

No. 137, Original  
IN THE SUPREME COURT OF THE UNITED STATES  
VOLUME 21 OF 25 VOLUMES  
TRANSCRIPT OF TRIAL PROCEEDINGS

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

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

James F. Battin United States Courthouse  
2601 2nd Avenue North  
Billings, Montana 59101  
8:33, Monday, November 25, 2013

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Proceedings recorded by machine shorthand  
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1 MONDAY, NOVEMBER 25, 2013, 8:33 A.M.

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

4 So, first of all, welcome back to everyone.  
5 And I saw, I guess, that Wyoming beat University of  
6 Hawaii in football that weekend; right?

7 MR. BROWN: It sounded like a barn-burner.

8 SPECIAL MASTER: So that's good. I  
9 understand that Montana beat Montana State. And those  
10 of you from Montana, I don't know which side you're on.  
11 So -- but if any of you are on the University of  
12 Montana side, congratulations.

13 And I gather, though, that University of New  
14 Mexico did not do particularly well over the weekend.  
15 So my apologies. But I'm sure you guys will do well  
16 again at some point.

17 MR. DRAPER: And I think Stanford did pretty  
18 well over the weekend itself.

19 SPECIAL MASTER: I'm very happy to the  
20 football gods. The universe seems to be back in  
21 balance again, but thanks not only to Stanford's  
22 football team but a special word of thanks to Arizona's  
23 football team for knocking Oregon out of the  
24 championship game and giving us another potential route  
25 to the Rose Bowl, which sounds a lot better to me than



1 having to fly to San Antonio this time of year for the  
2 Alamo Bowl.

3 And I'll confess, I couldn't find anything in  
4 the newspaper about North Dakota.

5 MS. VERLEGER: That's because you presume I'm  
6 a North Dakota fan, but I'm not from there. I'm from  
7 Michigan actually.

8 SPECIAL MASTER: Oh, okay. But still,  
9 Michigan is not doing too poorly.

10 MR. DRAPER: And I would mention on behalf of  
11 Mr. Peterson that North Dakota State did very well this  
12 weekend.

13 SPECIAL MASTER: Okay. Okay. So back to the  
14 proceedings, so I assume we'll continue with Miss Lowry  
15 this morning?

16 MR. BROWN: Yes, sir.

17 SPECIAL MASTER: And then will she be  
18 followed by Mr. Tyrrell?

19 MR. BROWN: Yes, sir.

20 SPECIAL MASTER: So we'll probably get to the  
21 expert witnesses sometime tomorrow?

22 MR. BROWN: Late tomorrow is our guess right  
23 now.

24 SPECIAL MASTER: Okay. Sounds good. And so,  
25 Ms. Lowry, you can come back up. And remind me, who is

1 doing the cross for -- oh, Mr. Wechsler.

2           Okay. So, first of all, it's great to see  
3 you again this morning. So welcome back, and we'll not  
4 be swearing you in again. So you remain under oath  
5 from last week.

6           THE WITNESS: Okay. Yes, I understand.

7           MR. BROWN: And I'll let Your Honor know and  
8 the court reporter, I guess, that Ms. Lowry picked up a  
9 little bit of laryngitis.

10           SPECIAL MASTER: Let's take a quick break off  
11 the record.

12   (Discussion held off the  
13   record.)

14           MR. BROWN: And I think I was saying that I  
15 already picked up some laryngitis this weekend, so  
16 hopefully we'll be able to work through that.

17           At any rate, when we finished up on Friday,  
18 if you'll recall, Your Honor, Ms. Lowry was describing  
19 generally the interstate decrees in the state of  
20 Wyoming. On the weekend, we put together a  
21 demonstrative exhibit so she could kind of describe the  
22 organization of those compacts and decrees. I would  
23 just ask her to go around and describe each of those  
24 for us.

25

## Direct Examination Cont. by Mr. Brown

1 SUE LOWRY (CONT.),  
2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION CONTINUED

4 BY MR. BROWN:

5 Q. Looking at Wyoming Demonstrative Exhibit  
6 No. 1.

7 A. Okay. And, Mr. Brown, do you want me to kind  
8 of go around the state and describe where there's  
9 decrees and compacts and what type of organization with  
10 each one.

11 Q. Yes.

12 A. Okay. Maybe I'll start down in the southeast  
13 corner of the state. There is a little portion of the  
14 state that goes to the South Platte drainage, but  
15 really no interstate regulation occurs there.

16 The Laramie Basin is the one in purple. And  
17 it is covered by the Laramie River decree, which was  
18 back in the 1920s, between Wyoming and Colorado.

19 The North Platte River is also covered by a  
20 decree, originally 1945, and then there was litigation  
21 in the late '80 and '90s. A settlement was reached in  
22 2001. And the administration of the North Platte  
23 between us and Nebraska and Colorado is covered by that  
24 decree.

25 The Green River Basin and Little Snake Basin

## Direct Examination Cont. by Mr. Brown

1 or tributaries to the Colorado, and there are two  
2 compacts which cover -- one covering the entire basin,  
3 and then of the allocation made to the upper basin, the  
4 upper basin states in the Colorado have also negotiated  
5 a compact to describe the allocation within -- manage  
6 the upper basin states.

7           The Bear River Basin is the little orange  
8 strip along the southwest corner of the state. There  
9 is a compact there that was negotiated. It's, I  
10 believe, our only compact that's also been amended.  
11 That compact is between us, Utah, and Idaho.

12           The Snake River is also covered by a compact.  
13 And that compact is between Wyoming and the state of  
14 Idaho.

15           And then, of course, we're all aware of the  
16 Yellowstone Compact covering what's shown here in  
17 yellow.

18           And then the kind of brownish color is the  
19 Belle Fourche River Basin. There is a compact there  
20 between Wyoming and South Dakota.

21           And then the Cheyenne River Basin is our only  
22 area of any size that is not covered by a compact.  
23 There actually were some negotiations in the 1940s, and  
24 ultimately, no compact was ever ratified there.

25           And then the little, green slot there where

## Direct Examination Cont. by Mr. Brown

1 the little town of Lusk is, that's the Niobrara River  
2 Basin. And there's a compact between ourselves and  
3 Nebraska that covers that portion of Wyoming.

4 SPECIAL MASTER: I have to just ask, out of  
5 curiosity, two questions. Number one, I notice over on  
6 the Snake River Basin there's that the little pink  
7 part. What is that?

8 THE WITNESS: Yes, sir. That little pink  
9 portion is covered by the Roxanna decree. That decree  
10 was, oh, in the early 1900s. I forget the date. Maybe  
11 it says on here -- I believe that says 1941. And it  
12 covers Teton Creek, which comes off of the west side of  
13 the Teton Range and flows into Idaho. And that decree  
14 essentially divides the flow of Teton Creek between  
15 ourselves and Idaho.

16 SPECIAL MASTER: Okay. Thank you.

17 MR. BROWN: And you said you had a couple of  
18 questions.

19 SPECIAL MASTER: Well, the other question, so  
20 do you recall -- it has nothing to do with this. It's  
21 totally irrelevant. But I'm just curious with the  
22 Snake River Basin why that decree was amended?

23 THE WITNESS: Oh, the Bear?

24 SPECIAL MASTER: Bear, sorry.

25 THE WITNESS: I believe the upper basin

## Direct Examination Cont. by Mr. Brown

1 states, and in that case the upper basin states are  
2 ourselves and Utah, there was interest in developing  
3 some additional storage. Bear Lake is a large natural  
4 lake that lies on the border between Idaho and Utah.  
5 It's operated by now Pacific Corps. But a number of  
6 different Utah power -- a number of different power  
7 companies. And they, the power companies, wanted some  
8 protection of the elevation of Bear Lake if additional  
9 storage was going to happen upstream. And so I think  
10 that was the impetus of the negotiations.

11 And so the 1978 amendments has language in  
12 there about some restrictions to upstream storage.

13 SPECIAL MASTER: One of the reasons I ask is  
14 that not only, I think, is Wyoming unusual in having so  
15 many different compacts, but it's highly unusual ever  
16 to find an amendment of a compact. I mean, it's not  
17 only Wyoming's only one -- I think there might be only  
18 two situations where -- that have ever been amended.

19 So thank you.

20 BY MR. BROWN:

21 Q. And I think you told us on Friday when you  
22 were with us that you don't really have any  
23 responsibility for the North Platte decree or the  
24 Colorado River Compact; is that right?

25 A. That's correct. In the division that I'm the

## Direct Examination Cont. by Mr. Brown

1 administer of, there are three people, two of whom  
2 spend their time almost exclusively on Colorado River  
3 issues. And then the third person, when the North  
4 Platte decree was settled, that litigation was settled  
5 in '01, there was some additional reporting  
6 requirements on Wyoming. And so we did get a new  
7 position that we call our Platte River coordinator. So  
8 that person pretty much handles all the Platte River  
9 topics.

10 Q. So you're primarily responsible for the  
11 remaining compacts and decrees; is that right?

12 A. Yes, that's correct.

13 Q. Okay. In your position with the state  
14 engineer's office, do you have any reason to go out  
15 yourself and regulate water rights?

16 A. No, I don't. I've never worked in -- among  
17 our field staff. So I've not turned on or off a  
18 headgate.

19 Q. So do you have any experience with interstate  
20 regulation between Wyoming and another state?

21 A. Yes, I do.

22 Q. And describe that experience for us.

23 A. Okay. I mentioned the Bear River Compact.  
24 That is probably our most detailed compact as far as  
25 actually having flow requirements or what that compact

## Direct Examination Cont. by Mr. Brown

1 calls divertible flow volumes. There are -- there's  
2 also language in that compact that talks about when an  
3 emergency regulation will occur. And so as the  
4 commissioner now, and as the technical staff for many  
5 years for that basin, the Cheyenne office certainly  
6 played a role in determining and making sure that we  
7 complied with those emergency regulation rules. All --  
8 although, the day-to-day administration was handled out  
9 of Cokeville, is the little town where the  
10 superintendent's office is so comparable to what  
11 Carmine LoGuidice would do for the Tongue River Basin.

12 Q. And I'll just draw your attention to the fact  
13 that we put up Wyoming Demonstrative Exhibit No. 2 on  
14 the screen next to you. If you could just very briefly  
15 describe the relationship and looking at the map  
16 between the three states to that compact.

17 A. Okay. Probably two main things to point out.  
18 You'll see, where it says upper division, so that  
19 includes everything from the headwaters up here in  
20 Utah. And then Bear River flows northerly through  
21 Wyoming. And then you see Woodruff Narrows Reservoir  
22 there. The Bear River goes into Utah, comes back into  
23 Wyoming.

24 And this Pixley Dam is a very important  
25 structure. That divides the upper division from the



## Direct Examination Cont. by Mr. Brown

1 central division. Then down here, at Stewart Dam, that  
2 is the bottom of the central division.

3 And then, of course, Wyoming doesn't have any  
4 lands or isn't as intimately involved in lower division  
5 issues 'cause that's all in Utah and Idaho.

6 So this emergency regulation language that I  
7 mentioned has specific volumes that when they are not  
8 met, either the total, what's called divertible flow --  
9 so both Utah and Wyoming would assess how much water  
10 they have out in various ditches. And that number  
11 would be reported -- that commissioner actually has a  
12 paid staff member called the engineer manager. When  
13 conditions are dry and we think we might be close to  
14 the provisions in the emergency regulation, our field  
15 staff then get those divertible flow numbers to our  
16 engineer manager.

17 Up in the central division, rather than a  
18 divertible flow volume, it's actually -- the emergency  
19 is actually defined by a gauge that's right there on  
20 the Wyoming/Idaho line. So simply, Wyoming field  
21 staff, water commissioners, and the Idaho water master  
22 would be out assessing how much water was out in their  
23 respective diversions.

24 Q. So since you've been Wyoming's  
25 commissioner -- are you Wyoming's commissioner to the

## Direct Examination Cont. by Mr. Brown

1 Bear River Compact?

2 A. Yes, I am.

3 Q. And since you've been Wyoming's commissioner,  
4 has Wyoming had to regulate its water uses in order to  
5 comply with the provisions of that compact?

6 A. Yes, we have. Last year was a fairly dry  
7 year. And there was emergency regulation called for in  
8 the central division.

9 Q. And what is your role as the commissioner of  
10 the compact?

11 A. Because the -- I don't want to say it's  
12 routine, but we certainly have a lot of experience with  
13 these emergency regulation procedures in that basin.  
14 So -- of course, it's been -- was fairly dry in both  
15 water year '12 and water year '13. So we're to the  
16 point now where the actual call is actually made by  
17 Idaho and the engineer manager then verifies that the  
18 conditions are such that the call is valid.

19 So the commissioners are alerted that the  
20 conditions are dry and that that emergency regulation  
21 is likely to take place. But as far as the actual  
22 day-to-day, I guess, integration or the actual  
23 beginning of the water emergency procedures, that's  
24 pretty much handled out of our Cokeville office and our  
25 water commissioners.

## Direct Examination Cont. by Mr. Brown

1 Q. And does Wyoming have to regulate its water  
2 rights uses every year under that compact?

3 A. Not every year; only when the emergency  
4 regulation amounts are reached. And it's not an  
5 automatic. The engineer manager will ask the  
6 downstream state if they want to have regulation called  
7 for.

8 In the upper basin, we actually have several  
9 years where the states agree that, yes, the  
10 conditions -- a call would be valid. But because of  
11 this little reservoir up here called Whitney, that's  
12 quite high elevation up in the Uintahs. And many of  
13 the users of water out of Whitney understand that if  
14 they would call for emergency regulation, that storage  
15 would have to cease. And so the water commissioners  
16 still divide the water out into the ditches as though  
17 we were in a regulation, but they still allow Whitney  
18 to continue to fill.

19 Q. Okay. When you first came to work at the  
20 state engineer's office -- and refresh us when that  
21 was.

22 A. April of 1988.

23 Q. Okay. What was your role with regard to the  
24 Yellowstone River Compact at that time?

25 A. I was technical staff as a brand-new

## Direct Examination Cont. by Mr. Brown

1 employee. My main assignments were to look at the  
2 agendas, review the minutes. I may have mentioned last  
3 Thursday the Powder River Water Quality study. That  
4 was beginning in 1988, at least the -- kind of the  
5 scoping for what would be covered in that study. So I  
6 spent some timing working with the U.S. Geological  
7 Survey and Chuck Dalby and others in Montana on the  
8 beginning of that study.

9           So that was primarily the topics I was  
10 assigned in that first year or so that I worked there.

11           Q. With regard to the meetings of the compact  
12 commission, when did they typically occur?

13           A. Generally, late November or early December.

14           Q. Did you have occasion to have meetings in the  
15 spring of years at times?

16           A. At times. In looking back through the  
17 records to prepare, I noted that we did do a  
18 face-to-face meeting, I believe, in April of 1990. And  
19 then there were conference calls a couple of times in  
20 the early '90s. I wouldn't say it was routine to meet  
21 in the spring; it happened occasionally.

22           Q. Okay. And what typically occurred at the  
23 regular compact commission meetings?

24           A. The U.S. Geological Survey would give us an  
25 update of the flow volumes and give us a sense of the

## Direct Examination Cont. by Mr. Brown

1 type of water year it was, particularly at the stream  
2 gauges that are specifically mentioned in the compact.

3           We would -- it was an opportunity for any  
4 kind of up-and-coming issues, if you will, to alert our  
5 sister states. Issues like coalbed methane, when we  
6 were starting to see more of those applications come  
7 in, Mr. Fassett asked for that to be an agenda such  
8 that we could let Montana know we were starting to see  
9 more of that kind of development.

10           I mentioned the water quality study. Chuck  
11 Dalby and I were also actively working on the  
12 adjudication of interstate ditches. That work had  
13 certainly started well before I got to the office. But  
14 we were interested in giving kind of one last notice to  
15 water users to say the commissioner has adopted these  
16 interstate adjudication rules. If you feel like you  
17 have one of these interstate ditches, please let us  
18 know. And these rules provide for the notification if  
19 the point of diversion is in one state and lands are  
20 served in the other state of providing a mechanism for  
21 the records in the other state to reflect that there is  
22 this valid point of diversion.

23           So Chuck Dalby and I worked with the  
24 solicitor's office to ask their opinion whether --  
25 because the commission has a federal piece to it,

## Direct Examination Cont. by Mr. Brown

1 whether we needed to put the notice in the Federal  
2 Register, if there were other federal rules that we  
3 needed to follow for this notification. Really more  
4 procedural process kinds of things that Chuck and I  
5 were working on.

6 Q. With regard to just the general topics that  
7 were covered at the regular commission meetings, were  
8 the water conditions present in each state during the  
9 year discussed at those meetings?

10 A. Yes, absolutely. That was always on the  
11 agenda.

12 Q. Is that a topic that you find common to all  
13 of your interstate dealings?

14 A. Yes, it is. We are water people, so we tend  
15 to always talk about what's going on with water  
16 conditions.

17 Q. Sure. Just briefly describe your  
18 relationship with the Montana representatives.

19 A. Oh, I'd say it was always very good. I  
20 always -- I can't think of an instance where we didn't  
21 get along. I think it was always very professional.  
22 And, you know, over 25 years, I mean, some of these  
23 people, I saw an awful lot. And we got to be quite  
24 good friends.

25 Q. Over those 25 years, did you usually have

## Direct Examination Cont. by Mr. Brown

1 occasions to interact with the Montana officials during  
2 the irrigation season?

3 A. I'm not sure I'd say "usually." I'd say,  
4 again, occasionally. The nature of our work is that  
5 our respective agencies are quite busy in the  
6 summertime with regulation and topics that occur during  
7 the irrigation season. So most of our compacts or  
8 groups like the Western States Water Council will  
9 occasionally meet during the summer months.

10 Now, sometimes the technical committees, if  
11 we had a lot of work before us, so groups -- I think I  
12 might have mentioned on Thursday the Missouri River  
13 Basin Association, that group might have had summer  
14 meetings. I don't recall right off the top of my head.

15 Q. And the annual report was produced after each  
16 annual meeting; is that right?

17 A. Yes, that's correct.

18 Q. Did both states have an opportunity to  
19 comment on the minutes of those meetings?

20 A. Yes, we did.

21 Q. Okay. And when you first began, how were  
22 those meeting minutes circulated?

23 A. Well, that was long enough ago we didn't have  
24 e-mail. And so probably for the first -- oh, until the  
25 early '90s, we relied on the U.S. mail. So the USGS

## Direct Examination Cont. by Mr. Brown

1 would mail out a draft. And then we'd mark up our  
2 edits and send them back.

3 But since probably, I don't even -- 1993 or  
4 so, then everything was done via e-mail.

5 Q. Did you always review the minutes?

6 A. Yes, I did.

7 Q. Did you try to make sure that they accurately  
8 reflected what happened at the meetings?

9 A. Yes, I did.

10 Q. Montana officials have claimed that the USGS  
11 tried to eliminate reference to controversy in the  
12 minutes. Do you agree with that?

13 A. No, I do not.

14 Q. Do you believe the minutes of the annual  
15 reports accurately reflect the substance of the  
16 meetings held each year?

17 A. Yes, I do.

18 Q. If Montana had made a call at any of those  
19 meetings, would you expect that to be reflected in the  
20 report?

21 A. Yes, that would have been a very big deal.

22 Q. If Montana had made a call during the  
23 irrigation season of any of those years, would you  
24 expect it to be reflected in the minutes?

25 A. Yes, I would have.



## Direct Examination Cont. by Mr. Brown

1 Q. So I wanted to briefly discuss some of the  
2 issues that were in front of the commission when you  
3 first became involved in 1988 and 1989. And I think  
4 you've already discussed the water quality issue and  
5 the Interstate Ditch issue.

6 With regard to the water quality issue, what  
7 was the impetus behind your work on that issue?

8 A. Okay. My recollection was, of course,  
9 Montana was quite concerned that Wyoming had, on its  
10 drawing board, if you will, the Middle Fork of the  
11 Powder Dam facility. And they had expressed concern  
12 that if that dam were to be put in place, it was fairly  
13 high up in the watershed and would have captured high  
14 quality water coming off of the Big Horn Mountains.  
15 They had asked the USGS if they could assess and do  
16 some modeling work to predict trends of whether we  
17 might see changes in the water quality at Moorhead at  
18 the state line if Middle Fork were to be put in place.

19 Q. The states worked on that together?

20 A. They did. The two states, as well as both  
21 USGS offices from Wyoming and from Montana.

22 Q. And I think you pretty thoroughly described  
23 the Interstate Ditch issue. Was there an issue with  
24 regard to the proper role of the federal chair to the  
25 commission?

## Direct Examination Cont. by Mr. Brown

1           A.    Yes, there was.  Prior to my coming to the  
2 state engineer's office, there had already been  
3 notification, I guess, by the U.S. Geological Survey  
4 that they did not feel comfortable in having their  
5 employee, the federal representative, vote on  
6 controversial issues.  Mr. Grady Moore, I believe I  
7 only overlapped with him at one meeting, perhaps two.  
8 And so he had been kind of the bearer of that kind of  
9 change in philosophy from the USGS.  So the commission  
10 spent a lot of time discussing what that meant for  
11 compact work, what the role really was of the federal  
12 chairman, I should say.

13                   And so then when Mr. Bill Horak came in as  
14 the federal chair, there were still discussions about  
15 how the USGS viewed their role as the federal chair.  
16 That ultimately led to the commission developing the  
17 dispute resolution rule.  But I believe we started that  
18 more about 1992 or so.

19           Q.    Okay.  And were you involved with the process  
20 to develop those dispute resolution procedures?

21           A.    Yes, I was.  Dr. Matt McKinney was a staff  
22 member for a while.  And then he went into work at more  
23 of a public policy position.  But he worked for DNRC  
24 and had experience in dispute resolution which was --  
25 its application to natural resource issues was kind of

## Direct Examination Cont. by Mr. Brown

1 a new topic at that time. So he really took the lead.  
2 But I was Wyoming's contact person to work with him on  
3 drafts.

4 Q. Okay. You were present in court when  
5 Mr. Rich Moy testified; right?

6 A. Yes, I was.

7 Q. And he had made reference to some work he had  
8 done with regard to the history of the Yellowstone  
9 River Compact; do you remember that?

10 A. Yes, I do.

11 Q. Were there any discussions by the compact  
12 commission at the time you became involved with regard  
13 to that history document and the issues identified in  
14 it?

15 A. Yes, I was.

16 Q. I'm going to show you what's marked as  
17 Exhibit M101. And I believe that's already been  
18 admitted. But do you recognize Exhibit M101?

19 SPECIAL MASTER: It has been admitted.

20 MR. BROWN: Thank you.

21 SPECIAL MASTER: While she's looking, I'm  
22 going to grab my other copy, only because I'm keeping  
23 notes on it. I will have notes in the same place.

24 (Discussion held off the  
25 record.)

## Direct Examination Cont. by Mr. Brown

1           SPECIAL MASTER: Back on the record.

2 BY MR. BROWN:

3           Q. Do you recognize that, Ms. Lowry?

4           A. Yes, I do.

5           Q. If you'll turn to the very last page of that  
6 exhibit, there's a memo there that has your name on it;  
7 do you recognize that?

8           A. Yes, I do.

9           Q. Is that your signature that's on there?

10          A. Yes, it is.

11          Q. Can you tell us what the purpose of this memo  
12 was?

13          A. Yes. The history document as authored by  
14 Rich Moy had been transmitted to us at the  
15 November '89 commission meeting. And State Engineer  
16 Fassett agreed that Wyoming would take a look at the  
17 document and review to see whether we felt Mr. Moy had  
18 captured Wyoming's position and had captured the  
19 history, what we felt was in an appropriate way. So  
20 this memo, which is dated February 28th of '90, I was  
21 sending to Craig Cooper and Mike Whitaker, who were the  
22 two division superintendents in the Yellowstone Basin,  
23 and asking for them to take a look at Rich's document  
24 and to get me their thoughts.

25          Q. Did the states meet to discuss this history

## Direct Examination Cont. by Mr. Brown

1 memo?

2 A. Yes, they did.

3 Q. Did Wyoming, in fact, provide some feedback  
4 to Montana with regard to the issues identified in the  
5 history document?

6 A. Yes, we did.

7 Q. Do you recall if anything was resolved as a  
8 result of that meeting?

9 A. I did look back at my notes from the meeting.  
10 I believe rather than March 20 and 21st, it actually  
11 occurred on April 9th, I think. And in reviewing my  
12 notes from that meeting it appeared that we did discuss  
13 the document. But then after April of '90, I never saw  
14 where that document was really reviewed or that the  
15 commission took any action with it after that time  
16 period.

17 Q. Okay. So the states didn't really engage any  
18 additional work with regard to the issues after that  
19 meeting?

20 A. That's correct.

21 Q. Just so the record is complete, there's  
22 handwriting on Exhibit 101. Turn to the first page.  
23 And on the first page, do you recognize that  
24 handwriting?

25 A. Yes. In the upper right-hand corner, that's

## Direct Examination Cont. by Mr. Brown

1 my handwriting.

2 Q. And it's hard to see. But over in the upper  
3 left-hand corner on the first page, do you know whose  
4 that is?

5 A. I've seen a little cleaner copy of this, and  
6 I believe the -- clear up at the very top, I believe  
7 that was maybe John Shields' handwriting. And I think  
8 the smudgy in between "draft" and "introduction," I  
9 think that may have been Craig Cooper's handwriting.

10 Q. And if you'll look at pages 29 and 30, do you  
11 recognize the handwriting on those pages?

12 A. Yes. The red on page 29 and 30 is Craig  
13 Cooper's, and the blue on page 30 is John Shields'.

14 Q. Okay. That's all I have for that exhibit.

15 So at any time during 1988 or 1989, did any  
16 Montana water official make a call or a demand for  
17 Wyoming to curtail its uses for the benefit of Montana?

18 A. No, they did not.

19 Q. Let's look at Exhibit M427; do you recognize  
20 that document?

21 A. Yes, I do.

22 Q. What is it?

23 A. It's a memo from me to State Engineer Fassett  
24 and to Mike Whitaker dated June 4th of 1990.

25 Q. And I believe this exhibit is also admitted.

## Direct Examination Cont. by Mr. Brown

1 But can you just tell us generally what the purpose of  
2 this memo was?

3 A. Yes. I had been working with Glen McDonald,  
4 who was in the position that Kevin Smith is now in.  
5 The state of Montana was working on a modeling effort  
6 to determine the hydrologic -- the volume of water that  
7 could potentially be stored at Tongue River Reservoir.  
8 And they were looking at options to see what the firm  
9 yield could be and options for how large to make the  
10 enlargement to Tongue River Reservoir.

11 They had -- they being Montana -- had made it  
12 clear to Wyoming that they did not want the enlargement  
13 to Tongue River Reservoir to impinge on rights that  
14 Wyoming felt it had under the Yellowstone Compact. So  
15 they were asking us to take a look at the work that had  
16 been done by John Buyok back in the early 1980s and to  
17 see if Wyoming still felt that Mr. Buyok's estimates  
18 were appropriate, or if we wanted to make changes. And  
19 if we did wish to make changes, that those volumes  
20 would be incorporated into the model that was being  
21 developed.

22 Q. Do you know if Montana ultimately used the  
23 information that you provided for purposes of their  
24 modeling effort?

25 A. Yes, I know, and, yes, they did.

## Direct Examination Cont. by Mr. Brown

1 Q. Sorry.

2 A. That's okay.

3 Q. Let's look at Exhibit J41. And that's the  
4 1991 annual report of the compact commission; right?

5 A. Yes, that's correct.

6 Q. And I want to look -- were you present at  
7 this meeting?

8 A. Yes, I was.

9 Q. I want to look at page Roman Numeral III.  
10 And it's Wyoming Bates stamp 15677. And I want to take  
11 a look at the third paragraph from the top. And I'm  
12 going to read the last sentence. It says, "He  
13 suggested that Ms. Lowry meet with Glen McDonald  
14 (Montana Department of Natural Resources and  
15 Conservation) to ensure that Wyoming is not adversely  
16 affected by the agreement." And that was Mr. Fritz  
17 making that statement; right?

18 A. Yes, that's correct.

19 Q. Did you, as a result of that, meet with  
20 Mr. McDonald?

21 A. Yes, I did.

22 Q. What were you told about the effects of the  
23 Northern Cheyenne Compact on Wyoming?

24 A. Was that it would not impose or infringe on  
25 our ability to use water that we thought was ours under



## Direct Examination Cont. by Mr. Brown

1 the Yellowstone Compact and that the volumes of water  
2 that we estimated would be incorporated into the model.

3 Q. Now, we're going to fast-forward to 2000.  
4 And I'm going to show you Exhibit J50.

5 MR. BROWN: And this is the 2000 annual  
6 report of the compact commission, Your Honor. And I  
7 apologize. I've only got one copy.

8 SPECIAL MASTER: Which exhibit number?

9 MR. BROWN: J50.

10 SPECIAL MASTER: I'm sure I have a copy, so,  
11 again, off the record.

12 (Discussion held off the  
13 record.)

14 SPECIAL MASTER: Okay. Back on the record.

15 BY MR. BROWN:

16 Q. And you were at the 2000 commission meeting;  
17 is that right?

18 A. Yes, I was.

19 Q. And I want to look at page III again, page  
20 Roman Numeral III. And if you'll look at the third  
21 paragraph from the bottom, the first sentence says,  
22 "The commissioners discussed the need for quantifying  
23 diversions and other hydrologic factors in order to  
24 administer the compact and agreed to establish a  
25 committee to provide recommendations to the

## Direct Examination Cont. by Mr. Brown

1 commissioners on possible future efforts."

2 Up to that point in time with your  
3 involvement with the compact, had the states ever  
4 quantified diversions?

5 A. Not as an effort of the commission. I think  
6 we, within Wyoming, had our hydrographers' reports, but  
7 never had there been a joint commission effort to do  
8 it.

9 Q. So there never had been any effort to  
10 quantify those for purposes of compact administration?

11 A. That's correct. There had not been.

12 Q. Up until today, have the states tried to  
13 quantify diversions for the purpose of compact  
14 administration?

15 A. No. We've discussed it, and I think we'll  
16 probably get to those discussions, but we've never  
17 accomplished the feat, that's true.

18 Q. And I think it indicates here on page III  
19 that you and Rich Moy were cochairs of that technical  
20 committee?

21 A. We were assigned to be, yes.

22 Q. What was your understanding of what the  
23 technical committee was supposed to do?

24 A. I think back at that point in time, the  
25 technical committee, there had not been one

## Direct Examination Cont. by Mr. Brown

1 established. During the '90s, there really wasn't any  
2 technical discussions.

3           And I think that the commissioners intended  
4 that Mr. Moy and myself would understand what was  
5 available in each state. I think we were under the  
6 understanding that -- we, Wyoming, understood a little  
7 bit about how the court appointed water commissioners  
8 worked and knew that there had not been -- that there  
9 weren't staff in Montana comparable to our field staff,  
10 as far as having diversion data like we have for our  
11 hydrographers' reports.

12           So I think the goal was for me and Mr. Moy to  
13 see if there were other data that could be the  
14 equivalent of those diversion records that would help  
15 us better understand what was going on on the Montana  
16 side.

17           Q. And it indicates in the annual report in that  
18 same paragraph that you guys were supposed to come up  
19 with something by the end of May; do you see that?

20           A. Yes, I do.

21           Q. Did the meetings of the technical people ever  
22 happen in 2001?

23           A. No, they did not.

24           Q. Why not?

25           A. Well, I'm not quite sure. I did find in my

## Direct Examination Cont. by Mr. Brown

1 notes that, I believe it was March of 2001, the Western  
2 States Water Council had a meeting. I did make a  
3 notation I saw Mr. Stults at that meeting and told him  
4 I had not heard anything from Mr. Moy, that I felt that  
5 it was really appropriate for Montana to start the ball  
6 rolling to get these technical discussions going, as I  
7 felt that on the Wyoming side we were better equipped  
8 with diversion data. That was our understanding of  
9 what Montana had.

10 So I expressed, again, in March to Mr. Stults  
11 that I was waiting for Mr. Moy to contact me and that I  
12 was ready, willing, and able, whenever Mr. Moy would  
13 have time, to begin those discussions. And I never did  
14 receive any contact from Mr. Moy in this regard.

15 Q. Let's look at Exhibit M134; do you recognize  
16 that document?

17 A. I do.

18 Q. What is it?

19 A. It's an e-mail from me to Mike Whitaker dated  
20 November 19 of 2001.

21 Q. Do you recognize the handwriting on that  
22 exhibit?

23 A. I do recognize it. It's Mr. Tyrrell's. It's  
24 not mine.

25 MR. BROWN: I'd like to offer Exhibit M134.

## Direct Examination Cont. by Mr. Brown

1 MR. WECHSLER: No objection.

2 SPECIAL MASTER: Exhibit M134 is admitted  
3 into evidence.

4 (Exhibit M134 admitted.)

5 BY MR. BROWN:

6 Q. What was the purpose of this e-mail?

7 A. I was actually going to miss the 2001 compact  
8 commission meeting. I think that's the only one I've  
9 missed since I worked for the State. And I was wanting  
10 to give Mr. Whitaker an update of a phone call I  
11 received from Keith Kerbel.

12 Q. And it appears from the e-mail that  
13 Mr. Kerbel is looking more at operational issues above  
14 Tongue River Reservoir. What's your understanding of  
15 what he meant by that?

16 A. Mr. Kerbel had expressed that the operations  
17 and getting Tongue River Reservoir full each year was a  
18 high priority for Montana. And that better  
19 understanding runoff estimates, how the snowpack  
20 forecasts might affect the available water for Tongue  
21 River Reservoir, that that was really the highest  
22 priority for Montana at the discussions of the  
23 technical group.

24 Q. And it appears you made preliminary  
25 arrangements to have a meeting in January, in Sheridan,

## Direct Examination Cont. by Mr. Brown

1 of the next year?

2 A. Yes, I did.

3 Q. And I think you already said you didn't  
4 attend the 2001 compact commission meeting; is that  
5 right?

6 A. That's correct.

7 Q. Do you recall if you attended any meeting  
8 with regard to the Yellowstone River Compact in 2001?

9 A. I don't believe that I did hold any -- that  
10 there were none, and I did not attend any.

11 Q. Let's look at Exhibit W65.

12 MR. BROWN: And, unfortunately, Your Honor,  
13 it appears I only have one copy of this one as well.  
14 And I don't believe it's admitted.

