

No. 137, Original
IN THE SUPREME COURT OF THE UNITED STATES
VOLUME 3 OF 25 VOLUMES
TRANSCRIPT OF TRIAL PROCEEDINGS

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

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

James F. Battin United States Courthouse
2601 2nd Avenue North
Billings, Montana 59101
9:07, Monday, October 21, 2013

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1 MONDAY, OCTOBER 21, 2013, 9:07 A.M.

2 SPECIAL MASTER: Okay. We're back on the
3 record now. And so, again, good morning, everybody.
4 And just a brief update on where I think we are in
5 terms of courtrooms this week. It does look like for
6 Wednesday we'll need to be over at the Oil and Gas
7 Commission hearing room.

8 But then on Thursday, it looks like we might
9 be able to be back here again over in the -- I want to
10 say Snowy Mountain courtroom. And once we get over to
11 the Snowy Mountain courtroom, we might actually be
12 there not only for the remainder of this week but for
13 all of next week.

14 So I think we're just talking about moving
15 over that one day. And, in fact, technically, we might
16 only need to be out of here for the afternoon on that
17 particular day. But I assume if we're going to move
18 over there, we might as well move over there for the
19 entire day.

20 But if counsel want to talk about that.
21 Again, I think at the moment, it looks like we will
22 definitely be squeezed out of the courtroom on
23 Wednesday afternoon but that, with luck, on Thursday,
24 we'll be able to move back in. So during a break, you
25 might just want to talk about that and see what you

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Direct Examination Cont. by Mr. Wechsler

1 would prefer in the way of managing that. And I'll
2 keep you updated as to what's actually occurring.

3 So, Mr. Davis, welcome back to the witness
4 stand this morning. And, Mr. Wechsler, I believe that
5 you were in the middle of your direct examination.

6 MR. WECHSLER: Yes, Your Honor. Thank you.

7 TIMOTHY DAVIS (CONT.),
8 having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION CONTINUED

10 BY MR. WECHSLER:

11 Q. Can you hear me without lowering the
12 microphone?

13 Good morning, Mr. Davis.

14 A. Good morning.

15 Q. On Thursday before the weekend, we were
16 discussing the administration and regulation of
17 pre-1973 rights; do you recall that discussion?

18 A. Yes.

19 Q. Just to get us in the right place for this
20 morning, could you summarize the regulation and
21 administration of -- that occurred in Montana prior to
22 1973?

23 A. Prior to 1973, water rights had to either
24 be -- they were primarily use rights. When you put
25 water to a beneficial use, that established the water

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1 right. Or you could file a water right with the clerk
2 of the district court.

3 For water administration, it was primarily
4 through an informal call process or through the
5 district courts and having the district courts put a
6 commissioner on when you had an enforceable decree.

7 Q. In 1972, did the State of Montana adopt a new
8 constitution?

9 A. Yes.

10 Q. What impact did the 1972 Montana constitution
11 have on water administration and regulation?

12 A. Primarily three impacts. First, it
13 established that all waters in the state of Montana
14 belonged to the state for the beneficial use of its
15 people. It directed the state to create a centralized
16 database of water rights, and it confirmed all existing
17 water rights in the state.

18 Q. Are you familiar with the term the Water Use
19 Act?

20 A. Yes.

21 Q. And now, we've given the State of Wyoming a
22 set of laws; do you have one before you?

23 A. I do.

24 Q. And I believe we've also provided one for the
25 Special Master. And --

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1 SPECIAL MASTER: Okay. I have a copy now.

2 Thanks.

3 BY MR. WECHSLER:

4 Q. Is this what you would commonly refer to as
5 the Water Use Act?

6 A. Yes.

7 Q. So what is this?

8 A. It's Title 85, Chapter 2 of Montana Code
9 Annotated. And it generally outlines -- when we think
10 of the Water Use Act, it generally outlines water right
11 regulation, water adjudication, the centralized
12 database of water rights, as well as water
13 reservations, water compacts.

14 Q. Those laws are generally found in Title 85 in
15 this volume?

16 A. Yes.

17 Q. Do you have Exhibit M230 before you?

18 A. Yes.

19 Q. If you would turn, please, to pages 2 and 3.

20 A. Okay.

21 Q. Do you have that?

22 A. I do.

23 Q. And here, this is under the heading Montana
24 Water Use Act. Looking first at the first point, could
25 you explain what No. 1 there is describing?

