

No. 137, Original
IN THE SUPREME COURT OF THE UNITED STATES
VOLUME 18 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
8:33, Tuesday, November 19, 2013

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Proceedings recorded by machine shorthand
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1 TUESDAY, NOVEMBER 19, 2013, 8:33 A.M.

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

4 Okay. Why don't we start out this morning by
5 resolving Wyoming's motion at the end of Montana's case
6 yesterday. So I did go home. I carefully -- yes.

7 MS. VERLEGER: This is off the record.

8 (Discussion held off the
9 record.)

10 SPECIAL MASTER: Would anyone object if we
11 took lunch today at 11:30, if I remember correctly?
12 That gives us an opportunity to all get out and get
13 lunches before the lunch crowd hits. And Ms. Verleger
14 has an 11:30 phone conference she wants to participate
15 in.

16 Any objection to that?

17 MR. KASTE: No objection.

18 MR. DRAPER: No.

19 SPECIAL MASTER: Okay. Then we will plan to
20 take the break at 11:30 this morning. And,
21 Ms. Verleger, if I forget about that and we're in the
22 middle of a witness, feel free just to stand up, and
23 I'll remember at that particular point.

24 Okay. So I did take all of my notes home
25 last night, reviewed them carefully. And, Mr. Draper,

1 I mentioned that I might want a little bit of help from
2 you on a couple of years.

3 My notes were, I think, really quite good on
4 the question of notice for actually 2001, 2002, 2003,
5 2004, and 2006 as well as the 1981 year that was added
6 back in.

7 But could you just briefly summarize what the
8 evidence was on '87, '88, '89, and 2000? Because those
9 were the years where my notes weren't as copious as on
10 some of the other ones.

11 MR. DRAPER: Yes, Your Honor.

12 SPECIAL MASTER: Okay. Thank you.

13 MR. DRAPER: You had mentioned the years
14 before 2000 yesterday. And that's what I focused on.
15 So my remarks are mainly directed to the 1980s.

16 SPECIAL MASTER: Okay. Thank you.

17 MR. DRAPER: I think you mentioned first that
18 your notes were quite good on the 1981 exchanges that
19 were memorialized in Exhibit M136.

20 SPECIAL MASTER: That's true.

21 MR. DRAPER: Between Mr. Fritz and
22 Mr. Christopoulos.

23 SPECIAL MASTER: That's correct.

24 MR. DRAPER: And we would formally ask that
25 you reserve any ruling. I know you've made rulings

1 prior to trial that did not have the benefit of this
2 evidence that came in late during the discovery
3 process. And we would formally request that, to the
4 extent that your rulings were made in the absence of
5 that and that these are relevant, that you would
6 reconsider your rulings excluding matters that relate
7 to the years 1981 and following. Because those do show
8 the consistent position of the state of Wyoming that
9 they did not need to do anything to protect the
10 pre-1950 rights of Montana.

11 You see that in those notes very clearly.
12 It's the message that we've been getting down through
13 the decades. It was essentially the response right up
14 until your ruling in this case. And so we've been
15 battering against that concrete wall for all that
16 period. There's no evidence that that attitude changed
17 after the 1981 exchanges that do document that.

18 I would point Your Honor to particularly the
19 evidence that Mr. Moy gave with respect to those years:
20 1987, 1988, and 1989. I did print out a rough
21 transcript that we do have relating to a couple of
22 passages in that regard. He testified on November 1st.
23 And it was an a.m. and a p.m., in other words, a
24 morning and an afternoon transcript. And I printed out
25 just a couple pages for Mr. Kaste and you, if I may.

1 SPECIAL MASTER: You certainly may.

2 MR. DRAPER: The morning session -- it
3 doesn't say morning, but it starts on page 42. And the
4 afternoon session starts on page 22 of these two
5 copies.

6 SPECIAL MASTER: Okay. Thanks.

7 MR. DRAPER: Looking at the transcript that
8 starts on page 42, that's the morning transcript. If
9 you turn over to the second page. This is printed
10 double-sided. The beginning of the front side of the
11 second page, page 44, has some language I think is
12 worth quoting. I did print out a little bit more so
13 that you can see the context and the other statements
14 that are consistent with the ones that appear on this
15 page.

16 You can see that on page 44, line 16, the
17 question is: "Well, and so my question is: You have
18 testified that you were frustrated about Montana not
19 receiving enough water; did you have communications
20 with Wyoming about that?

21 "Answer: I had communications with Wyoming
22 about that. I had communications with the Montana
23 commissioner about that.

24 "Question: Was this that 1987, '88, and '89?

25 "Answer: Yes."

1 This is the next question: "Did you demand
2 Wyoming stop using post-'50 water?"

3 "No, you can't demand.

4 "Question: Did you ask them?"

5 "Answer: I asked.

6 "Question: Did you tell --

7 "Answer: Asked, talked.

8 "Question: Did you ask them to stop using
9 post-'50 water?"

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

13 So this is very direct evidence of the
14 official Rich Moy who was testifying and who
15 represented the interests of Montana at that time for
16 Mr. Fritz who was the chief water official.

17 On the second printout, this is from the
18 afternoon on November 1st, I would point you to the
19 bottom of the first page, page 22. It starts on line
20 20, where I would direct your attention.

21 "So you stated earlier you did not demand any
22 water of Wyoming. But is it your testimony that you
23 asked?"

24 "Answer: I never demand -- the issue was
25 asking for the protection of pre-'50 rights in Montana

1 and Wyoming to shut off its post-'50 uses."

2 And this is other -- I have printed out an
3 extra page or two there so you could see the rest of
4 the discussion.

5 But these are very direct claims by the water
6 official who really was the one that was engaged,
7 interfacing with Wyoming at that time. It is quite
8 consistent with the conversations we've seen between
9 the state engineers in the early 1980s as documented in
10 those notes. And it's consistent with the other
11 witnesses that have been presented in this proceeding,
12 that there were direct conversations. This is some of
13 the most pointed that we have.

14 But the others support that. And there was
15 ongoing discussion -- there's evidence of ongoing
16 discussions with the water users, their water officials
17 in Montana who were complaining to them and being told
18 that they were, in fact, having their complaints
19 communicated to Wyoming.

20 So the whole -- the specifics of the person
21 directly in the center of these discussions and all of
22 the evidence around them, go to the point that Montana
23 was doing whatever it reasonably could do as a
24 sovereign to make its concerns known and its demands
25 for compliance with the compact in the form of letting

1 water down to satisfy pre-1950 rights in Montana.

2 This appears also in the records of the
3 compact administration meetings. We see it in Joint
4 Exhibit 32, which Your Honor I think referred to
5 yesterday. We've also had evidence from several
6 witnesses that the strong tendency of the USGS, who is
7 responsible for preparing the minutes of meetings,
8 tried at all costs to avoid controversy in the official
9 record. And we know that nothing gets in the official
10 record unless it's agreed to by both states so that
11 there's veto power even on the minutes. And so you're
12 really looking at a forum where to create a record is
13 sometimes very difficult. But I think despite that,
14 we've got all the indices of strong communications
15 between Montana and Wyoming folks speaking directly on
16 their demands for water in the 1980s.

17 SPECIAL MASTER: Okay. Thank you,
18 Mr. Draper.

19 So I'm sure Mr. Kaste would love to respond.
20 But let me just comment. I've gone back over all of my
21 notes. The actual transcript was valuable this
22 morning. And based on my notes, I conclude that
23 actually Montana has presented substantial evidence for
24 all the various elements of their claims for the years
25 that were in issue. So I'm going to deny Wyoming's

1 motion at this point.

2 So, Mr. Kaste, you still have a record, not
3 having prevailed on one of these motions.

4 Let me just say several things. First of
5 all, my decision to carefully consider Wyoming's motion
6 and actually go back and review all the records should
7 not in any way indicate anything about my overall views
8 of Montana's case. But even though this is a
9 proceeding where I'm actually preparing a record and
10 then recommending findings for the United States
11 Supreme Court, I do think that Wyoming's motion
12 deserves to be carefully considered. And if we could
13 have avoided the need for additional witnesses on
14 particular issues, that's always useful to avoid.

15 Obviously, my decision to deny Wyoming's
16 motion also shouldn't be considered as any indication
17 as to ultimately how the United States Supreme Court
18 will come out on this or what recommendations I will
19 make one way or the other. Because all I have, number
20 one, were my notes in front of me. And I obviously
21 have not gone back and reviewed all the various
22 transcripts and exhibits. And furthermore, Wyoming
23 hasn't presented its case in chief at this point.

24 So, Mr. Draper, you also brought up the
25 question of other years in the 1980s. I do think,

1 given the one document that was produced, late 1981 is
2 a year that's still in contention. The -- if I
3 understood your request to also apply to years in the
4 1980s, other than 1981, 1987, 1988, and 1989, that,
5 I'll deny. I think that we should continue to limit
6 ourselves in the 1980s, other than that 1981 year, the
7 years at the end because there was testimony and it's
8 reflected in the minutes of the Yellowstone River
9 Compact Commission that whatever Wyoming's position
10 was, Montana was going to furnish notice to Wyoming of
11 any years in which they believe that they were short of
12 water.

13 So I think that notice is still an issue.
14 And at the moment, all we have as evidence is on those
15 years, 1987, 1988, and 1989. So we're basically in the
16 years that I denied Wyoming summary judgment on
17 earlier, but also including a 1981 year because of the
18 additional document that came in late on that
19 particular year.

20 MR. DRAPER: Thank you very much, Your Honor.

21 SPECIAL MASTER: Okay. You're welcome,
22 Mr. Draper.

23 So, yeah, I was just trying to think on
24 whether I should call on you first if you wanted to say
25 anything about the case today.

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Direct Examination Cont. by Mr. Brown

1 MR. KASTE: Are you giving me an open forum
2 to say what I'd like?

3 SPECIAL MASTER: Not quite.

4 MR. KASTE: That would be a mistake on your
5 part. No, I think it would be best to proceed to the
6 evidence in light of the fact that you've already ruled
7 on the motion.

8 SPECIAL MASTER: Okay.

9 MR. KASTE: Nothing further needs to be said.

10 SPECIAL MASTER: Okay. Then Mr. Levens can
11 come back up to the stand, and Mr. Michael -- I'm
12 sorry, Mr. Brown. I'm not promoting you to attorney
13 general yet.

14 MR. BROWN: I don't think I want that job.

15 SPECIAL MASTER: Mr. Brown can continue his
16 direct examination.

17 And, Mr. Levens, we will not swear you in
18 again this morning because you're still under oath.

19 RUSSELL LEVENS (CONT.),
20 having been first duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BROWN:

23 Q. First thing I'll do is bring back Exhibits
24 W203 and W204, which I believe is where we were at.
25 And the court reporter has yet to convince me to get

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1 the realtime or the daily transcripts, so I'll try to
2 remember where I was at as best I can.

3 And I think we just introduced the Powder
4 River Basin control groundwater area order; right?

5 A. I don't remember myself.

6 Q. I'm going to start there as if we just
7 introduced that, and I don't think we'd started talking
8 about that yet.

9 So you have that in front of you, it's W204;
10 right?

11 A. Yes.

12 Q. And what -- just what's your general
13 understanding of the purpose of that order?

14 A. It's to provide protections for existing
15 water users and as a result of, at that time,
16 pending -- impending coalbed methane development.

17 Q. Okay. And just generally, was it to provide
18 protection to existing groundwater users and spring
19 users? Is that right?

20 A. Wells and springs, yes.

21 Q. Okay. And just generally, how was the order
22 implemented? I'm wondering about the administrative
23 structure. Who was in charge? How did the state of
24 Montana go about implementing the order?

25 A. Well, I guess my perspective on it comes from

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1 the Technical Advisory Committee. And basically the
2 Board of Oil and Gas, Montana Board of Oil and Gas has
3 the authority for impacting coalbed methane
4 developments. And this provided for technical input
5 from the Technical Advisory Committee on
6 characterization and monitoring requirements so that,
7 you know, the primary responsibility was on the Board
8 of Oil and Gas.

9 And this -- the Technical Advisory Committee
10 provided advice to them.

11 Q. Okay. And I just want to look at a couple of
12 the provisions in the order itself. And if you'll look
13 on page 3 of the order. And it's the first paragraph
14 under the section of the order entitled "Order."

15 And it says, "The controlled groundwater area
16 designation shall apply only to wells designated and
17 installed for the extraction of coalbed methane (CBM)."
18 So this order didn't apply to any other kind of
19 groundwater withdrawals; right?

20 A. That's correct.

21 Q. Just those that were meant to withdraw CBM?

22 A. That's correct.

23 Q. And I wanted to look at, on that same page,
24 under paragraph 4, it talks about the Technical
25 Advisory Committee; right?

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1 A. Yes.

2 Q. And the third paragraph under that Technical
3 Advisory section starts out, it says, "The TAC will
4 periodically review groundwater data gathered for CBM
5 development." And that's what you were talking about
6 as far as the Technical Advisory Committee monitoring
7 what was going on with CBM development; is that right?

8 A. Yes.

9 Q. And it says, "This TAC will perform an annual
10 report or -- or prepare -- excuse me -- an annual
11 report each year of their findings regarding the impact
12 of the groundwater resources from CBM activities and
13 any mitigation recommendations that may develop."

14 And so did the Advisory Committee prepare
15 annual reports?

16 A. We prepared reports that we reported our
17 activities. And for the purpose of findings, we
18 adopted the reports that the Montana Bureau of Mines &
19 Geology does. That's more of a detailed assessment of
20 the data.

21 Q. And I think you told me that yesterday, that
22 Advisory Committee looked to those Montana Bureau of
23 Mines documents for the primary sorts of data that went
24 along with your work as the Advisory Committee; right?

25 A. Yes.

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1 Q. Okay. Now, I want you to look back at page 2
2 of Exhibit 204, under the "Conclusions of law" heading.
3 And the third paragraph under the "Conclusions of law"
4 heading, I'm looking at the last sentence. And it
5 says, "The Montana Department of Natural Resources may
6 petition the Board for hearings in regard to the
7 production, use, and disposal of water from coalbed
8 methane development wells that exist -- or could affect
9 existing water rights in the area based upon
10 information gathered concerning the water withdrawals."

11 And my question is whether or not the Montana
12 DNRC ever petitioned the Board -- I think this is
13 talking about the Board of Oil and Gas with regard to
14 what's discussed in that sentence. Do you know?

15 A. I do not know. I don't think so.

16 Q. So you're not aware of --

17 A. I'm not aware of it.

18 Q. Okay. I'm going to show you what's marked as
19 Wyoming Exhibit 224; do you recognize that document?

20 A. Yes.

21 Q. What is it?

22 A. It's a annual report that I prepared of the
23 activities of the Technical Advisory Committee for 2000
24 and 2001.

25 Q. And so is this the annual report that we just

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1 read about in the order?

2 A. Yes.

3 Q. Okay. And I think you said you prepared it;
4 right?

5 A. Yes. And I guess one point is a couple of
6 meetings occurred before I started.

7 Q. Sure. You started in 2001; right?

8 A. Correct.

9 Q. And you just put together what had happened
10 in the meetings prior to you getting --

11 A. Right. There were some detailed notes, and I
12 put them in the report.

13 Q. Does that appear to be complete?

14 A. Yes.

15 MR. BROWN: I'd like to offer Exhibit W224.

16 MR. BRAMBLETT: No objection.

17 SPECIAL MASTER: Then Exhibit W224 is
18 admitted.

19 (Exhibit W224 admitted.)

20 BY MR. BROWN:

21 Q. I'd like to direct your attention under the
22 introduction paragraph of -- or the introduction
23 section of the last paragraph. It's just one sentence.
24 It says, "The purpose of this report is to describe the
25 activities of the TAC and the impacts of CBM

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1 development on groundwater resources during 2000,
2 2001."

3 Did I read that right?

4 A. Yes.

5 Q. And looking at the other annual reports that
6 all -- I think they all contain that kind of a
7 provision. Is that generally what these reports are
8 designed to do?

9 A. That's what they are designed to do.

10 Q. I want to look at the second page of
11 Exhibit 224. And, of course, they are not page
12 numbered. But on the second page of W224, last
13 paragraph, last sentence, it says, "An outline of
14 coalbed methane technical guidance document was
15 proposed," and then in parentheses, "(see [the]
16 following text box) and a draft document was prepared
17 pursuant to the April 12th, 2001, conference call."

18 Did I read that right?

19 A. Yes.

20 Q. And then the outline appears on the following
21 page; right?

22 A. Yes.

23 Q. And then I want to direct your attention to
24 the Regional Monitoring section. And it says spring
25 and surface water flows.

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1 Now, did the Technical Advisory Committee do
2 anything independent to monitor streamflows?

3 A. No.

4 Q. My understanding is you essentially took what
5 available USGS data was available; is that right?

6 A. Yes.

7 Q. Let's turn to the last page of Exhibit 224.
8 And at the top of that page is Table 1 entitled Summary
9 of Water Produced from CBM Production Wells in 2000 and
10 2001. And can you just describe for us, please, the
11 information contained within Table 1?

12 A. These are water production numbers that would
13 have been obtained from the Board of Oil and Gas
14 database. I'm trying to remember back to that time.
15 Currently, there's an online database that you can
16 query. And that's how I'd get them. I don't recall
17 how I obtained these numbers. But it would have come
18 from the Montana Board of Oil and Gas. And it looks at
19 production from their producing at three different coal
20 zones on the Dietz, Monarch, and Kearney in the CX
21 Field of -- and this would not be a field that was
22 operated by -- at that time, it would have been
23 Redstone, but they were purchased by Fidelity.

24 Q. Okay. And this is reporting water production
25 not gas production; right?

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1 A. Correct.

2 Q. 'Cause that's what you guys were interested
3 in; right?

4 A. Right.

5 Q. The first sentence under Table 1 says, "Water
6 production from the Dietz, Monarch and Kearney coals
7 averaged 17 gallons per minute, 10.9 gallons per
8 minute, and 11.2 gallons per minute per well
9 respectively during 2001."

10 Are those gallons per minute production
11 levels consistent with what you observed as far as CBM
12 wells in Montana?

13 A. I guess I'd have to look at other -- I think,
14 you know, when you look at longer terms, it's lower
15 than that. But I guess I can't give you a detailed
16 answer to that.

17 Q. Fair enough. And all I want to do now,
18 Mr. Levens, is I'm going to go through some of the
19 annual reports that follow this initial one and just
20 get you to identify them for me. I've got a question
21 about a few, but more than anything, I'd just like to
22 have you identify the reports for me. So we'll just
23 look at the rest of them that I have anyway.

24 And I'll show you what's marked as W225; do
25 you recognize that document?

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1 A. Yes.

2 Q. And what is it?

3 A. It's 2002 Annual Report of the Technical
4 Advisory Committee.

5 Q. And you prepared that one as well?

6 A. Yes.

7 Q. Does it appear complete?

8 A. It does.

9 MR. BROWN: I'd like to offer Exhibit W225.

10 MR. BRAMBLETT: No objection, Your Honor.

11 SPECIAL MASTER: Exhibit W225 is admitted.

12 (Exhibit W225 admitted.)

13 BY MR. BROWN:

14 Q. I only have one question about this
15 particular report. If you'll look at the very first
16 page with me, under the Summary of TAC Meetings
17 section. And then under the March 1st, 2002, meeting,
18 the second sentence reads: "The subject wells are
19 intended to be first -- to be the first installation of
20 the regional-scale monitoring program developed by TAC
21 and included in the Statewide Draft Oil and Gas
22 Environmental Impact Statement."

23 Can you describe for me what subject wells
24 are being discussed in that -- at that meeting?

25 A. Well, if you look at the first sentence, it

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1 says, "TAC met to discuss the locations of wells to be
2 drilled by the Montana Bureau of Mines & Geology for
3 monitoring impacts of coalbed methane development." So
4 that would be referring to wells as part of the
5 regional-scale monitoring program.

6 And that was, you know, we recognized early
7 on that the most -- the information we were getting was
8 from the internal -- from the actual CBM fields, and
9 that's not the most useful information. And we needed
10 to have dedicated monitoring wells outside of the
11 coalbed methane fields where coalbed methane companies
12 couldn't drill off their property.

13 So we developed the regional monitoring
14 program that the Bureau of Mines has implemented. And
15 that was kind of the start.

16 Q. Okay. And I guess the main point I was
17 trying to get across is as time went on, the Technical
18 Advisory Committee recommended additional monitoring
19 wells be installed; right?

20 A. Yes.

21 Q. And then as time went on, more and more
22 monitoring wells were installed; right?

23 A. Correct.

24 Q. And those were monitored by the Montana
25 Bureau of Mines & Geology?

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1 A. Yes.

2 Q. I'm going to show you what's been marked as
3 Exhibit W227; and do you recognize that document?

4 A. Yes.

5 Q. And what is it?

6 A. 2004 Annual Report Powder River Basin
7 Controlled Groundwater Area Technical Advisory
8 Committee.

9 Q. And you prepared that one as well?

10 A. Yes.

11 Q. And does it appear to be complete?

12 A. It does.

13 MR. BROWN: I would offer Exhibit W227.

14 MR. BRAMBLETT: No objection.

15 SPECIAL MASTER: Exhibit W227 is admitted.

16 (Exhibit W227 admitted.)

17 BY MR. BROWN:

18 Q. And I had a question with regard to this
19 particular one. I downloaded these from -- are these
20 posted on the DNRC website, these reports?

21 A. Yes. I haven't, obviously, been -- I haven't
22 been back there for a while, but they should be.

23 Q. Well, I'll represent to you that I actually
24 downloaded this from the DNRC website. And as a title
25 for this particular report, it says 2003 and 2004. Do

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1 you know if this is meant to be a report for both these
2 years? It's not hugely important. I was just curious.

3 A. I'm reading it.

4 Q. Sure.

5 A. We changed over how we did these. We were
6 doing calendar year, and we changed over to the water
7 year. So I think that was about the time frame. So it
8 was probably 2003 water year data.

9 Q. Okay. Sure. So it might be a report for
10 both those years?

11 A. Yeah. But as far as the meeting
12 descriptions, it appears the first one was May 2004.
13 So all the activities, although, it -- so as you go
14 later on in the document, it talks about 2003
15 development. So that's -- that would have been that --
16 kind of the way it was done after that. So it would
17 have been -- the 2005 report would have presented data
18 from the 2004 water year. So this is activities of
19 2004, although the data is from the year 2003.

20 Q. And then you switched from reporting on a
21 calendar year to a water year?

22 A. Right. But when you look at 2004, the
23 activities were in 2004. The data was from 2003.

24 Q. On the first page of Exhibit W227, under the
25 Summary of the TAC Meetings, the second paragraph under

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1 there, can you read that paragraph to yourself for me.
2 And it's a discussion with regard to Mr. Ray Muggli.
3 And I have a couple questions about that. So if you
4 could take a look at that and refresh yourself, please.

5 A. Okay.

6 Q. Do you have a recollection of what
7 Mr. Muggli's concerns were at that time?

8 A. I believe his -- and as it states in there, I
9 believe his main concern was the water quality impacts
10 of discharge being coalbed methane water to the Tongue
11 River Reservoir.

12 Q. And that was my concern, whether his concerns
13 were water quantity or if they were water quality. And
14 you said they are water quality concerns; right?

15 A. Yeah. And I refer in that paragraph and
16 that's what my recollection was. They were primarily
17 water quality concerns.

18 Q. And he describes -- or it's described in
19 Exhibit 227 that part of his concern was he had
20 observed or taken photographs of sprinkler systems used
21 to distribute CBM produced water and CBM impoundments
22 with signs of seepage.

23 Do you know if those CBM impoundments that he
24 had concerns about, were they in Wyoming or Montana?

25 A. I believe they were in Wyoming.

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1 Q. Okay. And what's your understanding of his
2 concerns with regard to those impoundments?

3 A. I'm just going to read to refresh my memory.

4 Q. Sure.

5 A. Just that CBM produced water is leaking to
6 shallow sediments and surface water drainage. I think
7 that that water would then get into the surface water
8 drainage system.

9 Q. So, again, it was a water quality concern
10 that he had?

11 A. Yes.

12 Q. The water that was -- the CBM water that was
13 impounded -- the CBM water that was impounded in
14 Wyoming would seep out of those impoundments and get
15 into the surface streams?

16 A. That's my understanding, yes.

17 Q. If you'll turn to the second page of
18 Exhibit 227, and the third paragraph from the top.
19 That paragraph starts out with the sentence, "John
20 Wheaton presented maps"; do you see that paragraph?

21 A. Yes.

22 Q. And I'm looking at the last two sentences of
23 that paragraph. And it says, "In addition, MBMG plans
24 to install monitoring wells along the Wyoming border
25 during 2004." MBMG is the Montana Bureau of Mines &

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1 Geology; right?

2 A. Yes.

3 Q. What's your understanding of the reasons for
4 placing those monitoring wells along the Wyoming
5 border?

6 A. To be able to distinguish impacts from CBM
7 development in Wyoming from impacts from CBM
8 development in Montana.

9 Q. And were those monitoring wells ever
10 installed?

11 A. Yes.

12 Q. I believe they were installed in seven
13 different locations; is that right?

14 A. I don't recall the details.

15 Q. Okay.

16 A. That sounds right.

17 Q. The next sentence says, "The TAC also
18 discussed ongoing efforts by the Interagency Hydrology
19 Task Group to develop an integrated regional monitoring
20 plan for Montana and Wyoming portions of the Tongue
21 River Basin."

22 What is the Interagency Hydrology Task Group?

23 A. It was a combination of federal BLM
24 primarily, I believe, on the federal side, and state
25 agencies that had some sort of primacy on issues

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1 related to coalbed methane. I believe it came out of a
2 recommendation of the EIS. But that's about the limit
3 of what I know about it. I think it was set up as part
4 of the 2003 EIS in Montana.

5 Q. And that's what I was going to ask. The EIS
6 that you referred to was the EIS that was done for the
7 State of Montana; right?

8 A. Yeah, the programmatic EIS.

9 Q. And just to clarify for you, there's another
10 EIS that we've talked about in this case. So I wanted
11 to clarify which one that was.

12 A. Okay.

13 Q. Can you tell me whether or not an integrated
14 regional monitoring plan for Montana and Wyoming
15 portions of the Powder River Basin was ever developed?

16 A. I don't know. I'm pretty sure it was not
17 implemented.

18 Q. Okay. The last thing I want to look at on
19 Exhibit W227, there are a couple of figures at the end
20 of this particular annual report. And I apologize for
21 the poor quality of the copy. But can you please just
22 tell us what is depicted in Figures 1 and Figures 2 at
23 the end of this report?

24 A. Figure 1, the title is Map of 10-foot water
25 level drawdown contours for Dietz and Monarch coal

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1 beds. So that would be the approximate limit of the
2 extent of the 10 feet of drawdown in groundwater levels
3 around the CX Field.

4 Q. Okay. And how about the next one?

5 A. Figure 2 is titled Locations of wells
6 monitored by MBMG in the Powder River Basin controlled
7 groundwater area.

8 Q. So in that one, the particular Figure 2
9 indicates the locations of Montana Bureau of Mines &
10 Geology's monitoring wells?

11 A. Yeah, those are the wells they monitored.

12 Q. Okay. I'll now show you what's been marked
13 W229; and do you recognize that document?

14 A. Yes.

15 Q. What is it?

16 A. It is the 2007 Annual Report Powder River
17 Basin Controlled Groundwater Area Technical Advisory
18 Committee.

19 Q. And I just want to alert you, I've been going
20 in chronological order, but I don't have 2005 and 2006.
21 So I skipped a couple years here, just so you know
22 where we're at in the chronology of things.

23 Did you prepare this report as well?

24 A. Yes.

25 Q. And does it appear to be complete?

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1 A. Yes.

2 MR. BROWN: I would like to offer Exhibit
3 W229.

4 SPECIAL MASTER: Any objection?

5 MR. BRAMBLETT: No objection.

6 SPECIAL MASTER: Then Exhibit W229 is
7 admitted.

8 (Exhibit W229 admitted.)

9 BY MR. BROWN:

10 Q. The only question I have with regard to
11 Exhibit W229, turn to the very last page. And can you
12 describe for me -- well, for the Special Master, what
13 that reference is?

14 A. The reference is 2006 Annual coalbed methane
15 regional groundwater monitoring report: Northern
16 portion of the Powder River Basin. That would be the
17 report prepared by Montana Bureau of Mines & Geology on
18 data collected during the 2006 water year.

19 Q. Right. And I just wanted to point out that
20 at least by this time, the Technical Advisory Committee
21 is now referencing the work of the Montana Bureau of
22 Mines & Geology, and that's what that is; right?

23 A. Yes.

24 Q. Okay. That's the only question that I have.
25 I'm now going to show you what's been marked

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1 as Exhibit W230. Do you recognize that document?

2 A. Yes.

3 Q. What is it?

4 A. It is the 2008 Annual Report Powder River
5 Basin Groundwater Controlled Water Area Technical
6 Advisory Committee.

7 Q. Okay. And you prepared that one as well?

8 A. Yes.

9 Q. Does it appear to be complete?

10 A. It does.

11 MR. BROWN: I would like to offer Exhibit
12 W230.

13 MR. BRAMBLETT: No objection.

14 SPECIAL MASTER: Then Exhibit W230 is
15 admitted into evidence.

16 (Exhibit W230 admitted.)

17 BY MR. BROWN:

18 Q. On the second page of Exhibit W230, in the
19 second paragraph, and this relates back to a question
20 I'd asked you yesterday with regard to order 99-99,
21 when I wasn't quite certain what it was. But you'll
22 see in the middle of that paragraph is a discussion --
23 and I'll read a portion of it. It says, "...Russell
24 Levens finalized the proposed changes to MBOGC Board
25 Order 99-99 and the Groundwater Monitoring and

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1 Reporting Guidelines and, with TAC approval,
2 transmitted the final documents to Tom Richmond."

3 Can you describe for me -- or describe for
4 us, please, what's that discussing?

5 A. We proposed to update the Montana Board of
6 Oil and Gas' Board Order 99-99 was -- that was passed
7 by the Board at the same time that the DNRC did our
8 controlled groundwater area order. And it has specific
9 provisions. There were a number of parts of that order
10 that had been superseded by law, by future -- by
11 statutes that were passed. It was unclear in that
12 order how the TAC worked with the Board.

13 So we proposed -- you know, we had done -- we
14 had discussed with Tom Richmond about this prior to
15 embarking on this. And so we updated it with the
16 current law and then made it clear how the TAC worked
17 with the Board. And along with that, we also developed
18 a monitoring and reporting guidelines. And I think
19 part of that order described how we would submit those
20 to the Board. And they were approved by the Board.

21 Q. And so the monitoring and reporting
22 guidelines, were those guidelines for the Advisory
23 Committee or were they for industry?

24 A. It was a combination. It explained what was
25 expected from industry but described -- and I haven't

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1 looked at it in detail for a while. But it also
2 described essentially how the information would be
3 compiled, you know, the idea that companies could
4 prepare their own reports or the Bureau of Mines would
5 do a combined report.

6 Q. So what was settled on was -- the Bureau of
7 Mines report, was that one settled on as far as the
8 official reporting?

9 A. The companies were still given an option of
10 doing their own.

11 Q. Was there any change at that time made with
12 regard to the controlled groundwater area's focus on
13 groundwater impacts? And my question is: Was there
14 any focus then made to surface water impacts?

15 A. I don't recall. I don't recall that there
16 was any additional -- anything in addition added on the
17 surface water.

18 Q. Okay. Do you recall at any time during your
19 involvement with the TAC whether there was a focus on
20 surface water impacts?

21 A. There were -- I think, you know, there were
22 discussions at times. But the primary emphasis has
23 been wells and springs.

24 Q. Okay. Would it be fair to say that Fidelity
25 was the primary CBM producer in Montana? Fidelity

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1 production company I think is the name?

2 A. They're the largest by far.

3 Q. Okay. And I think as these reports go on in
4 years, the number of the companies increased; is that
5 right?

6 A. Correct.

7 Q. And then, of course, production, at least to
8 some point in time, increased; right?

9 A. To some point in time.

10 Q. All right. And then later on decreased?

11 A. Yes.

12 Q. I'm handing you what's marked Exhibit W231;
13 and do you recognize that document?

14 A. Yes.

15 Q. What is it?

16 A. It's the 2009 Annual Report Powder River
17 Basin Controlled Groundwater Area Technical Advisory
18 Committee.

19 Q. And did you prepare that report as well?

20 A. Yes.

21 Q. Does it appear to be complete?

22 A. Yes.

23 Q. I have no questions about that one.

24 SPECIAL MASTER: But you want to admit it?

25 MR. BROWN: I'd like to offer Exhibit W231.

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1 SPECIAL MASTER: Any objection?

2 MR. BRAMBLETT: I think we've got a relevance
3 objection if he doesn't have any questions about that
4 exhibit.

5 SPECIAL MASTER: I'm really quite open on
6 admitting documents that could be relevant. And I
7 actually prefer people didn't spend a lot of time on
8 the documents if we can avoid it. So I will admit
9 Exhibit W231.

10 (Exhibit W231 admitted.)

11 MR. BROWN: Thank you.

12 BY MR. BROWN:

13 Q. I'm going to hand you now what's marked as
14 Exhibit W232; and do you recognize that document?

15 A. Yes.

16 Q. What is it?

17 A. 2010 Annual Report Powder River Basin
18 Controlled Groundwater Area Technical Advisory
19 Committee.

20 Q. And did you prepare that report as well?

21 A. Yes.

22 Q. Does it appear to be complete?

23 A. I was just checking. Yes.

24 MR. BROWN: I would like to offer Exhibit
25 W232.

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1 SPECIAL MASTER: Any objection other than --
2 well, feel free to repeat your relevance objection.

3 MR. BRAMBLETT: State the same objection.

4 SPECIAL MASTER: Okay. I'll overrule the
5 objection, and I'll admit Exhibit W232.

6 (Exhibit W232 admitted.)

7 MR. BROWN: I have no questions about that
8 one. I may have, though.

9 BY MR. BROWN:

10 Q. I'm going to show you what's been marked as
11 W233; and do you recognize that document?

12 A. Yes.

13 Q. And what is it?

14 A. It is the 2011 Annual Report Powder River
15 Basin Controlled Groundwater Area Technical Advisory
16 Committee.

17 Q. And did you prepare that report as well?

18 A. Yes.

19 Q. Does it appear to be complete?

20 A. Yes.

21 MR. BROWN: I would like to offer Exhibit
22 W233.

23 SPECIAL MASTER: Same objection?

24 MR. BRAMBLETT: Yeah, if there are no
25 questions on it.

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1 SPECIAL MASTER: Okay. I'm going to admit
2 Exhibit W233.

3 (Exhibit W233 admitted.)

4 BY MR. BROWN:

5 Q. I do have a couple questions. Mr. Levens, if
6 you would look at that exhibit, W233, on the first page
7 under the groundwater Monitoring section, about halfway
8 through that first paragraph. And I'll read a portion
9 of it. It says, "MBMG reports that the 20-foot
10 drawdown contour extends a maximum distance of 1 to
11 1.5 miles from the edge of the CX Field. A shorter
12 distance than predicted in the final statewide EIS."

13 Can you describe for us, please, what that is
14 talking about?

15 A. It's just -- the MBMG reported that drawdown
16 of up to 20 feet occurred, extended a distance of 1 to
17 1 and a half miles. So there was modeling done, but
18 the EIS predicted that it would extend farther at --
19 for the same kind of development.

20 Q. So just generally, the earlier predictions
21 done by the EIS, the drawdowns extended further than
22 what was observed; is that right?

23 A. Yes.

24 Q. If you'll look at the next paragraph, which
25 begins at the bottom of page 1, says "Kevin Chandler

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1 presented a summary of the results of a groundwater
2 flow model constructed for the Ashenberg Creek-West
3 Decker Mine area that were included in the 2010 annual
4 report."

5 Can you describe that flow model that's
6 discussed there?

7 A. Not in detail. It's -- it was really, I
8 think, an attempt to match -- to model the groundwater
9 system matching data from observation wells. And that
10 particular location, that was historic. There was an
11 Ashenberg Creek Mine, I believe it's in Wyoming,
12 operated for a short time. There was some good data of
13 drawdown resulting from mining and recovery and
14 drawdown from CBM at a later time. And that model was
15 an attempt to try and calibrate to those data.

16 Q. Okay. And who is Kevin Chandler?

17 A. He works for the Montana Bureau of Mines &
18 Geology.

19 Q. Do you know what the purpose of that model
20 was? What were they trying to achieve with it?

21 A. I think it was just to see if they could
22 calibrate the model, maybe looking towards, you know, a
23 larger modeling effort. But I don't know the specifics
24 of that. That's my recollection. It was taking a
25 pretty comprehensive set of data and try to fit a model

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1 to it, see if they could.

2 Q. Okay. Can you just tell us generally what
3 the current status of CBM development in Montana is as
4 of today?

5 A. No.

6 Q. Is it going as strong as it was in the
7 mid-2000s?

8 A. No. The last I've looked, it has been
9 declining. The amount of production of gas and water
10 has declined in recent years.

11 Q. Do you know if Montana is still getting more
12 applicants for new CBM wells?

13 A. The only way I would know that is if we have
14 a monitoring plan to review. And we haven't had one
15 for a number of years.

16 Q. Okay. And so just generally to summarize,
17 then, the CBM production in Montana has been steadily
18 declining; is that fair?

19 A. I think, yeah, it has been declining for the
20 last few years.

21 Q. Okay. That's all I have. Thank you.

22 MR. BRAMBLETT: Can I have a minute?

23 SPECIAL MASTER: Why don't we take the
24 morning break, then, right now for ten minutes. And we
25 can come back at that point and have the

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1 cross-examination.

2 (Recess taken 9:29 to 9:39
3 a.m., November 19, 2013)

4 SPECIAL MASTER: Okay. Any
5 cross-examination?

6 MR. BRAMBLETT: No, Your Honor. We have no
7 questions for Mr. Levens.

8 SPECIAL MASTER: Okay. Neither do I. So you
9 can step down from the witness chair. Thank you for
10 coming in.

11 MR. BROWN: Well, that was easy. I know my
12 direct wasn't comprehensive.

13 Wyoming would call John Wheaton.

14 (John Wheaton sworn.)

