
12 diversion, or did you get them all?

13 A. I think we got every one of them.

14 Q. Do you know if any of the points of diversion
15 were changed throughout the season, and if so, did they
16 notify you?

17 A. No, I don't believe any of them were. I
18 don't remember any of them being changed.

19 Q. Looking at item B, it says, "The water users
20 will not be able to divert contract water until the
21 infraction is corrected." And I believe the infraction
22 they mean is the lack of a map up above.

23 How did you deal with that correction?

24 A. It was the water board, the Tongue River
25 Water Users' Association, that gave us the GPS and told

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1 us to establish the maps using the GPS.

2 Q. So you had those locations, and that's how
3 you tracked contract water from that point forward?

4 A. Right.

5 Q. Looking --

6 A. Excuse me. From that point forward, we knew
7 where the locations were. We had been to them.

8 Q. Okay. And then looking at Item C, did the
9 contract water users order water? Did they tell you, I
10 need this much water?

11 A. Yes, they did.

12 Q. And then your responsibility was to measure
13 it when it was delivered?

14 A. Yes, sir.

15 Q. Did you or Mr. Kepper, to your knowledge, go
16 on to their fields to measure how they were using it
17 once it went past the headgate?

18 A. No, sir. Our instructions were to measure at
19 their headgate or as close to their headgate as we
20 could get. And once it was through, it was their
21 responsibility. And you can use contract water for
22 anything you want to use it for. It's not held to the
23 decreed water user law.

24 Q. We'll look at one more item on this document.
25 If you could go to the next page, item G. And it says,

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1 "For the year 2002, the commissioners may be required
2 to administer decreed water."

3 Do you know if you and Mr. Kepper had to
4 administer decreed water?

5 A. Yes, we did.

6 Q. And do you recall what decreed water rights
7 you were focused on that year?

8 A. The only two that we measured decreed water
9 on were the Nance Ranch and the T & Y Ditch.

10 Q. When you say the Nance Ranch, you mean the
11 Nance Cattle Company, Mr. Jay Nance?

12 A. Yes, I do.

13 Q. And the T & Y Ditch. Why those two?

14 A. They -- there was -- we would take a
15 measurement on water coming into the reservoir at the
16 time we went on stored water. When you went on stored
17 water, you would take that measurement every day.

18 And the first, I believe it's 10.48 CFS, went
19 to the Nance Cattle Company. And then anything that
20 was left over went to the T & Y Ditch. And we never
21 exceeded that amount. There are two requirements.

22 Q. Were those two the two most senior water
23 rights on the river?

24 A. Yes, in the 1914 decree.

25 Q. And do you recall the amount of decreed water

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1 for the T & Y Ditch?

2 A. 187 and a half, I believe.

3 Q. Okay. Let's go ahead and turn to that
4 Montana 380B, which is that order. It may even be
5 attached to the same document you're looking at.

6 Do you have that?

7 A. Yes, sir, I have it.

8 Q. And looking there at paragraph 1, that's your
9 appointment, along with Mr. Kepper, correct, as water
10 commissioner?

11 A. Yes, sir.

12 Q. If we look at the bottom of paragraph 2, that
13 last sentence in bold, I wonder if you could read that
14 for us, please.

15 A. "No water user may use any water flowing in
16 the Tongue River except as distributed by the water
17 commissioners."

18 Q. Did you understand that to mean not just
19 storage water but decreed water?

20 A. Yes, sir, I did.

21 Q. Did you enforce that?

22 A. Yes, we did.

23 Q. If you could turn to the next page for a
24 moment. And looking at item 4. Item 4 discusses
25 keeping daily records distributed to each water user

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1 and filing summaries with the clerk of court biweekly.

2 Did you keep records of the diversions and
3 the amount that was delivered of stored water?

4 A. Yes, sir, we did.

5 Q. When you say "we," do you mean you and
6 Mr. Kepper?

7 A. Yes.

8 Q. And when -- did you report those records to
9 the clerk of court?

10 A. Yes, sir. Every two weeks we would get
11 together and compile our data and put it in on one
12 sheet.

13 Q. So if the record was submitted, it was the
14 compilation of you and Mr. Kepper together?

15 A. Yes, it was.

16 Q. All right. We'll look at a couple of those
17 later.

18 And looking at No. 5 -- I guess I'll ask you
19 one more question about No. 4.

20 Did you keep all your daily records of
21 everybody's diversions once you turned in the report to
22 the court?

23 A. I kept them for a while. But that was 11
24 years ago. No, I have not kept them.

25 Q. So the record that was turned in to the court

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1 wasn't everything you had written down. It was only
2 what you compiled and turned in; is that correct?

3 A. Yes.

4 Q. Then looking at No. 5, it indicates that
5 every water user needs to have suitable headgates or
6 other ways to turn water off. Did you encounter anyone
7 that didn't have a suitable headgate or a way that they
8 could shut off a diversion?

9 A. No, sir, I did not.

10 Q. Now, I believe you testified a minute ago
11 that you and Mr. Kepper split up the responsibilities
12 on the river once the original initial measurements
13 were done. Could you indicate for the Court on this
14 map that's next us to, which is a blowup of Figure 1
15 from Mr. Book's report, which is Exhibit M5, could you
16 just indicate to the Court where that dividing line
17 was? There's actually a marker there on the handrail
18 next to it. You can mark that with a black Sharpie
19 marker if you want.

20 A. (Witness complies.) About there.

21 Q. Go ahead and describe where you just marked
22 that.

23 A. I marked it right at the Brandenburg Bridge.
24 And that is approximate, because I was talking to Chuck
25 about this earlier on the division because I didn't

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1 remember it, and he said he was pretty certain he had
2 the Ball Ranch.

3 And there are a few north of the Brandenburg
4 Bridge, a few Ball Ranch pumps. Actually, just one, I
5 think, if I remember right. It's been a long time ago.
6 And then I would start at the Hamilton Ranch and go on
7 from there.

8 Q. So basically the dividing line was Ball
9 Ranch, going south, would be Mr. Kepper; the Hamilton
10 Ranch going north would be yours?

11 A. Yes, sir.

12 Q. Now, why did you end up with the northern
13 half and Mr. Kepper had the southern half?

14 A. I just thought it was a little more ethical.
15 I grew up in Birney. He knew all of those people very
16 well. And my brother-in-law has a ranch on the river.
17 And I didn't want to be the one checking him.

18 Q. For peace in the family; right?

19 A. Not just peace in the family. It just seemed
20 like the right thing to do.

21 Q. And you had known Mr. Nance before as well;
22 is that correct?

23 A. I went to grade school with Mr. Nance, yes.
24 And I worked for Mr. Nance.

25 Q. So you thought it was best to stay away and

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1 there would be no personal conflicts?

2 A. Yes, keep the conflict of the interest down.

3 Q. Could you just talk about your
4 responsibilities as a water commissioner? And maybe
5 just walk us through a normal day that summer on the
6 river.

7 A. A normal day of water commissioners on the
8 Tongue River is -- it's a long ways down there every
9 day, I promise you that.

10 But just checking the pumps, making sure they
11 were irrigating. I wouldn't necessarily say we
12 measured it every day because we were running on
13 electric meters, using the ultrasonic meters or Doppler
14 machine. So we'd go down and check and see if they
15 were irrigating. If they shut off, then we could read
16 it and see how much they used and write that down.

17 If we were coming close to the end of the
18 two-week period, you would go down when we had to file
19 our report, you would go down and pull the number so
20 that you could do your computation and send your report
21 in to Judge Hegel.

22 Q. Could you explain the electric meter part of
23 it? Would you do a calculation on how much electricity
24 they used and that created a certain amount of water
25 use?

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1 A. That was the only way we could keep track on
2 the pumps. Almost all the pumps were electric pumps.
3 So we would strap the Doppler machine onto the pipe and
4 get a gallon per minute out of it, how much it was
5 pumping. And then we would go over and watch the meter
6 until it clocked 1 kilowatt hour and determine how long
7 that took. And then we could use that as a value to
8 figure how much water they were using.

9 Q. So a certain rate per kilowatt hour, and
10 times the number of kilowatt hours that they used?

11 A. Yes. That's how we did that.

12 Q. But not every pump was electric; right?

13 A. Not every pump was electric. There were a
14 few, a very few tractor pumps or PTO pumps, diesel
15 pumps. And some of those had meters, and some of them
16 didn't.

17 Q. When you say "PTO pump," you mean the power
18 takeoff on the back end of the tractor would run the
19 pump?

20 A. Yes, sir.

21 Q. How did you keep track of how much water
22 those pumps had used?

23 A. Those were a little more difficult 'cause you
24 didn't -- running that much river, you didn't have
25 enough time to sit there and watch when they were going

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1 to turn it off. So you used what you called the honor
2 system. I think there were two or three people that
3 had those. I can think of two for sure. And you would
4 know what day they shut off, but you would have to ask
5 them what time.

6 And you would have to know when they were
7 going to turn it on also so you could keep track of the
8 water that they were using.

9 Q. That's why you called it the honor system,
10 because you relied upon them to tell you the correct
11 time?

12 And did you ever have an experience where any
13 of those users didn't act honorably?

14 A. No. No.

15 Q. So then on a typical day, sounds like you're
16 driving a lot, you're checking a lot of headgates and
17 pumps.

18 Did you ever talk to the actual water users?

19 A. When you would run into them, you would talk
20 with them, yes. But there were a lot of times that you
21 never saw them. You just slip in and do your work and
22 go back out and go to the next one and you would not
23 see them.

24 Q. And there was an understanding that you were
25 able to go check their diversions without seeing them

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1 or getting their permission first?

2 A. Oh, yes, they have to give you access. They
3 can't deny you or they can't have water.

4 Q. And then your responsibilities went all the
5 way to -- basically, to the confluence of the
6 Yellowstone River; is that correct?

7 A. Actually, at that time they went to the
8 T & Y. I had no idea there were users below the T & Y.

9 Q. So you didn't deliver any water below the
10 T & Y?

11 A. No.

12 Q. And in your experience with the T & Y -- I
13 guess we all know we're talking about the T & Y Ditch
14 Company -- were there times when they were basically
15 taking all the water in the river?

16 A. All summer long after the spring runoff, what
17 little bit there was, yeah. I never saw water go over
18 it. I think there may have been one precipitation
19 event that put it over the top. Just a spike came
20 down, and it went over the top. But I think that was
21 it.

22 Q. Do you recall how long that precipitation
23 event -- how long did you see that water in the river?
24 A couple days maybe or more?

25 A. Yeah, probably a couple days. I couldn't say

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1 for certain.

2 Q. When we talked about communicating with water
3 users, did you meet with them at the beginning of the
4 season and talk with them about what you would do?

5 A. Yes, sir.

6 Q. Did you have any trouble with water users?

7 A. No, not really. Not really.

8 Q. Now, how did you hear from a water user if
9 they wanted to order water?

10 A. They would telephone us. We had
11 communication back in those days.

12 Q. Not necessarily everybody running around with
13 iPhones; right?

14 A. Well, we do not have cellular communication
15 in Birney yet. No, it was all landline. But they
16 would call and request their water.

17 Q. And did you communicate with the Water Users'
18 Association?

19 A. Very well. The only one was Art Hayes. And
20 that's because he's a neighbor. You know, you'd run
21 into him on occasion.

22 Q. So how did you notify the Users' Association
23 how much water was being used throughout the summer?

24 A. Oh, when they called for their water, we
25 would have to get ahold of Art. And he would call the

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1 gate keeper at the dam and adjust the gate accordingly.

2 Q. So you mentioned, and I think we talked about
3 this a bit, but in terms of looking at decreed water
4 and stored water, you mentioned there were those two
5 first users, Mr. Nance and the T & Y. Did anybody else
6 the whole rest of that summer receive direct flow
7 decreed water?

8 A. Not to my knowledge, no.

9 Q. So if there was water going in a headgate or
10 through a pump, is it fair to say you or Mr. Kepper
11 were tracking that as stored water being delivered?

12 A. Yes, sir.

13 Q. And you never regulated anybody below the
14 T & Y Dam?

15 A. No.

16 Q. Do you recall seeing any return flows or
17 other water running off the T & Y lands? I mean, did
18 you go down there much below the dam?

19 A. I never did. We were told that once the
20 water reached their headgate, it was their
21 responsibility. Our responsibility ended at that
22 point.

23 Q. So that meant, even within the T & Y, you
24 couldn't go down and regulate among those users?

25 A. No.

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1 Q. And with the T & Y, did they have enough
2 direct flow or decreed water for their water right the
3 whole summer?

4 A. No.

5 Q. How did you keep track of their direct flow
6 or decreed water versus their stored water?

7 A. The DNRC has a gauge at the state line. And
8 you would read that gauge every morning. And that
9 water traveling through the dam was decreed flow, that
10 amount. And you would subtract off Mr. Nance's 10.48.
11 And then what was left of that went to the T & Y Ditch.
12 And anything over that amount was then in stored water
13 that went into the T & Y Ditch.

14 Q. Then basically all summer they were using --
15 at least some portion of that water was going to be
16 charged to stored water for them?

17 A. Yes.

18 Q. And did you ever receive a notice of anybody
19 that was leasing water or, I don't know, trading water
20 with another user?

21 A. Yes, I believe we did. It came from
22 Mr. Hayes that -- and I think also by letter, if I
23 remember right. And don't hold me to that. But I know
24 that Art told us that certain people were buying water
25 from other people.

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1 I remember one in particular. I think Tim
2 Lohof bought some water from Bill McKinney to finish
3 irrigating on him. That was on the Birney end, Chuck
4 Kepper's end. I can't remember if they bought any
5 Indian water that year or not.

6 Q. When you say "Indian water," do you mean from
7 the Northern Cheyenne Tribe?

8 A. Yes.

9 Q. Why was it important for a water commissioner
10 to know if someone was leasing or buying water from
11 someone else?

12 A. Well, you had to know what they had coming to
13 them. I mean, it's their money. They paid for it.
14 And you have to be able to control it.

15 Q. So when people were using their water, did
16 you see waste in -- or tailwater coming off of fields
17 that --

18 A. I never saw a drop of waste that year. At
19 approximately 50 percent of their water, these guys
20 were pushing hard.

21 Q. So when you say "pushing hard," what do you
22 mean?

23 A. I mean, to do everything right. On some
24 fields, they wouldn't irrigate because they didn't have
25 enough water and some they did. And some that they

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1 did, like on the sprinkler system, you can irrigate
2 light, you know, not make as many passes over it.

3 Q. And you saw water users do all those things?

4 A. Oh, yes.

5 Q. Did you ever hear from them when they wanted
6 to shut off to hay?

7 A. Yes.

8 Q. Then, I guess, did you understand that there
9 was a certain amount of time it took for water to get
10 from the dam down to certain users?

11 A. Yes. And I'm not positive what that was. I
12 remember three splits that we used, the Brandenburg
13 Bridge, Birney, and the T & Y Ditch, I think. I don't
14 know that they had the six splits at that time. It was
15 a little more gross. It was the first year.

16 Q. And Mr. Gephart testified that they had
17 calculated a certain amount of loss, conveyance loss
18 down the river. Were they doing that the year --

19 A. No.

20 Q. No conveyance loss?

21 A. No conveyance loss the first year, that I
22 remember.

23 Q. And do you know, was there anybody using
24 water on a post-1950 direct flow water right that year?

25 A. No. Not that I remember.

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1 Q. Would it have been likely that there was
2 someone with a post-1950 water right using water since
3 you were down to the two most senior water rights?

4 A. No. No. The only ones that got decreed
5 water were from the 1914 decree, and that was Mr. Nance
6 and the T & Y Ditch. They got it all.

7 Q. I'm going to hand you another document.
8 That's Montana Exhibit 381.

9 Do you recognize this document?

10 A. Yes, I do.

11 Q. Could you tell us what it is?

12 A. Part of it is mine. Part of it is Chuck
13 Kepper's. It was where we kept track of what was going
14 on along the river.

15 Q. So -- and Mr. Kepper has already testified to
16 this, and it's admitted into evidence. So I believe
17 what he said is the bottom half where there's 2004
18 notes, those are from him. The top half where it's
19 2002 notes, those are from you. Does that sound
20 accurate?

21 A. To a point. I was probably doing the writing
22 in it. But Chuck's figures are in this also in 2002.

23 Q. It was a shared effort?

24 A. Compiled it together into this book, yes.

25 Q. Okay. All right. I walked over you there

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1 again.

2 So that was a shared effort; you guys did it
3 together?

4 A. Yes.

5 Q. I want to just look at a couple pages here.
6 You mentioned the PTO pumps for the tractors. And I
7 want to look at a couple of those. If you could turn
8 to -- and you'll see some -- they are very hard to see.
9 But on the top right of each page, there's a typed page
10 No. MT. The first page is -- 015397 is the top page.
11 They're hard to see 'cause there's a lot of handwriting
12 around them.

13 A. Yes.

14 Q. If you could look at the second page of that
15 document, which is 015398.

16 A. I have it.

17 Q. The first section looking at Bill Carrel, it
18 says "nonmetered pumps" -- so it says, "Bill Carrel,
19 nonmetered pumps, honor system." And then "tractor PTO
20 pump."

21 You see that?

22 A. Yes, sir.

23 Q. Was there -- was Mr. Carrel one of the folks
24 that was on the honor system?

25 A. Yes, he was.

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1 Q. Do you know Bill Carrel?

2 A. Very well.

3 Q. Who is he?

4 A. Actually, he's a rancher right in the middle
5 of the Diamond Cross Ranch right now. And I call him a
6 young fellow. My wife taught him in the second grade.
7 Very nice, young man.

8 Q. You consider him an honest person?

9 A. Very much so, yes.

10 Q. Do you recall if he kept any records or notes
11 from his --

12 A. I've heard that he did. But I did not know
13 it then, no.

14 Q. Okay. But if Mr. Carrel told you at a
15 certain time when he turned on or shut off his pump,
16 you used that information for your calculations?

17 A. I would assume that Chuck did. This was on
18 Chuck's end.

19 Q. That's right. That's right. Okay. Let's
20 turn a few more pages, actually quite a few pages. The
21 number at the top will be 015422. So about 24 pages.

22 Are you there?

23 A. Yes, sir.

24 Q. Can you read those first couple lines on the
25 top of that page?

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1 A. "Felton Angus, honor system."

2 Q. Felton Angus, who is the owner of that place?

3 A. They're brothers. Morris Felton, and I
4 cannot remember his brother's name. I dealt with
5 Morris. He handled the farming and irrigating. His
6 brother handled the cow end.

7 Q. Does that honor system, though, does that
8 also mean he was the gentleman that had a PTO driven
9 pump?

10 A. Yes.

11 Q. And do you have any opinion on Mr. Felton,
12 whether you felt you could rely on him?

13 A. Mr. Felton, I felt, yes, was very reliable.

14 Q. And then let's turn about 23 more pages into
15 this document to No. 015445.

16 A. Excuse me. 015445?

17 Q. Correct. Do you have that?

18 A. Yes, I do.

19 Q. Could you read those top two lines?

20 A. "Les Hirsch, honor system."

21 Q. Did you understand that to mean that
22 Mr. Hirsch was also a gentleman with a PTO driven pump?

23 A. I don't remember exactly what the pump was.
24 I truly don't. By it wasn't metered. So we had to
25 rely on the honor system, yes.

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1 Q. Do you recall -- well, let me ask you, do you
2 have an opinion of Mr. Hirsch? Did you ever feel he
3 was not giving you accurate information?

4 A. No, I never did feel that way. And he is a
5 member of the -- or one of the board members for the
6 water users. So he had quite a stake in this also.

7 Q. So you felt you could rely on his
8 information?

9 A. Definitely.

10 Q. Do you recall how big the fields were that
11 these three gentlemen were using with those small
12 pumps?

13 A. Have not a clue. That was not part of what
14 we were supposed to do.

15 Q. Now, we talked a little bit ago about travel
16 time for the water to get from the dam down to a
17 particular point of diversion. So if a water user was
18 shut off for, let's say, their second cutting of hay
19 and then they wanted to turn back on, how far in
20 advance -- did they understand they had to tell you in
21 advance to turn on water to get to them.

22 A. Yes, they did. If I remember right, the
23 Tongue River Water Users' Association sent out a letter
24 to that effect to all of the water users.

25 Q. Did you ever have to shut off a water user

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1 when they ran out of shares at the end of the year?

2 A. Yes, I did.

3 Q. How did that go?

4 A. It went very well.

5 Q. Where did you -- did you get a sense that the
6 water users were watching the amount of water they used
7 at the end of the season?

8 A. Yes, I did. Would you like an example?

9 Q. If you've got an example, sure.

10 A. There was Pat Landers, and I was told to
11 watch out for this guy. And I never had a bit of
12 trouble with Pat Landers. He was plumb friendly, just
13 a good guy. And I pulled in there. I knew he was
14 getting close to the end. And he came out, and he was
15 all worried. And I think he thought I was going to put
16 him in jail or something 'cause he said, "I'm sure I
17 went over. I'm just positive I went over."

18 I said, "Just relax, Pat. I'll check your
19 pump." And I went out and checked his pump and ran the
20 calculations and came back and told him he could run
21 another eight hours. He was pretty pleased.

22 Q. That's great.

23 A. So, no, no troubles at all.

24 Q. I'm going to have you look at just two more
25 documents that are also already in the record, Montana

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1 Exhibit 382 and Montana 383.

2 You mentioned earlier you and Mr. Kepper
3 would put your notes together and then submit one
4 report to the court. Is that what these documents are?

5 A. That's what this document is, yes.

6 Q. But you -- do you know whether these are the
7 final draft or a working draft that were sent? I
8 guess, would Mr. Kepper be the best person to testify
9 on that?

10 A. Yes, he would.

11 Q. Okay. I just want to look down at the first
12 page of Exhibit 382. About a quarter of the way from
13 the bottom, there's a name, Alfred Leatherberry.

14 Do you see that?

15 A. Yes, I do.

16 Q. I believe in your deposition you indicated
17 you didn't think Mr. Leatherberry was using water or
18 had any shares. Would this document be more accurate
19 than your memory for what Mr. Leatherberry --

20 A. I would say that it would be, yes. Yes.

21 MR. SWANSON: Your Honor, if I could have a
22 minute with my cocounsel?

23 SPECIAL MASTER: Certainly.

24 BY MR. SWANSON:

25 Q. Mr. Fjell, I wonder if you could look at

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1 Exhibit M383 for a second. That's the one-page
2 document I handed you.

3 A. I have it.

4 Q. Do you see the date at the top, 7 June 2002?

5 A. Yes, I do.

6 Q. And you'd been a commissioner for, what,
7 about a month by then or a little over a month?

8 A. I believe. I don't remember the exact date
9 that I went on. I thought we started the 1st of June,
10 but I'm not sure about that.

11 Q. Let's go ahead and look back at the
12 appointment order real quick. That would be M380A and
13 380B. Let's go ahead and look at 380B.