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1 A. No. 1 on page 2 describes, basically, that --
2 the process of adjudicating all those rights that were
3 confirmed by the '72 constitution, so all existing
4 rights. And it's -- established the process for
5 adjudicating through the courts those water rights.

6 Q. So moving on to 2, this was another change
7 that occurred with the Montana Water Use Act?

8 A. Correct. The Montana Water Use Act created
9 the permit system for establishing for obtaining new
10 water rights. And that's what No. 2 relates to.

11 Q. How about No. 3?

12 A. No. 3, the Water Use Act also created the
13 process for authorizing changes to existing water
14 rights.

15 Q. And No. 4?

16 A. Details the centralized records system for
17 pre-'73 water rights and then all other water rights
18 after that.

19 Q. And how about point No. 5 on page 3 of
20 Exhibit M230?

21 A. No. 5 details a system was provided to
22 reserve water for future consumptive uses as well as
23 for instream flows.

24 Q. What water in Montana is covered by the
25 Montana Water Use Act?

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1 A. All waters.

2 Q. Does that mean that all water that is
3 beneficially used in Montana is regulated?

4 A. Yes.

5 Q. You talked a little bit about the Montana
6 Water Court. In 1979, the Montana Water Use Act was
7 amended; is that correct?

8 A. Yes.

9 Q. And that amendment, sometimes you'll see in
10 the literature it referred to as Senate Bill 76 or
11 SB76?

12 A. Correct.

13 Q. Can you describe the major changes that
14 occurred in 1979 to the Montana Water Use Act?

15 A. Senate Bill 76 established a water court in
16 Montana to oversee a statewide general comprehensive
17 adjudication and establish a general statewide
18 adjudication.

19 Q. Montana still have a water court?

20 A. Yes.

21 Q. How many judges are on the Montana Water
22 Court?

23 A. Two.

24 Q. Where is the court located?

25 A. Bozeman.

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1 Q. And does the water court -- are there also
2 water masters associated with the water court?

3 A. Yes.

4 Q. What are the functions of the water masters?

5 A. Water masters review summary reports of the
6 Department of Natural Resources and Conservation before
7 a decree is issued. They also hear cases -- hear
8 objections. They hold hearings at the direction of a
9 water judge on objections as well as issue remarks and
10 make recommendations to the water judge.

11 Q. Ultimately, the water court and the water
12 judges have responsibility for the adjudications in
13 Montana?

14 A. Yes.

15 Q. Now, what do you understand an adjudication
16 to be?

17 A. The adjudication is the establishment of
18 water rights by priority on a stream.

19 Q. Based on the historic beneficial use of those
20 water rights?

21 A. Yes.

22 Q. And as part of the changes that occurred in
23 1979 with Senate Bill 76, did the State of Montana
24 undertake a statewide adjudication?

25 A. Yes.

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1 Q. And what do you mean by a "statewide
2 adjudication"?

3 A. The general statewide -- it's a general
4 statewide comprehensive adjudication that was
5 established in 1979. Means that every basin in the
6 state would be adjudicated. There would be eventually
7 an enforceable and final decree in every basin
8 outlining priorities for every basin within the state.

9 Q. An attempt to capture all of the existing
10 water rights as of that time period?

11 A. As of '73, correct.

12 Q. You talk about the role of the water court in
13 the adjudication process. Does DNRC also have a role
14 in the adjudication process?

15 A. Yes.

16 Q. What is DNRC's role in the adjudication
17 process?

18 A. DNRC's role -- primary role in the
19 adjudication process is to serve as an arm of the water
20 court to examine pre-1973 water right claims, but also
21 to help resolve issue remarks in an informal process
22 and assist district courts in water distribution and
23 enforcement according to the decrees.

24 Q. On Thursday you described what is one of the
25 bureaus of the Water Resources Division. I think it's

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Direct Examination Cont. by Mr. Wechsler

1 called the Adjudication Bureau?