15 THE CLERK: Have a seat and state your name
16 and spell it for the court reporter.

17 THE WITNESS: My name is John Wheaton,
18 W-h-e-a-t-o-n.

19 SPECIAL MASTER: Good morning, Mr. Wheaton.

20 THE WITNESS: Good morning.

21 JOHN WHEATON,
22 having been first duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. BROWN:

25 Q. Good morning, Mr. Wheaton.

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1 A. Good morning, Mr. Brown.

2 Q. Good to see you again. And just fair
3 warning, the guy who produces the thicker report gets
4 more questions. Just so you know.

5 Could you please tell us what your current
6 professional position is?

7 A. I'm a senior research hydrogeologist with the
8 Montana Bureau of Mines & Geology. The Bureau of Mines
9 and Geology, just let me give you that background, it's
10 part of the university system. We're the State
11 Geological Survey for Montana. Most states have a
12 geological survey.

13 And I manage the Groundwater Investigation
14 Program, which is a four and a half year old program
15 and -- on the campus at Butte.

16 Q. Okay. Just taking questions right out of my
17 mouth. So that the Special Master has a better idea of
18 what your background is, can you please just generally
19 describe your education after high school?

20 A. I have a bachelor's in geology from the
21 University of Montana, master's degree also from the
22 University of Montana. And that was in environmental
23 studies and hydrogeology. That was just education you
24 asked about?

25 Q. Yes, sir. And I think you told me at your

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1 deposition that after you obtained your bachelor's
2 degree, you went to work for a while?

3 A. I did.

4 Q. And what did you do?

5 A. I worked in the oil field as a mud logger for
6 one year. Then after that, I went back to a different
7 kind of logger, timber logging for a few years. It
8 didn't take long to decide to go back to school for the
9 master's degree then.

10 After the master's degree, I went to work for
11 Peabody Coal as a hydrogeologist and then from there
12 came to the Bureau of Mines and Geology. I think I
13 started at the Bureau of Mines in 1988.

14 Q. And just generally describe what your job
15 responsibilities were for Peabody Coal?

16 A. I was a mine site hydrologist. And so we did
17 the annual reports, satisfied the regulatory monitoring
18 requirements, and helped compile the reports and helped
19 write a mine expansion permit application.

20 Q. And where was that mine located?

21 A. It was in Colstrip, which is part of the
22 Powder River Basin.

23 Q. Okay. Did you do a thesis for your master's
24 degree?

25 A. I did.

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1 Q. What was the topic of that?

2 A. Coal mining in the Colstrip area.

3 Q. And I think you said you went to work for the
4 Montana Bureau of Mines in 1988; is that right?

5 A. That's correct.

6 Q. Is that the same year you got your master's
7 degree?

8 A. No, I got the master's in '86 or '87.

9 Q. What did do you in between?

10 A. That was working at Peabody when I was
11 finishing.

12 Q. Describe your job responsibilities when you
13 first went to work for the Bureau of Mines.

14 A. The Bureau of Mines had a coal program, coal
15 hydrogeology and a coal geology program since -- or the
16 coal hydrogeology program started in about 1968. So
17 with my experience, I came in to assist Wayne Van Voast
18 who was kind of the father of coal hydrogeology. And I
19 worked for him as his research assistant.

20 Q. And how long were you the research assistant?

21 A. About three years. And then he took a
22 promotion, and I became the lead on that program.

23 Q. And that was 1991?

24 A. That's pretty close.

25 Q. What --

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1 A. I didn't check the dates.

2 Q. What was the purpose of that monitoring
3 program?

4 A. We did work around the coal mines to provide
5 third-party objective interpretations and
6 understandings of the impacts of large scale
7 development, like coal mines, to the groundwater
8 systems.

9 Q. And what geographic area are we talking
10 about?

11 A. We worked in Colstrip, which is the northeast
12 part of -- I'm sorry -- northwest, and Decker, which is
13 near the Wyoming and Montana state line.

14 Q. Right around Tongue River Reservoir; right?

15 A. Right.

16 Q. What kind of data did the program gather?

17 A. We collected water level data, long-term
18 monitoring wells on water levels, and physical
19 characteristics of the aquifers. And we also did a lot
20 on chemistry. Resaturation of the mine spoils and the
21 reestablishment of that material as an aquifer is a
22 major concern, major issue to understand. So we did a
23 lot of chemistry work.

24 Q. Would it be fair to say that at any time you
25 mention water levels today, it's about groundwater?

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1 A. It would be, yes. That would be fair.

2 Q. And I think you told me that you never did
3 anything with regard to monitoring surface water, at
4 least with regard to this monitor program; is that
5 right?

6 A. Which monitoring program?

7 Q. The coal.

8 A. Well, at Peabody, it's a one-person show.
9 You do surface and groundwater with the coal. With the
10 Bureau of Mines, we did very little. We did
11 occasional, but it was very little.

12 Q. And I guess, describe for us generally what
13 the concerns are or what happens with regard to
14 groundwater drawdown in coal mining.

15 A. In coal mining, the overburden material is
16 physically removed -- I'm sorry. I'm used to talking
17 with my hands.

18 Q. The Special Master can see your hands.

19 SPECIAL MASTER: You can go ahead and use
20 your hands, but you have to recognize that anything you
21 do with your hands is not going to end up on the
22 transcript. So you have to be able to describe it too.

23 THE WITNESS: As well as the testimony.
24 Okay. Thank you.

25 The target is the coal seam at depth. And so

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1 the overburden material is blasted, removed, and the
2 coal underneath that is then physically removed. The
3 spoils material, that clay and silt and sand
4 overburden, gets pushed back into the pit. And it's a
5 revolving process. The overburden from one pit goes
6 into the previous pit. And they keep working uphill.

7 The coal in that part of Montana is an
8 aquifer. And so it's feeding the recharge to the
9 spoils.

10 And now I've lost track of the question and
11 where we were going with that. But that's the process
12 of mining. And our interest is where there had been a
13 coal aquifer, there's now a silt, clay, sand aquifer.
14 There's a chemical change, and there's a salt flushing
15 that has to occur.

16 BY MR. BROWN:

17 Q. I guess another element to my question was,
18 what impact does that coal mining have on groundwater
19 levels?

20 A. The water levels around the coal mine is
21 drawdown to the bottom of the coal. And then a cone of
22 depression is shaped somewhat like a funnel, if we take
23 one well. And we have this funnel shape. But it gets
24 flatter as you get farther away from the wells, very
25 steep near the well and becomes flatter with distance

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1 away. If, instead of a single well and radio flow to
2 the well, we have a linear disturbance, like a mine
3 pit, then that with drawdown becomes more of a wall
4 shape away from there. Steep at the pit; less at a
5 distance.

6 And those can extend for several miles too.
7 In the Decker area, the drawdown extended between the
8 Ashenberg Creek Mine, which was actually in Wyoming, to
9 the Decker mines. There's a continuous extension of
10 those. The cones of depression extend for 10 or
11 15 miles.

12 Q. And you said that the water drawdown would go
13 to the bottom of coal. Would that be to the bottom of
14 wherever the mine had mined to?

15 A. The mine would take it to the bottom of the
16 coal.

17 Q. Okay. And my understanding is that that
18 existing coal mine monitoring program evolved into a
19 coalbed methane monitoring program when it started up;
20 is that right?

21 A. That's right.

22 Q. Explain to us how that evolved.

23 A. We had a network of wells that we were
24 monitoring. We were doing regular runs. We also had a
25 database, that's publicly available, in order to store

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1 the data. So everyone has access to the data. And we
2 had built the third-party reputation and the
3 respectability that goes with the university research.
4 So it was fairly easy for us to step into that new
5 role.

6 Q. And were you interested in -- with regard to
7 the coalbed methane product, were you also interested
8 in the groundwater level drawdown?

9 A. That's right.

10 Q. So you had the same types of interest with
11 regard to the coal mine monitoring program?

12 A. Correct.

13 Q. And so you collected the same kind of data?

14 A. Well, much less emphasis on chemistry, but it
15 was drawdown data.

16 Q. Did you collect more data as a result of the
17 CBM production?

18 A. We did expand our monitoring program with
19 time. Instead of just focusing around the mines, over
20 a period of years, then, we grew over a larger area.

21 Q. With regard to the CBM monitoring, let's
22 start at the beginning. When, to your recollection,
23 did you begin monitoring for CBM production drawdown?

24 A. There's not a distinct line. Because we
25 still monitor for the mine drawdown now. And we

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1 monitor for CBM drawdown now. So it's an overlap.

2 When we first started seeing drawdown around
3 1990 or 1991 would have been when we started talking
4 about it and looking at it more specifically.

5 Q. So the existing monitoring wells you had for
6 the coal mine monitoring program would pick up the
7 effects of the CBM production that was going on?

8 A. That's correct.

9 Q. And I think you told me that you were in
10 charge of that monitoring program from 1991 to 2009; is
11 that right?

12 A. That's right.

13 Q. And then you took over, I think you called
14 it, the Groundwater Investigation Program?

15 A. That's right.

16 Q. Okay. And I think you said that your
17 modeling efforts -- not modeling efforts -- monitoring
18 efforts with regard to the CBM production, you didn't
19 have anything to do with water rights; is that right?

20 A. That's right.

21 Q. You were just collecting data?

22 A. We were a nonregulatory agency.

23 Q. I think you said that to me like ten times in
24 your deposition.

25 A. It's a well-practiced phrase. We use it

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1 frequently.

2 Q. With regard to your new job, Groundwater
3 Investigation Program, describe that generally. What's
4 involved with that?

5 A. Specific questions come up. For example,
6 I'll just use aquifer storage and recovery as one
7 example. Someone wants to know, can we enhance aquifer
8 storage and develop, manage our water resources better?
9 So they can come to us, put that on a list, and when it
10 gets to the top of the list, a team of people would go
11 look at their site and look at the possibilities of an
12 aquifer storage project there.

13 It's applied research. So that question
14 would be answered in such a way that could be applied
15 to other areas.

16 Q. And does your program cover the entire state
17 of Montana?

18 A. Potentially. We have about 50 projects on
19 our list at the moment that go from the Bakken oil
20 field to the Bitterroot Valley.

21 Q. And I think you described to me a current
22 project that you had under your program wherein there's
23 some attempt to identify the base flows in the Powder
24 River Basin; is that right?

25 A. There is.

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1 Q. And is that the flows coming from the coal
2 seams into the perennial streams?

3 A. That's right.

4 Q. And that includes the Tongue River?

5 A. Yes.

6 Q. And I think it includes Hanging Woman Creek
7 and Otter Creek; right?

8 A. Right.

9 Q. And I think you told me that Elizabeth
10 Meredith is overseeing that project?

11 A. She is.

12 Q. And she took over the monitoring program
13 after you left?

14 A. That's right.

15 Q. With regard to that project she's doing, it's
16 an isotope study; right?

17 A. It is.

18 Q. Describe how that works.

19 A. She's an isotope chemist. And to actually
20 understand how those processes work, it would take
21 Liddy to explain it, the chemistry. But she develops a
22 signature for different waters and then uses samples
23 and mixes and models to look for different percentages.

24 Q. Okay. Is there a need to try to identify the
25 base flows in that area?

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1 A. To better understand how the system flows, we
2 know all of the Tongue River member aquifers discharge
3 at some point somewhere between the state line, roughly
4 Moorhead and Miles City, because of the Lebo Shale.

5 Q. And can you describe that? If you'll look up
6 at the big screen, we have exhibit, I believe it's W203
7 up there. Can you describe what you just said in the
8 context of that diagram?

9 A. I can. You gave me a pointer. So with the
10 Court's permission, I'll point.

11 SPECIAL MASTER: That will be fine.

12 THE WITNESS: Let me make sure I find it
13 without pointing it towards anyone.

14 The Lebo Shale outcrops, let's see, about
15 along Rosebud Creek down to -- that would be Ashland.
16 Actually, I'm not sure of the geology there. This may
17 be the Tongue River member. No, I think that's too far
18 up.

19 So it would be just down a little bit below
20 the Yellow to Gray contact. And the Tongue River, it
21 comes down fairly low, south of Broadus towards
22 Moorhead. So it's midway on the basin here, and it
23 follows the contours.

24 BY MR. BROWN:

25 Q. And describe to me again what you're

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1 discussing with regard to the discharge of the Tongue
2 River members.

3 A. The groundwater flow system really can't go
4 down because of the continuous shale. So any sand or
5 coal water that hasn't already discharged to date would
6 discharge above the Lebo contact.

7 Q. And I think you had told me that sometime in
8 the 1970s, the USGS had tried to measure the base flow
9 in the Tongue River; is that right?

10 A. The Paul Woods project.

11 Q. Describe how that went or what they tried to
12 do.

13 A. Yeah, I did not review that paper. And the
14 Tongue River Dam was receiving maintenance, the flow
15 was very low, and so he measured gains along the river.

16 Q. And did he run into any problems?

17 A. Did he?

18 Q. Yes.

19 A. I don't know if he did or not.

20 Q. Okay. I think you told me that he had made
21 some -- or there were some discussions with regard to
22 the base flow coming into the alluvium; do you recall
23 that?

24 A. In order to measure changes in the river, he
25 would have to allow for the alluvial flow.

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1 Q. Okay. And you're familiar with the Powder
2 River Basin controlled groundwater area; right?

3 A. Somewhat.

4 Q. You were asked to be on the Technical
5 Advisory Committee sometime after it was formed; right?

6 A. Right.

7 Q. I think we figured out in your deposition
8 that you weren't there right at the beginning of it but
9 sometime thereafter?

10 A. And then left in 2009.

11 Q. Right.

12 A. I think 2004 to 2009, I think, is when I
13 officially began. But I attended other meetings.

14 Q. Right. Prior to being officially an Advisory
15 Committee member you had gone and participated, at
16 least; right?

17 A. Right.

18 Q. What was your role with the Advisory
19 Committee?

20 A. The technical -- provide information on the
21 monitoring program drawdown and recovery and review the
22 hydrologic reports.

23 Q. Okay. And I think Mr. Levens told us that at
24 some point in time, it was the Bureau of Mines that
25 took over the yearly reporting with regard to the raw

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1 data; is that right?

2 A. The hydrologic reports. So there's actually
3 two reports: The short report and -- I shouldn't call
4 it short. But the description of the Committee's
5 activities that Russell prepared. There's the
6 hydrologic description that we prepared.

7 Q. Okay. You were here for Mr. Levens'
8 testimony; right?

9 A. Yes, I was.

10 Q. And the first reports you just described are
11 the ones I discussed with him?

12 A. Yes.

13 Q. And then the second ones were the ones
14 prepared by the Bureau of Mines?

15 A. That's correct.

16 Q. I'm going to show you what's been marked
17 W298; and do you recognize that document?

18 A. I do.

19 Q. And what is it?

20 A. It's the Bureau of Mines & Geology open filed
21 report 458 entitled Potential Groundwater Drawdown and
22 Recovery from Coalbed Methane Development in the Powder
23 River Basin, Montana.

24 Q. And that was written by you and Mr. John
25 Metish?

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1 A. That's right.

2 Q. Is that something you produced in your
3 ordinary course of work with the Bureau of Mines.

4 A. That would be a regular report for us, yes.

5 Q. Does it appear to be complete?

6 A. As far as I can tell.

7 Q. Okay. And was this report, and reports like
8 it, is it reviewed by others prior to being published?

9 A. It is. In order for it to be an open file or
10 a -- open files are our informal reports. So they
11 receive three internal reviews other than the authors,
12 I should say.

13 Q. Okay.

14 MR. BROWN: I'd like to offer Exhibit W298.

15 MR. DRAPER: No objection, Your Honor.

16 SPECIAL MASTER: Okay. Thank you. Exhibit
17 W298 is admitted into evidence.

18 (Exhibit W298 admitted.)

19 BY MR. BROWN:

20 Q. Tell us, generally, what's the purpose of
21 this report?

22 A. This describes the results of an assessment
23 that Dr. Metish and I did on the potential, what we
24 felt was the potential impact from coalbed methane
25 development within the Montana portion of the basin.

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1 Q. And is it fair to say that it was based on
2 the best information that you had available at the time
3 at least?

4 A. Yes.

5 Q. And what information did you either use or
6 collect to prepare this report?

7 A. We took water level data, aquifer physical
8 parameter data from as many sources as we could, and
9 evaluated mining impacts. And then Dr. Metish did a
10 model with those.

11 Q. Was that data information you used a lot of
12 the information you had developed from your coal mine
13 monitoring program?

14 A. Yes. But there was additional information
15 besides that. A lot of mining areas has been proposed
16 throughout the Powder River Basin. And so we used data
17 from mine permits and previous studies.

18 Q. Turn to the bottom of page 41. I guess to
19 page 41, and we'll look at the bottom. And I asked
20 about this particular paragraph in your deposition.
21 And I'll just read it at the bottom of page 41 there.
22 It says, "However, based on conditions near Decker,
23 vertical leakage from units near ground surface is
24 thought not to be a major factor. There drawdowns in
25 coalbeds pass uninterrupted beneath perennial streams

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1 (Squirrel Creek and Tongue River) and the associated
2 alluvial valley floors. Water table levels in the
3 alluvium and a shallow sandstone unit have not
4 responded to coal mine induced drawdown."

5 Did I read that right?

6 A. Right.

7 Q. Can you just describe for us, what do you
8 mean by that?

9 A. We have a set of monitoring wells -- actually
10 a series, to the west of the West Decker mines. And we
11 see drawdown in the coal seams extend quite some
12 distance out from the mine. But the overburden wells
13 did not respond and Squirrel Creek alluvium did not
14 show response during that time frame. So our
15 interpretation is a lack of vertical hydrologic
16 communication.

17 Q. So at least for that location, that was the
18 observation that you had made with regard to the coal
19 mine drawdowns; right?

20 A. That's right.

21 Q. Now, to be fair, in other locations, you've
22 seen more vertical connection?

23 A. We have. Some areas have seen some.

24 Q. So it just depends on where you're at?

25 A. Very site specific.

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1 Q. And I think you'd mentioned that Dr. Metish
2 had constructed a groundwater model with regard to this
3 report; right?

4 A. He did.

5 Q. And I don't really want to talk about that
6 much. But just as a point of reference, is the kind of
7 that groundwater model depicted to page 23, at least
8 its geographic scope?

9 A. Yes, Figure 10.

10 Q. Now, I wasn't sure by looking at that, can
11 you see that the -- what appears to be the cells in the
12 model, were they limited to Montana, or did they extend
13 south into Wyoming?

14 A. The cells continue into Wyoming.

15 Q. I'm going to show you what's been marked as
16 W228; and do you recognize that document?

17 A. I do.

18 Q. And what is that?

19 A. This is Bureau of Mines & Geology open file
20 report 508 entitled Groundwater Monitoring Program and
21 Perspective Coalbed Methane Areas of Southeastern
22 Montana, Year 1.

23 Q. And that was drafted by you and Ms. Donato?

24 A. That's correct.

25 Q. And this is also a report that you prepared

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1 during your ordinary work with the Bureau of Mines?

2 A. Yes, I did.

3 Q. This one's also reviewed prior to
4 publication?

5 A. Yes, it was.

6 MR. BROWN: I would like to offer Exhibit
7 W228.

8 MR. DRAPER: No objection.

9 SPECIAL MASTER: Okay. Exhibit W228 is
10 admitted into evidence.

11 (Exhibit W228 admitted.)

12 BY MR. BROWN:

13 Q. And what was the purpose of this report?

14 A. This was to review the monitoring program and
15 what we'd learned so far about drawdown around the
16 coalbed methane. And one of the questions also was
17 whether we could distinguish coal mining and coalbed
18 methane projects. I believe that was pointed out in
19 here.

20 Q. And you just mentioned the monitoring
21 program. Do you make any distinction between the coal
22 mine monitoring program and CBM monitoring program?

23 A. In part of it there's a funding source
24 distinction. So we do do some separation. But the
25 data are shared where they're applicable.

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1 Q. Okay. And so this report incorporates data
2 that had been collected during the history of the coal
3 mine monitoring program?

4 A. That's right.

5 Q. And this is the first annual report that
6 specifically deals with the coalbed methane monitoring?

7 A. That's correct.

8 Q. And so this would be the first in the
9 progeny, I guess, or the reports that came after,
10 yearly reports with regard to CBM impacts in Montana?

11 A. Correct.

12 Q. And looking all the way into the report at
13 page 1, and that's just an abstract. And down at the
14 bottom, it says, "Two types of groundwater flow systems
15 are present in the Powder River Basin in Montana: The
16 regional systems flowing from Wyoming north into
17 Montana. And the local systems that are recharged
18 along areas of outcropped in clinker-capped ridges, and
19 flow toward topographically lower areas."

20 And I just wanted to use that provision to
21 just have you generally explain to me the regional flow
22 system and the local system.

23 A. The shallow or local flow systems, sometimes
24 refer to those as topographically controlled. Clinker
25 we may need to explain, when you drive through eastern

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1 Montana, it's the red shale hills. The coal burns
2 underneath the hill. The overburden material gets
3 baked and collapses into the void formed by the burning
4 coal. That forms a very good recharge area. And so
5 these local systems, and probably the regional systems
6 to an extent, also recharged farther away.

7 So recharge in Wyoming, that eventually
8 becomes the deeper system wherever that seam outcrops
9 could be recharged. Locally, we have seams that are --
10 the clinker is recharged. It can form springs right
11 there at the edge of the clinker or form a shallow flow
12 system that feeds the adjacent springs and creeks.

13 Q. Okay. So I think for the most part what you
14 were describing there was the local systems; right?

15 A. Right.

16 Q. So generally describe the regional systems.

17 A. Now, the regional system flows, and it
18 recharges from our mapping primarily on the Wyoming
19 side, flows north across the border in the state line
20 into Montana. And it's identified partly by the
21 chemistry. It's typically sodium bicarb. And it's
22 fairly deep under artesian pressure.

23 Q. And your work with regard to both the coal
24 monitoring program and the coalbed methane monitoring
25 program, dealt with the geologic layers between the

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1 Lebo shale and the Wasatch Formation; is that right?

2 A. That included the Wasatch if it was present.

3 Q. Okay. And as you move north, the Wasatch
4 becomes less and less present; right?

5 A. That's right.

6 Q. If you'll turn to page 31 for me, please.

7 And that's under a section entitled Hydrologic

8 Conditions After Three Years of Coalbed Methane

9 Production. Are you there?

10 A. Yes.

11 Q. I'm looking at the second paragraph, about
12 halfway through. And I'll read a sentence. "Mining at
13 the West Decker Mine has not lowered the water levels
14 in the Squirrel Creek alluvium which indicates a lack
15 of vertical communication between the coal and shallow
16 aquifers." And then there's a citation to Van Voast
17 and Reiten, 1988. And then it continues, "For the same
18 reason, CBM production has not lowered water levels in
19 the alluvium."

20 Can you describe what that means for us?

21 A. It's what we talked about just a minute ago,
22 that that drawdown from the Decker Coal Mine, we can
23 measure that drawdown and actually watch it project
24 underneath Squirrel Creek. But we don't see a pressure
25 change or a drawdown vertically migrating into the

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1 Squirrel Creek area.

2 Q. And then it continues, "With the CBM
3 production area (11C) since 1999, the water level in
4 some reaches of the alluvium has increased probably in
5 response to CBM production water infiltrating from
6 nearby holding ponds."

7 Describe what that means.

8 A. So the shallow recharge from infiltration
9 pond or holding pond or any application, recharges
10 shallowly and, in this case, is discharging to the
11 alluvium and feeding the creek probably.

12 Q. Was that describing a CBM holding pond in
13 Montana?

14 A. That was an implication or assumption, yes,
15 that I had made was, there's a pond there close. And
16 when we get to the graph, it will -- that will show.

17 Q. You made the assumption that it was
18 infiltrating, or you made the assumption it was in
19 Montana?

20 A. No. That it was infiltrating.

21 Q. Okay. Do you want to look at the graph
22 that's referenced there? I hadn't planned to, but we
23 certainly can. Figure 11C. Where do we find that?

24 A. I think that's the one on the next page,
25 isn't it?

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1 Q. I think so. Describe to us what's depicted
2 by Figure 11C.

3 A. On the left axis, the Y axis, we have
4 elevations. So that's water level elevation. On the X
5 axis, on the bottom, we have time from 1974, although
6 the dates start in 1978, through 2004. And for
7 reference, we have at the top graph precipitation
8 trends, annual totals. And so the graphs themselves
9 are showing water level trends or water level
10 measurements in the alluvium.

11 Q. Okay. Anything else you wanted to talk about
12 about those figures?

13 A. Do you have another question on it?

14 Q. I do not.

15 Were there other CBM infiltration ponds in
16 Montana?

17 A. There were some in the Squirrel Creek area.

18 Q. Do you know how many, about?

19 A. No.

20 Q. Were there any in any other areas?

21 A. There were in Wyoming.

22 Q. Okay. But not in Montana?

23 A. But not in Montana that I know of.

24 Q. Let's turn to page 46. Are you there?

25 A. Yes.

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1 Q. And this is under your summary section;
2 right?

3 A. Right.

4 Q. And in the second paragraph, about halfway or
5 a little more than halfway down, there's a sentence
6 that says, "Groundwater discharge where aquifers
7 sub-crop in alluvium provides base flow to support
8 perennial streams."

9 What does that mean?

10 A. That's a standard textbook concept. A
11 perennial stream has to be supported by base flow from
12 an aquifer. And reiteration of that concept.

13 Q. And then it follows: "During CBM production
14 and aquifer recovery, the streams that receive
15 significant portions of their flow from groundwater
16 discharge from coal beds may decline due to the loss of
17 groundwater base flow."

18 Describe what that means.

19 A. If an aquifer is discharging to that stream
20 through the alluvium to the stream and that flow is
21 interrupted or decreased, there would be a
22 representative decrease in the streamflow.

23 Q. Okay. And it concludes that paragraph, "In
24 larger surface water bodies, such as the Tongue River,
25 this impact will likely -- not likely be measurable."

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1 What do you mean by that?

2 A. In measuring, surface flow measurements are
3 typically in the 5- to 10-percent accuracy. And so if
4 a stream is flowing, let's say 1000 CFS -- let's do 100
5 CFS. That's easier math. If it's flowing 100 CFS,
6 your accuracy of measurement would be 5 to 10 CFS.

7 Q. Okay. And to be fair, you're not saying
8 there that there wouldn't be some kind of impact? It's
9 simply it's likely not measurable; right?

10 A. Right.

11 Q. And during the course of your work with this
12 area and the CBM monitoring, you didn't ever attempt to
13 quantify impacts to surface flows; right?

14 A. That's correct.

15 Q. Look at what's been marked Exhibit W234. And
16 I apologize for the rubber band binding. Do you
17 recognize that document?

18 A. I do.

19 Q. And what is it?

20 A. This is Montana Bureau of Mines & Geology
21 open file report 600, titled 2010 Annual Coalbed
22 Methane Regional Groundwater Monitoring Report, Powder
23 River Basin, Montana.

24 Q. And you were an author on this report as
25 well?

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1 A. I am.

2 Q. And was this report prepared in the ordinary
3 course of Bureau of Mine business?

4 A. Yes, it was.

5 Q. And this one was reviewed prior to
6 publication as well; right?

7 A. That's correct.

8 Q. Does it appear to be complete?

9 A. Yes.

10 MR. BROWN: I would like to offer Exhibit
11 W234.

12 MR. DRAPER: No objection.

13 SPECIAL MASTER: Okay. Exhibit W234 is
14 admitted.

15 (Exhibit W234 admitted.)

16 BY MR. BROWN:

17 Q. So now we've gone to year 2010 for reporting
18 of CBM monitoring; right?

19 A. That's right.

20 Q. So between -- I think we looked at 2004 and
21 2010, there would be a report like this for every
22 single year; right?

23 A. Each year, that's correct.

24 Q. And I think within the reports, much of that
25 information is historical data, so a lot of the report

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1 is carried over from year to year; right?

2 A. That's correct.

3 Q. And predominantly, what new is contained in
4 each year's report is the monitoring information that
5 had been compiled during that year; right?

6 A. Correct.

7 Q. There's sometimes other changes, but usually
8 just the new monitoring data?

9 A. That's correct.

10 Q. By the time this 2010 report came out, you'd
11 moved on to your new job?

12 A. I had.

13 Q. But you're still listed as an author on here
14 because much of the information they used, you put
15 together?

16 A. Because of that historical perspective. And
17 this one, I would have still been involved in the early
18 part of it.

19 Q. So by this time, Elizabeth Meredith had taken
20 over the monitoring program?

21 A. That's correct.

22 Q. And she's a University of Wyoming graduate;
23 right?

24 A. She is.

25 Q. I had to figure out a way to get that in.

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1 A. She's an excellent University of Wyoming
2 grad.

3 Q. They all are. Just thought I'd throw that
4 in.

5 And in 2002, the 2002 report that we had
6 taken a look at, you had attempted to predict what the
7 CBM drawdowns would be as a result of CBM production;
8 right?

9 A. Correct.

10 Q. So by this time, how did your predictions
11 hold up?

12 A. Well, some of them were sort of where you
13 want a prediction to be, a little overstated but not
14 dramatically overstated. So we felt okay about the
15 predictive capabilities. And we continued to refine
16 them.

17 Q. So the -- your 2002 predictions were a little
18 bit more than what you came to observe; right?

19 A. That's correct.

20 Q. If you'd take a look at page 43 with me,
21 please.

22 A. No page numbers.

23 Q. There aren't on some of them. Some of them
24 there are.

25 A. Is it a figure or a section?

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1 Q. It is a section. It's not a figure.

2 A. I found 33.

3 Q. Page 43 actually has a page number on it.

4 A. Good. Okay. I'm there.

5 Q. Did you find it?

6 A. Yes.

7 Q. What's -- and it's entitled, the section I'm
8 looking at anyway, Tongue River Alluvial Aquifer Water
9 Levels and Water Quality; do you see that?

10 A. Yes.

11 Q. And this is talking about the water levels in
12 the Squirrel Creek alluvium; right?

13 A. Right.

14 Q. And about halfway through that paragraph, it
15 says, "Farther downstream in the CBM production area
16 (WR-52D), the water levels in the alluvium were stable
17 until 2000, when levels increased by approximately 4
18 feet. Since that time water levels have gradually
19 returned to baseline and are currently at their
20 original levels."

21 Is this the same concept that you described
22 in earlier reports with regard to infiltration from the
23 CBM impoundments?

24 A. It is.

25 Q. And I think this indicates here that after

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1 those CBM impoundments stopped being used, the water
2 levels in the alluvium went back to normal?

3 A. The timing is unknown between those two
4 because these were Fidelity -- originally Redstone and
5 Fidelity ponds. And they did not permit us to do
6 monitoring on the ponds. So we don't have state or
7 discharge records to the pond. We don't know when it
8 was filled.

9 Q. Okay. But after they stopped, then, using
10 the alluvium measurements anyway, you went back to
11 normal; isn't that what that indicates here?

12 A. What it indicates to me from a hydrogeologic
13 perspective is after it stopped infiltrating, they went
14 back to normal.

15 Q. Okay. I'm going to try to take a look at
16 Plate 1 for this report. And you can see it in the
17 report itself, but it's so small. It's really hard to
18 read. So we're going to see if we can't -- first, go
19 to the legend in the top right. You're familiar with
20 Plate 1 of this report?

21 A. Yes.

22 Q. And isn't Plate 1 of this report one that was
23 used in the previous reports as well?

24 A. Right. Once we developed a standard format,
25 we stayed with it.

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1 Q. Okay. And so this is just this year's
2 iteration of that report?

3 A. That's correct.

4 Q. And so it incorporates all of the -- well,
5 what's plate 1 depict?

6 A. This is the monitoring sites, the wells and
7 springs that we monitored and the weather stations that
8 we had out. And Plate 1, that just shows the
9 monitoring wells and the production wells, I believe.
10 Yes.

11 Q. And doesn't it also show the springs that the
12 Bureau of Mines was monitoring?

13 A. I think I said that. I intended to. Springs
14 and wells.

15 Q. I apologize.

16 MR. BROWN: Let's go back up and try to
17 enlarge around the Tongue River Reservoir area.

18 BY MR. BROWN:

19 Q. And can you use your pointer and just
20 generally describe what we're looking at here? It's
21 still kind of difficult to see. Do you --

22 A. Okay. Let's run back.

23 Q. You want back out some?

24 A. If we could back out -- actually, run back to
25 the legend real fast. And let's make sure that I get

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1 the color coding right.

2 Q. So what are we looking at here?

3 A. So we'll look for that symbol for monitored
4 wells and monitored springs. Production wells, coalbed
5 methane production wells, they're active during the
6 year, the gray dots, green dots and a tan. And maybe
7 that's an orange. I'm not sure. But these three are
8 Wyoming production, CBM production wells.

9 Q. Okay.

10 A. And then underneath is the geologic
11 cross-section.

12 Q. Okay. So, again, we'll go back to the Tongue
13 River area, maybe a little bigger than you had before.
14 Let's try that.

15 A. That works.

16 Q. Okay.

17 A. So we have the Tongue River, the Tongue River
18 Reservoir, the Tongue River continuing below the
19 reservoir, the Montana/Wyoming state line. This red
20 line is the location of the geologic cross-section.
21 It's not for reference.

22 The tan areas are areas that are potentially
23 coalbed methane producing or being considered for
24 coalbed methane production and includes areas where
25 there is production on the Montana side. This is the

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1 Redstone-Fidelity field. And I think that was at that
2 time Pinnacle.

3 This darker tan on this area is the Crow
4 Indian Reservation.

5 Q. Okay.

6 A. Within there we see coalbed methane
7 production wells in Wyoming. And we see our -- these
8 symbols are our monitor wells.

9 Q. Looking at the Hanging Woman Creek CBM field,
10 did the coal seam stop at the border?

11 A. Yes. Seriously.

12 Q. It does?

13 A. I think there was eventually one CBM well
14 drilled in Montana.

15 Q. My question was: Does the coal seam stop?

16 A. No.

17 Q. As the CBM monitoring program evolved, I
18 think there were a series of state line monitoring
19 wells put in, was there not?

20 A. Correct.

21 Q. What was the purpose of those?

22 A. That was to distinguish impacts, drawdown
23 in -- let me start that over.

24 That was to distinguish impacts to water
25 levels between Wyoming production and the Montana

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1 production.

2 Q. Okay. And I believe that those state line
3 monitoring wells were placed in about seven different
4 locations?

5 A. At that time, there were, I believe, six new
6 sites actually put in. That red line actually shows
7 those. But we picked up part of that state line
8 program. We picked up others since then. There's also
9 been some more put in.

10 That site there was put in after I -- no,
11 that's picking up the Powder River. Yes.

12 Q. So the state line monitoring program
13 stretches all the way from over by the Tongue River all
14 the way over to Powder River?

15 A. To the Powder River.

16 Q. And at each of those locations -- I guess
17 first of all, those particular monitoring wells are
18 designated with an SL; right?

19 A. They -- the ones we drilled are designated
20 with an SL, right.

21 Q. The state line monitoring well?

22 A. Correct.

23 Q. And at each of those locations, there's more
24 than one well?

25 A. Not in every location. That was our intent.

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1 Q. Okay. At some of the locations, I guess,
2 there's more than one well?

3 A. Correct.

4 Q. What's the purpose of having more than one
5 well?

6 A. To look at vertical gradients and that
7 separation and impacts between the regional and the
8 local system.

9 Q. And so on those sites where there's multiple
10 wells, they're completed different formations?

11 A. That's correct.

12 Q. Okay.

13 MR. BROWN: Probably a great place to take
14 our second break if you'd like.

15 SPECIAL MASTER: Okay. Why don't we take a
16 ten-minute break. We'll come back when that clock over
17 there says 20 minutes to the hour.

18 (Recess taken 10:29 to 10:41

19 a.m., November 19, 2013)

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

22 Mr. Brown, you can continue your direct.

23 BY MR. BROWN:

24 Q. I'm going to hand you what's been marked
25 Exhibit W235; and do you recognize that documents?

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1 A. I do.

2 Q. And what is it?

3 A. This is Montana Bureau of Mines & Geology
4 open file report 614 titled 2011 Annual Coalbed Methane
5 Regional Groundwater Monitoring Report Powder River
6 Basin, Montana.

7 Q. And you're still listed as an author; is that
8 right?

9 A. I am.

10 Q. And this is just the next year -- or 2011, at
11 least, with regard to the coalbed methane monitoring
12 information?

13 A. That's correct.

14 Q. And this one, as well, was prepared in the
15 ordinary course of the Bureau's business?

16 A. Yes, it was.

17 Q. And it was reviewed prior to publication?

18 A. Yes, it was.

19 MR. BROWN: I would like to offer Exhibit
20 W235.

21 MR. DRAPER: No objection.

22 SPECIAL MASTER: Okay. Thank you. Then
23 Exhibit W235 is admitted into evidence.

24 (Exhibit W235 admitted.)

25

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1 BY MR. BROWN:

2 Q. And there's also a 2012 report, is there not?

3 A. There is. I'm trying to remember if it's
4 published yet or not.

5 Q. I don't have it with me, so I just wanted to
6 establish that there is one.

7 A. There is. And I think it's published, and
8 they're actually drafting the next one. They got
9 confused after a while.

10 Q. Okay. And I was going to ask a couple
11 questions about that one. But I think we'll just move
12 on. And I just wanted to offer it for a book end with
13 regard to, at least, the last copy of the report that I
14 have.

15 I'm going to show you what's been marked as
16 Exhibit W236; and do you recognize that document?

17 A. I do.

18 Q. And what is it?

19 A. This is Montana Bureau of Mines & Geology
20 Information Pamphlet 6 titled Coalbed Methane Basics:
21 Ten years of lessons from the Powder River Basin,
22 Montana.

23 Q. And you're an author of this publication as
24 well; right?

25 A. I am.

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1 Q. Does it appear to be complete?

2 A. It does.

3 MR. BROWN: I'd like to offer Exhibit W236.

4 MR. DRAPER: No admission, Your Honor.

5 MR. BROWN: No admission?

6 MR. DRAPER: No objection.

7 SPECIAL MASTER: I knew what you meant.

8 I don't know what it is in the air this
9 morning.

10 Exhibit W236 is admitted.

11 (Exhibit W236 admitted.)