15 SPECIAL MASTER: And, unfortunately, it's a  
16 Wyoming exhibit, so I'm at a loss. Is it a short one?

17 MR. BROWN: It is.

18 SPECIAL MASTER: Is it going to be on the  
19 screen.

20 MR. BROWN: It's not. We could probably try  
21 to arrange that, if you'll give us just a minute.

22 SPECIAL MASTER: Sure.

23 MR. BROWN: We started a little early, so I  
24 didn't have time to check all these.

25 SPECIAL MASTER: This is Wyoming 65?

## Direct Examination Cont. by Mr. Brown

1 MR. BROWN: I've got a copy for you.

2 SPECIAL MASTER: So actually, it's Wyoming  
3 65, did you say?

4 MR. BROWN: Yes, sir.

5 SPECIAL MASTER: So we have found a copy. So  
6 does that mean it's been admitted?

7 MR. BROWN: I don't believe it has.

8 THE CLERK: No, it hasn't.

9 SPECIAL MASTER: No. Okay.

10 BY MR. BROWN:

11 Q. Do you recognize that document?

12 A. I do the body of the e-mail. I believe Susan  
13 Russell was, perhaps, Jack Stults' secretary. So I  
14 don't know about the heading, but the rest of the  
15 e-mail came from me to Jack Stults and Pat Tyrrell and  
16 Jim Kircher.

17 MR. BROWN: I'd like to offer Exhibit W65.

18 MR. WECHSLER: No objection.

19 SPECIAL MASTER: Exhibit W65 is admitted.

20 (Exhibit W065 admitted.)

21 BY MR. BROWN:

22 Q. What was the purpose of this e-mail? And let  
23 me ask you first: Do you recognize the attachment to  
24 the e-mail?

25 A. Yes, I do. Those were kind of a summary of

## Direct Examination Cont. by Mr. Brown

1 the meeting that was held on January 16th, that I had  
2 drafted.

3 Q. Okay. And so what was the purpose of the  
4 e-mail?

5 A. I was sending the e-mail to Mr. Stults,  
6 Mr. Tyrrell, and Jim Kircher as the federal chair and  
7 the two state commissioners, to let them know that this  
8 technical meeting had occurred. I believe there was  
9 reference in the 2001 commission minutes that said that  
10 this meeting would take place. And so I was just  
11 alerting them that it indeed had happened and providing  
12 the summary such that they could review it.

13 Q. Were any recommendations made to the  
14 commission as a result of this meeting?

15 A. No.

16 Q. And I see, if you look at the last paragraph  
17 on the second page, it indicates that the Committee  
18 felt there was not a need for ongoing technical  
19 committee meetings. What was the reason behind that?

20 A. Well, at this meeting, we shared our  
21 hydrographers' reports and our tab book, the  
22 tabulations of adjudicated rights, with Montana. We  
23 talked about where stream gauges were located. We  
24 talked about where SNOTEL sites were located. I think  
25 Mr. Moy felt that that information that we had given



## Direct Examination Cont. by Mr. Brown

1 them was what they were looking for at that particular  
2 time.

3 MR. WECHSLER: Your Honor, I would just  
4 object to the witness characterizing what Mr. Moy felt.

5 SPECIAL MASTER: I think, obviously, you  
6 can't testify in this particular proceeding as to what  
7 somebody else actually felt. You can answer the  
8 question, though, as to anything that the witness told  
9 you.

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

11 SPECIAL MASTER: I'm sorry. As to what  
12 Mr. Moy told you.

13 THE WITNESS: Okay. At the end of the  
14 meeting, Mr. Moy said to me that he felt -- I'm  
15 sorry -- said to me that by gaining the information  
16 that we shared, that that is what he was hoping to get  
17 out of the meeting at that time and that he believed  
18 our recommendation to make back to the commission was  
19 that there was no need for a technical committee to be  
20 formed and that he was quite busy in other basins and  
21 he did not have the time to begin yet another technical  
22 group.

23 BY MR. BROWN:

24 Q. Okay. Let's look at Exhibit J52.

25 MR. BROWN: Your Honor, can we take a quick

## Direct Examination Cont. by Mr. Brown

1 break so I can try and get these all organized?

2 SPECIAL MASTER: You certainly can. How long  
3 do you want?

4 MR. BROWN: Probably about five minutes.

5 SPECIAL MASTER: Why don't we take a  
6 ten-minute break at this point. And we'll come back at  
7 25 to the hour.

8 (Recess taken 9:23 to 9:36  
9 a.m., November 25, 2013)

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

12 MR. BROWN: Hopefully it will save us time in  
13 the long run.

14 BY MR. BROWN:

15 Q. Now I'm going to show you what's marked as  
16 Exhibit J52, Ms. Lowry.

17 MR. BROWN: And I think, Your Honor, we've  
18 got a copy up there for you.

19 SPECIAL MASTER: Okay.

20 BY MR. BROWN:

21 Q. And this is the 2002 compact commission  
22 report; is that right?

23 A. Yes, that's correct.

24 Q. And you were at this meeting?

25 A. Yes, I was.

## Direct Examination Cont. by Mr. Brown

1 Q. Let me draw your attention to page Roman  
2 Numeral III. And if you'll look at the bottom of page  
3 III, the bottom paragraph on page III, the first  
4 sentence says, "The commission discussed the need for  
5 and benefit of planning for the current and continuing  
6 drought situation, and agreed to a meeting of technical  
7 specialists in late March of 2003."

8 So apparently, the commissioners didn't take  
9 the committee's recommendation not to meet; is that  
10 right?

11 A. Yes, that's correct. At the -- at this  
12 meeting, they still felt that having a technical  
13 committee in place was a good idea and so assigned me  
14 and Mr. Kerbel to make that happen.

15 Q. So what, at this time, was your understanding  
16 of the direction the commission was giving to the  
17 technical committee?

18 A. Well, I think the numbered items in the last  
19 two lines of that same page say, No. 1, forecasting  
20 methods and information; 2, summaries of current and  
21 historical information; No. 3, discussions of water and  
22 operational issues; and 4, to make recommendations to  
23 the commission.

24 So as a result of the discussion during the  
25 commission meeting, in those four items, I attempted to

## Direct Examination Cont. by Mr. Brown

1 summarize what I felt I had heard from Mr. Stults and  
2 Mr. Tyrrell as to what they wanted our technical  
3 committee group to address.

4 Q. Now, it says there at the bottom, it says  
5 that you recommended the specific topics. But that's  
6 not, in fact, the case?

7 A. Well --

8 Q. Or it is a culmination of what was discussed  
9 at the meeting?

10 A. My recollection is that I said those things.  
11 So I think the minutes are accurate in that it was me  
12 doing the summarizing. But I was attempting to  
13 summarize what I felt I had heard the commissioners  
14 discuss prior to me doing the summary.

15 Q. Let's look at Exhibit W302. And do you  
16 recognize that document?

17 A. Yes, I do.

18 Q. What is it?

19 A. It's a summary of the meeting of the  
20 technical group, that was held on March 25th of 2003,  
21 in Sheridan.

22 Q. And did you draft this summary?

23 A. Yes, I did.

24 MR. BROWN: I'd like to offer Exhibit W302.

25 MR. WECHSLER: No objection, Your Honor. It

## Direct Examination Cont. by Mr. Brown

1 would be helpful -- I am not quite clear on if the last  
2 two pages are part of the exhibit. But I have no  
3 objection.

4 SPECIAL MASTER: Why don't we establish that  
5 first. And then I'll go ahead and rule at that point.

6 BY MR. BROWN:

7 Q. Ms. Lowry, take a look at the last two pages;  
8 are they a part of W302?

9 A. Yes.

10 Q. Do you recognize those?

11 A. I do.

12 Q. What are they?

13 A. They were a handout at the meeting by the  
14 U.S. Geological Survey representatives. I don't recall  
15 now if it was Mr. Berkas or Mr. Miller. Maybe he  
16 wasn't even there. It was likely Mr. Berkas who  
17 brought that as the USGS representative. We had asked  
18 for a summary of all gauges in the basin. Of course,  
19 some river stream gauges get discontinued for a variety  
20 of reasons. So this was a summary of -- from the  
21 USGS's perspective, the stations that had at one time,  
22 or currently, been active in the basin.

23 MR. BROWN: Okay.

24 SPECIAL MASTER: So at this point, Exhibit  
25 W302 is admitted into evidence.

## Direct Examination Cont. by Mr. Brown

1 (Exhibit W302 admitted.)

2 BY MR. BROWN:

3 Q. I want to direct your attention to the first  
4 page of Exhibit W302. And it's, I guess you would call  
5 it Section B3; do you see that?

6 A. Yes.

7 Q. And it states "Explore timing/efficiency  
8 issues among storage and direct flow uses in the  
9 basin." What's your understanding of what that means?

10 A. My recollection was that Montana was still  
11 interested in understanding more about the timing of  
12 runoff in these dry years. Of course, there isn't as  
13 much snow, and it melts earlier generally. So I think  
14 they were still wanting to know how we operated --  
15 well, we don't operate them -- how the private  
16 irrigation districts that own the facilities in the Big  
17 Horn Mountains, when they make decisions to store, when  
18 releases are made out of those storage facilities, that  
19 kind of thing.

20 Q. I'm going to direct your attention to the  
21 third page of Exhibit W302, and it's Bates-stamped  
22 MT13126. And if you'll look at the second paragraph  
23 under the General Discussion heading.

24 A. Yes.

25 Q. There's reference there to the fact that

## Direct Examination Cont. by Mr. Brown

1 Mr. Art Hayes passed out a resolution that was going to  
2 be presented to the Montana legislature. What's your  
3 recollection of that?

4 A. I recall that Mr. Hayes was alerting the  
5 technical group that the dry conditions in the Tongue  
6 River Basin had reached a status that the legislature  
7 was considering this resolution, that it was discussing  
8 an interim study. And I believe Mr. Hayes -- my  
9 recollection was that Mr. Hayes thought that this study  
10 would -- could provide a good opportunity to take a  
11 look at -- in more depth how operations are handled on  
12 both -- well, this study, I believe, was just to look  
13 at the Montana side of the line. But I think he felt  
14 it would be valuable information for the technical  
15 group to have.

16 Q. Okay. And just in general with regard to the  
17 Exhibit W302, did the Montana participants have an  
18 opportunity to review and comment on these minutes  
19 before they were finalized?

20 A. Yes, they did.

21 Q. And the committee's recommendations as a  
22 result of this meeting are found on the third page of  
23 the summary?

24 A. Yes, that's correct.

25 Q. All right. Let's fast-forward a little more.

## Direct Examination Cont. by Mr. Brown

1 We're going to talk about 2004. I'm going to show you  
2 Exhibit W72; do you recognize that document?

3 A. Yes. Again, with the similar part of the  
4 Susan Russell part I don't recognize. But the bulk of  
5 the e-mail is an e-mail that I sent to the technical  
6 group. But I also included the commissioners. And I  
7 believe Mr. Stults was asking his secretary to print  
8 it.

9 Q. Do you recognize the attachment to the  
10 e-mail?

11 A. Yes. There's two. One is the agenda, and  
12 one is the meeting summary.

13 MR. BROWN: I'd like to offer Exhibit W72.

14 MR. WECHSLER: No objection.

15 SPECIAL MASTER: Exhibit W72 is admitted.

16 (Exhibit W072 admitted.)

17 BY MR. BROWN:

18 Q. What was the purpose of this e-mail?

19 A. The e-mail itself was sent to the technical  
20 committee members, not the commissioners. So the  
21 intent of the bulk of the e-mail was to let the  
22 technical committee know that on -- at the commission  
23 meeting on December 16th of '03, that the commission  
24 agreed that our technical group should continue to  
25 meet. And then I was kind of doing a save-the-date



## Direct Examination Cont. by Mr. Brown

1 e-mail that I had arranged for a meeting room at the  
2 county courthouse in Sheridan for April 14th, which was  
3 to be the next meeting of our technical group.

4 Q. Reference about halfway through the body of  
5 your e-mail, there's reference there to including  
6 carryover storage in the Commission's annual report.  
7 What was the purpose for wanting to do that?

8 A. In the annual report is a document we refer  
9 to as Table 10, which includes a listing of the  
10 reservoirs. And I think our technical group had been  
11 tasked with making that Table 10 more detailed to  
12 include reservoirs in both states, and if there was a  
13 combination of storage prior to 1950 and any  
14 enlargements post-1950 or if they were reservoirs that  
15 were built after '50, to include a column to designate  
16 the storage in each of those two categories.

17 Q. So carryover storage had not been tracked by  
18 the commission to that degree in the past?

19 A. And I think to that degree it is important on  
20 the large facilities like Yellowtail and Boysen, I  
21 believe there had been information about storage as of  
22 the end of the water year. But for these small  
23 facilities, again, that Wyoming did not manage, they  
24 were private facilities. I believe prior to this we  
25 had not necessarily had that end-of-year content or

## Direct Examination Cont. by Mr. Brown

1 carryover storage prior to this effort.

2 Q. So in relation to the work that was being  
3 done by the technical committee at this time, why would  
4 it be important to know carryover storage?

5 A. I think we were trying to memorialize, I  
6 guess, for each year at the end of the water year  
7 should we ever find ourselves wanting to do the  
8 calculations that are in V, C, that V, C describes  
9 storage carryover. So we felt it was important to  
10 track and keep those numbers in Table 10 such that  
11 there be an easy place to reference that in the future.

12 Q. Did it have any application at the  
13 forecasting?

14 A. Yes.

15 Q. And what was that?

16 A. Mr. Roy Kaiser, who was a modeler with the  
17 NRCS was an active member of our technical group. And  
18 one of his forecast points for estimating -- trying to  
19 take the snowpack that's in the mountains and turn that  
20 into a volume water that you might expect as the spring  
21 runoff occurs, by him knowing how full the reservoirs  
22 were at the beginning of the runoff season, then he  
23 could adjust his models to reflect how much storage  
24 potentially could occur prior to his forecast points.

25 Q. And I think your e-mail also indicates that

## Direct Examination Cont. by Mr. Brown

1 the full commission was also going to meet in the  
2 spring of 2004. Was that normal for the commission?

3 A. Was not normal. They, for the last several  
4 years, had not been doing any kind of spring formal  
5 meeting. But in 2004, they decided to hold both a  
6 spring meeting and fall meeting.

7 Q. I'm going to show you what's marked as M207.  
8 And I believe this exhibit has been admitted.

9 Can you tell me what it is?

10 A. Yes. It's a copy of the meeting summary of  
11 the technical group from their April 14th, 2004,  
12 meeting.

13 Q. Did you draft these minutes?

14 A. Yes, I did.

15 Q. And it appears to me that the only Montana  
16 official that was present at this technical committee  
17 was Mr. Keith Kerbel; is that right?

18 A. Yes, that's correct. Mr. Hayes was there,  
19 but Keith was the only DNRC employee.

20 Q. And this meeting was held the day before the  
21 regular commission meeting?

22 A. Yes, that's correct.

23 Q. Did Mr. Kerbel have a chance to review and  
24 make edits to these minutes before he made them final?

25 A. Yes, he did. And on the last page, it shows

## Direct Examination Cont. by Mr. Brown

1 that he did provide edits.

2 Q. Let's turn to page 3 of the summary or the  
3 minutes. And it's Wyoming Bates stamp 18729. And I'm  
4 interested in the last paragraph on that page. And  
5 you'll see the second sentence of that last paragraph.  
6 It states, "Keith raised the issue of how the compact  
7 could be administered if Montana made a call for the  
8 9369 acre-feet of post-1950 water, if Montana could not  
9 fill Tongue River Reservoir this spring."

10 Is that the first time that you were ever  
11 asked that question?

12 A. Yes, it was.

13 Q. It was your understanding that Mr. Kerbel was  
14 asking for Wyoming to release the water or he was  
15 posing a hypothetical?

16 A. My recollection is it was a more hypothetical  
17 discussion. We, at that point in time, felt that --  
18 well, I think the fact that there is no exact language  
19 in the compact about how a call will take place, we  
20 discussed kind of that reality of the compact. And I  
21 believe the discussion here where it goes on to say  
22 that we talked about some of our other compacts where  
23 there is a provision and it is more clear, where  
24 procedures have been developed -- since I don't recall  
25 this specifically, but since I was there, I'm presuming

## Direct Examination Cont. by Mr. Brown

1 that probably the Bear River Compact came up in the  
2 discussion as an example of how Wyoming does regulate.

3 And I think we probably discussed with Keith  
4 that up to this point, no methodology nor procedures  
5 had been developed under the Yellowstone Compact. And  
6 so I think we let him know that from Wyoming's  
7 perspective, we didn't really know how the state  
8 engineer might respond if that's -- a request was made  
9 to the state engineer.

10 Q. If you'll take a look at the last sentence of  
11 that paragraph, and it spills over onto the next page.  
12 But it states that "Keith expressed that Montana would  
13 be interested in discussing with Wyoming operating  
14 scenarios for the basin that would result in a win-win  
15 solution for both states."

16 Do you recall Mr. Kerbel discussing any of  
17 those operating scenarios at that time?

18 A. Yeah. My recollection is that Mr. Kerbel  
19 used the term "win-win." And so I captured that, I  
20 guess, verbatim, you'd say. But as far as him having  
21 really any detailed discussion of what those operating  
22 scenarios might be, I don't believe that he came  
23 prepared with that.

24 Q. Okay. I'm going to hand you Exhibit J54.

25 SPECIAL MASTER: By the way, the last Exhibit

## Direct Examination Cont. by Mr. Brown

1 M207 is indeed already admitted.

2 MR. BROWN: Thank you, Your Honor.

3 SPECIAL MASTER: You're welcome.

4 BY MR. BROWN:

5 Q. And J54 is the 2004 annual report; right?

6 A. Yes, that's correct.

7 Q. And I believe there's the minutes of both the  
8 spring and the late fall meetings reflected in this  
9 report; right?

10 A. Yes.

11 Q. And I'm interested in the minutes from the  
12 spring which relate back to the exhibit we just looked  
13 at; right?

14 A. I'm sorry. There's reference to the  
15 technical committee in here, yes.

16 Q. Okay. And I'm looking at page Roman Numeral  
17 II. And if you look at the bottom of that page, that  
18 bottom paragraph appears to be a summation of what  
19 occurred at the technical committee the day before; is  
20 that right?

21 A. Yes, that's correct.

22 Q. And I'm going to read, at about the middle of  
23 that paragraph, there's a sentence that says, "The  
24 commissioners expressed the need to include some  
25 flexibility in order to meet existing obligations and

## Direct Examination Cont. by Mr. Brown

1 agreed to continue to discuss options for administering  
2 the compact and managing the available water."

3           What's your understanding with regard to what  
4 was discussed about managing the available water?

5           A.    My recollection was that Montana was still  
6 interested in better understanding the flows, what we  
7 call out of the canyons, so for Big Goose and Little  
8 Goose and the major tributaries, of the volume of water  
9 available as a result of spring runoff. And then my  
10 sense was that they still didn't feel that they really  
11 understood what that volume of water was and how  
12 Wyoming was then utilizing that water and how that  
13 volume, sort of the runoff supply, might fit with what  
14 was available at the state line or available for Tongue  
15 River Reservoir.

16           Q.    And it was a month later that Montana sent  
17 its 2004 call letter on May 18th; is that right?

18           A.    That's correct.

19           Q.    And I don't have to have you to look at that.  
20 But do you recall, generally, what you did after  
21 Wyoming received that call letter?

22           A.    Yes. I was involved with multiple meetings  
23 and phone calls between myself, Pat Tyrrell, Mike  
24 Whitaker, and then the water commissioners like Bill  
25 Knapp. I think Pat was very interested in wanting to

## Direct Examination Cont. by Mr. Brown

1 know what the situation was on the ground and that  
2 Wyoming really understand what we were doing with,  
3 again, that available water supply.

4 I think we were concerned that, perhaps, a  
5 couple sentences in that May 18th letter, it seemed  
6 that perhaps Montana had a misunderstanding about the  
7 storage, kind of capacities of our reservoirs versus  
8 carryover coming into water year '04. So we talked  
9 about drafting a letter back to Mr. Stults and in that  
10 letter clarifying what we thought was, perhaps, maybe  
11 some misunderstandings. And I think Pat was generally  
12 just interested in making sure we knew what was  
13 happening in Wyoming before we responded to that  
14 May 18th letter.

15 Q. At that time, did you have a good  
16 understanding about water rights and use in Montana?

17 A. Oh, I wouldn't say a good understanding, no.

18 Q. What was your understanding?

19 A. Well, we knew that their general adjudication  
20 was going on. We would get updates as far as which  
21 basins the adjudication review staff was concentrating  
22 on. We had been told that the court-appointed water  
23 commissioners had been in place at least a few years  
24 there in the early 2000s. I don't think we really  
25 understood yet quite what those water commissioners



## Direct Examination Cont. by Mr. Brown

1 did, whether their duties were the equivalent of our  
2 water commissioners' or not. I think we had some  
3 understanding that they shepherded the storage water  
4 from Tongue River Reservoir. But what their authority  
5 was to actually regulate on and off headgates, the  
6 purpose, whether those authorities were similar to our  
7 water commissioners or not, I don't think we understood  
8 that.

9           So we were aware that there was the Miles  
10 City Decree. But, again, we didn't know whether those  
11 decreed rights from many decades ago would be  
12 reaffirmed as part of the adjudication process or not.  
13 So we had questions about that. We knew that the  
14 Northern Cheyenne Reservation was in between Tongue  
15 River Reservoir and the T & Y Diversion. So that's an  
16 example of the many questions that we had as far as  
17 water regulation within Montana.

18           Q. What was your understanding of Montana's  
19 operation of Tongue River Reservoir?

20           A. Well, we'd certainly been given updates over  
21 the years from either Mr. McDonald or Kevin Smith. So  
22 we knew generally about the enlargement. They would  
23 make reference that they tried to keep winter flows. I  
24 think we had raised questions. And we ourselves would  
25 look often at the Miles City gauge and during the

## Direct Examination Cont. by Mr. Brown

1 winter months see sometimes quite high flows and felt  
2 that, again, given how we operate reservoirs in  
3 Wyoming, that there was water that could have been  
4 captured by Tongue River Reservoir that didn't get  
5 captured. So we had those kinds of questions.

6 Q. Okay. Was the May 18th, 2004, letter from  
7 Montana the first time since your involvement with the  
8 compact that Montana asked Wyoming to regulate its  
9 water uses?

10 A. Yes, it was.

11 Q. Let's look at Exhibit M167; do you recognize  
12 that document?

13 A. I do. Again, it's an e-mail string both  
14 occurring on June 4th of '04. I am forwarding an  
15 e-mail to Mike Whitaker. We have, with this kind of  
16 our first e-mail -- well, our e-mail system that we had  
17 at this point in time had kind of a general SEO site.  
18 And Kevin Smith had sent an e-mail to that general site  
19 and was asking for operational information. And I was  
20 forwarding that e-mail from Kevin Smith to Mike  
21 Whitaker to see what he felt Kevin was requesting.

22 MR. BROWN: I'd offer Exhibit M167.

23 MR. WECHSLER: No objection.

24 SPECIAL MASTER: Okay. Exhibit M167 is  
25 admitted into evidence.

## Direct Examination Cont. by Mr. Brown

1 (Exhibit M167 admitted.)

2 BY MR. BROWN:

3 Q. And I think you've already told us a little  
4 bit, but what was your understanding of the operational  
5 information that Mr. Smith was asking for?

6 A. Well, I think after Mike and I thought  
7 through what he might be asking for, we decided it was  
8 likely a tab book. And we had already provided a tab  
9 book to the group that came to the meeting back in  
10 January of '02. I don't recall whether Mr. Smith was  
11 at that meeting or not. My recollection is he was not.  
12 So whether Kevin had actually seen the tab book prior  
13 to this or not, I can't say.

14 Q. There's reference in this e-mail to a meeting  
15 to be held on June 10th. Can you tell us what that  
16 meeting was about?

17 A. Yes. I believe by that point in time, we  
18 had -- Wyoming had responded back to Mr. Stults'  
19 May 18th letter. We were requesting information of  
20 Montana. And the parties agreed that a face-to-face  
21 meeting might be a good idea. So I believe that's what  
22 that June 10th meeting was referring to.

23 Q. I'm going to show you exhibit --

24 SPECIAL MASTER: Before you do that, I think  
25 I know, but just to make absolutely clear for the

## Direct Examination Cont. by Mr. Brown

1 record. Could you explain what a tab book is?

2 THE WITNESS: Certainly, Your Honor. It's  
3 our tabulation of adjudicated rights. So it's kind of  
4 a bible, if you will, for our water commissioners. So  
5 in it would be a reflection of the amount of the  
6 adjudicated right. I think the Board of Control  
7 activities have been described here. So if any  
8 petition work had been done to an individual right,  
9 change of a point of diversion, anything like that,  
10 would be reflected in that tabulation of adjudicated  
11 rights.

12 SPECIAL MASTER: Okay. Thank you.

13 BY MR. BROWN:

14 Q. So, again, I'm going to show you what's  
15 marked as Exhibit W86. And do you recognize that  
16 document?

17 A. Yes, I do.

18 Q. What is it?

19 A. It's an e-mail from me to Jack Stults, dated  
20 June 18th of '04.

21 MR. BROWN: I'd offer Exhibit W86.

22 MR. WECHSLER: Your Honor, I have no  
23 objection. I do want to double-check, if I can have  
24 one moment, to see if this is a duplicate of a Montana  
25 exhibit that might already be in the record.

## Direct Examination Cont. by Mr. Brown

1           Yes, Your Honor, I believe this is a  
2 duplicate of Exhibit M186. But I have no objection.  
3 But to keep the record clean, it may be better to refer  
4 to it by that number.

5           MR. BROWN: Absolutely.

6           SPECIAL MASTER: Okay. Sounds good. And in  
7 fact, why don't I just -- let's go off the record for a  
8 second.

9   (Discussion held off the  
10   record.)

11           MR. BROWN: And, Your Honor, I'm going to  
12 hand the witness M186 so we're all on the same page.

13           SPECIAL MASTER: Great. And I appreciate you  
14 taking a moment so I could find it 'cause I actually  
15 have notes on this one.

16 BY MR. BROWN:

17           Q. And, Ms. Lowry, can you tell us what the  
18 purpose of that particular e-mail was?

19           A. Yes. It's, as I mentioned, dated  
20 June 18th of '04. So we had held our face-to-face  
21 meeting on June 10th and had discussed a variety of  
22 data sources that are available, one being the 1973  
23 Water Planning Program that Wyoming had completed. And  
24 so I was sending Jack a copy of the URL to find that  
25 publication online.

## Direct Examination Cont. by Mr. Brown

1           We also had been alerted to some work that  
2 HKM had done for the state of Montana looking at  
3 irrigated lands in Wyoming. And we had -- we were not  
4 aware of that report prior to this data exchange.

5           We received the summary report, but we didn't  
6 get the maps as a part of that HKM work. So I was  
7 asking Jack if we could get a copy of those maps.

8           And then the last data request concerned --  
9 my recollection was that Montana came to the  
10 June 10th meeting with some GIS coverages of their  
11 water rights claims. And we were asking whether we  
12 could maybe get a copy of the electronic version of  
13 those maps.

14           Q. With regard to the maps that were associated  
15 with the HKM reconnaissance study, to your knowledge,  
16 did Wyoming ever receive those maps prior to discovery  
17 in litigation?

18           A. I don't believe that we did, no.

19           Q. So this e-mail was just -- tell me if this is  
20 fair, was just part of the process of information  
21 exchange between the two states after the 2004 call?

22           A. Yes, that's correct.

23           Q. I'm going to show you Exhibit W319; do you  
24 recognize that document?

25           A. I do.

## Direct Examination Cont. by Mr. Brown

1 Q. What is it?

2 A. It's my handwritten notes from a call that I  
3 made to Keith Kerbel on June 18th of '04.

4 MR. BROWN: I'd move admission of W319.

5 MR. WECHSLER: No objection.

6 SPECIAL MASTER: Okay. Exhibit W319 is  
7 admitted.

8 (Exhibit W319 admitted.)

9 BY MR. BROWN:

10 Q. What was the purpose of the phone call  
11 between you and Mr. Kerbel on June 18th of 2004?

12 A. I was interested in better understanding how  
13 Keith and his staff reviewed the claims that were a  
14 part of the general adjudication in Montana. We were  
15 aware that these claims had been submitted. But as far  
16 as the actual review for their verifying the data that  
17 were portrayed by the water users, we were interested  
18 in whether field inspections were done. We were  
19 interested in -- I was clarifying that there was no  
20 duty of water statute in Montana, that sort of  
21 information.

22 Q. What was it that Mr. Kerbel related to you as  
23 far as Montana's adjudication?

24 A. Well, he explained to me that when the claims  
25 come in, that for a while, there had been field visits

## Direct Examination Cont. by Mr. Brown

1 made. But time and resources were an issue. So his  
2 staff more and more depended on what the landowner  
3 included in their claim and depended upon aerial  
4 photography that they had available to them. He told  
5 me that they rarely did field inspections related to  
6 the duty of water question.

7 He told me that there was no statutory duty  
8 of water and that up to 17 gallons per minute per acre  
9 was considered kind of a threshold amount; that if the  
10 claim was for less than that, they pretty much took the  
11 landowner's request. If it was greater than that, that  
12 didn't mean the landowner didn't get that flow volume;  
13 it just meant that the landowner had to do some more  
14 verification as to leaky canals or sandy soils or that  
15 sort of situation as to why they needed a larger volume  
16 of water.

17 Q. During this conversation, did Mr. Kerbel  
18 relate anything to you regarding conveyance losses  
19 below Tongue River Reservoir?

20 A. Yes, he did. We were aware that one of the  
21 earliest rights that Montana had was the T & Y Canal.  
22 And we also knew that it was many, many river miles  
23 from Tongue River Reservoir to the T & Y. And so we  
24 were interested in how conveyance losses were assessed  
25 by the water commissioners, since Keith doesn't have



## Direct Examination Cont. by Mr. Brown

1 staff that does that kind of work.

2 So he related to me that the river is divided  
3 into six segments and that they assess a 2 percent per  
4 segment conveyance loss.

5 Q. Okay. Did Mr. Kerbel tell you anything with  
6 regard to instream flow rights below Tongue River  
7 Reservoir?

8 A. Yes, he did mention that there was a 1978  
9 instream flow right in place. He mentioned that the  
10 State Fish, Wildlife & Parks was interested in flushing  
11 flows and having releases made for those flushing flow  
12 habitat improvements below Tongue River Reservoir. He  
13 didn't really quantify it, but he made the remark that  
14 Fish & Wildlife as well as the Fish & Wildlife Service  
15 of the federal agency, that they were interested in  
16 having water below T & Y Dam.

17 Q. Okay. I'm going to show you Exhibit W94; do  
18 you recognize that document?

19 A. I do.

20 Q. What is it?

21 A. Again, an e-mail string between myself and  
22 Keith Kerbel.

23 MR. BROWN: I'd like to offer Exhibit W94.

24 MR. WECHSLER: One moment, Your Honor. I  
25 haven't found my copy.





## Direct Examination Cont. by Mr. Brown

1 about.

2 Q. And did you put together a PowerPoint for  
3 Mr. Tyrrell?

4 A. I don't recall specifically, but I'm guessing  
5 I probably did.

6 Q. Do you know what kind of information you  
7 included in -- that would be included in the  
8 PowerPoint?

9 A. Yes. My recollection was that by this point,  
10 we'd received information back from people like Mike  
11 Whitaker and Bill Knapp as far as what the canyon flows  
12 had looked like, that compared with the state line  
13 gauge and the Miles City gauge, how our storage had  
14 occurred in our mountain reservoirs, that type of  
15 information.

16 Q. Okay. When you say "canyon flows," what are  
17 you referring to?

18 A. We have seasonal stream gauges that operate  
19 on tributaries like Big Goose and Little Goose that  
20 give our water commissioners a feel for the volume of  
21 water supply that's coming from snowmelt.

22 Q. Does that include Tongue River main stem  
23 flow, or you're not sure?

24 A. Yes, there's a gauge above Dayton.

25 Q. Let's look at Exhibit W102; do you recognize

## Direct Examination Cont. by Mr. Brown

1 that document?

2 A. Yes, I do.

3 Q. What is it?

4 A. Again, an e-mail string between Keith Kerbel  
5 and myself, one -- I guess they are both dated  
6 June 30th of '04.

7 MR. BROWN: I'd like to offer Exhibit W102.

8 MR. WECHSLER: No objection.

9 SPECIAL MASTER: Exhibit W102 is admitted  
10 into evidence. And I'm just looking here. You said it  
11 was an exchange.

12 THE WITNESS: Yes, I'm sorry. Just to be  
13 clear, the original message came from staff within  
14 Montana to Keith Kerbel and to Rich Moy, and then Keith  
15 forwarded that information to me.

16 SPECIAL MASTER: Okay. Thanks.

17 (Exhibit W102 admitted.)

18 BY MR. BROWN:

19 Q. What was the purpose of that e-mail?

20 A. He was forwarding on, I believe they were  
21 spreadsheets, but listings, essentially, of the water  
22 right claims work. I believe the 402J and the 42I are  
23 subsections that Montana uses in their adjudication  
24 processes. So these were for the Powder and Little  
25 Powder.

## Direct Examination Cont. by Mr. Brown

1 Q. To your knowledge, did Wyoming previously  
2 have that information?

3 A. No, I don't believe we did.

4 Q. Going to look at Exhibit W101.

5 SPECIAL MASTER: So this exhibit apparently  
6 has already been admitted.

7 MR. BROWN: Okay.

8 BY MR. BROWN:

9 Q. And, Ms. Lowry, is this another e-mail from  
10 Mr. Kerbel?

11 A. Yes, it is.

12 Q. To you?

13 A. Yes, it is.

14 Q. What was the purpose of this e-mail?

15 A. Keith was forwarding on to me a listing of  
16 the table from the Miles City Decree.

17 Q. To your knowledge, did Wyoming previously  
18 have a copy of the table that's referred to in the  
19 e-mail?

20 A. I believe it was one of the affidavits  
21 attached to the May 18th call letter.

22 Q. It was part of an affidavit?

23 A. Sorry. Whatever the right legal term is. It  
24 was a piece of paper that came along with the  
25 May 18th letter.