14 A. Okay. I have it.

15 Q. And this is the order appointing you and
16 Mr. Kepper as commissioners; right?

17 A. Yes.

18 Q. Look at that second page with the judge's
19 signature. And there's a date right above that.

20 A. May 20th, 2002. Is that the date you're
21 looking for?

22 Q. Right above the judge's signature. I believe
23 it says May 2nd, 2002. You might be on --

24 A. May 2nd, 2002.

25 Q. May 2nd, 2002. So you were a commissioner,

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1 had been on for about a month by then; is that right?

2 A. Yes, evidently.

3 Q. So let's go back to 383 for a second.

4 Looking down at this list of users here, water users,
5 do you recognize any names that were in your area of
6 the river? Can you just point them out to us?

7 A. From the Hamilton Ranch on down.

8 Q. Hamilton, Les Hirsch; is that right?

9 A. Yes. Tom Pezzarossi, Wade Olson, Bice Ranch,
10 and T & Y Ditch.

11 Q. Would you have been the one that put together
12 the records of what water they used for this report?

13 A. That was probably, at the time when Chuck and
14 I were running together reading pumps, I would guess.

15 Q. So did you participate in tracking this
16 information and putting it together for this report?

17 A. Yes.

18 MR. SWANSON: Your Honor, I move the
19 admission of Exhibit Montana 383. I thought it was
20 admitted, and we just confirmed in our notes it hadn't
21 been admitted yet.

22 MR. KASTE: No objection.

23 SPECIAL MASTER: Okay. I just want to very
24 quickly check my own notes. But you are correct. So
25 this has not been admitted before. So Exhibit M383 is

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1 admitted.

2 (Exhibit M383 admitted.)

3 MR. SWANSON: I have no further questions,
4 Your Honor.

5 SPECIAL MASTER: Okay. Thank you,
6 Mr. Swanson.

7 Mr. Kaste? What happened to Mr. Brown today?

8 MR. KASTE: I let him be excused for the day.

9 SPECIAL MASTER: Has he gone hunting?

10 MR. KASTE: Not that excused. He had other
11 work that needed to be attended to.

12 CROSS-EXAMINATION

13 BY MR. KASTE:

14 Q. Good morning -- is it, Mr. Fjell?

15 A. Yeah.

16 Q. So the J is like a Y?

17 A. Excuse me?

18 Q. So the J is pronounced like a Y?

19 A. Yes.

20 Q. Since we've already talked to Mr. Gephart and
21 Mr. Kepper in some detail, I don't want to go over
22 everything with you necessarily in the same amount of
23 detail, but I have a couple of questions for you, all
24 right?

25 I assume, like Mr. Kepper and Mr. Gephart,

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1 part of your responsibility was not to calculate the
2 effects of the return flows on the Tongue River; right?

3 A. Right.

4 Q. All right. And similarly, I assume you
5 didn't regulate any groundwater wells of any kind?

6 A. No, sir. Did not.

7 Q. And didn't have any opportunity to regulate
8 any diversions on any of the tributaries to the Tongue
9 River?

10 A. No.

11 Q. And I think you said that you never had
12 occasion to -- in the course of your duties, to go
13 below the T & Y Canal?

14 A. Right.

15 Q. And I assume, because we didn't see any here
16 during the course of your testimony, that unlike
17 Mr. Gephart, you don't have a record of the phone calls
18 that people made to you when they asked you for stored
19 water?

20 A. No, sir. I did not keep any of the records.
21 It was 11 years ago. And my house gets clean just like
22 anybody else's.

23 Q. So basically what we have to work with, I
24 think, is Exhibit M381, which I think you still have in
25 front of you; right? Those would be your handwritten

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1 field notes.

2 A. Yes.

3 Q. And like I think Mr. Gephart and Mr. Kepper,
4 a lot of the math that you did in the course of your
5 duties isn't reflected on your field notes; right?

6 A. Yes. And I would hope it's accurate.

7 Q. Well, I mean, what I see in your field notes
8 are the dates that you visited various diversions;
9 right?

10 A. Yes.

11 Q. And then I see the meter readings or other
12 gauge information that you would have recorded at that
13 diversion; right?

14 A. Yes.

15 Q. And then there's some figuring to turn that
16 meter reading to a quantity of water sometimes; right?

17 A. Yes.

18 Q. And then remaining math happened somewhere
19 else; correct?

20 A. Correct.

21 Q. All right. I guess I only want to look at
22 one page in Exhibit M381, and that has a number down at
23 the bottom of MT23805. And at the top it says "Jay
24 Nance."

25 A. MT -- what was the number?

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1 Q. 23805.

2 A. 23805.

3 Q. That's the one at the bottom. There's, of
4 course, a different one at the top for -- I'm not sure
5 why.

6 A. I'm not finding that.

7 Q. Can I just turn to the page for you?

8 SPECIAL MASTER: You may approach the
9 witness.

10 THE WITNESS: Thank you.

11 BY MR. KASTE:

12 Q. There's a reason you can't find it; yours
13 doesn't have the page numbers on the bottom; it just
14 has them on the top. My copy has both.

15 In any event, these would be records, I
16 assume, that you made as you visited Mr. Nance's
17 diversions; right?

18 A. No, I did not do Mr. Nance.

19 Q. That would have been in Kepper's area?

20 A. He was in Mr. Kepper's area.

21 Q. If you look down at the bottom, there's a
22 part that says "flood ditch." And it kind of indicates
23 when that ditch was opened and closed.

24 You understand that Mr. Nance has the very
25 first right on the Tongue River; right?

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1 A. Yes.

2 Q. And he uses this --

3 MR. SWANSON: Objection. He's just testified
4 that this was not his notation. And he's testified
5 that this is -- '04 was Mr. Kepper, so there's no
6 foundation.

7 MR. KASTE: Actually, these dates are '02.

8 SPECIAL MASTER: Actually, I'm just curious
9 of the variance because I'm a little confused from
10 yesterday. So on the page that we're looking at right
11 now, the handwriting on the top of the page is not
12 yours?

13 THE WITNESS: The handwriting at the top of
14 the page is mine. That just means I took Chuck's notes
15 and wrote it in for him.

16 SPECIAL MASTER: Okay. So there would have
17 been other notes that Mr. Kepper would have kept, and
18 at some point these were then transcribed into this
19 notebook?

20 THE WITNESS: Yes.

21 SPECIAL MASTER: Okay. Thank you. So I
22 think, though, in response to your question, I think
23 you can certainly ask the witness what he does know.

24 BY MR. KASTE:

25 Q. Is the handwriting at the bottom of the page

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1 under the heading, "flood ditch" yours as well?

2 A. I do not think that's my writing, no.

3 Q. All right. That's fine. But you understand
4 Mr. Nance has the first right on the Tongue River for
5 direct flow; right?

6 A. Yes.

7 Q. And do you understand that he utilizes the
8 ditch to obtain that water right?

9 A. Yes.

10 Q. And I think we all heard Mr. Kepper say that
11 he took note of when that ditch was using water and
12 when it wasn't. And you understood he did that; right?

13 A. Yes.

14 Q. Would he tell you, for purposes of your work,
15 whether or not Mr. Nance's diversion was taking water
16 at any given time?

17 A. Oh, yes.

18 Q. So you would know whether or not that 10 CFS
19 that you're comparing to the state line is being used
20 on any given day; right?

21 A. Right.

22 Q. Did you make any changes to anybody's
23 diversions based on whether or not Mr. Nance was
24 utilizing his direct flow right?

25 A. You would have had to have made the change to

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1 the T & Y Ditch. If he shut his off, that 10.48 CFS
2 would have then gone to the T & Y Ditch. And then you
3 would have adjusted your tabulation on what was stored
4 water being used and what was decreed water.

5 Q. And if there's water left over, that goes to
6 the next irrigator after T & Y; right?

7 A. Yes. In 2002, there was no water left over.

8 Q. In a wetter year, that's what would have
9 happened, though; right?

10 A. Yes.

11 Q. Fair enough. Now, let's look at a little bit
12 different record, and that's Exhibit M382. And that's
13 the stack of summaries that I think you may have sent
14 to the court, or you and Mr. Kepper.

15 A. M382, yes.

16 Q. There's a series of these documents that are
17 compiling the information that you guys have gathered
18 during the course of certain periods of time; right?

19 A. Right.

20 Q. If you'll look at the second page of that
21 document, I think this is the very last report. And I
22 think that because it has the highest number I could
23 find. And it's dated 1 September 2002.

24 Does that sound about right to you?

25 A. I have 13 August, 29 July, 9 July, and

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1 7 June.

2 Q. So is the second page the latest record in
3 that series?

4 A. I would think that's not the latest record.
5 13 August? I'm sure there was one made after that.

6 Q. I'm looking at one that says
7 1 September 2002. It looks to me like your exhibit
8 is -- is it loose or is it stapled?

9 A. I do not have a 1 September. And this one
10 was 7 June. Oh, they're printed on both sides.

11 Q. We're doing all we can to confuse you.

12 A. Thank you.

13 Q. Now, again, is 1 September 2002 the latest
14 one of the records that you have there?

15 A. I don't -- it is the latest one that I have
16 here, I think.

17 Q. It's the latest one I have, too, and the
18 latest one we have in the record. So let's talk about
19 that one. I counted up the number of folks on this
20 list. And there were 32 different irrigator names. Do
21 you understand -- or do you have an understanding about
22 how many different folks there are with shares in the
23 Tongue River Water Users' Association?

24 A. No.

25 Q. Don't know?

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1 A. I don't know how many there are, no.

2 Q. All right. But these would reflect, as far
3 as you know, the folks that utilized water in 2002?

4 A. As far as I know, yes.

5 Q. Would there be any reason why other
6 shareholders, you might not have recorded what they
7 used?

8 A. I'm trying to think. There's one
9 shareholder, I think it's Christine Valentine, who sold
10 her shares, I believe. So she would not have used
11 hers. And there may be some others like that. I don't
12 know.

13 Q. There are other records in evidence that
14 show, maybe in 2006, there were about 43 different
15 folks that seem to have taken water in 2006. Can you
16 explain really why those particular 10 folks aren't on
17 this list?

18 MR. SWANSON: Objection. Foundation.

19 SPECIAL MASTER: It's a perfectly permissible
20 question. He can answer he doesn't know.

21 BY MR. KASTE:

22 Q. And I'm sorry. The objection interrupted
23 your answer, so I couldn't hear it.

24 A. I said no.

25 Q. Thank you. Let's just look at a couple of

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1 folks on here. Brown Cattle wouldn't have been in your
2 area?

3 A. No.

4 Q. That would have been in Mr. Kepper's?

5 A. Yes.

6 Q. And I think you testified in your direct
7 examination that there was a 50 percent pro rata
8 reduction during 2002?

9 A. Yes.

10 Q. All right. Is it possible some folks took
11 less than their 50 percent in 2002?

12 A. I would imagine it's possible, yes.

13 Q. All right. And I got the impression from
14 your testimony, however, that it wouldn't be possible
15 for people to take more because you were watching them;
16 right?

17 A. They shouldn't have been able to; right.

18 Q. T & Y Ditch was within your district; right?

19 A. Yes.

20 Q. Do you know how many shares they have?

21 A. No, I do not. I do not remember.

22 Q. 5280, I think is the evidence thus far that's
23 been introduced in this case. Now, you recorded them
24 as taking 2910 acre-feet of water September 1, 2002; is
25 that correct? I have the number right; correct?

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1 A. That's the number that's down here, yes.

2 Q. And that's more than half of 5280, isn't it?

3 A. Yes.

4 Q. So I kind of have the same question for you
5 as Mr. Gephart. How is it possible, with you on the
6 river watching who is doing what, for the T & Y Ditch
7 to take more than it's supposed to?

8 A. I don't know.

9 Q. All right. Thank you very much, sir.

10 SPECIAL MASTER: Okay. I don't have any
11 questions.

12 REDIRECT EXAMINATION

13 BY MR. SWANSON:

14 Q. Mr. Fjell, Mr. Kaste asked you a number of
15 questions about a report in September. Were you a
16 water commissioner the entire summer?

17 A. No.

18 Q. When did you quit your duties or leave those
19 duties?

20 A. I think I quit when they ran out of water or
21 were getting out of water to where Chuck could handle
22 it by himself.

23 Q. Do you recall when that was in the summer?

24 A. No, I do not.

25 Q. Do you know if it was before September?

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1 A. I would assume that it was at the end of
2 August. But I can't say that for certain.

3 Q. So this particular report that we're looking
4 at that Mr. Kaste just asked you about that says
5 1 September 2002 and it has Mr. Kepper's signature at
6 the bottom, do you know whether this was the final
7 report for the year or if there were others beyond
8 that?

9 A. I do not know.

10 Q. Would Mr. Kepper be the best person to ask
11 that question?

12 A. He would.

13 Q. Could there have been -- well, I'll just tell
14 you, Mr. Kepper, as I understood, testified that these
15 particular documents may not have been the final ones
16 sent to the court and they may not be all of the
17 documents sent to the court. Is that -- do you have a
18 reason to disagree with that?

19 A. No, I don't.

20 Q. And then there's a -- you mentioned one
21 person, Christine Valentine, who didn't use her shares
22 and sold them. Do you know if there were any other
23 users who may have chosen not to use their shares in a
24 dry year?

25 A. I don't offhand, not that long ago.

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1 Q. One of the things you did testify to earlier
2 was about people in a dry year may be irrigating less
3 hay. You mentioned if they have a sprinkler system
4 they would do fewer passes in order to have less water
5 on. So do you recall whether they all perfectly
6 figured out how much water to use by the end of the
7 season, or if they may have miscalculated and
8 underused, in fact, what their shares were?

9 A. I can't really answer that. I'm sorry. I
10 can't really answer that. And it -- I'm thinking about
11 this, and could I expand on that a little bit?

12 Q. Yes.

13 A. On those, I'm not sure. But if the T & Y had
14 bought Northern Cheyenne water, then the quantity that
15 they had used would have gone up. And it might be
16 wrapped up in that figure right there. I'm not
17 certain. Somebody else is going to have to dig that
18 information out.

19 Q. So here where it says T & Y Ditch and it has
20 a certain number, part of that could have been water
21 they leased from somewhere else?

22 A. Yes, that could have been water that was
23 bought from the Northern Cheyenne and it was recorded
24 going in through their headgate, yes.

25 MR. SWANSON: No further questions, Your

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1 Honor.

2 SPECIAL MASTER: Okay. Thank you,
3 Mr. Swanson.

4 So, Mr. Fjell, thank you very much for your
5 testimony.

6 THE WITNESS: You're welcome, Your Honor. I
7 hope I was of some help.

8 SPECIAL MASTER: Everybody's testimony is of
9 help in this proceeding. Together it gives an overall
10 sense of the facts.

11 Why don't we take a ten-minute break now, and
12 we'll come back at 11:00.

13 (Recess taken 10:52 to 11:02
14 a.m., November 15, 2013)

15 SPECIAL MASTER: Okay. Everyone can be
16 seated.

17 Mr. Draper, who is the next witness?

18 MR. DRAPER: The next witness, Your Honor, is
19 Mr. John Hamilton.

20 SPECIAL MASTER: Thank you.

21 MR. DRAPER: And we would call Mr. Hamilton
22 to the stand at this time.

23 (John Hamilton sworn.)

24 THE CLERK: Please have a seat. And if you
25 could state your name and spell it for the court

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1 reporter, please.

2 THE WITNESS: My name is John Hamilton,
3 J-o-h-n. Hamilton, H-a-m-i-l-t-o-n.

4 SPECIAL MASTER: Good morning, Mr. Hamilton.
5 Nice to see you again.

6 THE WITNESS: Thank you.

7 SPECIAL MASTER: Mr. Draper.

8 MR. DRAPER: Thank you, Your Honor.

9 JOHN HAMILTON,

10 having been first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. DRAPER:

13 Q. Mr. Hamilton, good morning. Would you please
14 state your address for the record.

15 A. My address is 3401 Tongue River Road, Miles
16 City, Montana 59301.

17 Q. And can you take a moment to show us where on
18 the blowup of the map that we have next to the witness
19 stand, which is Figure 1 from Exhibit M5, where you
20 live as located on that map and where your related
21 farming and ranching operation is?

22 A. We're -- in the north, we're about two miles
23 above the Garland School and about three miles below
24 the Brandenburg Bridge. It would be approximately this
25 stretch of river right here. It's approximately

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1 15 miles long on the river. We have 12 circles and 2
2 flood pumps. We incorporate center pivot, gated pipe,
3 and the open ditch.

4 Q. And for the record, you were indicating on
5 the map that your property starts somewhat north of the
6 Brandenburg gauge; is that right?

7 A. Yes.

8 Q. And it continues for a length of about
9 15 miles along the river?

10 A. Yes, sir.

11 Q. And is it generally located between the road
12 and the river along that stretch?

13 A. Yes, sir.

14 Q. How wide is that distance between the road
15 and the river? How much does it vary over that 15-mile
16 stretch?

17 A. It varies from about 2 miles to probably
18 200 yards.

19 Q. And generally occupies the area between the
20 road and the river?

21 A. Yes, sir.

22 Q. Did you grow up in Montana?

23 A. Yes, I did. I grew up in Bozeman and went to
24 school in Belgrade. Spent 46 years of my life in
25 Gallatin Valley.

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1 Q. And did you go to college?

2 A. Yes. I graduated from MSU in 1968 with a
3 degree in agricultural production, with a major
4 emphasis in plant soil science and animal science.

5 Q. And how did you use your education in your
6 subsequent work?

7 A. After I graduated from college, my neighbor's
8 place came up for sale. And at that time -- I was
9 raised on a very small place. And this place came up
10 for sale, and it was big enough to possibly have a
11 viable operation in the future. So I started out
12 farming in 1968 right after graduation.

13 Q. And where was that?

14 A. It was approximately 13 miles north of
15 Belgrade, Montana.

16 Q. More or less, where is Belgrade located?

17 A. It's about 10 miles west of Bozeman.

18 Q. How long did you continue that operation at
19 that location?

20 A. Actually, until 1995 actually there. We
21 didn't sell all the land in the Gallatin Valley until
22 2008.

23 Q. What kind of an operation did you run in that
24 area?

25 A. It was mainly dry land grain. And also I

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1 started a registered Angus herd at that time.

2 Q. And so you ran registered Angus cattle on
3 your spread?

4 A. Yes, sir.

5 Q. And did you engage in irrigation as part of
6 that operation?

7 A. Yes.

8 Q. What kind of irrigation did you engage in?

9 A. It was both sprinkler and flood irrigation.

10 Q. When did you move to the Tongue River Valley?

11 A. It was in May of 1992.

12 Q. And did you acquire the property you just
13 indicated, at that time?

14 A. We acquired one -- the southernmost part of
15 that property in '92. We acquired more in '95.

16 Q. How many total acres do you have on your
17 ranch?

18 A. We have about 15,000 deeded acres and about
19 1500 acres of state land.

20 Q. State land is leased?

21 A. State lease, yes.

22 Q. Have you done any improvements to your ranch
23 since acquiring it?

24 A. Yes, we have. We've put in several systems,
25 center pivot systems, to improve the efficiency of the

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1 water use. We've also put in gated pipe in most of the
2 flood irrigated areas.

3 Q. Of the 15,000 total acres, how many irrigated
4 acres do you have?

5 A. We have approximately 2200 acres of irrigated
6 land.

7 Q. Do you know how much of that is under center
8 pivot applications as opposed to other types of
9 irrigation?

10 A. Approximately 19 -- I think it's about
11 1900 acres of the center pivot land and about 300 of
12 flood irrigation.

13 Q. Flood irrigation, is that just furrow
14 irrigation, or does that include gated pipe?

15 A. It's through gated pipe via border dikes.
16 It's gated pipe at the head of the border dikes. And
17 all of the flood is border dike type irrigation with
18 either open ditch or gated pipe.

19 Q. How does the gated pipe process work,
20 briefly?

21 A. Well, you get all the water in the pipe. And
22 it has little gates on it that you open and close. And
23 it's a very efficient way to eliminate loss from a
24 ditch. It's a very efficient way to flood irrigate.

25 Q. How many separate center pivots do you have?

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1 A. I have a total of 12.

2 Q. What kind of crops have you been raising on
3 your place since you acquired it?

4 A. We've raised alfalfa, corn, wheat, barley,
5 oats. And I also have raised a number of vegetable
6 crops. And I also have a fruit orchard. I've done a
7 lot of experimentation with probably some vegetable
8 crops that aren't really traditional Montana crops,
9 like watermelons, cantaloupe, squash, pumpkins. And
10 also in my fruit orchard. I have approximately 100
11 trees. I have plums, pears, peaches, 22 different
12 varieties of apples, and then cherries.

13 Q. When you say you've experimented with certain
14 crops like watermelons, for instance, what kind of
15 experimentation have you done?

16 A. Well, over the years, probably tested 20
17 different varieties of these watermelons and
18 cantaloupe. And I evaluated them both for survival in
19 Montana and how they -- the quality of fruit that you
20 got out of the plants.

21 I pretty well narrowed out of those 20
22 varieties to one variety of cantaloupe and one variety
23 of watermelon, which I pretty much raise exclusively
24 anymore, because they're more adaptable to the northern
25 climate. And from the consumer acceptance, the quality

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1 of these fruits is very good.

2 Q. So have those resulted in crops that have
3 proved to be useful and profitable to raise and sell?

4 A. Yes, sir. And most people in Montana have
5 never experienced eating a watermelon that was vine
6 ripened, or a cantaloupe. And it's unbelievable how
7 good they are. Because there's a lot of people in
8 Montana who have never ate one.

9 Q. Have you found that your education in plant
10 and soil science has contributed to your work in that
11 regard?

12 A. Very much so. I was in proximity to most of
13 the professors at Montana State. And after graduation,
14 I became very good friends with these professors. And
15 we did a lot of experimentation on our farm because it
16 was a new area for them. I was one of the first
17 no-till grain in Montana. It was sold on our farm.
18 And I pretty much tried to stay on the cutting edge of
19 new things coming out of the University at that time.

20 Q. What do you mean when you refer to "no-till"?

21 A. Well, I went into barley stubble and planted
22 winter wheat in the fall without doing any other
23 tillage, other than running the drill through the
24 stubble. That practice right now, it's quite common.
25 But in -- I think that was in 1971. It was pretty

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1 revolutionary at that time. But it pretty well became
2 the normal way of farming in the west now, especially
3 for dry land small grain.

4 Q. You mentioned your irrigation. Do you have
5 water rights for your irrigation?

6 A. Yes, sir.

7 MR. DRAPER: Your Honor, I'd like to approach
8 the witness with exhibits during his testimony, if
9 that's all right?

10 SPECIAL MASTER: You certainly may.

11 MR. DRAPER: Thank you.

12 BY MR. DRAPER:

13 Q. Mr. Hamilton, I'm going to bring you what's
14 marked Exhibit M243. Do you recognize M243?

15 A. Yes, sir.

16 Q. And what is it?

17 A. I think this is from the court of the 1914
18 decree. Is that right?

19 Q. 1914 Miles City Decree.

20 A. Yes.

21 Q. And are some of your water rights adjudicated
22 in this decree?

23 A. Yes, sir.

24 Q. Okay. Let me ask you to turn back maybe
25 about six or eight pages. There's a page, lower

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1 right-hand Bates number shows MT16785. This is a place
2 in the decree where the Court makes a finding and lists
3 the rights with their priorities and amounts.