12 BY MR. BROWN:

13 Q. I think you'd mentioned at your deposition
14 that this particular document was given some kind of a
15 national award?

16 A. It was. It was recognized by the American
17 Association of State Geologists as the best
18 environmental geology publication in the last three
19 years. And Liddy received her award at the Geologic
20 Society of America meeting in Denver in October.
21 Actually, unfortunately, though, she couldn't go.
22 Somebody had to stand in for her.

23 Q. You were quick to give all the credit to
24 Liddy.

25 A. Absolutely.

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1 Q. And that's Elizabeth Meredith; right?

2 A. It is.

3 Q. And you had drafted previous versions of this
4 informational pamphlet, and this was, at least as of
5 this time, the latest version; right?

6 A. That's correct.

7 Q. So it identifies itself as Information
8 Pamphlet 6; correct?

9 A. That's correct.

10 Q. And you had put together the previous five?

11 A. No. The Informational Pamphlet series is a
12 Bureau of Mines series. So I had put out Informational
13 Pamphlet 5, which is a predecessor to this. But 1, 2,
14 3, 4, they were unrelated.

15 Q. So, at least with regard to the coalbed
16 methane focus, No. 5 was the predecessor to this?

17 A. Right.

18 Q. And you drafted that?

19 A. I drafted it.

20 Q. But Elizabeth got the award with No. 6?

21 A. She did much better.

22 Q. What's the purpose of this informational
23 pamphlet?

24 A. This is intended as sort of a layperson's
25 review of the hydrogeology. Because it is a

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1 controversial subject, we like to make our information
2 as available and useful as we possibly can.

3 Q. Is it fair to say that this informational
4 pamphlet kind of boils down the more technical
5 information in the annual report and puts it in a more
6 user friendly format?

7 A. It does. But it's a generalization, an
8 overview, whereas, the annual reports present that
9 year's finding, and maybe the question of the year, so
10 to speak.

11 Q. Let's take a look at page 18, which is --
12 it's not the last page. And are you there? Page 18?

13 A. I am.

14 Q. And I'm looking at the left-hand column at
15 the very bottom, the last paragraph appearing in the
16 left-hand column. And there's a discussion there with
17 regard to baseline information and an identification of
18 something called the state-funded Montana CBM
19 Protection Act. Are you familiar with that?

20 A. Yes.

21 Q. And what is the Montana CBM Protection Act?

22 A. It was formed -- and I'm not familiar enough
23 to give you times and dates. It was formed as a method
24 for landowners to be compensated for unidentified --
25 I'm sorry. That's not accurate. It's an impact whose

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1 cause is not -- the company indicates the coalbed
2 methane is not identifiable. If there's no liable
3 party, but yet an impact's identified as coalbed
4 methane related, that would give them some resource.

5 Q. Okay. And I think you had told me that you
6 were on the Advisory Committee for this particular act?

7 A. I was, in this committee.

8 Q. And during your experience with your
9 involvement with that, were you aware of any
10 groundwater well owners that had taken advantage of the
11 act?

12 A. No.

13 Q. And I think you told me that you were aware
14 of one surface water right owner that attempted to take
15 advantage of the act; is that right?

16 A. From what I understood, yes. And I actually
17 was not -- I never saw the application. But I heard
18 the members mention that.

19 Q. Okay. But it was your understanding that
20 that application, at least at the time you were
21 involved, was not accepted because it was an incomplete
22 application?

23 A. Right.

24 Q. So at least with regard to the extent of your
25 involvement, you're not aware of anybody who actually

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1 got any benefit from that act?

2 A. That's correct.

3 Q. During your time that you were involved with
4 the CBM monitoring program in Montana, I think you told
5 me that you never observed a time where -- you never
6 observed any impacts to a groundwater well in Montana
7 that was caused by CBM pumping; is that right? Did I
8 say that poorly?

9 A. Our monitoring program showed drawdown in our
10 monitoring wells from CBM pumping in Wyoming that
11 caused drawdown in Montana.

12 Q. Right. And I think my question was, I think
13 you told me that you didn't observe any impacts to
14 existing groundwater wells for groundwater right owners
15 in Montana; is that right?

16 A. And that's -- I have not observed it. And I
17 would not necessarily have recourse or an option to
18 observe it. So it's not -- I can't say that it didn't
19 happen.

20 Q. Sure. You just never observed it?

21 A. Right.

22 Q. And during the course of your monitoring
23 program in Montana, you have not observed any impacts
24 to springs in Montana?

25 A. That's correct.

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1 Q. And some of those springs that you monitor
2 are connected to the regional groundwater flow system;
3 right?

4 A. Some of those have a mixed source; regional
5 and local.

6 Q. Okay. Showing you what's been marked as
7 Exhibit W237. And I apologize for the binding. Do you
8 recognize that document? Do you recognize it?

9 A. I do recognize it as a talk that I'd given.
10 I don't know when or where because it doesn't have the
11 source underneath.

12 Q. It appears to be a presentation; right?

13 A. It appears to be a PowerPoint slide
14 presentation. And I have given a lot of presentations.

15 Q. You were an author of this particular
16 presentation?

17 A. As the first listed person, I should have
18 been the presenter of this one.

19 Q. Do the slides or the information contained
20 within Exhibit 237 look familiar to you?

21 A. It does.

22 Q. And does this look to be a presentation that
23 you provided at some point in time during your
24 involvement with the CBM monitoring program?

25 A. Yes.

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1 MR. BROWN: I would like to offer Exhibit
2 W237.

3 MR. DRAPER: I'm not going to object to the
4 admission of this exhibit, Your Honor.

5 SPECIAL MASTER: Okay. Thank you. He's
6 being very careful now how he says this.

7 So Exhibit W237 is admitted.

8 (Exhibit W237 admitted.)

9 BY MR. BROWN:

10 Q. What was the purpose of this presentation?

11 A. Since it's not identified as to where I gave
12 it, I'm not sure I can tell the exact purpose. But
13 we're having a discussion -- this is not a national
14 conference. Slide 3 is -- look to the 2009 regional
15 monitoring report. That's not something you talk about
16 at a national conference. But yet it's a little more
17 technical than some of the landowner talks we would
18 give. So it may be a BLM update or someone was working
19 on a group update.

20 Q. And just give us a general summary of the
21 information contained within this presentation.

22 A. So this was specific to infiltration ponds,
23 our work, just our infiltration sites, lessons that we
24 had learned in presenting some of our data.

25 Q. Okay. And my understanding is generally you

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1 had done some studies to analyze the infiltration rates
2 of the CBM impoundments; is that accurate?

3 A. That's right.

4 Q. And this kind of provides the results of a
5 couple of those studies; right?

6 A. We had one pond in particular that we had
7 very well instrumented.

8 Q. And which pond was that?

9 A. Coal Creek.

10 Q. And does your discussion of Coal Creek begin
11 on the fourth page of Exhibit W237?

12 A. That's correct.

13 Q. Describe the Coal Creek infiltration pond for
14 us.

15 A. So this first picture, slide 4, we're looking
16 down Coal Creek proper. There's a farm pond in
17 foreground. Coal Creek is running from that, away from
18 us towards the trees. It's just left -- you can see a
19 house way down the road. Up on the right, you can see
20 three red frac tanks where they're drilling CBM wells.
21 There's actually a drill rig. That's our monitor well
22 drilling rig. And the disturbed dirt you see just to
23 the right of that drill rig is actually the berm around
24 the pond. So that's the pond itself.

25 Q. Okay. And if I'd have been better organized,

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1 I would have just ran the whole presentation on the
2 screen. But I apologize. I'm not that organized.

3 Where is the Coal Creek infiltration pond?

4 A. This is in the Powder River watershed in the
5 Powder River Basin. So remembering the Powder River
6 Basin contains several watersheds. This is in the
7 Powder River watershed east of Sheridan, Wyoming,
8 30 miles. And Coal Creek is tributary to Clear Creek,
9 which is, I think, direct tributary to the Powder
10 River. It's a bit of a convoluted path.

11 Q. So this particular study is in Wyoming?

12 A. It is.

13 Q. And what were you doing studying infiltration
14 ponds in Wyoming?

15 A. Actually, this started as Apache Oil Company
16 asked a group from the University of Wyoming and the
17 Western Research Institute and myself to come down and
18 do a study. And so this is near Ucross. And they had
19 found the site, and we worked out a nice project with
20 this. And it continued beyond the patchy work.

21 Q. But the Coal Creek site wasn't the only place
22 that you were doing studies; is that right?

23 A. That's right.

24 Q. I think you had mentioned you were doing at
25 least one other study of an infiltration pond south of

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1 Gillette?

2 A. That was an on-channel pond where they
3 worked -- actually built a dam across the channel,
4 enhancing existing ranch pond life.

5 Q. And I think you'd mentioned also that you had
6 conducted some studies in the small ponds in Montana?

7 A. That's right.

8 Q. But the best data set you had was from the
9 Coal Creek site?

10 A. That's correct.

11 Q. So let's turn the page, which I believe is
12 page 5 of Exhibit 237. Describe that -- what's
13 depicted in that photo.

14 A. I'm going to hold mine up to make sure we're
15 all on the same page 5.

16 Q. No, that's page 6. And I apologize. These
17 aren't numbered or Bates numbered. I didn't get them
18 in discovery.

19 A. So we're looking at the picture of the pond.
20 Okay.

21 Q. Yes, sir.

22 A. Slightly photo shopped. I have highlighted
23 our monitoring wells. They're not really that large.
24 But what you see in the white bars are the locations of
25 our monitoring wells, some of them. There's still a

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1 few, about ten more, that are not visible from this
2 locale. They're down closer to Coal Creek. The pond
3 itself, which has coalbed methane produced water in the
4 pond, the wells in the pond are at three different
5 depths, and the wells around the pond where there's
6 pairs, there's a shallow and a deep well. And then the
7 pump rig and equipment there is sitting at one of these
8 paired wells where there's a shallow and deep. And
9 we're pulling water quality samples. We have
10 transducers and data loggers in the pond and in quite a
11 few of the wells. Not all of them.

12 Q. And let me clarify what I said a few minutes
13 ago. I didn't get this particular version of this
14 PowerPoint in discovery, which is why it doesn't have
15 numbers. I believe we got it in discovery, however. I
16 think I caused some heartburn.

17 Oh, look, it's up there.

18 MR. BROWN: Thank you very much. State of
19 Montana threw up the picture on the screen so everybody
20 makes sure they are looking at the same thing.

21 BY MR. BROWN:

22 Q. Let's turn the page. And it's got the --
23 well, it's on page 6 of Exhibit 237. Describe what is
24 depicted in that slide.

25 A. So it's a graph -- let's start on the

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1 right-hand Y axis, says pond water depth. That goes
2 from 0 to 8 feet. And offset that upward so that we
3 can see the graph better. That's the depth of the
4 water in the pond. On the X axis is time starting in
5 June 2003 and continuing through September 2007. On
6 the -- to the left Y axis is volumes of water. And
7 those are monthly rates.

8 That axis, the left axis relates to the bar
9 graphs. And there's two bar graphs. And one shows
10 vertical infiltration from the pond, my calculation.
11 And the other, the red one, is evaporation off the free
12 water surface.

13 Q. Describe how you made your calculation with
14 regard to the percentage of water that evaporated as
15 compared to the percentage that infiltrated.

16 A. So we have the bathymetry of the pond.

17 Q. And what is that?

18 A. That's the shape and volume of the pond, the
19 shape of the bottom.

20 And we have the stage, the water level of the
21 pond. So by that, we can calculate surface area of the
22 free water surface using standard evaporation, free
23 water surface evaporation rates. I calculated from
24 that surface what the evaporation from the free water
25 surface would be from the pond. That's the red bar.

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1 And you see that going up and down because
2 the water level, as it's higher, there's a larger area
3 to evaporate. So there's more volume lost to water. I
4 think free water evaporation in this area is about
5 40 inches per year, almost 3 and a half feet.

6 Then the yellow bars are the remainder of the
7 water that's not accounted for in the pond water level.
8 So by doing the volume of the pond, subtracting free
9 water surface evaporation, the remainder, since there's
10 no outflow from the pond, must infiltrate.

11 Q. Okay. And at least through this particular
12 study, if I'm correct, you calculated that 70 percent
13 of the water in the pond infiltrated into the ground?

14 A. At that point in time.

15 Q. But I think you told me in your deposition
16 that just through your experience with all of the ponds
17 that you had investigated, that you thought that it was
18 probably more accurate around 50 percent of the
19 infiltration rate; is that right?

20 A. It would depend on the pond and the timing of
21 the use. If we look at this pond, the typical life of
22 a well is about seven years. And this well pumped for
23 a year and a half. The ceiling occurred, what, seven
24 months after it really started. You know, that might
25 be less than that. And once it seals, no matter how

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1 long you pump into the pond, there's not going to be
2 any more infiltration. The clays have flocculated,
3 disbursed and flocculated.

4 Q. So once the clays flocculate, then it reduces
5 the infiltration?

6 A. Pretty much blocks it.

7 Q. So that there cannot be any additional
8 infiltration?

9 A. There's a rare occasion when it can. But if
10 the pond goes completely dry, you can actually form
11 desiccation cracks. There's, I think, a picture.

12 Q. I think there is.

13 A. Yeah. And you can get a little bit more.
14 That's very short lived. As soon as that mud
15 rehydrates, it will stop again.

16 Q. The remainder of that particular presentation
17 deals predominantly with water quality issues; right?

18 A. Yes. Let's look at it real quick.

19 Q. Sure.

20 A. Since I can't remember this one. Uh-huh.
21 And the Beaver Creek pond which is --

22 Q. And the Beaver Creek pond was the one near
23 Gillette; is that right?

24 A. Right.

25 Q. Okay. I think you told me at your deposition

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1 that at least up until that point in time, you've never
2 spoken with anybody by the name Steven Larson; is that
3 right?

4 A. Right.

5 Q. And you weren't ever asked to review any work
6 that he did for this case?

7 A. I've never reviewed his work.

8 Q. And you weren't ever asked to review any work
9 that was performed by a Dr. Schreüder; is that right?

10 A. That's right.

11 MR. BROWN: I think that's all I have. Thank
12 you.

13 SPECIAL MASTER: Thank you, Mr. Brown.

14 Mr. Draper?

15 MR. DRAPER: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q. Good morning, Mr. Wheaton.

19 A. Good morning.

20 Q. I'd like to ask you about a couple of the
21 exhibits that Mr. Brown discussed with you. Do you
22 have still there with you the pamphlet -- Information
23 Pamphlet 6, which is designated Exhibit W236?

24 A. Yes.

25 Q. I'd like to ask you to turn to page 13 with

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1 me, please. Do you have that page?

2 A. I do.

3 Q. Do you see there's a heading on the page at
4 the top of the right-hand column, says Infiltration and
5 Evaporation Ponds?

6 A. Yes.

7 Q. The second paragraph starts out with a
8 statement that says, "The utility of infiltration ponds
9 can be reduced if the interaction of sodium in the
10 coproduced water with the floor of the pond causes the
11 floor to seal greatly restricting infiltration";
12 correct?

13 A. Correct.

14 Q. In that statement, what do you mean by the
15 word "infiltration"?

16 A. The water -- maybe the best picture is to
17 think of watering your lawn. The water that isn't
18 absorbed and used by the grass infiltrates into the
19 soil.

20 Q. You mean infiltrates to the immediately
21 adjacent soil below the grass in your example or below
22 the ponds in this --

23 A. Infiltration can be a fairly generic term. I
24 don't think it's implying a specific depth. But it's
25 going below the base, in this case, below the base of

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1 the pond.

2 Q. Does it necessarily mean infiltration to the
3 regional aquifer system?

4 A. Let's see. We're on IP6. It doesn't imply
5 that.

6 Q. What does that statement generally mean, that
7 I just read to you?

8 A. The part about the sealing and the reduced
9 infiltration?

10 Q. Yes. "...the interaction of sodium in the
11 coproduced water with the floor of the pond causing the
12 floor to seal greatly restricting infiltration." Can
13 you describe what you're talking about there?

14 A. The material in the Fort Union Formation, the
15 Tongue River member, has a lot of fine material, and a
16 lot of clays. For lack of a better analogy, just try
17 imagining clumps of clays that are actually boxes of
18 playing cards that have never been opened. And so we
19 have a bucket of those playing cards. And if we pour
20 water through it, those boxes in random position can
21 allow water to flow through. We can picture that
22 fairly easily.

23 But if there's sodium in the water and the
24 sodium goes in between the playing cards, instead of
25 the playing cards being held closely together, the

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1 sodium will displace the calcium and magnesium and
2 allow the individual cards to float apart and form sort
3 of a gel structure within the structure of the clays.
4 And if that gets wide enough and there's enough water,
5 then those playing cards would come out of the box and
6 migrate away from each other and settle into the bottom
7 of the bucket of water.

8 Now, instead of random blocks, we have a
9 stack of many layers of platelets. Now that prohibits
10 the movement of water through there. And if you try to
11 get those cards back in the box, they won't go back in
12 the box. You can dry it up and make some cracks
13 between them.

14 Q. Did you find that -- in your work, that this
15 phenomenon of the sealing caused by the presence of
16 sodium to be relatively widespread?

17 A. In the Tongue River member, it's common.

18 Q. Now, you go ahead in that same paragraph and
19 further state, "Additionally, if an impermeable layer
20 such as shale is present, infiltrating water maybe
21 diverted horizontally to form unwanted saline seeps."

22 What do you mean by the horizontal diversion
23 of the water?

24 A. Groundwater flow follows an energy gradient,
25 just like a ball rolling down a hill. It goes from

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1 high to low following the path of least resistance.
2 Now, this is high energy to low energy, not necessarily
3 downhill to be coming up.

4 But if it's flowing through a sand layer, for
5 example, and there's a shale underneath it, a lower
6 permeability layer, then it would preferentially flow
7 along the top of that until it either reached daylight
8 or found another pathway down.

9 Q. And you mentioned saline seeps in this
10 statement. In your experience, do these saline seeps
11 or horizontal movement of water typically discharge to
12 surface streams?

13 A. We have not, in an infiltration pond,
14 questioned -- we never did find surface discharge.

15 Q. Let me turn now to the next exhibit that
16 Mr. Brown discussed with you, which is W237. It's the
17 PowerPoint presentation. And he questioned you about
18 the Coal Creek infiltration pond. In the graph, it
19 appears -- I think it's slide 6. We're projecting it
20 on the screen. Were you able to get back to that
21 figure?

22 A. Yes.

23 Q. Now, he had you describe what was going on as
24 depicted in this figure. Is this figure consistent
25 with your previous testimony about the tendency for the

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1 pond floors to seal in the presence of sodium in these
2 ponds?

3 A. Yes.

4 Q. Please explain how so.

5 A. Could we flip to the next slide?

6 Q. Sure.

7 A. If that's okay. The red line on the next
8 slide is vertical hydraulic conductivity. That's
9 calculated using the previous slide that you were
10 asking about. In order to move that water out of the
11 pond to infiltrate it, there has to be an ability for
12 that forced medium to accept and transmit the water,
13 hydraulic conductivity. And if we look at the pressure
14 gradient and the area of the pond and the rate of
15 movement, we can back calculate hydraulic conductivity
16 below the pond. That red line shows -- and it's on the
17 right-hand Y axis is the indicator for that.

18 As the pond material saturates, the vertical
19 conductivity increases until it's moving water pretty
20 well. And then you see it start to come down and then
21 finally just drop to near zero where there's much
22 smaller amounts of water capable of moving through that
23 profile.

24 Q. So when that red line goes to zero,
25 essentially that means there's no passage of liquid

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1 through the floor of the pond?

2 A. We want to be careful about saying zero in
3 hydrogeology. I was taught by one of my early
4 professors the only true aquiclude is permafrost. So
5 there would still be some, but it would be very small.

6 Q. And just for the record, the term aquiclude
7 means?

8 A. An absolute barrier to water.

9 Q. So turning back to the previous figure then,
10 how is that reduction essentially to zero -- I guess I
11 would use the word essentially to conform to your
12 point -- how is that shown in the information on the
13 graph that Mr. Brown took you to?

14 A. The bar graph, the yellow bar graph drops
15 dramatically in October 2004 and picks up a little bit
16 with time after that, but a small amount. At that
17 point, it wouldn't matter how long you used that pond.
18 With very little infiltration, that's going to occur
19 after that.

20 Q. So there is some seepage in that area where
21 we have the tall yellow bars during the sealing
22 process. And then it goes to essentially a sealed pond
23 condition?

24 A. Essentially, it goes -- certainly reduces
25 vertical migration significantly. And it's very

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1 dramatic, as you can see there.

2 Q. How long was this pond used? I think you
3 stated in your direct testimony.

4 A. I think that they started pumping in -- oh,
5 they did their test pumping in the summer of 2003. You
6 can see when that -- well, if you look at the blue
7 line, the stage graph, you can see it really kick up
8 there in the spring of '04. But they stopped pumping
9 in -- I think that they stopped pumping in
10 October 2004, very close to that. It might show in one
11 of these others.

12 Q. And this chart shows that it went dry where
13 it's indicated --

14 A. Right.

15 Q. -- in blue?

16 A. And increases in the stage after that where
17 snow and rain accumulated and collected in it, in the
18 pond.

19 Q. Now, I noticed that in the far right, there
20 is a yellow bar that comes up below the minimal level
21 shown since the original sealing. Does that mean that
22 the pond began to allow infiltration again at that
23 time?

24 A. Let me glance through the rest of this talk
25 and see. There's pictures that I use sometimes.

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1 Q. Sure.

2 A. No.

3 Q. Well, if I may direct your attention to two
4 slides on, there's a picture which is on the screen.

5 A. Oh, yes. That picture on the bottom, there's
6 a picture you don't see on a sandy beach. When the
7 water drains out of a sandy beach, you have a nice,
8 flat, dry layer afterwards. When the water drains out
9 and you have some sun baking on a clay flocculated
10 material, a flocculated clay, you get desiccation
11 cracks. And that's what you're seeing there. I placed
12 my pencil for scale amongst those desiccation cracks.

13 My interpretation of the yellow bar back in
14 summer of '07 on Figure -- that one.

15 Q. Slide 6?

16 A. Slide 6, is that those desiccation cracks are
17 allowing migration of the rain water until they swell
18 back up and seal off again.

19 Q. So there's a short-lived small amount of
20 infiltration until it rehydrates the floor of the pond?

21 A. Right.

22 Q. And then once again it would seal?

23 A. It would seal.

24 Q. So if this pond had been used during the
25 regular, say, seven-year lifespan of a set of CBM

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1 wells, would it have allowed significant infiltration?

2 A. Well, significant, I'm not sure of the term
3 in this sense. But infiltration would not have
4 increased back to the summer of 2004 levels.

5 Q. And the indication that you give at the
6 bottom of this graph of infiltration, 70 percent would
7 not apply, would it?

8 A. That applies for the period of this specific
9 site and its use, uh-huh.

10 Q. And if it were -- if this site had been used
11 for disposal of CBM produced water, would the
12 infiltration have been significantly less than that?

13 A. It would certainly be less, yes.
14 Significant -- we measure things in feet rather than
15 significant. So it's just a term I'm not
16 comfortable -- I'm not quite sure how to apply it. But
17 it certainly would be a lot less. Significant may be a
18 fine term.

19 Q. And if you go from the period of use of this
20 pond, which is about a year and a half, the other, say,
21 four and a half, five and a half years of normal use of
22 a pond would have seen infiltration values that are
23 down in the type of values you see on the right-hand
24 side of this graph rather than the left-hand side;
25 isn't that right?

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1 MR. BROWN: I'm going to object. Assumes
2 facts not in evidence with regard to other typical
3 ponds, I guess, towards the CBM usage. I don't know
4 that we've established that.

5 SPECIAL MASTER: So I think the question can
6 be rephrased in this particular case as to the
7 witness's experience with ponds that are in use for a
8 longer period of time and what happens to the
9 infiltration levels during the overall period of use.

10 BY MR. DRAPER:

11 Q. Mr. Wheaton, based on your personal
12 experience and observations, would the values of
13 infiltration that we see on the right-hand side of this
14 graph and the low hydraulic conductivity that we saw on
15 this other graph, would those remain in the life of the
16 pond, based on your experience?

17 A. From my experience, I would expect that to
18 happen.

19 SPECIAL MASTER: And I'm sorry. Just to be
20 clear, you said expect that to happen?

21 THE WITNESS: As opposed to having measured
22 CBM pond coral.

23 SPECIAL MASTER: But when you said expected
24 that to happen, what do you mean by "that"?

25 THE WITNESS: Oh, that. To see a continued

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1 low vertical hydraulic conductivity would maintain. I
2 would not expect to see infiltration increase over
3 time.

4 MR. DRAPER: Thank you.

5 BY MR. DRAPER:

6 Q. Mr. Wheaton, the water that did discharge in
7 the sealing process, did you determine what the fate of
8 that water was? Did it discharge, for instance, to
9 surface drainages?

10 A. We did not ever actually see it show up at
11 this site. We had a spring down-gradient, and we did
12 not see that water show up in the spring during the
13 study. We had monitoring wells that were 8 feet to
14 80 feet deep in and around the pond. Those showed a
15 mounding where the water came down to that depth and
16 mounded up. And then that mound dissipated. We had
17 another set of wells 120 to 150 feet deep. We did not
18 see mounding occur in those wells.

19 So our interpretation is that the water went
20 to approximately 100 feet and then moved on, moved on
21 horizontally.

22 MR. DRAPER: Your Honor, if I may have a
23 brief moment?

24 SPECIAL MASTER: You certainly may.

25 MR. DRAPER: That should do it, Your Honor.

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1 Thank you, Mr. Wheaton.

2 SPECIAL MASTER: Thank you. So I have some
3 questions of my own. But I'm wondering, rather than
4 breaking it up, whether it makes the most sense just to
5 stop now. And then we'll come back at about 25 after
6 the noon hour to finish up.

7 MR. DRAPER: Very good.

8 SPECIAL MASTER: Okay. Sounds good.

9 (Recess taken 11:25 to 12:27
10 p.m., November 19, 2013)

11 SPECIAL MASTER: Okay. Everyone can be
12 seated.

13 EXAMINATION

14 BY SPECIAL MASTER:

15 Q. Okay. Again, I think my questions are going
16 to be relatively short because I think counsel for both
17 sides did a good job of covering the documents and
18 making the questions fairly clear on the record. But I
19 do have a couple of questions.

20 So the first one deals with Exhibit W228,
21 which is the groundwater monitoring program and
22 perspective coalbed methane areas of southeastern
23 Montana. This is the Montana Bureau of Mines and
24 Geology open file. You have that document?

25 A. Yes, I have it.

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1 Q. Great. If we could start out just by turning
2 to page 31 for one second.

3 A. Okay.

4 Q. So there was a passage that Mr. Brown
5 referred you to on page 31. And I'm looking in
6 particular about, oh, halfway through the second main
7 paragraph. It says, "Mining at the west Decker mine
8 has not lowered the water levels in the Squirrel Creek
9 alluvium, which indicate the lack of vertical
10 communication between the coal and shallow aquifers."
11 And then, just hold that particular sentence in mind.

12 If we then turn to page 46. And on page 46
13 in the second paragraph, the second sentence says,
14 "groundwater levels in overlying and underlying
15 aquifers are expected to show little response to
16 drawdown in the producing coal beds through the
17 presence of shale dominated stratigraphic sequences."

18 And my question is: Is that referring to the
19 same phenomena?

20 A. Geologically, it's the same phenomena. The
21 deposition environment is very fine grain material. So
22 if we look in a cross-section across the Powder River
23 Basin, it's really a clay or shale, a very fine grain
24 material with interbedded sand lenses or channel sand
25 lenses and laterally continuous coal seams.

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1 Q. And is this -- you suggested a moment ago
2 that this is a general phenomenon across the Powder
3 River Basin?

4 A. That trend is fairly general.

5 Q. So it's a general phenomenon?

6 A. That layering of the clays and the sands.

7 Q. Okay.

8 A. It's a very heterogeneous setting. Because
9 it's river deposits. We typically think of coal as
10 deposited in a swamp next to the ocean. These are
11 river deposited with raised swamps where the coal was
12 actually developing, and then river systems. And so a
13 river system is constantly moving back and forth and
14 depositing different materials in different areas. But
15 as a general rule, we think of it as a very
16 fine-grained material with interbeds of sand and coal.

17 Q. Okay. So even though you would tend to find
18 this stratigraphic sequencing throughout much of the
19 basin, the impact would be different in different
20 areas?

21 A. Not at depth. Once you're at depth, it would
22 be fairly similar.

23 Q. Okay. Then on page 46, at the end of that
24 particular paragraph, it says, "In larger surface water
25 bodies such as the Tongue River, this impact will not

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1 likely be measurable." And, again, Mr. Brown asked
2 about that.

3 And my question is: What do you mean by
4 "measurable" here? Are you talking about physically
5 trying to measure the impact?

6 A. I am. Can I make an example?

7 Q. Yes, you certainly may. Again, try to
8 describe as much as possible so it actually turns out
9 on the record.

10 A. I'm used to a more classroom-type setting.

11 Q. You can go ahead and use those. Physical
12 demonstration is great. I just want to make sure you
13 try to narrate it as much as possible.

14 A. If I pour some water from this water pitcher
15 into the glass, we could have marked that, the glass,
16 and probably seen the change in the water level of the
17 glass. I don't think we would have seen a change in
18 the pitcher. It's maybe -- to use that significant
19 term, that's awkward for me to use, it might be
20 significant here, but it's not significant in the
21 pitcher.

22 It's that degree of measurability. How
23 accurately can we measure? That's not to say that
24 there's not a change. There's less water in the
25 pitcher.

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1 Q. That's what I thought you were referring to.
2 And I just wanted to make absolutely clear. So when
3 you said that in measuring, I believe you said like a
4 5- to 10-percent error?

5 A. Correct.

6 Q. And is -- that's, again, the physical
7 measurement of exactly how much water there is in a
8 water body?

9 A. Correct, absolutely. We can calculate, but
10 we can't always measure the changes.

11 Q. So those were my only questions with respect
12 to that document.

13 And then if we could turn for a second to
14 Exhibit W236. And both Mr. Brown and Mr. Draper asked
15 you about this document. And on page 13 of the
16 document.

17 A. I'm sorry?

18 Q. Page 13 --

19 A. Thirteen.

20 Q. -- of the document, there was a passage that
21 Mr. Draper referred you to during his
22 cross-examination. Second paragraph in the right-hand
23 column that says, "The utility of infiltration ponds
24 can be reduced if the interaction of sodium in the
25 coproduced water with the floor of the pond causes the

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1 floor to seal, greatly restricting infiltration."

2 My question is: Is that what you were
3 referring to when you mentioned the term deep
4 flocculation?

5 A. Right. Exactly. The clays dispersing from
6 each other and then forming a floc or a layer that's
7 very tight.

8 Q. Okay. So that's where that particular term
9 comes from?

10 A. Correct.

11 Q. And when that happens, that is deep
12 flocculation, or is that floc?

13 A. I think that's flocculation.

14 Q. That's flocculation. Okay. Because I was
15 looking through here. Initially, I thought it was
16 flocculation. But then I saw another mention of deep
17 flocculation. But that's flocculation?

18 A. I think that's -- make sure we've got that
19 right. Dispersion and flocculation.

20 Q. And then finally, on Exhibit W237, which is
21 the PowerPoint presentation. So I just had a couple of
22 questions on this one.

23 So the first one was, I know you don't
24 remember exactly when you gave this talk. But do you
25 recall why you would have been talking about these

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1 particular infiltration ponds; the one on Coal Creek
2 and then on Beaver Creek?

3 A. This talk or similar talks would have been
4 given at our -- we had a team that worked on water
5 management, and so we had annual meetings, and we all
6 got together. And it's part of the peer review
7 process. If we have 20 co-researchers that are working
8 on not these infiltration ponds but on the project,
9 they're familiar with it, we can give a talk and then
10 get feedback from them. So we used talks frequently as
11 a way of getting feedback.

12 When we go to a conference and give a talk,
13 we're expecting and looking for feedback.

14 The other potential for this talk would have
15 been one of the working groups, like, the interagency
16 work group may have asked or the Yellowstone River
17 Compact Commission. I've given talks to a number of
18 places that have asked for specific talks on parts of
19 coalbed methane. And so this is -- could have been for
20 any of a number of those.

21 Interagency working group comes to mind
22 because it says look for the upcoming monitoring
23 report. This could have actually been the controlled
24 groundwater area task. It could have been an update
25 for them.

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1 Q. I guess my question, I need to ask it a
2 different way. So these were not the only infiltration
3 ponds that you monitored?

4 A. This was the ones that we did the most
5 thorough monitoring on. We had a couple of places --
6 well, there's the one that's mentioned in the annual
7 reports that we had wells, a long creek history
8 adjacent to a new pond that came in. So we can watch
9 that water soak into the shallow aquifers but not make
10 it to the deeper aquifer. But we didn't have the
11 record of the pond levels.

12 We had two sites with Dr. Jim Bauder out of
13 Bozeman where he built a controlled pond that he put a
14 plastic liner and salt when he put the 20-foot ponds
15 in. And he built an unlined pond adjacent to it. And
16 it filled those. We put some wells around and watched
17 that process. Those were from the groundwater with
18 respect to incomplete projects. And then we had a few
19 other sites where we just opportunistically looked at
20 ranchers' flowing wells discharging across the
21 landscape and drilled some holes in the channel and
22 didn't find water underneath the channel.

23 Q. And where is Coal Creek?

24 A. Coal Creek is in Wyoming, east of Sheridan.

25 Q. Okay. And is -- this infiltration pond

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1 you're describing, was it lined or unlined?

2 A. Unlined.

3 Q. So that helps. I thought this was probably
4 something in Montana because so many other things
5 were -- discussed were in Montana. And then I had
6 noticed in one of the reports that you prepared, going
7 back to W236, on page 13 in the -- towards the top, it
8 notes that "Both lined and unlined ponds are used
9 extensively in Wyoming; however, ponds in Montana are
10 currently all lined."

11 So this falls within the category of unlined
12 ponds in Wyoming?

13 A. That's correct.

14 Q. Okay. And then, again, I just want to make
15 sure I totally understand the chart which is two pages
16 farther along, which is a chart that we were referring
17 to earlier. So, again, the blue line with the
18 triangles shows the depth of water in the pond?

19 A. Right.

20 Q. And then the evaporation rate, which is --
21 are the red bars, that, you're calculating based on a
22 combination of the pond depth of the contour of the
23 pond and standard evaporation rates; is that right?

24 A. Correct.

25 Q. Okay. And then what I didn't totally

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1 understand, and maybe you can walk me through it on
2 here, is how you then calculated the infiltration?

3 A. So we converted first the pond water level to
4 a pond volume, so every month. Then we did what's
5 really a standard water budget approach. We had this
6 much water. And what's not here is how much water came
7 into the pond from different sources. We didn't put
8 that. But it's implied by the stage of the pond.

9 By converting that to a volume, which it's
10 shown here as a stage, not a volume because it seemed
11 relevant, then we just subtract the evaporation from
12 that volume. The remaining water, that represents
13 change from each month. The change in storage volume
14 each month has to represent either precipitation coming
15 in, coalbed methane water coming in, evaporation going
16 off, or infiltration going in.

17 We have a rain gauge, so we knew the
18 precipitation. We've done evaporation studies in the
19 area. So we knew that the standard charts were valid.
20 We could take out the evaporation. And so then the
21 change in storage volume that's left over becomes
22 infiltration.

23 Q. Okay. So, for example, if you look for what
24 appears to me to be April of 2004, I noticed that there
25 was a large infiltration rate. But it was also very

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1 defined when the pond water depth is going up. And
2 that's because what's not shown here would be things
3 that are coming into the pond which could be CBM water
4 or it could be precipitation?

5 A. Correct.

6 Q. Okay. And then turning to the next chart, I
7 understood that you calculate vertical hydraulic
8 conductivity based on the data from the prior page.
9 But could you just define what vertical hydraulic
10 conductivity is?

11 A. Okay. Yes. The hydraulic conductivity is
12 the ability of a force being transmitted through it.
13 And that's used as the -- one of the factors, one of
14 the parts of the equation when we calculate flow. Here
15 we're using a fairly simple approach called the Darcy
16 equation. So it's the vertical -- or well, let's first
17 just start with conductivity. Hydraulic conductivity
18 times the area it flows through times the gradient, the
19 change in head, that's the energy gradient gives the
20 flow through the system. If we just turn that up and
21 do it vertically, then we have the same thing.

22 So hydraulic conductivity represents the ease
23 with which a fluid moves through a medium in the
24 simplest terms. And here it's whether we're
25 calculating the vertical movement of the water was

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1 horizontal movement, and we're specifying vertical
2 movement.

3 Q. And I notice that the units of measurements
4 are feet per D. What does D stand for?

5 A. Day.

6 Q. Okay. So that measures how many feet, then,
7 the water would move vertically in a day?

8 A. No. Unfortunately, the unit on hydraulic
9 conductivity doesn't -- gallons per day, foot squared
10 are another common unit, cubic feet per square foot per
11 day. Let's see. I don't even work in those anymore,
12 so I'm not sure I got that right. So it's not a
13 velocity measurement that's important.

14 The material is, at the max, in a clean beach
15 sand, 20 percent pore space. And these materials may
16 be 1 percent pore space. The velocity is occurring in
17 that pore space. And so this is not -- we really can't
18 think of it as a velocity. But if we calculate the
19 flux and divide by porosity then come up -- divide by a
20 porosity, we can get a velocity.

21 Q. So then vertical hydraulic conductivity would
22 be a measure of what?

23 A. The ease with which water could move
24 vertically.

25 Q. Okay. And then you said that you had looked

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1 at some other -- you also studied some other
2 impoundment ponds. Were there any impoundment ponds
3 that you studied as part of this research that did not
4 encounter flocculation?

5 A. We studied a pond in the south of Gillette
6 that was on channel. This was essentially cut into the
7 gravel alluvium on a small tributary to Beaver Creek.
8 So it didn't really change with time. It leaked and
9 overflowed.