## Direct Examination Cont. by Mr. Brown

1 Q. And so with regard to that exhibit and the  
2 previous one, Exhibit W102, is that more of just the  
3 information exchange that was occurring between the  
4 states after the May 18th call letter?

5 A. Yes, that's correct.

6 Q. I'm going to show you Exhibit W324; do you  
7 recognize that document?

8 A. Yes, I do.

9 Q. And what is it?

10 A. The front page is a copy of the agenda of a  
11 conference call that we held between Montana and  
12 Wyoming representatives. And then the other pages are  
13 photocopies of my handwritten notes taken during that  
14 call.

15 MR. BROWN: I'd like to offer Exhibit W324.

16 MR. WECHSLER: No objection.

17 SPECIAL MASTER: Okay. Exhibit W324 is  
18 admitted.

19 (Exhibit W324 admitted.)

20 BY MR. BROWN:

21 Q. And so I think you said already this was a  
22 conference call between the states?

23 A. Yes, that's correct.

24 Q. Describe what was just generally discussed at  
25 this particular meeting.

## Direct Examination Cont. by Mr. Brown

1           A.    Well, we had done our face-to-face meeting on  
2 June 10.  And then a variety of information was shared  
3 among the states.  And then this conference call was  
4 held to, I guess, further our discussion of how or what  
5 actions we're going to take as a result of the May 18  
6 letter.

7           Q.    Turn your attention to the first page of your  
8 handwritten notes.  It's got a Wyoming Bates stamp  
9 18758.  And three-quarters down the page towards the  
10 bottom, there's an identification of terms of  
11 reference.  Can you tell us what that means?

12          A.    Yes, my recollection was that Candace West  
13 from the Attorney General's Office in Montana and Hugh  
14 McFadden, who was the Wyoming AG's rep to our agency at  
15 that time, were working on this document that got  
16 coined a term of reference.  My recollection, it was  
17 going to be a fairly general document of how the two  
18 states were hoping to work together and what they hoped  
19 to get accomplished.  But it was going to be a fairly  
20 high-level document that the governors were to sign.

21          Q.    To your knowledge, was a term of reference  
22 document ever completed and executed by the states?

23          A.    No, it was not.

24          Q.    Let's look at the second page of your  
25 handwritten notes, and Bates stamp WY018759.  And first



## Direct Examination Cont. by Mr. Brown

1 of all, I guess, could you tell us in just looking at  
2 your notes, in the left-hand column you can see names;  
3 is that right?

4 A. That's correct.

5 Q. So was your attempt to put names to the  
6 people that were making the comments to the right? Is  
7 that accurate? Is that fair?

8 A. Yes.

9 Q. And I'll point your attention to the  
10 left-hand column. I see the name Rich. Was that Rich  
11 Moy?

12 A. Yes, it was.

13 Q. And there's a reference to, in quotes, "need  
14 to define and not act on hunch," end quotes. What was  
15 your understanding with regard to what Mr. Moy had  
16 related?

17 A. Again, I had mentioned the water supply  
18 available coming off of the mountains from snowpack  
19 melt. Again, I believe that Mr. Moy was expressing  
20 that rather than Montana just guess what that water  
21 supply was and perhaps jump to the conclusion that  
22 Wyoming was using more water than we were, he was  
23 asking whether we could better show Montana really what  
24 that water supply was that was available to us and how  
25 we were putting that water to use.

## Direct Examination Cont. by Mr. Brown

1 Q. And I'll have you turn to the next page which  
2 is page 3 of your notes. And it's Bates stamp  
3 WY0187670. And, again, about the middle of the page,  
4 there's an indication there from Mr. Moy. Can you tell  
5 us what he was -- first of all, what that says? And  
6 then, second of all, what he was trying to relate with  
7 that comment?

8 A. Okay. What I jotted down was "needs  
9 technical committee to review and study what's really  
10 being diverted and how management changes during the  
11 dry years. Also wants to look at Powder."

12 Q. What was your understanding of what it meant?

13 A. I think they were -- I believe Mr. Moy was  
14 asking whether we had the ability through our water  
15 commissioners' records to, not exactly realtime, but at  
16 least during the irrigation season and not waiting  
17 until at the end of the water year, whether we had the  
18 ability to show what was being diverted, when and where  
19 and to what rights.

20 Q. Okay. Let's turn to page 4 of your notes,  
21 which is Bates-stamped WY018761. And you'll see three,  
22 what look like kind of, bullet points. And I just want  
23 you to read those for us, in about the middle of the  
24 page. Because I don't know that I understood what  
25 those meant. So I need you to read them so it's clear

## Direct Examination Cont. by Mr. Brown

1 what your notes mean here.

2 A. Okay. So the first one that's EX and a  
3 triangle, that means "exchange technical data requests  
4 by 7/7." So the technical staff had been given a  
5 number of data points to share with one another. So  
6 essentially both states had agreed that by July 7th, we  
7 would do that data exchange.

8 The second bullet says "DOQQ for Wyoming."  
9 And I don't remember exactly what that stands for. But  
10 those are -- that's aerial photography. And the --  
11 those photos were available electronically through kind  
12 of a GIS clearinghouse that Wyoming has. I don't  
13 recall that discussion exactly. But my guess is that  
14 we had agreed to let Montana know where -- what the  
15 location was of those DOQQs, and they could go download  
16 them themselves.

17 And then the final item was, "Jack will get  
18 dates for Martz." And I think what that meant was we  
19 were aware that the Western Governors' Association was  
20 having some meetings where Governor Martz and Governor  
21 Freudenthal might already be at a meeting together. So  
22 I think Jack was checking that schedule to see. I  
23 think at the time we had this meeting, Hugh and Candy  
24 were still working on the terms of reference. And so I  
25 believe that's why -- when the governors might be

## Direct Examination Cont. by Mr. Brown

1 seeing one another was important.

2 Q. Okay. And just above the reference to Pat --  
3 what I assume is Pat Tyrrell; is that right?

4 A. Yes, that's correct.

5 Q. Just above that, tell us what that reference  
6 is.

7 A. That says "Montana will work on"?

8 Q. Yes, ma'am.

9 A. "Montana will work on schedule for tech  
10 committee and get with Mike," meaning Mike Whitaker,  
11 "on whether they will visit Sheridan prior to 8/2." So  
12 we had tentatively set another meeting for -- of the  
13 principals, me, Pat, and Jack, for August 2nd.

14 Q. And during this meeting, had Wyoming invited  
15 Montana to Wyoming to look at what was going on?

16 A. Yes, we had.

17 Q. Okay. And what's the last reference at the  
18 bottom of the page?

19 A. It says "press - work towards solutions  
20 without litigation. Montana coming to look at what's  
21 happening in Wyoming. Get better understanding of how  
22 water is used on both sides of the border." We ended  
23 this meeting agreeing with each other on if either  
24 state was asked by a reporter, what we would say to the  
25 press. After our June 10th meeting, there was some

## Direct Examination Cont. by Mr. Brown

1 press reported in the Billings Gazette that we felt he  
2 was not in accordance with what had been agreed to at  
3 the June 10th meeting. So I think Pat was just  
4 reiterating that we shouldn't be running to the press  
5 with items that were outside what the two states had  
6 agreed to.

7 Q. What was the press event that occurred after  
8 the June 10 meeting?

9 A. Mr. Moy was quoted in the Billings Gazette on  
10 June 11 essentially saying that they were preparing to  
11 move forward with litigation against Wyoming.

12 Q. Okay. Let's look at Exhibit W106; do you  
13 recognize that document?

14 A. Yes, I do.

15 Q. What is it?

16 A. It's an e-mail from Keith Kerbel to me on  
17 July 1st of '04.

18 MR. BROWN: I'd like to offer Exhibit W106.

19 MR. WECHSLER: No objection.

20 SPECIAL MASTER: Exhibit W106 is admitted.

21 (Exhibit W106 admitted.)

22 BY MR. BROWN:

23 Q. Can you tell us the purpose of this e-mail?

24 A. Yes. This was the day after we'd had the  
25 June 30th conference call we were just talking about.

## Direct Examination Cont. by Mr. Brown

1 And in the conversation, Pat had mentioned our duty of  
2 water being 1 CFS per 70 acres. Keith apparently had  
3 gone to our website and was doing a little research on  
4 his own. And he was asking about our -- what we call  
5 our surplus water right, where if we're in a free river  
6 condition, those rights with a pre-'45 right can take a  
7 double if they have the capacity in their ditch.

8 Q. Did you get back to Mr. Kerbel and describe  
9 to him our surplus water statute, Wyoming's surplus  
10 water statute? Do you recall?

11 A. I don't recall. I'm guessing that I did or  
12 asked him to call Mr. Whitaker, since he would have a  
13 better idea on how often that actually happened up in  
14 this basin.

15 Q. Okay. Look at Exhibit W108. And I believe  
16 this has already been admitted.

17 SPECIAL MASTER: It has been admitted.

18 BY MR. BROWN:

19 Q. What is this e-mail, Exhibit W108?

20 A. This is an e-mail from me to the primary  
21 members of the technical committee, dated July 2nd of  
22 '04.

23 Q. What was its purpose?

24 A. I was transmitting to them another version of  
25 the minutes for the April 14th technical meeting.

## Direct Examination Cont. by Mr. Brown

1 Q. So you're providing yet another opportunity  
2 for the meeting attendees to edit those minutes should  
3 they wish?

4 A. Yes, that's correct. Since it says shown in  
5 strike-through format, I'm assuming that I had received  
6 some comments. And so I wanted to make sure that  
7 everybody saw each other's comments before we decided  
8 that it was really a final version.

9 Q. Okay. Is that process the typical way that  
10 those types of minutes would become finalized?

11 A. At least when I was doing the minutes, that's  
12 correct.

13 Q. Okay. And it seems that you did the minutes  
14 quite often?

15 A. That's the way it seems, yes.

16 Q. Look at Exhibit W133. And do you recognize  
17 that document?

18 A. Yes.

19 Q. What is it?

20 A. It's an e-mail from Keith Kerbel to me dated  
21 July 6 of '04.

22 MR. BROWN: I'd offer Exhibit W133.

23 MR. WECHSLER: No objection.

24 SPECIAL MASTER: Okay. Exhibit W133 is  
25 admitted.

## Direct Examination Cont. by Mr. Brown

1 (Exhibit W133 admitted.)

2 BY MR. BROWN:

3 Q. What was the purpose of this e-mail?

4 A. Keith, he was sending on additional summary  
5 spreadsheets of the adjudicated claims that had been  
6 filed as part of the general adjudication. This time  
7 they were for the Clark's Fork and segments of the  
8 Tongue and Powder and Little Powder.

9 Q. So this was just more of communications with  
10 regard to the information sharing after the 2004 call?

11 A. Yes, that's correct.

12 Q. Okay. Do you know if Wyoming previously had  
13 information that was communicated in this e-mail?

14 A. No, I don't believe we did have it.

15 Q. Let me show you Exhibit W112; do you  
16 recognize this document?

17 A. Yes, I do.

18 Q. What is it?

19 A. It was an e-mail from Wayne Berkas to Mike  
20 Whitaker, Carmine LoGuidice, and Keith Kerbel. But I  
21 was shown as a CC.

22 MR. BROWN: I'd like to offer Exhibit W112.

23 MR. WECHSLER: No objection.

24 SPECIAL MASTER: Okay. Exhibit W112 is  
25 admitted into evidence.



## Direct Examination Cont. by Mr. Brown

1 (Exhibit W112 admitted.)

2 BY MR. BROWN:

3 Q. What was the purpose of this e-mail from --  
4 first of all, who is Mr. Berkas?

5 A. Wayne Berkas is the data chief for the USGS  
6 office in Montana. In addition to those duties of  
7 being data chief, he acts as the secretary for the  
8 commission. So he works up the minutes for the annual  
9 report.

10 MR. BROWN: And for the record, it's  
11 B-e-r-k-a-s.

12 BY MR. BROWN:

13 Q. What was the purpose of this e-mail?

14 A. I had mentioned earlier the Table 10. So the  
15 summary table in the annual report that talks about  
16 reservoirs. And the technical committee had been  
17 charged with making some changes to that table and  
18 adding some columns. My recollection was that Wayne  
19 made a first stab at adding that type of information.  
20 And so I think he was just double-checking with the  
21 field staff to see whether he was accurately portraying  
22 the capacities and carryover amounts, that kind of  
23 thing.

24 Q. So this is just a continuation of the work  
25 from the April 14th technical meeting with regard to

## Direct Examination Cont. by Mr. Brown

1 the reservoir listing?

2 A. Yes, that's correct.

3 Q. And I don't remember if I asked you when we  
4 previously talked about that. But how was it decided  
5 what reservoirs to include in that list?

6 A. Well, it was definitely a work in progress.  
7 The technical group has massaged Table 10 multiple  
8 times.

9 I believe that generally we were looking at  
10 facilities over 1000 acre-feet, so not wanting to kind  
11 of clutter the table with a lot of the small reservoirs  
12 where we may not have carryover data, but a few of --  
13 there are a few still on the table that are smaller  
14 than a thousand acre-feet if we feel like their --  
15 either their location or the ownership of the reservoir  
16 is important for some other reason.

17 Q. Okay. I'm going to show you Exhibit W127; do  
18 you recognize that document?

19 A. Yes, I do.

20 Q. What is it?

21 A. It's an e-mail from Pat Tyrrell to me, Hugh  
22 McFadden, and Mike Whitaker, dated July 29th of '04.

23 MR. BROWN: What I previously referred to is  
24 Exhibit W127 has been already admitted as Exhibit M172.  
25 And so I'll refer to that document as M172. Okay?

## Direct Examination Cont. by Mr. Brown

1           SPECIAL MASTER: Okay. Can we take a quick  
2 break?

3                           (Discussion held off the  
4 record.)

5           SPECIAL MASTER: Okay. We can go back on the  
6 record.

7 BY MR. BROWN:

8           Q. Okay. Ms. Lowry, I've now handed you Exhibit  
9 M172. Can you tell us what the purpose of that e-mail  
10 was?

11           A. Yes. Mr. Tyrrell had had a phone call with  
12 Jack Stults updating one another on where they felt  
13 they were with the progress being made. Pat then  
14 described that the term of reference document was not  
15 coming together that easily. And so perhaps we should  
16 change gears a bit.

17                           A lot of data requests had been shared  
18 between the two states. And so Jack and Pat agreed  
19 that myself and Rich should get together and go over  
20 these various letters that were requesting information,  
21 many of which had several items on them. And Jack and  
22 Pat felt that prioritizing those data requests would be  
23 a good next move.

24                           And Pat relayed that he and Jack had agreed  
25 to talk on August 20th to get another update on how

## Direct Examination Cont. by Mr. Brown

1 everything was progressing.

2 Q. So just so I make sure I understand, you're  
3 familiar with the fact that the states exchanged a  
4 formal information request by letter; right?

5 A. Yes, we had.

6 Q. And so had that information request exchange  
7 happened by this time?

8 A. Yes, it had.

9 Q. And so was some of that request for  
10 information, was that what you and Mr. Moy were  
11 supposed to prioritize?

12 A. Yes, that's correct.

13 Q. Let me show you Exhibit W130; do you  
14 recognize that document?

15 A. I do.

16 Q. What is it?

17 A. It's an e-mail from me to Rich Moy dated  
18 August 4th of '04.

19 MR. BROWN: I'd like to offer Exhibit W130.

20 MR. WECHSLER: No objection.

21 SPECIAL MASTER: Exhibit W130 is admitted.

22 (Exhibit W130 admitted.)

23 BY MR. BROWN:

24 Q. What was the purpose of this e-mail from you  
25 to Mr. Moy?

## Direct Examination Cont. by Mr. Brown

1           A.    It was follow-up in regards to the call that  
2 Jack and Pat had had on July 29th instructing Rich and  
3 me to then begin this prioritization process of the  
4 various data requests that had been made and to see  
5 whether Montana was interested in having a tour.

6           Q.    You need to take a minute?

7           A.    No.  Let me get a cough drop, and I'll be  
8 good.

9           Q.    Okay.  Did you suggest at this time setting  
10 up a meeting in Sheridan for technical discussions?

11          A.    Yes.  I had offered up a few dates that were  
12 open on my calendar for Mr. Moy, seeing whether those  
13 were good dates for him.

14          Q.    And I think you mentioned already that you  
15 had offered to provide Montana a tour.  Was that of the  
16 Tongue River Basin in Wyoming?

17          A.    Yes, it was.  Again, I think because we'd  
18 been asked a lot of questions about the stream gauges  
19 and our ability to understand the volume of water  
20 available to us, we wanted to take Montana to those  
21 gauge sites.  We wanted to take them up Little Goose  
22 and Big Goose and show them where the SNOTEL sites were  
23 and give them an understanding of -- you know, there's  
24 nothing like seeing it on the ground for yourself, so a  
25 better understanding of the location of those gauges

## Direct Examination Cont. by Mr. Brown

1 relative to where they lie geographically.

2 Q. Did Montana ever take advantage of that  
3 invitation in 2004?

4 A. No, they did not.

5 SPECIAL MASTER: I wonder whether this would  
6 be a good time for the second of the morning breaks.  
7 It would give you an opportunity just to rest your  
8 voice for ten minutes. And I'm sure the court reporter  
9 would also appreciate the break. I assume that was all  
10 the questions you had regarding W130?

11 MR. BROWN: Yes, sir.

12 SPECIAL MASTER: Okay. Why don't we go ahead  
13 and take the morning break -- second morning break, and  
14 we'll come back at about five to by that clock.

15 (Recess taken 10:45 to 10:57

16 a.m., November 25, 2013)

17 SPECIAL MASTER: Okay. Everyone can be  
18 seated. Again, just let me know if you need a break.

19 THE WITNESS: I appreciate that. Thank you.

20 BY MR. BROWN:

21 Q. Okay. Ms. Lowry, I'm going to show you  
22 Exhibit W131. And do you recognize that document?

23 A. I do.

24 Q. What is it?

25 A. It's an e-mail from me to the primary members

## Direct Examination Cont. by Mr. Brown

1 of the tech committee dated August 5th of '04.

2 MR. BROWN: I'd offer Exhibit W131.

3 MR. WECHSLER: No objection.

4 SPECIAL MASTER: Okay. Exhibit W131 has  
5 already been admitted.

6 THE CLERK: Yes, it has.

7 MR. BROWN: Well, then I don't need to offer  
8 it, Your Honor.

9 SPECIAL MASTER: You don't need to. It would  
10 have been troublesome if there would have been an  
11 objection.

12 MR. BROWN: That one got past me. I  
13 apologize.

14 SPECIAL MASTER: No problem.

15 BY MR. BROWN:

16 Q. Ms. Lowry, just to try to finally close the  
17 loop with regard to the April 14 technical committee  
18 minutes, is that the final e-mail -- the conclusion  
19 where you're sending out those final minutes to the  
20 attendees of that meeting?

21 A. Yes, that's correct.

22 Q. Let's look at Exhibit W119; do you recognize  
23 that document?

24 A. Yes, I do.

25 Q. What is it?

## Direct Examination Cont. by Mr. Brown

1           A.    It contains two e-mails between myself and  
2 Rich Moy.  One is dated August 6th, and the reply is  
3 dated August 17th.

4                   MR. BROWN:  I'd like to offer Exhibit W119.

5                   MR. WECHSLER:  No objection.

6                   SPECIAL MASTER:  Okay.  Exhibit W119 is  
7 admitted.

8   (Exhibit W119 admitted.)

9 BY MR. BROWN:

10           Q.    What was the purpose of your original  
11 August 6 e-mail to Mr. Moy?

12           A.    I was following up to an earlier e-mail when  
13 I was suggesting dates that we could get together to  
14 accomplish the tasks that we'd been assigned by Jack  
15 and Pat to do this prioritization.  And I was letting  
16 Rich know that I now had had a conflict develop with  
17 one of the sets of dates that I had provided him.

18           Q.    Okay.  And what was Mr. Moy's response?

19           A.    Well, he apologized for not getting back  
20 earlier.  He had been on vacation.  And he then came  
21 back and suggested whether October 21st would work.

22           Q.    Have you look at Exhibit W137; do you  
23 recognize that document?

24           A.    Yes, I do.

25           Q.    What is it?



## Direct Examination Cont. by Mr. Brown

1           A.     Again, it's two e-mails: the first one from  
2 me to Rich Moy and Keith Kerbel on October 15, and then  
3 a reply later in the day from Rich Moy to me.

4           MR. BROWN:   I'd like to offer Exhibit W137.

5           MR. WECHSLER:   No objection.

6           SPECIAL MASTER:   Okay.   Exhibit W137 is  
7 admitted.

8                                 (Exhibit W137 admitted.)

9 BY MR. BROWN:

10          Q.     What was the purpose of your original e-mail  
11 dated October 15, '04?

12          A.     We'd had earlier agreed that October 21st was  
13 going to be a date that we could do this prioritization  
14 work and that Mike Whitaker would be prepared to show  
15 Montana examples of how we did field regulation and  
16 administration.   And so I was just sending a reminder  
17 e-mail that we had lined up space at Mike Whitaker's  
18 office to do that meeting at 9:00 a.m. on October 21st.

19          Q.     And what was Mr. Moy's response?

20          A.     He replied that he thought that Jack had told  
21 Pat that Rich wasn't going to be able to make it on the  
22 21st, that he'd had some other things come up and that  
23 he wasn't going to be able to make that meeting.

24          Q.     Did a technical meeting ever take place in  
25 2004 after the May 18th call?

## Direct Examination Cont. by Mr. Brown

1           A.    Well, I'd just like to clarify, I guess, that  
2 this was not to be a full technical committee of the  
3 commission. This was to be kind of a work group of  
4 just Montana and Wyoming. And after the assignment was  
5 made from the phone call that Jack and Pat had given  
6 Rich and me direction to work on that prioritization,  
7 that effort, we did not ever hold that meeting.

8           Q.    Okay. And I think that's all the documents I  
9 have for you with regard to 2004.

10                    Compared to all the other years that you were  
11 involved with the Yellowstone River Compact, describe  
12 your involvement with the Yellowstone River Compact in  
13 2004.

14           A.    Way, way more complicated than working on  
15 more topics. The amount of data exchange, the response  
16 to the May 18th letters, all of that invoked much more  
17 effort and time being spent on those issues than we had  
18 ever in the past.

19           Q.    So let's move into 2005, and I'm going to  
20 show you Exhibit W340. And do you recognize that  
21 document?

22           A.    Yes, I do.

23           Q.    What is it?

24           A.    It's the summary of the meeting discussions  
25 of the technical committee on April 25th in Sheridan.

## Direct Examination Cont. by Mr. Brown

1 Q. Did you draft this summary?

2 A. Yes, I did.

3 MR. BROWN: I'd like to offer Exhibit W340.

4 MR. WECHSLER: No objection.

5 SPECIAL MASTER: Okay. Exhibit W340 is  
6 admitted.

7 (Exhibit W340 admitted.)

8 BY MR. BROWN:

9 Q. And, Ms. Lowry, if you'll look at the top  
10 left-hand corner of the first page of that exhibit, it  
11 says, "Final 10/14/05," which is a date, "(no changes  
12 from 9/28 draft.)" Do you see that?

13 A. I do.

14 Q. So is this the final version of these  
15 minutes, as far as you know?

16 A. Yes, I believe that's correct.

17 Q. Okay. And my question is: Did these -- this  
18 summary or these minutes go through the same kind of  
19 review and edit process we went through with regard to  
20 the April 2004 technical committee meeting minutes?

21 A. Yes, that's correct. I reflect back on my  
22 little by-line at the bottom where I say submitted by  
23 me June 6th. So I'm presuming that between  
24 June 6th and September 28th, that there had been  
25 different versions and opportunity to edit. And then I

## Direct Examination Cont. by Mr. Brown

1 was sending out this final letting the technical  
2 committee members know that from the version I had sent  
3 out on September 28th, there had been no additional  
4 revisions.

5 Q. Okay. And turning to the second page of this  
6 exhibit, and I'm looking under the section 5 heading  
7 entitled Reservoir Operations and Storage Information  
8 in Both States. And without reading through there, it  
9 appears that both states presented reservoir operations  
10 and storage information at this meeting; is that right?

11 A. Yes, that's correct.

12 Q. And can you describe what kind of information  
13 was shared?

14 A. Yes. The water planning effort within  
15 Wyoming, we had been -- I believe that the  
16 Powder/Tongue River Basin plan had been completed by  
17 this point in time. And one of the technical memos  
18 that the consultants that worked for the water  
19 development commission in completing that plan, one of  
20 those tech memos was specifically related to reservoir  
21 operations. And the consultants visited the sites.  
22 They took photos of the dam and the outlet works and  
23 that sort of thing and then provided a short summary of  
24 if there was an irrigation district that was the owner,  
25 how they used that storage generally.

## Direct Examination Cont. by Mr. Brown

1           So Jodee Pring and Mike Whitaker did a  
2 run-through of these facilities that I have listed here  
3 specifically to summarize and to show the kind of data  
4 that could now be found online via the water plan  
5 concerning the operations for each of those facilities.

6           Q.    And had this kind of information been shared  
7 before the technical meetings?

8           A.    I'm sorry.  I didn't quite hear you.

9           Q.    That's okay.  Had this kind of information  
10 been shared previously at the technical meetings?

11          A.    This kind of information, I'd say not in this  
12 detail.  Because we didn't have the technical memo  
13 specific to each reservoir prior to that.  And I think  
14 these tech memos make a very nice summary place where  
15 internal to Wyoming we use that website a lot, too, if  
16 we have a quick question.  So I think we wanted to let  
17 Montana know that that resource was now available.  So  
18 we talked probably more in detail than we would have in  
19 previous years.

20          Q.    And how about Montana?  Did they share  
21 information with regard to reservoir operations and  
22 storage?

23          A.    Yes, they did.  Kevin Smith gave us a pretty  
24 detailed description of the water rights within Tongue  
25 River Reservoir, the enlargement, its relationship to

## Direct Examination Cont. by Mr. Brown

1 the Northern Cheyenne, and generally how Tongue River  
2 Reservoir is operated.

3 Q. And had Montana presented that kind of  
4 information in that detail previously?

5 A. Perhaps not at that level of detail, no.

6 Q. Okay. And looking at the third page of these  
7 minutes under the section No. 8 entitled Other Items.  
8 And the first sentence under the Other Items section  
9 says, "Jack Stults commented that we have not gone the  
10 next step with taking the water supply information and  
11 trying to relate that to how many water rights will get  
12 filled and who will get turned off."

13 What was your understanding of what  
14 Mr. Stults was commenting on there?

15 A. I think that Jack was reflecting that the  
16 technical committee had done a pretty good job of  
17 getting information from the NRCS and from the National  
18 Weather Service, those federal entities that do water  
19 supply forecasting, but that on the side of the  
20 equation of then where that water gets diverted or by  
21 whom it is utilized and the capability to perhaps  
22 forecast that based on an April 1 forecast, could we  
23 ever develop a modeling effort that was sophisticated  
24 enough to know the level of priorities that might be  
25 regulated to. I think he was suggesting that we were

## Direct Examination Cont. by Mr. Brown

1 far from being able to do that kind of forecasting.

2 Q. And was the necessary information ever  
3 developed?

4 A. No, it was not.

5 Q. Let me show you Exhibit W143. And do you  
6 recognize that document?

7 A. Yes, I do.

8 Q. What is it?

9 A. It's a memo from me to Pat Tyrrell dated  
10 July 26th, '05.

11 MR. BROWN: I'd like to offer Exhibit W143.

12 MR. WECHSLER: No objection.

13 SPECIAL MASTER: Okay. Exhibit W143 is  
14 admitted.

15 (Exhibit W143 admitted.)

16 BY MR. BROWN:

17 Q. What was the purpose of this memorandum?

18 A. Pat was getting ready to have a meeting with  
19 the governor. And Pat had asked me if I could just  
20 pull together some current data about what kind of a  
21 water year 2005 was. So I looked at a few key gauges  
22 in the Big Horn and Tongue and Powder River Basins and  
23 summarized those data.

24 Q. Okay. And I just want to draw your attention  
25 to the paragraph at the bottom of the page. And

## Direct Examination Cont. by Mr. Brown

1 there's a discussion with regard to setting aside funds  
2 to explore with Montana the administration of post-'50  
3 rights. Can you describe what's contemplated there?

4 A. Sure. Pat was willing to -- in our budget  
5 requests, to request funds. At this time, we are  
6 contemplating doing a joint study with the state of  
7 Montana to come up with the resources to do more of  
8 that demand side, if you will. So the suggestion -- I  
9 guess, the reflection that Jack Stults had at the  
10 meeting that said we're doing pretty good with knowing  
11 what the water supply is but we're not as sophisticated  
12 at knowing and being able to forecast where the water  
13 is going to go. So that kind of review where  
14 diversions are, doing some mapping work, that is what  
15 was contemplated with this request.

16 Q. Okay. I'm going to show you Exhibit J55.  
17 And that's the 2005 compact commission annual report;  
18 right?

19 A. Yes, that's correct.

20 Q. And you were at both meetings in 2005; right?

21 A. Yes.

22 Q. And I want to draw your attention to page IX,  
23 and that's Roman Numeral IX. And at the bottom  
24 right-hand corner, you'll see a WY016257. Are you  
25 there?



## Direct Examination Cont. by Mr. Brown

1           A.    Yes, I am.

2           Q.    And I want to direct you to the fourth  
3 paragraph down from the top.  And it -- I'm going to  
4 read it.  "Ms. Lowry advised the commission that the  
5 technical committee needs some direction for their task  
6 inserting reporting on years of drought.  If the  
7 commission wants the technical committee to forecast  
8 and estimate the number of water rights that could be  
9 filled, the task would require state-to-state  
10 discussions and more commitment in time from each state  
11 to better understand each state's administrative  
12 system."

13                   Can you describe a little bit more fully what  
14 you meant by that comment at the meeting?

15           A.    Yes.  I believe this was a follow-on to the  
16 discussion that we had at the technical committee that  
17 said in order to really forecast, based on a given  
18 water supply, how the regulatory scheme of that given  
19 water supply might play out, would take a fair bit of  
20 effort.  There's a lot of things that can happen during  
21 the course of a water year.  And in order to put  
22 together that kind of a model, that's fairly  
23 sophisticated work.

24                   So I think I was suggesting that, as the  
25 technical group, we were hearing Mr. Stults, that there

## Direct Examination Cont. by Mr. Brown

1 was a next step to take. But that next step would be  
2 expensive and would take quite a commitment of  
3 resources from both of our states. So I guess I felt  
4 that as the representative for the technical committee,  
5 I wanted to alert the commission that, yes, we're  
6 hearing you, but here's the direction that would be  
7 helpful to the technical committee in order to go that  
8 next step.

9 Q. And what was Mr. Stults' response to your  
10 alerting them of that next step expense?

11 A. Well, I think the next paragraph describes  
12 that he understood that that would be a great thing to  
13 do next but that he said that it was not feasible at  
14 that time because of constraint on their resources.

15 Q. I'm going to show you Exhibit M212; do you  
16 recognize that document?

17 A. Yes, I do.

18 Q. What is it?

19 A. It's a summary of the discussions of the  
20 technical committee, held on April 12th of 2006, at  
21 Thermopolis.

22 Q. And did you draft this summary?

23 A. Yes, I did.

24 MR. BROWN: I'd like to offer Exhibit M212.

25 MR. WECHSLER: No objection.

## Direct Examination Cont. by Mr. Brown

1           SPECIAL MASTER: Okay. Exhibit M212 is  
2 admitted.

3                                 (Exhibit M212 admitted.)

4 BY MR. BROWN:

5         Q. And I'd like to draw your attention to the  
6 second page. And under the section entitled --  
7 No. 4 -- Reservoir Operations and Storage Information  
8 in Both States. And the last -- well, let me read the  
9 last two sentences of that first paragraph. "Jack  
10 noted that the committee is getting more sophisticated  
11 about the water supply piece of water budget." We  
12 don't have an equal amount of information on the demand  
13 side yet. Perhaps the joint state study, if funded,  
14 would provide the resources to gather more of the  
15 demand data."

16                         What is the demand data that your  
17 understanding is Mr. Stults is referring to there?

18         A. Well, I think similar to the discussion on  
19 the last exhibit, it was better mapping, better  
20 understanding of geographically where the priority of  
21 water rights are located in relation to one another. I  
22 think a review of the water rights. We -- well,  
23 certainly true in Wyoming -- I'm guessing, perhaps,  
24 true in Montana as well -- but there are water rights  
25 of record that are still valid but, perhaps, don't take

## Direct Examination Cont. by Mr. Brown

1 water every year, so understanding where those water  
2 rights are. I think the Court has seen the stick  
3 diagram that Bill Knapp uses. So expanding that  
4 relationship of where water rights are in relation to  
5 each other and better forecasting the volume of water  
6 necessary to satisfy those rights and priority.

7 Q. I'm going to draw your attention to the third  
8 page of this summary. It's WY027363. And under  
9 section 7 entitled Wyoming's Budget Request and  
10 Approval for Joint Study, is that, again, in reference  
11 to the same study that you've been referring to?

12 A. Yes, it is.

13 Q. So at this point, was Montana still  
14 expressing an interest in pursuing that joint study?

15 A. Yes, they were.

16 Q. I'm going to show you Exhibit W154; do you  
17 recognize that document?

18 A. Yes, I do.

19 Q. What is it?

20 A. It's an e-mail from Bill Knapp to me, dated  
21 August 3rd of 2006.

22 MR. BROWN: I'd like to offer Exhibit W154.

23 MR. WECHSLER: No objection.

24 SPECIAL MASTER: Okay. Exhibit W154 is  
25 admitted.

## Direct Examination Cont. by Mr. Brown

1 (Exhibit W154 admitted.)

2 BY MR. BROWN:

3 Q. Ms. Lowry, you're aware that Montana sent  
4 another call letter in 2006; right?

5 A. Yes, that's correct.

6 Q. Do you recall the date of that call?

7 A. The end of July. I think it was the 26th or  
8 28th, something like that.

9 Q. So this e-mail would have been after that  
10 call?

11 A. Yes, that's correct.

12 Q. So what was the purpose of this e-mail?

13 A. Again, Bill Knapp is who I worked with in the  
14 Sheridan office because of his long knowledge and good  
15 history on the Tongue. So similarly to our response --  
16 or I guess Pat's request of us technical folks after  
17 the May 18th, '04, letter, I was touching base with  
18 Sheridan to see what information they had to show what  
19 the situation was on the ground as of the date of the  
20 call letter.