4 Do you see that page?

5 A. Yes, sir.

6 Q. And I'm looking down. Do some of your rights
7 stem from the Ball Ranch Company as listed in No. 9-a
8 there on the left?

9 A. Yes, sir.

10 Q. And what is the priority date associated with
11 that?

12 A. January 27th, 1897.

13 Q. And what is the amount of the water right in
14 cubic feet per second?

15 A. 1.24.

16 Q. If you look just above that, the one that has
17 the Ball Ranch Company, East Ditch with the priority
18 date of January 27, 1897, does that show 16.91?

19 A. Yes, sir.

20 Q. I'd like to draw your attention also to the
21 last one in the list, G.B. Pope. Do some of your water
22 rights in --

23 A. Yes, that's our 1910 water right dated
24 November 22nd, 1910.

25 Q. And what is the CFS amount for that water

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1 right?

2 A. 14.95 CFS.

3 SPECIAL MASTER: So just for clarity,
4 Mr. Draper, if I can ask, both of those two rights, do
5 you own all of those, the two rights you just
6 mentioned, or do you now own a fraction of those
7 rights?

8 THE WITNESS: Yes, Your Honor. That Ball
9 Ranch and that Flowers, if you note, the date is both
10 January 27th, 1997. Over the years, with the land
11 being bought and sold, that water right, that first
12 one -- part of that's being shared with that Flowers
13 water right. And the adjudication that's going on
14 today, that has been split out to separate owners.

15 But actually, that Ball right -- Ranch, I
16 owned part of that 16.91 CFS. It belongs to my ranch,
17 along with the Flowers, the 1.24.

18 SPECIAL MASTER: So you actually hold -- now
19 you share what's listed as the 9-a Ball Ranch right and
20 a share of the 9-b John Flowers right?

21 THE WITNESS: Yes, sir, that's correct.

22 SPECIAL MASTER: And similarly, on the Pope
23 right at the bottom of the page, you own only a share
24 of that?

25 THE WITNESS: We own all of that water right.

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1 SPECIAL MASTER: All. Okay. Thanks.

2 BY MR. DRAPER:

3 Q. I'm going to bring you now what's been
4 admitted as Exhibit M5. This is Mr. -- sorry. It's
5 M6, Mr. Book's rebuttal report as we refer to it here.

6 Mr. Hamilton, I have handed you Exhibit M6
7 opened to page 120. It is a title page for Appendix D
8 of this document. And I'd like to look with you, if I
9 may, at the two water rights for your ranch as they now
10 appear.

11 I believe the first one on the list on the
12 next page, No. 14, it has a rather complicated looking
13 number ending in the nonzero numbers, 311, identified
14 for Ceder Hills Ranch, LLC. Is that your ranch?

15 A. Yes, sir.

16 Q. And you can see that there's a page No. D135
17 associated with that. That corresponds -- if you'd
18 turn back to the page, looking at the center numbers,
19 259 is in the center of the bottom of these pages. And
20 that's corresponded to that particular Exhibit D page
21 number. And page 259 in the center bottom, just for
22 reference, I'll get the Montana Bates number page,
23 which is 018133 in bold at the lower extreme right.

24 This is the beginning of the documentation of
25 your water right; is that right?

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1 A. Yes, sir.

2 Q. And do the maps and aerial photos here that
3 follow depict the irrigated areas on your ranch?

4 A. Yes, sir.

5 Q. And if we turn to the first page after the
6 aerial photos, we see a page entitled "Preliminary
7 Decree." Owners listed as yourself and Victoria
8 Hamilton; is that right?

9 A. Yes.

10 Q. And showing a priority date of January 27,
11 1897?

12 A. Yes.

13 Q. And a flow rate of 16.91 CFS?

14 A. Yes.

15 Q. So is this the documentation in the current
16 adjudication that relates to that first water right
17 that we looked at in --

18 A. Yes.

19 Q. -- in the Miles City Decree?

20 A. Yes.

21 Q. And your second right, if we look at -- and,
22 again, I'll use the page numbers in the center
23 bottom -- page 396. It's further back in the same
24 appendix.

25 A. Okay.

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1 Q. Is this the other one of your rights that we
2 looked at in the Miles City Decree?

3 A. Yes, sir.

4 Q. Again, we have maps and aerial photographs of
5 the irrigated areas?

6 A. Yes, sir.

7 Q. And followed by the preliminary decree in
8 this instance, again same owners. Here the priority
9 date, though, is given as November 22, 1910?

10 A. Yes, sir.

11 Q. And that corresponds to the second water
12 right that you identified in the Miles City Decree,
13 doesn't it?

14 A. Yes, sir.

15 Q. And, again, the flow rate shown here is 14.95
16 CFS; right?

17 A. Yes, sir.

18 Q. And that corresponds to the amount in Miles
19 City of 14.95, doesn't it?

20 A. Yes.

21 Q. And you sometimes call this your 312 water
22 right based on the number that has been given in this
23 adjudication?

24 A. Yes.

25 Q. And do you rely on these decreed water rights

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1 as much as you can each irrigation season?

2 A. Yes, we do.

3 Q. And what do you find is the typical amount of
4 time that you're able to take water under these water
5 rights?

6 A. Typically, early in the season. Later in the
7 season, we're almost entirely dependent on stored
8 water.

9 Q. Now, stored water, does that mean that you
10 have storage rights with the Tongue River Water Users'
11 Association?

12 A. We have 2500 acre-feet of Tongue River Water
13 Users' water.

14 Q. I'm going to bring you a copy of Exhibit
15 M336, which has been admitted in this proceeding.

16 Do you recognize this document?

17 A. Yes, sir.

18 Q. What is it?

19 A. It's the amount of shares that the Tongue
20 River -- members of the Tongue River Water Users'
21 Association, the number of shares that's allotted to
22 those entities on the page.

23 Q. And do you see your storage rights indicated
24 here?

25 A. Yes.

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1 Q. Do they appear under the name Cedar Hills
2 Ranch, LLC?

3 A. Yes.

4 Q. And those are more or less in the center of
5 the first of the pages; correct?

6 A. Yes.

7 Q. And you have a number of entries there. If
8 you add all those up, how much do they come to?

9 A. 2500 acre-feet.

10 Q. And 2500 acre-feet, that's how much you're
11 eligible to receive from storage as long as the
12 reservoir fills?

13 A. Yes.

14 Q. And what happens if the reservoir does not
15 fill?

16 A. Usually we're put on a percentage of your
17 shares. You know, if the reservoir only fills half,
18 you'll probably get 50 percent of your shares.

19 Q. Have you taken on any additional
20 responsibilities with respect to the Tongue River Water
21 Users' Association other than simply being a contract
22 user?

23 A. I've been on the board for approximately 14
24 years.

25 Q. And what functions have you performed as a

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1 member of the board?

2 A. Well, there are various duties that we have
3 to perform with the State of Montana as far as our
4 obligation to the state and also our obligation to the
5 water users to try to manage the dam to where it's safe
6 and also that -- we try to maximize the amount of water
7 available to our customers, to the users.

8 And, you know, essentially, financially we
9 have several bills we have to pay. We have to be
10 fiscally responsible and also manage the dam in a safe
11 and prudent manner for the benefit of our users and the
12 community.

13 Q. In that capacity, do you play a role in
14 appointing water commissioners?

15 A. Yes.

16 Q. What is that function?

17 A. We have to get a document that goes to the
18 court. And we have to sign the document turning over
19 the management of the river to the court, which
20 appoints the water commissioner. And then the water
21 commissioner is responsible for making sure that the
22 water is dispersed in the correct manner.

23 Q. In that regard, I'm going to hand you Exhibit
24 M394, which has been admitted in this proceeding and
25 which in the first pages contains a petition to appoint

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1 a water commissioner and an order. And I've opened
2 your copy to Bates No. MT10020. This is the signature
3 page for the petition to appoint water commissioners in
4 2006.

5 Does your signature appear on that page?

6 A. Yes, sir.

7 Q. So this illustrates the function that you
8 were just describing?

9 A. Yes, sir.

10 Q. In regard to the appointing and functioning
11 of the water commissioners, has the board been able to
12 appoint commissioners who, in your opinion, have
13 adequately administered the waters of the river during
14 the term that you've served on the board?

15 A. Yes.

16 Q. Based on your personal knowledge, has the
17 water user community cooperated with those water
18 commissioners?

19 A. Very much so.

20 Q. Have you personally interacted with them in
21 regard to your own water use?

22 A. Yes.

23 Q. What kind of interaction have you had with
24 them?

25 A. Well, we have -- first of all, we find out

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1 how much our pumps are pumping. And so we get an idea
2 of the total water use for -- we're consuming. We get
3 our consumption rate. And then we try to work with the
4 commissioners to keep a fairly accurate accounting of
5 how much water we have left and how much we're using in
6 planning how many days of irrigation you have left.
7 And based on that, we make various decisions in our
8 cropping systems and things like that.

9 The other thing we do is we have a website
10 that we access really virtually every day during the
11 river irrigation season. We look at the state line.
12 We look at the amount of water at the state line
13 discharged from the dam.

14 At that time, we had monitoring stations at
15 Birney Day, Brandenburg, and also at T & Y. And we get
16 an idea how much water is in the river. And we order
17 our water based on those flows that we read off the
18 Internet every morning.

19 Q. How do you adapt when water supplies are low?

20 A. Well, the year we got half our waters, a good
21 analogy would be, I guess, you go to work some morning
22 and your boss says, I'm going to cut your salary in
23 half. So you go home, and you make a new budget.

24 That's what we do. We adjust our operation
25 in that we eliminate, at least, irrigation that is the

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1 least efficient. We also take out of production our
2 least productive land. And we put all of our efforts
3 into the most efficient irrigation system we have on
4 our best land. And also we consider the value of the
5 crops. The high value crops get priority versus lesser
6 value crops.

7 Q. And as you make those adjustments to adapt to
8 the lower water supply, you use as much of the water
9 that is available as you can; correct?

10 A. We certainly try to.

11 Q. But in some instances, it's not possible to
12 use every acre-foot that you might have in storage?

13 A. That's right.

14 Q. So some may be left over as you make these
15 adjustments. Is it difficult to make them exact to the
16 last acre-foot or hundred acre-feet, that kind of
17 thing?

18 A. Yes. A lot of our -- most all of our pumps
19 are electric pumps. And, you know, it depends on the
20 time of year, whether -- what crop you got growing.
21 And sometimes you may have a little water left over.
22 But when you consider what it costs to start that pump,
23 and if it's late in the season, the chances of you
24 getting an economic benefit out of that extra few
25 gallons of water just doesn't make sense. That's an

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1 instance where you might have a little water left but
2 not use it.

3 Q. Is one of the complications you have to deal
4 with the charges that you have to pay for electrical
5 power and stand-by fees and that kind of thing?

6 A. The Tongue River Electric Company, TRECO,
7 they call it, has a thing called demand, that I have
8 one electric pump; it's 125 horse. If I flip the
9 switch on that for two seconds, it costs me \$1500.
10 Then after that, I buy the electricity.

11 So it's very important, as you can see, to
12 manage the demand. And that demand charge is only
13 charged once a month. So once you start that pump, you
14 had better be able to use that water for a month. If
15 you just had to use it for a few days, it wouldn't make
16 a lot of sense to pay a whole month's demand for a
17 couple days of irrigation.

18 Q. In your ranching operation and irrigation,
19 have you experienced any problems with icing, ice jams,
20 that kind of thing?

21 A. Yes.

22 Q. What have those consisted of, in your
23 experience?

24 A. The stretch of river that I live on is, you
25 know, below Brandenburg there. And the channel of the

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1 Tongue River at that particular area widens. And the
2 river becomes quite shallow in places. In periods to
3 where you get below zero weather, those shallow areas
4 will freeze solid to the bottom, which restricts the
5 flow of the channel, narrows the channel. And you'll
6 get a damming effect of that ice freezing and
7 eliminating the size of the channel, making the size of
8 the channel smaller.

9 And then what happens is when that water
10 backs up, upstream the water will start flowing out of
11 an exit somewhere, a warm place next to the bank or so
12 on. And then you actually have water running on top of
13 the ice. In periods of cold weather, every night, that
14 water over the top of the ice will freeze. And this
15 will continue every night. And you will get ice
16 thickness up to 2 feet at times.

17 And what happens sometimes is this ice in the
18 channel becomes quite thick. You will get a spring
19 event where you have flood water running into the river
20 on top of this ice, enough volume to actually float
21 that ice up and break it up. And then it starts
22 flowing down the river and gorging.

23 It's really a quite serious problem. If
24 you've ever experienced that, you can be a few miles
25 away from the river and hear the popping, the grinding

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1 of the ice. It's a very scary thing.

2 As those ice jams get bigger as they go
3 downstream, you might have 5 miles of whichever that's
4 jammed up with ice. And when that breaks loose, it
5 breaks loose with a vengeance. And it goes until it
6 finds another place to where it can jam up.

7 And what happens as you move down the river
8 is this thing just keeps growing. And the real danger,
9 Miles City is in the floodplain, and they are in the
10 real danger of any events where you have really bad ice
11 jams of flooding Miles City. You also have tremendous
12 potential -- we've lost fencing that was a long ways
13 from the river because these big chunks of ice float
14 out of the channel and kind of wipe out any low lying
15 area fence. We have a lot of bank erosion at times.
16 And you also get a lot of scarring at the bottom of the
17 river, actually tillage at the bottom of the river with
18 ice.

19 So ice being -- is a very serious problem in
20 the management of the river, not only for the economic
21 value to agriculture but for safety.

22 Q. Are there ways in which the problems created
23 by icing can be minimized, based on your experience
24 living on the river?

25 A. Well, I think one thing that helps, if the

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1 river has enough flow in the wintertime to prevent
2 these -- where the channel widens and gets a little
3 shallower, if there's enough water to prevent that
4 channel from icing up all the way, you don't get near
5 the flooding and you won't get near the ice. So an
6 adequate flow actually reduces a lot of the potential
7 ice jamming.

8 Q. Based on your personal experience, do you
9 have any feel for what kind of flow is necessary?

10 A. I'm not an expert. But I will tell you that
11 in my observation of the river, and I observe it a lot,
12 almost on a daily basis, somewhere between 150 and 200
13 CFS would be a sensible winter flow for preventing a
14 lot of excessive icing.

15 Q. Thinking about your role as a board member of
16 the Tongue River Water Users' Association and ice, does
17 ice raise any concerns with you with regarding the
18 safety of the dam itself?

19 A. Yes.

20 Q. What are those?

21 A. We have some issues with the concrete that
22 can -- and also the tunnels in the dam that we have to
23 maintain a certain level in the reservoir to prevent
24 that concrete from freezing and chipping off. So we
25 need to have -- Art knows the correct figures, but

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1 somewhere around 45,000 to 50,000 acre-feet in the
2 reservoir to prevent damage.

3 Q. In your daily observations up and down the
4 river, have -- do you know whether there has been any
5 significant waste of water by yourself or others?

6 A. I have not observed that, no.

7 MR. DRAPER: Your Honor, if I may take a
8 moment?

9 SPECIAL MASTER: You may.

10 MR. DRAPER: Thank you.

11 BY MR. DRAPER:

12 Q. Mr. Hamilton, we've talked about your
13 irrigation practices. Do you also run cattle on your
14 ranch?

15 A. Yes, sir.

16 Q. What does that consist of?

17 A. I didn't hear the last part.

18 Q. What does that consist of, that cattle
19 operation?

20 A. Well, it's -- prior to '99, it was a
21 registered Angus herd. We dispersed about 1250 animals
22 in '99. Since then, it's been a commercial operation
23 of black Angus cattle. And my son is currently running
24 that operation.

25 Q. Do you depend on the river flows for any

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1 stock water?

2 A. Yes. We pretty well -- somewhere on the
3 river, we're usually using the river for water pretty
4 much year-round for stock water.

5 Q. And that includes stock water in the winter?

6 A. Yes.

7 Q. And is that affected by the presence of the
8 ice that you described earlier?

9 A. Yes.

10 Q. Does it tend to interfere with your ability
11 to get water to your stock?

12 A. At low levels, it's very difficult to water
13 stock because of the extra icing.

14 Q. Under those conditions, it's difficult for
15 you to utilize your stock watering rights?

16 A. Yes.

17 MR. DRAPER: I think that's all I have on
18 direct, Your Honor.

19 SPECIAL MASTER: Okay. Thank you very much,
20 Mr. Draper.

21 Mr. Kaste, you're not going to be doing the
22 cross?

23 MR. KASTE: (Shakes head.)

24 SPECIAL MASTER: Excellent.

25 MR. KASTE: I don't appreciate that.

Cross-Examination by Mr. Kuhlmann
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1 SPECIAL MASTER: It's just I see so much of
2 you up there, it's nice for a change of pace.

3 CROSS-EXAMINATION

4 BY MR. KUHLMANN:

5 Q. Good morning, Mr. Hamilton.

6 A. Morning.

7 Q. My name is Andrew Kuhlmann, and I took your
8 deposition in this case; correct?

9 A. If you say so. I don't remember
10 particularly.

11 Q. Do you remember being deposed?

12 A. Yes. I guess I do. Yes.

13 Q. You talked about your water use with
14 Mr. Draper just now; correct?

15 A. Yes.

16 Q. And you have, I believe you said, 12
17 different pivots and 3 fields that you irrigated with
18 flood or 3 pumps, flood pumps?

19 A. Yes, that's correct.

20 Q. And so you have multiple points of diversion
21 for those?

22 A. Yes.

23 Q. Do you divert the same amount of water from
24 day to day all through the irrigation season?

25 A. No. We have -- there will be times when

Cross-Examination by Mr. Kuhlmann
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1 there will be some pumps on and some pumps off. So you
2 probably have an average of what you divert. But from
3 day to day it might vary.

4 Q. Okay. I'd like to take a look at an exhibit
5 that's already in the record, Exhibit 382.

6 SPECIAL MASTER: Is this one that he already
7 has?

8 MR. KUHLMANN: I don't think he has it up
9 with him.

10 SPECIAL MASTER: Then you can approach him
11 and give him that.

12 MR. KUHLMANN: Thank you.

13 SPECIAL MASTER: Can we go off the record for
14 a second?

15 (Discussion held off the
16 record.)

17 SPECIAL MASTER: Thanks. We can go back on
18 the record.

19 BY MR. KUHLMANN:

20 Q. So you have a copy of that now?

21 A. Yes, sir, I do.

22 Q. I believe you testified earlier it to be a
23 record of water usage in 2002?

24 A. Okay.

25 Q. And I'd like you to turn to the second page

Cross-Examination by Mr. Kuhlmann
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1 marked MT09981. Are you there?

2 A. Yes.

3 Q. Is your name on this list?

4 A. Pardon?

5 Q. Is your name on this list?

6 A. Oh, yes.

7 Q. And what's the number associated with your
8 name?

9 A. 1375.

10 Q. Okay. I believe in early testimony it was
11 stated that in 2002 there was a 50 percent reduction of
12 your storage rights or Tongue River Water Users'
13 storage water; is that correct?

14 A. Yes, sir.

15 Q. Was that what you understood in 2002?

16 A. Yes, sir.

17 Q. And you said earlier you have 2500 acre-feet
18 of water; correct?

19 A. Yes.

20 Q. So half of that would be 1250?

21 A. Yes.

22 Q. So I believe that's a difference of 125
23 acre-feet from this 1375 on the exhibit and the amount
24 of shares you would have had in 2002; correct?

25 A. That's correct.

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1 Q. Do you know where that extra water came from?

2 A. Well, in the real world, when you're
3 operating that many pumps and on that many acres,
4 that's probably -- maybe I wasn't told to shut off soon
5 enough or I ran an extra day. I wasn't aware that I
6 had ran over the 1250 acre-feet until today.

7 Q. Okay.

8 A. But I think there's years that, you know, we
9 maybe don't quite use all our water, and there's years
10 you might use a little more. But that's pretty close,
11 125.

12 Q. Would that be a significant amount of water
13 in terms of your operation?

14 A. Well, what percent is that of 2500? 125 is,
15 you know, not a lot, no.

16 Q. 10 percent?

17 A. Yeah.

18 Q. How about 200 acre-feet? Would that be a
19 little water or a significant amount?

20 A. Well, all water is significant. All water is
21 valuable. So, you know, it's all valuable. Yeah, it's
22 all significant.

23 Q. Okay. Would you describe either of those
24 numbers as a little water?

25 A. Well, not really. I mean, when I irrigate my

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1 fruit orchard, I use a very small amount of water for a
2 very good benefit. So I guess every drop of water is
3 valuable.

4 Q. Okay. Thank you.

5 MR. KUHLMANN: I don't believe I have any
6 other questions.

7 SPECIAL MASTER: Okay. Thank you.

8 EXAMINATION

9 BY SPECIAL MASTER:

10 Q. Okay. So just a couple questions that I
11 have. So earlier you talked, in general terms, about
12 the type of decisions that you would make if you were
13 told that you were not going to receive all of the
14 acre-feet of water that you were entitled to get in a
15 normal year for your shares. And what I'm interested
16 in is knowing a little more about the four years in
17 which you actually did receive fewer acre-feet for each
18 share than you were entitled to.

19 My understanding is those are -- 2001, 2002,
20 2004, and 2006 were all years in which there were
21 shortages declared.

22 First of all, do you recall, were those four
23 years in which there were shortages?

24 A. Yes, I do. I recall a lot of it.

25 Q. And would you have made adjustments to what

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1 fields you were irrigating as a result of those
2 shortages in those four years?

3 A. Yes. Some of the fields that were harder to
4 irrigate on the flood irrigation, we really didn't
5 irrigate those fields. We wanted to -- our water, we
6 figured, was a lot more valuable running through the
7 pivots because we could get more acres, so more
8 efficient water use. So the less efficient fields
9 under the less efficient irrigation systems, we
10 didn't -- we abandoned those fields in those years.

11 Q. And that would have been true in all four of
12 those years?

13 A. Yes, I believe so.

14 Q. And you would have abandoned those particular
15 fields because of the water shortage?

16 A. Yes. It's possible, you know, we may have
17 got a little bit of first cutting or something without
18 irrigation. But to try to get a second cutting or to
19 grow a first cutting on those fields, it just didn't
20 make sense because of the shortage of water. And some
21 of the flood irrigation compared to center pivot, as
22 one gentleman testified, is 85 percent efficient. So,
23 I mean, that's -- when water is short, that's where you
24 want to use your water, is through the most efficient
25 systems you have.

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1 Q. Okay. And does -- I assume that the date
2 when you're told that you no longer have any --
3 actually, let me take a step back.