2 A. Yes.

3 Q. And ultimately, you are responsible for the
4 Adjudication Bureau?

5 A. Yes.

6 Q. If you could, please, turn to Exhibit M233.

7 A. M233?

8 Q. Yes, sir.

9 A. I don't have M233.

10 Q. You can also use the screen. It's being
11 shown on the viewfinder, and I believe that's a -- it's
12 a one-page exhibit. So that's the entire exhibit.

13 A. Yes, I have it.

14 Q. Can you please describe Exhibit M233?

15 A. This is a status map of the adjudication for
16 all the basins within the state as of July 17th of this
17 year.

18 Q. And in the lower left-hand corner, it
19 indicates -- it has a logo from the DNRC; do you see
20 that?

21 A. Yes.

22 Q. Is this a map that was produced by the DNRC?

23 A. It was.

24 Q. It appears to be from July of 2013?

25 A. It is.

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1 MR. WECHSLER: Your Honor, at this point, we
2 would offer Exhibit M233.

3 SPECIAL MASTER: Any objection?

4 MR. KASTE: No objection.

5 SPECIAL MASTER: Okay. If no objection, then
6 Exhibit M233 is admitted into evidence.

7 (Exhibit M233 admitted.)

8 BY MR. WECHSLER:

9 Q. Mr. Davis, do you see -- well, does Exhibit
10 M233 provide the status, as you understand it, in
11 July 2013, for the statewide adjudication process?

12 A. Yes.

13 Q. How did the courts determine which basins to
14 take first?

15 A. There is, by statute, an order set out for
16 how to prioritize which basins would be examined first.
17 There's also, if a -- if a water dispute has been
18 certified to the water court, those also get priority.

19 Q. Do you see the Tongue River Basin on Exhibit
20 M233?

21 A. Yes.

22 Q. Does it have a designation of a number there?

23 A. Yes. It is B -- I mean, 42B and C.

24 Q. So looking at Exhibit M233, what is the -- or
25 what was the status of the adjudication in the Tongue

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1 River Basin as of July 2013?

2 A. Both basins have a preliminary decree on
3 them.

4 Q. Looking at your Water Use Act, Title 85, if
5 you could turn, please, to Chapter 2, which I believe
6 is on page 52.

7 A. Okay.

8 Q. And what is contained in part 2 there?

9 A. Part 2 begins the adjudication of water
10 rights, the statutes as relates to the adjudication of
11 water rights on page 52.

12 Q. So this part contains the majority of the
13 Montana statutes related to the adjudication process;
14 is that fair?

15 A. Yes.

16 Q. So was there a point, in Montana, that all
17 water users had to file a claim in the adjudication
18 process?

19 A. Yes, by 1982, or they could file late claims
20 in 1996.

21 Q. So by 1996, all claims were before the water
22 court for water rights that were in use as of that
23 time?

24 A. As of -- yes, as of 1973.

25 Q. Now, were there any exemptions from the

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1 requirement of filing a claim in the adjudication?

2 A. Yes. Yes.

3 Q. What were those exemptions?

4 A. There were exemptions established for
5 in-stream stock watering as well as groundwater for
6 stock and domestic use.

7 Q. What does it mean that stock water rights
8 were exempted from the claim filing process?

9 A. The exempt rights did not need to be filed.
10 But it did not mean that those rights were not part of
11 the adjudication, that they did not lose those rights;
12 they just did not need to file them.

13 Q. Those rights might still be in existence?

14 A. Yes.

15 Q. They simply -- it was not a requirement that
16 they file as part of the adjudication?

17 A. Correct.

18 Q. If someone elected to file a stock water
19 claim, could they file that in the adjudication?

20 A. Yes.

21 Q. And then there would be a record of those
22 filed claims?

23 A. Yes.

24 Q. But that wouldn't be a complete record of the
25 stock water rights because there might be others that

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1 were not filed?

2 A. Correct.

3 Q. And who would have the best information about
4 these stock water rights that were not filed?

5 A. The water users on any particular stream.

6 Q. So could you please describe the way in which
7 claims were filed and collected by the water courts?

8 A. A claimant would submit the claim form to the
9 department. It would include information: the stream,
10 the name of the water source, the place of use, the
11 amount that they are claiming, and the period of use,
12 as well as other information.