21 Q. Okay. So you were just investigating to try  
22 to figure out what was going on in the Tongue River  
23 Basin in Wyoming?

24 A. Yes, that's correct.

25 Q. It appears through this e-mail you're also

## Direct Examination Cont. by Mr. Brown

1 doing some investigation with regard to Tongue River  
2 Reservoir; is that right?

3 A. Yes, I think Bill Knapp was letting me know  
4 that he'd been keeping track and looking at the flows  
5 available to Tongue River Reservoir, and that he was  
6 noting that the December through February flows, that  
7 there had actually been releases from the dam.

8 Q. And so why was Wyoming looking into that  
9 information?

10 A. I think that if a part of the call letter was  
11 concerned that Tongue River Reservoir did not fill,  
12 that Bill saw this as evidence to show that there was,  
13 in fact, water supply available to Montana had they  
14 chosen to store it, and to then send a letter the  
15 following July suggesting that somehow operations on  
16 the Wyoming side had some impact on their ability to  
17 fill Tongue River Reservoir. I think he was pointing  
18 out that there was ample supply available to them had  
19 they chose to store it.

20 Q. Okay. Look at Exhibit W155 -- actually, let  
21 me change that.

22 Look at Exhibit M495. Can you tell us what  
23 this document is?

24 A. Yes. It's an e-mail -- again, an e-mail  
25 string from between Bill Knapp and myself and Mike

## Direct Examination Cont. by Mr. Brown

1 Whitaker.

2 Q. Do you recognize the attachment? What it is?

3 A. It appears to be Bill Knapp's schematic of  
4 the various water rights in Wyoming along the Tongue  
5 and tributaries.

6 Q. And just wondering, is that just what you  
7 were referencing in your description earlier about the  
8 study?

9 A. Yes, the same document.

10 Q. What was the purpose of these e-mails?

11 A. It was Bill's response with some dates of  
12 regulation. When we received the late July letter from  
13 Montana, again, we wanted to assess where we were at in  
14 Wyoming. And so Bill was letting us know that he was  
15 regulated back to 1881 and 1884 on the main tributaries  
16 to the Tongue.

17 Q. Look at Exhibit W163.

18 SPECIAL MASTER: It has apparently been  
19 admitted. So for the record, it's been admitted.

20 BY MR. BROWN:

21 Q. Ms. Lowry, this is a set of e-mails between  
22 you and Mr. Dalby; is that right?

23 A. Yes, that's correct.

24 Q. Can you tell us just generally what the  
25 subject matter of this e-mail string was?

## Direct Examination Cont. by Mr. Brown

1           A.    Yes.  We were still working on the  
2  presumption that both states would be able to acquire  
3  their funding for the joint study.  I believe it was at  
4  the commission meeting prior to this that Mr. Stults  
5  had named Chuck Dalby as the main point of contact for  
6  this effort.  And Chuck had taken a first attempt at a  
7  couple of items that could be included in a scope of  
8  work for that joint study.

9           Q.    And is the draft attached to this e-mail,  
10 that was the one that Mr. Dalby prepared?

11          A.    Yes, it is the final page.

12          Q.    Take a look at the final page.  What does he  
13 indicate the purpose of the joint study is?

14          A.    He says, "The purpose of the joint water  
15 study is develop information on historic and current  
16 uses of water in the Tongue and Powder River drainages  
17 in Montana and Wyoming."

18          Q.    So is it fair to say that, at least up to  
19 this point, the states had not yet developed that  
20 information?

21          A.    Yes, that's fair.

22          Q.    And I think I've asked you since -- a couple  
23 of different times since we started today, about calls  
24 and alleged calls.  And you were here with regard to  
25 Mr. Moy's testimony; right?



## Direct Examination Cont. by Mr. Brown

1 A. Yes.

2 Q. And some of the other Montana witnesses?

3 A. Yes.

4 Q. And I'll ask again: Since the time you  
5 became involved in the Yellowstone River Compact, did  
6 any Montana official make a call or demand on Wyoming  
7 that Wyoming curtail its uses for the benefit of  
8 Montana prior to 2004?

9 A. No, they did not.

10 Q. So did Mr. Fritz ever make any such call or  
11 demand?

12 A. No.

13 Q. Did Mr. Stults?

14 A. No, he did not.

15 Q. Did Mr. Moy?

16 A. No, he did not.

17 Q. Did Mr. Kerbel?

18 A. No, he did not.

19 Q. And finally, Mr. Dalby?

20 A. No, he did not.

21 Q. And I wanted to ask you, as well, about  
22 Mr. Moy. And he's indicated in this case that he and  
23 his staff made every effort to work with Wyoming.  
24 What's your recollection of Mr. Moy's efforts to work  
25 with Wyoming?

## Direct Examination Cont. by Mr. Brown

1           A.    Well, I think we've pointed out a couple of  
2 instances where Mr. Moy was assigned a task by his  
3 commissioner to be the technical representative. And I  
4 think in many ways we felt that these issues were being  
5 brought to us by Montana and that as Montana's  
6 technical representative, I would have expected him to  
7 be the one to make the first arrangements for meetings,  
8 to be prepared to talk about the items that they raised  
9 at the commission.

10                   And I think we've shown that in 2001 and then  
11 also in 2004, he would not follow through with meetings  
12 that had been set up. And I mean, I'm sure he always  
13 had other things he was up to. But at least from the  
14 position of working on Yellowstone items, he'd -- over  
15 the 20 whatever years I've been working on this, his  
16 attendance was not that consistent. He would come to a  
17 meeting and raise issues. Mr. Moy can have pretty  
18 strong opinions. And then assignments would get made  
19 and many times no follow-up.

20           Q.    Okay. If you had, during your time on the --  
21 being involved with the Yellowstone River Compact  
22 Commission, if you had received a verbal call, what you  
23 would construe as a verbal call from a Montana water  
24 official, how would you have responded to that?

25           A.    I would have told them that they needed to

## Direct Examination Cont. by Mr. Brown

1 put it in writing, that a state-to-state request of  
2 that magnitude was important and shouldn't just be done  
3 over a cup of coffee. And I would have suggested that  
4 that needed to be made to the state engineer.

5 Q. Okay. Has Montana made a call under the  
6 compact since 2006?

7 A. No, they have not.

8 Q. So Wyoming's not had an opportunity to  
9 respond to a call since that time?

10 A. No, we have not.

11 Q. After the Special Master issued his first  
12 interim report in this case, what's your general  
13 understanding of Wyoming's obligation under the compact  
14 with respect to Montana's pre-1950 rights?

15 A. I believe the Special Master has instructed  
16 Wyoming that we have an obligation to review our  
17 post-'50 uses relative to regulation for pre-'50 uses  
18 in Montana and the delivery of that water under the  
19 provisions of the prior appropriation doctrine.

20 Q. And is Wyoming, to your knowledge, ready to  
21 satisfy and able to satisfy that obligation?

22 A. Yes, we have every intent to comply with  
23 those directives out of the first interim report.

24 Q. And in your view, what is the compact  
25 commission's role with regard to those obligations?

## Direct Examination Cont. by Mr. Brown

1           A.     Well, I think in drawing back on my  
2 experience from the Bear River commission where we  
3 tackled very similar kinds of the need to look at water  
4 delivery on both sides of the state line, I think that  
5 the compact commission can be the appropriate avenue to  
6 develop procedures such that when we get another dry  
7 year and Montana feels the need for a call, that  
8 there's more certainty or the states have already  
9 talked through what the potential procedures or what  
10 that methodology could be.

11           Q.     Okay.

12                   MR. BROWN:   Can I have just a couple minutes,  
13 Your Honor?

14                   SPECIAL MASTER:   You certainly may.

15                   MR. BROWN:   That's all I have, Your Honor.

16                   SPECIAL MASTER:   Okay. Thank you, Mr. Brown.

17                   So, Mr. Wechsler, are you prepared to start  
18 now?

19                   MR. WECHSLER:   Yes, Your Honor.

20                   SPECIAL MASTER:   Okay. Great. Then why  
21 don't we start with the cross-examination at this  
22 point. And we'll go for a half hour and break for  
23 lunch.

24                   MR. BROWN:   Are you all right, Ms. Lowry?

25                   THE WITNESS:   Yeah, I'm doing fine.

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1           SPECIAL MASTER: So, Ms. Lowry, I think you  
2 win the award for producing more e-mails than any other  
3 witness who's taken the stand which, unfortunately, is  
4 to your disadvantage as to how long you're going to be  
5 on the stand.

6           THE WITNESS: Not sure if I should feel proud  
7 of that distinction or not.

8           SPECIAL MASTER: I think there's no doubt  
9 that since the invention of e-mails, lawyers have had  
10 more documents to work with than certainly 30 years  
11 ago.

12           THE WITNESS: Yes, it's easy to hit resend.

13           SPECIAL MASTER: You can proceed.

14           MR. WECHSLER: Thank you, Your Honor.

15                           CROSS-EXAMINATION

16 BY MR. WECHSLER:

17           Q. Good morning, Ms. Lowry.

18           A. Good morning.

19           Q. Unfortunately, the Special Master is correct.  
20 We have a number of documents for you to look at. And  
21 I want to look at some of the same documents that you  
22 looked at with Mr. Brown as well as some others in the  
23 same time period.

24                   First, I want to talk a little bit about your  
25 background. And that is, you started at the state

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1 engineer's office in 1988; is that correct?

2 A. Yes, it is.

3 Q. And that would have been in April; right?

4 A. Yes.

5 Q. And so up until that point, you had no  
6 involvement with the Yellowstone River Compact;  
7 correct?

8 A. That's correct.

9 Q. So you have no personal knowledge of things,  
10 at least that took place prior to April of 1988?

11 A. I do not; that's correct.

12 Q. So any information you have about that period  
13 would come from your review of records?

14 A. Yes, that's correct.

15 Q. And as the interstate -- remind me, again.  
16 You're the administrator now of the Interstate Streams  
17 Division; do I have that right?

18 A. Yes, you do.

19 Q. So as the administrator of the Interstate  
20 Streams Division, you're in charge of all of the  
21 records related to the Yellowstone River Compact, is  
22 that right, at Wyoming?

23 A. Yes, in charge might be -- there are old  
24 documents that had been sent to what we call our  
25 records center. We would have the ability to go get

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1 those. But they are not physically within the control  
2 of either my staff or -- so I guess I don't want to  
3 give the impression that somehow all of these documents  
4 are at our fingertips. But they're within state  
5 government either archives or records center; that's  
6 correct.

7 Q. And ultimately, you're responsible for the  
8 Division; correct?

9 A. That's true.

10 Q. And, therefore, ultimately responsible for  
11 the records of the Division; is that correct?

12 A. I guess we've never made that distinction.

13 Q. You supervise the individual who is  
14 responsible for those records?

15 A. These older records that have been in file  
16 folders, I mean, they're in a number of boxes at the  
17 records center. So I guess to say that they're in my  
18 control is not exactly accurate.

19 Q. But you have the ability to access those  
20 records?

21 A. That's correct.

22 Q. And, in fact, you've examined many of those  
23 records; correct?

24 A. That's also correct, yes.

25 Q. Now, when you were new to the commission, I

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1 believe you said in April of 1988; right?

2 A. Yes.

3 Q. And you didn't have the full set of duties at  
4 that time that you do now; correct?

5 A. Not the supervisory duties, but I was  
6 assigned to the same bevy of compacts and their  
7 commissions that I currently work on.

8 Q. When you were speaking with Mr. Brown, you  
9 indicated that really in that first year, 1988, you  
10 were responsible for going through the minutes;  
11 correct?

12 A. Reviewing the agenda when it came out and  
13 getting familiar with the last year's worth of minutes,  
14 that's probably true, yes.

15 Q. And at that time, you were familiarizing  
16 yourself with the job; correct?

17 A. That's correct, yes.

18 Q. And so in April of 1988, you didn't know the  
19 Montana representatives to the Yellowstone River  
20 Compact Commission; right?

21 A. No, I did not.

22 Q. And they didn't know you?

23 A. I don't believe so.

24 Q. Okay. Let's look at some of these documents.  
25 I think what I'd like to do is, I find it helpful to go



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1 chronologically, especially when we're looking at such  
2 a large volume. And then at the end, I'll ask you some  
3 questions related to all of those documents to try and  
4 summarize what we're talking about.

5 I've placed before you a folder full of  
6 documents, and they are tabbed. Hopefully we have  
7 those right. So if you turn to the very first  
8 document, that's Exhibit M136. And I'll give everyone  
9 else a little opportunity to catch up. Because,  
10 unfortunately, we didn't have time to do more than one  
11 binder.

12 Have you ever seen this document before?

13 A. No, it does not look familiar.

14 Q. Were you aware that these notes existed?

15 A. No.

16 Q. Now, I'll represent to you this is a document  
17 that was testified to by Mr. Fritz. And if you'll turn  
18 to the page marked at the bottom as WY048194. At the  
19 top it says 5/7/81. That's a date.

20 A. Okay. I'm there.

21 Q. And if you'd take a look at that, you can see  
22 these are notes of a conversation from a  
23 Mr. Christopulos. Do you know who that is?

24 A. I do.

25 Q. Who is that?

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1           A.     George Christopulos, he was the state  
2 engineer prior to Mr. Fassett.

3           Q.     He was taking notes off a conversation that  
4 he had with Mr. Fritz. And here, I think if you'll  
5 read, you'll see that this is notes where Mr. Fritz  
6 called to ask Wyoming to curtail its water use in 1981.

7                     Now, you were not aware of this document;  
8 correct?

9           A.     That's correct; I was not aware of it.

10          Q.     Are you aware of any internal memorandum  
11 related to this document?

12          A.     No, I'm not.

13          Q.     Are you aware of any written correspondence  
14 related to this document?

15          A.     No, I'm not.

16          Q.     Are you aware of any letters to the governor,  
17 for example, related to this document?

18          A.     No, I'm not.

19          Q.     And those types of things, letters to the  
20 governor, correspondence, would you expect those  
21 documents to be kept, if there were any?

22          A.     I would expect them to have been, yes.

23          Q.     Turn with me, please, to the next document,  
24 which is Exhibit J31. This is the annual report from  
25 the 1981 compact commission meeting.

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1 A. Yes.

2 Q. I'm going to give people just a second to  
3 make sure they catch up.

4 You weren't at this meeting; correct?

5 A. No, I was not.

6 Q. I expect you've had the chance to review the  
7 minutes from the previous years; is that right?

8 A. No. Once I got to the job in 1988, I did not  
9 go back and read every one of the compact commission  
10 meetings prior to that.

11 Q. So you've never seen Exhibit J31?

12 A. I don't recall that I've read it, no.

13 Q. Well, I'll give you one second to take a  
14 quick look. It's a relatively short version. You'll  
15 see there's only four pages. And let me know if you  
16 see anywhere where it indicates that Montana made a  
17 call on Wyoming.

18 A. I see a sentence that says, "No incidents  
19 during the water year required administration of water  
20 in accordance with the provisions of the compact." And  
21 that would lead me to believe that they did not.

22 Q. They did not include any reference to that  
23 discussion between Mr. Fritz and Mr. Christopoulos;  
24 correct?

25 A. I think you asked me whether they made a

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1 call. And I believe that would suggest that they did  
2 not make a call if no administration was done in  
3 accordance with the compact.

4 Q. Any reference at all between -- to the  
5 conversation between Mr. Christopulos and Mr. Fritz?

6 A. Well, at quick glance, I'm not seeing it.

7 Q. Let's turn to Exhibit J38, which is the 1988  
8 compact commission annual report.

9 A. That's a few documents in?

10 Q. It is.

11 A. It's not next.

12 Q. I included many of these documents in the  
13 event that Mr. Brown raised something in his  
14 conversation with you. And so I'm happy to say we  
15 don't have to look at every single one.

16 A. Okay. That makes me feel better. Thank you.

17 Q. I will tell you that we are going to come  
18 back to the 1982 annual compact meeting because there  
19 was a reference to the conversation with  
20 Mr. Christopulos in the 1982 version. But I want to  
21 talk about that a little bit later.

22 So for now, we're looking at 1988. Do you  
23 have that before you?

24 A. I do.

25 Q. Now, you were present; correct?

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1 A. I was.

2 Q. Here if you look with me at Roman III under  
3 the heading 3, Wyoming Water Management; do you see  
4 that?

5 A. I do.

6 Q. Here it indicates that Mr. Whitaker was  
7 giving a report about the regulation in Wyoming;  
8 correct?

9 A. Yes.

10 Q. And that was a common occurrence during the  
11 years that you were on the commission; correct?

12 A. Yes, it was.

13 Q. Or that you have attended commission  
14 meetings, I should say?

15 A. Yes, that's correct, it is common.

16 Q. Because you have now been the commissioner  
17 for 2000 -- since 2012?

18 A. That's correct.

19 Q. And one of the reasons, in fact, Montana  
20 raises this issue at commission meetings; correct?

21 A. Raises what issue?

22 Q. Whether there was regulation in Wyoming.

23 A. Generally, the course of the agenda is that  
24 as the upstream state, we go first. And then Loren  
25 Smith and Mike Whitaker and now Carmine describe the

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1 situation and give an update of the type of water year  
2 it was. And then Montana certainly can ask questions  
3 of us.

4 Q. And they have asked in the past whether or  
5 not Wyoming was regulating in the Tongue River Basin;  
6 correct?

7 A. Yes.

8 Q. And that was not uncommon?

9 A. Not uncommon for them to ask?

10 Q. Correct.

11 A. Yes.

12 Q. While we're here looking at the 1988 version  
13 of the YRCC annual report, all of us here are familiar  
14 with these reports. I wonder if you could just give a  
15 very brief summary of what goes into these, sort of an  
16 anatomy for someone who has never seen one of these  
17 reports?

18 A. Of how the minutes are developed, or what  
19 goes on at a meeting?

20 Q. What the reports themselves contain. Because  
21 they tend to be -- have the same form; correct?

22 A. Yes. That's correct. They are written  
23 almost in a letter format to the governors of the three  
24 states and then what we think of as the meeting  
25 minutes, then generally follow.

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1           And then the USGS provides budgeting  
2 information. 'Cause each of the states pays their  
3 portion of the cost to operate the gauges that are  
4 defined in the compact. And then the USGS includes the  
5 information about the type of water year it was and a  
6 summary at each of the compact -- the compact described  
7 gauges.

8           And then there's almost always a copy  
9 included of the what are called the Rules and  
10 Regulations for Administration of the Yellowstone  
11 Compact, which pretty much talks about the records and  
12 the role of the USGS, that sort of thing. And then  
13 also included is a copy of the rules for adjudicating  
14 water rights on interstate ditches. And it's not in  
15 '88 because we hadn't completed it yet, but more  
16 recently the rules for dispute resolution are included  
17 also, as well as the meeting summaries for the  
18 technical group.

19           Q. Thank you. That's helpful. Turn with me,  
20 please, in that same exhibit, J38, to Roman IV, labeled  
21 at the bottom with the Bates No. WY015566.

22           A. Okay. I'm there.

23           Q. Here under the heading Article V; do you see  
24 that?

25           A. I do.

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1 Q. And here it indicates that "The commissioners  
2 discussed issues concerning development of a  
3 methodology to administer terms of the YRCC"; do you  
4 see that?

5 A. I do.

6 Q. You understand there was an effort throughout  
7 the 1980s to develop a methodology to administer the  
8 compact?

9 A. To focus on Articles B and C, I believe. So  
10 the work Mr. Ashenberg and Dr. Allen did.

11 Q. You were not involved with those efforts;  
12 correct?

13 A. That's correct; I was not involved.

14 Q. Mr. Moy was involved; correct?

15 A. He was certainly at DNRC at that time. And I  
16 believe that Mr. Ashenberg worked for him, yes.

17 Q. He would know best whether he was involved;  
18 you'll agree with me?

19 A. I would.

20 Q. So he testified he was involved.

21 Now, you say it had to do with Article V, B  
22 and C. Now, Mr. Allen and the people from Montana who  
23 were involved, they would be the best source of  
24 information to say exactly what articles of the compact  
25 that methodology dealt with; correct?



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1 A. Yes.

2 Q. There was a fair amount of information  
3 exchanged between the two states in developing those  
4 methodologies; would you agree with that?

5 A. I've certainly seen correspondence that the  
6 reports of Mr. Ashenberg and Mr. Allen were shared with  
7 each other, yes.

8 Q. Some of the information in those reports had  
9 to do with existing water rights and water use in each  
10 state; correct?

11 A. I'm sorry. I didn't quite -- doing what with  
12 water?

13 Q. Some of the information that was exchanged or  
14 contained in those reports had to do with water use in  
15 both Wyoming and Montana; correct?

16 A. Well, it's my understanding that they -- at  
17 least Mr. Allen's look at available water supply at  
18 multiple places throughout the basin. I guess when I  
19 hear the term water use, that refers -- I think more of  
20 what's going on with an individual water right. And I  
21 don't know how much of that work that Mr. Allen did.  
22 It may have been water use, but I don't know.

23 Q. So you don't think that they looked at  
24 individual water rights. Did they look at collectively  
25 how much the water supply and collectively the amount

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1 of water used in each of the states?

2 A. Again, I believe they looked for sure at  
3 water supply. I don't know about the water use part.  
4 They may or may not have. I don't know those reports  
5 that well.

6 Q. If you look back to the document here,  
7 Exhibit J38, Roman IV, at the bottom here, it  
8 indicates -- well, turning to Roman V, here at the very  
9 bottom of that section, it indicates that "Mr. Moy was  
10 asked to prepare a draft scope of work for the  
11 Commission's review by December 1, 1988"; do you see  
12 that?

13 A. Yes.

14 Q. And Mr. Moy testified that that occurred.  
15 And he'd be the best source of information for that;  
16 correct?

17 A. Yes.

18 Q. Turn with me to J39, which is the annual  
19 report for 1989. Do you have that?

20 A. Yes, I do.

21 Q. Here it indicates the commission held its  
22 meeting on December 1st, 1989. By this time, you have  
23 been working for the state engineer for approximately a  
24 year and a half; right?

25 A. Yes, that's correct.

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1 Q. And you attended this meeting?

2 A. Yes, I did.

3 Q. Turn with me to Roman IV, under the heading  
4 3, Compact Administration/Models.

5 A. Yes.

6 Q. And here at the very bottom of that very  
7 first paragraph, it indicates that the report includes  
8 summaries of the position of the two states; do you see  
9 that?

10 A. I do.

11 Q. And we, in fact, looked at one of those  
12 reports; do you recall that? You looked at that with  
13 Mr. Brown?

14 A. So we're speaking now about Mr. Moy's draft,  
15 not the Ashenberg or Allen reports?

16 Q. That's my understanding. Do you recall  
17 looking at a report of the history of the compact and  
18 the position of the states, with Mr. Brown?

19 A. Yes, I do.

20 Q. Turning to Roman V. Now, here it indicates  
21 Montana's adjudication process. See that under the  
22 heading 5?

23 A. Yes.

24 Q. I think you testified with Mr. Brown that it  
25 was common for Montana to give reports on the

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1 adjudication process; right?

2 A. Yes, a general summary of which basins they  
3 were working in and that sort of thing.

4 Q. The status of the adjudication?

5 A. Yes, that's fair.

6 Q. And Wyoming had the ability to ask questions  
7 about that process; right?

8 A. They did.

9 Q. Are you aware in years after 1989 that all of  
10 the information from the adjudication was put on the  
11 website of the DNRC?

12 A. I may have been told that. I'm sorry. I've  
13 not really gone and looked at that site, so I don't  
14 know one way or the other.

15 Q. If you look with me at what is no longer  
16 Roman Numerals but page 16 of that document, which is  
17 labeled WY015623. At the top, it's labeled Monthly  
18 Summary of Contents for Compact Reservoirs Existing on  
19 January 1, 1950; do you see that?

20 A. I do.

21 Q. And this is a chart that's kept in pretty  
22 much all of the annual reports; correct?

23 A. Yes. It's been updated over the years, but  
24 something comparable has been around, yes.

25 Q. You spoke about that update with Mr. Brown;

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1 correct?

2 A. Yes.

3 Q. But dating back even to the 1980s, they were  
4 keeping a summary of some of the reservoirs in the  
5 Yellowstone River area?

6 A. Yes.

7 Q. And if you look, it indicates the Tongue  
8 River Reservoir; do you see that as the last one?

9 A. I do.

10 Q. And there it indicates the end of month  
11 contents; do you see that?

12 A. Yes.

13 Q. So you can see generally what level the  
14 Tongue River Reservoir filled to by looking at that  
15 table; correct?

16 A. Generally, yes.

17 Q. And, in fact, you can also see -- if you look  
18 at that table, you can generally see when reservoir  
19 releases would have started; is that right?

20 A. Generally, yes.

21 Q. Because you know that once the reservoir  
22 starts going down in a particular month, that at least  
23 by that time, there's reservoir releases; correct?

24 A. Yes.

25 Q. Here in the year of 1989, we can see that the

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1 max end of month contents is 48,000; is that right?

2 A. The maximum in that column, yes.

3 Q. Now, you understand the Tongue River  
4 Reservoir to be -- at least part of it to be a pre-1950  
5 right in Montana?

6 A. Yes.

7 Q. Do you know what -- what do you consider to  
8 be the pre-1950 component of the Tongue River  
9 Reservoir?

10 A. The reservoir that was there prior to the  
11 enlargement.

12 Q. Do you have an acre-feet, a capacity?

13 A. No, I don't know that off the top of my head.

14 Q. Turn, please, to the next exhibit, Exhibit  
15 M427. Do you have that?

16 A. Yes, I do. Sorry.

17 Q. This is a document that you looked at with  
18 Mr. Brown. It looks to be a memo from you to  
19 Mr. Fassett and Mr. Whitaker dated June 1990; do you  
20 see that?

21 A. Yes.

22 Q. The very first sentence indicates that these  
23 are calculations that you found while trying to piece  
24 together the 26,000-acre estimate given by Montana  
25 during the early '80s for their modeling effort of the

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1 Tongue River Basin; do you see that?

2 A. I do.

3 Q. What was the modeling effort that you're  
4 referring to there?

5 A. It was an effort by Montana to look at the  
6 volume of water supply available upstream of Tongue  
7 River Reservoir and how large of an enlargement could  
8 be put in place and what the firm annual yield of that  
9 enlargement potentially could be.

10 Q. And when they were looking at the firm annual  
11 yield, one thing they looked at was the uses downstream  
12 of the reservoir; correct?

13 A. Yes.

14 Q. And the amounts of water that was necessary  
15 below the Tongue River Reservoir?

16 A. I'm not entirely familiar with the modeling  
17 effort. But that would make sense. I mean, they  
18 approached us more on the estimates of use in Wyoming.  
19 I did not get that intimately involved with the  
20 workings of the model.

21 Q. Were you given a copy of that model?

22 A. Yes.

23 Q. And that, I believe, was done by a company  
24 called GeoResearch?

25 A. I believe so.

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1 Q. Okay. That would have been evaluated by  
2 somebody at the Wyoming State Engineer's Office?

3 A. Yes.

4 Q. Do you know what that was?

5 A. The version that I'm recalling seeing would  
6 have been in the '91, '92 time frame. So I recall  
7 looking through the model documentation, but that's a  
8 lot different than understanding the inner workings of  
9 the model. So perhaps someone in the Sheridan office  
10 reviewed it. I don't recall.

11 Q. In looking at that documentation, did you see  
12 that there were levels of water use below the Tongue  
13 River Reservoir in Montana?

14 A. I'm sorry. I don't remember that  
15 specifically.

16 Q. Now, you went back and you looked and you  
17 found a memo here from -- I believe it's from  
18 Mr. Buyok?

19 A. That's correct.

20 Q. And you're talking about the early '80's  
21 modeling effort. Do you recall what that effort was?

22 A. It's my understanding that John Buyok was  
23 actually involved, at least with the technical group  
24 that was in place in the early '80s. And this  
25 April 26, '83, letter to Rich Brasch was estimating



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1 what John Buyok felt would be additional depletions in  
2 Wyoming that should be estimated and accounted for in  
3 the modeling effort.

4 Q. Do you have any more detail about what that  
5 modeling effort looked at in both states?

6 A. Well, at least the request that was made of  
7 Wyoming was to provide what we felt additional  
8 supplemental -- acres requiring supplemental use that  
9 could be developed and an estimate of sort of  
10 foreseeable development. And then Montana told us that  
11 they would take that level of depletion, sort of out,  
12 if you will, make that unavailable at the state line.  
13 And then that balance of water supply that was  
14 remaining, the balance of the modeling would be done  
15 with that volume of water.

16 Q. Montana was trying to understand how much  
17 water would be available for the state of Montana?

18 A. That's correct.

19 Q. Now, it looks like Mr. Buyok and ultimately  
20 you were able to find information about the  
21 supplemental uses in Wyoming; correct?

22 A. Yes.

23 Q. If you'd turn to the next page of the letter,  
24 which is labeled WY022659.

25 A. Yes.

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1 Q. At the top here, you're having -- this is a  
2 letter to Mr. Fassett who was the state engineer at the  
3 time; correct?

4 A. Yes.

5 Q. And here you're indicating that you may want  
6 to give a revised acreage amount to Montana. And  
7 there's a sentence that reads, "The other side of the  
8 coin would be to keep these estimates as high as  
9 possible to make the model show there is less water  
10 available for dealing with the Northern Cheyenne"; do  
11 you see that?

12 A. I do.

13 Q. At that point, you were considering whether  
14 or not -- which set of information to give Montana;  
15 correct?

16 A. Yes. I was inquiring as to the likelihood of  
17 the Sheridan Canal ever being developed as was  
18 envisioned. 'Cause that -- the acreage under the  
19 Sheridan Canal was included in Mr. Buyok's estimate.  
20 And I was trying to get some information from  
21 Mr. Whitaker as to his assessment of the viability of  
22 that project.

23 Q. I do want to let you know, I went back and  
24 verified, and it actually is this estimate that you're  
25 providing to Mr. Fassett that you did give to Montana

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1 rather. And so it was the original one that you  
2 actually provided.

3 Turn with me, please, to Exhibit J50. Do you  
4 have that?

5 A. Is it appropriate for me to ask you to repeat  
6 what you just said?

7 SPECIAL MASTER: It certainly is.

8 BY MR. WECHSLER:

9 Q. Absolutely. I didn't want to leave the  
10 impression that somehow you gave Montana an  
11 inappropriate number. And so my point is that I have  
12 gone back and verified -- we can look at the document  
13 if you'd like -- that it's this estimate from Mr. Buyok  
14 to Mr. Brasch that you did provide to Montana, and you  
15 did not try and keep the estimates as high as possible.  
16 Does that make sense?

17 A. It does. But the way you just said it, that  
18 isn't the way it sounded to me. So the estimate we  
19 gave did not include the Sheridan Canal.

20 Q. Correct.

21 A. Okay. Yes, thank you.

22 Q. And now to Exhibit J50.

23 A. Okay.

24 Q. Do you have that?

25 A. Yes, I do.

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1 Q. This is the 2000 annual commission meeting,  
2 again, you attended?

3 A. Yes.

4 Q. There is also in attendance a person named  
5 Wade Irions?

6 A. Yes.

7 Q. Who is he?

8 A. He was an engineer that worked for HKM. And  
9 they were the consulting firm that did the river basin  
10 planning for the Powder/Tongue for the state of Wyoming  
11 for the Water Development Commission.

12 Q. And that document that's been discussed in  
13 this proceeding, are you aware of that?

14 A. Yes. It's the -- when I was talking about  
15 Ms. Pring and Mr. Whitaker giving the assessment of the  
16 technical memo, that would have been all that same  
17 work.

18 Q. The year 2000 was the beginning of a drought  
19 in the Tongue River Basin; is that correct?

20 A. Yes, that's correct.

21 Q. And I've heard you use the term "a serious  
22 drought"; is that right?

23 A. That's correct.

24 Q. That lasted all the way until 2006?

25 A. Some minor years that were a little bit

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1 better. But overall, it was dry all of those years,  
2 yes.

3 Q. And those minor years, I think, are 2003 and  
4 2005; is that right?

5 A. Yes, that's correct.

6 Q. Look with me, please, at the Roman III. And  
7 I'm looking at the third full paragraph, begins "The  
8 Commissioners"; You see that?

9 A. I do.

10 Q. And here, this is the language that you  
11 looked at with Mr. Brown. There was an intent to begin  
12 a committee to provide recommendations on quantifying  
13 diversions and other hydrologic factors; is that  
14 correct?

15 A. Yes, that's correct.

16 Q. I believe I heard you say that you thought it  
17 was more up to Montana to initiate those efforts; is  
18 that right?

19 A. Yes. I felt that Mr. Moy, as being charged  
20 with taking a look at this, that he would contact me,  
21 yes.

22 Q. The Yellowstone River Compact deals with both  
23 states, Wyoming and Montana; correct?

24 A. That's true.

25 Q. And there were shortages in both states; is

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1 that right?

2 A. Yes, that's true.

3 Q. You understood at this time Montana was  
4 interested in understanding the diversions in both  
5 states?

6 A. That Montana was? Is that what you said?

7 Q. Yes.

8 A. Yes, I'd say that's true.

9 Q. And you understand that Montana was concerned  
10 about shortages as of the year 2000; is that right?

11 A. I think Montana expressed to us that they  
12 were not able to certainly fill all of their senior  
13 rights. But the same as we in Wyoming were not able to  
14 fill all of our senior rights.

15 Q. They expressed that in the year 2000?

16 A. I don't remember specifically.

17 Q. They expressed that in the early 2000s?

18 A. Yes.

19 Q. When they said "senior rights," did you  
20 understand that to mean rights that were prior to the  
21 compact?

22 A. Yes.

23 Q. Look with me, please, at page 16, again, of  
24 this document, Exhibit J50. And, again, it's not Roman  
25 Numerals here. It's page 16.

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1 A. Yes.