10 Q. Which creek was that?

11 A. That's on Beaver Creek.

12 Q. So was that the other --

13 A. That's the other site that shows up here.

14 Q. And then I have to ask, even though I'm sure
15 it won't be relevant, but is saturated paste relevant
16 to flocculation?

17 A. It's not why we did saturated paste.
18 Saturated paste was done to calculate the chemistry
19 changes when the water moves through that material. It
20 dissolves salts and the quality of the water changes.
21 And so we were doing laboratory experiments to predict
22 that.

23 Q. Okay. And I guess the final thing on
24 flocculation. So flocculation is -- the determinants
25 of flocculation is the chemical makeup of the water; is

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1 that correct?

2 A. Uh-huh.

3 Q. And what else?

4 A. And the rock material. So a sand grain will
5 not come apart. But a clay, because the structure
6 internally, that stack of platelets, of clay platelets,
7 will come apart.

8 Q. So in the case of the Coal Creek infiltration
9 pond, the flocculation was a combination of the sodium
10 in the water, in the CBM water, and the high clay
11 content of the soil; is that correct?

12 A. That's correct.

13 Q. Okay. Great.

14 SPECIAL MASTER: Those are the only questions
15 I have. Thank you.

16 But at this point, Mr. Draper's entitled to
17 ask any other cross he wants on those particular
18 issues.

19 MR. DRAPER: Thank you, Your Honor.

20 SPECIAL MASTER: You're welcome.

21 RECCROSS-EXAMINATION

22 BY MR. DRAPER:

23 Q. Just wanted to follow up, Mr. Wheaton, on a
24 couple of the Special Master's questions. He was just
25 now asking you about Exhibit W237, the PowerPoint. And

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1 we were looking at the two graphs. I think they're
2 slides 6 and 7 in that. First, as to vertical
3 hydraulic conductivity, which is on the screen right
4 now, that graph -- and you were talking about units.
5 Well, the units can be kind of confusing to us
6 laypeople. When hydraulic conductivity goes to zero,
7 there's no flow through the medium; isn't that right?

8 A. If it actually went to zero. But I want to
9 reemphasize what I said earlier. It would very rarely
10 go to zero. It did not go negative.

11 Q. I'm not suggesting any particular situation
12 or anything. But when hydraulic conductivity goes to
13 zero, flow through the medium goes to zero?

14 A. It would, yes.

15 SPECIAL MASTER: Can I just ask one quick
16 question? If I actually look at the chart on that
17 page, it looks as if it goes below zero.

18 THE WITNESS: That is part of the error of
19 measurement. And while I would not report a negative
20 number, I presented all the data on the chart.

21 SPECIAL MASTER: That's good.

22 BY MR. DRAPER:

23 Q. And then turning to the previous graph that
24 you discussed with the Master. You discussed
25 infiltration. Now, just to be clear, the type of

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1 infiltration that you're referring to here is not
2 infiltration to the regional aquifer system, is it?

3 A. Not -- and I think I said that in my original
4 testimony. At this site, we had a set of wells that
5 were 80 to 90 feet deep, another set 120 to 150 feet
6 deep. We saw the mound in the shallow wells. We did
7 not see the mound underneath those wells. So I don't
8 know of a case where it's gone -- where that
9 infiltration has gone deeper than, say, a hundred feet.

10 Q. So you have not seen indications that there
11 was any infiltration to the regional aquifer system?

12 A. Not in my work, I haven't.

13 Q. Would an assumption of 25 percent, getting
14 back to the regional aquifer system, seem appropriate?

15 A. Based on my work. And that's all I can base
16 that on. I haven't seen a site where any water made it
17 to the original aquifer. So the 50 percent that leaked
18 out of the pond, that's just leaking out of the pond
19 into the shallow system. 25 percent could be a random
20 number. I just haven't seen anything get to the deeper
21 system.

22 Q. Nothing at all?

23 A. Nothing. In my data.

24 SPECIAL MASTER: I'm sorry. I just have one
25 other question regarding this chart. The 30 percent

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1 and 70 percent, so 30 percent evaporation, 70 percent
2 infiltration, is that simply taking up the total of the
3 yellow bars and the total of the red bars and have
4 turned out, and in this case, it was 30 percent?

5 THE WITNESS: Correct.

6 SPECIAL MASTER: And that was over this
7 entire period?

8 THE WITNESS: Over this period. And that's
9 just, if we imagine the pond edges to be a boundary, it
10 crossed the boundary. That's not addressing the fate
11 of the water.

12 SPECIAL MASTER: Correct.

13 MR. DRAPER: Very good. Thank you. Your
14 Honor, no further questions.

15 SPECIAL MASTER: Okay. Thank you.

16 Mr. Brown?

17 MR. BROWN: I'm trying to decide if we've
18 flocked that one enough.

19 SPECIAL MASTER: I just like saying deep
20 flocculation so much that I had to ask those questions.

21 MR. BROWN: I don't think I have anymore
22 questions. Thank you for coming, Mr. Wheaton.

23 THE WITNESS: Thank you.

24 SPECIAL MASTER: So, again, thank you very
25 much. And so you can step down now.

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1 THE WITNESS: Okay. Thank you, Your Honor.

2 SPECIAL MASTER: You're welcome.

3 MR. KASTE: At this time, the State of
4 Wyoming would call Mr. Fassett to the stand.

5 SPECIAL MASTER: Mr. Fassett, you can come
6 forward.

7 (Gordon Fassett sworn.)

8 THE CLERK: Have a seat. And if you'd state
9 your name and spell it for the court reporter, please.

10 THE WITNESS: My name is Gordon, G-o-r-d-o-n,
11 W. Fassett, F-a-s-s-e-t-t.

12 SPECIAL MASTER: So good afternoon,
13 Mr. Fassett. Thank you for coming today.

14 GORDON W. FASSETT,
15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. KASTE:

18 Q. Mr. Fassett, you started off today, but I
19 want to put it on the record as well so it's absolutely
20 clear. We'll often see your name in various documents
21 in this record as Jeff; correct?

22 A. That's correct.

23 Q. Okay. And do you often go by the nickname
24 Jeff?

25 A. I almost always go by the name Jeff.

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1 Q. All right. How do you get Jeff out of
2 Gordon?

3 A. A grandparent, a long, long time ago, used to
4 call me by my initials, G.F. And he'd say G.F.
5 quickly. It turns into Jeff.

6 Q. And it stuck?

7 A. Don't ever do that to your children because
8 I'm now 61 years old still explaining my name.

9 Q. Well, I have a daughter and I call her J.J.
10 So I've already screwed that up. Her name is Jamie.
11 And she's rebelling against that moniker at this point.

12 Obviously, everybody here has been here for a
13 long time and are aware that you are the former state
14 engineer for the State of Wyoming. And so you're here
15 to testify about your time in the state engineer's
16 office. That's what we're here to do. And he's also,
17 as a former and long-time state engineer going to talk
18 to you a little bit about the question you raised with
19 regard to how reservoirs are operated and accounted for
20 and regulated in Wyoming.

21 So what I'd first like to do is give
22 everybody a more complete picture of your background.
23 And so if you could give us a brief history of your
24 educational background, that would be helpful.

25 A. Sure. I went to University of Wyoming in

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1 Laramie. And I graduated with a bachelor's of science
2 degree in civil engineering in 1974.

3 Q. And do you have any other, say, non-degreed
4 educational experience?

5 A. I took some graduate level classes as part of
6 that. I was on a four and a half year program at that
7 school. So I had the opportunity to take some graduate
8 classes, did not get an advanced degree.

9 Q. I was going to say, graduate classes in what?

10 A. Well, one of them, as it turns out, was
11 helpful for my future career. Because it was an
12 elective called Wyoming Water Law that I took at the
13 law school as an engineer. I then took --

14 SPECIAL MASTER: Can I just ask, who did you
15 take that course from?

16 THE WITNESS: That was from Professor
17 Trelease, the author of the book.

18 MR. KASTE: And you got it from the man's
19 mouth.

20 BY MR. KASTE:

21 Q. And can you give us a brief history, then, of
22 your professional employment beginning with the -- say,
23 your first job after you obtained your degree?

24 A. Sure. I went to -- my first job out of
25 school was with the Denver Water Department. Denver

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1 Water is what they call themselves now. They are the
2 major Denver metropolitan area water supply agency. I
3 worked there for about five years.

4 And that entire time, I was in what they
5 called, at that time, sort of the raw water operations
6 group. I was the part of the staff that was involved
7 with making the decisions about how to run the
8 reservoirs in delivering water down to the water
9 treatment plants, which then treated the water and
10 delivered it to the citizens and customers of the
11 Denver Water Department.

12 So as part of that job, we were very much
13 involved with the reservoirs, the water supply
14 collection systems in the mountainous areas of Colorado
15 that they depended on almost exclusively in the
16 tunnels. Much of the water of the Denver Water
17 Department is imported from the West Slope, the
18 Colorado River Basin into the South Platte River Basin.
19 So all of those facilities to divert, gather, store,
20 and manage the untreated water was the responsibility
21 of the group that I worked in.

22 And as part of that, I got my real life first
23 introduction into the water law in the state of
24 Colorado through their water court system. Because
25 often it would be the data we collected of how much

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1 water was diverted, which was then used by the
2 attorneys representing the Denver Water -- or in water
3 court to prove up their water rights usage. And that
4 was all part of the staff work that I had done through
5 my years there.

6 Q. All right. And after the five years you
7 spent with the Denver Water Department, what was your
8 next professional experience?

9 A. Left and went to work in a private
10 engineering consulting practice. I worked for a firm
11 called -- again, at that time, it was called Leonard
12 Rice Consulting Water Engineers. And it was a small
13 firm of about 15 people. It's much bigger than that
14 now. But back then, there was about 15 people. And,
15 again, it was a consulting engineering practice,
16 private engineering practice working for a variety of
17 private, governmental, different sorts of clients.

18 Again, actively involved with the water
19 rights activities. They were what we would term back
20 then sort of a specialty firm. It was a firm that was
21 very much focused on surface and groundwater hydrology
22 and water rights activities, water supply studies for
23 our clients, and then representing those clients again
24 in front of the state water court system that the state
25 of Colorado uses to handle water matters.

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1 Q. And that position, you were there from, I
2 think, in 1979 through --

3 A. Through March of 1984. Probably the most
4 significant activity during my time at Leonard Rice was
5 during that time, we became -- that firm was retained
6 to the Wyoming Attorney General's Office. And we were
7 provided much of the technical support on hydrology and
8 water rights analysis and water rights modeling for, at
9 that time, the new Big Horn River general adjudication
10 case.

11 It was the general adjudication case in the
12 state of Wyoming that was started in the late 1970s.
13 Leonard Rice was retained by the Attorney General's
14 Office to support the outside legal counsel to provide
15 technical work, investigations, testimony work for that
16 adjudication proceeding which was about a quarter of
17 the state of Wyoming was involved with that case.

18 During my time with Leonard Rice, I was the
19 lead technical person for our firm among a whole bevy
20 of experts that had been hired to support the state of
21 Wyoming in that adjudication process.

22 Q. And is that adjudication process done today?

23 A. It is not done.

24 Q. Still working on that one; right?

25 A. We are. Waiting for the last 40.

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1 Q. We can take comfort in these proceedings that
2 it's not going to last as long as the Big Horn
3 adjudication.

4 So you said that that position with Leonard
5 Rice ended in March of 1984. Where did you go from
6 there?

7 A. From there, I was retained by the state of
8 Wyoming, took the position of deputy state engineer.
9 I'd gotten to know the state engineer's office very
10 well through all of our activities. I was living in
11 Wyoming almost full time or at least a lot of the time
12 doing our work for that case. The major body of that
13 initial adjudication on their tribal reserved water
14 rights was the first phase of that case, which you said
15 is still going on 40 years later. But the first phase
16 dealt with the tribal-based reserved water rights. And
17 all of those trials were in primarily '79 and '80. And
18 some of the early rulings flowed thereafter.

19 Because of my knowledge, and I got to know
20 the people at the state engineer's office, then State
21 Engineer George Christopulos offered me a position as
22 his deputy. And so I left Leonard Rice and moved to
23 Cheyenne.

24 Q. And can you give us an idea, sense, of what
25 the duties of the deputy Wyoming state engineer were at

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1 that time?

2 A. Sure. Under Mr. Christopoulos' leadership, he
3 looked at that position as what the title might
4 suggest; as his deputy. So I had the quite good
5 fortune, actually, to sort of be involved in most
6 everything that went on. I was not the decision maker
7 he may have been, but he was very aggressive in
8 involving me in many of the activities and
9 responsibilities of the state engineer's office as the
10 deputy.

11 The deputy, back then, again, had a very --
12 had a few sort of formal roles. One of the formal
13 roles of the deputy state engineer was actually the
14 secretary to the State Board of Control, which is the
15 adjudicatory body for the water rights in the state of
16 Wyoming. And changes to water rights is through the
17 State Board of Control. And the deputy had a formal
18 role back then as being secretary to the board.

19 So I really got very good exposure of working
20 for Mr. Christopoulos as his deputy in both -- whether
21 it was sort of the agency operational things dealing
22 with budget or whether he would, again, allow me to
23 accompany him to compact commission meetings. He would
24 involve me in decisions dealing with the permitting,
25 things of that nature. So I had a fairly comprehensive

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1 exposure to the entire agency.

2 Q. Did you have any opportunities to become
3 involved, as deputy state engineer, with the
4 Yellowstone River Compact Commission?

5 A. Yes, I'm pretty sure I didn't -- it was back
6 a long ways, but I'm pretty sure I -- he would have
7 routinely asked me to join him at those kinds of
8 meetings. And so I often accompanied him to the
9 Yellowstone as I did other interstate compact meetings
10 or similar interstate organizations dealing with water
11 issues.

12 Q. I think this is worth asking. In your
13 position as deputy state engineer, did you get the
14 opportunity to gain an understanding of
15 Mr. Christopoulos' relationship with the folks in
16 Montana as it may relate to the Yellowstone River
17 Compact?

18 A. Well, yes. I mean, again, I was with him.
19 My office was physically next door to his in our
20 office. And I, like I said, accompanied him to many of
21 the meetings. Sometimes there were -- I believe back
22 then there were even some sort of conference call type
23 sessions that he would have allowed me to sit in. I
24 guess my sense, Mr. Kaste, is the relationship was
25 certainly professional. It was a state-to-state

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1 relationship that we always take very seriously.

2 I think I came at a time when there was a
3 dispute. There were strong differences of opinion on a
4 couple of points. And I think that as a new party,
5 sort of showing up and beginning to learn about those
6 issues, I could sense sort of the frustration, if you
7 will, between the parties at times. But I always
8 deemed it as professional and sort of legitimate
9 differences of opinion on certain points.

10 Q. And we're going to get to a point in our
11 discussion where we talk about what those issues were.

12 But what I'd like to do is to finish out
13 talking about your employment history. And there did
14 come a point in time when you moved from deputy state
15 engineer to state engineer. When that was?

16 A. I did. In March of 1987. Mr. Christopoulos
17 had retired from state government. He was also at the
18 end of his term. State engineer in the state of
19 Wyoming is -- actually operates on a term. And so I
20 sought and was appointed by the governor to become the
21 next Wyoming state engineer.

22 Q. So the Wyoming state engineer is appointed by
23 the governor of Wyoming?

24 A. It is. And you are confirmed by the state
25 legislative senate. And then you serve a six-year

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1 term.

2 Q. All right. And can you describe for us, just
3 generally, what the responsibilities of the Wyoming
4 state engineer are? And I guess I would break those up
5 into some different concrete packages, first being
6 within the state of Wyoming, and then in your role as
7 state engineer on an interstate basis.

8 A. Sure. Well, the state engineer's office, the
9 way Wyoming state government is structured, you are the
10 chief water official. The statutes and the state
11 constitution, the State of Wyoming creates that
12 position. And you are the chief water resources, water
13 rights official for the state. And that's what the
14 agency does.

15 The shorthand we used to use was sort of the
16 three A's we called them: appropriation, adjudication,
17 and administration. And so the state engineer was sort
18 of a one-agency package for all things water, all
19 things water rights in the state of Wyoming. Whether
20 you were seeking to use water, you need to appropriate
21 that. And the only way you can appropriate water in
22 the state of Wyoming is to get a permit to do so from
23 the state engineer's office.

24 So that's a major function of the agency.
25 The agency, through the Board of Control, is also the

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1 entity that adjudicates those water rights. A process
2 that's going on against the statehood, the Board of
3 Control has also created that statehood in our state
4 constitution.

5 And then part of the state engineer's office
6 is the administration or the regulation of the prior
7 appropriation doctrine. So all of the officials,
8 starting with the division superintendents, the termed
9 hydrologist, the water commissioners, all of the
10 network of people that are scattered around the state,
11 again, all report back up through the agency to the
12 state engineer.

13 So as state engineer, you're really the
14 agency head over all of those sort of water right
15 functions, as well as being an agency head of state
16 government and dealing with the politics and the budget
17 and the personnel management and all the other
18 functions that comes with the state agency of state
19 government.

20 Q. Let's take a short detour. Because in the
21 course of that, you talked about the Board of Control.
22 And it's sort of a weird looking animal. And I don't
23 know that anybody has explained that very well yet to
24 the Special Master about how the Board of Control is
25 made up and what its responsibilities are.

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1 And if you could give us some idea about
2 those subjects, that would be great.

3 A. Okay. Wyoming State Board of Control, again,
4 as I mentioned, was created in our state constitution.
5 It then -- it is made up of a five-member board. It's
6 made up of the person who holds the position of state
7 engineer and the four water division superintendents.

8 The state is divided into four major river
9 basins, some have multiple basins, but basically
10 quadrants following the hydrologic divides of the
11 state. And each one of those geographic areas had a
12 division superintendent, is what that's termed. It's
13 the chief regulatory official for that portion of the
14 state. So the four superintendents and the state
15 engineer sit as the State Board of Control.

16 Board of Control has the primary
17 responsibilities to deal with the final step or the
18 adjudication of water rights. You first receive a
19 permit. The water user then puts that water to use,
20 notifies the state that they made beneficial use of
21 that water. Once that notice is submitted to the Board
22 of Control, then that goes out, goes through what the
23 user did, how he put the water to use, was it
24 conformance with the permit or not. And then that --
25 those documents and that evidence comes back before the

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1 Board. And it's the Board of Control, five-member
2 board, who then approves the adjudication. It issues
3 what we call certificates of appropriation.

4 The Board of Control, though, importantly
5 handles all changes to water laws. So if somebody
6 wanted to make a change of use, the change of type of
7 use, a change in point of diversion, any sort of
8 changes to those water rights once they have been
9 adjudicated, that requires a process called
10 petitioning.

11 You submit a petition or a request to the
12 State Board of Control. And it's that five-person
13 entity who then reviews and approves, holds hearings on
14 whether those changes should be approved or denied.

15 So those are sort of the main activities.
16 And the people who staff that are part of the state
17 engineer's office. While the state engineer makes the
18 initial decision on the appropriation of water by
19 issuing permits, it's the five-member board who does
20 the adjudication process and then handles changes to
21 those water rights subsequent.

22 Q. So the division superintendents wear two
23 different hats. And do I get this right, when they're
24 acting in their capacity as superintendent, you're
25 their boss, and when they're acting on the Board of

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1 Control, you're all members of the board?

2 A. And we each get one vote; that's correct.

3 Q. That seems a little odd.

4 A. The constitution actually says almost the
5 identical thing, for both the state engineer and the
6 state...

7 Q. Well, I think that's helpful to understand a
8 little bit about the administrative process in Wyoming.
9 And I kind of interrupted your answer. I wanted you to
10 explain the state engineer's interstate role.

11 A. Again, in addition to being appointed as
12 state engineer, it is the governor of the state of
13 Wyoming that independently needs to appoint somebody to
14 be the compact commissioner to all the various compacts
15 and a variety of the non-compact types of interstate
16 entities. The tradition in Wyoming has always been
17 that it was the state engineer that was appointed to be
18 the compact commissioner or the state's representative
19 at any of those sort of interstate water organizations,
20 whether they were in a regulatory setting or in a
21 policy setting.

22 So in addition to being appointed state
23 engineer in 1987, I was, at the same time, appointed to
24 be Wyoming's representative to all the different
25 interstate compacts that Wyoming is a party to.

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1 The good or the bad part of being in Wyoming
2 is our geography. And our geography in the state of
3 Wyoming is you're at the top. And all of our water
4 flows downstream to somebody. So the state of Wyoming
5 is surrounded with interstate relationships with our
6 neighboring downstream states. Some of those are
7 through compacts. Others of those are through
8 equitable apportionment decrees of the United States
9 Supreme Court. And the state engineer in the state of
10 Wyoming spends a lot of time on those issues.

11 We are at the top. We are of a small
12 population. We are still growing into our water uses.
13 And we have many, many downstream neighbors who are
14 more quickly growing into their water use. And those
15 neighbors always have an eye on the upstream source of
16 the water at some time. So the state engineer has that
17 interstate responsibility to monitor, to stay abreast
18 of issues that are occurring not only in the legal
19 sense under formal compact commissions or other
20 organizations, but even on a policy level. We would
21 get involved with matters dealing with the Endangered
22 Species Act, things of that nature, where the
23 endangered species weren't in the state of Wyoming;
24 they were downstream from the state of Wyoming but
25 clearly can have a ricocheting effect if you go up our

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1 river basins to the state of Wyoming.

2 So those interstate responsibilities were
3 important to the bevy of in-state issues of handling
4 the water rights system of the state of Wyoming.

5 Q. So as part of your coming into the state
6 engineer position, were you appointed commissioner --
7 Wyoming's commissioner for the Yellowstone River
8 Compact?

9 A. I was.

10 Q. All right. And did you have opportunities in
11 these intrastate dealings with our neighbors all around
12 Wyoming to get to know the water officials of the
13 surrounding states?

14 A. Yes. Quite definitely. Either through the
15 direct sort of compact commission type entities, but
16 really through other water resource organizations as
17 well.

18 Q. And what are you referring to there?

19 A. Well, for instance -- well, there's a number
20 of them. But there is an organization called the
21 Western States Water Council. That is a entity that
22 grew out of the Western Governors' Association, where
23 there are three members from each of the western
24 states. If you are a member of the Western States
25 Water Council -- and Wyoming has always been a member

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1 since the beginning. And it includes almost every
2 western state west of the Mississippi, in general
3 terms, were members.

4 And so often, the chief water resources,
5 water rights official, often the chief water quality,
6 DEQ type agency, and the chief water attorney for the
7 state were often the three members that would attend
8 Western States Water Council meetings on behalf of each
9 state.

10 I was appointed one of the members of Wyoming
11 for the Western States Water Council, attended their
12 meetings. They were initially four times a year. Then
13 they became three times a year. And so I actually
14 became the chairman of that organization during my
15 entire tenure.

16 But it was at those meetings where, again,
17 your counterparts from all of the western states or the
18 counterparts to the DEQ agencies would gather
19 periodically to deal with issues of federal
20 legislation, water policy, water law issues of
21 interest. And so you would see your counterparts
22 outside of just attending any formal meetings of the
23 commission.

24 And there were multiple organizations like
25 that. The other one that we shared with the state of

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1 Montana, was the Missouri Basin States Association,
2 which I don't think exists anymore. But back then,
3 there were the nine states that were party to the
4 Missouri River Basin States. That organization has
5 been reformulated. It's called something else now.

6 But, again, that would be another
7 organization that would meet sometime each year. And,
8 again, you would see your counterparts in a different
9 environment dealing with different issues. They
10 weren't your state-to-state sort of issues. But you
11 were dealing with these broader issues of, perhaps, a
12 Clean Water Act, the Endangered Species Act, things of
13 that nature that would bring those entities together to
14 look at sort of the state's view.

15 It was often an organization where the states
16 were sort of circling the wagons, if you will, if there
17 were a particular federal policy that the state water
18 organizations didn't like. That was certainly true in
19 the water rights world where the states' primacy in
20 water rights allocations decision is very closely
21 guarded. And whenever there were appearances of
22 federal control over water rights sorts of issues, the
23 states would be involved with those kinds of things.

24 Q. That sounds typical for the western states to
25 be concerned, of course, about the federal government.

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1 So is it a relatively small or a large group of people
2 that are involved in these kinds of meetings that
3 you're discussing and these kinds of other
4 opportunities to visit?

5 A. They were generally pretty small. The term
6 you grow up learning is that they used to call it the
7 Water Buffalo Club. And the idea was that it almost
8 had a club-like atmosphere. The directors of the
9 departments of water resources from 18 states, at most
10 were 18 people. And you would have different
11 combinations with them in different places for
12 different organizations.

13 So over my tenure, about 13 years, you got to
14 know those people very well 'cause you saw them in both
15 a -- as a state-to-state, perhaps, kind of issue,
16 between your state and their state if they were one of
17 our direct neighbors. But I also got to know state to
18 state my counterpart from states that were much farther
19 away, that we had a more distance relationship with,
20 but we're connected by the river basins, if you will,
21 that Wyoming shared.

22 Again, Wyoming's geography puts us in the
23 Snake, Columbia, the Colorado, the Missouri,
24 Yellowstone, part of North Platte. If you follow those
25 rivers to the end, there weren't too many states west

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1 of the Mississippi that we didn't deal with on a
2 regular basis, when you were in a position that I had.

3 Q. All right. I'd like to finish up briefly
4 finishing out your work experience. There came a time
5 when you stopped being the Wyoming state engineer and
6 moved on to do something else.

7 Can you tell us about that?

8 A. I did. As I said, the state engineer is on a
9 six-year term. I was appointed in '87, reappointed six
10 years later. Reappointed six years after that. But I
11 only took about a year and a half or so in that last
12 term and had just sort of burned out, if you will.

13 But I did move on. I went back to private
14 engineering practice. I initially opened my own firm.
15 I stayed in Cheyenne, Wyoming, which is where I'd lived
16 all those years, opened a firm Fassett Consulting. I
17 was a sole proprietorship. And went back to -- at that
18 point in my career, I was sort of ready for no boss, no
19 staff, if I can characterize it that way. You just
20 will burn out on a job like that.

21 And so I did that for about six years,
22 handled a wide variety of private governmental clients,
23 consulted back to Wyoming and other states during that
24 time. And then I moved to a larger firm. I'm
25 currently with HDR Engineering, a big national

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1 architectural engineering firm based in Omaha,
2 Nebraska, offices almost everywhere in the country.
3 And my small office in Cheyenne became the HDR
4 Engineering office for Cheyenne, Wyoming.

5 Q. So after going back into private practice
6 both on your own and for HDR Engineering, are you still
7 dealing with water issues?

8 A. Yeah. That's primarily still in the focus
9 area of my career. Water supply; water rights issues;
10 represent private landowners; work for municipal
11 clients; work with state, local, federal government
12 agencies. If there's water rights, water supply
13 issues, we believe we can be of help. Primarily that
14 work is in Wyoming. But I've had client relationships
15 outside of Wyoming and other states as well during my
16 return to private practice.

17 Q. And I think I skipped over this earlier on.
18 But just generally, are you a member of any
19 professional organizations?

20 First, I assume you have a license as an
21 engineer; correct?

22 A. I do. You have to be a registered
23 professional engineer to be the Wyoming state engineer.
24 But I had it as soon as I could get it out of school.

25 Q. And what states are you licensed in?

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1 A. It's -- well, you get a professional's
2 engineer license for the area of expertise that you're
3 competent to practice in. You have that discretion.

4 Q. My understanding is often you'll get licenses
5 from various states and engineers and geologists and
6 such would say, I have a license from Wyoming and
7 Colorado. Do you have licensure in multiple states?

8 A. Right now, I have just Wyoming and Colorado.

9 Q. And I understand that you also hold a
10 position on the Red River Compact Commission?

11 A. I did -- or do, excuse me. After I left the
12 state of Wyoming service, again, because of -- in part
13 because of the relationships you build with your fellow
14 water resource state agency heads, it was a couple
15 years, I think it was fall of 2002, I was approached by
16 folks in Texas, Oklahoma, and Arkansas, three of the
17 four states that are part of the Red River Basin of the
18 south and not the Red River of the north, asking
19 whether I would be interested in serving as the federal
20 representative to that compact commission. Those four
21 member states, it had an awful lot of turnover in the
22 federal chairmanship. And they became sort of
23 frustrated with the inconsistency of attendance and
24 participation, to have the chairman be a bit more
25 engaged.

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1 So they reached out to me, I think in part
2 because I'd been on interstate compact commissions
3 before, partly because I had no direct connection to
4 those four states. They were looking for somebody that
5 knew the prior appropriation doctrine, who understood
6 the relationships of compacts and things.

7 So they ultimately elevated my name. That's
8 an appointment by the president of the United States.
9 So I was appointed by President Bush back in 2002. And
10 I've remained in that position ever since. And so I --
11 that is a nonvoting chairman of the compact commission.
12 There's actually a nine-member commission in that case,
13 four states each, with two members, and a single
14 federal representative who is also the chairman. And
15 that's the position I hold.

16 Q. So you've held that position from 2002
17 through the present?

18 A. Through the present.

19 Q. And how do they fire you?

20 A. You serve at the pleasure of the president.
21 So whenever the president wants to make a change, he
22 can do so.

23 Q. So they have to complain to the president,
24 and nobody has done that that you know of?

25 A. Not that I know of. They have come to -- I

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1 think my first meeting there, I wonder who was this guy
2 from one of those funny square states out west. But
3 it's been a great experience for me personally to
4 involve myself in a very different river basin.

5 A couple states worrying about flood control
6 and navigation, and a couple others fighting over
7 whether northern Dallas can have water from Oklahoma.
8 So you couldn't ask for a better mix of issues,
9 something that didn't touch the state line.

10 Q. Well, congratulations on that appointment.

11 Earlier, I told you that we would talk about
12 sort of the nature of the issues that arose between
13 Montana and Wyoming related to the Yellowstone River
14 Compact during your time in the state engineer's
15 office. And there I'm not limiting it to the time you
16 were state engineer but also the three years preceding
17 when you were the deputy state engineer.

18 Can you give us a sense of the issues that
19 existed during your tenure for the state engineer's
20 office between Montana and Wyoming related to the
21 Yellowstone River Basin?

22 A. Sure. There was a variety of things. I'm
23 sure I'm not going to remember all of them. But when I
24 first got there, I think that was soon after the
25 commission had first adopted the formal rules on the

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1 adjudication of interstate ditches. I think that had
2 just been finalized, if I'm recalling correctly. I
3 don't have the exact dates.

4 But that was an issue that had been going on.
5 And I showed up. And that was -- became an ongoing
6 activity and ongoing topic of discussion among the
7 states, dealing with the finalization of the water
8 rights associated with states that have a point of
9 diversion in one state and a point of use in the other
10 going both ways.

11 That was one of the issues. We -- the
12 compact commission would routinely talk about sort of
13 activities that were going on in each other's states
14 from a water resource standpoint. New water
15 development activity was often a topic of discussion in
16 one of the states or the other.

17 There was often -- during my tenure, quite
18 honestly there was a fair amount of discussion about
19 how Wyoming did business, how we did water rights, and
20 our permitting structure, adjudication process, the
21 regulation of water rights. It was, you know, a pretty
22 open and free discussion about folks just learning from
23 each other about how things are done in the other
24 states, if you will.

25 Q. Why would you be discussing, sounds like in

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1 some detail, how Wyoming did things?

2 A. Well, I think Montana was curious, as we were
3 curious about their processes 'cause they were often
4 quite different. The processes -- some of those
5 processes within the state of Montana were much newer,
6 and I think our basic structure of permitting and state
7 adjudications and the regulation of water right all the
8 way back to statehood. So we'd had sort of an 80-year
9 head start on some of those activities because we don't
10 have as much water. And so we had a more rigid system.
11 And I think, certainly my sense was that Montana folks
12 were embarking on a very broad-based, very complex
13 adjudication process of their own. So they were
14 curious about how our processes worked.

15 We were also, during that time, in the middle
16 of the Big Horn River general adjudication process,
17 which was, again, slightly different than our Board of
18 Control process, but involved the tribal reserve water
19 rights. So there was lots of issues about how that
20 process was occurring.

21 We had discussions about issues of instream
22 flow. Just early in my tenure, our state passed the
23 state instream flow law. And Montana, again, had a
24 different approach to handling instream flows. So
25 there was discussion about that. We had Wild and

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1 Scenic designation on the Clarks Fork, one of the
2 compact tributaries. So that was a topic of discussion
3 at times as well.

4 So it was fairly broad-based set of things
5 that would get talked about.

6 Q. One of the things you mentioned is the -- I
7 think you described it as interstate -- see if I get it
8 right -- interstate ditches, and there being certain
9 ditches that cross the state line between Wyoming and
10 Montana and some discussion about how that ought to be
11 addressed by both states.

12 Did that issue ever get resolved or addressed
13 by the Yellowstone River Compact Commission?

14 A. It did. They actually went through a very
15 formal sort of rule. They actually adopted a set of
16 rules, was the sort of the mechanism, if you will,
17 under the compact guidelines and the commission itself.
18 And so there was -- I wasn't there for all that
19 history. Although, my understanding is there were some
20 sort of commissioners assigned, work-up forms, what the
21 forms should look like. There was a lot of dialogue
22 among the states and with the federal representative to
23 the commission to talk about how to provide proper
24 notice, the collection of claims to those interstate
25 ditches, how they would be reviewed, how -- depending

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1 on which side of the state line it was on, either my
2 staff would be involved or the Montana staff would be
3 involved.

4 And so there was a lot of communication about
5 trying to implement that. But it was ultimately
6 embedded in a set of rules, and that's what really
7 guided that process.

8 Q. So in that particular instance, the
9 Yellowstone River Compact Commission was able to
10 effectively resolve the issue?

11 A. They were, yes. I think quite
12 satisfactorily, from my understanding.

13 Q. And we've all gotten the impression
14 throughout the course of these proceedings that that
15 wasn't always the case. And there was -- one of the
16 issues that was apparent between the states during your
17 tenure was the decision-making process of the
18 Yellowstone River Compact Commission; is that fair?

19 A. That is fair.

20 Q. Can you describe what the issue was and how
21 it was resolved, if it was?

22 A. Well, as I said, there had been a dispute
23 brewing before my time about the role of the federal
24 chairman and when and how and under what circumstances
25 would that chairman sort of be the tie-breaking vote,

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1 if you will, and some dispute that may have gotten
2 elevated to the commission.

3 And there was a lot of concern about what
4 kinds of issues could be elevated. There was then a
5 lot of frustration, I think, by some that the federal
6 chairman we had, sort of chose to not get involved with
7 a heated issue between the two states. And so I think
8 that was a source of frustration.

9 During my time, though, we worked to get
10 through that. And while, perhaps, not tackling some of
11 the issues head on, we did develop a dispute resolution
12 process.

13 And we actually had some outside folks come
14 from -- actually from the state of Montana that were
15 involved with the mediation and dispute resolution
16 techniques. Those were certainly -- in my view back
17 then, they were relatively new. It's certainly much
18 more commonplace now to -- lots of organizations
19 involved with dispute resolution. But that was sort of
20 a new thing. And we thought, well, let's at least try
21 to put a more structured process in place that would
22 allow these issues sort of -- if you will, to sort of
23 germinate and be worked on through resolution process
24 before you might be confronted with sort of a hard vote
25 or very controversial or very difficult decision in

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1 front of the commission itself.

2 Q. One of the issues, I think that we've heard a
3 little bit about but not terribly much, had do with, I
4 assume, the Middle Fork project; is that right?

5 A. The Middle Fork Dam project.

6 Q. Nobody has really explained that, I don't
7 think, very well to the Special Master. What was that
8 about?

9 A. The Middle Fork Dam, as the name suggests,
10 was a proposed dam on the Middle Fork of the Powder
11 River, west of Kaycee, Wyoming. That Middle Fork was
12 one of the better producing headwater area streams for
13 the Powder River Basin. And it was a proposed dam that
14 had been proposed a very long time ago. In fact, I
15 believe I recall correctly, the initial permit
16 application for a water right permit for that dam site
17 was originally approved in the 1940s. 1945 is -- I'm
18 not sure if that's exactly right. But it was in the
19 1940s. A permit was issued to build the dam. Under
20 Wyoming law, you have to get a permit. The permit was
21 issued.

22 The project proponents then went on a long
23 period of time of trying to develop the project, get
24 the funding, do the technical engineering studies, to
25 sort of firm up the site with those sorts of things.

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1 That -- I don't have the whole history of
2 that project, but it sort of ebbed and flowed sort of
3 over time. But during my tenure as the compact
4 commissioner, it became a bit more heated. Because
5 Montana was interested in the project because they saw
6 the state itself becoming more interested in the
7 project.

8 The state in the late 1970s, State of Wyoming
9 set up a water planning and development program that's
10 funded by mineral royalties, natural gas, coal, and
11 oil, going to a special fund for water planning and
12 development activities with a goal of beginning to have
13 state funding support to local entities, whether they
14 are irrigation districts or municipalities or the state
15 itself in developing more of our allocated but unused
16 water supplies.

17 The state itself showed some interest, began
18 doing some studies on the Middle Fork project itself.
19 Those studies were shared. Information about all that
20 was routinely shared at compact commission meetings. I
21 think -- we can look in the logs. I'm sure the minutes
22 reflect the project was discussed, the water
23 development program was discussed during meetings.

24 But there became a dispute, if you will, over
25 how, if perfected -- if perfected, what would be the

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1 effects of that project on the water supplies on the
2 Powder River and on the compact and on the compact
3 allocations. There was also concerns about water
4 quality that had not yet been fully studied, but
5 certainly there were concerns that this dam sort of
6 would store some of the better quality water that would
7 be put to beneficial use in Wyoming. And that might
8 have a degrading effect on the remaining water supplies
9 on the Powder River. So those were the variety of
10 concerns that had been expressed.

11 Q. Can you give us a flavor of what the parties'
12 positions and interactions were in the context of the
13 Yellowstone River Compact Commission related to the
14 Middle Fork project?

15 A. I think just the -- my recollection of the
16 nub of the argument was as of 19 -- if perfected under
17 Wyoming law, the priority date of that reservoir would
18 relate back to the original date the permit was issued.
19 So it would be a 1945 -- it would be a 1940s
20 pre-Compact right under Wyoming law.