13 Q. In Exhibit M230, on page 8.

14 A. Yes.

15 Q. Under the heading criteria; do you see that?

16 A. I do.

17 Q. And so is this a listing of the criteria and
18 things that need to be included in a claim in the
19 adjudication process?

20 A. Yes.

21 Q. Now, after a water user file is claimed in
22 the adjudication process, what was the impact of that
23 claim?

24 A. The water user was entitled to use the water
25 as claimed until it was modified by the court and the

TIMOTHY DAVIS - October 21, 2013
Direct Examination Cont. by Mr. Wechsler

1 decree process.

2 Q. So they were entitled to use the amount of
3 their claim?

4 A. Yes.

5 Q. So when you say modified by the water court,
6 what would constitute modifying a claim?

7 A. If the -- throughout the adjudication
8 process, if the court decreased the amount of the flow
9 rate, decrease -- changed the place of use, made any
10 changes to the claim in one of its decrees, that would
11 modify how the water could be used.

12 Q. So, for example, if someone filed a claim,
13 they would be entitled to use up to the full amount of
14 that claim unless preliminary decree changed that
15 claim?

16 A. Yes.

17 Q. Could you turn, please, again, in the Montana
18 Water Use Act to page 58 to 85-2-227.

19 A. Yes, I'm there.

20 Q. And are you familiar with this statute?

21 A. Yes.

22 Q. Could you read that No. 1 there?

23 A. "For purposes of adjudicating rights,
24 pursuant to this chapter, a claim of an existing right
25 filed in accordance with 85-2-221 or an amended claim

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1 of existing right, constitutes prima facie proof of its
2 contents in the issuance of a final decree. For
3 purposes of administering water rights, the provisions
4 of a temporary preliminary decree or a preliminary
5 decree as modified after objections and hearings,
6 supercede a claim of existing right until a final
7 decree is issued."

8 Q. That's what you just described; is that
9 correct?

10 A. Correct.

11 Q. So, now, does a claim include the flow rate
12 that the water user is entitled to put to beneficial
13 use?

14 A. Typically, yes.

15 Q. Now, if there's -- in the adjudication
16 process, is there a standard flow rate that is applied
17 in adjudication?

18 A. There are standards that are applied for
19 different types of claims. For example, for an
20 irrigation right, the standard is used at 17 gallons
21 per minute per acre.

22 Q. Can you translate that into CFS?

23 A. I won't try to do math. But that generally
24 translates to 26 acres for 1 CFS for irrigation.

25 Q. That's in rough numbers?

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1 A. Roughly.

2 Q. So 1 CFS is used to irrigate 26 acres?

3 A. Yes.

4 Q. I believe we heard last week that Mr. Book,
5 in his analysis, used 1 CFS for 40 acres; do you recall
6 that?

7 A. Yes.

8 Q. So would you say that Mr. Book was being
9 conservative?

10 A. Yes.

11 Q. How is that standard flow rate determined?

12 A. The flow rate comes from what are known as
13 the Montana Supreme Court Claims Examination Rules.
14 And it was established -- it's my understanding that it
15 was established by a comparison of irrigation
16 efficiency standards.

17 Q. Ultimately, it's an amount that Montana
18 believes is 1 CFS can be beneficially put to use on
19 26 acres?

20 A. Through the adjudication process, correct.

21 Q. If a claimant comes in and shows that they
22 need more or less water, would they be able to
23 establish that?

24 A. If they provided evidence, yes.

25 Q. It would be their burden?

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1 A. Yes.

2 Q. Ultimately, does the water court -- through
3 its final decree, will it determine the amount of water
4 that a water user is entitled to put to beneficial use?

5 A. Yes.

6 Q. Okay. So, now, we talked about the claims
7 process. After the claims process, what's the next
8 step in an adjudication in Montana?

9 A. After a claim is filed with the department,
10 the department then examines the claim to see if
11 there's any discrepancies and if it meets the
12 standards. And if there are discrepancies or there are
13 questions that the department has about the claim, we
14 would contact the claimant and try to address those.