2 Q. At the top, it's labeled Monthly Summary of  
3 Contents for Compact Reservoirs Existing on January 1,  
4 1950; do you see that?

5 A. I do.

6 Q. This is the year 2000. And the Tongue River  
7 Reservoir actually filled in that year to 78,740 or at  
8 least to that amount; correct?

9 A. That's correct.

10 Q. Turn to the next document, Exhibit M134.

11 SPECIAL MASTER: Mr. Wechsler, I'll let you  
12 decide exactly where is a good break in your  
13 cross-examination at this point. But any point from  
14 now forward would be fine.

15 MR. WECHSLER: Your Honor, this is a great  
16 time.

17 SPECIAL MASTER: Okay. Why don't we then  
18 break, and, again, give Ms. Lowry an opportunity to  
19 recover a bit from her ailments.

20 So we'll break now. It's five after the  
21 hour. And then what we will plan to do is to come back  
22 at five after 1:00.

23 (Recess taken 12:06 to 1:10  
24 p.m., November 25, 2013)

25 SPECIAL MASTER: Okay. Everyone can be

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1 seated.

2 So, Mr. Wechsler.

3 MR. WECHSLER: Thank you, Your Honor. And  
4 before I started, I did want to wish my colleague happy  
5 birthday. It is Cory Swanson's birthday today.

6 SPECIAL MASTER: Happy birthday. So which  
7 day is today?

8 MR. SWANSON: Today is the 25th, Your Honor.  
9 I was born on Thanksgiving Day. And that usually comes  
10 every six or seven years. So when I was born, my  
11 grandmother told everyone I was a turkey and not a  
12 human. It didn't come true.

13 SPECIAL MASTER: Well, I shouldn't probably  
14 say this because I'm glad it's your birthday. Because  
15 it's actually my youngest's daughter's birthday too.  
16 She's in Berlin right now. So I hadn't even focused on  
17 the fact that I need to contact her. But happy  
18 birthday.

19 BY MR. WECHSLER:

20 Q. Good afternoon, Ms. Lowry.

21 A. Mr. Wechsler.

22 Q. Could you turn, please, to Exhibit M134,  
23 which I believe is where we left off before lunch?

24 A. Okay. I'm there.

25 Q. And you spoke about this exhibit with



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1 Mr. Brown; correct?

2 A. Yes, I did.

3 Q. And the point here was that with regard to  
4 this particular committee meeting, Mr. Moy had never  
5 gotten back to you; is that right?

6 A. I did mention that in the e-mail, yes.

7 Q. And, now, Mr. Moy was here, and he testified  
8 that he did have communications with people from  
9 Wyoming in 2001. And so in this e-mail, you're not  
10 saying that he didn't communicate with anybody from  
11 Wyoming; is that right?

12 A. I'm saying that Rich and I were appointed to  
13 be a technical review -- a technical review committee  
14 was asked to -- that Rich and I were asked to work on  
15 some Yellowstone technical issues during calendar year  
16 2001, which was assigned at the 2000 commission  
17 meeting. And I'm saying that I was never contacted by  
18 Rich to get that discussion going.

19 Q. But you may have had communications with  
20 Mr. Moy in 2001?

21 A. I may have. But I looked through my records,  
22 and I did not see where I had been at a meeting that he  
23 had been in in '01.

24 Q. You mentioned your records. What records are  
25 you talking about?

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1           A.    I keep a file folder by each year related to  
2 the Yellowstone, that I would keep some of the  
3 handwritten notes that have been provided as exhibits.  
4 Those folders were provided to you during discovery.

5           Q.    Do you know if a complete set of those notes  
6 were provided?

7           A.    To the best of our ability, we certainly  
8 tried to provide you with everything, yes.

9           Q.    Now, those notes may not have been complete;  
10 is that right?

11          A.    I'm sorry. I don't quite understand what  
12 you're asking.

13          Q.    The notes that were provided to Montana might  
14 not have been a complete, full set of every note you  
15 took over the years; is that right?

16          A.    It would have been awfully close. My normal  
17 way of doing business is I don't keep a daily diary or  
18 anything like that. Anything that's related to a river  
19 basin, I put into a folder related to that river basin.  
20 So when I had communications like those that were  
21 produced, they would have been in the files for  
22 those -- the years from 1988 until the present.

23          Q.    Turn with me, please, to Exhibit J51. Do you  
24 have that?

25          A.    I do.

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1 Q. You weren't present at this 2001 meeting;  
2 correct?

3 A. That's correct.

4 Q. If you look with me at page 2 of the 2001  
5 annual report, it indicates the attendees; right?

6 A. Yes.

7 Q. And there we see Mr. Art Hayes, Mr. Les  
8 Hirsch, Mr. Ray Muggli, and Mr. Roger Muggli. Do you  
9 know who they are?

10 A. I have met Roger Muggli. I don't know the  
11 other two -- and I know Art. But I don't know the  
12 other two gentlemen. I don't know Mr. Hirsch or  
13 Mr. Ray Muggli.

14 Q. Who is Mr. Muggli?

15 A. Roger.

16 Q. And who is Roger Muggli?

17 A. He is -- I don't know if manager is the right  
18 term. But he's certainly associated with the T & Y  
19 Irrigation District, and he has attended also some of  
20 our technical meetings. He became quite involved with  
21 coalbed methane and water quality issues for a time in  
22 the basin.

23 Q. Is it fair to say Mr. Muggli was concerned  
24 about getting enough water for his irrigation district?

25 A. Well, my recollection at the times I've seen

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1 him, he was more concerned about the quality of CBM  
2 water than any quantity discussion.

3 Q. He was worried about water for his irrigation  
4 district?

5 A. I think that's a fair assessment, yes.

6 Q. And Mr. Hayes, who is he?

7 A. Art Hayes is a rancher in the Birney area,  
8 and he represents the Tongue River Water Users'  
9 Association and attends many of our compact and  
10 technical committee meetings.

11 Q. And that was true dating back to the early  
12 2000s?

13 A. Yes.

14 Q. And do you understand that Mr. Hayes is  
15 concerned about getting enough water for the Tongue  
16 River Reservoir?

17 A. Yes. I know it's a goal of theirs to fill  
18 Tongue River Reservoir, yes.

19 Q. That was true even back in the early 2000s?

20 A. Oh, I forget when the construction was of the  
21 enlargement. But I know there was a time during  
22 construction where perhaps they didn't want a full  
23 reservoir. But, generally, their operations are such  
24 that they want to fill in the spring.

25 Q. And so if the construction took place before

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1 2000, then filling the reservoir would have been a  
2 concern of theirs in the 2000s?

3 A. Yes. That's -- I believe that's true, yes.

4 Q. You understood that to be true in the early  
5 2000s; right?

6 A. Yes.

7 Q. Turn, please, to page Roman IV of that same  
8 exhibit, Exhibit J51. Second full paragraph begins,  
9 "Mr. Moy asked if new irrigation or changes in  
10 irrigation methods have occurred in the Tongue River  
11 Basin in Wyoming since 1950"; do you see that?

12 A. I do.

13 Q. Do you recall that changes in irrigation  
14 methods and new irrigation was an issue that was  
15 expressed by Montana in the early 2000s?

16 A. When Mr. Moy and others came to the meeting  
17 in Sheridan in January of '02, Mr. Moy did raise the --  
18 just asked Mike Whitaker his assessment of the  
19 percentage of acres that had changed over from flood to  
20 sprinkler.

21 Q. And they were raising that issue in 2001 as  
22 well; correct?

23 A. Well, it looks like he asked that at the  
24 meeting, yes.

25 Q. You continue in that same paragraph, it says,

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1 "Mr. Roger Muggli expressed concern about apparent  
2 decreases in flow in the lower Tongue River and the  
3 effects on maintaining fishery resources and irrigation  
4 capability"; do you see that?

5 A. I do.

6 Q. So at least by 2001, Mr. Muggli was  
7 expressing a concern about the amount of available  
8 water; correct?

9 A. That sentence would appear to reflect that,  
10 yes.

11 Q. Then the next sentence indicates that  
12 "Mr. Moy stated that an evaluation of pre-1950 water  
13 rights in both Montana and Wyoming might prove useful";  
14 right? And did you understand that Montana was  
15 concerned about the pre-1950 rights in both states in  
16 the early 2000s?

17 A. I mean, I can read that sentence here, but I  
18 don't recall Rich ever having that discussion with me  
19 separate from reading this in the minutes.

20 Q. Montana never expressed to you that they were  
21 concerned about shortages in Montana?

22 A. Rich had expressed to me that there were  
23 years where T & Y wasn't getting their full -- the  
24 volume available to them was not equal to what their  
25 water right was for.

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1 Q. So Montana was concerned about the drought in  
2 Montana; right?

3 A. I'd say that's fair, sure.

4 Q. And concerned about the impact of the  
5 shortages on its pre-1950 water right; right?

6 A. They expressed that they had water rights  
7 that were going unfulfilled, yes.

8 Q. This is the 2001 annual report. If you look  
9 with me again at that familiar table of contents of  
10 reservoirs on page 16, Bates number is WY016096. Do  
11 you have that?

12 A. I do, yes.

13 Q. And here the maximum end-of-month contents  
14 listed, as I see it, is 44,390; do you see that?

15 A. I do.

16 Q. If you look down at the bottom, it indicates  
17 the change in contents during the water year was a  
18 negative 23,000 acre-feet; right?

19 A. That's correct.

20 Q. Turn, please, to Exhibit W65, which is going  
21 to be labeled in your book there -- well, it's the next  
22 exhibit. W65. Here it indicates M138. It's a  
23 duplicate which we discussed earlier. And so I'll  
24 refer to this document as W65.

25 A. Okay. I have it.

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1 Q. And you talked about this particular document  
2 with Mr. Brown; right?

3 A. Yes, we did.

4 Q. Looking at the first page of text, which is  
5 labeled -- well, it's under the list of attendees. Do  
6 you see that paragraph begins "Montana started"?

7 A. Yes, I see that.

8 Q. Now, the next sentence indicates, "First,  
9 they" -- do you understand that to mean Montana?

10 A. The representatives at the meeting, yes.

11 Q. Are --

12 A. Or Montana representatives, sorry.

13 Q. "Are receiving inquiries from irrigators and  
14 other water users along the Tongue River about  
15 Wyoming's water use, and Montana is interested in  
16 understanding more about the upper system in order to  
17 answer those inquiries." Do you recall that there were  
18 irrigators in Montana that were asking about Wyoming's  
19 water use?

20 A. I don't recall that any Montana irrigator had  
21 asked me directly. I mean, I had to take Montana on  
22 their word that they were getting those kinds of  
23 requests. I don't doubt that they were. But nobody  
24 talked to me directly.

25 Q. Montana informed you that that was true?



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1 A. Yes, but no irrigator talked to me.

2 Q. I understand. And Montana informed you that  
3 those irrigators believed that Wyoming was using too  
4 much water?

5 A. I don't know that they said that. I think  
6 there was some -- Mr. Kerbel, particularly, just  
7 because he lived closer, I think he would drive down  
8 I-90 and see sprinkler systems and that sort of thing.  
9 He had some specific fields or specific areas that I  
10 recall him asking Mike Whitaker about. But I don't  
11 think they were overtly coming to the conclusion that  
12 somehow Wyoming was doing something inappropriate. I  
13 think they were truly there trying to understand the  
14 system better and ask us questions.

15 Q. That was in the early 2000s that Mr. Kerbel  
16 was asking those questions?

17 A. That's my recollection, yes.

18 Q. And do you know if he was trying to find out  
19 if those were post-1950 water rights that were being  
20 used in Wyoming?

21 A. I don't know.

22 Q. He was asking about specific diversions?

23 A. He would have had conversations with Mike  
24 Whitaker directly about individual fields. But, yes, I  
25 was not involved in those discussions.

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1 Q. Now, Wyoming is upstream of Montana; right?

2 A. That's correct.

3 Q. If that water gets used in Wyoming, it  
4 doesn't make it to Montana; is that right?

5 A. Well, return flows aside, that would be true,  
6 yes.

7 Q. So is it logical to understand that  
8 Mr. Kerbel was concerned about whether or not that  
9 water should be going to Montana?

10 A. I don't know. I mean, I was not involved  
11 with those discussions. I don't know what he asked  
12 Mr. Whitaker. I recall some general discussions.

13 Q. I asked if it was logical.

14 A. Could you repeat your logic piece again,  
15 please?

16 Q. Given that Wyoming is upstream of Montana,  
17 and you agreed with me that if water gets used in  
18 Wyoming it doesn't make it down to Montana, is it  
19 logical to understand the discussions that Mr. Kerbel  
20 had as a concern whether or not Montana is getting  
21 enough water?

22 A. I guess it -- I know there's a lot of factors  
23 in there. You don't know how far upstream. You don't  
24 know return flow patterns. I'm not one to try to guess  
25 Keith Kerbel's logic.

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1 Q. He just happened to be asking about  
2 diversions in Wyoming?

3 A. I think he drove down I-90 and he saw  
4 sprinkler systems and he wanted to know more about  
5 them.

6 Q. Any idea why he might want to know more about  
7 them?

8 A. I think either they were ones he didn't  
9 recognize as being on before or he had other irrigators  
10 asking Keith whether he knew. There could have been  
11 multiple reasons why. And I don't know the answer to  
12 why.

13 Q. Look at the last partial paragraph on that  
14 page we're examining. There it indicates that  
15 "Rich" -- you understand that to be Rich Moy?

16 A. Yes, I do.

17 Q. "Asked about the general irrigation practices  
18 in the basin and whether the Wyoming irrigators tend to  
19 turn on their water supplies earlier when a drought  
20 appears imminent"; do you see that?

21 A. I do.

22 Q. Do you recall that discussion?

23 A. I do.

24 Q. Then looking over to the next page, there's a  
25 paragraph that begins, "Montana then asked about the

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1 various storage facilities in the tributaries to the  
2 Tongue River"; do you see that?

3 A. I do.

4 Q. And there they are inquiring about storage  
5 facilities in Wyoming; right?

6 A. Yes.

7 Q. Do you recall why that was a concern to them?

8 A. I think they -- about the same time, we, the  
9 technical group -- no, I take that back. Sorry. Let  
10 me get my years in order.

11 So I think Montana was aware and at  
12 commission meetings -- I mean, certainly they knew we  
13 had storage facilities in the Big Horn Mountains at the  
14 head end of Goose and Little Goose. And I think that  
15 Montana knew that there were facilities up there but  
16 didn't necessarily know how big they were. I think  
17 there was some misunderstanding that somehow our  
18 relationship with those storage facilities was similar  
19 to Montana's relationship with Tongue River Reservoir,  
20 meaning that there either was state funding or some  
21 state role in the contracting, which was not the case.  
22 So we had those sorts of discussions to describe that  
23 they were -- "they" being those upper mountain  
24 reservoirs were purely private reservoirs, that they  
25 had been filed for by private irrigation districts.

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1 I don't recall whether we talked about the  
2 priority dates of those reservoirs. But we certainly  
3 could have. I don't recall exactly what all Mike  
4 Whitaker and his staff were prepared to talk about.

5 But -- well, let me qualify that. I know  
6 that we did hand them a hydrographers' report. And in  
7 that report would be a summary of how those different  
8 reservoirs were operated and deliveries made from them.

9 Q. That hydrographers' report would also show  
10 the priority dates?

11 A. I'm pretty certain they do. I'm trying to  
12 think back what the page for each individual reservoir  
13 shows. But in some cases, they may have more than one  
14 priority date. And I don't recall exactly how that  
15 page is shown. But in all likelihood, the priority  
16 date is on there.

17 Q. You understood that the Tongue River  
18 Reservoir was important for irrigation in Montana?

19 A. Yes.

20 Q. If water is stored in Wyoming, it doesn't  
21 make it down to the state line; right? Setting aside  
22 return flows.

23 A. Yes. That would be true.

24 Q. Do you know if the Tongue River Reservoir  
25 filled in 2002?

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1 A. I don't.

2 Q. Turn, please, to Exhibit M434.

3 A. Okay.

4 Q. Do you recognize this document?

5 A. I believe it's a summary of the report that  
6 Montana contracted with HKM to complete.

7 Q. This is already in evidence. You've been  
8 given a copy of this document by Montana; right?

9 A. Yes, when we were doing the information  
10 exchange after the '04 call letter, we received a copy.

11 Q. Did you understand that Montana was doing  
12 investigation of Wyoming water use in 2002?

13 A. In 2004, we understood that. We did not know  
14 that they were doing it prior to that.

15 Q. Do you know why they were doing that  
16 investigation?

17 A. I had a conversation with Rich Moy about, I  
18 guess, doing this study. We had actually shared some  
19 aerial photography in -- I guess in retrospect, we  
20 thought we were all working on this stuff together.  
21 And then find out that HKM had been working on  
22 something with those aerial photos that we didn't know  
23 about.

24 I guess I asked Rich what the intent of that  
25 was. And he said that they were trying to understand

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1 the conversion of flood to sprinkler and what the  
2 magnitude of that issue might be.

3 Q. If you look at the introduction to the second  
4 paragraph, it indicates that "The objective of the  
5 study is to determine if there have been significant  
6 changes in the extent of irrigation from the time the  
7 Yellowstone River Compact was signed in 1950 to  
8 present." And was that the discussion that you had  
9 with Mr. Moy?

10 A. I don't recall. For some reason, the flood  
11 to sprinkler issue sticks more in my mind than the  
12 changes to the extent of irrigation.

13 Q. In 2002, you understood that Montana was  
14 curious about irrigation and irrigation practices in  
15 Wyoming; correct?

16 A. That Rich had asked about -- had certainly  
17 asked Mr. Whitaker how much changes he felt had  
18 happened, yes.

19 Q. And so Montana was trying to learn about what  
20 irrigation was going on in Wyoming?

21 A. I think they were trying to better -- they  
22 were asking questions about how irrigation did happen  
23 in the basin, yes, that's true.

24 Q. One thing they were trying to learn was  
25 whether there had been increased irrigation since the

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1 time of the compact?

2 A. Well, now that I read this sentence in this  
3 report, that appears to be the case, but I don't recall  
4 knowing that at the time.

5 Q. Turn, please, to Exhibit J52. You attended  
6 the annual compact commission meeting in 2002?

7 A. Yes, I did.

8 Q. On page Roman III, labeled at the bottom  
9 WY016117, there's a paragraph that begins "Mr. Davis";  
10 do you see that?

11 A. Up toward the top?

12 Q. Yes.

13 A. I see that.

14 Q. Last sentence in that paragraph indicates --  
15 and this is talking about Mr. Whitaker, "He also  
16 reported that diversions in Wyoming in water year 2002  
17 were about average and many water users tried to  
18 conserve usage"; do you see that?

19 A. I do.

20 Q. Do you remember the 2002 year being average  
21 in Wyoming?

22 A. My recollection is that it was -- the  
23 streamflow was below average, yes.

24 Q. Was below average; is that right?

25 A. Yes.



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1 Q. Turning to page 16, again, where we'll look  
2 at the contents of Tongue River Reservoir.

3 A. I'm sorry. Which page?

4 Q. Sixteen.

5 A. Oh, right.

6 Q. And here it indicates that the max  
7 end-of-month contents was 42,720; do you see that?

8 A. I do.

9 Q. And that's not to capacity; right?

10 A. That's not what?

11 Q. To the full capacity of the Tongue River  
12 Reservoir.

13 A. That's correct. I believe 42,000 is less  
14 than total capacity, yes.

15 Q. Were you aware in 2002 that the Tongue River  
16 Reservoir did not fill?

17 A. I presume we talked about it at the  
18 commission meeting, but I don't remember that  
19 specifically.

20 Q. Do you -- as part of your duties, do you  
21 regularly monitor the state line flows?

22 A. Oh, I don't say regularly, no.

23 Q. Now, you agree with me that's the dividing  
24 point between Montana and Wyoming; correct?

25 A. I agree the state line means something, yes.

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1 That would be where Wyoming stops and Montana starts,  
2 yes.

3 Q. And if water is going to enter into Montana,  
4 it would be at the state line; right?

5 A. That's correct.

6 Q. How often do you monitor the state line  
7 flows?

8 A. Oh, it really depends on the year. In my  
9 work in Cheyenne, I rely an awful lot on folks like  
10 Mike Whitaker during this time period, and Carmine  
11 LoGuidice and Bill Knapp. They are more in tune of  
12 keeping track of day-to-day or weekly -- you know, in  
13 Bill's case, the Tongue River is kind of his baby. And  
14 he keeps track.

15 In a year like 2004, when we got the call,  
16 then I would have probably pulled up the state line  
17 flow more often. But it's just a rule of thumb. It's  
18 not like every Wednesday morning I know I got to go  
19 look at state line flow. I don't keep track of it in  
20 that manner.

21 Q. Prior to 2004, would you have done it less  
22 than once a week?

23 A. Yes.

24 Q. Less than once a month?

25 A. Perhaps not.

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1 Q. Approximately once a month?

2 A. That's probably -- yeah.

3 Q. Turn, please, to Exhibit M207.

4 A. Okay.

5 Q. You have talked about this with Mr. Brown.

6 This is some minutes from a meeting that was held on  
7 April 14th of 2004; right?

8 A. Yes, that's correct.

9 Q. I think you're the one who wrote these  
10 minutes up; is that right?

11 A. Yes, that's right.

12 Q. Mr. Brown asked you about the page that's  
13 labeled WY018729. That's the third page of this  
14 document.

15 A. Okay.

16 Q. And, now, this is a meeting that we talked  
17 about, April 14th of 2004. I want to look at a little  
18 language that Mr. Brown didn't talk to you about. And  
19 the bottom paragraph, middle of the paragraph, you  
20 mentioned with Mr. Brown that you hear Montana and  
21 Wyoming were discussing the Tongue River Reservoir;  
22 right?

23 A. Yes, that's correct.

24 Q. There's a sentence there that begins "It  
25 appears"; do you see that?

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1 A. Yes.

2 Q. "It appears from all the reports that were  
3 heard today, the percentages of filling Tongue  
4 Reservoir this spring are extremely low"; do you see  
5 that?

6 A. I do.

7 Q. So by April 14th, 2004, you were aware that  
8 it was unlikely that the Tongue River Reservoir was  
9 going to fill; correct?

10 A. Yes.

11 Q. Did you change any of the practices in  
12 Wyoming because of that information?

13 A. Not that I recall.

14 Q. Did you release any water down to Montana?

15 A. No.

16 Q. It didn't start raining after April 14th a  
17 lot, did it?

18 A. Not that I recall.

19 Q. It continued to be a drought year?

20 A. That's my remembrance, yes.

21 Q. This time period, April 14th, is that the  
22 time period that you might begin what is called the  
23 free river conditions in Wyoming?

24 A. Well, we -- in a normal year, we might. A  
25 dry year like this, I don't recall if the field staff

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1 said they were regulating already. But in these really  
2 dry years, it's not unheard of to have someone do a  
3 call for regulation even into April.

4 Q. The free river stops after somebody makes a  
5 call for regulation; correct?

6 A. That's correct.

7 Q. At least for that particular water body?

8 A. That tributary, yes.

9 Q. So we should talk to Mr. Knapp or about Mr.  
10 Boyd, the water commissioners, about whether or not  
11 there was regulation as of April 14th; right?

12 A. Yes, that's correct.

13 Q. Turn, please, to Exhibit J64.

14 A. Okay.

15 Q. This is the letter that came in 2004 from  
16 Mr. Stults to Mr. Tyrrell. You've seen this document  
17 before; right?

18 A. Yes, I have.

19 Q. Looking at the first page under Tongue River,  
20 it indicates that -- and I'm looking at the third  
21 sentence. "Insufficient water is entering Montana on  
22 the Tongue River to meet any of the prior decreed  
23 rights except for partial satisfaction of the first two  
24 1886 rights"; do you see that?

25 A. I do.

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1 Q. By this time, you knew that those two rights  
2 were the Nance right and the T & Y right; correct?

3 A. Yes.

4 Q. You had learned that in the early 2000s?

5 A. Yes. I think just conversations with Keith  
6 Kerbel, he had mentioned that T & Y is the second right  
7 on the system.

8 Q. And, in fact, you told me that Montana told  
9 you that they had senior rights that were going  
10 unfulfilled; correct?

11 A. In those early dry years, yes.

12 Q. Montana has the best understanding of its  
13 water rights; correct? Certainly better than --  
14 Montana had better information than Wyoming about the  
15 condition of its water rights; correct?

16 A. Yes.

17 Q. It then indicates, the next sentence, "No  
18 other valid rights are currently being met out of the  
19 1914 decree"; do you see that?

20 A. I do.

21 Q. At this time, May 18th, 2004, did you have  
22 any information in your possession that suggested that  
23 that was not true?

24 A. Not that I recall. I don't recall that I  
25 would have had any information that would have told me

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1 that wasn't true, no.

2 Q. Turn, please, to the next page. Under the  
3 heading -- it goes through each of the basins. It  
4 completes the Clark's Fork Basin. And then there's a  
5 paragraph that begins "As compact commissioner"; do you  
6 see that?

7 A. I do.

8 Q. And then midway through there, it  
9 indicates -- there's a sentence that says "We hereby  
10 request"; do you see that?

11 A. Okay. Yeah, I'm there.

12 Q. "We hereby request that all these stored  
13 waters be immediately released and delivered to the  
14 Montana border to begin to satisfy our valid and  
15 protected pre-1950 water rights on the Tongue and the  
16 Powder Rivers"; do you see that?

17 A. I do.

18 Q. Do you know if that was done?

19 A. I do. And it was not.

20 Q. Next sentence says, "This call is for all  
21 pre-1950 Montana prior rights and those drainages, as  
22 protected in the compact in Article V, A, and needed to  
23 satisfy the senior appropriative rights in Montana"; do  
24 you see that?

25 A. I do.

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1 Q. You understood this to be a call under  
2 Article V, A?

3 A. From Montana's perspective, that's what it  
4 was, yes.

5 Q. Not from your perspective?

6 A. I believe Wyoming's interpretation of that at  
7 that time was that we did not have that obligation to  
8 move that storage water down as they are suggesting in  
9 this paragraph.

10 Q. But you did understand this to be -- from  
11 Montana's perspective it was a request for water; you  
12 understood that; right?

13 A. Yes.

14 Q. It's just that you disagreed as to whether or  
15 not the compact provided for that; right?

16 A. That's correct.

17 Q. Next paragraph, second sentence, it says  
18 "Additionally." You follow where I am?

19 A. I believe I do, yes.

20 Q. "Additionally, the technical committee should  
21 develop a process for continued delivery of water to  
22 satisfy senior users throughout the summer"; do you see  
23 that?

24 A. I do.

25 Q. Did the technical committee ever develop a



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1 process for that continued delivery of water?

2 A. We did not.

3 Q. Turn, please, to the next Exhibit, J65.

4 A. Okay.

5 Q. This is Mr. Tyrrell's response to Mr. Stults;  
6 correct?

7 A. Yes. That's what it appears to be, yes.

8 Q. And you saw this letter before it went out to  
9 Montana; correct?

10 A. I did.

11 Q. First paragraph, fourth sentence, says "We  
12 too." You see where I'm starting?

13 A. Uh-huh.

14 Q. "We too are regulating water rights back to  
15 the 1880s in the Tongue and Powder River Basins, and  
16 have numerous pre-1950 rights going unfulfilled"; do  
17 you see that?

18 A. I do.

19 Q. Here it says numerous. Do you know if there  
20 were some pre-1950 rights that were using water as of  
21 May 24th, 2004?

22 A. At the time of writing this letter, I didn't  
23 know.

24 Q. Now?

25 A. I don't know if the work done for this

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1 litigation -- I think there has been some review that  
2 there are some post-'50 rights in the main stem Tongue  
3 that perhaps were on at the time of this letter.

4 Q. Now, you testified that you investigated  
5 after this letter was sent; right?

6 A. I contacted Mike Whitaker and his staff, yes.

7 Q. And did they tell you there was no regulation  
8 on the main stem of the Tongue River in Wyoming?

9 A. I don't recall exactly. I know that we got  
10 comments back from Mr. Knapp on how far back he was  
11 regulating on the tributaries. But I don't recall  
12 whether there was specific mention on what he was doing  
13 on the main stem Tongue or not. I don't remember that  
14 specifically.

15 Q. You were aware of the content of the  
16 reservoirs in Wyoming; correct?

17 A. Mr. Tyrrell asked that the field staff go to  
18 the best of their ability and see what storage was in  
19 those facilities, when we received the call letter,  
20 yes.

21 Q. And they informed you of that content?

22 A. Yes.

23 Q. And so as of that date, whenever they  
24 reported back to you, you did know the contents of the  
25 reservoirs in Wyoming?

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1 A. Correct.

2 Q. Next page, page 2 of 3 as labeled at the top.

3 A. Okay.

4 Q. First full paragraph, second, if you include  
5 the partial one at the top, begins "As I stated;" do  
6 you see that?

7 A. Yes, I do.

8 Q. As I stated earlier, the compact makes no  
9 provisions for any state to make a call on a river"; do  
10 you see that?

11 A. Yes, I do.

12 Q. That was Wyoming's position as of 2004;  
13 right?

14 A. That's correct.

15 Q. That there was no provision for a call in the  
16 compact?

17 A. That's correct.

18 Q. That position was true prior to 2004;  
19 correct?

20 A. The position that Wyoming felt there was no  
21 language in the compact that described a call?

22 Q. Yes.

23 A. Yes, that was our position.

24 Q. And that was your position in 2001?

25 A. I don't know that we articulated that

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1 position. But I think it's certainly true that there  
2 is no language in the compact that says, here's how you  
3 do a call.

4 Q. Is that also your position in 2002?

5 A. I think that what I just described is, I  
6 don't know that we had an overt position but that as we  
7 read the compact, there was no language that said that.

8 Q. Looking at the beginning of the next  
9 paragraph, it indicates that what water is apportioned  
10 is specified in Article V, Section B; do you see that?

11 A. I do.

12 Q. That was Wyoming's position at the time;  
13 correct?

14 A. That's correct.

15 Q. That the allocation between the two states  
16 was in Article V, B; right?

17 A. Correct.

18 Q. And that Article V, A did not divide the  
19 waters between the two states?

20 A. That Article V, A recognized the rights that  
21 were in place as of 1950 and that each state regulated  
22 those under their law of prior appropriation.

23 Q. And you understood that to mean that if  
24 Wyoming was regulating its water rights according to  
25 Wyoming law, that you were in compliance with the

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1 compact?

2 A. That's correct.

3 Q. But you were not obligated to regulate  
4 Wyoming rights -- pre-Compact Wyoming rights to the  
5 benefit of -- I'm sorry. Let me start that again.

6 You were not obligated to regulate Wyoming  
7 post-Compact rights for the benefit of Montana's  
8 pre-Compact rights; correct?

9 A. That -- yes, that was our interpretation.  
10 Yes.

11 Q. That was true in 2001?

12 A. Yes.

13 Q. And 2002?

14 A. Yes.

15 Q. Exhibit M183; do you recognize this document?

16 A. I have seen this document before.

17 Q. I think you told us in your deposition that  
18 you were responsible for drafting part of it; is that  
19 correct?

20 A. That's my recollection. Just based on the  
21 font and those sorts of things, I don't believe I would  
22 have been the originator. But I likely had a chance to  
23 edit it.

24 Q. Now, you say likely. Sitting here today, do  
25 you know whether you had a chance to edit it?

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1 A. I don't remember.

2 Q. I'm going to look at the second page here and  
3 ask you a question about it. Under the heading Points  
4 Wyoming Needs to Make Clearly, it indicates, "The  
5 compact is clear that pre-1950 rights were not to be  
6 administered or allocated under the provisions of the  
7 compact"; do you see that?

8 A. I do.

9 Q. That was Wyoming's position as of 2004;  
10 correct?

11 A. That's correct.

12 Q. Exhibit M157.

13 A. Okay. I'm there.

14 Q. Have you ever seen Exhibit M157 before?

15 A. Yes, I've seen it before.

16 Q. Is this a document you saw on June 10th or  
17 somewhere around June 10th, 2004?

18 A. Yes, I believe Mr. Tyrrell would have shared  
19 it with me.

20 Q. Does it look to be reasonably complete?

21 A. Yes, it does.

22 Q. Is this a document that's kept in the records  
23 of the state engineer's office?

24 A. Yes, I believe so.

25 Q. What is this document?

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1           A.     Mr. Tyrrell was getting ready to have an  
2 update meeting with Governor Freudenthal. And Pat  
3 drafted this document after we had our meeting on  
4 June 10th with Montana.

5           MR. WECHSLER: Your Honor, I'd move the  
6 admission of Exhibit M157.

7           MR. BROWN: No objection.

8           SPECIAL MASTER: Exhibit M157 is admitted.

9   (Exhibit M157 admitted.)

10 BY MR. WECHSLER:

11           Q.     I'm interested in this second page, which is  
12 labeled WY028043.

13           A.     Okay.

14           Q.     And this is under the heading Wyoming's  
15 Arguments Are. And I'm looking at No. 4 under that  
16 heading.

17           A.     Yes.

18           Q.     That indicates that "MT, Montana, has yet to  
19 show injury from Wyoming's current operations"; do you  
20 see that?

21           A.     I do.

22           Q.     Under the prior appropriation doctrine, when  
23 a right is asking for a call, is it required to show  
24 that it's been injured?

25           A.     It has to show that if that water is

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1 delivered to it, that it can put that water to  
2 beneficial use.

3 Q. It has to show a need for water?

4 A. That's correct.

5 Q. But it doesn't need to show that it's been  
6 injured, does it?

7 A. Oh, I need to think about that for a minute,  
8 I guess.

9 Q. Take your time.

10 A. I guess to me, those two are related. They  
11 are making the call because they feel like they are not  
12 getting water to which they are -- that they have the  
13 right to. And our field personnel will make certain  
14 that that water user has the capability to put it to  
15 beneficial use. So I think by -- I think the two of  
16 those are connected, then, that says if the person  
17 wasn't injured, he wouldn't have called for the water.

18 Q. So the type of injury you're talking about is  
19 you're not getting enough water; is that right?

20 A. That's correct.

21 Q. Now, 2004, Montana told you, we're not  
22 getting enough water; right?

23 A. They told us they had rights going  
24 unfulfilled, yes.

25 Q. In fact, they said it's only the first two



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1 that are being fulfilled; right?