21 And the issue of concern was whether that was
22 correct or not under the compact and sort of the --
23 whether it was pre- or post-Compact and how the waters
24 and beneficial use of water, water stored in that
25 reservoir, would be accounted for.

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1 Q. So having a pre-1950 priority date would be
2 of concern to the folks in Montana; right?

3 A. It would.

4 Q. And it was, wasn't it?

5 A. That's how they expressed it to us.

6 Q. Well, and what was Wyoming's response?

7 A. Well, actually through the studies, at the
8 time, I think we didn't sort of like, sort of
9 addressing an issue as a hypothetical. We didn't
10 really think the project was going to go forward
11 anyway. But the issue was -- at times we didn't think
12 it was right.

13 But the state did go ahead and do additional
14 studies on the yield and the analysis. It was my
15 understanding -- I think some of this work may have
16 been completed after I left the position. But it was
17 really my understanding that it sort of didn't matter.
18 If the storage of water was acted that's pre- or
19 post-Compact the percentage allocations under the V, C
20 compact undeveloped share would have been enough to
21 cover the storage anyway. So the compact analysis was
22 not germane to the validity of the project being
23 feasible or not.

24 It had to get through other technical and
25 environmental and financial issues before that project

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1 was going to become a reality. And it never did
2 overcome any of those other hurdles.

3 Q. There is no Middle Fork Dam, is there?

4 A. There is no Middle Fork Dam. My successor
5 actually canceled that permit. So it doesn't exist
6 anyway.

7 Q. All right. Is it fair to describe the Middle
8 Fork issue as one of the larger ones that came up
9 during your tenure?

10 A. Well, it would come up routinely. Again,
11 part of that, as I said, we would regularly report on
12 new development activities at the compact commission
13 meetings. I think during my tenure, there were several
14 smaller reservoirs constructed for municipal use. For
15 example, city of Sheridan, I think built a new
16 reservoir during my time. There were some reservoirs
17 on the Big Horn River side.

18 So the fact that we had this program, I
19 think, the Water Development Program, you know,
20 provided a lot more and more stable funding supply for
21 water development activities to occur. So that was of
22 concern and of interest in Montana. So we routinely
23 shared ongoing activities, ongoing studies, tried to
24 make them aware of what development activities were
25 occurring in any of the drainages that we shared under

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1 the compact.

2 Q. Now, I think it would be fair to say that
3 another issue --

4 SPECIAL MASTER: Mr. Kaste, before you go
5 into that, I'm just looking at the time and also
6 thinking of the court reporter who has been going for
7 an hour and 20 minutes. So would this be a good time
8 for the first of our afternoon breaks?

9 MR. KASTE: Sure.

10 SPECIAL MASTER: Okay. Great. So we'll then
11 come back at five minutes to 2:00 by that clock.

12 (Recess taken 1:44 to 1:56
13 p.m., November 19, 2013)

14 SPECIAL MASTER: Everyone can be seated.

15 Okay. Mr. Kaste.

16 BY MR. KASTE:

17 Q. All right. When we left off, we were talking
18 about issues that arose during your tenure as state
19 engineer and deputy state engineer related to the
20 Yellowstone River Compact. And I want to turn now to
21 the issue of compact administration. Okay.

22 Can you explain what the issues were with
23 regard to compact administration while you were deputy
24 and state engineer?

25 A. Well, most of the focus was really on

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1 different methodologies associated with the V, C
2 portion of the compact. Again, actually starting
3 before I got involved directly, there had been
4 agreements to do some technical work on both sides from
5 both states with different proposals.

6 I think a lot of the early research and
7 proposals that Wyoming did were done by a staff
8 gentleman named -- Lou Allen was his name. A person on
9 the staff for the state engineer's office worked for
10 Mr. Christopoulos. I think he may have retired when I
11 became the state engineer. But he did some of the
12 early work for us. There were counterpart staff from
13 Montana agencies working on those issues.

14 Q. Is that Dan Ashenberg?

15 A. Yes, Mr. Ashenberg.

16 Q. What do you recall about the different
17 proposals or methodologies that came from Mr. Ashenberg
18 and Mr. Allen? What problem were they trying to solve?

19 A. Well, my recollection of part of the interest
20 was really on getting, again, back to the fact that
21 with our state Water Development Program, I think there
22 was concerns about whether Wyoming would be more
23 aggressive in developing new water supplies. So if
24 you're going to develop new water supplies, those are
25 something out of the V, C allocations, if you will. So

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1 there was a concern on, we ought to get a handle on how
2 that's going to be implemented. Never had been
3 implemented. There were not rules of the commission.
4 There wasn't any adopted procedure on how the
5 mathematics and the accounting of the compact would be
6 accomplished.

7 And so we started off on these analyses.
8 It's my recollection that Wyoming approached. The
9 proposals that Mr. Allen brought forward were sort of
10 very rigidly associated with the math as described in
11 the compact language itself. I think Mr. Ashenberg and
12 some of the concepts coming from other folks in
13 Montana, was not that approach. It was a different
14 approach, looking at how there might be another way to
15 sort of monitor the water use, the activities, the
16 accounting, try to make it in a more -- perhaps a more
17 practical approach, things of that nature. So it was
18 clearly a different approach as being presented back
19 then.

20 Q. And I take it then, from sort of the tone of
21 your answer, for purposes of this litigation, has it
22 made you go back and read Mr. Ashenberg's stuff?

23 A. No.

24 Q. I do want you to look at one document with me
25 quickly to get a sense of one particular issue. I'm

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1 going to hand you what's been marked Exhibit M140.

2 Have you had a chance to look that over?

3 A. Yes.

4 Q. Can you tell us what that document is?

5 A. Exhibit M140 is a letter addressed to
6 Mr. Fritz, head of the Water Resources Division State
7 of Montana, sent by me. And as the letter states, it
8 was forwarding a copy of the report and information of
9 the analysis by Mr. Allen.

10 Q. All right. And that letter is dated?

11 A. Excuse me. That letter is dated
12 September 9th of 1988.

13 Q. And is this your signature where we see the
14 word "Jeff" on the second page?

15 A. That's correct.

16 MR. KASTE: I'd move for the admission of
17 Exhibit M140.

18 MR. SWANSON: No objection, Your Honor. It's
19 just not clear whether the attachment is included.

20 MR. KASTE: It is not.

21 MR. SWANSON: Is it to be offered?

22 MR. KASTE: No. I apologize. I didn't put
23 the attachment on this exhibit. It was an oversight.
24 And the point that I intend to make with this exhibit
25 is unrelated to the substance of Mr. Allen's report.

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1 SPECIAL MASTER: Okay. I understand. So
2 Exhibit M140 is admitted into evidence.

3 (Exhibit M140 admitted.)

4 BY MR. KASTE:

5 Q. Having said that, that's probably not
6 entirely true. Because I am going to talk about the
7 substance of Mr. Allen's report, which you
8 characterize, I think, in the second paragraph of this
9 letter.

10 Can you read for us the first three sentences
11 of the second paragraph?

12 A. Sure. "The enclosed report is arranged into
13 two main sections. The first reviews Article V, C of
14 the Yellowstone River Compact and how, in general,
15 allocation should take place. The second portion of
16 the report focuses on an example computation using the
17 Tongue River and how allocation would proceed based on
18 Article V, C."

19 Q. Is that consistent with your recollection
20 about what Mr. Allen was looking at when he did his
21 work?

22 A. It was. As I was remembering that, the focus
23 was on the V, C allocation, mathematics, and
24 procedures.

25 Q. All right. Now, then the question arises,

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1 what -- did you have any discussions or was V-A and the
2 application of Article V-A of the compact an issue
3 during your time?

4 A. It really wasn't the focus of the discussions
5 during my tenure. And, again, it's not that V-A was
6 discussed or not discussed. The issue was often
7 presented as a discussion about water supply conditions
8 that year or in the prior year, depending on when we
9 had our meetings. Water supply conditions, the amount
10 of regulation that may have occurred was clearly a
11 routine topic like the other things that we talked
12 about. That was presented at the compact commission
13 meetings.

14 So we didn't talk about V, A because the
15 conversations, in my recollection, were really focused
16 about how dry things were in a particular year.
17 Montana expressing that they were in dry conditions and
18 us expressing, well, us too, and often sharing
19 information about -- oh, I would have generally the one
20 or two superintendents would have joined me at these
21 meetings so they could -- division superintendents,
22 excuse me -- so they could often report directly to
23 Montana about what priority enforcements and regulation
24 activity had occurred that year. We often met in
25 November, December, so they could kind of summarize how

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1 the prior irrigation season went and what kind of
2 regulations occurred.

3 And it was fairly routine that both states
4 were sort of dry at the same time. And so both states
5 were suffering from drought. And there really wasn't
6 any sort of, in my recollection, that much focused
7 discussion about sort of V, A 'cause it was, well, I
8 already got a whole bunch of people off, and so do you.
9 And it really wasn't the topic of the day back then.

10 This was really -- this work was really
11 focused on the percentage allocations and mathematics,
12 the point of measurements, and trying to implement that
13 V, C thing associated with new development activities
14 that may or may not occur in the state of Wyoming.

15 Q. So when we see reference in the documents,
16 say, to, well, the parties discussed compact
17 administration, in your mind, what is that referring
18 to?

19 A. My memory is that it was mainly about the V,
20 C types of conversations and the fact that we had staff
21 working on these issues. They were engaged. They were
22 coming up with the proposals. You know, there was
23 activity being assigned. There -- we just didn't have
24 that on the other provisions of the compact. There
25 really -- you had this sort of, no compact was

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1 necessary because, like I said, often when dry years
2 came around, they were dry in both states. And so the
3 issues of our juniors, they were off, as I'm sure there
4 were juniors off in the state of Montana. At least
5 that's how it was reported to us.

6 Q. When the parties, in the various documents,
7 including the compact reports and things like that,
8 talked about administration of the compact or under the
9 compact, in your tenure, did that discussion ever
10 include enforcement or regulation under Article V, A?

11 A. No.

12 Q. And I think you told us that the meetings of
13 the Yellowstone River Compact Commission were in, you
14 said, November or December?

15 A. They were often -- the regular meetings were
16 often, as I recall, November, December. There were
17 special meetings, sometimes conference calls at other
18 times of the year. But, generally, they were toward
19 the end of the calendar year.

20 Q. Would that be the predominant opportunity to
21 talk with your counterparts from Montana about
22 Yellowstone River issues?

23 A. Certainly the Yellowstone Compact
24 specifically. Those were the times. But like I said
25 earlier, we would run into each other at other times

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1 during the year, talk about lots of stuff.

2 Q. Who was -- and I'm getting the sense that
3 because of the long tenure that you had, who is your
4 counterpart in Montana at the various times you served
5 as deputy state engineer and state engineer?

6 A. When I first went to the commission, Gary
7 Fritz was the Water Resources director. Sort of in our
8 view, he was the counterpart to the position of state
9 engineer in Wyoming. And he was the compact
10 commissioner.

11 And then towards the end of my tenure,
12 Mr. Stults. Mr. Fritz retired and Mr. Stults came --
13 ascended to that position and also became the compact
14 commissioner.

15 Q. And what kind of relationship did you have
16 with Mr. Fritz and Mr. Stults?

17 A. Well, I knew Mr. Fritz better because we had
18 served longer. And in addition to the Yellowstone
19 specific issues, I would have seen him in some other
20 forums as well. So I had a longer-time relationship
21 with him. Although, the Yellowstone, obviously,
22 covered the major rivers that are shared between
23 Wyoming and Montana.

24 But, yeah, I felt I had a good relationship
25 with both of those gentlemen. I was not around as long

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1 with Mr. Stults. My successor, Pat Tyrrell, always
2 reminds me that I left at the right time because we
3 plunged into the drought of the 2000 soon after I left.

4 Q. It's better to be state engineer when it's
5 wet; right?

6 A. Better to be a state engineer when it's wet.

7 Q. All right. How much interaction would you
8 typically have with your counterpart in Montana,
9 Mr. Fritz or Mr. Stults, during an irrigation season?
10 So outside these compact commission meetings that
11 happened after the irrigation season and outside things
12 like Western States Water Council meetings.

13 A. There weren't as many meetings in the
14 summertime, I think the irrigation season, summer. I
15 think most of the formal meetings, like I said, were in
16 the fall sometimes. There were spring meetings. But
17 they would be earlier ahead of the irrigation season,
18 perhaps March or April. Some of the other
19 organizations -- Western States Water Council used to
20 always have a meeting in July. So there would have
21 been, perhaps, an opportunity to have seen or
22 interacted with those gentlemen if they were attending.
23 Sometimes they did; sometimes they didn't.

24 But it was also another one of the
25 organizations, I'm not sure I mentioned yet, was the

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1 Association of Western State Engineers. That name
2 implies it's another group of just the heads of the
3 water resource agencies of the states. And Montana was
4 a member of that. And that group almost always met in
5 September of every year.

6 Q. So, you know, just based on your sort of
7 repeated references to various meetings, I get the
8 impression, and tell me if this is right or wrong,
9 sounds like the vast majority of your interactions with
10 Montana officials occurred during the course of one of
11 these meetings.

12 A. On Yellowstone specifically, I think that's
13 exactly right. There certainly would have been other
14 opportunities to talk about the Yellowstone River
15 issues. When you're focused on just this issue, that
16 was done at our compact meetings or conference calls or
17 other special meetings that may have been handled.
18 There were -- I recall during my tenure, there were
19 some committees, some assigned staff people from the
20 states on both sides to work on certain issues. So
21 then the principals, the commissioners themselves,
22 would get back on a call to hear a report, for example,
23 from work that our two staffs would have been working
24 on in between meetings. When you meet just once a
25 year, it's hard to make progress unless you're making

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1 assignments and making sure other activities are
2 occurring between those meetings.

3 Q. Well, let's talk a little bit about the
4 compact commission itself. And, obviously, a report is
5 generated by the compact commission every year?

6 A. Yes, it is.

7 Q. And if I understand right, both states have
8 an opportunity to comment on the draft report before
9 it's finally issued; right?

10 A. That's correct.

11 Q. Did you take an opportunity to comment on
12 draft reports?

13 A. I recall that we did. I would often look at
14 it myself. And then the staff people on the Wyoming
15 side that were involved, I would ask them to review the
16 draft as well, compare it to any of their own notes or
17 things that they may have captured from the meeting.
18 And we would have sent comments back before or after it
19 was finalized.

20 Q. Did Montana take advantage of the opportunity
21 to comment on these draft reports as well?

22 A. Well, I wasn't there, but I suspect they did.
23 I mean, both states were given that opportunity. I
24 wasn't in their offices to know whether they did or
25 didn't. But they wouldn't have necessarily had shared

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1 their comments with Wyoming. They would have gone in
2 to whoever was -- took responsibility for the minutes
3 of the report.

4 Q. And at the end of the day, you had to sign
5 that report on behalf of the state of Wyoming; right?

6 A. That's correct.

7 Q. Were these reports an accurate reflection of
8 the Yellowstone River Compact meetings?

9 A. They were. They were -- I'm sure you've
10 looked at them. They are quite standard in their
11 approach. There are certain -- the flow information
12 and storage information, a lot of this data is
13 routinely included in those. And, perhaps, add or
14 subtract a gauge or a reservoir or things of that
15 nature. But the written stuff was -- it was our
16 document. It was to document the sense of the
17 discussions, the sense of the activities that occurred
18 during that year.

19 Q. I assume it wasn't verbatim. It wasn't a
20 transcript like is being prepared in these hearings;
21 right?

22 A. It was not, no.

23 Q. Now, you've heard this comment a couple of
24 times during the course of this trial. The USGS
25 sanitized all the controversial stuff out of these

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1 reports. What do you think about that? Did that
2 happen?

3 A. Certainly not to my knowledge. I don't
4 recall -- I would never have used the word "sanitized."
5 They were summaries. But I haven't read them all
6 lately. But certainly, issues of disagreement weren't
7 avoided in those reports. They talk about issues like
8 the Middle Fork, for example, and other things. So I
9 think they captured the sense of the meeting. I don't
10 think -- it would have been fairly unusual. There was
11 an awful lot of deference from the federal chairman to
12 the states. I think to suggest that the federal
13 chairman would have sometimes cleaned up what states
14 were saying, I think would be -- that would be
15 difficult for me to believe that that was occurring.

16 MR. SWANSON: Your Honor, I just want to
17 lodge an objection to Mr. Kaste's use of the word
18 "sanitized." I believe it's mischaracterizing the
19 testimony of Montana's witnesses. I don't believe they
20 used the word.

21 SPECIAL MASTER: I think it's fine, though,
22 to ask the question whether or not this witness would
23 consider them to be sanitized. And you're free to
24 point out the difference in the language at a later
25 time.

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1 BY MR. KASTE:

2 Q. All right. Were -- when you were the Wyoming
3 state engineer and you had an opportunity to review
4 these draft reports and ultimately sign your name to
5 them, were the important things in there? I mean, if
6 an issue was important, did it make its way into the
7 report?

8 A. Yes. I mean, it was capturing the sense of
9 the written or verbal discussions that occurred
10 certainly at the meetings or things that were reported
11 on that occurred during that year. Now, I can't
12 remember an example where some important issue would
13 have been left out. I can't imagine why. There would
14 be no reason to leave it out.

15 Q. Can -- do you agree that the state of Montana
16 makes a call on the state of Wyoming in a given year,
17 that's kind of a big deal?

18 A. It would be a huge deal.

19 Q. Would you expect to see that in the minutes
20 of the compact commission and the reports?

21 A. I would.

22 Q. If Montana had done that during your tenure,
23 would you make sure it was in the report?

24 A. I think it would have been there anyway, but,
25 yeah. We would have wanted it in the report. We

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1 probably would have wanted any comments we had on it in
2 the report as well.

3 Q. That being said, at any time, any time during
4 the period that you were either the deputy state
5 engineer or the state engineer, did any Montana
6 official make a call or a demand on the state of
7 Wyoming that Wyoming curtail its post-1950 uses for the
8 benefit of Montana, regulate its post-1950 uses,
9 anything like that?

10 A. Not that I recall.

11 Q. Well, we talked to Gary Fritz at various
12 times. Did Mr. Fritz ever request or demand water from
13 Wyoming?

14 A. He did not. As I said earlier, Mr. Kaste,
15 the conversations were there were certainly expressions
16 of, you know, we're having a bad year or good year,
17 whatever. There were just reports on streamflow
18 activities and snowpack, reservoir storage. All that
19 information was shared and discussed. But there was
20 never any formal request for action.

21 Q. What about an informal request for action?
22 What about Mr. Fritz saying, hey, can you turn loose
23 some water for us; we're really low, and we think
24 you've got some post-'50 water, and we're entitled to
25 it?

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1 A. I don't recall those kind of specific
2 requests at all. It really was much more
3 conversational than how you're describing it in your
4 question. It was, we're having a tough year down
5 there. And I would ask my staff. Or if I had
6 first-hand knowledge, we'd report on the toughness on
7 our side as well. And it never got into the point of
8 how each person should do something else.

9 Q. What about communications with Mr. Stults?
10 In your communications with him verbally or otherwise,
11 did he ever request water from the state of Wyoming in
12 any fashion?

13 A. He did not. Not during my tenure.

14 Q. What about Mr. Moy? Same question, did he
15 ever come to you and request water from the state of
16 Wyoming?

17 A. No. No, not Mr. Moy. He wasn't the compact
18 representative. I wouldn't have expected him to come
19 to me with that kind of request anyway. It would have
20 come from Mr. Fritz or Mr. Stults.

21 Q. Well, even if he wasn't the compact
22 representative, did he -- and you wouldn't expect it to
23 come from a person in his position, did he make a
24 request for water?

25 A. I'm not recalling he did. Again, I think he

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1 attended many of the meetings, as I recall. And he was
2 a strong advocate for the state of Montana, talking
3 about the conditions. I think I'm not completely clear
4 on the structure of Montana state government. But I
5 know he was involved with, actually the work of
6 Mr. Ashenberg and others. So I know he was involved
7 with working on the proposals for the V, C
8 administration issues and things of that nature.

9 But, well, as I said, I don't recall him
10 making a direct request, a call for water from the
11 compact. That -- I would have remembered.

12 Q. 'Cause that would be a big deal?

13 A. It would be a huge deal. I mean, I just
14 lived through similar things elsewhere in the state of
15 Wyoming. So that's not a casual thing.

16 Q. Same questions with regard to Mr. Kerbel or
17 Mr. Dalby, either of them request any water from the
18 state of Wyoming?

19 A. Not that I'm aware of. Mr. Kerbel may have
20 had discussions with Mr. Whitaker. I think they were
21 more sort of counterparts, if you will. They had
22 similar positions in each of our states. But, again,
23 the meetings that we had, those people don't -- they
24 don't speak for the state. It's the compact
25 commissioner that speaks for the state.

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1 Q. Let's talk about Mr. Whitaker and some other
2 folks that maybe worked for you when you were the state
3 engineer. If somebody, anybody, from the state of
4 Montana had talked to Mr. Whitaker or to Ms. Lowry and
5 requested or demanded water, would you expect to hear
6 that from your staff?

7 A. Oh, absolutely.

8 Q. Did you ever --

9 A. They better had.

10 Q. You would anticipate that that request would
11 go through the chain of command to you?

12 A. There's no doubt. Well, certainly that's my
13 view is there's no doubt it would. It's not routine.
14 It's not a matter of course under the duties to which
15 those people were assigned. And that would have been
16 an issue that would have been immediately elevated to
17 me as state engineer.

18 Q. Did Mr. Whitaker, Ms. Lowry, or anybody else
19 on your staff ever communicate with you or bring to
20 your attention that the state of Montana had requested
21 or demanded water?

22 A. No.

23 Q. If Montana had made such a call on the state
24 of Wyoming, would you anticipate your office generating
25 pieces of paper that would memorialize that?

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1 A. Well, yeah. You would take that quite
2 seriously. I mean, it wouldn't be a casual thing at
3 all. It would be memorialized. It would have
4 triggered meetings. It would have triggered
5 investigations. It would have triggered all sorts of
6 things. You wouldn't -- you wouldn't blow off another
7 sovereign entity raising an issue like that. It's
8 serious. It's why we're here today. I would have
9 remembered if that would have happened, Mr. Kaste.

10 Q. All right. I think we've kind of beat the
11 call issue to death. But it's important for this case
12 as we go through that and sort of explore all the
13 possibilities in which someone could have brought to
14 your attention requests for water from Montana.

15 I want to turn to two different subjects; one
16 is short, and one is a little longer. The first is
17 related to an employee of the state engineer's office,
18 and I'm not exactly sure if your tenure overlapped with
19 his or not. His name is John Buyok. There's been some
20 testimony in this case that he was appointed to a
21 technical team related to the Northern Cheyenne Tribe
22 Compact.

23 And can you give us a sense of when Mr. Buyok
24 was employed by the Wyoming State Engineer's Office?

25 A. I know John, but I -- I'm pretty sure he

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1 actually left before I became employed by the state.

2 Q. And you became an employee of the state in --

3 A. 1984, March of 1984. And I believe he -- he
4 was -- I think he was in a group of staff actually with
5 Mr. Lou Allen, we talked about previously. I don't
6 believe he -- he did not overlap. I don't think he
7 overlapped during my tenure. So he never really
8 assisted me on any of the Yellowstone River Compact
9 issues.

10 Q. Sure. During your time as deputy state
11 engineer and state engineer, did the state of Wyoming
12 have anybody assigned to a technical committee related
13 to the Northern Cheyenne Tribe Compact?

14 A. Not that I recall, not on a committee. I
15 mean, we got involved later on in the process but not
16 back -- the timeline when Mr. Buyok may have been
17 around was in the early 1980s, I mean, before I became
18 employed there. And it was many years later when I got
19 back involved.

20 Q. When you say "got back involved," you don't
21 mean as a participant on the technical team, do you?

22 A. No. Those issues were coming to finalization
23 and being advanced to -- through the state legislature
24 to congress.

25 Q. And we went down that road. And I'm not

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1 going to go down that road in this trial as a result of
2 the Special Master's rulings. So we're going to skip
3 over that portion of your testimony 'cause I don't
4 think it's fruitful at this point.

5 So I want to turn your attention now to
6 regulation in Wyoming and reservoir accounting. And
7 obviously, we've heard a little bit in this case, or
8 maybe a lot, about the one-fill rule in Wyoming.

9 And can you give us a sense of what the
10 one-fill rule is and how it relates to reservoir
11 accounting in Wyoming?

12 A. Sure. Sort of the one-fill rule is really
13 the application of regulation of a call on behalf of a
14 reservoir water right as opposed to a direct flow water
15 right. And the concept is that under the priority
16 water right of the reservoir, that right, under its
17 priority, is entitled to a one fill on a water-year
18 basis.

19 So you would -- you would look at how much
20 water was carried over from one year -- water year to
21 the next. So what was the amount of water in storage
22 on September 30th? And between that and the water
23 righted amount, that would be your one fill for that
24 year if you're under regulation.

25 Q. And if you're not under regulation, can

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1 reservoirs in Wyoming fill in excess of that amount
2 that you just described?

3 A. They can.

4 Q. And so for purposes of application to the
5 one-fill rule, do I understand correctly that the key
6 trigger is regulation or a call?

7 A. That's exactly right. 'Cause you're under
8 regulation, you're then -- you're looking at all of the
9 water users and all of the priorities, junior and
10 senior, that may be affected somehow by that
11 regulation, whether you need to turn people off, turn
12 people down, make whatever adjustments are necessary.
13 So that's really when that more rigid accounting occurs
14 in most -- under most circumstances. When you're in
15 kind of a free river, there's no regulation occurring
16 or priority enforcement occurring, then reservoirs
17 could operate differently. They could behave
18 differently and -- because there's no river. The issue
19 is that they're impacting other appropriators, is what
20 we're trying to give some definition to and protect
21 seniors and juniors from injury from what activity is
22 associated with the reservoir.

23 So as soon as you ask for a call, then your
24 activities get to be reviewed as much as the activities
25 of the other water right holders.

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1 Q. Well, can you explain that in a little more
2 detail? When you say as soon as you make a call, your
3 activities come under review -- let's say a reservoir
4 operator in Wyoming makes a call on upstream juniors
5 and says, I'd like water to fill up my reservoir. Then
6 what does the state engineer do in response to that
7 call?

8 A. Well, the first thing you always do is you go
9 to the calling facility. In this case, if it's a
10 reservoir, depending on when that call comes in, you're
11 then going to seek the accounting and look for all the
12 information to be able to sort of back up what had been
13 occurring since the end of the prior water year and to
14 sort of take a full accounting of sort of operationally
15 what was occurring at that reservoir and how water was
16 stored.

17 If -- I guess the clearest example is if
18 somebody requests a call in the spring, anticipating
19 they're not going to get their one fill so they place a
20 call, we're going to go back and look at what they have
21 been doing since October 1st. And if that reservoir
22 had, for instance, passed a whole lot of water through
23 for whatever reasons, didn't take full advantage of the
24 flow that was there, then that water would get
25 accounted against the one fill once they request a

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1 call. We're not going to let them bypass water or even
2 let more water out and then place a call to refill the
3 entire reservoir. 'Cause they had a chance to fill.

4 But when you look at the information on the
5 flows and the situation, you find out that part of that
6 water would have gone by. You still may honor the
7 call, but you're going to take a full accounting of
8 that. And some of those bypasses would be counted as
9 if they were stored even though they, in fact, may not
10 have been stored at the time.

11 Q. So when you say -- I think you used the word
12 "rigid accounting" in response to a call. What are you
13 counting? I mean, is it some things and not others?
14 Is it everything?

15 A. Oh, no. Again, I'm describing sort of an
16 onstream reservoir. But you're taking a count for --
17 you know, for the inflows, for the change in storage.
18 You look at evaporation. You'd look at flows being
19 bypassed, and why were they bypassed? Maybe the
20 reservoir was bypassing water because it was going to a
21 downstream senior who the reservoir itself has called
22 out. So you can't be penalized for passing water
23 through if it was going to a different appropriator.

24 But -- so you'd have to investigate the
25 accounting of all of those operations to determine

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1 what -- in fact, whether the call should be honored and
2 for how much more water are they entitled to under that
3 priority. And once they achieve that, then that call
4 would come off.

5 Q. What about, for example, if a reservoir had
6 released water over the course of the winter for flood
7 control purposes and not in response to a demand by a
8 downstream senior? Does that get accounted against
9 their fill?

10 A. Well, yes. I mean, you sort of gave me an
11 unusual hypothetical. If you're releasing for flood
12 control, it means the reservoir is real full. So you
13 might not be honoring a call anyway.

14 But the idea of looking back through the
15 water year to the behavior, to the activities, to how
16 the water was used, what was their water that they
17 would have been entitled to have stored but chose not
18 to? That's really one of the key issues.

19 Q. What if they chose not to for a real good
20 reason? What if it makes all kinds of sense for the
21 purposes of maintenance of your dam to send water down
22 that could have been stored? Does it still count
23 against their one fill?

24 A. In my view, it does. Again, that's not to
25 say that behaving correctly isn't the right thing to

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1 do. But the issue becomes, when you're placing a call,
2 you're now impacting other appropriations, whether they
3 are upstream or downstream. And those people are
4 entitled to their appropriation, their beneficial use
5 of water as well.

6 So it's really -- it's an issue of injury to
7 other appropriators. Just because you want to be a
8 nice guy for whatever reasons, that turns into, then, a
9 demand on somebody else. And that -- our laws don't
10 provide for that. You have to take responsibility. If
11 you choose to pass water, that's your choice. But that
12 doesn't mean you get to put that pain on some junior.

13 Q. Have you ever had to deal with these kinds of
14 issues during your tenure as the state engineer? Not
15 necessarily on the Tongue 'cause as we all know, all of
16 Wyoming's reservoirs happen to be at the top of the
17 system. But we have other rivers in Wyoming. So has
18 this kind of rigid accounting ever come up?

19 A. It has. Probably the best example is on the
20 North Platte River Basin. In fact, that rigid
21 accounting is routine, and it's every year. It's not
22 just during dry periods. Even in really bountiful
23 years, there's very strict accounting of all the water
24 activities, conversions, storage, and evaporation,
25 releases for hydropower, the whole packet of things

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1 that occur. And that's 'cause it's generally a
2 water-short basin.

3 In that basin, you have two and a half times
4 the flow of the river in storage capacity. So you've
5 got sort of complete control over all the water. And
6 so there is a very rigid accounting of all of the
7 activities at all of those reservoirs and all the
8 diversions up and down that system.

9 Q. When you say all of those reservoirs on the
10 North Platte, how many reservoirs are there on the
11 river?

12 A. There's --

13 Q. In Wyoming.

14 A. There's five or six major reservoirs that are
15 all owned and operated by the Bureau of Reclamation.

16 Q. And these are big ones; right?

17 A. Couple of them are over a million acre-feet.

18 Q. And do some of them shut their gates in the
19 winter?

20 A. Absolutely. The furthest downstream one is a
21 reservoir called Guernsey Reservoir near the town of
22 Guernsey, Wyoming. It's about 40 miles upstream of the
23 state line of the state of Nebraska. And it is shut
24 tight at the end of the irrigation season every year.

25 Q. And what about the reservoirs --

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1 A. And so all of the -- all the water upstream
2 of that point is rigidly accounted and rigidly going
3 into reservoirs. Because they all have different
4 priority dates. So you're capturing that water and
5 accounting for water in all the reservoirs.

6 Q. Well, I get the impression, because Guernsey
7 is shut tight, that some of these other reservoirs are
8 not?

9 A. That's correct.

10 Q. And some of them have hydroelectric power
11 plants associated with them; right?

12 A. They do.

13 Q. And there's water going out of these various
14 reservoirs all the time; fair?

15 A. Fair.

16 Q. All right. And does the state engineer's
17 office hold these reservoirs strictly to a one fill
18 every year?

19 A. They do. Absolutely.

20 Q. And these are reservoirs owned by the Bureau
21 of Reclamation; right?

22 A. Yes.

23 Q. Now, these reservoirs are essentially all on
24 the same line. Does the Bureau of Reclamation move
25 water between these reservoirs as it sees fit also?

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1 A. It does. They have operational flexibility.
2 They actually have one reservoir that has sort of
3 surplussed, what they call reregulation space so that
4 they can make deliveries upstream and recapture them
5 before they would just go down the river system.

6 And so you can -- they're actually able to
7 generate hydropower. They're actually able to
8 accommodate some of the needs of the fisheries and
9 things of that nature. But all of that water is
10 accounted for. It may be released from one reservoir
11 and it's recaptured and it's maintained in the same
12 ownership and the same accounting of where it all is.
13 So no matter which bucket it's in, each priority is
14 rigidly tracked as to whether it's filled or not.

15 Because, again, Bureau of Reclamation is
16 entitled to a call. And those calls are enforced
17 against juniors. And state engineer's office has to be
18 assured that the right priority and the right date's
19 being effectuated against the right set of juniors if
20 regulation is necessary.

21 Q. So even on a system like that that's
22 considerably more complicated than the Tongue River --
23 and we can all agree the North Platte is a lot more
24 complicated than the Tongue River -- there is, what,
25 every single acre-foot is accounted for purposes of

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1 determining a fill if necessary?

2 A. Yeah. There really is. There's actually
3 a -- and it's done -- while the Bureau of Reclamation
4 is the primary reservoir owner and operator, actually,
5 not only is the reclamation involved and the state of
6 Wyoming involved, but the state of Nebraska is
7 involved.

8 State of Nebraska is interested because much
9 of the water in the federal reservoirs in Wyoming
10 ultimately goes to water users in the state of
11 Nebraska. So this detailed accounting is a system
12 that's done every day, every morning from the
13 irrigation season, every single day from May through
14 September. And it's done, I think, weekly through the
15 wintertime. And it's exchanged and shared
16 electronically among both states and the federal
17 government and made available to all the water users.

18 So it's complete transparency about how much
19 is flowing, where it's going, whose account it's going
20 into. Most of the reservoirs have multiple storage
21 accounts for each of the different irrigation districts
22 that have contracts for water or municipalities that
23 have contracts for water. So the accounting not only
24 gets a one fill for the water right; that one fill
25 volume is then divided up among the different owners

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1 that share that priority date as well. So that occurs,
2 really, on a constant basis. Even in years -- well, it
3 doesn't happen very often, but even in years where the
4 system fills and spills, they are tracking.

5 Q. Now, that's sort of the extreme end of
6 complicated.

7 A. It is.

8 Q. And you could probably sit here for a day and
9 tell us about the intricacies of that system. But on
10 the less complicated side, do I understand correctly
11 that the rigid accounting or the state engineer's
12 decision to go look at an account for things typically
13 occurs in response to a call by a reservoir?

14 A. That's exactly right. Unless there's some
15 other accounting or obligation to track water use,
16 other examples from the North Platte. But the state of
17 Wyoming is limited in how much storage and pools we're
18 allowed to have.

19 So we've got even high mountain reservoirs
20 that -- where our people will hike or practically snow
21 machine into to get an end of water year number so that
22 we know what that carryover is so that you can track
23 the one fill that following spring. We still want to
24 collect that information, that data, so you can do an
25 accounting, even if it's after the fact.

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1 Q. Okay.

2 MR. KASTE: May I have just one minute?

3 SPECIAL MASTER: You certainly may.

4 BY MR. KASTE:

5 Q. Having said that we were done talking about
6 calls, I do want to ask you maybe one or two more
7 questions, not about whether you you received calls
8 from the state of Montana. Because we've covered that
9 ground. But as the state engineer, have you received
10 calls from other states?

11 A. Well, we have -- let me see, geez. The North
12 Platte is so unique. It's a little different. It's
13 mainly the Bureau of Reclamation 'cause the Bureau of
14 Reclamation is the appropriator. So they become the
15 person making the call. Even though most of that water
16 goes to the state of Nebraska, it isn't really the
17 state of Nebraska in that particular example.

18 Q. Okay. Have you received a call from the
19 Bureau of Reclamation?

20 A. We did.

21 Q. What did it look like?

22 A. They wrote us a letter. It's, again, one of
23 these first-time events. Again, in the North Platte,
24 in spite of the fact that we had this very
25 long-standing, complicated apportionment decree, right

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1 in the middle of the reopening of that case, the Bureau
2 of Reclamation, again, in reaction to some very dry
3 years, did request a call.

4 And they wrote the state a letter and told us
5 which facilities and what priority date they were
6 seeking enforcement for. And it was the first time
7 that had ever happened since those reservoirs were
8 built at the turn of the century. So off we went.

9 Q. I think those are all the questions I have
10 for you, Mr. Fassett. Thank you.

11 SPECIAL MASTER: Thank you, Mr. Kaste.

12 Mr. Swanson, are you doing the
13 cross-examination?

14 MR. SWANSON: I am, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. SWANSON:

17 Q. Good afternoon, Mr. Fassett. How are you?

18 A. I'm fine.

19 Q. So we just met today; isn't that right?

20 A. We did.

21 Q. I'm going to take you through a number of
22 documents.

23 SPECIAL MASTER: It's a long story.

24 THE WITNESS: It's a long, inside story?

25 MR. SWANSON: We've been here too long.

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1 That's the bottom line.

2 THE WITNESS: You did introduce yourself,
3 Mr. Swanson, so thank you.

4 BY MR. SWANSON:

5 Q. I'm going to just take you through a number
6 of documents. I think that would be the best way. I
7 think we can accomplish most of what we need to do by
8 looking at those documents first. And then I'll
9 probably have some follow-up questions based on
10 Mr. Kaste's examination.

11 So I'd like to begin with --

12 MR. SWANSON: And, Your Honor, may I approach
13 freely to hand the witness documents?

14 SPECIAL MASTER: You may.

15 BY MR. SWANSON:

16 Q. I'm going to begin with Montana 519.

17 SPECIAL MASTER: Let's go off the record for
18 a second.

19 (Discussion held off the
20 record.)

21 SPECIAL MASTER: Okay. We can go back on the
22 record.

23 BY MR. SWANSON:

24 Q. Do you recognize this document?

25 A. Yes. Looks like -- M519 looks like a portion

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1 of the regulations and instructions of the State Board
2 of Control. And these were dated June of 1986.