4 So are you told each year when you no longer
5 have a direct flow right?

6 A. Yes. Yes.

7 Q. And so who informs you of that?

8 A. Well, if we have a commissioner, he kind of
9 determines it. Sometimes we will have -- you know, we
10 determined -- even at the board early on, we -- you
11 know, we're always looking at the flows. And if the
12 flows aren't there, you know, we get the word out that,
13 hey, everybody is going to be on stored water, except
14 the two oldest water rights, as we've talked to before,
15 is around 200 CFS. So, I mean, that pretty well takes
16 up the whole river except in a real wet year where you
17 have a lot of flow.

18 Q. And how much variation is there from year to
19 year and when you actually run out of your direct flow
20 right?

21 A. Oh, oftentimes it's anywhere from the middle
22 of May to the middle of June possibly, or even earlier.
23 It can be even the first of May.

24 Q. Are there any determinations that you make at
25 the time that you find out that your direct flow rights

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1 are ending?

2 A. Well, early on, you might decide to grow
3 spring wheat instead of planting corn because it has a
4 shorter irrigation season. You might decide you'll go
5 for two cuttings of alfalfa instead of three because
6 you delay the first cutting a little longer to increase
7 the tonnage. And then you delay cutting the second
8 cutting a little later. And then you're done.

9 So you try to balance the water use with the
10 crop and how much water is available.

11 Q. And you probably need to explain that a
12 little more for me. How do those particular
13 determinations depend on when you run out of your
14 direct flow right?

15 A. Well, that depends on how much storage water
16 you have and how far that stored water is going to go.
17 When you have a combination of stored water and decreed
18 water, your water is going to go a lot further. You're
19 going to be irrigating more crops, more acres. So that
20 is really dependent on every individual's amount of
21 stored water, is how you reach those decisions.

22 Q. So I'm asking in your particular case, does
23 the date when you no longer have direct flow make a
24 difference as to any of your planting or other
25 agricultural decisions?

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1 A. Yes. When I run out of direct flow, or I
2 call it decreed water, I stop irrigating with that
3 flood irrigation. I switch over to pivots because it's
4 just more efficient. I can get, you know, more income
5 and better water conservation by running it through the
6 pivots because the flood just takes too much water.

7 So when I don't have decreed water, I don't
8 flood irrigate. I use exclusively pivots on stored
9 water.

10 Q. Okay. So this is helpful. So during the
11 period of time that you're still getting your decreed
12 water, then you will generally be using flood
13 irrigation?

14 A. Flood irrigation with my 1910 and my 1897
15 water right.

16 Q. And when you find out that you no longer have
17 any decreed water, at that point, you stop engaging in
18 flood irrigation?

19 A. Yes, sir.

20 Q. So the fields that you flood irrigated, at
21 that point you switch to dry cropping?

22 A. To Mother Nature.

23 Q. And then if you -- so then take, then, at
24 that point, the various other fields that you're
25 irrigating with your center pivot systems. So now,

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1 let's assume that in a particular year you not only
2 find out that you're off your decreed water rights, so
3 you're no longer engaged in the flood irrigation, just
4 have your center pivots. And if you find out now that
5 you, say, have only a 50 percent storage rights, how
6 does that affect what you're doing on the center
7 pivots?

8 A. I will take my very best fields, very best
9 ground under those pivots, and I will continue to
10 irrigate those. That's when I start looking at the
11 soil and the moisture holding capacity of that soil.

12 So if you have a sandy soil, that doesn't
13 hold a lot of water, you probably don't irrigate that.
14 You probably go to a pivot that has a nice sandy loam
15 that has a high moisture holding capacity. You would
16 put your water on that field.

17 Also, you look at -- on pivots, you look at
18 whether the field is level or not. And, you know, if
19 it is in a field that has a lot of ridges and uneven,
20 it's hard to get the water on those fields and not run
21 off. So you just select your very best soils, the
22 flattest ground you have, and that's what you go with.

23 Q. And let's assume that you have 50 percent of
24 your normal storage rights, and in particular you've
25 been told that. What type of calculations do you go

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1 through in deciding which particular fields you
2 actually can irrigate at that stage?

3 A. Well, it's kind of crisis management, flying-
4 by-the-seat-of-your-pants deal. It's something you
5 learn by experience. You know, farmers are people that
6 if something doesn't work one year, it's always the
7 next year country. And you plan the best you can for
8 the year you have because next year you're going to
9 have the perfect year. That's the attitude of the
10 farmer, and why they do it, I don't know. But that's
11 what happens.

12 Q. I guess I'm still curious. I mean, if I were
13 told I only had half my water, for example, one of the
14 things I'd do is to sit down and start actually
15 calculating how much water I need for each field, how
16 long I'd need water on that particular field.

17 So do I understand you don't do any formal
18 calculation?

19 A. Well, yeah, every pump has been measured. So
20 you know how many gallons per minute is running out of
21 that pivot going out to the field. Most of the pivots
22 that we have are 7 gallons per acre per minute. So if
23 you have a hundred acre pivot, that's 700 gallons a
24 minute that's going out there. So you do the
25 calculations of the number of acre-feet you have, you

Recross-Examination by Mr. Kuhlmann
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1 do that, and you figure out, how many days can I run
2 that pivot on the water that I have?

3 You look at the calendar and you say, what
4 can I grow? Can I grow another crop of alfalfa? Can I
5 go for a third crop? You make all those decisions by
6 the gallonage in those pivots, the gallonage the pumps
7 are putting out. So you actually calculate your whole
8 system. How much of that system can I operate because
9 of the number of gallons of water that I have? So
10 that's really how you do it, I guess.

11 Q. And so, again, because earlier I thought you
12 had been talking about flood irrigation. So in years
13 when you are told that the amount of stored contract
14 right you're going to be entitled to are being cut
15 back, in those years, you've always taken out some of
16 the land under center pivot?

17 A. I believe so, yes. Yes.

18 Q. Okay. Thank you.

19 SPECIAL MASTER: Mr. Kuhlmann?

20 MR. KUHLMANN: I have just one. I promise
21 they're quick.

22 RECROSS-EXAMINATION

23 BY MR. KUHLMANN:

24 Q. You were just talking to the Special Master
25 about how you calculate what lands to irrigate and how

Further Examination by the Special Master
JOHN HAMILTON - November 15, 2013

1 to deal with water-short years; is that correct?

2 A. Yes.

3 Q. Okay. Have you ever leased water from the
4 Northern Cheyenne Tribe?

5 A. One year I did.

6 Q. Do you know what year that was?

7 A. It was around 2002. I'm not sure. I would
8 have to look it up. But one year we did buy tribal
9 water.

10 Q. And you talked to the Special Master about, I
11 think, 2001, 2002, 2004, and 2006, correct, as being
12 water-short years?

13 A. Yes.

14 Q. Was tribal water available for you to lease
15 in those years?

16 A. Yes, it was. There possibly was one year
17 where they didn't apply to the state of Montana to sell
18 the water. But I think, later in the irrigation
19 season, it did become available.

20 MR. KUHLMANN: Thank you.

21 SPECIAL MASTER: Let me follow up on that
22 because this is useful too.

23 FURTHER EXAMINATION

24 BY SPECIAL MASTER:

25 Q. So in those -- first of all, can you give me

Further Examination by the Special Master
JOHN HAMILTON - November 15, 2013

1 a rough idea how much the Northern Cheyenne water
2 costs?

3 A. It's about twice to three times what it is
4 for the irrigators, what we charge. We've tried to
5 enter into a long-term agreement with them to lease
6 water. But we haven't been able to come to an
7 agreement because that water is very expensive.

8 And as you well know, that water is delivered
9 at the dam, and there's also pumping charges. Once you
10 pay what they want for the water and you pay the
11 pumping charges, the electricity to deliver it to your
12 field, it becomes expensive. Some crops it may be cost
13 prohibitive.

14 Q. So going to sort of the absolute numbers,
15 approximately how much do you charge the members of the
16 Tongue River Water Users' Association?

17 A. It's kind of complicated, depending on
18 whether your contracts are paid for or not. And it's
19 roughly six bucks an acre-foot. We pay about 13.5 for
20 the 2500, 13,500.

21 Q. And, again, I'm just trying to get sort of a
22 rough sense. So about \$6 an acre-foot for the water
23 that you have under contract?

24 A. Yes.

25 Q. And then how much more is the Northern

Further Examination by the Special Master
JOHN HAMILTON - November 15, 2013

1 Cheyenne water?

2 A. It's -- I think it's somewhere between 12 and
3 \$15 an acre-feet.

4 Q. Okay. And then you said, in addition to
5 that, you have to pay a pumping charge?

6 A. Right.

7 Q. And you don't pay that pumping charge when
8 you are getting your contract rights?

9 A. No. You still have the pumping charge.
10 That's correct.

11 Q. So the pumping charge is true for any water
12 that's stored?

13 A. Right, right. The other thing is that that
14 water is released from the dam. If you're downstream a
15 long ways, you're going to -- that water is going to be
16 reduced by the percentage depending on what part of the
17 river you live on for the water loss as it flows down
18 the river.

19 Q. And so if you think you're going to bring in
20 enough in the revenue from your crops to be able to
21 afford it, you can go out, in most years, and buy
22 Northern Cheyenne Tribe rights to cover any shortfall
23 in your storage rights?

24 A. It's available. Yeah, it's available,
25 usually every year.

Further Examination by the Special Master
JOHN HAMILTON - November 15, 2013

1 Q. So from the part of the nation that I'm from,
2 those water prices sound really low. So could you
3 explain for a Californian, why it is that at that price
4 you can't just cover all the water you need?

5 A. Your Honor, with all due respect, when the
6 Northern Cheyenne hires a consultant to determine the
7 value of that water, they usually hire one from
8 California or Colorado. And we Montanans, we arrive at
9 a value of what we think is a ballpark figure. I mean,
10 we don't like to be overcharged, let's say.

11 So, to us, when we have to pay twice as much
12 for something, it's not something we like. And I
13 think, first of all, you have to have a very efficient
14 system for that to work. But in this day and age,
15 you're looking at fuel costs, machinery costs, repairs.
16 All of this stuff adds up.

17 I asked a banker one time, that got involved
18 in farming, how many rich farmers he knew. And, well,
19 he didn't realize that there wasn't any rich farmers
20 until he became one. And then he found out he needed a
21 bank to farm. So, you know, it adds up, the expenses.

22 And there just isn't a lot of profit. It
23 seems like it's a real profitable deal, but when you
24 add in all the expenses and maybe pay yourself a little
25 bit, it's not a way to get rich in the farm and

Further Examination by the Special Master
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1 ranching today.

2 Q. Okay. So let me back up just for one second.
3 So I understand, then, that one reason why you would
4 prefer not to buy the Northern Cheyenne water is you
5 think it's too expensive for what you can get other
6 water for in the area; is that correct?

7 A. Yes.

8 Q. In addition to that -- now let me ask a
9 slightly different question.

10 In the years where you had to cut back on the
11 number of acres of farm land under center pivot because
12 you were not expecting to get all of your stored water,
13 could you have profitably farmed that land by buying
14 the Northern Cheyenne water?

15 A. I don't know, Your Honor, that I can answer
16 that question. There are years. And those were some
17 years that we had 30 days of 110 degrees with a
18 20-mile-an-hour wind. Under those circumstances, it's
19 really hard for a plant to live regardless of how much
20 water you're putting on.

21 So I think, to answer that question, you'd
22 almost have to know the current situation, the climatic
23 conditions, the time of year it is. It's a highly
24 variable question. And I think the answer is highly
25 variable too. It just depends on a particular

Further Examination by the Special Master
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1 situation at the time.

2 It also depends on commodity prices. Is hay
3 worth 120 bucks or is it worth 60 bucks? Is grain
4 worth 2 bucks a bushel or is it worth 10? It depends
5 on current markets. So you're dealing with a lot of
6 variables. And, you know, given what the prices are,
7 what the weather is, what the humidity is, the wind
8 speed and all that, I can give you an answer.

9 But I do know in those years that not only
10 was water short, but growing conditions was very
11 difficult in those years because of the amount of
12 stress that everything was under because of the heat
13 and the wind and extended dryness.

14 Q. So let me go back again to the particular
15 decisions that you made in the 2001, 2002, 2004, 2006
16 years. So in each of those years, you testified that
17 you cut back on some of the land that you would have
18 irrigated by center pivot systems because of the fact
19 that you knew you weren't going to get all of your
20 stored contract water.

21 In making that decision in each of those
22 years, did you consider the option of acquiring
23 Northern Cheyenne water to make up that difference?

24 A. Yes, I'm sure I did. You know, when you have
25 a cattle operation, there's some forage out there. Do

Further Examination by the Special Master
JOHN HAMILTON - November 15, 2013

1 you harvest it with a machine, or do you let a cow eat
2 it? You know, that's another option that's there.

3 So do I irrigate at considerable expense,
4 power, buy water? There's some forage out there when
5 the irrigation season is over I'll turn the cows in and
6 let those harvest what's there. You're short of labor
7 oftentimes.

8 So you know, I can't tell you at that very
9 moment when I did that. But I probably had good reason
10 for making the decisions that I made in those years.

11 Q. So in some years, you actually purchased
12 Northern Cheyenne water?

13 A. Yes, we did one year. I'm pretty sure we
14 did.

15 Q. Why would you have purchased it that year?

16 A. I think we were growing corn that year. And
17 corn is a big budget item to even plant a corn crop,
18 with the seed, chemical, and it requires more water and
19 a longer watering season.

20 And now that I think about it, that 1375 was
21 probably the year that we bought Indian water or tribal
22 water, and that's why we went over 1250. That's right.
23 That's what happened. 'Cause we bought, like, 300
24 some, I think, acre-feet of tribal water. And that's
25 why we ran over the 1250 in 2002.

Further Examination by the Special Master
JOHN HAMILTON - November 15, 2013

1 Q. Okay.

2 A. 'Cause we had 200 -- 300 or 200 acre-feet of
3 tribal water.

4 Q. And in the years when you did not buy tribal
5 water but you cut back on the amount of acreage that
6 you were irrigating -- I know I've asked this before
7 but I want to make sure we're clear -- why didn't you
8 buy the Northern Cheyenne water in those years?

9 A. I just felt it was too expensive for the kind
10 of crops I had.

11 Q. And when you say too expensive for the type
12 of crops you had, what do you mean by that?

13 A. Well, it was probably alfalfa. And the stand
14 could have been poor. That's another thing about
15 growing hay. If you get a poor stand, you don't get
16 near the benefit of irrigating a poor stand that you do
17 a good stand. It could have been a poor stand of grain
18 or something. But it was -- I can't answer it.

19 But, you know, I know where you're going in
20 that it is cheap water compared to California, compared
21 to Colorado, compared to a lot of places. But in
22 Montana, it's still kind of expensive to us. We're not
23 used to it, put it that way.

24 Q. Right. And I'm still trying to get a sense
25 of whether you would not have bought Northern Cheyenne

Further Examination by the Special Master
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1 water in those years because, you know, it just seems
2 high and, you know, it seems outrageous to have to pay
3 that price. That would be one.

4 Or the other option is, well, you know, if I
5 look at that price, I just couldn't make a profit if I
6 paid that much for that water.

7 I'm trying to figure out which of the two it
8 is or whether it's both.

9 A. I think it's both, you know. I have to think
10 about that. I don't know. That was a long time ago.
11 But, you know, sometimes in those crisis years,
12 sometimes you just get tired, you know. When you scale
13 back, you just try -- you know, you lose a lot of stuff
14 in those dry years. You lose pasture. You lose -- all
15 your dry land has went south on you.

16 And sometimes you're just trying to salvage
17 what you have. And, you know, maybe your operating
18 line is at the end. Maybe your operating budget is --
19 you know, you used up your operating budget. I don't
20 have any money for that. At that time my banker, we
21 were very close in those years. So if there was a way
22 to save money, you certainly did it.

23 Q. Okay. Thank you.

24 SPECIAL MASTER: So, Mr. Kuhlmann.

25 MR. KUHLMANN: Two question, Your Honor.

Further Recross by Mr. Kuhlmann
JOHN HAMILTON - November 15, 2013

1 FURTHER RECROSS-EXAMINATION

2 BY MR. KUHLMANN:

3 Q. You said you couldn't remember what year you
4 bought water from the tribe?

5 A. Yes.

6 Q. I'd like to see if I can help refresh your
7 recollection possibly. I'd like you to take a look at
8 Exhibit M387.

9 SPECIAL MASTER: You can approach the
10 witness. Is this an exhibit that was introduced
11 before?

12 MR. KUHLMANN: Yes.

13 BY MR. KUHLMANN:

14 Q. Mr. Hamilton, this document says it's titled
15 Northern Cheyenne Tribe Water 20,000 acre-feet, Lease
16 Applicants 2004; is that right?

17 A. That's correct.

18 Q. And your name is on here?

19 A. Yes, sir.

20 Q. Okay. And it says 250 acre-feet?

21 A. Yes, sir.

22 Q. Was 2004 the year that you leased water from
23 the tribe?

24 A. Yes. Thank you for reminding me that it was
25 2004 that I bought Indian water.

Further Recross by Mr. Kuhlmann
JOHN HAMILTON - November 15, 2013

1 Q. Okay. Just one other question. Do you -- in
2 years when you have your full shares of storage water,
3 do you have a full supply for your crops?

4 A. Yes.

5 Q. Okay. Thank you.

6 SPECIAL MASTER: Okay. Thank you. So why
7 don't we take the lunch break at this particular point.

8 So, Mr. Hamilton, I'm afraid that means
9 you'll have to come back briefly after lunch for
10 redirect by Mr. Swanson, unless you want to -- I'm
11 perfectly happy if there's only a couple questions now
12 to do the redirect.

13 MR. DRAPER: I'll be doing the redirect, Your
14 Honor, and after lunch would be my suggestion.

15 SPECIAL MASTER: Okay. So why don't we take
16 a break now. It's 20 after 12:00. We'll do a regular
17 hour break today. So we'll be back at 20 minutes after
18 1:00. Thank you.

19 (Recess taken 12:20 to 1:23
20 p.m., November 15, 2013)

21 SPECIAL MASTER: Everyone can be seated.
22 Mr. Draper.

23 MR. DRAPER: Thank you, Your Honor.

24 SPECIAL MASTER: You're welcome.

25

Redirect Examination by Mr. Draper
JOHN HAMILTON - November 15, 2013

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REDIRECT EXAMINATION

BY MR. DRAPER:

Q. Good afternoon, Mr. Hamilton.

A. Good afternoon.

Q. Do you still have there the copy of Exhibit M382 that Mr. Kuhlmann provided you during his cross-examination?

MR. KUHLMANN: He does not.

MR. DRAPER: Oh, thank you very much. He's going to bring it to you.

THE WITNESS: Thank you.

BY MR. DRAPER:

Q. He drew your attention in this exhibit to the second page, which has the Montana Bates number of 09981; correct?

A. Yes.

Q. Now, these are cumulative usage figures as of 1 September 2002, as shown at the top of the page; correct?

A. Yes.

Q. And we were looking at the number beside your name, which is 1375. Now, your normal acre-feet is 2500; is that right?

A. Yes, sir.

Q. Have you had a chance to think back further

Redirect Examination by Mr. Draper
JOHN HAMILTON - November 15, 2013

1 about what the situation was in 2002 with respect to
2 the amount by which the reservoir did not fill?

3 A. Yes.

4 Q. And what is your recollection about the
5 cutback that the members of the Water Users'
6 Association had to suffer in that year?

7 A. In that year, we were promised 55 percent of
8 our normal water.

9 Q. I'd like to hand you what's been admitted in
10 this proceeding as Exhibit M343. This was admitted
11 during Mr. Hayes' testimony. It's a document dated
12 August 21st, 2002. I'd like to -- it's -- as you can
13 see, it's styled at the top as a memorandum regarding
14 minutes of the July 31st, 2002, Tongue River Advisory
15 Committee meeting. I'd like to ask you to turn to the
16 second page. And the third partial paragraph there
17 starts "The Committee."

18 If you go down to the third line, over at the
19 end, there's a sentence starting with the name "Roger."

20 Do you see there -- it starts the third line
21 of the -- and I'm counting the bold paragraph as a
22 paragraph itself, as being the second paragraph. And
23 then the third paragraph, the one starts "The Committee
24 discusses water used."

25 In that paragraph, on the third line on the

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1 right-hand side, you see a sentence that says, "Roger
2 said that T & Y has used about 5212 AF and, at
3 55 percent of 5300, equals 2950 AF."

4 Do you see that reference?

5 A. Yes, sir.

6 Q. Would that be consistent with your
7 recollection that the cutback was to the 55 percent
8 level in 2002?

9 A. Yes.

10 Q. Looking at the last sentence in that section
11 just above the heading "Agenda Item 4," the last
12 sentence says -- and this is, I think, referring to
13 tribal water -- says "Of the 7500 AF, 4125 AF is
14 available (55 percent of 7500 AF)."

15 Do you see that?

16 A. Yes.

17 Q. Would that also tend to corroborate your
18 recollection that the cutback in 2002 was to 55 percent
19 and not to 50 percent?

20 A. The correct number should have been
21 55 percent, yes.

22 Q. Now, if we look back at Exhibit M382 showing
23 the history of your use in 2002 of reservoir storage
24 water in the amount of 1375 acre-feet.

25 A. Yes.

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1 Q. We were figuring that at 50 percent of your
2 2500, you would expect to have 1250 acre-feet; isn't
3 that right?

4 A. That's correct.

5 Q. Now, if there was an extra 5 percent
6 available to you, 5 percent -- an extra 5 percent of
7 2500, if 10 percent is 250, 5 percent would be 125
8 acre-feet?

9 A. That's correct.

10 Q. And what is 125 acre-feet added to 1250?

11 A. 1375.

12 Q. So that would be the exact amount of your
13 reduced allocation that year?

14 A. Yes, sir.

15 Q. And so do you conclude -- what do you
16 conclude about whether your use was consistent with
17 your allocation that year?

18 A. It was.

19 Q. Also, the Special Master was asking you about
20 factors that went into your determination of whether to
21 purchase extra water in years of shortage.

22 Could you summarize the types of factors that
23 go into your decision under those circumstances,
24 please.

25 A. Well, number one, I think, is profitability.

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1 You have to grow some crops on that land that are
2 profitable. You have the fixed inputs and the variable
3 inputs. And one of the first things you look at is how
4 much can I produce on this acre and what is that
5 product worth after I grow it.

6 And a lot of those dry years, 2002 and '1 and
7 '4 and '6, we were looking at hay roughly at \$60 a ton;
8 it is 150 today. Grain prices were in the \$2 range.
9 So on today's prices, you know, a little extra expense
10 for water might not matter much, but in those years, it
11 did.

12 The main factor is that you don't want to run
13 a ranch to where you just break even. You have to try
14 to make a profit. And the reason you have to do that
15 is that in an environment, the semi-arid environment
16 that has a lot of variable weather, you have to have
17 some good years to take care of some bad years because
18 you're not going to make money every year.