2 A. Yes.

3 Q. And they told you the reservoir wasn't  
4 filled; right?

5 A. Correct.

6 Q. And they attached an affidavit, I think;  
7 correct?

8 A. Mr. Hayes had one, I think, yes.

9 Q. And there was some information about the  
10 Tongue River Reservoir attached; correct?

11 A. Yes.

12 Q. And we talked about the fact that Montana  
13 certainly knows its water rights better than Wyoming;  
14 right?

15 A. Correct.

16 Q. Do you happen to know how big a right the  
17 T & Y Irrigation District is?

18 A. Oh, my recollection, it's somewhere in the  
19 168 CFS range, something like that.

20 Q. I'll represent it's 187.5.

21 A. Okay.

22 Q. And that was roughly consistent with your  
23 understanding; correct?

24 A. Yes.

25 Q. And that was true in 2004; you understood

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1 that?

2 A. Yes.

3 Q. I'm hoping my colleague will put page 35 of  
4 Mr. Book's report up, which is Exhibit M5. Page 35 is  
5 a Table 5, which shows the mean CFS at the state line.

6 A. That's not in here.

7 Q. It's not in there, no. You'll have to look  
8 at the screen.

9 A. Okay.

10 Q. Are you able to see that?

11 A. Yeah.

12 Q. Maybe we can highlight the section from, say,  
13 1999 to the bottom. Okay. Can you see that better?

14 A. I can. That's much better.

15 Q. So we were talking about 2004. You mentioned  
16 that you understand the T & Y is roughly -- I think you  
17 said 165. Let's use that number. In May, at the state  
18 line, the mean was 192 CFS; right?

19 A. I'm sorry. I didn't look at the columns, but  
20 I'll trust you that's what that first column is.

21 Q. I think it indicates at the very top. Oh, I  
22 see -- yes. I'll represent to you the first column is  
23 May. And that indicates 192 CFS; right?

24 A. Correct.

25 Q. Now, the briefing we were looking at was

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1 after the June 10th meeting; correct?

2 A. That's correct.

3 Q. In June, the mean there was 181 CFS; right?

4 A. Yes, that's correct.

5 Q. And then the CFS drops after that; correct?

6 A. Yes. Yes, that's correct.

7 Q. Do you still have with you Exhibit W319 that  
8 was provided by Mr. Brown? It's your handwritten notes  
9 from a call with Mr. Kerbel dated 6/18/04.

10 A. I'm sorry. What was the date again?

11 Q. It's handwritten notes. At the top, it says  
12 Keith Kerbel, with the date 6/18/04 - phone call.

13 Total of three pages.

14 A. These were just in chronological order. Yes,  
15 I have it.

16 Q. I'm looking at page 2.

17 A. Okay.

18 Q. About the middle of the page, it says "On  
19 Tongue"; do you see that?

20 A. I do.

21 Q. So it looks like here you're inquiring from  
22 Mr. Kerbel about the addition of their rights; correct?  
23 Well, let me just ask you what each of these say. Here  
24 it says, as I read your handwriting, "On Tongue using  
25 both 1914 decree and 1978 claims." Let me stop there.

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1 You were aware of the 1915 decree; correct?

2 A. Nineteen.

3 Q. Fourteen decree.

4 A. Yes. I'm sorry. I thought you said 1915.

5 Q. I may have. I meant to say 1914.

6 A. Okay.

7 Q. And next it indicates 1978 claims. What did  
8 you understand that to mean?

9 A. I meant the claims that might be done under  
10 the general adjudication process in Montana.

11 Q. Then it indicates "The two," and it says  
12 "water comm." Is that referring to water  
13 commissioners?

14 A. I believe I may have asked Mr. Kerbel a  
15 question about whether water commissioners had been  
16 appointed by the courts and trying to learn a little  
17 bit more about how that whole process worked. And I  
18 apparently didn't finish that thought of "I don't know  
19 what only have," then went on to say -- but we were  
20 talking about the water commissioners that are  
21 appointed by the court on the Tongue.

22 Q. And you understood those water commissioners  
23 were using both the 1914 decree and the 1978 claims?

24 A. I'm not sure whether I knew whether the  
25 '78 claims had been through the adjudication process

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1 sufficiently such that they were actually being used to  
2 regulate water or whether deliveries were still being  
3 made only under the 1914 decree. I'm not positive  
4 about that.

5 Q. You understood the water commissioners were  
6 using at least the 1914 decree?

7 A. That's correct.

8 Q. Then it indicates, as I understand it, that  
9 there's only half of the Nance 10 CFS 1886 and T & Y  
10 186 and one-half CFS also 1886; you see that?

11 A. I do.

12 Q. These notes are dated 6/18/04. Do you know  
13 if Wyoming took any action to make sure that additional  
14 water got down to Montana?

15 A. I do know. And, no, we did not.

16 Q. Next page, WY018756 at the bottom. Then it  
17 indicates "getting reservoir full would help lots,"  
18 does that say "issue on Tongue"?

19 A. I'm sorry. Almost at the bottom?

20 Q. Almost at the bottom.

21 A. Yes. "Getting reservoir full would help  
22 lots -- lots issues" meant lots of issues on the Tongue  
23 is what I wrote, yes.

24 Q. What does that mean?

25 A. I think Mr. Kerbel was expressing that if

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1 Tongue River Reservoir is full, that even if we  
2 experience dry conditions later into the season where  
3 direct flow rights are, perhaps, limited, that if  
4 there's ample storage water, that that definitely helps  
5 the regulation scenario in Montana.

6 Q. Did Wyoming take any action to make sure that  
7 the Tongue River Reservoir got full in 2004?

8 A. We did not.

9 Q. Please turn to Exhibit M159. At the top it,  
10 says "Draft, Draft, Draft."

11 A. That's in your notebook?

12 Q. It is, yes.

13 A. And I'm sorry. I didn't hear the number.

14 Q. M159.

15 A. Would it be quite a ways down?

16 Q. Should have a tab on it.

17 A. There's a W159, and that, of course, is not  
18 it.

19 SPECIAL MASTER: This is a new document  
20 today?

21 MR. WECHSLER: It is, yes.

22 THE WITNESS: Sorry. Am I just being blind?

23 MR. WECHSLER: Hopefully they are in  
24 chronological order.

25 SPECIAL MASTER: It doesn't appear to be on

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1 your list. So we're going to pull a copy back here.

2 By the way, just two thoughts from the  
3 standpoint of my own organization. First of all, when  
4 Wyoming is going to be using any exhibits which are  
5 Montana exhibits, if you actually tell the court deputy  
6 at the beginning of the day about those, she can pull  
7 all my copies, and I'll just have them. And that way  
8 you don't have to make an additional copy. And I'm  
9 sure I have the ones that I may have already made a  
10 note on them.

11 MR. BROWN: Okay.

12 SPECIAL MASTER: And that goes for the J  
13 exhibits also. I think I have a full set of the J  
14 exhibits back here. And then on the Montana side, it's  
15 probably easier for me to put them in numerical order  
16 rather than putting them in the order that you're going  
17 to be using them because sometimes I notice you switch  
18 a little bit along the way. And it's harder for me to  
19 find them.

20 MR. WECHSLER: Okay.

21 SPECIAL MASTER: Okay. Great.

22 BY MR. WECHSLER:

23 Q. Ms. Lowry, do you have Exhibit 159?

24 A. Yes, I do.

25 Q. Have you seen this document before?

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1 A. Yes, I have.

2 Q. What is it?

3 A. The title says Potential Items for Basin  
4 Management Plan for Tongue River. It's dated June 28,  
5 '04.

6 Q. What was this document used for?

7 A. Internal discussions on, I think Montana had  
8 raised the idea of how to more look at the basin as a  
9 unit, I guess. And I think we were brainstorming on  
10 whether there were some topics that might fit with that  
11 kind of philosophy of how to manage the river.

12 Q. Those were discussions that you were involved  
13 in?

14 A. Yes, they were.

15 Q. And you used this document at that time?

16 A. I believe so, yes.

17 MR. WECHSLER: Your Honor, I move the  
18 admission of Exhibit M159.

19 MR. BROWN: I apologize, Your Honor. I was  
20 talking about a different exhibit. I don't recall if  
21 Miss Lowry ever testified with regard to the author of  
22 this document.

23 MR. WECHSLER: She testified that she used  
24 it. I'm happy to ask her if you'd like, Your Honor.

25 THE WITNESS: I don't believe it was me. I



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1 think Hugh McFadden drafted it. I have seen it before,  
2 but I don't believe I was the author.

3 MR. BROWN: I don't have any objection.

4 SPECIAL MASTER: Okay. Then Exhibit M159 is  
5 admitted.

6 (Exhibit M159 admitted.)

7 BY MR. WECHSLER:

8 Q. Ms. Lowry, this is June 28th. And my  
9 understanding is this is just prior to a meeting with  
10 Montana; correct?

11 A. Yes. A phone call, I believe, on June 30th,  
12 yes.

13 Q. And this document was done in preparation for  
14 that phone call; right?

15 A. Yes. My recollection was that the work that  
16 Hugh McFadden, the terms of reference discussion, I  
17 think he was interested in exploring some of these  
18 topics as he was doing his work with Candace West.

19 Q. Second bullet point talks about Wyoming could  
20 outline how the private reservoirs are operated; do you  
21 you see that?

22 A. I do.

23 Q. And then it goes on to say "and what  
24 restrictions there are such as icing issues, et  
25 cetera." What issues were those?

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1           A.    I think we heard testimony from the field  
2 personnel that these reservoirs are quite high in  
3 elevation and depending on the type of outlet works  
4 that there could be issues on how high a carryover to  
5 go into the winter months with, potentially could be  
6 icing issues into the spring months as well when they  
7 would start to -- the capability to make releases  
8 without causing icing issues in the stream channel  
9 below. I think those would be generally the topics  
10 that were in mind here.

11           Q.    Those are reservoirs in Wyoming?

12           A.    I'm sorry?

13           Q.    Those are reservoirs in Wyoming?

14           A.    Yes, I believe that paragraph was referring  
15 to the high elevation mountain reservoirs in Wyoming.

16           Q.    Skip a bullet point. And then there, it  
17 indicates "Wyoming main stem Tongue, assess rights even  
18 when no formal call for regulation by senior right"; do  
19 you see that?

20           A.    I do.

21           Q.    What did that mean?

22           A.    I think we had discussions with Mr. Whitaker  
23 and either Bill Knapp or Pat Boyd about the rights that  
24 were on the main stem within the Tongue in Wyoming.

25           Q.    And you were willing to discuss with Montana

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1 whether to assess those rights even if there's no  
2 formal call?

3 A. I believe that was our intent of having this  
4 on the list, yes.

5 Q. And then the paren says "maybe agree to do  
6 this ahead of time for certain hydrologic conditions";  
7 do you see that?

8 A. I do.

9 Q. What did that mean?

10 A. I don't recall that we had gotten into any  
11 depth more than just the words that are there. I think  
12 it was just, again, we were brainstorming topics and  
13 that if there was some mechanism to tie our review of  
14 the Tongue River main stem to a year when it's dry,  
15 that we might be willing to talk about that.

16 Q. Turn, please, to Exhibit 192.

17 A. Wyoming?

18 SPECIAL MASTER: M192?

19 MR. WECHSLER: M192.

20 THE WITNESS: There's a W192 that's Park  
21 Reservoir. That's not it?

22 BY MR. WECHSLER:

23 Q. It should be dated June 30th, 2004. Let me  
24 get you one.

25 SPECIAL MASTER: This was used this morning?

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1 MR. WECHSLER: It was not, Your Honor.

2 SPECIAL MASTER: Okay. Hold on one second,  
3 and we'll pull that.

4 THE WITNESS: Oh, it was in my book, but it  
5 was labeled -- oh, sorry. Never mind.

6 SPECIAL MASTER: I assume this was already  
7 admitted? Yes, okay.

8 BY MR. WECHSLER:

9 Q. Ms. Lowry, this is a document I spoke with  
10 Mr. Moy about. I assume this is a document you've  
11 never seen.

12 A. I've never seen this document.

13 Q. You recall there was a teleconference on  
14 June 30th?

15 A. Yes, I do.

16 Q. Turn to page 2 of that document under the  
17 heading Aerial Imagery.

18 A. Okay.

19 Q. Third sentence indicates, "Montana asked if  
20 Wyoming would be willing to share in the cost of such  
21 an endeavor." And here I think they are talking about  
22 gathering aerial imagery; right?

23 A. Yes, that appears to be true.

24 Q. Wyoming indicated that it wasn't willing to  
25 do that in part because you already had aerial

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1 photography; is that right?

2 A. That's correct.

3 Q. You recall that discussion?

4 A. Just vaguely. But when you mentioned that  
5 earlier today, in my hand notes where I had the DOQQ, I  
6 believe that's what those -- those maps refer to this  
7 high resolution photography.

8 Q. Let's take a look at that document, which is  
9 W324. And you spoke with Mr. Brown earlier today. And  
10 these, I believe, are notes of yours from the same  
11 meeting. The front indicates it's the agenda for the  
12 conference call. And behind it, as I understood, are  
13 your notes.

14 A. Okay. I have it.

15 Q. Now, the first paragraph on page 2, you spoke  
16 with Mr. Brown, I believe, about a paragraph that says  
17 need to define and not act on a hunch; is that right?

18 A. That's right.

19 Q. Now, certainly Wyoming knows Wyoming water  
20 rights much better than Montana; right?

21 A. Yes, I believe we do.

22 Q. And, in fact, you have annual reports;  
23 correct?

24 A. Our hydrographer reports?

25 Q. Yes.

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1 A. Yes.

2 Q. And you have water commissioners that are out  
3 there on the rivers; correct?

4 A. That's correct.

5 Q. So certainly you would know what -- Wyoming  
6 would know what water rights are in use much better  
7 than Montana; right?

8 A. I believe so, yes.

9 Q. Turn, please -- well, you spoke with  
10 Mr. Brown about Exhibit W106, which is an e-mail from  
11 July 1st, 2004, from Keith Kerbel to you.

12 A. May I put 324 away?

13 Q. Yes, please.

14 A. I'm sorry. The next number?

15 Q. W106.

16 A. Yes, I have it.

17 Q. This is the e-mail where Mr. Kerbel is asking  
18 about the free water; right?

19 A. He's asking about the duty of water, yes.

20 Q. And it talks about the 2 CFS per 70 acres in  
21 the spring?

22 A. Correct.

23 Q. Now, in the spring is also typically when the  
24 Tongue River Reservoir fills; right?

25 A. Typically, yes.

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1 Q. You knew that in 2004?

2 A. Yes.

3 Q. Turn, please, to Exhibit W110. W110.

4 A. That's in your book?

5 Q. Yes. Do you have that?

6 A. I do.

7 SPECIAL MASTER: I'm sorry. Let me just --  
8 so where is W110?

9 MR. WECHSLER: W110.

10 SPECIAL MASTER: But is it part of --

11 MR. WECHSLER: It should be part of the  
12 documents that Montana identified. It's a letter from  
13 the Wyoming state engineer's office dated July 6, 2004.

14 SPECIAL MASTER: Okay. There was just a  
15 whole series of W documents. And they all just had a  
16 W80 sticker on it. So my guess is it's in here. So  
17 let me just check.

18 THE WITNESS: Mr. Wechsler, mine doesn't  
19 appear to be complete. I only have pages 1 and 2 if  
20 that was your intent.

21 SPECIAL MASTER: Same here. This would be an  
22 excellent time for a break. So why don't we take the  
23 first of the afternoon breaks right now, and then we  
24 will come back in ten minutes.

25 (Recess taken 2:16 to 2:29)

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1 p.m., November 25, 2013)

2 SPECIAL MASTER: Everyone can be seated.

3 Okay. Mr. Wechsler.

4 MR. WECHSLER: Thank you, Your Honor.

5 BY MR. WECHSLER:

6 Q. Ms. Lowry, I had referred to a document that  
7 was W110. But I'm informed that that exhibit is also  
8 J66. So I'm going to ask that you look at J66, which I  
9 have placed in front of you.

10 A. Yes, I have it.

11 Q. Do you recognize that document?

12 A. Yes, I've seen this before.

13 Q. In fact, you were copied on it; right?

14 A. Yes, I was.

15 Q. My question on this document is, did Wyoming  
16 ask Montana for any information about the activities of  
17 Montana's water commissioners?

18 A. I don't see it now, and I don't recall that  
19 we did.

20 Q. You also have before you Exhibit J67?

21 A. Yes, that's correct.

22 Q. Do you recognize that document?

23 A. Yes.

24 Q. And this is a request from Montana to  
25 Wyoming; correct?



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1 A. Correct.

2 Q. Do you know if you got all this information  
3 to Montana?

4 A. It appears they were asking for a few things  
5 that weren't necessarily from our agency, so I would  
6 say it's unlikely that a complete list, 1 through 9,  
7 was responded to.

8 Q. Turn, please, to Exhibit J54.

9 A. Yes, I have it.

10 Q. This is the annual report from 2004, or the  
11 minutes from the annual report; correct?

12 A. That's correct.

13 Q. And the first part is the April 15th meeting;  
14 correct?

15 A. Yes.

16 Q. You attended that meeting?

17 A. Yes, I did.

18 Q. Starting on Roman V is the  
19 December 6th meeting; is that right?

20 A. Yes, that's correct.

21 Q. December 6 was after the letter that was  
22 written by Mr. Stults requesting regulation in Wyoming;  
23 correct?

24 A. Yes, that's correct.

25 Q. So I want to look through this document and

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1 find where the reference is. So on that page, Roman V,  
2 do you see any reference to the call made by Montana?  
3 I don't think it's there if that helps you at all.

4 A. Well, I see a paragraph that starts  
5 "Mr. Stults stated the 2004 were deficient," so...

6 Q. What page are you?

7 A. I'm on Roman Numeral VIII.

8 Q. Oh, yes. I believe --

9 A. Midway.

10 Q. So my point is, that reference doesn't show  
11 up on Roman V, VI, or VII; right?

12 A. I'm sorry. I didn't quite follow.

13 Q. There's no reference to the communication  
14 between Montana and Wyoming on pages V, VI, or VII of  
15 the 2004 annual meeting; correct?

16 A. Well, I haven't thoroughly reviewed these  
17 again. So I can't say for sure.

18 Q. You didn't immediately see one when you  
19 looked?

20 A. That's correct.

21 Q. Looking at Roman VIII there, and I think it  
22 shows up on the fifth paragraph "Mr. Stults stated";  
23 right? Is that the paragraph you were looking at?

24 A. The 2004 flows in the Tongue River, that one?

25 Q. Yes.

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1 A. Yes.

2 Q. And if you read through that paragraph, then  
3 it says -- finally says, "Montana specifically  
4 requested that Wyoming release post-1950 stored water  
5 so that pre-1950 users in Montana could satisfy their  
6 water rights"; do you see that?

7 A. I do.

8 Q. Then it indicates, "Wyoming indicated that  
9 this call would not be heeded as Wyoming believes there  
10 is no legal basis for making such deliveries"; right?

11 A. I see that, yes.

12 Q. And that was Wyoming's position at the time?

13 A. That's correct.

14 Q. You understand that the Tongue River  
15 Reservoir did not fill in 2004?

16 A. Yes. I was notified of that, yes.

17 Q. Turn, please, to Exhibit W340 which you  
18 looked at with Mr. Brown this morning.

19 A. Do you mind giving me the date?

20 Q. Not at all. The date is April 25th, 2005.  
21 It's labeled Yellowstone River Compact Commission  
22 Technical Committee discussions.

23 A. 340?

24 Q. W340.

25 A. Okay. I have it.

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1 Q. My question is on the third page of this  
2 document, which is MT13477; do you see that?

3 A. I do.

4 Q. Now, there's a description here, a paragraph  
5 about the Tongue River Reservoir. Now, the best source  
6 of information about the reservoir would be either  
7 Mr. Smith or Mr. Hayes; correct?

8 A. Yes.

9 Q. So if there's something in here that's  
10 inconsistent with their testimony, then, really, it's  
11 their testimony that's more accurate; correct?

12 A. I believe Mr. Hayes was at this meeting.  
13 But...

14 Q. To the extent there's something inconsistent,  
15 really we should go by what Mr. Smith and Mr. Hayes  
16 testified to; is that right?

17 A. I really can't answer that. I tried to  
18 accurately reflect what those gentlemen said at this  
19 meeting. And if they said something else in their  
20 testimony, that -- they certainly could have.

21 Q. You're not claiming to be an expert on the  
22 Tongue River Reservoir?

23 A. No, I am not.

24 Q. In 2005, you were informed that you should  
25 anticipate another call letter; right? Do you recall

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1 that?

2 A. I do not recall that.

3 Q. In your book there, if you turn to Exhibit  
4 M158.

5 A. Okay.

6 Q. Have you ever seen this document before?

7 A. If I have, it's been a long time ago, and I  
8 don't -- it doesn't really look like anything I  
9 remember, no.

10 Q. Fair enough. The top indicates that there  
11 was a technical meeting held on the 25th of April. And  
12 we just looked at some minutes of that meeting;  
13 correct?

14 A. Right.

15 Q. And that was followed by a commission meeting  
16 on the 26th; is that right?

17 A. In April?

18 Q. Yes.

19 A. Yes.

20 Q. And looking at this particular bullet --  
21 three bullet points down, it's an empty circle. It  
22 says, "At the commission meeting, Montana stated that  
23 Wyoming should anticipate another letter calling for  
24 their water under the compact"; do you see that?

25 A. I do.

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1 Q. Does that refresh your memory?

2 A. I'm sorry. It doesn't. I don't dispute that  
3 it probably happened, but I don't remember it.

4 Q. Turn, please, to Exhibit J68.

5 A. Okay.

6 Q. Do you recognize this document?

7 A. Yes, I do.

8 Q. This is the call letter that was sent from  
9 Mr. Stults to Mr. Tyrrell in 2006; right?

10 A. Yes, that's correct.

11 Q. And, again, here in -- under the second full  
12 paragraph under the heading The Tongue River on the  
13 first page, about midway down is a paragraph -- I'm  
14 sorry, a sentence that begins "Article V, A"; do you  
15 see that?

16 A. You're still on page 1?

17 Q. I am. "Article V, A of the Yellowstone  
18 Compact provides."

19 A. You're within the first big paragraph there?

20 Q. Under the heading The Tongue River.

21 A. Yes, I think I'm there.

22 Q. Continuing that sentence "provides that each  
23 state is entitled to satisfy its pre-1950 water rights  
24 before either state may supply its supplemental or  
25 post-1950 uses"; do you see that?

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1 A. I do.

2 Q. You understood that to be Montana's position?

3 A. I did.

4 Q. A little further down is the sentence that  
5 begins, "Our 1938."

6 A. Yes, I see that.

7 Q. "Holders are not able to use the full amount  
8 of their contracts and the decreed pre-1950 users of  
9 direct flow in Montana are being seriously shorted on  
10 rights they would normally receive to finish the  
11 irrigation season"; do you see that?

12 A. I do.

13 Q. Did you understand that to be true?

14 A. I had no reason to not believe those  
15 statements, yes.

16 Q. And, in fact, they -- those statements were  
17 supported by an affidavit from Mr. Hayes; correct?

18 A. Yes.

19 Q. Also an affidavit this time from Mr. Kepper  
20 who was a water commissioner in Montana?

21 A. Yes.

22 Q. You had no reason to doubt that?

23 A. Correct.

24 Q. We don't need to go and look at the flows  
25 again. But do you recall the flows at the state line

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1 in July of 2006 as being extremely low?

2 A. It was a dry year, yes.

3 Q. Do you recall that they were low in July of  
4 2006?

5 A. I'm sorry. Not without going back and  
6 looking.

7 Q. We can do that. That would be in Exhibit M5,  
8 Table 5. But you do remember it being dry?

9 A. Yes.

10 Q. Turning to an exhibit that you talked with  
11 Mr. Brown about but it is in the book you have from me,  
12 Exhibit W154.

13 A. Yes, I have it.

14 Q. This is an e-mail from Mr. Knapp; correct?

15 A. That's correct.

16 Q. I understood this to be part of the  
17 investigation you were asked to contact Mr. Knapp;  
18 right?

19 A. Right.

20 Q. Find out what the state of water was in  
21 Wyoming; correct?

22 A. Right.

23 Q. That information that you got, that was from  
24 Mr. Knapp; right?

25 A. Correct.



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1 Q. And you relied on the information that  
2 Mr. Knapp provided?

3 A. I did.

4 Q. And you didn't have any independent knowledge  
5 of that information; right?

6 A. When you say "that information," do you mean  
7 what's in his spreadsheets or what's in Item 1 and 2  
8 there where he's giving those URLs?

9 Q. I mean the information that he investigated  
10 in the Tongue River Basin in Wyoming.

11 A. The information that was in his attached  
12 spreadsheets, I would have had no other source of  
13 information other than Bill Knapp. And I trust that he  
14 keeps very meticulous records. I think upon receiving  
15 this e-mail, I certainly might have gone to the Miles  
16 City gauge that's located on the USGS's website to take  
17 a look at the information he's suggesting here about  
18 what the flows were that could have been available for  
19 Tongue River Reservoir to flow -- or I'm sorry, to  
20 store.

21 Q. I understand. Turning to Exhibit M495, which  
22 was the next document in that folder. I believe you  
23 spoke with Mr. Brown about this document. It's an  
24 e-mail from Mr. Knapp to you dated Friday, August 4th,  
25 2006, with spreadsheets attached.

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1 A. M155 -- I'm sorry. W155. Oh that's the one  
2 that got introduced by both?

3 Q. I believe it was a document that Mr. Brown  
4 handed you, Exhibit 495, which I will represent is  
5 identical to Exhibit W155.

6 A. Okay. I have it.

7 Q. And, again, this is information that was  
8 provided by Mr. Knapp?

9 A. Yes, that's correct.

10 Q. And you didn't have independent information  
11 about that?

12 A. No, I did not.

13 Q. Turning to Exhibit J69, which is the response  
14 from Mr. Tyrrell.

15 A. Yes, I have that.

16 Q. Page 2 at the top.

17 A. Okay. I'm there.

18 Q. Here it indicates at the very last sentence  
19 of that paragraph, "An interstate delivery schedule for  
20 pre-1950 rights is not now, and never was, a provision  
21 of this compact"; do you see that?

22 A. I do.

23 Q. And that was the position in 2006; right?

24 A. That's correct.

25 Q. Up above it talks about that being the

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1 long-held position of Wyoming. Do you understand that  
2 that was a long-held position of Wyoming?

3 A. Yes.

4 Q. And at the end on page 3, Mr. Tyrrell  
5 concludes, indicating that Wyoming will not release  
6 stored water; you see that?

7 A. I'm sorry. I don't.

8 Q. Third page, second to last paragraph, "In  
9 sum."

10 A. Okay.

11 Q. And Wyoming didn't release water for the  
12 benefit of Montana; correct?

13 A. I didn't quite understand you.

14 Q. Wyoming did not release stored water for the  
15 benefit of Montana?

16 A. Oh, for the benefit. No, we did not.

17 Q. And also did not regulate any Wyoming water  
18 rights for the benefit of Montana?

19 A. We did not.

20 Q. In fact, that's never been done?

21 A. That's accurate.

22 Q. Turn, please, to Exhibit J56. Well, I'm  
23 sorry, Miss Lowry. Before you go there, let's look  
24 first at Exhibit W164. Do you have that in your book?  
25 It should be the document immediately before.

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1 A. Oh, it's an e-mail from Mary Sexton?

2 Q. Correct.

3 A. Yes, I have that.

4 Q. That's an e-mail that you received; is that  
5 correct?

6 A. Yeah, looks like I'm in the distribution.

7 Q. Looking at that distribution list, that's a  
8 number of individuals that are involved in the compact  
9 commission; is that correct?

10 A. Yes. I'm guessing that was probably the  
11 USGS's distribution 'cause it has some additional folks  
12 in it that aren't necessarily day-to-day kind of  
13 involved. So, yes.

14 Q. By this time, Ms. Sexton was the Yellowstone  
15 River Compact Commissioner for the state of Montana?

16 A. Yes, I believe that's correct.

17 Q. And the subject here is Montana Resolution;  
18 right?

19 A. Correct.

20 Q. Turning to the attachment, that is the  
21 resolution that's referred to; correct?

22 A. Yes.

23 Q. Do you remember receiving this resolution?

24 A. I remember seeing it at the meeting and that  
25 it was discussed. I don't recall how -- I don't know

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1 the timing of December 28th relative to the meeting.

2 Q. You are one of the addressees?

3 A. Yes.

4 MR. WECHSLER: Your Honor, I move the  
5 admission of Exhibit W164.

6 MR. BROWN: No objection.

7 SPECIAL MASTER: Exhibit W164 is admitted.

8 (Exhibit W164 admitted.)

9 BY MR. WECHSLER:

10 Q. Here in the text of the message, Ms. Lowry,  
11 it indicates that Ms. Sexton's speaking, "I'm sorry  
12 that this is coming at a late date"; do you see that?

13 A. Yes, I do.

14 Q. It indicates, "I had thought that Bill Horak  
15 would attach this to the agenda mailing"; do you see  
16 that?

17 A. I do.

18 Q. Do you recall that Montana had thought that  
19 Mr. Horak would attach the resolution to the agenda?

20 A. I recall at the meeting that Mr. Horak said  
21 that he did not include it with the mailing. I don't  
22 know whether Montana felt that he would or not.

23 Q. Let's take a look at that commission meeting,  
24 which is J56.

25 A. Okay.

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1 Q. And I think the discussion begins on page  
2 Roman X. XI -- I'm sorry. 11, XI, and Bates-stamped  
3 WY016135. Fifth paragraph down indicates, "Mr. Horak  
4 asked Ms. Sexton to begin the discussion"; do you see  
5 that?

6 A. I do.

7 Q. And that's on this resolution; is that  
8 correct?

9 A. That's correct.

10 Q. Now turning to the next page, Roman XII, at  
11 the very top, first sentence, Ms. Sexton was indicating  
12 that she was under the impression that when the  
13 resolutions came in, the commission, through the  
14 chairman, would present them at the meeting. Do you  
15 see that?

16 A. I do.

17 Q. Now, if you look at the next paragraph, there  
18 it indicates, "Mr. Horak replied that he did not  
19 distribute the resolution with the agenda because he  
20 felt that the Wyoming commissioner would not adopt that  
21 resolution without considerable discussion, if, in  
22 fact, he was ever ready to adopt it."

23 Do you see that?

24 A. I do.

25 Q. Do you recall that discussion?

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1 A. I do.

2 Q. Skipping the very short paragraph and going  
3 to the next one that begins "Again, Mr. Horak"; do you  
4 see that?

5 A. I do.

6 Q. And then I understand this paragraph to be  
7 Mr. Horak speaking; is that your understanding?

8 A. Yes.

9 Q. Last sentence -- I'm sorry. Second to last  
10 sentence, "In a circumstance where a proposed  
11 resolution isn't characterized by that evident conflict  
12 of opinion, he probably would have done as requested  
13 and distributed the resolution. However, he deemed  
14 this to be quite a different circumstance."

15 Do you recall that discussion?

16 A. The general discussion, yes.

17 Q. And the general discussion was because this  
18 was a matter of dispute; Mr. Horak wasn't going to put  
19 it on the agenda; correct?

20 A. I guess my recollection was that he felt  
21 because of the -- Mary Sexton had not been to a meeting  
22 yet, I think that the commission had not generally done  
23 its work through resolutions such as this. I think  
24 Mr. Horak recognized that the items that were in the  
25 resolution were quite controversial and recognized that

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1 Wyoming was likely not going to second the admission of  
2 that resolution into the agenda.

3 I mean, I can't speak for whether that was  
4 the proper thing for the federal chairman to do or not.  
5 But I think that was Mr. Horak's reasoning as to why he  
6 chose to not distribute the resolution with the mailing  
7 that went out to his larger distribution list.

8 Q. Skipping, again, the very small paragraph, it  
9 indicates, "Mr. Horak replied that this issue has a  
10 long history in this commission. The position Montana  
11 put forth is a position that the Wyoming commissioner  
12 would not embrace." And that's consistent with what  
13 you just said; right?

14 A. Yes.

15 Q. And then I think we can confirm, actually,  
16 what you suggested about no second actually happened if  
17 you look at the next page, Roman XIII. Third paragraph  
18 indicates, "Ms. Sexton made a motion to move forward  
19 Montana's resolution as proposed for the December 6th  
20 meeting, and that the Northern Cheyenne Tribe be given  
21 an opportunity to comment on their position regarding  
22 this resolution."

23 Do you see that?

24 A. I do.

25 Q. Next it indicates, "Mr. Horak asked for a



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1 second on the motion. There was no second"; do you see  
2 that?

3 A. I do.

4 Q. Is that your recollection?

5 A. It is.

6 Q. Next I want to talk about a couple of  
7 documents that were discussed with Mr. Loren Smith.  
8 Were you present for his testimony?

9 A. Yes, I was.

10 Q. And there were a couple documents that I  
11 don't have a lot to ask you about, other than to verify  
12 that they are what they are. And the first is Exhibit  
13 M214, which should be the last exhibit in your  
14 compendium there.

15 A. Yes, I see that.

16 Q. Now, I understand from Mr. Smith, that you  
17 were the person at Wyoming who was responsible for  
18 collecting comments on Wyoming's comments to the  
19 Yellowstone River Compact Commission minutes; is that  
20 right?

21 A. Yes. Generally when Wayne Berkas would --  
22 well, by '07, we were having an actual transcript of  
23 the meeting completed. So Wayne would send his first  
24 edit and condensed minutes as well as the transcript  
25 itself, to each of the states. I would then distribute

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1 that to whoever staff from Wyoming who attended the  
2 meeting and ask for any further comments they had and  
3 to get those back to me such that we could just send  
4 back to Wayne one consolidated Wyoming set of comments  
5 rather than several trickling in to Wayne.

6 Q. At the top of this document, it indicates,  
7 "Edits from Wyoming to 3/16/07 version from Wayne"; do  
8 you see that?

9 A. I do. Mine is not blue.

10 Q. Is this the type of compilation that you were  
11 just describing?

12 A. It is.

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

14 A. Yes.

15 Q. Is this a compilation that you did of  
16 comments from Wyoming?

17 A. Just quickly glancing, I can't tell whether  
18 these are all just Wyoming's so whether perhaps some of  
19 Montana's edits are in this version. But certainly a  
20 version like this is what we would circulate amongst  
21 the Wyoming people.