3 Q. And we -- I understand that this is not a
4 complete copy. I wondered if you could just look
5 briefly at the page which is marked page 4, Bates
6 No. MT24212. And specifically, if just -- if you could
7 tell us if that page and the preceding page look to be
8 accurate representations of the actual full manual. I
9 probably won't admit this. I just want to ask you a
10 question about it.

11 Oh, it's already admitted?

12 SPECIAL MASTER: What section are you --

13 MR. SWANSON: I'm actually going to be, Your
14 Honor, on Section 6 which is on numbered page 4.

15 SPECIAL MASTER: Okay.

16 BY MR. SWANSON:

17 Q. Now, as I understand your duties as a state
18 engineer, you were in charge of the division
19 superintendents who were in charge of the water
20 commissioners; is that correct?

21 A. That's correct.

22 Q. And these regulations govern how the water
23 commissioners do their job to administer water?

24 A. Water commissioners, yeah, that whole
25 hierarchy.

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1 Q. So looking at Section 6, Administrative
2 Regulation, I wonder if you could look at those first
3 two sentences and read those for us, please. Beginning
4 "Any person with a water right"; do you see where I am?

5 A. Yes, uh-huh.

6 Q. Can you read those out loud?

7 A. Oh, I'm sorry. Yes, sure.

8 Q. I guess I didn't specify.

9 A. Yes. Section 6 administrations --
10 "Administrative Regulation. Any person with a water
11 right in a stream system may request the water
12 commissioner to request the stream for his benefit --
13 to regulate the stream for his benefit. The request
14 should be made in writing on a form provided by the
15 State Board of Control."

16 Q. So is this -- this is the rule always, always
17 a written request for a call from the water user?

18 A. I think there are times when water
19 commissioners might take action without a written
20 request. But this is their guidance.

21 Q. So a call could be proper even if it's not
22 fully in writing; is that accurate?

23 A. Yeah. My understanding is that there have
24 been circumstances where water commissioners have
25 received and taken action on a request.

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1 Q. So the --

2 A. Without it always being in written form.

3 Q. Without it always being in written form? And
4 I'll not ask the next question as rapidly or the court
5 reporter will be unhappy with me.

6 So then the sentence that's after the
7 sentence that's in parens, because that appears to be a
8 sample written call. The next sentence says, "Upon
9 receiving a proper request for regulation, the water
10 commissioner will act to limit each water right," and
11 it goes on from there. So looking at the preface word
12 there or preface phrase "Upon receiving a proper
13 request for regulation," the commissioner could act on
14 a verbal call, and that would be considered a proper
15 request for regulation?

16 A. Yes. It's my understanding that has
17 occurred.

18 Q. Okay. So would it surprise you to know, in
19 fact, that there's been four Wyoming water
20 commissioners who have testified in this trial and they
21 have all testified that they routinely regulate based
22 on verbal calls rather than written calls? Would that
23 surprise you?

24 A. No. That's what I just testified to.

25 Q. So when we ask the -- I guess the question,

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1 talking about a verbal call, and needs to be proper,
2 what is a proper call in the state of Wyoming if it's
3 verbally, between -- let's say I'm a water user, you're
4 a commissioner, and I want to do a verbal call for you
5 to regulate my water. What would that look like -- or
6 sound like, I should say?

7 A. Well, it would sound like either a phone call
8 or a meeting in the field and -- between the water user
9 and the water commissioner. And then he would have to
10 go investigate and decide whether any action was
11 necessary or not.

12 Q. So what kind of wording would I have to use
13 for the commissioner to say, this is proper. I'm going
14 to act upon this?

15 A. He would have to make a -- it would have to
16 be a request for regulation.

17 Q. So a man named Tom Koltiska testified, and he
18 said something to the effect -- and I don't want to be
19 accused of mischaracterizing his testimony, so I'm not
20 going to tell you that this is exactly what he said,
21 but something along the lines of, I called
22 Mr. Schroeder and said, hey, I need water down here.
23 Is that enough, or does it need to be more than that?

24 A. Well, I guess if that was his testimony, I
25 wouldn't have a basis for disputing that that's what

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1 happened. And he went and took action based on that.

2 Q. So I mean, you wouldn't have -- let's say
3 you're the state engineer. You wouldn't have cause to
4 call Mr. Schroeder and say, what's wrong with you;
5 you're acting on an improper call.

6 A. No, it would probably come to me in a very
7 different manner. It would come to me when a water
8 commissioner took action against some junior. And the
9 junior might allege it was an improper request for
10 regulation.

11 Q. And there may be many factors involved in
12 that; is that right?

13 A. And the water commissioner may have to go
14 back to the original appropriator and say, I need it in
15 writing.

16 Q. But barring no complaint, there wouldn't
17 necessarily be a reason to say, Mr. Schroeder, you
18 can't act on Mr. Koltiska's phone call of, hey, I need
19 water down here, and I need it now?

20 A. I wouldn't -- as state engineer, I wouldn't
21 have weighed in on that.

22 Q. I want to flip to a memo that is Montana
23 Exhibit 263. I'll hand this to you. I don't believe
24 you have it.

25 This is Montana 263. Could you just describe

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1 this memorandum and tell us if you understand this
2 document? Is it addressed to you at the top there?

3 A. It is addressed to me, yeah.

4 Q. Do you remember or recognize this document?

5 A. I'm not recalling it. This is -- well, the
6 date is prior to my going to work for the State of
7 Wyoming. This was written to me, I assume, as I was a
8 consultant working for Leonard Rice Engineers and our
9 work. Mr. Merrill, I think, was one of the attorneys.
10 And Mr. Sommers was another one of the consultants on
11 our team. And this was the group that was working for
12 the state on the Big Horn River general adjudication.

13 Q. Do you recognize these gentlemen, James
14 Merrill and Craig Sommers?

15 A. I do.

16 Q. And, yeah, it is October 18th, 1982, which
17 would have been when you were at Leonard Rice. And I
18 believe you testified a moment ago you were retained by
19 Wyoming for the Big Horn River general adjudication.
20 So it sounds like you're saying you believe this memo
21 was pursuant to that contract?

22 A. Yeah, that's my assumption when I looked at
23 the names. Those were people that were all involved
24 with me at that time.

25 MR. SWANSON: Your Honor, I move admission of

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1 Exhibit M263.

2 MR. KASTE: Well, I'm a little concerned
3 about the foundation laid by this witness who says he
4 doesn't remember this document. The fact that his name
5 is printed on it is one thing. His testimony about it
6 has not provided adequate foundation, moreover. But
7 the little information he does have about it seems to
8 be related to a different matter. So I object on the
9 foundational grounds and relevance grounds.

10 MR. SWANSON: Your Honor, he recognized the
11 names on it, and he just told us he believed it was in
12 pursuant to his duties working for the state of Wyoming
13 on adjudication matters. And I intend to ask him about
14 the purposes of that. And I don't believe that's
15 necessary to admit it.

16 MR. KASTE: My view is that foundation
17 consists of information sufficient to show that
18 something is what it purports to be. And I don't think
19 we have that from this witness at this time.

20 MR. SWANSON: That's actually a different
21 objection. That would be more authenticity. I believe
22 the Court can determine for itself the relevance of the
23 document. I believe the authenticity has been verified
24 by the witness.

25 SPECIAL MASTER: So why don't we do this

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1 because I understand Mr. Kaste's objection on this.
2 Why don't you ask the witness about the particular
3 portions of this exhibit which you consider to be
4 most -- or you consider to be of relevance in this
5 particular proceeding and see if the witness has any
6 memory with respect to those portions of it.

7 MR. SWANSON: Yes, Your Honor. And honestly,
8 we've probably fought about this more than we needed
9 to. I had one general question for the witness.

10 BY MR. SWANSON:

11 Q. And that is: Mr. Fassett, can you just
12 maybe, if you recall, explain Wyoming's interest in
13 looking at irrigated agricultural demand in Montana and
14 the methodology of how they may have gathered that
15 information?

16 A. I actually don't know why we were doing that.
17 As part of the Big Horn River general adjudication, all
18 the water rights investigations and all of the focus of
19 the work that we were doing was on activities in the
20 state of Wyoming.

21 So I haven't read this whole memo, so I don't
22 know if there's some connection. But the Tongue River
23 isn't even -- wasn't part of the general -- Big Horn
24 River general adjudication. It was outside the basin.
25 So I'm not -- I'm missing the connection.

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1 Q. I wonder if you could look at page 4 of the
2 document, please.

3 A. Sure.

4 Q. Do you see under the heading D, Instream
5 flows and prior rights?

6 A. Okay.

7 Q. And it's talking about the Northern Cheyenne
8 Reservation irrigation demands. Do you see that in the
9 first sentence?

10 A. I do.

11 Q. There's a sentence, if you skip one and go to
12 another one, it says, "The total prior rights
13 downstream require an estimated 475 CFS. All these
14 figures are for a May through September irrigation
15 season."

16 I wanted to ask you how you -- how that
17 number was arrived at, if you know how that number was
18 arrived at?

19 A. I do not know how that number was arrived at.

20 Q. Do you know how you and your team relied upon
21 that number, to what extent you relied upon it?

22 A. I can't think of a reason why we would have
23 been interested in that number as part of the Big Horn
24 case.

25 MR. SWANSON: Your Honor, could I have a

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1 moment?

2 SPECIAL MASTER: You may.

3 BY MR. SWANSON:

4 Q. Do you recall if, in the course of this work,
5 you were focused to assist Wyoming with estimation of
6 Indian reserved water rights on the Tongue or Powder
7 Rivers in Wyoming and Montana?

8 A. No. I do see on page 7, though, a reference
9 to, it looks like, some BIA projects on the Big Horn
10 River side. So that, at least, is in the right basin.
11 But there's no -- we did no analysis. We did no
12 modeling. There was no presentation of anything in the
13 Tongue River Basin in the Big Horn River general
14 adjudication.

15 Q. And then -- but looking at pages 6 and 7, the
16 discussions of -- let's look at page 6 under the sub-B,
17 Potentially Irrigable Land; you see that?

18 A. Uh-huh.

19 Q. And begins discussing, "The BIA has provided
20 an extremely valuable report. It's focused on the Crow
21 irrigation project." And then when we go to the
22 following page, page 7, and looking again at sub-B near
23 the bottom, Potential Irrigable Land. Do you
24 understand whether the United States and the BIA were
25 using the same kinds of calculations of potentially

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1 irrigable acreage to evaluate reserved water rights
2 throughout this area? Or were they doing different
3 methodologies for different reservations?

4 A. My understanding was that they were all
5 looking at sort of the PIA, Practical Irrigable Acreage
6 Standard the same way.

7 But this really doesn't relate to any of the
8 work we did in that case. So Mr. Sommers was one of
9 our consultants. He may have been responding to some
10 question from the legal team on why he did this
11 research. I could have easily been copied because we
12 were -- we often were looked at as the sort of the
13 outside consultant most involved with issues. And so
14 he may have been simply copying me as a matter of
15 course to keep me informed.

16 But this didn't come from me. This wasn't
17 requested by me. I can't see how -- it may have been
18 for some sort of other legal reason, but not for the
19 technical work that we were performing for the state of
20 Wyoming.

21 Q. Okay. And then I just have one last
22 question. Going to the bottom of page 3 of the
23 document.

24 A. Okay.

25 Q. And I understand your point about other

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1 basins. But it appears this section is clearly focused
2 on the Tongue River Basin. And the reason I say that
3 is are you familiar with a thing called the T & Y Ditch
4 in Montana?

5 A. Yes.

6 Q. Do you see that at the bottom of page 3?

7 A. I do.

8 Q. And then when we go to the following page,
9 you -- actually, that's the section that I wanted to
10 focus on was -- it would be the second sentence of that
11 paragraph under heading C, which is General
12 Information. It begins, "He estimates" -- and I
13 understand that to be referring to Mr. Griffith. "He
14 estimates," I wonder if you could read that sentence
15 and the following sentence.

16 A. On page 4 now?

17 Q. Page 3 at the bottom.

18 A. Oh, sorry.

19 Q. I apologize. I jumped back from page 4 to
20 page 3. So bottom of page 3.

21 A. Okay.

22 Q. Go ahead. Can you read that out loud, those
23 two sentences? "He estimates" and the following
24 sentence.

25 A. Sure. Reading from the bottom of page 3 of

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1 Exhibit M263, "He estimates that approximately
2 15 percent of the acreage in the basin, not including
3 the T & Y Ditch, is under sprinkler irrigation. The
4 entire T & Y Ditch is irrigated by gravity systems."

5 Q. And then the following, the next sentence.

6 A. "All of the presently irrigated land on the
7 Northern Cheyenne Reservation is under center pivot
8 irrigation."

9 Q. So going back to the estimation of water
10 rights in the Tongue River in Montana, would you agree
11 that this is clearly a focus on the irrigation demands
12 in Montana in the Tongue River Basin?

13 A. That's what the document appears to read. I
14 don't know why that was in the Big Horn case.

15 MR. SWANSON: Your Honor, I believe we've
16 laid sufficient relevance for this document. It's got
17 multiple pages focused on the Tongue Basin. And I
18 would point out that the document speaks for itself and
19 that I believe the time for authenticity objections has
20 actually passed.

21 MR. KASTE: I don't think Mr. Fassett
22 acknowledges through the course of this discussion that
23 he ever even received this document. Certainly he
24 didn't create it. I guess I'd move to strike all the
25 testimony about it in light of the fact that there's no

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1 sufficient foundation for it.

2 SPECIAL MASTER: So here's my concern with it
3 is that at least at the moment we have no idea whether
4 this is a draft of a document, whether it was ever
5 received by Mr. Fassett or Mr. Merrill. So it's hard
6 for me, at this particular point in time, to see what
7 the relevance -- it's one of those things where it gets
8 over into the question of foundation -- but what the
9 relevance is in this particular proceeding.

10 MR. SWANSON: Do you want me to respond to
11 that, Your Honor?

12 SPECIAL MASTER: Yes.

13 MR. SWANSON: One of the things that we have
14 focused on today and will continue to focus on is
15 whether the state of Wyoming was interested in or
16 looking at water demands in the state of Montana and
17 vice versa. And going back to at least October 18th,
18 1982, Wyoming had in its possession or a consultant
19 working for the state of Wyoming had in its possession
20 at least an initial analysis of some of those demands.

21 Now, I mean, the Court can take this document
22 for what it is. But the witness has testified here he
23 was working for the State of Wyoming on this project at
24 this time. He knows these gentlemen. And it's
25 certainly more foundation than has been laid on a lot

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1 of exhibits that have been admitted to this point.

2 SPECIAL MASTER: As I said, at the moment,
3 I'm not going to permit this into evidence.

4 But, you know, I'll take it under advisement.
5 But at the moment at least I'm not going to admit it.

6 MR. SWANSON: All right. Thank you, Your
7 Honor.

8 BY MR. SWANSON:

9 Q. You can set that one aside. I believe we've
10 done our best on that one.

11 SPECIAL MASTER: But also with respect to
12 Mr. Kaste's point, I'm not going to strike the
13 testimony since it's all actually regarding the
14 document and I think relevant to the question of
15 whether or not the document should come in.

16 MR. SWANSON: Thank you, Your Honor.

17 BY MR. SWANSON:

18 Q. Mr. Fassett, I'll hand you two documents
19 together. The first is Montana 81; the second is
20 Montana 79. Rather, let's look at Montana 79 first.

21 Now, you testified that you took on the
22 position of deputy state's engineer in 1984; is that
23 correct?

24 A. That's correct.

25 Q. And you -- I believe you testified that

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1 Mr. Christopulos involved you in pretty much everything
2 and anything that went on in the office that somehow
3 even affected his duties; is that accurate?

4 A. Yes, that's generally accurate.

5 Q. Did you get a sense that Mr. Christopulos,
6 who retired three years later, was kind of preparing
7 you to take over for that position?

8 A. Not necessarily. I think he was looking for
9 me to become well-rounded enough that I could take on
10 things for him so he could focus on other issues. It
11 was really more of a broad-based indoctrination and
12 training.

13 Q. And I believe you testified that in the
14 course of, you said -- as a new party that's coming in
15 and learning these issues, you could sense some
16 frustration from both states, in fact, dealing with
17 some of the disputes that were between them. That's
18 accurate as to what you said a little while ago?

19 A. Yes.

20 Q. And in doing so, I wanted to ask you to look
21 at a memo that would have been received before you were
22 in the state engineer's office. And that's Montana 79.
23 And then it appears to be, and we'll see by its
24 contents, it's related to the next memo that I handed
25 you, which is Montana 81.

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1 Let's look at Montana 81 first, just to lay
2 the background. The first page is just a cover page.
3 The second page, do you see some handwriting on the top
4 right corner?

5 A. We're on 81 now; right?

6 Q. Correct.

7 A. Okay. Yes, I do.

8 Q. Are those your initials, J.F.?

9 A. They are.

10 Q. And the date 4/16/84, was that shortly after
11 you were hired?

12 A. I think that was my first day.

13 Q. Is it fair to say this was your first day on
14 the job, here's a pile of stuff and start catching up?

15 A. I think that would be a good
16 characterization.

17 Q. And then below your initials, there's another
18 date with some initials. And it says 11/18/83, L.E.A.
19 Do you understand that to be Lou Allen?

20 A. Yeah. I think for these issues, that would
21 be my understanding.

22 Q. And then could you read the title of this
23 memo, this Montana 81?

24 A. Says, "Notes on Gary Fritz's letter of
25 October 27th, 1983, on Yellowstone Compact allocations

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1 and administration."

2 Q. So did you understand this to be a memo that
3 Mr. Allen had produced in the course of his duties and
4 was given to you to review after you were hired?

5 A. Yes. Like you said, it would have been part
6 of the pile of stuff I got.

7 MR. SWANSON: Your Honor, I'd move admission
8 of Montana 81.

9 MR. KASTE: No objection.

10 SPECIAL MASTER: Okay. Exhibit Montana 81 is
11 admitted.

12 (Exhibit M081 admitted.)

13 BY MR. SWANSON:

14 Q. So looking at the title of Montana 81, Gary
15 Fritz's letter of October 27th, 1983, on Yellowstone
16 Compact allocations and administration, could you look
17 back at Montana 79? And does this -- is this that
18 document to which the memo refers?

19 A. Sure looks like it.

20 Q. And we know that, right, because if you look
21 through Mr. Allen's memo, Item 1 is referring back to a
22 statement within Mr. Fritz's letter; isn't that right?

23 Mr. Allen's first line says, "In Mr. Fritz's
24 next to last paragraph, he refers to a statement." And
25 then if we go to page 3 of M79, do you see the second

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1 to last paragraph, it says, "Lou Allen states that
2 'Diversions to pre-1/1/1950 rights'" and goes on from
3 there? Do you see that?

4 A. I do.

5 Q. So it's clear that these two documents are
6 referring -- or I should say the second document is
7 referring back to the first?

8 A. Yes.

9 Q. And at the bottom of page 3, I see a
10 signature by Gary Fritz. And at the top of page 1 of
11 M79, I see it addressed to Mr. Christopulos; you see
12 that?

13 A. Yes.

14 Q. And that -- is that the address for the state
15 engineer's office at that time?

16 A. At that time.

17 MR. SWANSON: Your Honor, I move admission of
18 M79.

19 MR. KASTE: Until I hear that Mr. Fassett's
20 reviewed that letter, I object on foundational grounds.

21 SPECIAL MASTER: Well, in this particular
22 case, I'm going to admit this particular exhibit. And
23 it might seem inconsistent, but in this particular
24 case, it shows other signs of actually being sent.

25 MR. KASTE: I understand. But not to him.

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1 And so all we need is the question to say --
2 Mr. Fassett obviously he reviewed one initial and
3 looked at the letter. Did you review the letter? And
4 then we have adequate foundation for the letter.

5 SPECIAL MASTER: Given -- you know, I realize
6 I'm not bound, it's going to be one of those situations
7 where I'm going to go probably beyond where the Federal
8 Rules of Evidence are. But given the time period that
9 we're involved in in this particular case, I'll go
10 ahead and admit M79.

11 (Exhibit M079 admitted.)

12 MR. SWANSON: Thank you, Your Honor.

13 BY MR. SWANSON:

14 Q. So, Mr. Fassett, let's go ahead and look at
15 that first paragraph of Mr. Allen's memo. Actually, I
16 think what would make sense is to go back to
17 Mr. Fritz's letter, which would be page 3 of M79. And
18 that second to last paragraph, do you see about halfway
19 down the paragraph, there's a sentence that begins
20 "Well, only post-1950 diversions"; do you see that?

21 A. I do.

22 Q. Could you read that down to the end of the
23 paragraph?

24 A. "While only post-1950 diversions are included
25 in the allocation formula, all diversions would have

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1 been monitored in both states for bookkeeping purposes
2 and to make certain there is no overuse by pre-'50
3 appropriators. Unless there are water measuring
4 devices in pre-'50 canals, there would be no way to
5 regulate pre-'50 use. Also, many pre-'50 and post-'50
6 water rights may flow through a single headgate."

7 Q. Do you agree -- did you agree with the
8 statements, all diversions would have to be monitored
9 in both states, and then skipping, to make certain
10 there's no overuse by pre-1950 appropriators? Do you
11 agree with that statement?

12 A. Do I agree with Mr. Fritz?

13 Q. Yes.

14 A. I'm not sure if I follow all of that
15 argument.

16 Q. Okay. I think Mr. Allen actually explains
17 it. If we could flip back to his memo. And looking
18 at, again, that first paragraph, and you see -- really,
19 beginning after the colon in the first sentence. It
20 says, quote, "'Diversions to pre-1/1/1950 rights,
21 whether from direct flow or storage releases, would not
22 need to be monitored for compact administration,'" end
23 quote. There I understand Mr. Allen's referring back
24 to a previous statement.

25 And then Mr. Allen states, and this is

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1 without quotes, "He correctly takes issue with the word
2 'administration,' which should have been written
3 'allocation calculations.'"

4 And then if you go to the second paragraph,
5 this is Mr. Allen's kind of summary of that, of his
6 analysis. If you could read that first sentence of the
7 second paragraph that begins "I readily concede."

8 A. You want me to read that?

9 Q. Please.

10 A. Of out of 81?

11 Q. Correct?

12 A. "I readily concede that for administration
13 both states need to monitor pre-'50 diversion and
14 storage, not only for internal water administration but
15 also for interstate verifications."

16 Q. So it appears that when we talk about
17 allocation calculations, Mr. Allen and Mr. Fritz seem
18 to be discussing this idea of post-1950 uses. And when
19 they talk about administration, they are talking more
20 about regulating water uses. Is that -- I mean, do you
21 have a view on that? Because you reviewed this. Could
22 you tell us whether you agree with Mr. Allen and
23 whether that's what he means -- or whether that's what
24 you understood him to mean?

25 A. I guess I -- I haven't read this in 30 years.

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1 So I just -- I'm not recalling my review of this
2 document. I think it speaks for itself.

3 Q. So --

4 A. Mr. Allen's views are stated clearly here.

5 Q. But in terms of the office, you and
6 Mr. Christopoulos, when you use the word
7 "administration," could you just explain generally what
8 that is meant in the context of the compact
9 commissioner?

10 A. As I stated earlier -- and perhaps my
11 recollections are different than this memo. But as I
12 said earlier, my recollections were that the
13 administration, most of the focus of the work was on
14 the percentage sharing allocations under V, C. And
15 that's where the effort and the work was being
16 attended. And there wasn't as much on what was going
17 on on the pre-'50 side.

18 Q. So when you say "pre-'50 side," that's what
19 you refer to when you use the word "administration,"
20 and post-'50 is when you use the word "percentage
21 allocations"? Is that accurate?

22 A. No. I think they're more intermingled than
23 that, in my view. I don't recall that rigid a
24 distinction in the use of the terminology.

25 Q. If we could look at page 6 of the same

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1 exhibit, M81. And the Bates number at the bottom is
2 000086.

3 A. Okay.

4 Q. And the paragraph 7, beginning with the words
5 "we do not need." And, again, this is Mr. Allen. And
6 I believe when he says "we," he refers to the state of
7 Wyoming. Could you tell me if you disagree with that?

8 I'll just read this out, and I'll ask you a
9 question. So the statement is "We do not need a
10 storage limit calculation. Storage is limited by the
11 reservoir permit and physical capacity and, at least in
12 Wyoming, by the one-filling per year restriction. The
13 water administrative accounting in each state should
14 suffice."

15 So the statements seem to suggest that the
16 one-filling limitation on reservoirs is focused on
17 Wyoming. Do you agree with that?

18 A. In this sentence, yeah, I do.

19 Q. Did you disagree with this statement when you
20 reviewed it and correct Mr. Allen and say, I think
21 Montana has a one-fill rule?

22 A. No, I don't think we knew what their laws or
23 procedures allowed for.

24 Q. So at this point, you didn't have an opinion
25 on whether Montana had a one-fill rule like the state

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1 of Wyoming?

2 A. I -- no. I'm recalling that we did not have
3 an opinion.

4 Q. Okay. Thank you.

5 SPECIAL MASTER: I wonder whether this would
6 be a good time for the second afternoon break. So
7 let's come back at 25 minutes to 4:00.

8 (Recess taken 3:23 to 3:37
9 p.m., November 19, 2013)

10 SPECIAL MASTER: Okay. Everyone can be
11 seated.

12 You can proceed.

13 MR. SWANSON: Thank you, Your Honor.

14 BY MR. SWANSON:

15 Q. You ready, Mr. Fassett?

16 A. Sure.

17 Q. We left off discussing a number of documents
18 that you -- well, we looked at two documents that you
19 reviewed when you first came to the state engineer's
20 office in Wyoming. I'm going to hand you two more that
21 I believe are in the same vein. And I'll ask you if
22 that's the case. These are Montana 87 and Montana 88.

23 SPECIAL MASTER: Just to be clear, I think
24 the witness testified that he would have reviewed the
25 document with his initials. But I don't think he ever

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1 actually testified he reviewed M79.

2 THE WITNESS: I think that's correct.

3 SPECIAL MASTER: Do you recall whether you
4 reviewed M79?

5 THE WITNESS: I don't recall.

6 SPECIAL MASTER: Okay.

7 BY MR. SWANSON:

8 Q. All right. So I'll approach and hand you M87
9 and M88. So, Mr. Fassett, first looking at M87, can
10 you just identify what this document is?

11 A. It's a memorandum dated June 22nd, 1983, to
12 Mr. Christopulos, the State Engineer, from both
13 Mr. Buyok and Mr. Allen.

14 Q. And that was prior to your working at the
15 state engineer's office; correct?

16 A. It was.

17 Q. And if you look at the very top right corner
18 of that document. Is that the same situation, your
19 initials and the date there at the top?

20 A. Yes.

21 Q. Was that the first day you started? I can't
22 recall.

23 A. It was.

24 Q. So this was a memo that was produced and kept
25 in the files by the Wyoming State Engineer's Office?

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1 A. Yeah, I assume so.

2 Q. And by your initials, do you know whether you
3 would have reviewed this document when you began your
4 employment there?

5 A. Yes, that's what my initials would have
6 identified.

7 MR. SWANSON: Your Honor, I move admission of
8 M87.

9 MR. KASTE: No objection.

10 SPECIAL MASTER: Okay. Exhibit M87 is
11 admitted into evidence.

12 (Exhibit M087 admitted.)

13 BY MR. SWANSON:

14 Q. So looking at the first paragraph of that
15 memo, could you just read the very first sentence,
16 please?

17 A. Sure. "The Yellowstone River Compact
18 Commission Technical Committee met on June 21st, 1983,
19 to discuss the 'Draft Proposal for the Formulation of a
20 Cooperative Plan Based on Streamflow Forecasting to
21 Administer the Yellowstone River Compact.'"

22 Q. And if you look down at the attendance list
23 for the June 21 meeting, do you see any employees of
24 the State of Wyoming that are on that list?

25 A. Yes, Mr. Allen and Mr. Buyok.

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1 Q. So looking at the top, Phil Farnes, and it
2 has the letters SCS after him. Who would that person
3 work for?

4 A. Oh, I think at this time SCS could have stood
5 for the Soil Conservation Service. But that's changed
6 today.

7 Q. And then looking at the next person, Chuck
8 Parrett, do you understand the initials after that to
9 be United States Geological Survey?

10 A. That's correct.

11 Q. And then Mr. Dan Ashenberg, Montana DNRC. Do
12 you know who he is?

13 A. Yes. I forgot his name, but I remember he
14 was one of the lead staffers for DNRC working on these
15 issues.

16 Q. And then the next two individuals, Rick
17 DeVore, and I believe those USBR initials mean United
18 States Bureau of Reclamation, and Tim Felchle, who
19 apparently will forever be memorialized as the person
20 who was late for the meeting.

21 So looking at the next sentence -- or the
22 first sentence of the next paragraph, "Dan Ashenberg"
23 who you identified as Montana DNRC employee "opened the
24 meeting with a request for comments from Wyoming. We
25 expressed our reservations," and it goes on from there.

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1 Do you understand that Mr. Ashenberg and the
2 state of Wyoming produced this draft proposal that they
3 are discussing?

4 A. I don't know if that was a joint
5 presentation.

6 Q. So this may have been a document that Montana
7 and Wyoming worked on together?

8 A. I'm sorry, the memo?

9 Q. The draft proposal that it references.

10 A. Yes. I'm not recalling it specifically. But
11 if Mr. Ashenberg opened the meeting seeking comments,
12 it sounded like it was their proposal looking for
13 comments from Wyoming. I didn't recall that as being a
14 joint proposal.

15 Q. So if someone else, if Mr. Moy from Montana
16 had testified that Montana produced such a document,
17 would he be the best source of that information?

18 A. Yeah. I mean, it sounds like the meeting was
19 a meeting of the technical committee and that proposal
20 was apparently on the agenda for that discussion.

21 Q. Then if we look at the next document I handed
22 you, which is M88, and if you look at the title of that
23 document, it matches the title of the first paragraph.
24 And I see your initials at the top.

25 Did you understand this to be that draft

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1 proposal that they reviewed and that you, in fact,
2 reviewed it yourself when you began employment in
3 Wyoming?

4 SPECIAL MASTER: Just to divide it up, I
5 think there's two questions.

6 MR. SWANSON: I'll divide it up, Your Honor.

7 SPECIAL MASTER: And maybe start out by just
8 asking him to confirm those are his initials.

9 BY MR. SWANSON:

10 Q. If you look at the top right, again we have
11 some partial initials that are handwritten and the date
12 4/16/84, partial initial. Are those your initials?

13 A. It sure looks like it, yep.

14 Q. And then if you look at the title of this
15 document, it appears to match the title referenced in
16 M87?

17 A. It does.

18 Q. Do you believe you reviewed this document
19 when you began employment at the state engineer's
20 office?

21 A. You can see I had a busy first day.

22 MR. SWANSON: Your Honor, I'd move admission
23 of Exhibit M88.

24 SPECIAL MASTER: Any objection?

25 MR. KASTE: No objection.

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1 SPECIAL MASTER: Okay. Then Exhibit M88 is
2 admitted.

3 (Exhibit M088 admitted.)

4 BY MR. SWANSON:

5 Q. I'd like to look at M88 on the page that's
6 numbered page 11 at the bottom. And there's a
7 paragraph there that begins "after the determination";
8 do you see that paragraph?

9 A. I'm sorry. What page are we on now?

10 Q. It's page 11 at the bottom. The Bates number
11 is Wyoming document 000136.

12 A. Okay. I've got that page.

13 Q. I'm interested in that bottom paragraph and
14 then the numbered items 1, 2, and 3. Could you read
15 those out loud, please?

16 A. Starting the paragraph?

17 Q. Yes, "after the determination."

18 A. Sure.

19 Q. Read that paragraph and numbered Items 1, 2,
20 3.

21 A. Okay. "After the determination of the
22 allocable flow has been made and the water apportioned
23 according to Article V, the administrative model would
24 calculate the minimum flow that should cross the state
25 line each day of the" -- looks like it's been crossed

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1 out on my copy and a 10 was put in there, "10-day
2 period."

3 Q. Yes, I have the same thing. Go ahead.

4 A. "This minimum flow is equal to the sum of:
5 1, All Montana pre-1950 agricultural needs; 2, Demands
6 for filling any Montana pre-1950 reservoirs; 3,
7 Montana's post-1950 compact allocation."

8 Q. So this is -- this document for Montana,
9 would you agree, seems to be saying that we can figure
10 out how much water Montana should get under the
11 compact? Start first with the pre-1950 agricultural
12 needs. Second, the demand for pre-1950 reservoirs.
13 And then the post-1950 allocation.

14 Do you understand that to be what their
15 proposal included in that section?

16 A. Yes. That's just what you had me read.

17 Q. So you mentioned earlier that all of the
18 discussions that were happening during the '80s, you
19 testified, were focused on Article V, C, not V, A.
20 Could you explain the difference? What does V, A cover
21 as you remember it -- well, first, let's back up.

22 Do you remember the Yellowstone River
23 Compact? I know you've been away from the job for a
24 while.

25 A. I'm sorry. I'm getting confused. I mean,

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1 these were proposals that were being exchanged and
2 discussed at meetings before I worked there. So...

3 Q. Right.

4 A. Nothing I testified to was a recollection of
5 this. This didn't occur. In fact, I think the memo
6 says we're at an impasse, and they stopped.

7 Q. Okay.

8 A. Before I got there. So that's why my
9 recollection of how things were characterized during my
10 time may be different than what was being discussed
11 this year prior to me going to work there.

12 Q. So it's possible that Montana did, in fact,
13 discuss how to meet their pre-1950 water right the year
14 before you came?

15 A. There were proposals on both sides. I mean,
16 that's what I recall. This is Montana's.

17 Q. And at an impasse, so you'd agree that
18 Wyoming didn't appear to be agreeing with Montana's
19 proposal?

20 A. Apparently not. It didn't go anywhere, and
21 none of this continued on during most of my tenure.

22 Q. Okay. Well, we'll move on. But, actually,
23 before we go to the next one, I think it would be
24 helpful if you could explain, as you recall, the
25 compact itself. And when we talked about Article V, A

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1 and Article V, C, you talked about that in your
2 testimony.

3 Could you just explain to the Court what you
4 understood the difference to be between Article V, A
5 and V, C?

6 A. It was really sort of pre-'50 versus
7 post-'50. And I think my recollection, as I said, was
8 that the focus was on the mathematics of the V, C
9 sharing, splitting of the water under the compact and
10 how that should be mathematically worked out so that we
11 would know whether the states are in compliance. To
12 make sure that neither state was overusing their share
13 of that V, C water, that was really the focus.

14 And the V, A, the discussions about pre-'50
15 during my time was really much more general, as I said.
16 It was much more conversational related to sort of
17 dryness. It was never the detailed focus about what
18 we're going to do about something. I mean, there was
19 not that kind of detail.

20 Q. Is it a fair statement that before you can
21 talk about Article V, C and what water is available to
22 be split for post-'50 rights, you have to figure out
23 what each state got under its pre-'50 rights?

24 A. Well, yeah. You might have to sort all that
25 out, as well as the issues of the supplemental supply.

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1 Q. What do you mean by "supplemental supply"?

2 A. I don't have the compact, but the other
3 provision of it, of course, that talks about water
4 supplemental diversions for the pre-1950 rights.

5 Q. So when you mentioned that you wanted to
6 understand that math so that you could know whether
7 each state was in compliance, what if Wyoming
8 determined that Montana was not in compliance? In
9 fact, let's say Montana was using more than its
10 percentage of post-1950 water. What would Wyoming do
11 about that?

12 A. We would bring it to Montana's attention and
13 discuss what needed to be done, if anything.

14 Q. Did you believe in that time, in the 1980s,
15 when you were the deputy and then when you were the
16 state engineer, that you had the authority under the
17 compact to call on Montana and say, stop using those --
18 that amount of post-1950 water; that's ours?

19 A. That -- I guess we could have. But we didn't
20 have that kind of information.

21 Q. But you believe that the compact gave you the
22 authority to make that call?

23 A. Well, you're using the word "call." I think
24 we can make an informational request from a fellow
25 state any time we want, and we did. If we wanted to

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1 know about what was going on, Montana, to the extent
2 they could, they would tell us. They would inform us
3 as to what was going on. And we did the same with
4 them. When they asked about what are you doing with
5 Powder River Dam, we shared what we could and what we
6 knew where it was and where it was going, the status of
7 those projects. It was more of a dialogue than the
8 formality that your question is sort of suggesting.

9 Q. So let's go back to this idea of figuring out
10 how much water is used so we know what's left over. If
11 you've got a river that, let's say, has 1000 CFS
12 flowing down it, and let's say you've got two water
13 users, one upper and one lower, and they agree that
14 they are going to divide -- they are each going to use
15 about 400 CFS, and they have equal water rights, and
16 then they say we're going to go ahead and split the
17 remaining 200 CFS, that would be pretty easy to
18 administer, wouldn't it?

19 A. Yeah, under the example you gave me.

20 Q. So what if those same water users said, we're
21 going to respect each other's use as of a date, a date
22 certain, January 1st, 1950, and then whatever is left
23 over, we will split between us on a percentage basis?
24 Wouldn't you agree that the first thing they need to do
25 is -- I mean, not the first thing, but they needed to

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1 find out how much they were each using as of that date
2 certain?

3 A. Sure.

4 Q. So if the lower water user calls up the upper
5 one and says, I'm not getting everything that I'm
6 supposed to get as of my January 1st, 1950, date, and
7 we need to figure out that amount, would it do any good
8 for the upper one to say, we just need to focus on the
9 extra that's left over and how we're going to use it?

10 A. No. I think you'd want all the information.

11 Q. So you think that the upper one would
12 reasonably need to say, yeah, first thing we need to do
13 is know how much water we used on that date so you know
14 if you're getting all that you were guaranteed?

15 A. Yeah. But you know the compact, it's not
16 that easy. It's not a given day. And it's cumulative
17 for the year. It involves the calculations of lots of
18 diversions, lots of storage. I mean, the mathematics
19 does not fall out under an example like you just gave
20 me, at all.

21 Q. The cumulative year calculation goes to the
22 post-1950 share split of water; right?

23 A. Right.

24 Q. But the pre-1950, what are we looking at
25 there in terms of water rights? Aren't we looking at

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1 the water rights that were in place in both states at
2 that time?