19 But you have to look at the conditions, the
20 cost of your fixed inputs, the cost of the variable
21 inputs and also look at the cost of what you can
22 produce. And you make those decisions based on where
23 you have the greatest possibility of making a profit.

24 Q. Very good. Thank you very much.

25 SPECIAL MASTER: Thank you, Mr. Draper. So

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1 thank you, Mr. Draper.

2 And thank you, Mr. Hamilton, for your
3 testimony. So you're excused now.

4 THE WITNESS: Thank you, sir.

5 SPECIAL MASTER: Mr. Draper, who's the next
6 witness today?

7 MR. DRAPER: Your Honor, our next witness
8 will be Mr. Les Hirsch. And the examination will be by
9 Mr. Swanson. And we would, therefore, call to the
10 stand Mr. Les Hirsch.

11 SPECIAL MASTER: Mr. Hirsch, you can come
12 forward.

13 (Les Hirsch sworn.)

14 THE CLERK: Please state and spell your last
15 name for the court reporter, please.

16 THE WITNESS: Sure. My name is Les Hirsch,
17 L-e-s H-i-r-s-c-h.

18 SPECIAL MASTER: So good afternoon,
19 Mr. Hirsch.

20 THE WITNESS: Good afternoon, Your Honor.

21 SPECIAL MASTER: And, again, it's nice to see
22 you also.

23 THE WITNESS: Thank you very much.

24 MR. SWANSON: Thank you, Your Honor.

25

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1 LES HIRSCH,
2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. SWANSON:

5 Q. Good afternoon, Mr. Hirsch. How are you?

6 A. Very well, thank you.

7 Q. Could you tell us where you live right now?

8 A. I live 30 miles south of Miles City or
9 42 miles east of Ashland. It would be very close to
10 the Garland School, which indicated on the map.

11 Q. Could you go ahead and at this time indicate
12 on the map where you live. And there's a marker next
13 to the map. Feel free to indicate. And can you put
14 your initials if you want to so we can see your
15 location?

16 And this is Figure 1 from Exhibit M5.

17 A. (Witness complies.)

18 Q. Mr. Hirsch, have you lived in the Tongue
19 River Valley your whole life?

20 A. Primarily, I have. I was born and raised on
21 what is now called the Bice Ranch, and I lived there
22 for 15 years. Moved away from the river for a little
23 while. Went to college at Bozeman. I got a degree in
24 political science, and so I was gone for a few years at
25 that time.

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1 And then I've been gone somewhat in the late
2 '70s and '80s, as I served in the Montana legislature
3 for those years in the house and the senate. And so I
4 was gone temporarily for those -- parts of those years,
5 but primarily always lived along the Tongue River.

6 Q. And did you go to college?

7 A. Yes, I got a degree in political science from
8 MSU.

9 Q. The perfect degree to be a farmer and rancher
10 apparently?

11 A. Correct. The only time I really used it was
12 serving in the legislature. So I never taught it or
13 anything. But I did use it during those years.

14 SPECIAL MASTER: And I'm just curious. So
15 how accurate did you find what you learned about
16 political science in college for actually being in the
17 legislature?

18 THE WITNESS: The real world was somewhat
19 different, Your Honor.

20 SPECIAL MASTER: Thank you.

21 BY MR. SWANSON:

22 Q. So was it your intention to always be a
23 farmer and rancher, or was political science heading
24 you in another direction?

25 A. I wanted to be a diplomat for the U.S.

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1 government. But I didn't get my master's in that area.

2 So I decided it would be best to return to my roots.

3 Q. So can you explain your occupation currently
4 and then maybe a little history of when you finished
5 college and the years, intervening years?

6 A. Oh, okay. My father and I bought a ranch
7 right after college. And we were successful there.
8 And then we moved, and I bought a larger ranch,
9 currently where I live today. And I have always been
10 involved in irrigation and the raising of livestock and
11 crops.

12 Q. And so what is your current place where you
13 operate now? Can you tell us what kind of operation
14 you run?

15 A. Yes. I have about 320 acres of irrigated
16 land. And it's primarily used -- the production from
17 those lands from alfalfa are actually used in my
18 pelleting plant which I have on the ranch. We
19 pelletize alfalfa and mix dry shelled peas with that
20 alfalfa so that we can sell that to ranchers
21 supplementing range cows' native grazing range.

22 So we do about 7000 tons of that per year,
23 which is a large enough mom-and-pop operation for us.
24 But all of the production from the irrigated land is
25 primarily from alfalfa used in that winter operation.

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1 Q. And do you raise enough hay to do that
2 operation, or do you have to buy additional hay to do
3 all your pelleting?

4 A. We buy about 3000 tons of alfalfa annually
5 from up and down the valley as best we can. And we use
6 about 50,000 bushels of peas in our process. And those
7 come from area dry land farms near Miles City.

8 Q. And I understand that your neighbor upstream
9 is Mr. Kyle Shaw. And if you could just explain your
10 family and business relationship with him?

11 A. Oh, sure. I bought that ranch in '95, I
12 think. A Japanese gentleman owned it. And I bought it
13 from him at that time. And I owned it for just 18
14 months and discovered the hard way that I didn't need
15 that much ground.

16 So I sold that to my father. And then my
17 sister and her husband farmed that ranch for him to
18 this day. And she's -- Kyle is my brother-in-law and
19 Gail is my sister.

20 Q. So that property is actually owned by Ted
21 Hirsch; is that correct?

22 A. That's correct.

23 Q. And so there's been a lot of various
24 documents we've looked at with senior water rights in
25 the name of Ted Hirsch. Is it fair to say those water

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1 rights, if they're owned by Ted Hirsch, are not water
2 rights you use on your place?

3 A. That's totally correct.

4 Q. And those would be used by --

5 A. The Shaws, yes.

6 Q. The Shaws. Okay.

7 Now, you bought the place, I believe you
8 indicated, in the 1980s. Did you do any work or
9 improvements on the irrigation systems there?

10 A. Yes. During the '80s, it was very difficult
11 economic times for ranching. And the place was in very
12 difficult repair. And so after I bought it, I
13 proceeded to laser level all of the land that we were
14 going to irrigate.

15 Q. Now, this laser leveling has been discussed a
16 couple times. But no one has actually told us what
17 that means. Can you just describe what process you did
18 when you laser-leveled this land?

19 A. Oh, sure. The -- naturally, lands aren't
20 perfectly level in most cases. And there was a company
21 in Miles City that had large scraper units that would
22 have a laser receiver on them. And it would indicate
23 to the scraper automatically whether to cut or fill
24 land as it leveled it to design.

25 And so what we did was laser leveled the land

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1 and built in a two-tenth down-fill slope and possibly a
2 flat-side slope. And after you do that, then it
3 becomes very easy and efficient to irrigate that land
4 'cause there are no longer humps and bumps in it.

5 Q. And is it -- do you -- do you level the whole
6 field, then do you divide it up into segments for flood
7 irrigation?

8 A. Oh, correct, yes. And then we use the border
9 dike system where you confine the water to, say,
10 50 feet wide or 100 feet wide. And then you put the
11 irrigation water, say, in a gated pipe. And then you
12 open those gates in that confined area. And it
13 probably varies, but it can take from two to ten hours
14 to get from the head end of the field to the end of it,
15 depending, of course, upon the length and your volume
16 of water that you're using.

17 MR. SWANSON: Your Honor, may I approach and
18 hand the witness an exhibit?

19 SPECIAL MASTER: You may. And, in fact,
20 during your examination, feel free to approach whenever
21 you need to.

22 MR. SWANSON: And I think at this time I'll
23 just tell you a couple things about exhibits, Your
24 Honor. First, I'm going to hand the witness
25 Demonstrative Exhibit 2 from Montana, which is the

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1 photos.

2 There are two other exhibits that were not
3 originally on the list with Mr. Hirsch. They've just
4 been mentioned by the previous witnesses, so I'm going
5 to refer to them in about ten minutes. And that's
6 Montana 343 and Montana 397. But they were other ones
7 that have already been discussed this morning. So you
8 may have them in your list.

9 SPECIAL MASTER: Thank you.

10 BY MR. SWANSON:

11 Q. So what you should see on the -- before you
12 is a demonstrative exhibit which is a photo. Can you
13 read the number at the bottom corner there?

14 A. 2-11.

15 Q. 2-11 or 2-II? Can you tell us what this
16 picture is?

17 A. That's a picture of some irrigated land right
18 next to the Tongue River. We're -- during the tour
19 that we had earlier in the summer, we gathered around a
20 structure, a 12-inch irrigation pipe. And it looks
21 like we're all discussing how that actually works.

22 Q. And so this is your irrigated land; correct?

23 A. Correct.

24 Q. And so you irrigated with gated pipe?

25 A. I do.

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1 Q. And can you explain the difference between
2 flood irrigating with gated pipe than open ditch?

3 A. Yes. The irrigation with gated pipe is more
4 efficient than the open ditch. It's less labor
5 intensive. During those years when we were putting
6 gated pipe on the place, the federal government
7 actually had the cost share program where they
8 encouraged farmers to use the gated pipe and abandon
9 the ditches. And we took advantage of those programs
10 for a number of years so that, today, 95 or 98 percent
11 of the land is under this gated pipe system.

12 Q. And what's the benefit of gated pipe over
13 ditch?

14 A. There's no water loss from the gated pipe.
15 It all goes to the source where it's needed. And so
16 water savings and, of course, like I mentioned, much
17 less labor intensive. My wife can change those, and
18 she can't change an irrigation dam.

19 Q. And do you still have a little bit of land
20 that is irrigated by other types of flood irrigating?

21 A. I have one small field that has an open ditch
22 yet.

23 Q. And so when you irrigate -- I guess this
24 field would be a good example that we're looking at
25 just to explain how you do that. Is that -- how many

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1 times do you irrigate that in a season?

2 A. Like I mentioned earlier, we're primarily
3 alfalfa unless we're rotating the crop to new stands of
4 alfalfa. So in our case, we will start irrigating as
5 early as we can. Primarily, with our types of soil, we
6 can irrigate just once for each cutting. And we do get
7 three of those.

8 Q. Does that mean you irrigate three times? Do
9 you irrigate after third cutting?

10 A. We never irrigate after third cutting. We
11 always irrigate prior to the first, second, and third.

12 Q. Oh, I understand. Why don't you irrigate
13 after third cutting?

14 A. I'm of the philosophy that real wet ground
15 and winter coming on and alfalfa is not a good
16 combination. I think we get some heaving of the
17 ground. And our winter kill is increased by that
18 scenario. So I leave the ground somewhat dry. Just
19 nature -- well, there's some reserve moisture there
20 quite adequate for the alfalfa when the plant is
21 dormant. So that's my thought on it.

22 Q. Do you run livestock?

23 A. I do.

24 Q. Can you explain your livestock operation?

25 A. Probably ten years ago, I had an Angus cow

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1 herd. And we calved those cows and sold calves in the
2 fall. And with my pelleting business, it seemed like I
3 didn't have enough hours in the day to take care of
4 everything. So we sold the cows and went to a stocker
5 yearling operation where we buy the calves this time of
6 year coming off of the mother cows.

7 And then we'll have those backgrounded in a
8 feedlot, possibly, along the Tongue River or elsewhere.
9 And then in the spring, we'll receive those cattle and
10 grass them until about the first of September. And
11 then they are remarketed to a finishing feedlot
12 somewhere. Yes.

13 Q. I think we mentioned earlier or you and I
14 talked earlier that it doesn't make a lot of sense in
15 the spring to do the pellet operation all day and calve
16 all night?

17 A. That's correct.

18 Q. And when you did have livestock, did you
19 winter them along the river?

20 A. Yes, we did. Uh-huh.

21 Q. And did they drink out of the river at that
22 time?

23 A. Yes, they would. We used it at that time and
24 may go back to that someday, but not in the foreseeable
25 future yet.

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1 Q. I'm going to hand you an exhibit, M5. And M5
2 is a pretty lengthy book. But there's an appendix in
3 there, Appendix A, and -- I believe on page 70 of the
4 document?

5 A. Pardon me? Seventy?

6 Q. Seventy. Well, what you'll want to do is go
7 to --

8 MR. SWANSON: Actually, Your Honor, I'll just
9 find the page for him.

10 SPECIAL MASTER: Yep.

11 THE WITNESS: Oh, thank you.

12 BY MR. SWANSON:

13 Q. You're welcome. So in Appendix A, there's a
14 number of pages of irrigated land. And if we could
15 look at the third of those pages. And at the bottom
16 center, it says 70. And then for this particular
17 section, it says page 3 of 9 [sic] at the bottom left.
18 You've got that page?

19 A. I do.

20 Q. Can you just indicate on here where your
21 operation is?

22 A. Yes.

23 Q. And you can draw on the screen. I apologize.
24 I meant to tell you that. You can draw on the screen
25 with your finger, and it will make a line.

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1 A. Oh, okay.

2 Q. And so the center pivots just upstream from
3 you are not yours, those round circles?

4 A. That's correct.

5 Q. And do you know if those lands were irrigated
6 in 2009?

7 A. Pardon me?

8 Q. Do you know if those lands were irrigated in
9 2009?

10 A. Yes.

11 Q. Okay. And do you know if you irrigated these
12 lands in the years that are in question in this case,
13 which would be the -- really from about 2000 to 2006?

14 A. Yes, I did. I personally irrigated them.

15 Q. All right. You can set that away for a
16 second. So in terms of your priority dates and your
17 water rights, do you rely on direct flow water rights,
18 or do you rely on storage water?

19 A. We have to rely on a direct flow right for
20 that first cutting. If we're not on stored water, I
21 use that to, I guess, prepare for the season of those
22 dry years that were in question. We were on stored
23 water immediately and a reduced amount of stored water.

24 So actually, I had to make adjustments during
25 those years. And I did that by idling some lands,

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1 irrigated land. And I actually had a chance to lease
2 some water that -- both from the tribe and from a
3 private owner that wasn't using it. So I did increase
4 the amount of water available to me by those means.

5 Q. So let's just talk a little bit about that.
6 So first of all, in terms of your direct flow rights,
7 those are generally not real senior rights, as I
8 understand; is that correct?

9 A. Oh, correct. Yes.

10 Q. So you may use them earlier in the season,
11 and then you rely on stored water?

12 A. When there's no call for the direct flow
13 rights, I use those. And some years, like I say, there
14 weren't any of those. But most years when we fill the
15 reservoir, I can use those. But after that, then it's
16 exclusively stored water.

17 Q. When do you think -- on a typical year that's
18 not excessively dry, when would you quit using your
19 direct flow water? Would you get through first cutting
20 with your stored water?

21 A. That would be a good way to explain it. We
22 could probably irrigate the first cutting one time.
23 And then normally, by that time, we have to use the
24 stored water for the other remaining irrigations that
25 we do.

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1 Q. How many shares of water in the Tongue River
2 Water Users' Association do you have?

3 A. I have 433.

4 Q. Does that come out to 433 acre-feet of water
5 then?

6 A. That's where I get that from, yes.

7 Q. So you talked about some years when things
8 were dry. Let's go ahead and talk about those years
9 now. When did you see those years that were dry and
10 where you were having shortages of water? When did
11 they begin?

12 A. '01 was the first year. Of course, it
13 carried into '02, '04, and '06, is my recollection,
14 like has been pointed out many times here.

15 Q. So in 2001, do you recall if you were able to
16 get three cuttings of hay and basically have a normal
17 amount of hay, or were you short?

18 A. In 2001, if the reservoir did not fill, I
19 wouldn't have been able to irrigate three cuttings, no.

20 Q. So then let's ask about 2002. 2002, did you
21 have a shortage situation?

22 A. Oh, yes. That was our 55 percent year, '02.
23 And, of course, that would have been very short at that
24 time.

25 Q. So did you have to change any of your

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1 operations in 2002 because of the water shortage?

2 A. Sure, we did. I didn't have the option of
3 planting different crops that might use less water. I
4 was committed to alfalfa. So I knew what my water
5 needs were. But I did like everyone else, only
6 irrigated the best land I had, the best stands of
7 alfalfa.

8 And after that was exhausted, we leased some
9 land in northern Montana. So we were able to acquire
10 actually dry land alfalfa from up there. They were
11 having an excellent year. And so we hayed up there for
12 a while and brought home -- I can't remember the
13 amount. But it was significant so that we could
14 continue to operate the pellet mill.

15 Q. In northern Montana, can you tell us where
16 that was?

17 A. We were up near the community of Opheim,
18 which is about 15 miles south of the Canadian border.
19 And we trucked that alfalfa from there to home to be
20 processed into the pellets that we make.

21 Q. How far of a trip is that, would you guess?

22 A. It's 285 miles.

23 Q. One way?

24 A. One way.

25 Q. Was there anyone else from the Tongue River

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1 area that was also doing that?

2 A. Yes. Another neighbor went with me,
3 Mr. Bice. And then there were two other ranchers from
4 the Broadus area. So we leased, I can't remember,
5 maybe 1500 acres or more up there and was able to bale
6 that and bring it home. So that's how we responded to
7 the drought.

8 Q. So just to be clear, you weren't just buying
9 the hay. You were going up, cutting it, baling it, and
10 hauling it down?

11 A. Yes. They sold the crop standing in the
12 field, which is common practice.

13 Q. Is it safe to say it's a little more
14 expensive to do it that way rather than haying your
15 own?

16 A. Oh, yes. Far more expensive. Yes. It was a
17 crisis management situation. Sure.

18 Q. Were you running your cow/calf pairs still in
19 2002?

20 A. I'm sure I was. Uh-huh.

21 Q. Do you recall if you had to reduce your cow
22 herd?

23 A. I did, as everyone did. They culled as hard
24 as they possibly could to get down in numbers to kind
25 of correspond with the feed that was available, of

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1 course. So, yes, we did. That was another reaction.

2 Q. What about 2004? Do you remember any
3 economic problems or any changes of your practice in
4 2004, any specifically?

5 A. I don't remember. I remember leasing water,
6 of course, whenever I had the opportunity to supplement
7 what I had or the reduced amount that I had. So I'm
8 sure we did that. And maybe by 2004, maybe I had the
9 cows sold. I'm not sure at that time.

10 Q. And you're growing hay for your pelleting
11 business, you testified a minute ago?

12 A. Yes.

13 Q. If you produced less hay, does that mean you
14 have to buy more hay for your pelleting business?

15 A. Oh, absolutely.

16 Q. So in a dry year, does that hay tend to be
17 more or less expensive?

18 A. Oh, you can raise it cheaper than you can buy
19 it somewhere else and haul it. Costs about \$6 a loaded
20 mile to haul alfalfa around or square bales. So at the
21 285 miles, it adds up pretty quickly. Yes.

22 Q. So one of the things that was discussed was
23 the idea if you were irrigating less land. And you
24 discover at the end of the season or near the end of
25 the season you have more water available. And you

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1 mentioned that you do, in fact, irrigate less land in
2 dry years.

3 Can you then put that water on a hay field
4 later in the season and get a good yield out of it if
5 the hay field has been dormant most of the summer?

6 A. I don't recall ever being able to revive a
7 dormant stand during the growing season. If it's that
8 dry -- the situation never occurred when we were able
9 to do that. I mean, the drought didn't turn around
10 that quickly. So we did not do that.

11 Q. You mentioned 2002. You said it was our
12 55 percent year. Explain what you mean by 55 percent.

13 A. In the documents that we've found, we
14 estimated early on as a member of the Water Users'
15 Association that we would have between 45 and
16 54 percent of our normal fill. And so by 55 percent, I
17 mean 55 percent of full pool is what we ended up
18 getting. So in our estimation, early on in the spring,
19 we were a little low. But it -- we weren't very far
20 off. We had to somehow predict what that volume of
21 water would be for us.

22 And that Water Users' Association, as a
23 board, we sat down and tried to do that given the
24 snowpack that we had, the water content in the
25 snowpack. DNRC of Montana would help us do that. So

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1 those were our projections. And we ended up being
2 quite close.

3 Q. And so when you settle on a number of
4 55 percent, and there's been testimony that that
5 reduced your share amount of water you got, did you, as
6 a board member or water user, have the same reduction
7 as everybody else?

8 A. Oh, yes. Yes. The river loss percentages
9 were the same. It applied to all of us equally.

10 Q. I'm going to hand you Exhibit M4 -- 343 that
11 Mr. Hamilton just discussed. And then I'll also hand
12 you Exhibit M550 'cause we'll talk about that right
13 after.

14 A. Okay.

15 Q. And we'll start with 343, and we'll just look
16 at it for a moment because there's already been some
17 testimony on it.

18 On that second page of that document,
19 Mr. Hamilton had looked at a statement that's in the
20 second full paragraph below the bold. There's some
21 bold language that says, "Roger makes a motion." And
22 then there's a paragraph below that.

23 You see that?

24 A. Yes.

25 Q. And you see a line that I've underlined in

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1 the middle that basically says, "T & Y has used about
2 2215 AF and, at 55 percent of 5300, equals 2950 AF."

3 A. Yes, I see that.

4 Q. Did you understand that to be the percentage
5 of the full water amount that the T & Y was going to
6 receive that year?

7 A. Yes, that's correct.

8 Q. And then I see the sentence below it,
9 beginning with "Allen asked what does the tribe have,"
10 could you just read that sentence for us?

11 A. It starts with what? The tribe?

12 Q. The sentence -- if you want, look at the
13 screen. It's highlighted on the screen.

14 A. I'm sorry.

15 Q. The sentence at the bottom of that paragraph
16 says "Allen asked what does the tribe have."

17 A. Yes, "for available water. And Glen
18 indicated that about 12,000 to 15,000 acre-feet is
19 available depending on 55 percent or 65 percent
20 factoring."

21 Q. And are you familiar with the tribe, the
22 Northern Cheyenne Tribe's water that's stored in the
23 reservoir or part of the Water Users' Association?

24 A. Yes, I am.

25 Q. And you understand they have a compact water

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1 right as well as a contract water right?

2 A. Yes, correct.

3 Q. And I think if -- I'll ask you a question
4 about that in a moment. But look at the bottom of that
5 page at the same language that Mr. Hamilton had looked
6 at.

7 Actually, let's go to the second paragraph
8 from the bottom. And that sentence begins "The
9 committee believes that the 7500 AF is separate from
10 the compact water which is 32,500 AF per year." And
11 then in parentheses "20K new contract water and 12,500
12 direct flow."

13 A. Yes.

14 Q. As -- Mr. Jason Whiteman from the Northern
15 Cheyenne Tribe testified the tribe has 7500 acre-feet
16 of contract water and they have 20,000 acre-feet of
17 compact storage water. Are you familiar with whether
18 that's correct?

19 A. Yes, that is. The 20,000 acre-feet came from
20 the reconstruction of the Tongue River Dam. And they
21 were granted those acre-feet at that time. And they
22 had the 7500 acre-feet prior to that. Yes.