22 Q. And where it indicates edits from Wyoming,  
23 does that indicate to you that those were edits that  
24 would have come from Wyoming?

25 A. It does.

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1 MR. WECHSLER: Your Honor, at this point, I'd  
2 move for the admission of Exhibit M214.

3 MR. BROWN: If we could have counsel ask  
4 Ms. Lowry who she believes the edits might have come  
5 from.

6 MR. WECHSLER: Happy to.

7 BY MR. WECHSLER:

8 Q. Ms. Lowry, turning to page 3, it indicates  
9 comment D.W. Was there an individual at the state of  
10 Wyoming with the initials D.W.? Are you familiar with  
11 Mr. David Willms?

12 A. I am. I was verifying he was there. And,  
13 yes, I see his name in the first paragraph.

14 Q. Would you sometimes circulate these documents  
15 to Mr. Willms for comment?

16 A. Yes.

17 Q. On the next page, there's a comment that  
18 doesn't appear, on my version, to have an author. And  
19 so do you have any way of knowing whose edit that would  
20 be?

21 A. Where it says "Mr. Horak asked Ms. Sexton"?

22 Q. Yes.

23 A. I'm sorry. I don't.

24 Q. And unless there's an author connected with  
25 it, would you be able to identify who the comments came

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1 from?

2 A. Not off of this document. On my electronic  
3 version, the -- what's the word I'm thinking of -- the  
4 review function would tell me. But once it's on paper,  
5 I don't know.

6 Q. Who would you circulate this type of document  
7 to?

8 A. Internal to the Wyoming team?

9 Q. Yes. Who was on that team?

10 A. Well, generally whoever attended, but I would  
11 always copy the state engineer and the two division  
12 superintendents. If they had staff -- once Carmine  
13 LoGuidice got promoted to being the assistant  
14 superintendent, I would generally send it to him as  
15 well. More recently, Jodee Pring has gotten more  
16 active, so I would circulate it to her. And then if  
17 there was a representative from the Attorney General's  
18 office, I would circulate it to them. So pretty much  
19 the Wyoming people who were at the meeting and  
20 participated.

21 Q. We've talked about the D.W. comments.  
22 There's one other comment I want to ask, on page  
23 WY027415. That has a comment of -- the author appears  
24 to be S3; do you see that?

25 A. Oh, 415. Yes, I see the balloon, yes.

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1 Q. My next question is: Do you know who that  
2 is?

3 A. I do not.

4 MR. WECHSLER: I think that's all of the  
5 comments. And so, Your Honor, that's the best I can  
6 do.

7 MR. BROWN: Recognizing that this was already  
8 produced in discovery, I'd still like to, now that I  
9 know who D.W. is, lodge an objection with regard to  
10 privilege, recognizing that it's been produced in  
11 discovery.

12 SPECIAL MASTER: So is there any other -- if  
13 you would like to -- why don't we do this. If you'd  
14 like to question the witness about this, you're more  
15 than welcome right now, in terms of establishing more  
16 evidence of privilege. But based on what I see right  
17 now, I would deny the objection and admit it.

18 MR. BROWN: And I guess I don't -- I'm  
19 missing the point with regard to questioning the  
20 witness. She testified it was from David Willms. He  
21 was the legal counsel to the representatives on the  
22 Yellowstone River Compact Commission at the time. It  
23 was a communication from him to her with regard to the  
24 changes in this, so the basis of the fact that the  
25 communication was made from legal counsel to the

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1 client.

2 MR. WECHSLER: Your Honor, may I briefly  
3 respond to that?

4 SPECIAL MASTER: Yes, you can.

5 MR. WECHSLER: My only point is it appears  
6 from the initial comment that they are edits from  
7 Wyoming, that these comments were likely distributed at  
8 that time regardless of whether they were produced to  
9 the federal commissioner.

10 SPECIAL MASTER: So the reason why -- at this  
11 point, I mean, feel free to give me further advice on  
12 this. But based on what I see right now, Mr. Willms  
13 was apparently involved in providing comments on this  
14 particular document. But so were a variety of other  
15 people in Wyoming. And if doesn't appear that it was  
16 necessarily done in the course of actually preparing  
17 for this case or otherwise providing legal advice.

18 MR. BROWN: Maybe -- and I guess my position  
19 with regard to that, it doesn't necessarily have to be  
20 involved with the case. A communication between an  
21 attorney and client is confidential. And at any rate,  
22 I'm wondering, I don't know that I heard Ms. Lowry  
23 suggest that this would have been forwarded on with  
24 those comments attached. If that's the case, then it's  
25 been waived anyway. Maybe we can ask her and find that

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1 out.

2 THE WITNESS: I'm sorry. Mr. Brown, could  
3 you say that one more time?

4 MR. BROWN: Well, he's going to have to say  
5 it.

6 MR. WECHSLER: Special Master, would you like  
7 me to ask that question?

8 SPECIAL MASTER: Yes.

9 BY MR. WECHSLER:

10 Q. Ms. Lowry, would this document have been  
11 forwarded on to the -- to Mr. Horak with these  
12 comments?

13 A. I believe they would have been forwarded on  
14 to Mr. Berkas.

15 Q. Berkas. Thank you very much.

16 MR. BROWN: I have no objection.

17 SPECIAL MASTER: Okay. Then under those  
18 circumstances -- and my point was not that it was  
19 prepared necessarily in the case of litigation, but  
20 more that it was not clear to me whether or not, you  
21 know, this was advice provided by an attorney in  
22 connection with legal responsibilities here. But at  
23 this point, that strikes me as irrelevant.

24 So, therefore, Exhibit M214 is admitted into  
25 evidence.

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1 (Exhibit M214 admitted.)

2 MR. WECHSLER: Thank you, Your Honor. And,  
3 unfortunately, I have a couple of other documents that  
4 I have to do some cleanup on.

5 BY MR. WECHSLER:

6 Q. So next I'd ask Ms. Lowry to look at Exhibit  
7 M219. Ms. Lowry, this was, again, a document that was  
8 discussed with Mr. Smith. Now, we've seen today a  
9 version of this document that had subsequent revisions;  
10 do you recall that?

11 A. Yes, I do.

12 Q. Would you be the person who would have done  
13 the initial draft of this document?

14 A. Yes, I would.

15 Q. And it looks to me, looking at the last page,  
16 this is dated Sue Lowry 4/30/04; do you see that?

17 A. Yes, I do.

18 Q. Is this a document that you drafted?

19 A. Yes, it appears so.

20 MR. WECHSLER: Your Honor, I'd move admission  
21 of Exhibit M219.

22 MR. BROWN: No objection.

23 SPECIAL MASTER: Okay. Exhibit M219 is  
24 admitted into evidence.

25 (Exhibit M219 admitted.)



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1 BY MR. WECHSLER:

2 Q. Over the years, Ms. Lowry, the states have  
3 exchanged documents regarding water use and water  
4 rights in the various states; is that correct?

5 A. Generally, I'd say that's true, yes.

6 Q. And many of those documents are kept on file  
7 at the Wyoming state engineer's office?

8 A. Just to be clear, I think most of the sharing  
9 of the information we do is in relation either to the  
10 technical committee or to the compact commission  
11 meetings themselves, except for '04 and 06. Maybe if  
12 you're referring to some specific data exchange, that  
13 would be helpful to know.

14 Q. Well, there were a number of documents  
15 provided in discovery. And, unfortunately, I need to  
16 ask you if they're documents that you've ever seen  
17 before.

18 Now, you have seen some documents in your  
19 files related to Montana water rights and water use;  
20 correct?

21 A. They have shared with us the spreadsheets  
22 from adjudication process. And when we met after the  
23 '04 call letter, we did receive a map showing the  
24 location of some -- of water rights in Montana at that  
25 time.

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1 Q. You've seen the Miles City Decree; correct?

2 A. I have.

3 Q. How about the water resources surveys from  
4 the state engineer's office? Have you seen those?

5 A. The Montana state engineer's office?

6 Q. Yes.

7 A. I was in the room when Mr. Moy did his  
8 testimony, and he referred to those. I'm fairly  
9 certain we have a copy in our library. But they're not  
10 documents I've looked at any time recently.

11 Q. How about the Bechtel report from 1967?

12 A. Again, I vaguely know that it's around. But  
13 I have not looked at it any time recently.

14 Q. I'm going to hand you a document that's been  
15 marked Exhibit M260.

16 MR. BROWN: What was that number, Counsel?

17 MR. WECHSLER: 260.

18 BY MR. WECHSLER:

19 Q. Have you ever seen that document before,  
20 Ms. Lowry?

21 A. Not that I recall.

22 Q. Do you know who Mr. Fritz was?

23 A. Yes, I know Gary Fritz.

24 Q. Do you know who Mr. Scott was?

25 A. No, I don't.

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1 Q. Do you know Mr. Christopulos?

2 A. Yes.

3 Q. Here it indicates that it was received  
4 May 1st, 1978, at the state engineer's office in  
5 Cheyenne; do you see that?

6 A. I do.

7 Q. And is it routine for you to have documents  
8 like this one in the state engineer's office?

9 A. Yes, it is.

10 MR. WECHSLER: Your Honor, I would move the  
11 admission of Exhibit M260.

12 MR. BROWN: I'm going to object, I guess.  
13 Mr. Stults was here. And there's a lot of documents  
14 attached to this. So I'm just going to object that  
15 Ms. Lowry said she's never seen this before. Just  
16 because it might be around in the state engineer's  
17 office, I don't think lays foundation for it.

18 MR. WECHSLER: It was produced in discovery,  
19 Your Honor. And she did say it was the type of  
20 document that would be kept in the normal course of  
21 business.

22 SPECIAL MASTER: So can I ask why you didn't  
23 introduce it when Mr. Fritz was here?

24 MR. WECHSLER: I asked Mr. Fritz about  
25 documents. I'm sure you recall that Mr. Fritz's memory

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1 was not very clear. And so he had no memory of any of  
2 the documents I showed him other than the one he  
3 testified to. Actually, he didn't say that...

4 SPECIAL MASTER: I'm not sure you want to say  
5 that.

6 Well, I would have preferred this come in  
7 under Mr. Fritz. But, again, recognizing the somewhat  
8 liberal rules in this particular case, I think this  
9 document is sufficiently reliable at this stage, and I  
10 will admit it.

11 (Exhibit M260 admitted.)

12 BY MR. WECHSLER:

13 Q. Ms. Lowry, the last I want to ask you about  
14 is the basin plan. You're familiar with the basin  
15 plan; right?

16 A. Yes, I am. That was a yes if you couldn't  
17 hear it.

18 Q. Are you ready to continue?

19 A. Yes.

20 Q. Could you describe, please, what the basin  
21 plan is?

22 A. Yes. Wyoming completed a round of basin  
23 planning in the early '70s. And then no updates to  
24 those documents were done until, oh, very late 1999  
25 into 2000. We felt it was important to update by river

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1 basin. To give you a sense of scale, the state of  
2 Wyoming is split into seven river basins. And those  
3 basin plans take a look at water supply, water demand,  
4 where potentially new development could occur, that  
5 sort of thing.

6 Q. Now, the basin plan has been made a joint  
7 exhibit. We haven't had much discussion of it. So it  
8 would be helpful if we get a description. I'm going to  
9 hand you some pages of that very long document.

10 A. Okay.

11 Q. And I'm also going to hand you what's marked  
12 Exhibit M262.

13 THE CLERK: What was that exhibit number that  
14 you handed me?

15 MR. WECHSLER: M262. I'm sorry. The one I  
16 handed you was J58, parts of J58.

17 THE CLERK: Okay. Thank you.

18 SPECIAL MASTER: And was --

19 MR. WECHSLER: M262, I do not believe, has  
20 been admitted, Your Honor.

21 BY MR. WECHSLER:

22 Q. So looking first, Ms. Lowry, at Exhibit M262,  
23 have you ever seen this document before?

24 A. Yes, I have.

25 Q. What is it?

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1           A.    It's a letter from Wade Irion, again, who was  
2 the project manager for HKM doing the Powder/Tongue  
3 River Basin plan.  And he's writing to Chace Tavelli,  
4 who at the time was one of my employees.

5           Q.    And looking at the second to last paragraph,  
6 this actually refers to you; correct?

7           A.    Yes, it does.

8           Q.    And this has a stamp indicating that it was  
9 received at the Wyoming state engineer's office; right?

10          A.    It does.

11                MR. WECHSLER:  Your Honor, I move the  
12 admission of Exhibit M262.

13                MR. BROWN:  No objection.

14                SPECIAL MASTER:  Exhibit M262 is admitted.

15                                (Exhibit M262 admitted.)

16 BY MR. WECHSLER:

17           Q.    Ms. Lowry, that second to last paragraph is  
18 the one I want to focus on.  It indicates that as  
19 discussed with you and John Shields and, it looks like,  
20 Chance Tavelli [sic], HKM was indicating that it is  
21 "most appropriate for the compact limitations to be  
22 recommended by the state engineer's office"; do you see  
23 that?

24           A.    I do.

25           Q.    And were those limitations provided by you or

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1 Mr. Shield or Chance Tavelli [sic]?

2 A. Yes, they were.

3 Q. Do you recall what those limitations were?

4 A. Oh, perhaps instead of limitations, estimates  
5 might have been a better term. They -- HKM wanted to  
6 show if there was any flow restrictions on their --  
7 what we called their spreadsheet model, so essentially  
8 taking a look segment by segment with -- and intent.  
9 One of the uses of the spreadsheet models was to see  
10 where there could potentially be places either for  
11 future development or places where there were water  
12 shortages in the state.

13 And so rather than having HKM try to  
14 interpret the compact, they asked us if we would give  
15 some range of volume of what -- kind of the  
16 institutional constraints, if you will. Because of the  
17 compact, were there flow requirements that needed to be  
18 delivered, and could those be incorporated into their  
19 spreadsheet models? So that was the kind of work he's  
20 asking for here.

21 Q. This is a partial selected pages from J58.  
22 I'm happy to provide the entire thing if you'd like to.  
23 I believe it's over 1000 pages. I'm hoping that this  
24 will allow us to talk generally about what's in J58 in  
25 case the Special Master or the Court does want to look

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1 at it later.

2 If you look with me, please, on page Roman  
3 I-1. So I-1, I believe this is the introduction.

4 A. Okay. I'm there.

5 Q. And there it indicates what the objectives  
6 are with the plan. Using that to the extent that you  
7 need to, could you explain, please, what you understood  
8 the objectives to be?

9 A. Well, as I mentioned before, it was to --  
10 since the plans hadn't been updated for so many years,  
11 it was to take a current look at -- in a broad case,  
12 again, these were fairly large river basins. But to  
13 look at what the current level of use and consumption  
14 was for uses such as agriculture, municipal, domestic,  
15 industrial, environmental, and recreational uses; to  
16 quantify what the surface and groundwater supplies  
17 were; to try to estimate what demands were and what  
18 they might likely do over the next 30-year planning  
19 horizon; and to do kind of a short list of what those  
20 future water use opportunities might be to the basin.

21 Q. One thing it was doing was evaluating what  
22 water was available for future development in Wyoming;  
23 is that right?

24 A. That's one purpose, yes.

25 Q. Turn, please, to page Roman II-1 under the



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1 heading Basin Water Use Profile.

2 A. Okay.

3 Q. Second sentence there indicates, "The  
4 quantification of current water consumption is used to  
5 evaluate the overall use of water in the basin relative  
6 to compact allotments, for comparing existing water use  
7 to existing water supplies." And you understand that's  
8 what is done in this report?

9 A. Yes.

10 Q. This report was sponsored by the Wyoming  
11 state engineer; is that right?

12 A. Not sponsored exactly. The Water Planning  
13 Program is operated primarily out of the Water  
14 Development Commission. But we do have one staff  
15 member who's our water planning liaison, would be a  
16 good word. Because so much of the data that goes into  
17 a plan like this originates from the state engineer's  
18 office, the water rights information, because those  
19 data are so critical to the consultants who are doing  
20 the work, we do have a person who is assigned to water  
21 planning. But I'd say the primarily responsible agency  
22 is the Water Development Commission.

23 Q. On this same page, it indicates a number of  
24 technical memoranda with the bullet points; right?

25 A. Yes, that's true.

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1 Q. And all of those technical memoranda are  
2 actually found at the back of the basin plan; right?

3 A. Yes, that's correct. They are generally  
4 standalone documents.

5 Q. Discussing these various issues?

6 A. Correct.

7 Q. Now, turn, please, to page Roman III-1.

8 A. Okay.

9 Q. And here this is under a heading Available  
10 Surface Water and Groundwater Determinations; do you  
11 see that?

12 A. I do.

13 Q. And then if you turn to page III-63, again,  
14 these are selected pages.

15 A. Okay.

16 Q. And under the table, it's Wyoming's Remaining  
17 Allocation of Available Flow; do you see that?

18 A. I do.

19 Q. And here it's broken into the hydrologic  
20 condition being wet, normal, and dry; right?

21 A. Yes, that's correct.

22 Q. And these are actually -- as I understand it,  
23 they are model runs; is that correct?

24 A. I'm sorry. Model runs? Is that what you  
25 said?

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1 Q. Yes.

2 A. I'm sorry. I don't remember for sure. These  
3 could have come from the spreadsheet model. But it's  
4 been a while since I've looked at this, and I can't say  
5 that for sure.

6 Q. Sure. Do you recall the spreadsheet model  
7 itself generally?

8 A. Generally, yes.

9 Q. Could you generally describe that?

10 A. Sure. For, oh, a basin the size of the  
11 Tongue River, to give you a sense of scale, the basin  
12 would have been separated into nodes. So, perhaps, an  
13 area the size of Wolf Creek might have one or two  
14 nodes. The main stem Tongue might have been split  
15 into -- I don't recall for sure, but three or four.  
16 So, again, fairly fine.

17 But we would want the end of a node anyplace  
18 where there was a stream gauge or some pretty reliable  
19 information so that the modelers could verify the  
20 results. And then the primary use of this spreadsheet  
21 model was to not look at each individual water right  
22 but to lump them into these general geographic areas to  
23 give an estimate of where there might be shortages or  
24 where there might be additional water supply.

25 Q. Jumping to the last few pages of this

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1 document, which are entitled Technical Memoranda, dated  
2 February 2002, subject Powder/Tongue River Basin Plan  
3 Irrigated Land Mapping and Water Right, Task 2A; do you  
4 see that?

5 A. I do.

6 Q. I just wanted to point out this is what one  
7 of the technical memoranda looks like at the back of  
8 the report; right?

9 A. Yes, that's correct.

10 Q. And this particular one has to do with  
11 existing acreage in Wyoming; correct?

12 A. Yes, that's correct.

13 Q. And HKM looked at what lands were actually in  
14 irrigation as part of this report; right?

15 A. That's true, yes.

16 Q. All right. We've looked at the documents.  
17 We might have a couple more that I do want to look at.  
18 I promised I would show you again the 1982 annual  
19 commission meeting.

20 But I want to focus now on the notice and  
21 whether or not Montana provided a call to Wyoming. And  
22 I understand your testimony to be that Montana never  
23 provided a call to Wyoming until 2004; is that correct?

24 A. That's correct.

25 Q. And so we'll have to agree to disagree on

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1 that. But I would like to ask you some questions about  
2 the communications that you did have and try to  
3 understand what your testimony is.

4 Now, first of all, we've looked at a number  
5 of documents that indicate that as late as 2006,  
6 Wyoming's position was that a call was not required  
7 under the compact; right?

8 A. I think we said that a call was not defined  
9 in the compact.

10 Q. Was not allowed, I think is part of what the  
11 2004 call letter provided; correct?

12 A. I'm sorry. I don't remember that exact  
13 language.

14 Q. I guess the language is -- I'll quote it. If  
15 you'd like to look at it, it's Exhibit J65. It  
16 indicates, as I stated earlier, "The compact makes no  
17 provision for any state to make a call on a river"; do  
18 you see that?

19 A. I do.

20 Q. And that was Wyoming's position as late as  
21 2006; correct?

22 A. I believe that's the '04 letter, but, yes.

23 Q. Did you agree with that position?

24 A. Yes.

25 Q. Has Wyoming's position changed?

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1 A. Yes.

2 Q. What's Wyoming's position now?

3 A. Is that the 2004 and the 2006 letters were  
4 calls.

5 Q. And now Wyoming's position is that a call is  
6 required; right?

7 A. Required for what?

8 Q. In order to -- in order for Wyoming to  
9 regulate its post-1950 uses for the benefit of Montana?

10 A. Yes.

11 Q. Do you agree now with that new position?

12 A. That a call is permitted and when a call is  
13 received, that Wyoming shall comply with the provisions  
14 as laid out in the interim report.

15 Q. Do you agree that Montana is required to make  
16 a call in order to enjoy its pre-1950 rights?

17 A. I do.

18 Q. What has changed?

19 A. The Special Master's report.

20 Q. In this case, we talked about the fact that  
21 Wyoming is the upstream state; correct?

22 A. Yes.

23 Q. And if Wyoming depletes the flow of the  
24 Tongue River, it doesn't get to Montana; correct?

25 A. Again, barring return flows, yes, that's

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1 true.

2 Q. The beginning of your testimony, you  
3 testified to a number of organizations that you  
4 participated in that also included Montana officials;  
5 right?

6 A. Yes.

7 Q. And you had communications with Mr. Stults  
8 and Mr. Moy as part of those organizations?

9 A. Yes, I did.

10 Q. You also participated in a number of  
11 technical committee meetings over the years; correct?

12 A. I have.

13 Q. And those included Mr. Moy and Mr. Stults?

14 A. Yes.

15 Q. The technical committee sometimes met  
16 face-to-face; right?

17 A. Beginning in 2003, yes.

18 Q. Sometimes there were conference calls; right?

19 A. Since 2006, there have been technical  
20 committee meetings held via conference call. But of  
21 the years that are in contention here, I don't believe  
22 we ever did a conference call for the technical group.

23 Q. Do you recall in your deposition talking  
24 about conference calls?

25 A. For the technical group of the Yellowstone?

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1 Q. Yes.

2 A. No, I don't.

3 Q. There were e-mails exchanged that is part of  
4 the technical committee meetings; correct?

5 A. Just to be clear, we're talking about the  
6 formal technical committee meetings of the commission,  
7 not the discussions held as a result of the letters  
8 that came in '04 and '06?

9 Q. That's correct. I'm talking about the  
10 technical committee, there were e-mails exchanged;  
11 correct?

12 A. Certainly, yes.

13 Q. And there were indications that you had to  
14 communicate with Mr. Moy and with Mr. Stults throughout  
15 the year in the early 2000s; right?

16 A. Probably more with Mr. Stults, but, yes.

17 Q. Now, you're aware that Montana made a number  
18 of efforts in the 1980s to develop a methodology for  
19 administering the compact; correct?

20 A. The Ashenberg and Allen work, yes, I'm aware  
21 of it.

22 Q. You weren't involved in those, I think you  
23 said?

24 A. No, I was not.

25 Q. Do you know why Montana wanted to develop a



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1 methodology?

2 A. For being more clear on how the  
3 administration of the compact would occur.

4 Q. We saw, as late as 1988 in the annual  
5 reports, there were still some discussion of the  
6 methodology; right?

7 A. Yes.

8 Q. Mr. Moy was still working on that issue at  
9 that time?

10 A. Yes, that's correct.

11 Q. Did you understand from Mr. Moy that one of  
12 the reasons he wanted to develop a methodology was to  
13 make sure that Montana got its share of compact water?

14 A. By the time I became active with the  
15 commission, I believe in the minutes of both '88 and  
16 '89, there was this recognition that, perhaps, I think  
17 the -- that Mr. Fassett and Mr. Fritz used the term  
18 contemporary needs. So my recollection of the document  
19 that Mr. Moy developed that we were given at the  
20 November '89 meeting was to take a look at what those  
21 outstanding issues are and for the two states to then  
22 begin discussions on knowing that the compact is the  
23 compact and it's still the law of the land. But are  
24 there some other issues that the two states could,  
25 perhaps, be more fruitful in their discussion than what

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1 had occurred with the administration of the discussions  
2 in the '80s?

3           So after the Rich Moy document and this sort  
4 of scope of work on this 10 or 12 issues was developed,  
5 we did meet in, I believe it was, spring of 1990.  
6 So -- and my recollection in looking back at some of  
7 the minutes were that Mr. Fritz set things, like, let's  
8 focus now on the scope of work document and not focus  
9 so much on these methodology -- what's the right --  
10 approaches from each state. Because I think they felt  
11 the Ashenberg and Allen work had been fairly  
12 unfruitful.

13           Q.    There was disagreement over that methodology  
14 between Allen and Moy?

15           A.    The approaches taken by Ashenberg and Allen?

16           Q.    Yes.

17           A.    Yes. That's my understanding from reading  
18 the old minutes.

19           Q.    So you gave a helpful description of the  
20 history. I think my question was: Did you understand  
21 that one reason Montana was interested in developing a  
22 methodology was to make sure that it got its share of  
23 water?

24           A.    And I guess what I was trying to explain was  
25 that in reading the old minutes from the mid-'80s, that

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1 appears to be the case. But by the time I became  
2 personally involved, I believe that the focus shifted  
3 somewhat to them working on this issues document. And  
4 then both states then did edit that document. We met  
5 on it in 1990. And then I think the commission started  
6 work on a multitude of other topics. And that document  
7 was never really finalized.

8 Q. Fair enough. In the 2000s, there was also  
9 some discussion of methodology for administering the  
10 compact; right?

11 A. Could you be more specific?

12 Q. Mr. Fritz testified to an approach that he  
13 was interested in in making sure that water was  
14 distributed in an equitable manner?

15 A. Yes, I recall that.

16 Q. Was one of the reasons that you understood  
17 was that Montana was interested in making sure its  
18 rights were satisfied?

19 A. I think they were interested in understanding  
20 more about how the rights in Wyoming were administered  
21 and which ones were on and how that fit with the  
22 priorities in Montana.

23 Q. Montana was not interested in making sure  
24 that more water got to its users?

25 A. They likely were. But I don't think that

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1 that jump from Mr. Stults' description of let's look at  
2 the entire basin -- he was never that overt in saying  
3 why he wanted to do it.

4 Q. You, over the years, have been given some  
5 information about Montana water rights; correct?

6 A. Yes.

7 Q. Including the 1914 decree?

8 A. Yes.

9 Q. Including information about the adjudication?

10 A. Yes.

11 Q. There were modeling efforts in the 1980s and  
12 '90s; correct?

13 A. For the Tongue River enlargement?

14 Q. Yes.

15 A. Yes.

16 Q. You understood that the Tongue River was  
17 located near the state line; correct?

18 A. Yes.

19 Q. You understood that at least a large portion  
20 of that reservoir has a pre-Compact water right?

21 A. Yes.

22 Q. Now, I understood from your deposition you  
23 knew in the past that Montana had no one-fill rule; is  
24 that correct?

25 A. I'm sorry. I don't remember whether I knew

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1 that for certain or not.

2 Q. You don't recall saying that in your  
3 deposition?

4 A. I don't.

5 SPECIAL MASTER: By the way, it's a minor  
6 point, Counsel, but I think you actually asked whether  
7 or not the witness knew that the Tongue River was near  
8 the state line.

9 BY MR. WECHSLER:

10 Q. I meant to ask, you were aware that the  
11 Tongue River Reservoir was near the state line?

12 A. Oh, sorry. I knew that's what you meant, I  
13 guess. Yes, I know that's where the reservoir is.

14 Q. Now, you understand today, at least, that  
15 Montana doesn't have a one-fill rule; is that right?

16 A. Yes, that's correct.

17 Q. And so as I understand, then, your testimony  
18 is you didn't necessarily know that in the past; is  
19 that right?

20 A. I don't recall when I became aware that they  
21 didn't statutorily have a one-fill rule.

22 Q. How about, were you aware that Montana did  
23 not have a one-fill rule other than by statute?

24 A. Could you say that one more time?

25 Q. Well, when you answered, I heard you say you

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1 were aware that they did not have a statutory one-fill  
2 rule. So my question is: Were you aware of a one-fill  
3 rule from any source in Montana?

4 A. Oh, no, I am not.

5 Q. Now, Mr. Moy or Mr. Kerbel informed you of  
6 the T & Y right; correct?

7 A. Yes.

8 Q. And also of the Nance right; correct?

9 A. Yes.

10 Q. And you understood that the Nance right was  
11 the senior most right on the river; correct?

12 A. Yes.

13 Q. You understood that the T & Y was a very  
14 large right; correct?

15 A. Yes.

16 Q. At the bottom of the Tongue River in Montana?

17 A. Yes.

18 Q. And you understood that the T & Y was the  
19 second most senior right; correct?

20 A. Yes.

21 Q. We talked about the fact that 2000 to 2006  
22 was a serious drought; right?

23 A. That's correct.

24 Q. And that was true in Wyoming as well as  
25 Montana; correct?

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1 A. Certainly was true in Wyoming, yes.

2 Q. You understood it was also true in Montana?

3 A. I do. I'm certainly not as intimately  
4 involved with the details there. But, yes, it was dry  
5 throughout the basin.

6 Q. You had conversations with Montana in the  
7 early 2000s about shortages in Montana?

8 A. Well, I was trying to recall. But in looking  
9 back through my notes, because we weren't doing  
10 technical committee meetings yet, I don't recall  
11 specifically any place I would have seen any of the  
12 Montana folks during the year of 2001. And during  
13 2002, I would have seen them at the commission  
14 meetings.

15 Q. My question, I think, was very different.  
16 And that is: You understood that there were shortages  
17 in 2001, 2002; right?

18 A. I guess I was relaying that I'm not sure I  
19 was aware of those shortages during the year. I am now  
20 aware that they had shortages, yes.

21 Q. You testified earlier that you were aware  
22 that there were senior water rights in Montana that  
23 were not satisfied; correct?

24 A. I believe it's correct that I said that, and  
25 I'm now reflecting on -- I guess, without notes and

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1 things, I get confused of when I saw different people  
2 when. And I just wanted to be accurate that it was  
3 during 2000 or 2001 that I saw these individuals.

4 Q. So I've handed you your deposition. And I  
5 want to look at two pages. The first is page 127.

6 You recall having your deposition taken;  
7 right?

8 A. I do.

9 Q. And by Mr. Draper; correct?

10 A. Yes.

11 Q. Page 127, starting at line 15, and I'll read  
12 it. And you can confirm whether I'm answering  
13 correctly.

14 "Question: And that meant there were  
15 shortages to water users in both states; right?

16 "Answer: I can really only speak to Wyoming.  
17 But certainly we were regulating back very early water  
18 rights in several years of the 2000s, yes.

19 "Question: And didn't you confirm through  
20 meetings like this, that there were also water  
21 shortages in Montana?

22 "Answer: I was told anecdotally that there  
23 were water rights not being fulfilled in Montana."

24 That was your testimony; correct?

25 A. Yes.



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1 Q. Now turning to page 142. And here it's  
2 actually Mr. Brown asking you questions; is that right?  
3 The top of 142, it indicates cross-examination by  
4 Mr. Brown.

5 A. Yes, that's true.

6 Q. Looking at line 12.

7 "Question: I think Mr. Draper was asking you  
8 questions with regard to that meeting and the  
9 discussions that were had at that meeting and, perhaps,  
10 other meetings. And I think you indicated to him that  
11 representatives of the state of Montana had at least  
12 anecdotally told you that there were water rights in  
13 Montana that were not receiving water; do you recall  
14 that?

15 "Answer: Yes. In prior years. Of course,  
16 this was in April. So I think that discussion would  
17 have pertained to years prior to '04."

18 Do you see that?

19 A. I do.

20 Q. And that was your testimony; right?

21 A. Yes, it was.

22 Q. That's consistent with the testimony that you  
23 gave earlier today; right?

24 A. Yes.

25 Q. And so you understood in the early 2000s,

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1 that there were water rights in Montana that were not  
2 being fulfilled; right?

3 A. Yes, I think that's true.

4 Q. You understood those to be senior rights;  
5 correct?

6 A. Senior to whom?

7 Q. Pre-Compact?

8 A. Yes.

9 SPECIAL MASTER: So, Counsel, I wonder if  
10 this is a good time to take the afternoon break.

11 MR. WECHSLER: Yes, Your Honor.

12 SPECIAL MASTER: Okay. We'll come back at  
13 ten to then.

14 (Recess taken 3:39 to 3:50  
15 p.m., November 25, 2013)

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

18 Mr. Wechsler.

19 MR. WECHSLER: Thank you, Your Honor.

20 BY MR. WECHSLER:

21 Q. Ms. Lowry, we're almost done.

22 A. Okay. I'm ready.

23 Q. We talked about Kevin Smith and Art Hayes;  
24 right?

25 A. Correct.

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1 Q. And you understand that they are people who  
2 are familiar with the Tongue River Reservoir; right?

3 A. I do.

4 Q. And during the 2000s, Mr. Smith and Mr. Hayes  
5 would occasionally attend the commission meetings or  
6 the technical committee; correct?

7 A. Yes. Again, the technical committee didn't  
8 start until '03, but, yes.

9 Q. Well, we saw there was at least one meeting  
10 in '02; right?

11 A. Yes. I don't recall if Mr. Smith was at that  
12 meeting or not.

13 Q. Mr. Smith and Mr. Hayes, one of them would  
14 occasionally give reports on the Tongue River  
15 Reservoir; right?

16 A. Yes.

17 Q. And in the early 2000s, were you aware that  
18 the Tongue River Reservoir did not fill?

19 A. I was not aware of that, no.

20 Q. You had the information available to find  
21 that out if you needed to; correct?

22 A. That's correct.

23 Q. So we've talked about shortages of water, and  
24 you indicated that Montana informed you they were short  
25 of water for certain water rights. And so one

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1 additional thing that I understood you to be saying is  
2 that Montana needed to ask Wyoming to curtail specific  
3 water rights in Wyoming; do you believe that to be  
4 true?

5 A. I think Montana had to ask us to do  
6 something.

7 Q. Not just inform you that they were short of  
8 water?

9 A. That's correct.

10 Q. So I'm going to hand you what's been labeled  
11 as Exhibit M1, I think.

12 SPECIAL MASTER: Let's go off the record for  
13 one second.

14 MR. WECHSLER: It's not M1. It's J1.

15 (Discussion held off the  
16 record.)