3 A. Sure.

4 Q. And so that isn't necessarily a cumulative
5 yearly account, is it?

6 A. No.

7 Q. Isn't it how much I'm using for my irrigation
8 claim during the irrigation season?

9 A. Yep.

10 Q. So do you agree that to know how much you're
11 going to get under Article V, C, you first have to make
12 sure both parties are getting what they needed under
13 Article V, A prior to 1950?

14 A. Well, you changed it. Your question said
15 what they needed. That's different than determining
16 what their rights are or what they were using.

17 Q. That's a good point. That's a good point. I
18 appreciate you clarifying that.

19 So before you can focus on Article V, C and
20 what they would split for later water, wouldn't you
21 agree that first thing they need to do is make sure
22 they're each getting what they are entitled to under
23 Article V, A before 1950?

24 A. Sure.

25 Q. And would you consider it to be reasonable

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1 that if the lower water user said, I'm not getting
2 everything that I got that I'm entitled to under
3 pre-1950, that it doesn't do any good to talk about the
4 extra that you want to allocate?

5 A. Yeah, that's true.

6 Q. So let's say these two water users --

7 A. Well --

8 Q. Go ahead.

9 A. Again, I don't know if you're trying to
10 create an inconsistency.

11 Q. I'm not trying to. If I am, correct me.

12 A. Yeah. Again, like I told you, I recall the
13 expressions of, you know, shortness, dry year, people
14 are suffering. And we would tell them the same.
15 You're making it sound like something happened back in
16 the '80 and '90s that simply didn't happen. There was
17 no discussion of, let's go find out what all the water
18 rights are from top to bottom. Nobody asked that.

19 Q. Was there discussion, though, from Montana
20 saying, it's really dry; we're not getting all of our
21 pre-1950 water rights?

22 A. As I said, that would have been a routine
23 topic of discussion. And our responses were, we're
24 really dry too. And Mr. Whitaker would have shared
25 details about how his regulation was proceeding at that

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1 time. So it never went beyond that at that time.

2 Q. So let me just kind of recapsulate [sic].
3 Montana says -- you're at some meeting; Montana says,
4 it's really dry. We're not getting our pre-1950 water.
5 You know, it's dry. And Wyoming would respond, yeah,
6 it's dry in Wyoming too. We're regulating down to
7 really, really senior water rights; right?

8 And was there any junior water that
9 Montana -- that Wyoming could have cut down and
10 regulated and sent to Montana?

11 A. There may have been. I don't recall a sort
12 of proceeding to evaluate that. I mean, I think the
13 general sense was that our internal -- our internal
14 priority administration had turned all the juniors off.
15 They were already off by the time things got bad in
16 Montana. They were equally bad in Wyoming or as bad.
17 And our own internal regulation, separate and apart
18 from Montana, had already turned off the juniors.

19 Q. And so that, you felt, probably would have
20 satisfied Montana to say, hey we're down to 1883 over
21 here. There's no water we can send you?

22 A. Right.

23 Q. If we could look at an exhibit that's Montana
24 218. There are a number of these, Mr. Fritz [sic],
25 that the state of Wyoming produced for the state of

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1 Montana. And I took it to mean that it was -- there
2 were some internal notes that your office produced kind
3 of capturing what happened at meetings.

4 Is that the case?

5 A. I'm sorry. I was looking at the document.
6 Are you asking whether we would have kept our own notes
7 of meetings we attended?

8 Q. Yeah. I'm asking if this would have been
9 your own notes or if this was a compact commission
10 note. If you could tell us.

11 A. This looks more like the minutes that would
12 have been reviewed and approved. These don't look like
13 an internal memorandum of Wyoming staff, for instance.

14 Q. So if we look at the top, it says Meeting
15 Notes for the Yellowstone River Compact Commission
16 Meeting November 8, 1988.

17 You were state engineer at that time; is that
18 right?

19 A. I was.

20 Q. And if you look up at the very top right,
21 there's some handwriting, some initials again. I'm
22 just wondering if you recognize those.

23 A. It looks like my handwriting. I think my
24 initials, the stuff that's cut off. K.C. was the
25 initials of my administrative assistant at that time.

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1 Q. So when it says "KC-file," it would have been
2 stick one in the file?

3 A. Would have been asking her to file my copy of
4 this document.

5 Q. And then if you go back to the list of
6 attendees, you're listed as an attendee for the state
7 of Wyoming; right?

8 A. I guess we don't -- do we have the annual
9 report from this year to see whether these are in
10 there?

11 Q. I don't know. I haven't actually looked at
12 that. I was looking at the attendees. You see under
13 the state of Wyoming, you see these three names?

14 A. Uh-huh.

15 Q. Jeff Fassett, that's you. Sue Lowry and Mike
16 Whitaker, who are they?

17 A. Sue, at that time, was a new employee
18 involved with the Interstate Streams Diversion group of
19 staff. And Mr. Whitaker, in '88, was fairly new
20 Division Superintendent for Water Division No. II.

21 Q. And then over at the Montana attendees, do
22 you know those three? You've already spoken about
23 Mr. Fritz. I believe you've spoken about all three of
24 these actually, Chuck Dalby, Rich Moy, and Gary Fritz.

25 Was it common to have Rich Moy at these

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1 meetings in the late 1980s?

2 A. Uh-huh, yes.

3 Q. In fact, he served on some technical
4 committees, didn't he?

5 A. I believe he did.

6 Q. So I'm looking at -- well, first, at the very
7 bottom, there's a deposition exhibit tag. It says "109
8 Fassett." Do you recall this from your deposition?

9 A. I'm not sure I recall it, but, obviously, it
10 was something we used when I was deposed.

11 MR. SWANSON: Your Honor, I move admission of
12 Exhibit M218.

13 MR. KASTE: No objection.

14 SPECIAL MASTER: Okay. Exhibit M218 is
15 admitted.

16 (Exhibit M218 admitted.)

17 BY MR. SWANSON:

18 Q. So if we look at the bottom of this first
19 page, under Water Management, this paragraph -- I think
20 this paragraph is describing exactly what you just
21 spoke about. Could you read this paragraph, the first
22 one, two, three, four sentences?

23 A. Sure. Reading from M218?

24 Q. Correct. Beginning with "Mike Whitaker
25 stated."

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1 A. "Mike Whitaker stated he was regulating
2 tributaries to the Tongue and Powder River back to the
3 1880s. In many areas only the first right was able to
4 take any water. Many areas in Division III near the
5 reservation, calls were being made on streams that had
6 never been regulated before. No regulation was done on
7 the main stem of the Tongue, only the tribs."

8 Q. So it sounds like a pretty dry year?

9 A. It does.

10 Q. Was it your experience as state engineer that
11 if water users could get water, they would use it to
12 irrigate in a dry year?

13 A. You bet.

14 Q. And so if we go to the second page, under
15 Article V Administration; do you see that heading?

16 A. Okay.

17 Q. And there's some discussion about management
18 stuff. And halfway through that paragraph, it begins
19 "A more theoretical discussion"; do you see that?

20 A. Yes, I do.

21 Q. Could you read those two sentences, that one
22 and the following one?

23 A. "A more theoretical discussion took place as
24 to the value of the compact and what types of problems
25 it really can help alleviate. In a dry year Wyoming

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1 has shut off all of her post-1950 rights anyway so
2 nothing that should be going to Montana is being
3 diverted."

4 Q. And that's what you told them; right? Hey,
5 it's a dry year. We can't help you. Is that right?

6 A. That's correct.

7 Q. Was that discussion a discussion of, if we
8 could shut it down, we would, and send you water, but
9 frankly, there's just nothing to shut down? Or was it
10 a discussion of, there's no call under the compact and
11 that's the way it is?

12 A. No, it wasn't that overt. I think it was
13 much more factual. I think it was a sharing of facts.

14 Q. So you don't know whether, in fact, you told
15 the representatives from Montana, we would help you out
16 if we could, but there's nothing we can do? Or whether
17 you said, hey, there's just no shutting down to send to
18 Montana?

19 A. Right. I mean, I think this seems to capture
20 what I've been trying to testify to, is that we would
21 have gotten a report from the people on the ground
22 stating the facts as to what regulation was occurring.
23 And that was likely -- I guess my sense was that was
24 satisfying demand on Montana. I mean, they accepted
25 that answer.

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1 Q. I'm sorry?

2 A. They accepted that answer.

3 Q. And anybody who would have been -- would have
4 had water would have been using it; is that your
5 experience? In Wyoming or Montana? I mean, if they
6 had access to water, they would be using it?

7 A. Yeah, in a dry year, I assume that's the
8 case.

9 Q. So I'm looking at that statement we just
10 read. And it says, "Nothing that should be going to
11 Montana is being diverted"; right? But then on the
12 first page, we read a statement that says, "No
13 regulation was done on the main stem of the Tongue,
14 only the tribs." Now, wasn't there water -- doesn't
15 the main stem of the Tongue go into Montana?

16 A. Right.

17 Q. And there was no regulations there. Do you
18 know if anyone was diverting out of the main stem of
19 the Tongue in Wyoming?

20 A. I don't know that. But I suspect there was.

21 Q. Did you know whether they were pre-'50 or
22 post-'50 water users?

23 A. I don't know. But if there was no
24 regulation --

25 Q. There was no regulation, so you don't know?

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1 A. Right.

2 Q. Okay. Well, we'll come back to that in a
3 moment. But that was -- I guess that was helpful.

4 I'm going to ask you to look at another
5 document which I'll hand you, which is M205. Do you
6 recognize this document?

7 A. Excuse me. M205 appears to be -- it's
8 entitled Meeting Notes, Yellowstone River Compact
9 meeting, November 26th, 1985, Billings, Montana.

10 Q. And do you see in the first paragraph, it
11 lists you as an attendee from the state of Wyoming?

12 A. Yes.

13 Q. That was before you were the state engineer;
14 right?

15 A. That's correct.

16 Q. And you see at the bottom, there's a Wyoming
17 document Bates No. 004918? You see that at the bottom
18 of the first page?

19 A. Yes, I'm sorry. I was glancing through it.

20 Q. And I think you testified a little while ago
21 that this was -- well, you testified about a different
22 document. So let me ask you about this one.

23 Do you understand this to be a meeting notes
24 that were actually from the compact commission, not
25 internal notes created by the state of Wyoming?

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1 A. They appear to be. They seem to be a draft
2 'cause of the notice. I guess I just ask whether these
3 aren't the same ones that are in the annual report.

4 Q. Okay.

5 A. I mention that only 'cause you can see in the
6 last document you handed me, the font is different, the
7 structure, the memo is different. So this may be a
8 draft. In fact, I see handwriting on here from
9 somebody.

10 Q. That's not your handwriting?

11 A. I don't think it is, actually. All of them
12 look like a gentleman on our staff. So he may have
13 been reviewing these -- this may have been a draft that
14 was reviewed by staff, maybe a copy of the draft
15 minutes.

16 Q. Okay.

17 A. The final would be in the report.

18 Q. Well, and I'm interested in a statement on
19 page 4 of this document.

20 A. Okay.

21 Q. And I just want to ask you if this is
22 something that you experienced in your time. On page
23 4, in the second half of the document, you talked about
24 how it was common at these meetings to review the water
25 conditions for the past year. And the middle of that

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1 paragraph, it says, "Gary Fritz asked his customary
2 question concerning regulation in Wyoming during the
3 past water year"; do you see that?

4 A. Yes, I do.

5 Q. So was it common for Gary Fritz to ask that
6 every time the commission got together?

7 A. Sure.

8 Q. And did he communicate why he was asking
9 that?

10 A. Well, I guess I don't remember a specific,
11 sort of, preface to this is why I'm asking it. I think
12 it was just -- he was routinely interested in what
13 regulation activity was occurring on the state of
14 Wyoming side of the line, if you will. So that's why
15 we had those field people.

16 Mr. Kawulok, that's quoted here, was
17 Mr. Whitaker's predecessor as superintendent. So he
18 would have been the right person to talk about his
19 regulation activities. He would be sharing whatever he
20 knew to Mr. Fritz.

21 Q. So it looks like he actually responded. He
22 says they regulated down to a priority of 1883. Is
23 that a very dry year but it's not the driest, or is
24 that pretty darned dry?

25 A. That's pretty darned dry.

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1 Q. And the next sentence, he says, "The main
2 stem Tongue River was not regulated." And this would
3 have been two years after the one we just looked at.

4 So it looks like it's consistent Wyoming is
5 not regulating the main stem of the Tongue River; is
6 that right?

7 A. Well, at least -- yeah. Well, the other one
8 was three years later, yeah. '88. This is '85.

9 Q. And then the next sentence, "Park
10 Reservoir" -- are you familiar with Park Reservoir?

11 A. A little, yeah.

12 Q. Can you tell us roughly where it is?

13 A. It's way up on the headwaters of Big Goose
14 Creek, which is a tributary to the Tongue.

15 Q. Are you familiar if there is a reservoir
16 above it? Does Last Chance Reservoir ring a bell?

17 A. Yeah, I forget the sequence. There's a
18 number of smaller high mountain reservoirs up on those,
19 both the Big and Little Goose drainage.

20 Q. It says, "Park Reservoir stored water to only
21 60 percent of capacity, with about 5900 acre-feet being
22 its maximum storage for the year." So if there's a
23 reservoir that doesn't fill, do you recall if there was
24 a fill order issued that year on Park Reservoir?

25 A. I wouldn't know that, no.

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1 Q. That wasn't something that would always rise
2 to your level of attention?

3 A. It would not. It would have remained in the
4 Division II field office in Sheridan.

5 Q. So the same with, if there was a reservoir
6 above Park, Last Chance Reservoir, whether it had a
7 fill or whether its fill was discounted because it let
8 water go by in the winter, you wouldn't be the best
9 source for that?

10 A. I would not be.

11 MR. SWANSON: Your Honor, I move admission of
12 Exhibit M205.

13 MR. KASTE: Stipulated. I love that one.

14 MR. SWANSON: Is it 205?

15 MR. KASTE: I don't think he has foundation
16 for it. That's why I'm stipulating.

17 SPECIAL MASTER: I was going to ask some more
18 questions if you objected. My guess is you might be
19 able to get the foundation. But in any case, Exhibit
20 M205 is admitted by stipulation.

21 (Exhibit M205 admitted.)

22 BY MR. SWANSON:

23 Q. So you mentioned a little while ago that
24 there was disagreement over the Middle Fork project.
25 And specifically, what was the disagreement? Could you

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1 tell us what the disagreement was between the two
2 states over the Middle Fork project?

3 A. Middle Fork Dam project?

4 Q. Yes.

5 A. Yeah. As to whether it was pre- or
6 post-1950.

7 Q. And what was Wyoming's view; that it was
8 pre-1950?

9 A. That's correct.

10 Q. And Montana's, obviously, would have been
11 that it was post-1950?

12 A. That's correct.

13 Q. So was -- Wyoming's position was that being a
14 pre-1950 water right, that it was protected under
15 Article V, A and was not a shared percentage under
16 Article V, C?

17 A. Yes.

18 Q. And there was a discussion over the term "a
19 perfect water right," when was it perfected? I think,
20 in fact, you testified that was Montana's concern.

21 What did you understand that to mean when the
22 water right was perfected for that reservoir?

23 A. Well, that water right was -- we don't use
24 the word "perfected." But in our system, perfected
25 would be equivalent to adjudication. It was permitted.

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1 It had a permit to be constructed. That was what was
2 at issue in the '40s and canceled here recently.

3 So it was never perfected because the project
4 never went forward and was never built. So there's no
5 way to perfect that right.

6 Q. I thought you had testified earlier it didn't
7 matter whether it was a pre- or post-1950 water right
8 because it wouldn't matter in terms of the percentage
9 owed to Wyoming at that time. That wasn't your
10 position?

11 A. No. I'm saying there were studies,
12 subsequent studies analyzing that project which showed
13 that the storage and the yield associated with that
14 project, whether it was pre or post, could have been
15 accommodated. In other words, it was enough -- I'm
16 recalling that there was a study that indicated that
17 there was enough water remaining under the V, C
18 allocation to Wyoming that that reservoir could have
19 been accommodated under an estimated compact sharing.

20 Q. But your position was it was a pre-'50 right
21 so it should be under V, A?

22 A. (Witness nods head.)

23 Q. Okay. I'm going to hand you another document
24 that is M198. Could you identify this document for us?

25 A. Sure. M198 is -- looks like 23 pages of

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1 materials. It's entitled State Engineer's Notes of
2 Conference Call on December 16, 1986, Annual Meeting by
3 Teleconference of Yellowstone River Compact Commission.

4 Q. And you're listed as a participant from
5 Wyoming?

6 A. Yes, I am.

7 Q. And Shields. Someone named Shields is
8 listed. Can you tell us who Shields is?

9 A. Yes. John Shields was a staff member of the
10 state engineer's office involved with Interstate
11 Streams matters.

12 Q. So this appears to be notes that were
13 actually done internally in the Wyoming State
14 Engineer's Office; is that right?

15 A. That's how I would interpret the notes, that
16 these were notes prepared by the Wyoming side, if you
17 will, 'cause it was being done by call.

18 Q. And I'm wondering if Mr. Shields, in fact,
19 drafted them. And I would ask you to turn to page 13.
20 And you may see a reason why I say that. So this
21 basically is a transcript of a conversation. And at
22 the bottom of a long statement by Mr. Fritz, you see in
23 brackets, it says "Shields'," with a possessive
24 apostrophe "note." And it gives kind of a note about
25 something of substance; do you see that?

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1 A. Yes, I do.

2 Q. And if you go to page 18. In the top
3 paragraph, near the bottom of that, there is the same
4 thing, brackets. And then it says "Shields',"
5 possessive "question." And he offers kind of an
6 editorial comment.

7 And if you go to page 20, again near the top
8 of the page, the fifth line, there's a bracket, says
9 "Shields'," possessive "note," and another editorial
10 comment in brackets.

11 I took that to mean Mr. Shields drafted these
12 notes. Do you read that the same way?

13 A. I do.

14 MR. SWANSON: Your Honor, I move admission of
15 Exhibit M198.

16 MR. KASTE: Maybe I didn't hear it. Did -- I
17 don't think the witness acknowledged that he ever
18 reviewed this.

19 BY MR. SWANSON:

20 Q. Do you know if you reviewed these notes?

21 A. I don't know. I don't see my initials on
22 this one. This is a draft set. I don't know if
23 there's a final or not.

24 Q. Do you recall if you attended this meeting?

25 A. Well, I'm listed, so I'm sure -- I assume

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1 that's accurate.

2 Q. Could I point to another item to perhaps help
3 you with your memory?

4 A. Sure.

5 Q. Page 11, under about -- in the bottom half of
6 the page, there's a heading that says Other Business.
7 It's underlined. And then in parentheses, Really Old
8 Business, closed parentheses; do you see that?

9 A. Yeah.

10 Q. And then there's a bracketed statement, which
11 says that -- well, beginning in the second sentence,
12 "Due to the item discussed being such a sensitive one
13 and the previous conversations and correspondence being
14 somewhat controversial, the subsequent discussion is
15 recorded in full"; do you see that?

16 A. I do.

17 Q. Do you recall this meeting when the state --
18 or the Yellowstone River Compact Commission or Wyoming
19 actually recorded the teleconference?

20 A. Actually, I don't. That would have been
21 fairly rare. Mr. Shields is still on staff and is
22 quite famous internally for having detailed notes. I'm
23 not surprised that he's the author of this. But I'd
24 forgotten that this was taped, if that's what it sounds
25 like. Quite honestly, I've been in meetings with him

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1 where he's captured almost everything that's said as a
2 note taker.

3 Q. Are his notes usually pretty accurate?

4 A. For the most part, yep.

5 Q. So do you have any reason to believe this is
6 not an accurate transcript we can look at to understand
7 the meeting at the time?

8 A. Do you have a final?

9 Q. This is what I have. If you look to the
10 bottom of any of those pages, it says Wyoming document
11 and gives a number. So this was produced by the state
12 of Wyoming.

13 A. I assume it's something you found in the
14 files at the state engineer's office.

15 MR. SWANSON: Your Honor, I'd move admission.
16 He's testified he assumes it was kept in a file in the
17 Wyoming State Engineer's Office.

18 MR. KASTE: Clearly he's the wrong witness
19 for this document. He didn't create it. He doesn't
20 remember if he received it. He doesn't have adequate
21 foundation. His recollection of whether or not he
22 attended the meeting is a different question than is
23 this document -- should this document be admitted.

24 That being said, I don't care. It's great.
25 It's wonderful. And it talks about the decision-making

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1 fight that he described earlier. So stipulated again.

2 SPECIAL MASTER: Okay. Can I just ask one or
3 two questions? So, Mr. Fassett, did you or somebody in
4 your office frequently keep notes of teleconference
5 calls of this nature.

6 THE WITNESS: Yes. I think because this
7 meeting was a call, there was probably much more focus
8 on us keeping our own internal meeting minutes. But
9 I -- again, I don't have the annual report for this
10 year to know what may have been contained in that
11 report as well. I mean, Montana was probably taking
12 notes on their end of the phone call, as was the
13 federal representative. So this is all -- this is
14 Wyoming's version of how the meeting went.

15 SPECIAL MASTER: Understood. And Mr. Shields
16 would be somebody who, apparently with his great
17 transcription ability, would keep these type of notes?

18 THE WITNESS: He would.

19 SPECIAL MASTER: Okay. Thank you.

20 So then Exhibit M198 is admitted.

21 (Exhibit M198 admitted.)

22 BY MR. SWANSON:

23 Q. So if we go to the bottom of page 19, and
24 just to save a little time, I'll agree with Mr. Kaste
25 that the big argument here is the authority of the

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1 federal chairman to make a decision or to cast a vote,
2 which was a hot and heavy issue at the time.

3 And at the bottom of page 19, you see
4 Christopulos, so Mr. Christopulos is speaking. And you
5 can see, in fact, he is talking about the controversy
6 over the Middle Fork Powder Reservoir; do you you see
7 that?

8 A. I do.

9 Q. I'm interested in the following page. And if
10 you go to the middle of that long paragraph. And,
11 again, this is Mr. Christopulos speaking. There's a
12 sentence that begins on the right-hand side, middle of
13 the paragraph that says "I certainly can't agree"; do
14 you see that?

15 A. Okay.

16 Q. And it appears he's responding to Mr. Fritz
17 who said, "Frankly, this is taking way too long to
18 decide some of these issues." But I'm interested in
19 where it says "I certainly can't agree," if you could
20 read that down to the bottom of the paragraph out loud.

21 A. Sure. So page 20 of M198. "I certainly
22 can't agree that we have been or have purposely delayed
23 it because the longer we delay it, the more we are
24 going to be able to continue to divert water is [sic]
25 short years. I can only remember one time of any kind

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1 of question was raised as to whether we may be taking
2 water or not taking water. I don't remember too much
3 about those facts or circumstances, but I remember it
4 was on the Tongue River, and I think it was probably
5 self-regulating. If there were water shortages,
6 chances are damn good the post-1950 rights didn't get
7 any water anyway, or damn little, and if they got any
8 water, it was probably during the high runoff when
9 Montana was getting water also. That would be my
10 response."

11 Q. He's referring to some point prior to 1986
12 when this discussion came up. Do you have any idea
13 what instance or year he was referring to?

14 A. I don't. This whole discussion is related to
15 Middle Fork, Powder; right?

16 Q. Well, it is. But it appears here, I take
17 this to mean that we're talking about post-'50 and
18 pre-'50 rights on the Tongue River; do you take it to
19 mean that?

20 A. Okay. I'm sorry, I read more of it. Yeah,
21 these notes indicate that the context changed at the
22 bottom of page 19.

23 Q. Yeah, it actually appears he was answering a
24 question, and then he went on to discuss another issue.
25 You're right about that.

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1 A. I don't know -- well, let me see. These were
2 in -- this was November of 1986.

3 Q. Right.

4 A. So, I guess my view is this seems consistent
5 with my memories of my time as well.

6 Q. And that was the question I was going to ask
7 you. If it wasn't during your time, when you took over
8 as deputy state engineer, did Mr. Christopulos ever
9 talk to you about problems with the compact, I guess,
10 when Montana may have said, we want to make a call, or
11 something like that, on our pre-1950 water rights? Did
12 he ever talk to you about anything like that before
13 your time?

14 A. Before I was state engineer, yeah. I mean --

15 Q. Well --

16 A. The phrase that jumped out at me was in these
17 notes, Mr. Christopulos used the phrase "I think it was
18 probably self-regulating." I think that's how the
19 discussion often went.

20 But, again, you never had the factual
21 situation where there was a lot of water in Wyoming and
22 none in Montana. So you had a lot of post-'50 on, and
23 they would be dry as a bone. It was self-regulated
24 because they were dry at the same time. So many
25 post-'50 people are already off because of internal

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1 Wyoming regulation activities that had nothing to do
2 with the compact. I think that's his view. His term
3 is self-regulated. There's no reason to get into a big
4 fight about the article because it doesn't matter.
5 Because our juniors are off.

6 Q. I understand. But you don't recall him ever
7 saying, hey, you've just taken over as deputy state
8 engineer; there's something important about the compact
9 I need to tell you? Montana made a call in X year for
10 its pre-1950 water rights?

11 A. No, I don't recall any conversation like
12 that.

13 Q. Okay. And we don't need to necessarily --
14 well, I will just so you can see that I'm giving you
15 the straight information. I'm going to look briefly at
16 Joint Exhibit 36. And I just want to look at page
17 that's Roman Numeral VI. Bates number on the bottom is
18 WY015497.

19 And looking at that last page, I just wanted
20 to point out that this conference call discussion is
21 within the joint exhibit, which is the Yellowstone
22 Compact Commission Annual Report for 1986. And there's
23 a sentence in here, "Mr. Christopulos indicated"; you
24 see that? It's about a third of the way from the
25 bottom of the paragraph.

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1 A. Okay.

2 Q. And the sentence beyond that,
3 Mr. Christopulos -- it says, "He," so I take that to
4 mean Mr. Christopulos, "could only remember once when
5 pre-1950 water rights may not have been satisfied in
6 Montana."

7 But, again, back to you, you don't have any
8 knowledge what that year would be?

9 A. I do not.

10 Q. I wonder if this next document will just help
11 us understand that a little more. And that's Montana
12 Exhibit 136. And I'm not going to ask you to -- a lot
13 of questions about it. It's already been admitted into
14 evidence.

15 But the date on the front page is May 4th,
16 1982, and I understand that was before you were
17 employed by the State of Wyoming. But if you look
18 through it, there's already been testimony in this case
19 about this exhibit, in that it's a letter from 1982
20 referring back to phone calls in 1981 and that there's,
21 in fact, a number of handwritten notes in 1981 from
22 Wyoming employees.

23 And I'm wondering, do you know whether this
24 was the one time Mr. Christopulos would have been
25 referring to when he said there was one year prior to

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1 1986 when Montana may not have gotten its water?

2 A. I don't know.

3 Q. Okay. And then you mentioned an interesting
4 point about self-regulating. And it -- basically what
5 you were saying, I think, and tell me if I'm wrong, is
6 it was so dry it didn't really matter whether we
7 regulated post-1950 water rights because they probably
8 weren't getting any water anyway?

9 A. That's correct.

10 Q. And if we could look at several pages into
11 this document, the Bates number at the bottom is
12 WY048193; do you see that page?

13 A. I do, uh-huh.

14 Q. And if I look, it's got several headings
15 across the top. It's got After 1939. Then it says,
16 Post-'39, Pre-'50, and Post-'50; do you see that?

17 A. I'm sorry. I wasn't -- 193?

18 Q. 048193.

19 A. I don't have that number of the document you
20 handed me.

21 MR. SWANSON: May I approach, Your Honor?

22 SPECIAL MASTER: You can. And maybe just for
23 the record --

24 THE WITNESS: I found 94, but the page before
25 it doesn't have a number.

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1 BY MR. SWANSON:

2 Q. Can you see the screen?

3 SPECIAL MASTER: Does the witness not have a
4 copy of that page?

5 MR. SWANSON: I'm handing it to him now.

6 THE WITNESS: Actually, that page is in
7 there. It's just not marked with a number.

8 BY MR. SWANSON:

9 Q. Here's the rest of it.

10 A. Okay.

11 Q. So there's -- as you can see, there's three
12 headings across the top. And that right-hand column,
13 the heading says Post-'50; do you see that?

14 A. Uh-huh, yes.

15 Q. Then you see a number of drainages listed
16 down the left-hand side. Tongue River and the --
17 Wyoming still was not regulating the main stem of the
18 Tongue River in 1981, do you know?

19 A. I don't know.

20 Q. Prairie Dog Creek, Big Goose Creek, Wolf
21 Creek, Little Tongue River. Are those all within the
22 Tongue River Basin?

23 A. Yes.

24 Q. And if you look, it appears that there are --
25 they're listing a number of water rights next to each

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1 of those drainage names. And in the right-hand column,
2 when it says Post-'50, and it gives a number, like the
3 top one is 3.58. Do you see at the bottom where they
4 total 19.36?

5 A. Yes.

6 Q. So this is what happens when you give up your
7 copy.

8 A. Again, I'm sorry. This page is in the copy
9 you handed me. It just didn't have a number on it.

10 Q. Okay. Well, within this document, there's a
11 notation that someone communicated to Mr. Fritz and
12 said even if we regulated, we'd probably only get 20
13 CFS or even under 20 CFS, I think it says. So I'm
14 looking at this. And I take it to be their
15 calculations.

16 So my question to you would be, when you
17 talked about self-regulating and Mr. Christopoulos said
18 there wouldn't be any water left, does it appear to you
19 there would be almost 20 CFS if they did regulate all
20 those streams on the Tongue River?

21 MR. KASTE: Foundation. The witness hasn't
22 demonstrated what the basis for any of these numbers
23 are or that he knows what any of them refer to. So to
24 ask him to then conclude what the total means is
25 unfair, and it lacks foundation.

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1 SPECIAL MASTER: I think probably the better
2 way of asking the question, having shown the witness
3 this exhibit, is whether he knows if post-1950 water
4 rights have been regulated, how much water would have
5 been made available.

6 BY MR. SWANSON:

7 Q. And do you know that?

8 A. No.

9 Q. So this document may be the best source of
10 information for that?

11 A. This appears to be Mr. Christopulos' work to
12 sort that out.

13 Q. Okay. Do you recognize that handwriting, any
14 of that handwriting?

15 A. I do. That table you were just talking about
16 is George's handwriting, George Christopulos.

17 Q. So what would have been the policy in Wyoming
18 in the 1980s, when you were deputy and then when you
19 were state engineer? I mean, you talked about
20 self-regulating. So let's say self-regulating wasn't
21 it. In fact, there would have been 20 CFS available in
22 a dry year if Wyoming would have regulated its later
23 water rights. Would Wyoming have done that? Would you
24 have done that as state engineer, regulate those later
25 water rights and send that water to Montana if Montana

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1 asked?

2 A. Probably not. We probably would have to know
3 a lot more about what was going on on the Montana side.

4 Q. So would you have said, no, we wouldn't do
5 it? Or would you say, we need to gather information?

6 A. We need to gather information on our side and
7 your side.

8 Q. What kind of information would you need to
9 gather?

10 A. We'd need to have a better understanding of
11 the amounts of water, the water rights, the active
12 diversions, the priority dates. All of the factors
13 that would have led -- we wouldn't have just said -- we
14 wouldn't have just taken Mr. Fritz's word of, we're
15 short; can you send some down? For us to take
16 regulatory action, we would have had to do a much more
17 detailed investigation.

18 Q. Could you -- you probably weren't here.
19 Mr. Muggli was here and testified that he got in a
20 plane and flew down to Wyoming to look at the water.
21 Could you have done that? Could you have flown over
22 Montana and looked at fields and said, yeah, clearly
23 they're short. We need to send the water?

24 A. No.

25 Q. Why not?

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1 A. That wouldn't tell you much.

2 Q. I'm sorry?

3 A. That wouldn't tell you much just looking at
4 what's green, what's not. That doesn't give you any
5 information about priority, amounts of water, any of
6 the activities, return flows. I mean, you need a full
7 accounting to understand exactly what the circumstances
8 were.

9 Q. So it wasn't -- you never had a conversation
10 where you said, there's no call under the compact,
11 period, for pre-1950 Montana water rights?

12 A. No.

13 Q. Did you have a conversation where you said,
14 we need to clearly gather more data to know what
15 Montana is doing with its water rights?

16 A. I don't think we did. I don't think it ever
17 got elevated to that extent during my time. The
18 self-regulating view and expressions of the facts on
19 the ground by the field people who were involved seemed
20 to satisfy the issue. It never got escalated, never
21 turned into any sort of formal call or much more
22 serious request. It was just conversational about
23 we're having tough times down here. And we would
24 express it was tough in Wyoming too.

25 Q. But you would also express that we didn't

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1 regulate the main stem of the Tongue and there's 20 CFS
2 available if we did regulate it?

3 A. Well, you don't know that. You don't know if
4 they are diverting or not at that time. I don't know
5 the facts of 1981. But that's what I'm saying. You
6 would have to do an investigation, not only in
7 understanding the Montana side but what's going on on
8 our side as well. Where are they?

9 Q. Well, I thought you testified earlier, that's
10 why I asked you, in a dry year, if someone has water
11 they are going to be using it. You testified to that a
12 little while ago?

13 A. Yeah, in a general sense, that's true. But
14 you don't know in particular. When you're going to
15 take regulatory action and turn somebody off, you need
16 a better factual base to do that.

17 Q. And so, would you have encouraged some
18 information gathering on both sides of the border?

19 A. Would I have?

20 Q. Yes.

21 A. Yes. I think that's what would have happened
22 had a more formal request been made.

23 Q. You would have said, look, for all we know
24 you're going to just waste that water. Show us where
25 you're going to use it. Show us that you actually have

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1 pre-'50 water rights. Show us demand levels.

2 I'm sorry. You have to answer yes. I'm
3 asking questions, and you're nodding. But go ahead.

4 A. I am nodding, yeah. That's the kind of
5 information you would need to know before you can turn
6 around and regulate somebody off.

7 Q. And you also worked with Mr. Stults from
8 Montana, is that right, after Mr. Fritz?

9 A. I overlapped with Mr. Stults.

10 Q. You overlapped with him? He was at one point
11 the commissioner for Montana?

12 A. He was.

13 Q. And he, in fact, asked for a lot of that
14 information to be gathered, didn't he?

15 A. I'm not recalling. We may have had those
16 questions. I think we set up some committees to
17 begin -- I think there was sort of a work plan idea,
18 whether that's Mr. Stults or not. But I know there was
19 a sort of let's give this issue some attention, begin
20 to collect information, share information.

21 Q. Do you remember anyone who would have worked
22 on those committees, the technical committee -- or the
23 work plan?

24 A. On our side, it probably would have been
25 Ms. Lowry or Mr. Whitaker, would have been those kind

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1 of folks who would have been the ones involved from
2 Wyoming.

3 Q. What about Rich Moy on the Wyoming --

4 A. Oh, on the Montana side.

5 Q. I meant the Montana side. I apologize.

6 A. Yeah. Yeah. I mean, he had been involved
7 for a number of years. I don't know if he was still
8 involved as actively when Mr. Stults was the
9 commissioner. But there were other staffers who likely
10 would have gotten the assignment to work on a
11 committee.

12 Q. When do you think that began, those
13 assignments to gather that information to understand
14 each other's water rights? Did it begin under our
15 watch as Engineer?

16 A. I don't know if it did. We were -- we had
17 committees working on the interstate stuff, the dispute
18 resolution. The early work that Mr. Allen and
19 Mr. Ashenberg had done, it sort of died out. I'm
20 sorry. I'm just not recalling whether there was some
21 technical committee work before 2000, when I was still
22 the commissioner.

23 Q. I know after you left, you were still
24 somewhat involved in those water issues as a
25 consultant. Do you know if Wyoming ramped up those

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1 technical committees in 2000 or in those years?

2 A. I don't know that.

3 SPECIAL MASTER: Mr. Swanson, do you have a
4 sense of how much longer your cross-examination is
5 likely to take?

6 MR. SWANSON: Wow. I have three more
7 exhibits, Your Honor. And they will go a lot quicker
8 than the last ones have. But I would guess 20 minutes.

9 MR. KASTE: Mr. Fassett has to get on a plane
10 tomorrow, and coming back isn't a very good option. I
11 would like to finish with him tonight. My redirect
12 will be exceedingly brief. I don't know how much you
13 would like to ask him.

14 SPECIAL MASTER: Actually, at the moment, I
15 don't think my questions are going to be very long,
16 partly because I think we have -- this has actually
17 been very valuable testimony in terms of actually
18 fleshing out these years. Questions on both sides, I
19 think, it's been quite valuable. So at the moment, I'm
20 not anticipating very much.

21 So does anyone have any objection to trying
22 to finish today? And, of course, the court reporter is
23 the one that gets the -- why don't we go ahead and do
24 that. I need to be back at the hotel by 6:00. I guess
25 we'll finish up in time.

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1 MR. SWANSON: I'll try to expedite it.

2 THE WITNESS: Do you want this?

3 BY MR. SWANSON:

4 Q. You can set that aside. I'll hand you
5 another exhibit, Montana 139.

6 A. Thank you.

7 Q. Do you recognize this document?

8 A. Yes. This is a letter dated July 11th, 1988,
9 to Mr. Whitaker, Division Superintendent, from me.

10 MR. SWANSON: Your Honor, I move admission of
11 Exhibit M139.

12 MR. KASTE: No objection.

13 SPECIAL MASTER: Okay. Exhibit M139 is
14 admitted.

15 (Exhibit M139 admitted.)

16 BY MR. SWANSON:

17 Q. So if you look at the top there, Mr. Whitaker
18 [sic], it indicates, "The state of Montana recently
19 alerted us about a number of unpermitted stock
20 reservoirs in the Hanging Woman Creek drainage." And
21 it references a letter of April 6, 1988.

22 To save time, I'm going to hand you that
23 letter as well. And that's Exhibit M -- I'm going to
24 hand you Exhibit M124, which has a later letter as well
25 as the April 6th letter. They are included together.

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1 MR. SWANSON: So what we could do, Your
2 Honor, if you want, is do M124A would be Bates No.
3 MT22578. That's a September 19th, 1988, letter from
4 Jeff Fassett to Mr. Fritz.