23 Q. Well, in the middle -- right after I just
24 finished reading, it says, "Written notice to the Water
25 Users' Association and the BIA is the only thing

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1 necessary for the 7500 acre-feet portion." Do you know
2 anything about written notice requirements for the
3 tribe to use its compact water right?

4 A. Yes. We attempted to purchase water from the
5 tribe on one or two occasions. And in our state
6 statutes, it requires the tribe to notify the state of
7 Montana 180 days in advance that they would like to
8 sell some of their water. And in one, most likely two
9 years, the tribe failed to do that. And on at least
10 one occasion, we were not able to purchase any of that
11 water.

12 Q. So in those years, the compact water right of
13 20,000 acre-feet was not available for use that summer?
14 And it would have only been the smaller contract
15 amount; is that accurate?

16 A. That is accurate, yes.

17 Q. Thank you. You can set that one aside.

18 SPECIAL MASTER: Can I just interrupt? Do
19 you know which two years those were? If you don't,
20 don't guess. I'm just asking.

21 THE WITNESS: I'm sure it was 2001. And I
22 can't say, Your Honor, on the second one.

23 SPECIAL MASTER: Okay. Thank you.

24 MR. SWANSON: And, actually, I think our next
25 document may help us look at that as well.

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1 SPECIAL MASTER: Thanks.

2 BY MR. SWANSON:

3 Q. Go ahead and look at Exhibit M550. Do you
4 have that with you?

5 A. Yes, sir.

6 Q. Can you just tell us what this document is?
7 Actually, I should say it's a collection of documents.
8 Can you just kind of thumb through here and describe
9 what these are?

10 A. Yes. Many of these documents are minutes or
11 recordation of policy made by the Tongue River Water
12 Users' board of directors.

13 Q. Are you a member of that board?

14 A. Yes.

15 Q. How long have you been a member of the board
16 of the Tongue River Water Users' Association?

17 A. I kind of forgot, but it's either 28 or 30
18 years. A long time.

19 Q. Are you an officer of the association?

20 A. Vice president, right under Art Hayes,
21 uh-huh.

22 Q. And so as a member of the board, would you
23 have attended these meetings where there are these
24 board minutes that we see in all these documents?

25 A. Yes. Yes. The schedule of loss, the

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1 division of the river was all made by the board of
2 directors. And I was present at those meetings.

3 Q. So on items where it says the board voted or
4 the board adopted a policy, unless your absence was
5 noted at the beginning of the minutes, can we assume
6 that you were present and voted on those policies?

7 A. Yes. Yes, I was. I remember them clearly.

8 Q. As a board member, did you review minutes of
9 past meetings from time to time?

10 A. Always prior to the -- at the beginning of
11 each meeting, we always did, yes.

12 Q. Do you have any knowledge of where the
13 minutes from the Association are stored? Does a
14 secretary store them or Mr. Hayes or yourself?

15 A. They're normally -- we've had the same
16 secretary for a lot of years. And as far as I know,
17 she keeps those at her home. I don't know anywhere
18 else they might be stored. But I'm sure she stores
19 them, uh-huh.

20 Q. Did you ever -- were you ever notified that
21 the Association and Mr. Hayes has provided records from
22 the Association to the state of Wyoming in this
23 lawsuit?

24 A. Oh, yes.

25 Q. You were notified of that?

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1 A. That's correct. I was, uh-huh.

2 MR. SWANSON: Your Honor, I'd move admission
3 of Exhibit M550.

4 MR. KUHLMANN: No objection.

5 SPECIAL MASTER: Then Exhibit M550 is
6 admitted into evidence.

7 (Exhibit M550 admitted.)

8 BY MR. SWANSON:

9 Q. Mr. Hirsch, I ask you turn to a page, it's
10 about 20 pages into the document. I believe I've
11 actually marked it there for you. But the bottom
12 number will say WY037887.

13 A. Yes, I have it.

14 Q. And I wonder if you could identify what this
15 letter is. It's on -- says Tongue River Water Users'
16 Association at the top. And it has a date of May 22nd,
17 2002. Can you tell us what this letter is?

18 A. It's the result of a water board meeting on
19 that date which -- where we adopted policy to
20 segmentize the river and to notify the water users of
21 our difficult situation with water quantity and to
22 recognize that we had -- we're recommending the court
23 appoint Mr. Kepper and Mr. Fjell as water commissioners
24 for that season.

25 Q. And the first line or the first sentence

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1 indicates that the board was still guessing at what
2 amount of contract water would be available, and the
3 best guess is between 45 to 54 percent as of May 22nd.

4 You see that?

5 A. Correct. Yes.

6 Q. So it appears that after that, they did --
7 would you agree they settled on a number of what that
8 percentage would be?

9 A. On that 55 percent, yes.

10 Q. And then the second main section there, if
11 you could look at the indented portion below the
12 paragraph where it says, "From the dam to Birney, one
13 day; from Birney to Ashland, two days."

14 Can you just tell us what those day numbers
15 mean?

16 A. Yes. For the purposes of ordering water, we
17 ask the growers to give us -- we gave them a
18 recommendation for lead time so that they could order
19 their water those days prior to their needing to divert
20 the water. The board just recommended those segments
21 of the river. And we've used those ever since, in dry
22 years.

23 Q. Okay. If you could turn to the next page,
24 please. And this appears to be some minutes from
25 another meeting in April. But the middle of the page,

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1 there's a short paragraph that begins "The ditch
2 riders' résumés."

3 Do you see that?

4 A. It might be on the back of this; is that
5 correct?

6 Q. It might be on the back. The bottom number
7 on the page is 037888.

8 A. Oh, yes, I see it. Sure.

9 Q. So that "The ditch riders' résumés were read
10 and it was a unanimous decision to hire Alan Fjell."

11 A. Yes.

12 Q. Mr. Fjell would be probably happy to know it
13 was a unanimous decision for him?

14 A. Uh-huh.

15 Q. I wonder if we could look at the next page.

16 A. Yes.

17 Q. And could you just tell us what this next
18 page is? It's a letter dated March 6, 2002.

19 A. It's another record of the minutes of a
20 meeting, at that time indicating what our conditions
21 were on the mountain and identifying to the growers
22 that there would be two public informational meetings
23 to answer questions about watering measuring devices
24 and so forth, so additional policy coming out of the
25 board of directors.

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1 Q. And then that middle paragraph discussing
2 requiring all water users installing a water-measuring
3 device. So at this point, it indicates Parshall
4 flumes. So it was after this meeting when the decision
5 was made to buy the ultrasound device; is that correct?

6 A. That's probably correct.

7 If I may, I didn't remember that we ever did
8 require water-measuring devices from the board of
9 directors. I don't think there was enough lead time at
10 that time for everyone to be able to do that. So I
11 don't know if the secretary has made an error there or
12 not.

13 But we highly recommended them, but there
14 wasn't sufficient time to really accomplish that before
15 that season actually started.

16 Q. You think -- is that the reason that you had
17 the ultrasound device and had the commissioners measure
18 it instead?

19 A. Obviously, yes. We had to have a way of
20 measuring. We just had to quickly achieve that goal.

21 Q. And then if we could look at the next page.

22 A. Yes.

23 Q. And I believe you mentioned a moment ago to
24 the Special Master you thought 2001 was a year when you
25 were concerned that you weren't going to get water from

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1 the tribe. Can you see the date on the first section
2 of that document?

3 A. What's the number on it again?

4 Q. The bottom number is Wyoming 037890.

5 A. Yes, I have it.

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

7 A. My copy -- August 17th, 2001. I'm sorry.

8 Q. And then if you look at the second to the
9 bottom paragraph.

10 A. Yes.

11 Q. Could you read that, please.

12 A. "The board discussed" -- right there?

13 Q. Yes.

14 A. "The board discussed the water flow and
15 buying water from the tribe. It was feared that the
16 time would run out before the tribe got all the legal
17 work worked out. At the time -- as the" -- oh, I'm
18 sorry. That's all that was important.

19 Q. Is that what you referred to earlier when you
20 said that the tribe hasn't provided a notice?

21 A. Correct, a 180-day notice to the state, yes.

22 Q. And then if we could turn a couple more
23 pages. Actually, two more pages. The bottom number is
24 WY037892. And I wanted to point this out in response
25 to a question the Special Master had for Mr. Hamilton.

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1 It's just a paragraph of text in the middle of a page.

2 Do you see that?

3 A. Yes.

4 Q. Can you just explain what this is? You can
5 take a moment if you want.

6 A. It's the entire paragraph, if I might ask?

7 Q. Yes. I mean, it appears to be a notice that
8 they have some -- the Association has some shares for
9 sale; is that accurate?

10 A. I'm sorry. I guess --

11 Q. Can I approach and see if we're on the same
12 page, Your Honor?

13 SPECIAL MASTER: You certainly may.

14 THE WITNESS: Yes, I'm sorry. May I ask, is
15 that the resale of the tribal water on one of the years
16 that we did get it purchased?

17 BY MR. SWANSON:

18 Q. And I actually think it's just some shares
19 that are available. But the question I was going to
20 ask, number one is, do you know if that's what it is?
21 And the second question is I just wanted to look at the
22 numbers that appear to be charged for shares. And then
23 there's numbers that go to different things. I was
24 wondering if you could explain that part of it?

25 A. Yes. During the construction of the first

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1 Tongue River Dam, I think that was a 40-year contract
2 with users. And some of those contracts were a \$1.56
3 per acre-foot some 50 years ago.

4 And then there other contracts that were
5 available. And they were for a higher amount. And I
6 believe that's \$3.27 or so, plus the dollar operation
7 and maintenance. And those did become available, as I
8 recall, over the years. And they were purchased by
9 users at that time.

10 Q. And what I want to ask is, so when you look
11 at your share price of your water, is every share the
12 same price, or are there different numbers that add up
13 to how much you pay for your water? That's what I was
14 trying to get to. I'm sorry. That's a difficult way
15 to get there.

16 A. Yes, I'm sorry. Yes. The new construction
17 of the dam ends up costing growers \$4.97 as a share of
18 the cost of the reconstruction. And then there is a
19 dollar operation and maintenance fee that we all pay.
20 And then there are a few contracts left from the
21 construction of the first dam. And those are around
22 \$2 -- they are \$2.50 per acre-foot per share. Yes.

23 Q. And that operations and maintenance fee that
24 is kind of looked at, is it looked at on an annual
25 basis, that additional dollar?

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1 A. Yes. The board reviews that each year. And
2 if we are short of operation and maintenance cash, we
3 have to increase that to cover our costs. But it does
4 set up \$1 per share today.

5 Q. And so as a member of the board, you're
6 involved in the financial decisions for the
7 Association?

8 A. Sure. Sure. Annually we do a budget. We're
9 responsible for repair and maintenance of course,
10 everything that goes along with the fiduciary
11 responsibility of a board member.

12 Q. Do you make the day to day decisions for how
13 to operate the reservoir, or do you focus on the big
14 items?

15 A. I'm not involved in the operation and
16 maintenance of the dam. In the statute, they created a
17 board of -- advisory board that advises the
18 Department -- some of that input is from sportsmen,
19 Fish, Wildlife & Parks, irrigators, recreationists who
20 use the reservoir so that they can come to an agreement
21 on how to operate the reservoir.

22 Q. And one of the things that's been discussed
23 is the winter storage in the reservoir. And are you
24 aware of a limitation on how much water can be stored
25 in the reservoir over the winter?

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1 A. Yes, we have tailored that around 45 to
2 50,000, maybe plus one or two, yeah. So 45,000 to
3 52,000, I would say.

4 Q. So let's say the water level was high enough
5 that if the ice caused damage to the spillway, who is
6 going to have to pay for that damage?

7 A. We're required to, as a board of directors,
8 uh-huh, to come up with the dollars to repair those,
9 make those repairs.

10 Q. So that operation and maintenance assessment
11 that we talked about, would it have to go up?

12 A. Certainly, yes, if we had a major problem.
13 Yes.

14 Q. Well, let's talk about water commissioners
15 for a little while here. Do you recall years when
16 there were water commissioners on the -- well, we know
17 you do because you hired Alan Fjell, who was in the
18 document we just looked at.

19 A. Yes. Yes, we recommended Chuck Kepper. We
20 recommended Charlie Gephart. Yes, I was involved in
21 that.

22 Q. Were you also involved, I guess, in operating
23 your farm and dealing with the commissioners on a
24 personal level?

25 A. Oh, yes. Uh-huh.

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1 Q. Can you just explain how they -- I guess, how
2 they interacted with you on your farm?

3 A. Oh, sure. Normally, when the year started
4 out, if they were new, they would come in the yard or
5 call ahead and say, can you help me find your
6 diversions, your points of diversion? And we'd
7 probably just hop in the pickup with them and show
8 them.

9 And like others have testified, from there
10 on, you might have a cup of tea with them, or a glass
11 of tea and visit a little bit about how much water you
12 had remaining from your stored rights. And I can't
13 emphasize enough the cordialness of the grower towards
14 the commissioners. It's just a small community.
15 Everybody knows everybody. No friction. I mean,
16 everybody tried, I think, very hard, to comply.

17 Q. Did they measure your pumps for your
18 irrigation points?

19 A. Yes.

20 Q. Do you remember what method they used?

21 A. We used the ultrasound exclusively, as I
22 recall.

23 Q. And there was testimony from Mr. Fjell about
24 a so-called honor system with certain pumps that were
25 powered by a tractor. And your name was on that list.

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1 Do you remember what happened there, and can
2 you explain that?

3 A. Oh, yes. I have one field that's quite
4 small. It's like 16 acres. And it's in alfalfa. And
5 there's no electricity or anything nearby. So in that
6 particular case, the tractor was new enough to where it
7 had an hour meter. And we kept track of the use of
8 that water by first measuring the pump's capability
9 with the ultrasound. And then I would just turn in the
10 hours on the hour meter on the tractor.

11 So by honor system, the commissioner had to
12 rely on the fact that, yes, I pumped for 20 hours to
13 irrigate this field. And he never did question me on
14 it. I guess he had maybe no reason to. But that was
15 what the honor system meant to us.

16 Q. You had an hour meter on that tractor?

17 A. Correct. Yes.

18 Q. Okay.

19 A. But he didn't -- wasn't there the moment it
20 shut off to check it. I mean, I had to give him those
21 hours.

22 Q. And how often would you communicate with the
23 water commissioners?

24 A. I probably run into them once a week.
25 Otherwise, we were out working with cattle or just not

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1 around when they came in. And so they were on their
2 own to do their job as they see it.

3 Q. And how did you ask for water to be delivered
4 for your operation?

5 A. Just like everyone else. I would call the
6 number, leave a message. And if you recall, first we
7 used to call the commissioner themselves. And of
8 course, they were being called all hours of the day and
9 night, like you might expect. So the board decided to
10 get an answering machine, so we used just one phone
11 number.

12 And, of course, my ranch was in the five-day
13 category from the reservoir. So I had to make a
14 prediction whether or not -- when to order that water
15 so that in five days I would be ready to irrigate.

16 Q. And that's the next thing I was going to ask
17 about. When would you shut off water during the
18 summer?

19 A. For the end of the season?

20 Q. No. During the season, would you ever shut
21 off your water during the season for haying or
22 anything?

23 A. The way we operated, and I think most operate
24 this way, is we will harvest a field of hay, maybe it's
25 50 acres, 100 acres, or 25 acres, or whatever. We will

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1 try to get that dried down as quickly as we can. And
2 then, of course, we'll -- as soon as that's dried,
3 we'll order -- at least as soon as we can, we'll order
4 our water. And then we'll be irrigating those fields
5 while we're still cutting others.

6 And before the summer is over, it's a
7 cyclical operation, where you're cutting, baling,
8 stacking, irrigating all at one time. It becomes a
9 rotation that works best for the maximum production
10 that you'd like to have.

11 Q. But you have to kind of predict five days in
12 advance, is I believe what you said?

13 A. That is a little tricky, yes. If you'd get a
14 rainstorm in between there and you weren't able to get
15 the hay off, it -- yeah, it caused problems all right.

16 Q. Meaning, it rained on your hay after you cut
17 it?

18 A. Yes. And you thought you'd have it off of
19 there and you ordered your water. So you had to be
20 very careful about that.

21 Q. Does it take longer to bale it if it got
22 rained on? Explain that.

23 A. Yeah, that's for sure.

24 Q. Can you tell us why?

25 A. Yes. The plant material takes on moisture.

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1 And, of course, you can't bale it when it's wet. And
2 so you hope that Mother Nature will dry it out for you
3 and you can proceed with your baling.

4 Q. So did you ever run out of water in any of
5 these dry years that we're talking about?

6 A. Yes. Uh-huh.

7 Q. I'm going to hand you a document M397 that
8 Mr. Gephart had talked about earlier.

9 A. Okay.

10 Q. Actually, did I already hand it to you?

11 A. No, this is 550. It was the last document
12 that I received. Oh, there it is. Yes.

13 Q. And on the second page of that document,
14 about halfway down.

15 A. Yes.

16 Q. I've marked three different lines. I wonder
17 if you could just read those lines for us.

18 A. "Les Hirsch 7/21, his water status. 7/24,
19 100 acre-feet, 6 cubic feet per second for 10 days."
20 And then on 8/5 [sic], it indicates that I had bought
21 water. It doesn't say from where.

22 Q. Sounds like there's a story there. Do you
23 want to tell us that story? You were ordering water,
24 and then you ran out of water and had to buy it; is
25 that right?

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1 A. I'm sure that's what occurred here. I'm not
2 certain -- if it says bought water, that would have to
3 have been from the Northern Cheyenne Tribe.

4 Q. And then on 7/21, it says "Les Hirsch, his
5 water status."

6 Was it a normal thing for you to do to call
7 and check on your water status with the commissioners,
8 how much you had left?

9 A. Oh, yes. It's much like a checking account
10 where you know about what's left in there. We watch it
11 pretty closely.

12 Q. Were you ever aware of any water users having
13 problems with the commissioners or commissioners having
14 a problem with the water user?

15 A. Very, very rarely. I remember one time I had
16 a neighbor that didn't really want the water
17 commissioner on the place, on the property. And I
18 think it was Mr. Kepper that called me and asked me if
19 I could encourage the grower to cooperate. And I did.
20 I called him and said, gosh, this is for your benefit.
21 Would you cooperate with us and let us read your
22 meters?

23 And that was all that was really said. He
24 understood that it had to be done. And -- but that was
25 the only time I ever had anybody have a problem with

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1 the commissioners on the river.

2 Q. And then I guess I'm about done here. But in
3 terms of those dry years, do you have any knowledge or
4 do you remember seeing any waste going on from
5 irrigators up and down the river area?

6 A. No. Really unequivocally no. If you think
7 about it a moment, first of all, you've got a scarce
8 resource, and you're not going to waste that. And you
9 will get up in the middle of the night. In our case,
10 if a set of water is done, we make sure we're there to
11 change it because you don't waste the resource. And,
12 number two, the pumping costs are such that you -- any
13 conscientious grower would not do that.

14 So unequivocally no. We just did not do
15 that. Myself, and I kind of think I can speak for
16 most. I'm not sure about all. But in my stretch of
17 the river, it was growers were very conscientious.

18 Q. And there's been some discussion of some
19 growers who may have not used all of their stored water
20 right.

21 A. Yes.

22 Q. Is there -- how easy is it a month before the
23 end of the season to change your practices if you've --
24 if you haven't irrigated all your land? I mean, maybe
25 talk us through that decision-making process, if you

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1 know.

2 A. Sure. Early on in the spring, you have to
3 determine, of course, what the availability of water
4 is. And then you, of course, turn to it -- a thought
5 process whereby you plant early spring crops rather
6 than late season crops, like corn. So you might just
7 plant small grains, for instance, that might need to be
8 irrigated just once.

9 And you can misjudge that. You prepare and
10 you're very conservative and you think, well, I'm not
11 going to have hardly any water to use. And you make
12 those decisions. And then, yes, you could end up with
13 some water left over.

14 Second of all, it's very difficult to take a
15 droughty plant, alfalfa, corn, or whatever, and revive
16 that, so to speak, late in the season.

17 And another comment I know was made earlier,
18 and I'd reiterate that. And that is that if, like, the
19 wind is blowing 20 miles an hour and it's 110 degrees
20 and you're in a very arid climate, and especially with
21 the sprinkler irrigation system, it doesn't do much
22 good to apply that water under those conditions. It's
23 just -- the evaporation rate is so great that you
24 might, yes, leave your water in the reservoir because
25 you know full well that you're not even going to return

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1 your pumping costs and the costs of applying that
2 water.

3 So it's very understandable that some water
4 could be left. I mean, it's a judgment that you make
5 given the conditions that are occurring at the time.
6 So it's very understandable that some could be left.

7 Q. And Mr. Hamilton testified that turning on
8 pumps with a big demand of electricity are more
9 expensive. Have you experienced that?

10 A. I don't have hundred horse power motors like
11 Mr. Hamilton. But we all have this demand charge
12 corresponding with the horse power requirement. And it
13 doesn't make sense to try to pay the demand, pay the
14 pumping costs for very little return. So that's how
15 those decisions, I think, are being made.

16 Q. I think the last question, are you familiar
17 with ice jams and winter or spring flooding along the
18 river? Do you have any experience with that?

19 A. Yes. Having lived along there most all of my
20 life, I've experienced ice jams. I've seen private
21 bridges taken out along the river from ice jams. Of
22 course, in the early days, even down by Glendive, ice
23 jams can take out huge bridges, I mean, when the
24 Yellowstone jams.

25 But on the Tongue River, yes, we experience

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Direct Examination by Mr. Swanson

1 ice jams regularly. During those drought years, of
2 course, we did not. There were so little water, I
3 guess we just didn't accumulate ice.

4 And, second of all, those were quite warm
5 winters. We didn't really have the extreme cold that
6 we normally experience, yes.

7 Q. So then in the -- I guess to wrap it up here,
8 in terms of your shares, years when your shares were
9 reduced and you irrigated less hay or you went
10 elsewhere to get hay, do you have any estimate of the
11 economic cost that was? And maybe not a number, but
12 just in terms of your operation, did you experience an
13 economic cost? Did you recover from it quickly? Or
14 how were those years economically?

15 A. Of course, those were difficult years. I
16 remember the prices of commodities has been noted,
17 wasn't very good. They were hardship years for
18 everyone. In my case, of course, like I mentioned, we
19 had to go out and get alfalfa hay to continue the
20 operations that we normally -- the pelleting business
21 that I had. And so I couldn't put a dollar number on
22 that. But much more expensive to leave home and
23 acquire a commodity that could be raised -- or should
24 have been raised right on your own ranch.

25 Q. And was it common for other users to have to

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1 buy more hay or sell --

2 A. Oh, yes. Yes, that was very commonplace.

3 MR. SWANSON: Your Honor, I have no further
4 questions.

5 SPECIAL MASTER: Okay. Thank you,
6 Mr. Swanson.

7 So I think this is probably a good time to
8 take our one and only afternoon break since we'll be
9 stopping at 4:00 this afternoon in order to move boxes.
10 So let's break for only ten minutes. And we'll come
11 back about seven to the hour.