17 SPECIAL MASTER: Okay. I'm ready.

18 BY MR. WECHSLER:

19 Q. Ms. Lowry, do you have Exhibit J1 before you?

20 A. I do.

21 Q. And this is, I'll represent to you, three  
22 different versions of the Yellowstone River Compact.  
23 Will you agree with me that there is no particular  
24 provisions in here for a call?

25 A. Yes, I would agree with that.

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1 Q. And so we can't look to the compact to find  
2 direction as to exactly what the communication has to  
3 be; correct?

4 A. That's correct.

5 Q. And the Yellowstone River Compact Commission  
6 has never developed rules regarding a call?

7 A. That's correct.

8 Q. Now, I promised I would talk to you about  
9 J -- well the 1982 Yellowstone River Compact Commission  
10 meetings. And so if you could turn, please, in your  
11 book there to Exhibit J32. And this is the annual  
12 report from 1982.

13 A. About how far back would it be?

14 Q. It's on Roman IV. Oh, the exhibit is the  
15 second exhibit, I believe, in your compendium. Well,  
16 third.

17 A. J32?

18 Q. Yes. And you should be looking for the  
19 annual report from 1982. Do you have that?

20 A. I do.

21 Q. Turn, please, to Roman IV.

22 A. Okay.

23 Q. Now, here this is the states talking. And we  
24 look at the communication between Mr. Fritz and  
25 Mr. Christopulos in 1981. And we noted that 1981

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1 didn't reference that discussion. But here, it was  
2 noted. And on IV, you can see, second paragraph,  
3 beginning "Montana voiced its concern"; do you see  
4 that?

5 A. Sorry. How far down?

6 Q. Roman IV, paragraph begins --

7 A. Oh, I'm sorry. Yes, I got it.

8 Q. And so it indicates, "Montana voiced its  
9 concern that during low-flow years, Wyoming needs to  
10 regulate its post-1950 water rights more carefully so  
11 Montana can use its pre-1950 water"; do you see that?

12 A. I do.

13 Q. And this is the part I'm interested in. It  
14 says, "Montana, in turn, must notify Wyoming when it is  
15 not able to obtain its pre-'50 water"; do you see that?

16 A. I do.

17 Q. So you can finish the paragraph there. The  
18 next sentence, I'll just read it out loud for the  
19 record. "A situation developed during the spring of  
20 1981 in which Montana was almost unable to fill the  
21 Tongue River Reservoir even though it has a pre-1950  
22 water right"; right? Did I read this --

23 A. That's what it says, yes.

24 Q. So looking at that one sentence that says  
25 what Montana must do, it says only that Montana must

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1 notify Wyoming when it is not able to obtain its  
2 pre-1950 water; do you see that?

3 A. Yes, I see that.

4 Q. And it doesn't say anything about telling  
5 Wyoming which rights have to be curtailed, does it?

6 A. That's not in that paragraph, that's correct.

7 Q. Now, another source of information for  
8 knowing when a call is made would be the water  
9 commissioners; right? They -- in Wyoming? They  
10 regulate water rights on a daily basis; is that  
11 correct?

12 A. That's correct.

13 Q. So I think it might be useful for us to look  
14 at what the water commissioners say. And I've printed  
15 off some pages from the transcript for that purpose.

16 Now, I will represent to you these are pages  
17 from a very rough transcript in this proceeding. And  
18 so -- oops. I'm sorry. I've given everybody --

19 MR. WECHSLER: Your Honor, can we go off the  
20 record for a moment?

21 SPECIAL MASTER: You certainly may.

22 (Discussion held off the  
23 record.)

24 MR. WECHSLER: Are we ready? Your Honor, may  
25 I?

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1 SPECIAL MASTER: Yes, you may. Sorry.

2 BY MR. WECHSLER:

3 Q. Ms. Lowry, I've now handed you, hopefully,  
4 and if you'd verify this for me, copies of transcripts.  
5 At the top, there should be one for Pat Boyd. Do you  
6 have that?

7 A. Yes.

8 Q. There should be one for William Knapp?

9 A. Okay.

10 Q. One for Carmine LoGuidice?

11 A. Okay.

12 Q. And one for Dave Schroeder?

13 A. Yes.

14 Q. You have all four of those?

15 A. I do.

16 Q. Let's start with Mr. Boyd.

17 A. Okay.

18 Q. He was asked a question: "Oftentimes, when  
19 you get a call for water it's not written?

20 "Answer: It's usually a phone call.

21 "Question: It might be as simple as a senior  
22 right calling and saying, hey, I'm short of water;  
23 correct?

24 "Answer: Correct.

25 "Question: And it's not necessary for a



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1 water user to use any specific words, correct, when  
2 he's telling you he's short of water?

3 "Answer: No.

4 "Question: They just need to make it clear  
5 that they need water; right?

6 "Answer: Yes."

7 Now, we'll just look at each one of these.  
8 Looking at Mr. Knapp, then. Mr. Knapp was asked by  
9 Mr. Kaste, question -- I'm looking at page 15, lines 22  
10 through 24.

11 "Question: All right. Now, I'd like you to  
12 explain to -- I'd like you to explain to us how  
13 regulation is typically initiated in your district.

14 "Answer: Well, before we're into regulation,  
15 I will be checking my diversions, checking streamflows  
16 as Little Goose, in particular, gets down to the mid-60  
17 range, I know it's starting to become short. So then I  
18 pay a little more attention at my headgates. Typically  
19 what happens is at some point, I will see one of my  
20 early rights short. And so I will make myself  
21 available even to the point of driving into that ditch  
22 rider or presidents' driveway and talk to him. And if  
23 he decides, you know, I went to your headgate and  
24 you're a couple feet short and he says, yeah, I'd  
25 like -- I'd sure like to have it, then that is a call.

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1 I construe that as being a call. He asked me for the  
2 difference in his water right."

3 Do you see that?

4 A. I do.

5 Q. Mr. LoGuidice says something similar.

6 Looking at page 52, "Question: Uh-huh. Now, when a  
7 call comes in, can you just kind of walk us through the  
8 procedure that" -- I believe it should say, "takes  
9 place in order to address that call? Tell us how it  
10 comes in and then what do you all do?

11 "Answer: If we get a call, I mean, if  
12 somebody calls me up or I run into them on the creek  
13 and they tell me that they need some water in their  
14 ditch, that they feel they are senior to somebody  
15 upstream of them, then first thing I'll do is I'll go  
16 to their ditch, to their headgate and see how much  
17 water they are diverting. I've got a record of what  
18 everybody's water right is, exactly what they should be  
19 diverting or have the ability to divert from the creek,  
20 by priority."

21 And it continues, I think, in parts that  
22 aren't as relevant.

23 And finally, Mr. Schroeder, line 14,  
24 "Question: It's because you know these people" --  
25 well, let me start at line 12.

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1 "Question: But you don't always require a  
2 written call?

3 "Answer: Not always a written call, no.

4 "Question: It's because you know these  
5 people and you talk to them on a regular basis and you  
6 know when they say they need water; is that correct?

7 "Answer: It's somewhat cumbersome to get a  
8 kind -- you know a signature. Very often, you know,  
9 I'm not around. Typically a lot of these are phone  
10 conversations.

11 "Question: And -- go ahead.

12 "Answer: I spend a lot of time out in the  
13 field so it's easier to do it verbally. And I believe  
14 it carries the same weight.

15 "Question: So what do they tell you when  
16 they leave a call or when they ask for a call? Let's  
17 say the head of one of the ditch companies needs more  
18 water and he calls you. What's a typical call you  
19 would have received?

20 "Answer: The creek went to heck last night.  
21 We need our water down here.

22 "Question: Okay.

23 "Answer: You know, to that effect."

24 And so you don't actually regulate water; is  
25 that right, Ms. Lowry?

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1 A. That's correct.

2 Q. And that's consistent really with what was  
3 talked about at the 1982 annual commission meeting;  
4 right?

5 A. Well, one sentence in a set of minutes, I  
6 guess, to me, isn't exactly like a rule of the  
7 commission. So, yes, it appears to be what that  
8 sentence in the '82 minutes said, yes.

9 Q. Are you aware of anything else in any of the  
10 commission minutes or rules that indicates something  
11 different?

12 A. I'm not.

13 Q. You testified to a number of documents having  
14 to do with the investigation after the 2004  
15 investigation; right?

16 A. The '04 letter?

17 Q. Correct.

18 A. Yes.

19 Q. And now, during that whole investigation, you  
20 were looking at various studies. Did you understand  
21 during that whole time that Montana was still wanting  
22 to get water?

23 A. I understand that -- well, that it was a call  
24 for Wyoming to do some things, yes.

25 Q. And Montana never lifted that call, did they?

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1 In other words, they never said to you, never mind,  
2 we're studying this issue. And so, therefore, we don't  
3 need our water.

4 A. They did not. But certainly standard  
5 operating is that once you start a new water year,  
6 these kinds of calls are lifted.

7 Q. I understand that. I mean to be saying  
8 within a single water year, they never lifted their  
9 call; right?

10 A. Oh, that's right, yes.

11 Q. And that was true in '06 as well; correct?

12 A. Yes, that's correct.

13 MR. WECHSLER: Your Honor, may I have one  
14 moment? I think I'm done.

15 SPECIAL MASTER: You certainly may.

16 MR. WECHSLER: Thank you, Your Honor.

17 No further questions.

18 SPECIAL MASTER: Okay. Thank you,

19 Mr. Wechsler.

20 So I don't have very lengthy questions  
21 because I think counsel for both sides did a good job  
22 going through the various facts. And the last thing I  
23 want to do is to actually confuse the record.

24

25

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EXAMINATION

BY SPECIAL MASTER:

Q. But there's one or two points I want to just clarify or get a little bit more background on.

So the first is -- actually goes back to something you were talking about with Mr. Wechsler a moment ago. So did I understand your testimony to be that as of today, reflecting on everything that you're aware of, you do not believe that you met with Montana officials in 2001? Was that what you testified?

A. Yes, Your Honor. I was trying to go back through my mind. I know that I personally didn't attend the '01 commission meeting and that the technical committee was not yet in place 'cause they didn't -- yes, we did that one meeting in '02. But that was really just with Montana. It wasn't what I would call a technical committee meeting where the federal agencies are also involved. Those didn't begin until 2003.

So I was trying to reflect on whether I would have seen Mr. Stults at some -- like, a drought conference or Western States Water Council meeting or that sort of thing. I certainly could have. I just don't recall that off the top of my head.

Q. So it's possible you could have seen

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1 Mr. Stults or somebody else from Montana at a meeting  
2 of one or another water organization. But at this  
3 point in time, you do not recall any meeting where you  
4 would have encountered or had a conversation with  
5 Mr. Stults or other water officials from Montana?

6 A. Yes, that's accurate.

7 Q. Okay. And I also understand your testimony,  
8 then, being, in 2002, at this point in time, the only  
9 meeting that you would have -- that you recall having  
10 met with Montana water officials was the Yellowstone  
11 River commission meeting after the irrigation season?

12 A. In '02, I believe that was also the year that  
13 we did the meeting in Sheridan, where, again just  
14 Montana representatives came, where Mr. Whitaker  
15 provided a tab book and the hydrographer's book. I  
16 believe that was also 2002.

17 Q. Okay. But you do not recall actually meeting  
18 with any Montana water officials prior to that meeting  
19 in '02?

20 A. I'm sorry, Your Honor. So the Sheridan  
21 meeting was January of '02.

22 BY SPECIAL MASTER:

23 Q. I'm sorry. It was January -- so this is why  
24 I'm asking these questions. So you would have -- then  
25 in 2001, you do not actually recall a meeting with

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1 Montana water officials at this point in time?

2 A. That's correct.

3 Q. Okay. And --

4 A. Could have been a Western States Water  
5 Council or something like that. But I can't verify  
6 that for sure off the top of my head.

7 Q. And in 2002, you would have met with them in  
8 January?

9 A. That's correct.

10 Q. Okay. And then the Technical Advisory  
11 Committee was -- well, actually let me ask, do you  
12 recall other points in time in 2002 when you would have  
13 met with Montana water officials?

14 A. Well, the meeting in Sheridan and then the  
15 annual meeting. And I don't recall any others.

16 Q. Okay. And then you said starting in 2003,  
17 you then began to have meetings of the Technical  
18 Advisory Committee to the Yellowstone River Compact?

19 A. That's correct.

20 Q. When did the technical committee meet in  
21 2003?

22 A. I think in '03, we met in March. And,  
23 thereafter, we felt that the April 1st forecast, that  
24 is the NRCS, is a better indication of what kind of  
25 water year you have. So since then, we've met in



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1 April.

2 Q. So that's helpful. As you can see, I was a  
3 little confused as to the exact dates, in particular  
4 that 2002 year.

5 So I want to turn just for a moment to the  
6 2004 year. So there was the call letter by Montana in  
7 2004. And then there was Wyoming's response to that  
8 letter, in which Wyoming stated that the compact makes  
9 no provision for any state to make a call on a river  
10 and, furthermore, that Wyoming does not read the  
11 compact as an agreement to deliver any of Wyoming's  
12 pre-1950 direct flow water to Montana for Montana's  
13 pre-1950 rights.

14 So the various meetings that you testified to  
15 that occurred after this letter, between Montana and  
16 Wyoming, the meeting of what I'm beginning to think of  
17 as the technical committee with lower caps rather than  
18 upper caps, what were the purposes of those meetings?

19 A. Just so I'm clear, exactly which meetings?

20 Q. So in 2004, after Wyoming informed Montana  
21 that there was no provision for a call, and under  
22 Wyoming's interpretation, they had no responsibility to  
23 deliver water for pre-1950 rights in Montana. You've  
24 testified to a variety of meetings between Montana and  
25 Wyoming officials in which information was exchanged.

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1           And so my question is: What was the purpose  
2 of those meetings?

3           A. Well, I don't think we wanted to be totally  
4 unresponsive to Montana. Certainly, I mean, they  
5 delivered us a letter that, from their perspective,  
6 they believed it had some validity under the provisions  
7 of the compact. So I guess because it was this  
8 sovereign to sovereign letter, I mean, a letter on  
9 Montana letterhead coming to the state engineer saying  
10 I want you to do X, Y, and Z, I think we recognized,  
11 while we stated, again, kind of the obvious, that the  
12 compact doesn't have the language that specifically  
13 says, here's what a call is, it was still a very  
14 serious piece of paper. It was Montana asserting  
15 things under the compact to the state engineer. And I  
16 think we felt an obligation to respond to that.

17           So but before, I think, Mr. Tyrrell felt  
18 comfortable responding to the May 18th letter, he  
19 wanted to have a better sense for the provisions that  
20 Montana had in their letter. Again, we thought a  
21 couple of the storage references maybe weren't quite  
22 accurate. And I think before Pat responded, he wanted  
23 to know the situation on the ground in Wyoming.

24           And I don't know that we had in the back of  
25 our minds when we were then responding of, you know,

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1 where this might ultimately go. But I think we felt we  
2 had an obligation to respond to Montana in making this,  
3 what we're now calling the call letter.

4 Q. But those various meetings took place after  
5 Wyoming had delivered its response letter to Montana?

6 A. Yes. I think we felt that it was a work in  
7 progress, if you will. I think we asked for some data.  
8 And they responded again and asked for more  
9 information. And just sort of the normal sequence of  
10 events, I think, was then, oh, my, we have quite a  
11 litany of things each other has asked for. Okay, Rich  
12 and Sue, why don't you go try to prioritize this.

13 So I guess now with 20-20 hindsight, I think  
14 that was the progression, was each state responded to  
15 each other. And I think we were -- while Wyoming's  
16 position was that there wasn't necessarily a call  
17 provision in the compact, certainly this letter from  
18 Montana was serious business and we needed to take it  
19 serious.

20 Q. Okay. During that period of time, did  
21 Wyoming's position ever change that it did not need to  
22 provide water to Montana under the compact for the  
23 pre-1950 rights?

24 A. No, I don't believe it did.

25 Q. Okay. And I also noticed that at the -- and

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1 this is in Exhibit J65, which is, again, Montana's --  
2 I'm sorry, Wyoming's response to Montana.

3 A. Maybe I can just look at it on the screen,  
4 Your Honor.

5 Q. Here, I'll actually lend you mine. And what  
6 I'm looking at is, if you look at the third full  
7 paragraph on that page, it talks about needing to have  
8 discussions under articles V, B and V, C.

9 So trying, again, to understand those  
10 meetings, were those meetings to exchange data with  
11 respect to articles V, B and V, C?

12 A. I guess I'd say partially. I mean, I think  
13 that, again, we knew it was a very dry year. And if  
14 there were some post-'50 still on in Wyoming, that,  
15 because we knew there was still flow at Miles City,  
16 that one could say there could potentially be some  
17 allocation under V, B and C, such that at least  
18 Wyoming, when we received the May 18th letter, didn't  
19 feel we were in violation of the compact, at least  
20 according to our interpretation at that time.

21 But I don't think Pat was completely closing  
22 the door on talking through the severity of the year.  
23 I think he was interested in looking at the number of  
24 acres in the two states and what kind of water supply  
25 they had available to them. I think in some of the

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1 letters, this idea of parity came up. I think we were  
2 trying to assess that if truly Montana were seriously  
3 disadvantaged compared to the water supply available to  
4 Wyoming. I think Pat was at least exploring whether to  
5 talk about that. I think that was what led to all of  
6 this information exchange of kind of the first time the  
7 two states were exchanging much more detailed  
8 information than what we had ever done in the past.

9 Q. Okay. That's very helpful. So actually,  
10 keep the letter just for a second 'cause I have one  
11 other small question. So I think it's in the first  
12 full paragraph on that page, where Wyoming states that  
13 it is its position that the compact does not have any  
14 provision for a call.

15 My question is: At that point in time, was  
16 it Wyoming's position that there was no provision for a  
17 call under the compact in favor of pre-1950 water  
18 rights under Article V, A? Or was it Wyoming's  
19 position that there was no provision for any type of  
20 call for any type of water rights under the compact?

21 A. Oh, I -- well...

22 Q. And if you don't know or it wasn't an issue,  
23 then feel free to say that. I'm just trying to  
24 understand what Wyoming's position was.

25 A. I'm not certain I'm prepared to say

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1 succinctly. I don't believe that Wyoming had really  
2 talked through -- I think we had talked through more  
3 the V, A piece. And I think we felt that -- I mean, we  
4 certainly -- I mean, we can read the language in V, B  
5 and C, but felt that additional methodology would have  
6 needed to have been agreed to by the compact before any  
7 kind of call could have been effectuated under B and C.  
8 So I don't know that we were necessarily -- I don't  
9 think we had ever firmly thought that through. And  
10 we'd never, as a policy, said, oh, we don't think  
11 there's ever going to be a call under V, B or C.

12 Q. Okay. And the final question is a relatively  
13 quick one. And maybe there's an obvious answer to it.  
14 But you had testified that prior to 2004, there were  
15 periods when you checked what the state line flows  
16 were, like, once a month or so.

17 And my only question is: Why? Why were you  
18 looking to see what the state line flows were?

19 A. Just, I guess, knowing that the water supply  
20 throughout the basin is important. And, I mean, I  
21 wouldn't just look at that one. I would look and see  
22 what flows were doing at other places throughout the  
23 basin and just generally get a feel for what the water  
24 supply was like and what water supply was at the state  
25 line. I don't think I had any real analysis that I was

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1 doing.

2 Q. But I guess I still have the question then as  
3 to why? What would you do with the information of not  
4 only that flow, but general flow in the basin?

5 A. I guess just to keep conversant on what the  
6 conditions were in the basin. I do the same thing in  
7 the Bear River Basin 'cause I'm curious what the  
8 elevation of Bear Lake is. Or I'm curious what the  
9 state line flow is on the Belle Fourche and what we're  
10 delivering to South Dakota. So it's generally to have  
11 a good sense for what kind of water conditions are  
12 across the state.

13 Q. But in some of those other compacts, at  
14 least, I assume that that data would actually be  
15 directly relevant to how you were administering water  
16 rights in Wyoming or how you think you might be  
17 administering the water rights; is that correct?

18 A. Oh, I guess I'm not sure I would necessarily  
19 make that sweeping of a statement. I think I've  
20 mentioned the Bear, and it's certainly our most  
21 detailed as far as regulation volumes. But, I mean,  
22 we've never regulated the Belle Fourche for benefit of  
23 South Dakota either. But yet I'm curious as to what  
24 those flows are just 'cause I want to know -- there's a  
25 Bureau of Reclamation facility called Keyhole

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1 Reservoir. I want to know whether it's filled, whether  
2 we're -- whether storage water is being delivered to  
3 South Dakota. So it's more a general, here's what's  
4 going on throughout each of the basins.

5 Q. Okay. Thank you.

6 SPECIAL MASTER: Mr. Wechsler?

7 MR. WECHSLER: Nothing further.

8 SPECIAL MASTER: Okay. Mr. Brown?

9 REDIRECT EXAMINATION

10 BY MR. BROWN:

11 Q. Ms. Lowry, how you holding up?

12 A. I'm doing fine, Mr. Brown. Thank you.

13 Q. Hopefully, I won't keep you too long. The  
14 first place I want to start is with your deposition, if  
15 you still have that up there with you.

16 A. Yes, I have it.

17 Q. And if you'll look back at page 142 again,  
18 which was the second page that Mr. Wechsler had asked  
19 you questions about. And I just want to follow on to  
20 the -- finish up the thought with regard to the  
21 questions that I was asking you. And I'll direct your  
22 attention to line 22. And it's, "Question: Okay.  
23 Well, any of those discussions where Montana  
24 representatives might have told you that Montana rights  
25 in whatever form weren't receiving water during any of



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1 those discussions, did the Montana representatives ever  
2 ask Wyoming water users be curtailed for the benefit of  
3 those Montana users?"

4 What was your answer?

5 A. "No, they did not."

6 Q. Take a look at, if you have it in front of  
7 you, Exhibit M134.

8 A. Oh, I'm sorry. I'll need a little more help.

9 Q. M134 was the 11/19/2001 e-mail from you to  
10 Jack Stults where you were explaining why the technical  
11 group hadn't met in 2001.

12 A. Was that something you asked me about or in  
13 the notebook? Sorry. There's a lot of pieces of  
14 paper.

15 Q. The Special Master asked you a question about  
16 whether or not you had seen any other Montana water  
17 official at a meeting in 2001; do you remember that?

18 A. I do.

19 Q. And in looking at that e-mail, does that  
20 refresh your recollection whether or not you saw any  
21 Montana water official at a water meeting in 2001?

22 A. Yes, that's helpful. I couldn't remember if  
23 that was 2000 or 2001. But I apparently saw Jack  
24 Stults at a Western States Water Council in March 2001.

25 Q. Okay. And do you still have the portions of

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1 the 2002 -- I'm done with that one, by the way.

2 Do you still have the portions of the 2002  
3 basin plan up there? It's Exhibit J58.

4 A. I have these excerpts.

5 Q. Absolutely, yeah. Just the pieces of that  
6 exhibit that Mr. Wechsler had handed you. And I think  
7 he had directed you to the technical memorandum with  
8 regard to the irrigated lands mapping and water rights  
9 data. If you could turn to that.

10 A. Yes.

11 Q. Looking at the first page of that technical  
12 memoranda, and I guess I have a general question: Was  
13 the basin plan itself intended to identify individual  
14 water rights and their uses in this basin plan?

15 A. Only in a very general fashion. And, in  
16 fact, on page 8 of that same little excerpt, it talks  
17 about the water rights attribution piece. And this  
18 work that's, you know, now over a decade old, there was  
19 still a concern by water users in the state that they  
20 did not want the water planning effort to be specific  
21 water rights mapping. So just to be clear, the  
22 distinction.

23 So for the basin plan, it was on a much  
24 larger scale. So the aerial photography interpretation  
25 would have seen a ditch that was serving a fairly large

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1 polygon of land. A polygon would have been entered  
2 into the GIS format and then attribution of the water  
3 rights associated with that polygon. But there could  
4 easily have been anywhere from 3 to 15 water rights of  
5 varying priority associated with that polygon.

6 And both our office and the Water Development  
7 commission was sensitive to just the general public not  
8 wanting a more detailed water rights mapping at that  
9 time. And certainly complete water rights mapping is a  
10 very detailed exercise.

11 And so I think it's fair to say the water  
12 rights played a role and were reviewed but in a pretty  
13 general sense, and attributed in these larger polygon  
14 scales.

15 Q. Okay. See if you can find Exhibit M207. And  
16 that would be the April 14, 2004, technical committee  
17 summary.

18 A. The minutes of the April 14 meeting?

19 Q. Yes, ma'am.

20 A. Okay. I have it -- oh, I have M207.

21 Q. That's it.

22 A. Okay.

23 Q. And if you'll turn to the third page. And  
24 both Mr. Wechsler and I had asked you questions with  
25 regard to the last paragraph on that page; do you

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1 remember that?

2 A. Yes.

3 Q. And Mr. Wechsler had drawn your attention  
4 specifically to a sentence within the middle of that  
5 paragraph which reads: "It appears from all reports  
6 that were heard today, the percentages of filling  
7 Tongue River Reservoir this spring are extremely low."

8 Do you see that?

9 A. Yes, I do.

10 Q. And so Mr. Wechsler had asked you, so by the  
11 end of this meeting, you were aware that Tongue River  
12 Reservoir was likely not going to fill; do you remember  
13 that question?

14 A. Yes, I do.

15 Q. And he asked you, what did Wyoming do about  
16 it? And I think you said, nothing; is that right?

17 A. That's correct.

18 Q. If you'll turn to the next page and look  
19 under Section 6. And look under the second bullet  
20 under Section 6. Would you read that for us?

21 A. Okay. "Total runoff into Tongue River  
22 Reservoir may be sufficient to fill the original water  
23 right in the reservoir but may not fully fill the  
24 enlargement. The timing and low volume of runoff may  
25 make it difficult for Wyoming to fill its mountain

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1 reservoirs."

2 Q. So at least at this meeting, in the  
3 discussion, the members were discussing whether or not,  
4 as well, there was enough water to fill the original  
5 capacity of Tongue River Reservoir; is that right?

6 A. Yes, that's correct.

7 Q. And there was some thought at that time there  
8 would be sufficient water to fill that; right?

9 A. That's correct.

10 Q. Mr. Wechsler asked you a series of questions  
11 about whether or not it was your understanding that  
12 some of the inquiries and expressions that Montana had  
13 made you -- seemed to you that they were concerned  
14 about making sure Montana water rights were fulfilled;  
15 do you remember that?

16 A. Yes.

17 Q. In your experience with the interstate water  
18 organizations that you belong to, is that pretty much a  
19 uniform concern of the states involved with those  
20 organizations?

21 A. Sure. Everybody is looking out for their own  
22 water right holders.

23 Q. Mr. Wechsler had you take a look at multiple  
24 statements from testimony of Wyoming's hydrographers;  
25 do you remember that?

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1 A. I do.

2 Q. He had you look at sentences where they  
3 discussed how they would go and at least initiate the  
4 process of regulation based upon verbal communication;  
5 do you remember that?

6 A. I do.

7 Q. In your experience with interstate water  
8 regulation, is a call between two water users the same  
9 as a call between two states?

10 A. Absolutely not. The level of sophistication  
11 that occurs between, again, two sovereigns, two states,  
12 is very different than a water commissioner who has an  
13 ongoing relationship with their farmers and knows year  
14 to year when regulation might be called for. I think  
15 it's very different. And to expect that written  
16 documentation from one state to another seems the  
17 minimal that one would expect from one state to  
18 another.

19 Q. Well, you mentioned the fact that the  
20 hydrographers know their farmers and they know their  
21 rivers. Would you agree with that?

22 A. Yes, I do.

23 Q. And when Montana would tell you that its  
24 waters weren't receiving water, what time of year would  
25 that be when they were telling you that?

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1           A.    The two letters, one came in May, and one  
2 came in July.

3           Q.    And prior to that is what Mr. Wechsler was  
4 focused on.  So in 2001 and 2002, anecdotally you were  
5 told that the rights weren't being fulfilled.  What  
6 time of year was that?

7           A.    Could have been all over the board.  As I  
8 mentioned, I don't remember specifically other than  
9 this March meeting with Jack Stults.  So March.

10          Q.    Okay.  So let's say it's March, and let's put  
11 you in the shoes of the hydrographer.  Montana is  
12 making a call on you like a Wyoming water user would  
13 make a call on one of our hydrographers.  Did you know  
14 how much water was at the Montana pre-'50 headgates?

15          A.    No, I did not.

16          Q.    Did you know how much they were short?

17          A.    No, I did not.

18          Q.    Did you know whether or not they needed the  
19 water?

20          A.    No, I did not.

21          Q.    Did you know why they were short?

22          A.    No, I did not.

23          Q.    Did you know if there were other users,  
24 post-'50 users, taking water in Montana?

25          A.    No, I did not.

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1 Q. Did you know what caused Tongue River  
2 Reservoir not to fill?

3 A. No, I did not.

4 MR. BROWN: I think that's all I have. Thank  
5 you.

6 SPECIAL MASTER: Okay. Thank you, Mr. Brown.

7 So, Ms. Lowry, thank you very much. I hope  
8 you feel better.

9 THE WITNESS: Thank you.

10 SPECIAL MASTER: I'm sure you will feel  
11 better the moment you step down. Thank you very much  
12 for coming back.

13 THE WITNESS: You're welcome.

14 SPECIAL MASTER: So we have about -- probably  
15 we could squeeze in ten minutes if it made sense, or we  
16 could just start tomorrow morning at 8:30.

17 MR. BROWN: If I get a vote, I'd like to  
18 start in the morning.

19 SPECIAL MASTER: You're doing Mr. Tyrrell  
20 also?

21 MR. BROWN: Yes.

22 SPECIAL MASTER: Then I think you probably  
23 deserve the break.

24 So let me just ask, then. So I assume the  
25 estimate is probably still that, with luck, you'll be



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1 able to begin presenting one of the experts tomorrow,  
2 but you're probably not sure.

3 MR. KASTE: Well, based on how long this took  
4 today, I think Mr. Tyrrell's examination is likely to  
5 be of similar length, both from a direct and a cross  
6 perspective, unless I'm wrong. Wyoming anticipates a  
7 similar amount of cross-examination and, perhaps, more  
8 for Mr. Tyrrell.

9 We will have Mr. Fritz here and available to  
10 start as soon as Mr. Tyrrell is off the stand. But I  
11 think it's probably unlikely.

12 SPECIAL MASTER: Okay. And, again, just for  
13 clarity, your first expert will be Mr. Fritz? I just  
14 want to make sure that I'm prepared particularly for  
15 the two experts by having reviewed, in close proximity  
16 to their testimony, their expert reports.

17 MR. KASTE: Yes, our intention is to put on  
18 Mr. Fritz and finish with Mr. Hinckley.

19 SPECIAL MASTER: So if I review Mr. Fritz's  
20 expert report again tonight, then that should be fine.  
21 I don't need to actually look at Mr. Hinckley's report  
22 again this evening. Okay.

23 MR. KASTE: Is the copy of Mr. Fritz's report  
24 that you have and have been working from legible, or is  
25 it -- we had some issues with some of the copies that

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1 we got done at FedEx, that they are smudgy. I don't  
2 know the right word for -- the lettering isn't distinct  
3 at times. And I don't know if you've had an  
4 opportunity to even look through the exhibit that you  
5 received to make sure that it is not in that condition.  
6 'Cause we have a better copy that we can swap out for  
7 that one if your copy is difficult to read.

8 SPECIAL MASTER: So let me check on -- that  
9 copy that I've reviewed was on the thumb drive. And I  
10 didn't print that copy out. So the copy I was going to  
11 go home with and actually mark up would be the copy  
12 that you sent me here. And I actually haven't taken a  
13 look at that one yet. So I'll let you know if there's  
14 any problem with that. But even if there's a problem,  
15 I can review it again tonight on the thumb drive.

16 MR. KASTE: Okay. I'll bring a better copy  
17 for you tomorrow. But if the work that you're going to  
18 do tonight is on your iPad or other device --

19 SPECIAL MASTER: Yeah, I'm going to take a  
20 look at the hard copy. And if it's legible, then  
21 that's the one I'll use. Otherwise, I can take a look  
22 at the one on the thumb drive. And so bringing  
23 something in tomorrow morning will be fine. I just  
24 don't want you to have to put in any effort if the  
25 paper copy is fine.

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1           So the only other thing I wanted to mention.  
2 I, of course, have no idea whether or not Montana is  
3 going to want to present any rebuttal experts within  
4 the limits of the type of rebuttal testimony that can  
5 be presented at this stage. But if so, my expectation  
6 will be that Montana will be ready as soon as Wyoming  
7 is finished with its case with whatever testimony it  
8 wants to present. 'Cause if possible, I'd love to  
9 finish this up. I don't want to have to come back  
10 again. I don't think any of us do.

11           MR. DRAPER: We'll certainly do our best,  
12 Your Honor.

13           SPECIAL MASTER: Okay. Thanks.

14           MR. DRAPER: And I think it's a good idea to  
15 have Mr. Fritz here tomorrow. We may get started on  
16 him.

17           MR. KASTE: I'll be ready to go.

18           SPECIAL MASTER: Okay. Then that sounds  
19 good. And any other administrative matters? If not,  
20 then we will be in adjournment right now. And we will  
21 come back at 8:30 a.m. tomorrow morning. So thank you.

22                           (Trial Proceedings recessed at  
23                           4:37 p.m., November 25, 2013.)

24  
25

## 1 REPORTER'S CERTIFICATE

2 I, Vonni R. Bray, a Certified Realtime  
3 Reporter, certify that the foregoing transcript,  
4 consisting of 267, is a true and correct record of the  
5 proceedings given at the time and place hereinbefore  
6 mentioned; that the proceedings were reported by me in  
7 machine shorthand and thereafter reduced to typewriting  
8 using computer-assisted transcription.

9 I further certify that I am not attorney for,  
10 nor employed by, nor related to any of the parties or  
11 attorneys to this action, nor financially interested in  
12 this action.

13 IN WITNESS WHEREOF, I have set my hand at  
14 Laurel, Montana, this 13th day of February, 2014.

15  
16 

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