5 And then the rest of that exhibit, M124, we
6 could admit it as M124B. And that's several pages.
7 It's Mr. Fritz's original letter and then an attached
8 list of reservoirs.

9 SPECIAL MASTER: Okay.

10 MR. SWANSON: Just to clear it up.

11 SPECIAL MASTER: Just for purposes of -- so
12 we actually have three different documents; is that
13 correct? We have --

14 MR. SWANSON: That's correct.

15 SPECIAL MASTER: -- M139, the first page of
16 Exhibit M124, and then the remainder of Exhibit M124?

17 MR. SWANSON: That's correct.

18 SPECIAL MASTER: So for purposes of
19 discussion, we will have Exhibit M124 divided into two
20 parts, M124, which will be the first page, and then the
21 remainder of it will be Exhibit M124A.

22 MR. SWANSON: Did you mean to say B?

23 SPECIAL MASTER: B. We'll do 124A and 124B.

24 BY MR. SWANSON:

25 Q. Let's look at all three of them together.

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1 SPECIAL MASTER: Mr. Kaste.

2 MR. KASTE: I was going to not object to any
3 of them and proceed directly to admission.

4 SPECIAL MASTER: Under those circumstances,
5 to speed things up, we will admit M139 and M124A and
6 M124B.

7 And thank you, Mr. Kaste.

8 (Exhibits M124A and M124B
9 admitted.)

10 BY MR. SWANSON:

11 Q. So let's look at what would be M124B. That
12 second document I gave you, Mr. Fassett, the second
13 page has an April 6, letter; you see that?

14 A. Yes, I see that.

15 Q. And it appears to be a letter from Mr. Fritz
16 to yourself and discussing a concern Montana has about
17 unpermitted reservoirs in Wyoming; do you see that?

18 A. Yes.

19 Q. And then it appears that the following pages
20 are, in fact, an attached list of those reservoirs?

21 A. Yes.

22 Q. And I see, looks like there are 77 of them.

23 And then the first document I handed you is a
24 July 11, 1988, letter from yourself, which M139,
25 referencing that first letter; you see that?

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1 A. Yes.

2 Q. I'm looking down at the first page on that
3 document, under numbered Item 4. And this explains the
4 things that you've done to review this list. And I
5 wonder if you could read numbered Item 4, please.

6 A. This is in my letter to Mr. Whitaker.

7 Q. Yes.

8 A. Item No. 4 was, "Reviewed BLM ownership maps.
9 Almost all are located on private lands with one on BLM
10 and one on state of Wyoming lands."

11 Q. So does a water users need a permit to put a
12 reservoir on state of Wyoming land?

13 A. Yes.

14 Q. And on BLM land?

15 A. Yes.

16 Q. And on private land?

17 A. Yes.

18 Q. And so you testified that for anyone to
19 divert water or use it for a beneficial use, they have
20 to get a permit first?

21 A. Supposed to get a permit first.

22 Q. So do you know what happened here with this
23 large list of reservoirs?

24 A. As far as the follow-up work? I guess I'm
25 not recalling.

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1 Q. I'm just --

2 A. I was directing Mr. Whitaker to evaluate them
3 and then get with the landowners and get them to file
4 the permits that are necessary under Wyoming law.

5 Q. Did you ever determine how so many reservoirs
6 got constructed without your knowing about it?

7 A. Well, I assume these are -- yeah, I don't
8 know. It certainly wasn't a large number. But we went
9 through the -- not in this degree, but when we went
10 through the Big Horn River adjudication process, the
11 BLM came forth with, unfortunately, many more
12 reservoirs that had been built on rural ranch lands
13 that were unpermitted. So we don't have enough staff
14 to keep an eye on all of this rural, wide open country.

15 Q. Can't catch it all, can you?

16 A. You cannot.

17 Q. I was wondering why Montana was bringing them
18 to your attention. Do you recall what happened there?

19 A. No, I don't. It talks about these being
20 stock. I don't know if -- well, no, '88. This was --
21 initially I was wondering if it was small reservoirs
22 associated with CBM discharge. But this was really the
23 timeline, this is earlier on in the CBM development
24 activity.

25 Q. Yeah, that actually was going to be my

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1 question. Do you know if these were CBM reservoirs?

2 You don't know whether they were?

3 A. They could have been. It has the landowner,
4 but that doesn't -- often the -- even under the CBM,
5 they often file the reservoirs in the name of the
6 landowner.

7 Q. So at the bottom of that first page of M139,
8 you reference that Gary Fritz actually followed up on
9 this matter on a conference call on June 22nd; do you
10 see that?

11 A. Oh, yes. I'm sorry. Yes, I do.

12 Q. So you said, "So apparently Montana is still
13 thinking about this"?

14 A. Uh-huh.

15 Q. And then the next page, you say, "We will
16 eventually need to alert the various landowners." And
17 I'm just wondering if you were communicating no sense
18 of urgency to Mr. Whitaker when you used the word
19 "eventually." I wondered what that was all about.

20 A. I don't think so. I mean, it was a directive
21 for him to go investigate and get it cleaned up. Yeah.
22 If they're physically on the ground and they do not
23 have a permit, they need a permit.

24 Q. So if these are new reservoirs of various
25 sizes, did you have a view whether they would be under

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1 the compact, the Yellowstone River Compact, and I guess
2 whether Mr. Fritz was concerned about that, whether
3 this was an issue that he was actually focused on?

4 A. That seems like that would have been his
5 concern is to the -- and these may not have been new.
6 I think some of these could have been there for 50
7 years. They may have existed for a very long time --

8 Q. Okay.

9 A. -- without the benefit of a permit which is
10 to the water users' loss.

11 Q. And then M124A, which is that second document
12 there, the first page. So it looks like you sent him a
13 letter on September 19th. And the second paragraph
14 here, you say you are at that point sending letters to
15 the stock water reservoir owners; do you see that?

16 A. Uh-huh.

17 Q. So in April, when he first alerted you, is it
18 fair to say those reservoirs were probably filling
19 during that period of time?

20 A. Well, I don't know. This is not -- you know,
21 this is out on the dry flat lands north of Gillette.
22 So whether there was, you know, heavy spring snows that
23 year, rains or not, I just wouldn't know.

24 Q. So some of them could have filled either
25 earlier or later than that?

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1 A. Yeah. And until we got the actual permit
2 applications, that's where we'd find out how big they
3 really were and did the field work to investigate what
4 was going on, whether they were there, how big they
5 were, and to get them properly permitted.

6 Q. Do you know where these drainages drain into?
7 Do they drain into the Tongue and Powder River Basins?

8 A. I think, isn't Hanging Woman --

9 Q. Hanging Woman drainage?

10 A. I think that's in the Powder.

11 Q. How about -- well, maybe they are all Hanging
12 Woman. Are they all Hanging Woman?

13 And was 1988 a dry year?

14 A. I think, based on some of their materials
15 that you've been handing me, that that was one of the
16 years of concern.

17 Q. Okay. We're down to two exhibits. I know
18 Mr. Kaste is excited about that.

19 MR. KASTE: We can't have too many exhibits.
20 Three and now this will be five.

21 MR. SWANSON: They multiplied, that's right.

22 BY MR. SWANSON:

23 Q. This is Exhibit M101. Unfortunately, I
24 counted my folder divisions and not the actual numbers
25 on the documents.

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1 Looking at M101, can you identify this
2 document? And it might help to look at the very last
3 page. Is that last page a memo?

4 A. Yeah. I'm sorry. I was just reading. The
5 last page of one -- M101 that you handed me is a brief
6 cover memo from Sue Lowry to the two water division
7 superintendents indicating that this was a
8 Montana-created document on the history of the
9 Yellowstone River Compact.

10 Q. And you see at the very bottom, are you
11 copied on this memo?

12 A. Yes. Uh-huh.

13 Q. And this, she refers to Montana's history of
14 the Yellowstone River Compact. Is that the remainder
15 of this document?

16 A. Yeah, sure looks like it. About 35 pages.

17 Q. And if you look at the very front page of the
18 Yellowstone River Compact, this document that we're
19 referring to, not the cover memo, but the -- on your
20 stapled copy, you would have to actually go back to the
21 front page of the document that has M101 at the bottom;
22 you see that?

23 A. Uh-huh.

24 Q. If you look at the top right-hand corner, do
25 you recognize that handwriting?

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1 A. Yes. The handwritten notes are by Sue Lowry.

2 Q. And so she's asking -- so it appears Montana
3 gave you this document and Sue is asking for comments
4 from employees to give back to you at some point; is
5 that accurate?

6 A. Yeah.

7 Q. And do you recall actually receiving any
8 comments from your employees on this?

9 A. I don't recall. We may have.

10 Q. But the memo and the handwriting is from Sue;
11 is that right?

12 A. Yes.

13 MR. SWANSON: Your Honor, I move admission of
14 Exhibit M101. I'm not sure if Mr. Kaste is objecting.
15 He's standing up. He might be standing up to stipulate
16 again.

17 MR. KASTE: Somebody is whispering in my ear
18 on the identification of handwriting on the document.
19 I don't object to the admission. And I think we can
20 probably have one of our witnesses talk about what --

21 MR. BROWN: You may assume too much.

22 SPECIAL MASTER: Okay. Exhibit M101 is
23 admitted.

24 (Exhibit M101 admitted.)

25 MR. SWANSON: It will comfort you to know I'm

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1 not going to ask about any of the handwriting in the
2 margins.

3 Thank you, Your Honor.

4 BY MR. SWANSON:

5 Q. So if we go to multiple pages into the
6 document, it's actually numbered 27 on the very top
7 center of that. And the Bates number is WY081342. And
8 we're just looking at the fact that that's referring to
9 issues. And issue No. 1 is Indian Reserved Water
10 Rights at the bottom of that page. I'd like to go over
11 to the next page.

12 As I understand this document, it lays out a
13 number of issues that are in dispute between the two
14 states about the compact. And then it lays out in each
15 of them Wyoming's position and then Montana's position.

16 If we look at page 28, Wyoming's position on
17 Indian Reserved Water Rights, I'd just ask if you could
18 read that and tell us whether this document accurately
19 captured Wyoming's position at that time. And please
20 read it out loud. I should have specified.

21 A. You want me to read the --

22 Q. Read the Wyoming position paragraph -- you
23 don't need to read the rest -- out loud. And tell us
24 whether this accurately reflected your position at the
25 time.

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1 A. Page 28. "Wyoming position: Wyoming
2 believes the founders of the compact determines all
3 allocable waters on interstate tributaries based on
4 percentage of irrigable acreage in the basin including
5 lands on and off Indian reservations. Therefore,
6 reserved water rights in Wyoming would come out of
7 Wyoming's share, and reserved water rights in Montana
8 would come out of Montana's share. The minutes of the
9 final negotiation meeting held in December 1950 appears
10 to substantiate this position."

11 Q. Do you recall, is that an accurate statement
12 as to your position, Wyoming's position, at the time?

13 A. At the time, yes.

14 Q. Do you know if that's Wyoming's position --
15 well, you don't work there anymore. I'm not going to
16 even ask you about that.

17 Then going to the next paragraph, Montana's
18 position. And I won't ask you to read the whole thing.
19 But generally it says -- in fact, I'll just read the --
20 I'll read it, and we'll take turns here.

21 "Montana believes that the tribal water
22 rights predate or are senior to the Yellowstone River
23 Compact and that Article V, A also applies to tribal
24 reserved water rights."

25 Had Montana communicated that position to

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1 you? Do you recall if that's accurate as to what they
2 said at that time?

3 A. I'm just not recalling whether that's changed
4 or not. I mean, this is their document, and they are
5 stating their position. So I guess I have no reason to
6 disagree that was their position. I'm not recalling
7 the particular conversation on that point.

8 Q. Okay. So did Wyoming disagree about the
9 priority date of Indian reserved water rights?

10 A. What do you mean?

11 Q. Did you disagree about the -- let's say there
12 are Indian reserved water rights. And let's say they
13 are satisfied either through an adjudication or
14 settlement.

15 Did Wyoming disagree with Montana here which
16 says that they should come out of Article V, A?

17 A. I don't know if we had a position on that.

18 Q. Okay. If we go to the bottom of the next
19 page, which is the bottom of 29. We just look at the
20 heading, administration of Pre-1950 Water Rights. And
21 we'll ask the question at the bottom and then go to the
22 next page. And this document says, "The question is:
23 Does the compact commission have jurisdiction to
24 administer pre-1950 water rights?"

25 And going to the next page, could you read

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1 the Wyoming position and tell us if that accurately
2 reflects Wyoming's position at that time?

3 A. I'm sorry. You want me to read it out loud?

4 Q. Please, read it out loud.

5 A. "Wyoming position: Wyoming believes the
6 commission has no jurisdiction to administer pre-1950
7 water rights and that the way the compact has been
8 managed historically still applies. That is, Wyoming
9 satisfies its pre-1950 water rights first, then Montana
10 satisfies its pre-1950 rights, and whatever is left
11 over is divided on a percentage basis between Montana
12 and Wyoming on the interstate tributaries."

13 Q. Does that reflect Wyoming's position at that
14 time?

15 A. I don't know if it is.

16 Q. Do you recall if you --

17 A. Or was, I should say.

18 Q. Do you recall if you gave feedback to Montana
19 telling them to correct this?

20 A. I don't recall. It's marginal notes here on
21 the exhibit. But I don't know what the ultimate --
22 after Ms. Lowry had gathered all the input, what our
23 response back to Montana was. I'm not recalling.

24 Q. Do you remember, did the position of Wyoming
25 change regarding Article V, A pre-1950 rights from when

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1 Mr. Christopulos was state engineer to when you took
2 over?

3 A. Well, I'm not recalling that there was some
4 big philosophical switch of position. Again, my
5 recollection is it really wasn't much of an issue
6 during those times.

7 Q. So Montana is listing it as one of the top 12
8 issues of the compact, but you're saying it wasn't an
9 issue?

10 A. It was on the list, but it wasn't the number
11 one thing that we spent all our time on.

12 Q. Did you ever actually clearly enunciate
13 Wyoming's position on the issue to Wyoming -- I'm
14 sorry -- to Montana?

15 MR. KASTE: I need to object. I think this
16 line of questioning has been mischaracterizing this
17 document, which says the question is does the
18 commission have the authority to regulate. And it's
19 being mischaracterized as our position with regard to
20 pre-1950 rights in a different sense.

21 MR. SWANSON: I'm actually asking him what is
22 that position, Your Honor. And so far he's -- he's
23 answering the question in the context that I'm asking
24 it.

25 SPECIAL MASTER: So I guess, what I would

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1 suggest, so we have a clear record here, is I'd love it
2 if you could ask whether Wyoming had a position at this
3 particular point in time and whether or not that was
4 conveyed.

5 BY MR. SWANSON:

6 Q. I'll ask it both ways, Mr. Fassett. First,
7 going back to the issue of does the compact commission
8 have jurisdiction to administer pre-1950 water rights,
9 did Wyoming have a position on that question?

10 A. I think that goes back to the dispute over
11 the role of the federal chairman of the commission
12 itself. And the dispute over what types of questions
13 the commission and the commission chairman would be
14 deciding were not -- that was a lot of the -- some of
15 the other notes and things that we've talked about here
16 talk about the differences between Mr. Christopulos and
17 Mr. Fritz over that point. I think that didn't change.

18 There was -- the role of the commission was
19 just unclear.

20 Q. And then asking about the actual accounting
21 of or the satisfaction of pre-1950 water rights. Did
22 Wyoming have a position whether, under the compact,
23 Montana was entitled to have all of its pre-1950 water
24 rights satisfied before post-1950 water rights in
25 Wyoming were being used?

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1 A. Well, I think that's correct. I mean, that's
2 what these other self-regulating comments were talking
3 about.

4 Q. And do you know if that position was
5 communicated to Montana?

6 A. I don't know. I'm just not recalling. It
7 may have been. But I assume you would have found it.

8 Q. Well, did you communicate that to your
9 successor, Mr. Tyrrell?

10 A. No.

11 Q. So how -- I guess, let's talk briefly.

12 MR. SWANSON: And it will be briefly, Your
13 Honor.

14 BY MR. SWANSON:

15 Q. When Mr. Tyrrell took over for you, did you
16 do some kind of training and handoff of your duties to
17 Mr. Tyrrell across the board?

18 A. I did not. Mr. Tyrrell came from the
19 outside; he was not within the agency like I was. I
20 had the benefit of being George's deputy before I was
21 appointed. Mr. Tyrrell came from the outside, from the
22 consulting sector. And so he actually came in almost
23 eight months after I left. There was actually an
24 interim state engineer in between he and I.

25 And so while I've always made myself

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1 available to him, there was no training, no exercise.

2 It was his job.

3 Q. And he had to jump in. Okay. This is the
4 last document, I promise, that we're going to look at.
5 And that's Montana 427.

6 Can you identify this document?

7 A. It's a -- well, the first two pages are a
8 memo from Sue Lowry to myself and Mr. Whitaker, dated
9 June 4th, 1980. It's captioned Estimated Future
10 Supplemental Supplies for the Tongue River.

11 Q. And I think you said 1980.

12 A. 1990.

13 Q. There we go.

14 A. Excuse me. I misspoke.

15 MR. SWANSON: Your Honor, I move admission of
16 Exhibit M427.

17 MR. KASTE: No objection.

18 SPECIAL MASTER: Okay. M427 is admitted.

19 (Exhibit M427 admitted.)

20 BY MR. SWANSON:

21 Q. So as I understand it -- we don't need to go
22 through all of that. It appears that there are a
23 couple different versions of water supply estimates out
24 there. And Ms. Lowry is bringing that to your
25 attention so that you can do analysis on them. Is that

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1 a very easy, short summary? Actually, perhaps you can
2 just tell me briefly what you understand this to be.

3 A. I can't recall this discussion. I apologize.
4 I was trying to review it. Attached to the exhibit is
5 a 1983 letter from Mr. Buyok and a number of pages of
6 computations and tables.

7 Q. I'm interested in the second page on that
8 front memo. If you could read, basically, the first
9 half of that paragraph. You can stop at the sentence,
10 "For discussion purposes."

11 A. At the top starting "Since the Sheridan"?

12 Q. Yes.

13 A. "Since the Sheridan Canal application was
14 rejected in 1973, and given that any post-1990
15 supplemental supply rights are going to be administered
16 in priority, for the purposes of modeling, we may want
17 to give Montana a revised acreage amount. The other
18 side of the coin would be to keep these estimates as
19 high as possible to make the model show there is less
20 water available for dealing with the Northern
21 Cheyenne."

22 Q. So there were -- how would this affect water
23 availability for the Northern Cheyenne?

24 A. I'm sorry. I'm trying to read the rest of
25 the memo. I'm not recalling the context of this. But

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1 this was related to the -- I think, the modeling that
2 was going on with Tongue River Reservoir and the
3 negotiations, is my assumption.

4 Q. The negotiations with the Northern Cheyenne
5 Tribe?

6 A. Yeah. Between Montana and the Northern
7 Cheyenne Tribe and the United States. And so the
8 modeling folks were obviously reaching out for some
9 information data and estimates from Wyoming.

10 Q. Okay. And then --

11 A. Sue was just evaluating and sharing that
12 information.

13 Q. And then the next paragraph down, I'll just
14 read it briefly, the part I'm looking at. "As
15 Montana's modeling effort continues, we need to decide
16 among ourselves when or if to push the point of whether
17 the Federal Reserved rights for the tribes are pre- or
18 post-Compact."

19 And do you know what you ultimately decided
20 to do on that issue?

21 A. I don't. The general -- we'd had discussions
22 off and on between the states. I think some of them
23 were memorialized in the minutes about the tribal
24 rights litigation that was going on in Wyoming. The
25 settlement negotiations, the policy cut, if you will,

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1 was that Wyoming did not want to unnecessarily be
2 disrupted by Montana resolving the quantification of
3 reserved water rights, as long as it didn't affect us,
4 didn't affect Wyoming. We didn't want them resolving
5 their negotiations with Wyoming water.

6 Q. Right.

7 A. It's whatever works out on your side, we're
8 not concerned about the details.

9 Q. So you didn't nail down a priority date and
10 communicate that to Montana?

11 A. We did not, that I recall.

12 Q. So that's the end of the documents. I just
13 have a couple of questions on this whole thing. And
14 it's about communications between Montana and Wyoming.
15 In your years there as deputy and then state engineer.

16 I understand that you indicated you've never
17 heard of Montana actually calling and asking for water
18 for its pre-'50 water rights; is that right?

19 A. That's correct.

20 Q. But we looked at letters from 1981 that
21 indicate that they did, in fact, do that; is that
22 right?

23 A. In the materials from Mr. Christopoulos?

24 Q. Yes.

25 A. Yeah. I mean, I didn't read through all the

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1 notes. I wasn't there. I was not privy to the details
2 of what occurred in 1981.

3 Q. In 1984, you had a lengthy conference call.
4 And it was in the annual report that, in fact, there
5 may have been a year in the past when Montana didn't
6 get its pre-'50 water rights. And there was no
7 discussion going on at that time about that particular
8 call?

9 A. Not that I recall, not in the detailed manner
10 in which your question sort of suggests. Like I said,
11 my recollection is the dialogue was much more general
12 than that and the formality, which occurred later, in
13 making a request for regulation.

14 Q. And we talked about that dialogue, and you
15 said that, well, I would have said, I need more
16 information.

17 A. That's correct.

18 Q. In fact, that's what you did; isn't that
19 right? In the late '80s, you began those committees
20 gathering information to understand each other's water
21 right. And that was what you just testified to, that
22 if Montana asked for water, I would have said, let's
23 gather information.

24 A. We would need more information before any
25 kind of enforcement actions could come -- could flow

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1 from that.

2 Q. And you began gathering information; correct?

3 A. I think that's what I recall. Like I said, I
4 think there was committee efforts. It's a little bit
5 like your example with the stock reservoirs that were
6 unpermitted. I mean, the states just routinely, if
7 asked, would share information about what's going on in
8 the states.

9 Q. So Montana's desire and requests for water
10 never started those information gathering efforts?
11 They just started on their own?

12 A. Well, I think it flowed from the dialogue
13 that, you know -- and the sense of frustration that
14 this is something that, you know, we ought to start
15 taking a look at.

16 Q. And speaking of those reservoirs, Montana
17 went to some effort to find 77 reservoirs that Wyoming
18 didn't know about; would you agree with that?

19 A. Yeah, they did. They're the ones that
20 brought it to our attention.

21 Q. Did you understand that Mr. Fritz was
22 concerned about that because those could be late
23 reservoirs taking water that would have been headed to
24 Montana?

25 A. I guess I don't recall that kind of dialogue.

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1 But that would be a fair assumption, that that would be
2 the basis upon which he'd bring those to our attention.

3 Q. And then in terms of the discussions with
4 Mr. Moy, Mr. Moy was involved in some of these
5 technical meetings, he's testified. Do you recall if
6 that's accurate?

7 A. He was at some of the meetings. He was
8 actively involved for a number of years.

9 Q. And there were a number of other meetings.
10 You mentioned the Western States Water Council and the
11 Missouri River Basin group. So you would see someone
12 from Montana or your staff would see someone from
13 Montana multiple times a year; is that correct?

14 A. Yeah.

15 Q. And it was common to talk about water
16 shortages in all those years?

17 A. Not necessarily. You know, I'm not recalling
18 any specific thing. But it could have been a wide
19 range of discussion, whenever we saw each other.

20 Q. And those occurred all times during the year
21 or mostly out of irrigation season?

22 A. I think most of them were out of irrigation
23 season. Everybody is really busy during irrigation
24 season. But there could have been some during the
25 irrigation season as well.

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1 Q. And, you know, you mentioned that with
2 Mr. Kaste. So I just looked back at just the documents
3 that I looked at today. And there's a May 4th, 1982,
4 letter that we looked at, that's Montana Exhibit 136.
5 There's the phone calls from 1981, all those notes.
6 Those were during the irrigation season. There's a
7 June 8th, 2004, e-mail, that's Montana Exhibit 136.
8 Actually, we didn't look at that one, but it's already
9 in evidence.

10 We'll throw that one out 'cause that's 2004.
11 That's after the letter.

12 There's a July 11th, 1988, memo from you to
13 Mr. Whitaker. And in that one, you reference that
14 Mr. Fritz called you in April -- sorry. He sent you a
15 letter in April. Then he called you on the phone on
16 June 22nd. There's a September 19th letter back from
17 you to Mr. Fritz. There's a memo from Sue Lowry, this
18 is Exhibit 427, June 4th, 1990.

19 So there are a lot of communications during
20 the irrigation season; would you agree with that?

21 A. Sure.

22 Q. And when we talked about the formal meetings,
23 did -- the Yellowstone River Compact Commission,
24 there's been some testimony, actually quite a bit from
25 Montana witnesses, that there were a lot of

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1 conversations and things that happened not in the
2 formal meeting but on the sidelines or during the
3 breaks.

4 Was that consistent with your experience?

5 A. Yes.

6 Q. And that there were a lot of conversations
7 about water shortages in Montana that happened on the
8 sidelines and off the record.

9 Is that consistent with your recollection?

10 A. It is.

11 Q. It is?

12 A. Yeah. There would have been conversations
13 outside of the -- you know, like you said, when we took
14 breaks or went to lunch or whatever, conversations
15 would have continued or talked about a range of issues.

16 Q. And then you mentioned, in fact, to Mr. Kaste
17 that if something wasn't on the record in one of those
18 meetings, that there was a reason it wasn't on the
19 record. Do you remember saying that? I don't want to
20 misstate your testimony.

21 A. I don't think I said that.

22 Q. But I guess the question would be, we heard
23 from Mr. Stults that there were reasons he didn't want
24 to formally put things on the record. And I want to
25 know in your work with him whether you had

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1 conversations with Mr. Stults off the record during
2 those years?

3 A. Oh, I could have. I'm actually surprised at
4 what you just said.

5 Q. You are surprised by that?

6 A. Uh-huh.

7 Q. Okay.

8 A. That he would have requested something not be
9 in the record.

10 Q. Well, I think more like he talked to you or
11 he talked to other folks not during the formal session.
12 Not that something was deleted from the record. I
13 don't mean to misstate his testimony.

14 A. Okay. I'm relying on your statement.

15 Q. And then we looked at all these meetings
16 where, in fact, we looked at where it says Gary Fritz
17 asked his customary question about water supply and
18 regulation. And Wyoming responded and said, we're
19 regulating down to this date in these various
20 drainages.

21 And yet you never regulated the main stem of
22 the Tongue River; is that right?

23 A. Nor did we receive a request for regulation
24 from the state of Montana.

25 Q. And so -- I thought in characterizing those

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1 conversations, did Mr. Fritz say, it's really dry, and
2 is Wyoming regulating it's water rights?

3 A. And we responded with what actions we were
4 taking, and the discussion moved on. There was not the
5 follow-up. There was not pounding on the table. There
6 was not demands for action. There was nothing, in my
7 recollections, that would make that a call. The
8 formality that was triggered in '04, to my
9 understanding, never happened during my tenure.

10 Q. So nobody from Montana said, hey, regulate
11 your post-'50 water rights, and send that water to us?

12 A. They did not. They were satisfied. My
13 assumption was they were satisfied that we were taking
14 actions. We weren't ignoring it. Things were dry on
15 our side too. It was much more commodity, with an
16 "eye" than you're suggesting now.

17 Q. In each of those times when Montana asked and
18 said, it's dry here; is Wyoming regulating, and you
19 explained how you were regulating, in fact, several of
20 them it says Wyoming didn't irrigate the Tongue main
21 stem. Did anybody pull up the George Christopulos
22 handwritten notes we looked at and said, by the way,
23 that's about this many post-1950 water rights, and it's
24 probably about 20 CFS? Did that ever happen?

25 A. No.

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1 Q. And then I believe when you talked --

2 SPECIAL MASTER: Mr. Swanson, I'm just
3 curious. We're now half past --

4 MR. SWANSON: This is my last one, Your
5 Honor.

6 SPECIAL MASTER: Okay.

7 BY MR. SWANSON:

8 Q. When you talked to Mr. Kaste, you said, hey,
9 it would be a really big deal if Montana asked for us
10 to regulate water right. In fact, you said there would
11 be memos, there would be meetings, there would be
12 investigations. I wrote it down. But when we looked
13 at the handwritten notes from 1981 from Mr. Fritz to
14 Mr. Christopulos asking for water, are you aware of
15 whether there were any investigations or big meetings
16 or even typewritten memos coming out of that 1981 call
17 from Mr. Fritz?

18 A. I just don't know. Not that I've seen.

19 MR. SWANSON: If I could confer with my
20 colleagues, I believe I'm done, Your Honor.

21 SPECIAL MASTER: In fact, why don't we take a
22 five-minute break right now. And then we'll come back.
23 And, Mr. Kaste, do you have any idea how long you're
24 going?

25 MR. KASTE: In light of his last couple of

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Examination by the Special Master

1 answers, I'm whittled down to about two or three
2 questions.

3 SPECIAL MASTER: Okay. Then we're just going
4 to take a quick five-minute stretch and finger break.
5 And then we're going to come back.

6 (Recess taken 5:31 to 5:36
7 p.m., November 19, 2013)

8 SPECIAL MASTER: Okay. Let's go back into
9 session. And I do have, like, two or three questions.

10 MR. KASTE: It's important for you to get
11 answers.

12 SPECIAL MASTER: Mr. Swanson, are you
13 finished?

14 MR. SWANSON: It depends on your questions.

15 SPECIAL MASTER: Well, then maybe I shouldn't
16 ask any questions at this stage, since I need to get
17 out of here at quarter to.

18 EXAMINATION

19 BY SPECIAL MASTER:

20 Q. I just want to understand what your basic
21 testimony is with respect to general communications,
22 during your period of time, between Wyoming and Montana
23 over shortages of water in Montana. So if I understand
24 you -- and I realize that I'm missing some of the
25 detail. And so the record as a whole will reflect the

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Examination by the Special Master

1 detail of which you've answered this. But, again, I'm
2 trying to get the general outline.

3 As I understand your testimony, it is that
4 there were years in which Montana informed you or your
5 staff that there were water users in Montana who were
6 short of water?

7 A. Yes.

8 Q. And what was your -- why do you believe that
9 they were giving you that information?

10 A. Well, as I said, it really was a routine sort
11 of agenda item or topic of discussion at every compact
12 commission meeting. We would talk about streamflow
13 conditions, reservoirs, operational things. And that's
14 why each of us always had those field staff who were
15 directly related to the enforcement of the priority
16 system at those meetings. So they were there so that
17 they could report on those things.

18 And so it was -- in my view, it was just a
19 matter of sharing the conditions for the year. What
20 was happening? Was it a good year? Was it a bad year?
21 How are things going? I think there's minutes that
22 talk about crops. I mean, there was just a general
23 discussion about general conditions in the basin.

24 And Montana would have shared their views.
25 And we would have responded with what the situation was

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1 on the Wyoming side.

2 Q. And did you believe in any of the times when
3 Montana gave you this information that one of the
4 purposes was to see whether or not anything could be
5 done in Wyoming to help?

6 A. Oh, I think to some extent, that's correct.
7 I mean, that's why they were interested in our response
8 as to what was going on. And as I stated a couple of
9 times, our response was, it's dry on our side too. And
10 we're regulating a lot of people, perhaps not everybody
11 as the records have indicated. But there was -- the
12 sense was that water users in both states were
13 suffering in those conditions.

14 Q. And so that was actually going to be my next
15 question, which was the response that Wyoming would
16 provide in terms of the conditions in Wyoming. Since
17 we've already provided that, then the question -- or my
18 understanding, then, from your testimony, is after
19 that, you did not receive any request from Montana to
20 take any specific actions?

21 A. That's exactly right. We did not.

22 Q. Okay.

23 SPECIAL MASTER: Those are my questions.

24 MR. SWANSON: Nothing further, Your Honor.

25 SPECIAL MASTER: Okay.

Redirect Examination by Mr. Kaste
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1 Mr. Kaste.

2 REDIRECT EXAMINATION

3 BY MR. KASTE:

4 Q. I think it's important to make clear the
5 timing of those communications. When you're having
6 these discussions that you just described with the
7 Special Master, I get the impression that's during the
8 Yellowstone River Compact meetings after the irrigation
9 season?

10 A. That's primarily when that occurred. And
11 that's why it's reflected in the minutes and the annual
12 reports of the meetings.

13 Q. Did Montana, someone from Montana, in the
14 middle of an irrigation season, call on you the phone
15 and ask you to regulate anybody along the Tongue River?

16 A. No.

17 Q. And, you know, I just think it's important
18 for you to get the timing right. Those meetings are
19 after the irrigation season, and they are looking back
20 retrospectively at what had happened in the past;
21 right?

22 A. That's correct. That was the general sense
23 of the reporting and data collection, things of that
24 nature, was after the end of the water year.

25 SPECIAL MASTER: And, again, just to be clear

Redirect Examination by Mr. Kaste
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1 on that. So those are the meetings of the --

2 THE WITNESS: Compact commission.

3 SPECIAL MASTER: Thank you.

4 BY MR. KASTE:

5 Q. And it sounds like to me like today was a lot
6 of your testimony about your interactions with the
7 state of Montana joined with those compact commission
8 meetings?

9 A. They were. As Mr. Swanson pointed out, this
10 wasn't all. There was letters, correspondence, would
11 have been staff activities that were occurring at other
12 times. But times when the commissioners were directly
13 engaged and focused on those issues were at our
14 meetings.

15 Q. Are they always a retrospective look at what
16 happened in the past?

17 A. All the ones -- yeah. I mean, like I said,
18 most of those annual meetings were in November or
19 December. That's when they generally occurred. The
20 records were full of when other meetings occurred as
21 well. But that was the pattern during my tenure.

22 Q. All right. Mr. Swanson talked to you about a
23 series of notes, that you probably had never seen
24 before, from 1981, created by Mr. Buyok and
25 Mr. Christopoulos.

Redirect Examination by Mr. Kaste
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1 Do you remember that series of documents?

2 A. Yeah.

3 Q. And I forget the number. But if Montana had
4 made a call to Mr. Christopulos and they had a
5 discussion about whether Wyoming could deliver some
6 water, is that the important kind of event you might
7 see in the Yellowstone River Compact Commission annual
8 report?

9 A. Yes, in my opinion, it would be.

10 Q. So you might see that phone call in -- or the
11 discussion show up somewhere in the 1982 Yellowstone
12 River Compact Commission report? You probably haven't
13 read it, but it's in there?

14 A. I haven't. But as I talked to the Special
15 Master about the routineness of talking about
16 streamflow conditions, there's fairly standard portions
17 of all those annual reports, reservoir conditions.
18 There's a lot of overt statements about the
19 administration not being required this year, things of
20 that nature.

21 Q. Sure.

22 A. Seems obvious to me that any sort of formal
23 call would clearly have been documented in the report.

24 Q. Well, and that raises a point that you used
25 the word "formal call" a number of different times.

Redirect Examination by Mr. Kaste
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1 Does that necessarily mean that the call for water
2 would be in writing? Is that what you're talking about
3 when you say formal call? Or could that include a
4 verbal call by the state of Montana?

5 A. It could have started verbally. But it no
6 doubt that a written request would have been required.
7 But, again, that would have triggered the follow-on
8 event that I was talking with Mr. Swanson about. There
9 have been investigations, likely have been meetings.
10 Certainly we would be briefing governors, briefing our
11 legislators, briefing water users. I mean, this is not
12 a little deal to begin interstate priority enforcement
13 against water users for the benefit of things
14 downstream. And that is not a routine activity.

15 Q. When you look at the regulation with -- the
16 Board of Control regulations that said calls should be
17 in writing, and yet you know, as a matter of fact, that
18 calls among water users in Wyoming often are verbal, is
19 a call between the states, in your view, somewhat
20 different than a call between two farmers within the
21 same state?

22 A. I believe it is.

23 Q. Now, finally, this is just for fun.

24 A. Fun for who?

25 Q. Mr. Moy, I think testified, and you weren't

Redirect Examination by Mr. Kaste
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1 here, of course, that he was shocked -- shocked, I tell
2 you -- to learn that we hadn't been regulating the main
3 stem of the Tongue River. Would you look at 218 with
4 me?

5 A. Is that one of the ones I have here?

6 Q. Yes. And then I'm going to ask you to look
7 at M205. And, perhaps, I really don't need to get too
8 far in it, just the first page. I'll represent to you
9 that those were the two documents that Mr. Swanson
10 pointed out to you where Wyoming told them, we didn't
11 regulate the main stem of the Tongue River, only the
12 tributaries. And those are dated 1985 and '86. And I
13 just want you to tell me if Mr. Moy was there.

14 A. I'm looking at Exhibit M205. That's the
15 meeting notes from November 26, 1985. And they
16 indicate that Mr. Moy was in attendance.

17 Exhibit M218, that was the minutes from
18 November 8th, 1988. They also indicate that Mr. Moy
19 was in attendance.

20 Q. When you communicated with the folks in
21 Montana about how we were regulating in the state of
22 Wyoming, did you try to be as accurate as you could?

23 A. Certainly.

24 Q. Did you have anything to hide?

25 A. No.

Redirect Examination by Mr. Kaste
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1 MR. KASTE: Thank you. I have no further
2 questions.

3 SPECIAL MASTER: Okay.

4 So thank you very much, Mr. Fassett, for
5 being here today. You can now step down, and you can
6 actually make your flight tomorrow morning.

7 THE WITNESS: I appreciate that.

8 SPECIAL MASTER: And we will be back, since
9 we actually have probably worn out the court reporter
10 today, but we're going to have a different court
11 reporter tomorrow. So do you think that court reporter
12 can be here at 8:30?

13 THE REPORTER: Yes.

14 SPECIAL MASTER: Is that okay?

15 MR. KASTE: Well, I object to not having
16 Vonni. But other than that...

17 SPECIAL MASTER: I agree, it's going to be a
18 loss. We will start up again at 8:30 tomorrow morning
19 and continue to try and squeeze as much testimony in
20 these days as possible. So we are in recess until
21 tomorrow morning. Thank you.

22 (Trial Proceedings recessed at
23 5:47 p.m., November 19, 2013.)

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REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 308, is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Laurel, Montana, this 12th day of February, 2013.



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