12 (Recess taken 2:43 to 2:54
13 p.m., November 15, 2013)

14 SPECIAL MASTER: Okay. Everyone can be
15 seated.

16 So, Mr. Kuhlmann.

17 CROSS-EXAMINATION

18 BY MR. KUHLMANN:

19 Q. Good afternoon, Mr. Hirsch.

20 A. Good afternoon.

21 Q. I just have a few questions for you.

22 A. Certainly.

23 Q. You had talked about how -- I guess, the
24 process of how you use water on your property and
25 trying to irrigate some fields while haying others?

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1 A. Correct.

2 Q. Do you use the same amount of water all
3 summer in order to do that? I guess, do you take that
4 same amount of water out of the river to do that?

5 A. Yes. It's just a different timing. It's
6 just for maximization of production of alfalfa. We
7 don't use any more or any less. We just use it more
8 quickly or earlier in the season if we can operate that
9 way.

10 Q. Do you have multiple points of diversion?

11 A. Yes, I do.

12 Q. Do you run all those points of diversion all
13 the time?

14 A. Oh, no. Not all of the time, no. I would
15 run out of the water immediately if I did, yes.

16 Q. You mentioned earlier that you're a board
17 member for the Tongue River Water Users' Association?

18 A. Yes.

19 Q. Do the Tongue River Water Users'
20 Association -- is there ever a statement or receipt
21 sent out at the end of the year to users to let them
22 know how much water they used?

23 A. We do not, as a board, require that, no. The
24 record would remain with the district court. That's
25 public information. So if a grower did want to have

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1 that information, they would be able to acquire it
2 through the district court.

3 Q. The Association doesn't send a copy of that
4 out?

5 A. We do not.

6 Q. You mentioned that you used to have cattle
7 all year round or through the winter?

8 A. Correct.

9 Q. And they had to be watered from the river
10 sometimes?

11 A. Yes, they did.

12 Q. And you said that you don't have cattle in
13 the winter now, that they are kept some other place; is
14 that correct?

15 A. Correct, yes.

16 Q. Where is the water source for the cattle now?

17 A. They are in confined feedlots. So that would
18 primarily be well water where they are being
19 backgrounded, yes.

20 Q. Are those feedlots on your property?

21 A. No. They're custom feedlots elsewhere. I've
22 used one along the Tongue River, which would be the
23 Bice Ranch. He has a four-thousand head feedlot there.
24 And this fall, I do not have any cattle there. But
25 most years in the past, that's where they would be

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1 backgrounded during the winter months.

2 Q. There was some discussion about the level in
3 the reservoir; correct?

4 A. Yes. Yes, there was.

5 Q. And you had mentioned operation and
6 maintenance fees that the Tongue River water users had
7 to pay as part of the costs for their water; is that
8 correct?

9 A. Correct.

10 Q. Okay. Are there a variety of factors that go
11 into determining that number? Or I guess -- let me
12 rephrase it.

13 A. Go ahead.

14 Q. Are there a variety of factors that go in to
15 determining how much you would charge for O & M in a
16 given year?

17 A. Our expenses continually go up slowly. We --
18 so we factor in the fact that we may -- if we're
19 looking at a major repair or a significant minor
20 repair, we will take that into consideration.

21 Otherwise, we make the determination that we can get
22 through the year without major repair. Mostly, like
23 the small stuff, like weed control, paying the dam
24 tender, paying the secretary and those kind of things,
25 are expenses we try to apply to the operation and

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1 maintenance so we can cover those costs. So they don't
2 vary a great deal, but those are the components of how
3 we determine that. Some of the components. I'm sorry.

4 Q. So it sounds like it's on a year-by-year
5 basis. You'll just find out what the O & M is going to
6 be for this year, but we'll wait till next year to
7 figure out what to pay; is that correct?

8 A. That is correct, yes.

9 Q. Okay. And one last area I'd like to talk
10 about. If you can take a look at Exhibit M382, I think
11 that should still be up there with you.

12 A. Will it be on the screen?

13 Q. No.

14 A. I might have to have help with this one.

15 Q. Happy to help.

16 A. Yes, I see it.

17 Q. Okay. Can you turn with me to the second
18 page?

19 A. Yes.

20 Q. Okay. Can you find your name on this list?

21 A. Yes, I do.

22 Q. Okay. And this is a list of usage of water
23 by the Tongue River water users that was compiled by
24 Mr. Kepper, Commissioner; is that correct?

25 A. Yes.

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1 Q. What's the number next to or associated with
2 your name?

3 A. 317.

4 Q. Okay. And you'd mentioned earlier you have
5 433 shares of Tongue River Water Users' water; correct?

6 A. Correct, uh-huh.

7 Q. And I -- you mentioned there was a 55 percent
8 reduction in 2002?

9 A. Yes.

10 Q. I tried to do some math on that number. And
11 so in 2002, you would have had about 238.15 acre-feet
12 available.

13 Does that sound about right?

14 A. Yes, it would, uh-huh.

15 Q. Okay. And so the 371 acre-feet that's
16 reflected on Exhibit M382, that's more than 238
17 acre-feet; correct?

18 A. Correct.

19 Q. Okay. Do you know where that -- where the
20 water to make up the difference came from?

21 A. I'm -- I'm certain that the rest of it had
22 come from purchases either from the tribe or -- I don't
23 know we've introduced into evidence the leasing
24 agreements that I've had over the years with another
25 ranch that wasn't using their water. So I'm very

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1 confident that one of those two sources would have been
2 where it came from. Yes.

3 SPECIAL MASTER: And just before you go from
4 that document, I think everything is going to be clear
5 on the record, but you said 371. But I think you meant
6 to say 317; is that correct? I just want to make sure
7 I'm looking at the same document.

8 MR. KUHLMANN: You're correct.

9 SPECIAL MASTER: It's still larger. I just
10 wanted to make sure we're working with the same number.

11 THE WITNESS: I heard that too, yes.

12 BY MR. KUHLMANN:

13 Q. Now, you mentioned that you purchased water
14 from the tribe and from other users?

15 A. Yes, correct.

16 Q. But you don't remember right now exactly
17 which years you purchased water from the tribe?

18 A. If the Association bought the block of water
19 within 2002, I would have been part of that lease
20 'cause we purchased it from the tribe, and then we
21 sublet it to the growers that needed it. But I can't
22 definitively tell you that that's where this extra
23 water came from or whether it was from my private
24 contract from the ranch that wasn't using theirs. I
25 can't tell you definitively. I'm sorry.

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1 Q. You also don't remember exactly which other
2 years you may have purchased water from the tribe; is
3 that correct?

4 A. I do not. I should know that by now, but I'm
5 sorry, I don't.

6 Q. That's fine. Do you know if water was
7 physically available in the reservoir in 2001, 2002,
8 2004, and 2006, whether you leased water, extra water
9 or not?

10 A. Whether it was available to users? Is that
11 the question?

12 Q. Well, was there water physically in the
13 reservoir that was not used by users, whether you
14 leased it or not?

15 A. I think 10,000 acre-feet in the reservoir is
16 considered depleted. I'd have to make -- might have to
17 check on that. But it runs in my mind that we have to
18 leave 10,000 acre-feet in the Tongue River Reservoir.
19 And I'm not certain where that directive is coming
20 from. But that runs in my mind that we do have to
21 leave that quantity in the reservoir. And it might be
22 that where the -- I'm just not sure. We'd have to
23 clarify that. But I do know we have to leave some
24 water in there over winter.

25 Q. So that water would not have been leasable?

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1 A. Would not have been, pardon me?

2 Q. Would not have been leasable by you as a
3 water user?

4 A. I do not believe it would be, no.

5 Q. Okay. I guess my question was: For those
6 four years you talked about earlier --

7 A. Yes.

8 Q. -- was there water that was physically
9 available that could have been leased? And not -- I'll
10 let you answer.

11 A. Pardon me, once more. I'm sorry.

12 Q. Okay. You talked about that there was water
13 that couldn't be used --

14 A. Could not be used, okay.

15 Q. -- at all. And then there's also water that
16 was for the Tongue River water users; correct?

17 A. Correct.

18 Q. And there's also a segment of water that's
19 owned by the Northern Cheyenne Tribe; correct?

20 A. Correct.

21 Q. Okay. And that would make up all the water
22 in the reservoir; correct?

23 A. Okay. Yes.

24 Q. Do you know if in those four years, 2001,
25 2002, 2004, and 2006, if there was water physically

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1 available, if there was still water in the reservoir
2 that was not part of that bottom part but part of the
3 leasable part, that was still available at the end of
4 the season?

5 A. I would suspect not, although definitively, I
6 can't say. The need and demand was so great that I
7 don't know why we would have left any more in there
8 than we would have had to. I can't think of a reason
9 for that. So my answer would be, I don't think it
10 would have been available.

11 Q. Okay. I don't have any other questions.

12 A. Oh, thank you.

13 SPECIAL MASTER: So, Mr. Hirsch, I just have
14 two lines of questions I'd like to delve into a little
15 bit.

16 EXAMINATION

17 BY SPECIAL MASTER:

18 Q. And what I'm trying to do is understand how
19 things worked in the Tongue River area in Montana and
20 the relevant years.

21 So first of all, I want to just ask you some
22 questions about the ways in which you would order water
23 and then use water. And this is particularly helpful
24 for me because you're talking to a kid who grew up in
25 suburban Los Angeles. And although my grandfather was

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1 a farmer, I know very little about farming.

2 So, say, beginning of the actual growing
3 season, let's assume you have no direct flow rights in
4 that particular year. You have no decreed water, so
5 you're using stored water.

6 A. Okay.

7 Q. And you're about to irrigate a field for
8 alfalfa.

9 A. Okay.

10 Q. So you know you're about to need to turn on
11 your pumps. So what would you do? What do you do in a
12 typical year when you know you're about to need to
13 start to irrigate with your stored water?

14 A. And without enough -- with diminished
15 quantity or with a full quantity?

16 Q. With a full quantity. I'm not asking you how
17 much.

18 I'm just asking, how do you actually
19 physically go about getting the water from the Tongue
20 River Water Users' Association, that you're going to
21 need?

22 A. Sure. Sure. We'll go through the procedure
23 that has been kind of referenced earlier on. And we
24 would -- my ranch has a five-day lag time. So I have
25 to order water five days before actually using it. And

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1 I will do that. And then, of course, the hay field
2 would be harvested at that time. And the pump would be
3 a centrifugal pump, normally electric powered, would be
4 sitting there. And the day that I could turn on, I
5 would start irrigating that piece of ground that was
6 ready to receive water.

7 Q. Okay. And so you've ordered your water and
8 you've ordered it long enough ahead so that it actually
9 has been enough time to reach down to your property.
10 You turn on your pumps. So do you now just once you
11 turn on the pumps just let that pump run for a number
12 of days?

13 A. Yes. Well, yes. I'll know about how long it
14 takes to irrigate that. And I will turn it on, and it
15 will run night and day pumping that volume of water
16 that it is capable of pumping. And every four hours,
17 every six hours or so, I'll go out to the gated pipe.
18 As you remember, we stood along that gated pipe. And
19 when that segment of the field has been covered from
20 the gated pipe down to the end of the field, then I
21 will actually close those gates and open the new set.
22 And I'll wait another certain amount of hours. So it
23 goes until the field has been irrigated.

24 Q. So I think you've been clear about this in
25 the past. But, again, I just want to make sure I

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1 understand it. So you're having the pump run 24 hours
2 a day, but you are then diverting the water to
3 different acreage on your property as you need it; is
4 that correct?

5 A. That's correct. The border dike system that
6 we use takes a segment of the field. It might be
7 50 feet wide; it might be 100 feet wide. And that
8 water will stay concentrated between those two little
9 border dikes there. They are actually not very tall,
10 maybe 6 inches or so. But at least the water has to
11 stay confined to that strip of land.

12 And then we know in our own mind it took four
13 hours to finish the last set. And the next one might
14 be about the same length. So then in four hours we'll
15 be back there closing that segment and opening the new
16 until the field is done.

17 We don't normally shut the pumps off at night
18 because of priming and getting it going again is
19 more -- it's less difficult, I think, to just change
20 the water when it needs to be changed and leave the
21 pump run until you're finished. Yes.

22 Q. And then having irrigated for a period of
23 time, when do you stop the pumps?

24 A. Okay. When the field has been covered, that
25 pump is probably -- if it only serves one field, it

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1 will be shut down. But then in the process of haying,
2 during that, say, two, three, four days it took to
3 cover this field, you will probably have another field
4 or two that was harvested of the hay or grain or
5 whatever. And then we're able to either continue on
6 with that pump if it serves two or three fields or
7 start an additional pump.

8 And so like I kind of indicated, it becomes a
9 continuous process that we -- yeah, that's how we live
10 our summers, I guess.

11 Q. Right. So when you order a certain amount of
12 water from the stored contract water that you're
13 entitled to, you might, for a period of time, pull that
14 water out of one pump and then turn on a different pump
15 after that?

16 A. That is true. That is true. Or there might
17 be two running at the same time. And -- but I've
18 ordered enough water to cover the needs of both pumps,
19 yes. So it's a work in progress. You've kind of got
20 to keep five days ahead of what you're going to need.

21 It sounds complicated, but it's relatively
22 simple once it occurs or you get into a sequence of
23 events.

24 Q. So in looking at some of the documents, I'll
25 frequently see a reference to a certain amount of water

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1 for five days.

2 A. Yes.

3 Q. When you place your order, do you typically
4 ask for a certain amount of water for a set number of
5 days?

6 A. That's correct, yes. We -- yeah, we think we
7 know about what it takes to pump that much water with
8 that particular pump. And so we -- yeah, we order it
9 over that duration of time so that we have those days
10 to actually use the water. So, yes, there's a quantity
11 and a time element there that we try to get to -- well,
12 to come together, I guess you'd say.

13 Q. So you're trying to predict ahead of time as
14 to how much water you're going to need?

15 A. That is true, yes. We have to kind of guess
16 at what that field requires and how much that pump
17 pumps during that period of time. So if it pumps --
18 yeah, if it pumps 2000 gallons per minute, that would
19 be about 4 CFS. We would try to order that. And then
20 I would say I need that for five days. It will take
21 five days to finish this project. That's how we
22 would -- that's how we would do it, uh-huh.

23 Does that make sense?

24 Q. This is very helpful. So what happens -- do
25 you ever guess wrong?

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1 A. That's a good question. We probably fudge a
2 little bit. Water commissioners, if I was a day or two
3 late and nobody was short and then were getting their
4 water, they seem to be receptive to the idea of, yes,
5 go ahead and finish. So there's real flexibility, I
6 think, in that.

7 Although, we do try to be as accurate as we
8 possibly can. But with rain and different events that
9 can interfere with that schedule, we just have to do
10 the best we can.

11 Q. So normally you're ordering water for a set
12 number of days. And are there times when you decide
13 you want to actually turn off your water sooner than
14 you originally thought?

15 A. There are times that -- although, there's
16 probably another pump running somewhere where I can
17 actually use that. We don't try to lose any of our
18 stored water in the worst way. I mean, especially if
19 it's quite limited. Yes.

20 Q. Okay. So in -- you mentioned earlier that if
21 you need to order water, you have to order it five days
22 ahead?

23 A. In my situation, yes.

24 Q. Right. If you want to turn off your water,
25 do you have to turn it off five days ahead also?

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1 A. No. No. We probably used up that allotment.
2 And so there's -- it's gone. The pump shuts -- I mean,
3 we have to shut the pump off 'cause we have no more
4 allotment.

5 Q. All right.

6 A. Yes. And sometimes we don't tell the water
7 commissioner that we shut off. I have to admit that.
8 He assumes that you're done, and he might drive in.
9 And, of course, if you're still pumping, I mean, sure
10 you'd be in deep trouble. But they seem to be
11 receptive to the idea that most everybody is honest
12 about that.

13 I don't think there was any abuse of that,
14 that I know of. But they did give us some flexibility.
15 The commissioners do.

16 Q. Okay. So I guess my question is, if you
17 actually wanted -- and, again, this is probably
18 hypothetical, but if you decided that you needed to
19 turn off your pumps and you didn't really want to have
20 that water credited to you, then would you need to
21 generally do that five days ahead because of the fact
22 that it actually takes that long for water to get to
23 you? If that's unclear, tell me, and I'll rephrase it.

24 A. Yeah, try me one more time.

25 Q. Sure. Let me rephrase it this way: So let's

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1 assume -- so there's some situations where you might
2 turn off a pump a day earlier than you thought you
3 would?

4 A. Yes. But it might be that you got done
5 sooner but yet you used up your water. That could be
6 the scenario, yes.

7 Q. Okay. I see. So you've already used it up,
8 so telling somebody you don't want it doesn't do you
9 any good at that point 'cause you've already used it?

10 A. That's true. Now, in the event that you
11 didn't get it used up, in that event, I probably have
12 another pump that I could use that water. So
13 technically speaking, in my situation, I probably don't
14 let any of my stored water get away from me 'cause it's
15 in such limited supply.

16 Does that make sense?

17 Q. Yes, that's very helpful. So in your
18 particular case, as a normal matter, you're going to
19 end up using all the water that you've asked to be
20 released to you?

21 A. That's a fair statement, yes.

22 Q. Okay. Let me -- I also just want to go over
23 just a little bit the way in which the various water
24 rights work. So you have 433 shares in the Tongue
25 River Water Users' Association?

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1 A. That's right.

2 Q. And those shares entitle you to, in a normal
3 year when there's not a shortage, 433 acre-feet of
4 water?

5 A. That's correct.

6 Q. But in order to get that water, you still
7 have to pay the Tongue River Water Users' Association
8 for that water?

9 A. Oh, yes. Yes.

10 Q. And that water is both -- the price you're
11 paying is covering operation and maintenance costs?

12 A. Uh-huh.

13 Q. And it's also covering the cost of actually
14 repaying the construction costs on the --

15 A. The loans, yes, that did the construction,
16 correct.

17 Q. Okay. And then if you want to acquire
18 additional water, possibilities are, in a year where
19 the Northern Cheyenne Tribe has done all the paperwork
20 on time, then there's a possibility that you could
21 acquire the water right from the tribe; is that
22 correct?

23 A. Correct.

24 Q. And the tribal water right, as I understand
25 it, costs more than the Tongue River Water Users'

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1 Association contract water?

2 A. Yes. In the past, the tribe has been advised
3 that their water is worth X amount of dollars. And
4 they've taken that advice from a consultant. And then
5 we have to determine, I guess, whether or not that's an
6 economic -- it's something that's economically viable
7 for what we're doing.

8 If you have a high-dollar crop sitting there,
9 it very well would be that that price was well within
10 your means. And then in other cases, if your crop
11 isn't too valuable, maybe you decide that's -- I'm not
12 going to irrigate it any further and just take what's
13 there.

14 Q. Okay. Great. That's helpful to me.

15 So also sometimes some other members of the
16 Tongue River Water Users' Association may not be using
17 all of their water, is that correct, and, therefore,
18 would be willing to make it available for you to use?

19 A. Yes, that is correct. There's a few ranches
20 that use none of their water. Maybe labor conditions
21 are such or they're elderly and don't want to grow
22 crops. And in the case -- I have a case where I could
23 rent 205 acre-feet annually usually from that
24 situation, yes. They don't use their water. So
25 they're quite willing to lease that to me.

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1 And according to the State of Montana, they
2 don't want that user generating income from that. So
3 they have to actually rent that to us for the price
4 they pay for it. So -- and I think that's reasonable.
5 I do.

6 So we just simply pay their water bill, the
7 operation and maintenance costs. And we're entitled to
8 use that water each year that we lease it, yes.

9 Q. Okay. So that's --

10 A. Two sources, Your Honor.

11 Q. You anticipated my question on that. And on
12 those, those are then a direct agreement between you
13 and that other water user?

14 A. That is correct. And as long as we notify
15 the Association that's what's going on and notify the
16 commissioner so they can administer it, we're all good
17 to go.

18 Q. Thanks. And then I believe you also
19 mentioned that at least one year, the Association
20 itself contracted with the Northern Cheyenne Tribe for
21 water that then the Association distributed to --

22 A. To the members, yes, correct, Your Honor.
23 That worked one year early on. And then I guess that
24 was -- and I can't remember. I think that water was \$7
25 an acre-foot at that time. And we remarketed all of

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1 that.

2 But then as the years went by and as the
3 tribe utilized their consultant, that price got fairly
4 high. Not in California crop terms, but in our crop
5 terms, yes.

6 Q. I understand entirely. And I'll be
7 fascinated someday to find out who exactly their
8 consultant was on that advice.

9 A. Sure.

10 Q. So the final question on this is, so you
11 talked about the operation and maintenance costs. So
12 in a year in which there's not enough stored water and,
13 therefore, the amount of contract water which is
14 allocated is less than a hundred percent -- let's take
15 for example, the year it was only 55 percent -- how
16 does the Tongue River Water Users' Association cover
17 its operation and maintenance costs in that year?

18 A. We always charge a dollar maintenance fee for
19 each contract acre-foot. So that doesn't change just
20 'cause there's less water in the reservoir. If it's
21 only half, we end up paying \$2 an acre-foot, if you
22 follow me. So we don't tie that number to the
23 available water. It's always \$1 per acre-foot.

24 Q. I'm sorry. Now you've confused me a little
25 bit. Let me see if I understand.

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1 So is the operation and maintenance cost tied
2 to your shares or to the amount of water you actually
3 get?

4 A. It's tied directly to the shares. I would
5 pay \$433 per year no matter if I got 200 acre-feet.

6 Q. Okay. So in the years in which you get, for
7 example, only 55 percent of your water, you're still
8 paying the same price as if you got 100 percent of your
9 water?

10 A. Exactly right, yes.

11 Q. Okay.

12 A. Nobody has objected to that that I know of,
13 but upon second thought, it seems like maybe that is
14 inappropriate, but I don't know.

15 Q. I don't want to cause any trouble within the
16 Tongue River Water Users' Association. I'm just,
17 again, trying to figure out exactly how this actually
18 operates.

19 And so similarly, if there's less water
20 available for you in a particular year and you have to
21 then lease from another water user, you are paying for
22 a hundred percent of your shares?

23 A. Yes.

24 Q. Plus in addition to that now, the water that
25 you're getting from the lessor?

Recross Examination by Mr. Kuhlmann
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1 A. Lessor, exactly right. Plus their operation
2 and maintenance also. You cover -- you pay that also.
3 So it's -- yes, that's how it works.

4 Q. Okay. Thank you. So that's very helpful.

5 MR. KUHLMANN: I have a couple questions.

6 REXCROSS-EXAMINATION

7 BY MR. KUHLMANN:

8 Q. Just now you were talking with the Special
9 Master about a year when the Tongue River Water Users'
10 Association purchased water from the tribe and
11 subleased it to members?

12 A. Yes.

13 Q. Okay.

14 A. Do you recall what year that was?

15 Q. Well, I have an exhibit.

16 SPECIAL MASTER: I think he was going to ask
17 you that question.

18 BY MR. KUHLMANN:

19 Q. I have an exhibit that I hope might help you.

20 A. Thank you.

21 Q. This is Exhibit 378A, and it's on a page
22 marked MT09971.

23 A. 378A, you may have to help me with that one.
24 Thank you.

25 Q. You have a copy of that exhibit in front of

Recross Examination by Mr. Kuhlmann
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1 you now.

2 A. Yes, sir.

3 Q. Can you read the second paragraph of that
4 exhibit?

5 A. "On 9/20/01, 7000 acre-feet of stored water
6 was purchased from the Northern Cheyenne Tribe by the
7 Tongue River Water Users' Association. This water was
8 to be metered out from 8/20/01 through 9/4/01."

9 Q. Okay.

10 A. Yes.

11 Q. Okay. So those dates said 2001; is that
12 correct?

13 A. Yes.

14 Q. Okay. Does that refresh your recollection
15 about what year the Tongue River Water Users purchased
16 water?

17 A. Yes.

18 Q. Was that in 2001?

19 A. It was. Yes, according to this document,
20 yes, it was.

21 Q. Well, does that sound correct to you, to your
22 knowledge?

23 A. Yes.

24 Q. We talked earlier about your shares with the
25 Water Users, 433 shares; correct?

Recross Examination by Mr. Kuhlmann
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1 A. Correct.

2 Q. So in a year where you have your full shares,
3 so all 433 acre-feet available to you --

4 A. Yes.

5 Q. -- about how long does that allow you to
6 irrigate your property after you're off direct flow?

7 A. After the direct flow, how long does it allow
8 us to irrigate? Are you looking for a date or -- I'm
9 not -- like, August 15th? Is that -- or am I to answer
10 that by saying how many acres does that cover? How --
11 I'm sorry.

12 Q. I guess the amount of time.

13 A. The amount of time. We're usually done
14 irrigating by August 20th for alfalfa. We have enough
15 reserve moisture at that time to probably finish the
16 crop as best it's going to grow. And so my best answer
17 would be August 20th.

18 Q. So when you have your full 433 shares, does
19 that meet your needs?

20 A. It does not. As I mentioned before, I have
21 actually purchased water from a private source. And so
22 we normally supplement that 433 with that additional
23 water.

24 To give you an idea, with laser-leveled land
25 and gated pipe, it takes about 8/10th of an acre-foot

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1 to irrigate an acre of alfalfa under my situation. I
2 think rougher fields ask longer runs and some other
3 variables, it probably takes a full acre-foot to
4 irrigate an acre. But in my case, at 8/10ths of an
5 acre-foot would be my very best guess on that.

6 So if you divide -- if you times 320 acres by
7 8/10th of an acre-foot, you can just about tell how
8 many times I can irrigate that. Only twice normally.
9 And then I have to rely on direct flows when no one
10 else has called for them to do the three irrigations.
11 So I'm chronically short, yes.

12 Q. Okay. I don't have any other questions.
13 Thank you.

14 A. Thank you.

15 SPECIAL MASTER: Okay. Thank you,
16 Mr. Kuhlmann.

17 Mr. Swanson?

18 REDIRECT EXAMINATION

19 BY MR. SWANSON:

20 Q. We're almost done, Mr. Hirsch.

21 A. Pardon me?

22 Q. We're almost done.

23 A. We're almost done. Thank you.

24 Q. I have a question about the document
25 Mr. Kuhlmann showed you a moment ago referencing a

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1 lease of tribal water in 2001. Do you know if that was
2 the only year that the Association leased water from
3 the tribe?

4 A. I believe it was. After that we instituted
5 the policy of letting each individual grower lease
6 their own water from the tribe, and I actually did that
7 on at least one occasion.

8 Q. I wonder if we could look at Exhibit M382,
9 the second page of that. Do you have document M382?
10 It was not one I gave you. It was one Mr. Kuhlmann
11 gave you on the cross-exam.

12 A. I have that page that referred to 2001. But
13 I don't have M382 that I know of.

14 MR. SWANSON: Can I approach and see if he's
15 got it, Your Honor?

16 SPECIAL MASTER: You certainly may.

17 BY MR. SWANSON:

18 Q. And looking at the second page, which was the
19 page that Mr. Kuhlmann referred to.

20 A. Yes.

21 Q. And I don't know if you heard Mr. Kepper's
22 testimony, but I'll represent to you that he said this
23 may or may not have been the final draft document that
24 was submitted to the court. So I'm not worried too
25 much about your testifying to its accuracy.

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1 I just had a question about these shares that
2 are all listed. If we look at the very bottom name
3 there, it's BIA, which I understand to be the Bureau of
4 Indian Affairs. And it says one -- I believe 1666
5 acre-feet.

6 Do you see that?

7 A. Yes, I do.

8 Q. Do you know -- and this would have been in
9 2002. So this would have been when water users were
10 leasing it directly from the BIA. Do you have any idea
11 whether the water commissioners, in preparing this,
12 actually counted that water buys, basically listed it
13 as 1666, and then may have listed it with other water
14 users, such as John Hamilton, with the amount he
15 leased?

16 Do you have any knowledge about that?

17 A. I wouldn't know if it was calculated twice.
18 I'm sorry. I wouldn't.

19 Q. That's fine. So we will set that aside for a
20 second. And we'll look at one more document to clear
21 up a question, or at least maybe help further answer a
22 question from the Special Master. And that's M397.
23 Those are that pages of handwritten notes from
24 Mr. Gephart. And I had you look at the second page
25 where there were some items discussing your inquiries

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1 for your water status.

2 Do you recall that document?

3 A. Do I have it?

4 Q. Let me approach.

5 A. Thank you. Gosh, I'm sorry.

6 Q. That's okay.

7 A. Yes, I have that document.

8 Q. All right. On the second page, I'm just
9 going to refer you back to the thing we talked about
10 that was specifically your water rights. There's a
11 notation more than halfway down the page that says
12 "7/24," which I understand to be July 24th, "Les
13 Hirsch, 100 acre-feet, 6 CFS for ten days." You see
14 that?

15 A. Yes.

16 SPECIAL MASTER: Actually, just to be clear.
17 I think there's a squiggly line in front of the ten.

18 BY MR. SWANSON:

19 Q. Which means about ten days. And my question
20 is when Special Master was asking you in terms of
21 ordering water five days ahead and wanting to shut it
22 off, I believe what you said was that we use up that
23 particular allotment that we order and we don't cancel
24 it at the end of that allotment. So when I refer to
25 this, can you just explain what you mean? Let's say,

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1 on this particular quantity of water, when you ordered
2 it for ten days, how that would work.

3 A. Actually how it would work? That's the
4 question?

5 Q. You order water for ten days, and you use it
6 for ten days?

7 A. Yes, I would.

8 Q. Do you call them back on day five and say,
9 shut off in five days, or do they only send you ten
10 days' worth of water?

11 A. They would send me 6 cubic feet for the
12 ten-day duration. But they do not ask me to shut off
13 in five days, no. Am I following you correctly?

14 Q. Yeah. So they send you ten days of water.
15 And then, let's say you realize you're going to get
16 done early. And say you only want to use eight days of
17 water, you would need to call them on day three and say
18 shut -- you know, that amount I ordered, I want you to
19 reduce it; is that right?

20 A. I see. That hypothetical probably would not
21 occur because I would have another pump that, say I did
22 finish the one project early, I would probably just use
23 that allotment at another diversion and, thus, would
24 not let it go by, nor would I cancel a portion of it.

25 Q. And that's what I thought you were indicating

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1 when you said the water commissioners were flexible in
2 helping you figure out how to use that water; is that
3 right?

4 A. Yes, that would be correct. They are very
5 flexible. They are.

6 Q. 'Cause once it's out of the dam, you can't
7 call it back?

8 A. It's pretty hard.

9 Q. And then I guess near the beginning of
10 Mr. Kuhlmann's cross-examination, he was asking you
11 about cattle and watering from the river. I think we
12 looked at -- or we heard from your testimony that you
13 did have cattle in 2002 in the winter; right?

14 A. Yes, mother cows.

15 Q. So they would have been watering out of the
16 river in those years?

17 A. Yes.

18 Q. Do you know about 2004?

19 A. I just don't remember when I sold my cow
20 herd. I don't know about 2004.

21 Q. But 2000, 2001, 2002 you would --

22 A. I'm sure I had my cow herd then, yes.

23 Q. And I think you said you don't know if you'll
24 go back to that, but are you telling us today you'll
25 never go back to mother cows, or you may someday? Do

Further Examination by the Special Master
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1 you know?

2 A. Yes. To answer that question, I certainly
3 wouldn't rule that out. It's kind of a high stakes
4 game buying and selling cattle. The mother cow
5 operation is much more economically safe than buying
6 and selling. So if I get nervous someday, I won't do
7 this anymore, and I'll go back to my cow herd.

8 MR. SWANSON: Thank you, Your Honor.

9 SPECIAL MASTER: Thank you. Let me just
10 follow up since you brought it up. I'm now curious.

11 FURTHER EXAMINATION

12 BY SPECIAL MASTER:

13 Q. On this one line for 7/24, where it's 100
14 acre-feet, 6 CFS for approximately ten days.

15 A. Yes.

16 Q. I can understand an order for 6 CFS for ten
17 days. But would you sometimes say, I want 6 CFS for
18 about ten days?

19 A. Oh.

20 Q. And what would that mean in terms of an
21 order?

22 A. To the water commissioner, what would that
23 mean?

24 Q. Yes.

25 A. I was unsure of what I was doing. I might

Further Examination by the Special Master
LEE HIRSCH - November 15, 2013

1 say about. I'm not sure.

2 No, I think it was a definitive order. The
3 water commissioner would certainly process it as a
4 definitive order, I'm sure, even if I did say about.
5 Is that helpful?

6 Q. Yes. So I'm just trying to figure out if --
7 and, again, don't -- you know, do not speculate on
8 this. But I'm just curious. If you are the tender at
9 the Tongue River Dam, how do you figure out how much
10 water to deliver under those circumstances?

11 A. When I'm not certain?

12 Q. Yeah. And you might never have said this.
13 So I'm just curious.

14 A. Yes. I really think he would have thought
15 that would be a definitive order, and he would deliver
16 it, yes.

17 Q. Okay.

18 MR. SWANSON: Thank you, Your Honor.

19 SPECIAL MASTER: Thank you, Mr. Swanson.

20 Thank you, Mr. Hirsch. You can step down.

21 So we still have 15 minutes, and I would
22 actually love to use that if we can.

23 MR. DRAPER: Well, we do have our next
24 witness, Your Honor, if you'd like to use that 15
25 minutes.

JAY NANCE - November 15, 2013
Direct Examination by Mr. Swanson

1 SPECIAL MASTER: I think we might as well.

2 MR. DRAPER: All right. We would, with your
3 permission, then, call Mr. Jay Nance to the stand. And
4 Mr. Swanson will be doing the direct examination.

5 SPECIAL MASTER: Okay. Thank you.

6 (Jay Nance sworn.)

7 THE CLERK: Please be seated. If you'd state
8 your name, and spell it for the court reporter.

9 THE WITNESS: Yeah. It's Jay Nance, J-a-y
10 N-a-n-c-e.

11 SPECIAL MASTER: Good afternoon, Mr. Nance.
12 And sorry to have you take the stand for a little while
13 this afternoon. But my goal is to both try and get
14 this proceeding concluded sooner than later, and also
15 this will get you off the stand earlier when you have
16 to retake it.

17 THE WITNESS: Thank you.

18 JAY NANCE,
19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. SWANSON:

22 Q. Good afternoon, Mr. Nance.

23 A. Good afternoon.

24 Q. How are you doing?

25 A. Good.

JAY NANCE - November 15, 2013
Direct Examination by Mr. Swanson

1 Q. I understand you're shipping cattle this
2 week?

3 A. Yeah.

4 Q. Well, thanks for taking time out for business
5 to come see us.

6 A. You're welcome.

7 Q. Can you tell us where you currently live?

8 A. I live about 10 miles north of the Birney
9 post office on the east side of Tongue River.

10 Q. And you operate a farm and ranch; is that
11 correct?

12 A. I do.

13 Q. Could you -- looking at the diagram that's
14 blown up next to us -- this is an enlarged Figure 1
15 from Exhibit M5 -- could you mark on there with the
16 black marker the location of your property?

17 A. Yes.

18 Q. So you're about a third of the way between
19 the state line and Miles City on the Tongue River; is
20 that about right?

21 A. Yeah.

22 Q. And have you lived there your whole life?

23 A. Pretty much. I was gone for about two years,
24 but the rest of my life I've been there.

25 Q. Where were you for those two years?

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1 A. I was in a career in aviation in the
2 mid-'60s.

3 Q. So you were a pilot?

4 A. I am a commercial pilot, yes.

5 Q. Do you still fly?

6 A. I do.

7 Q. Did you fly here from your place?

8 A. No, it was too dark when I left home last
9 night to do that.

10 Q. How long have you operated the ranch that you
11 live on?

12 A. Well, I was born there. And except for those
13 two years in the mid-'60s, I've been there my whole
14 life.

15 Q. So you've basically grown up working on the
16 place with your father; is that right?

17 A. That's correct.

18 Q. And since -- when did you take over,
19 basically, full responsibility for managing it?

20 A. Well, it was just sort of a gradual process.
21 He died in 2005. But we worked together when he was
22 able to work and then consulted as long as he was alive
23 about decisions that we were making on the ranch. So
24 he was in good enough mental health until his death to
25 participate in some fashion throughout his whole life.

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Direct Examination by Mr. Swanson

1 Q. Can you tell us about your irrigation
2 practices? Do you irrigate?

3 A. Yeah. We have a gravity flow irrigation
4 ditch and also have one side roll sprinkler system,
5 which is a mile or so south of the diversion point for
6 the gravity flow system.

7 The gravity flow system consists of a ditch
8 that's deep enough to draw water out of the Tongue
9 River without a diversion dam and long enough to be
10 able to get the water up, you know, to where it's
11 useable as far as getting it to run out on the fields.
12 So, consequently, we've got about 2 or 3 miles of ditch
13 that's unusable as far as being able to put it out on
14 the ground.

15 And I use the analogy that it's -- maybe the
16 river drops 6 feet to the mile, and my ditch drops
17 3 feet to the mile. So the farther you get down the
18 river valley, it becomes high enough to where you could
19 start using it.

20 So anyway, I've got quite a bit of ditch
21 before it becomes usable. And then I irrigate from
22 about the first point of usable water. I irrigate
23 about 375 acres. It's all flood irrigation, ditch.
24 Dams and ditches. And we do use pumps on a couple of
25 fields.

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1 On one field, we use a pump to pump out of
2 the irrigation ditch and raise it up about 4 or 5 feet
3 and irrigate quite a few acres doing that. But we're
4 actually pumping out of the irrigation ditch, not the
5 river.

6 And we have a couple other diversion points
7 in the river that we can use contract water, or I think
8 they are legal to use for water right water as well.

9 Q. And I think what we'll do is look at a couple
10 of things that will help us look at those. And we've
11 heard a lot of discussion of the No. 1 right in the
12 river, and that's your water right; is that correct?

13 A. It's -- I'm a grateful No. 1 water right
14 owner, yes.

15 Q. There's a spiral bound notebook there before
16 you that has a number of pictures. That's Montana
17 Demonstrative Exhibit No. 2.

18 Do you have that?

19 A. Yes.

20 Q. Could you turn to the page marked 2-bb? And
21 I understand -- you were at the -- your irrigation
22 ditch this summer when we did the special -- the tour
23 with the Special Master; is that correct?

24 A. 2-what?

25 Q. BB?

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1 A. DD as in dog?

2 Q. Boy boy. And it will come up on the screen
3 in a second as well.

4 SPECIAL MASTER: So GG. BB is the go away
5 sign.

6 MR. SWANSON: Well, I wanted to ask him if he
7 recognized it.

8 SPECIAL MASTER: Oh, so you want BB. You
9 want boy boy.

10 MR. SWANSON: My colleague didn't comply.

11 BY MR. SWANSON:

12 Q. I wondered if you recognize this on the
13 screen next to you.

14 A. No, I don't.

15 Q. I believe Mr. Hayes has that as his front
16 gate. So I wondered if you ever felt you couldn't go
17 to his house because you have that sign?

18 A. Yeah, I stop immediately when I get to that
19 sign.

20 Q. Now, if we can go to 2-GG. Is this -- can
21 you tell us what we're seeing in this photo?

22 A. Yep. Yes, that's my diversion point for my
23 gravity flow ditch. And we're standing on a new --
24 actually standing on top of a new cement headgate
25 taking a picture of an old cement headgate.

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1 Q. And I think we go to the next page, 2-HH. Is
2 this your current headgate?

3 A. Yes, it is.

4 Q. Why did you put in the new one rather than
5 the old one we looked at a moment ago?

6 A. The old one just became unworkable. The
7 cement was cracking. I heard you all talking earlier
8 about ice jams. You can see how high this headgate is
9 above the water, river water there. We've actually had
10 ice jams go over the top of these headgates. And the
11 old headgate that I mentioned earlier was damaged by
12 ice at one point. And it's a long ways to the water
13 from the top of that headgate. So the ice jam got
14 pretty severe.

15 Q. Is this basically the same point of diversion
16 and system of getting the water out of the river since
17 it was first established?

18 A. It's not quite the same. Most of the
19 diversion dams on Tongue River required -- or most
20 gravity flow systems in the old days were obviously --
21 they all had gravity systems; they didn't have any
22 pumps. But they always seem to require a diversion
23 dam, either built out of rocks or trees or both. And
24 they were very expensive, time-consuming thing to
25 maintain.

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1 And there's still evidence of them being in a
2 pile. You can see old diversion dams up and down
3 Tongue River that have been abandoned and people put
4 pumps in.

5 Well, in our case, the original 1800 water
6 right was about a half mile down the river from this
7 one. So we changed our diversion point. And basically
8 what we did was lengthen the ditch up the river so that
9 we could take water out of the river with no diversion
10 dam and not have to maintain anything in the river and
11 have ice tear it out every spring and have to do it all
12 over again.

13 With the exception of that change, the
14 ditches and the -- everything, the ditch that goes down
15 the river, all through my hay meadows, this was all put
16 in with horses in the 1890s, and it's still there.

17 Q. Let's look at another exhibit. I'll help you
18 find the page. But it's going to be Appendix D to M6.
19 Exhibit M6. And I'll approach and hand you the paper.

20 So I'm looking at, it says page D1. The
21 number at the bottom is MT017999. And as I understand
22 it, this is your direct flow water right that we were
23 talking about.

24 Do you know if that's the right number?

25 A. I believe it is.

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1 Q. And then if we go to the next page, there's a
2 bit of a map. And so looking at this map, there's a
3 blue line running along the river that indicates ditch
4 in the legend. Is this your ditch that you were
5 talking about in terms of the long ditch before you get
6 to your meadows?

7 A. Yes, it is.

8 Q. And this map is going to be blown up on the
9 screen next to you. And you can write on that screen
10 with your finger. In a second when it's blown up, I'd
11 ask if you'd just indicate your points of diversion.
12 And trace with your finger the path of the water as you
13 irrigate your lands.

14 A. You want the points of diversion and the flow
15 of the water?

16 Q. Just generally, you can you kind of describe
17 how you irrigate the lands. And then trace with your
18 finger. We're going to give you a different map in a
19 second.

20 SPECIAL MASTER: While we're doing this, what
21 I'd suggest is we probably finish with Exhibit M6 this
22 afternoon, and then we can break and do the rest of the
23 examination on Monday morning.

24 MR. SWANSON: Yes, Your Honor.

25

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Direct Examination by Mr. Swanson

1 BY MR. SWANSON:

2 Q. Okay. So looking at the map that's before
3 us, Mr. Nance, on the screen, there's -- right where
4 I'm indicating with my finger, right at the bottom of
5 that blowup, there's a small little red disk, which the
6 map indicates is the point of diversion. And then can
7 you just kind of talk us through how you irrigate your
8 lands with that ditch and those fields?

9 A. Okay. Yeah. The point of diversion is as
10 you pointed to it. And the ditch just flows -- I can't
11 see what I'm doing. The ditch doesn't really become
12 usable until it gets down to here. And once it gets to
13 that particular point, we start using it. And we dam
14 up the ditch and irrigate the fields as we get to them.

15 Q. I'm sorry. That's about a mile and a half of
16 ditch before it gets to the field; is that right?

17 A. Yeah. I don't know exactly, but it's quite a
18 ways.

19 Q. Okay. Go ahead.

20 A. And then we just keep working our way down
21 the ditch with the water. And as we arrive at each one
22 of these fields, we dam it up, irrigate the field. And
23 there's a variety of rather complicated series of
24 ditches it takes to do all this. And anyway, we just
25 keep working it all the way down to the other end of

JAY NANCE - November 15, 2013
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1 the ranch.

2 Q. And there's a couple of little notations next
3 to these two other fields that look like other points
4 of diversion. Do you use other points of diversion?

5 A. Occasionally, we do. It depends on the year.
6 And we can pump onto -- there's two fields that we can
7 pump onto with those. And that's all. It's very small
8 fields. And we can pump on those out of the river and
9 hurry up the whole process of the irrigation.

10 Q. Okay. And just a couple more questions about
11 this exhibit, and then we'll probably take a break.

12 If you'd turn in that binder there that's
13 before you, a couple more pages to the page that's D6
14 at the bottom. Looking at what appears to be the
15 decree for your water right, I'm looking at a priority
16 date of July 6, 1886; is that correct?

17 A. I believe so.

18 Q. And a flow rate of 10.48 CFS?

19 A. Yes.

20 Q. And can your ditch take 10.48 CFS?

21 A. Yes.

22 MR. SWANSON: And, Your Honor, I think this
23 is a good place for us to take a pause.

24 SPECIAL MASTER: Excellent. Then why don't
25 we recess for today. And, Mr. Nance, I'm sorry that

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1 you have to come back another time. But that's the way
2 sometimes how these schedules work out.

3 And so I'm just thinking we should start next
4 Monday morning at 9:00 just so people can get settled
5 in with their boxes. We can make sure we know exactly
6 where the court reporter and everyone is going to sit.
7 It would be great probably to start at 8:30 on Tuesday,
8 Wednesday, Thursday. We can do that. But I think
9 probably Monday morning it's safe at 9:00.

10 MR. KASTE: That would be wise.

11 MR. DRAPER: I think that's the best policy.

12 SPECIAL MASTER: Great. We're recessed. I'm
13 going to be staying in here to try and clean up my
14 boxes too. So we're officially in recess. And no
15 reason to continue standing unless you're about to
16 clean up your boxes.

17 (Trial Proceedings recessed at
18 4:01 p.m., November 15, 2013.)

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REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 238, 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, 2014.



Vonni R. Bray, RPR, CRR
P. O. Box 125
Laurel, MT 59044
(406) 670-9533 - Cell
(888) 277-9372 - Fax
vonni.bray@gmail.com