15 Q. How does the DNRC go about examining the
16 claims?

17 A. Typically, for an irrigation right, we would
18 compare the claim to the water resource survey. So
19 between 1940 and 1960s, irrigation was mapped across
20 the state in water resource surveys. So we compared
21 what was claimed to the water resource survey for the
22 area, and then we would also compare it to aerial
23 photography.

24 Q. Again, if you could refer to Exhibit M230.
25 This time, at page 12. Do you have it?

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1 A. I do.

2 Q. And what does this flowchart show?

3 A. This flowchart shows the claims examination
4 process, from the claims being filed through a decree
5 being issued.

6 Q. For each claim, is there someone from the
7 DNRC who is assigned to be involved in that
8 examination?

9 A. Yes.

10 Q. And they'll go through that process that you
11 described?

12 A. Yes.

13 Q. Following the steps shown here on page 12?

14 A. Yes, up through issuing a summary report.

15 Q. Now, if there's a need to go out and ground
16 check something in the claim, do individuals from DNRC
17 go out and look at the water right, the land involved?

18 A. Occasionally.

19 Q. At what stage are remarks made?

20 A. Issue remarks are issued typically during the
21 examination process.

22 Q. And, again, can you describe what an issue
23 remark is?

24 A. An issue remark is if there's discrepancy or
25 there's questions about the claim that are not --

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1 cannot be addressed through the examination, those
2 would be added to the claim, and they need to be
3 resolved before a final decree.

4 Q. Resolved by whom?

5 A. The -- a water judge.

6 Q. Sometimes it initially goes to a water
7 master?

8 A. Yes.

9 Q. You described that at the end of the DNRC
10 examination process, a summary report is generated.
11 Can you please summarize what a summary report is?

12 A. A summary report is the list of water rights
13 by priority with the flow rates in -- it's essentially
14 a draft decree that's generated by the department and
15 then sent to the water court to be reviewed by the
16 water court. And then they would use that summary
17 report and -- when issuing a preliminary decree. They
18 would modify it if they felt that there need to be
19 changes to it.

20 Q. That summary report also includes the
21 remarks?

22 A. Yes.

23 Q. Are there rules for examination of water
24 claims in Montana?

25 A. Yes.

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1 Q. Who establishes those rules?

2 A. The Montana Supreme Court.

3 Q. And then are there also guidelines
4 established by the DNRC for examination?

5 A. Yes.

6 Q. Now, I want to ask you -- well, first, are
7 those available online?

8 A. Yes.

9 Q. So they are available to water users to see
10 how those claims are evaluated?

11 A. Yes.

12 Q. With regard to reservoirs, can you generally
13 describe the rules with regard to the volume of a
14 reservoir?

15 A. Yes. Very generally, if a reservoir -- under
16 the Montana Supreme Court Claims Examination Rules, an
17 issue remark concerning volume would not be added
18 unless the capacity claim -- the volume claimed exceeds
19 the capacity by two times that capacity.

20 Q. In other words, if a claim came before the
21 DNRC claims examiner and it only was asking for
22 one-and-a-half fills, that claim would not even receive
23 an examination remark?

24 A. Typically, no.

25 Q. And so that wouldn't be something that the

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1 water court would even have to review?

2 A. There would not be an issue remark to be
3 resolved. They would still review the claim, but they
4 would not need to resolve the issue remark.

5 Q. So if I understand you correctly, an issue
6 remark is put on a reservoir claim only if there is a
7 claim for two times the volume of the physical volume
8 of the reservoir?

9 A. Typically and generally. There may be other
10 issue remarks that can be placed on an individual
11 claim.

12 Q. You described the summary report. What's the
13 next step, after that is produced, in the adjudication?

14 A. The -- a water master would typically review
15 the summary report. And a water judge would issue a
16 preliminary decree. And then a preliminary decree
17 would then go to be publicly noticed, and an objection
18 period would begin.

19 Q. So starting with the preliminary decree, what
20 information forms the basis of a preliminary decree?

21 A. Three -- it's three items: It's the summary
22 report, the claims themselves, and if there are any
23 compacts in the basin, those would be incorporated as
24 well.

25 Q. I'm sorry. Did you say compacts?

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1 A. Compacts; federal or tribal compacts.

2 Q. Can you look in Title 85 again, the Water Use
3 Act. And I think that's a good time to point out that
4 the Water Use Act also contains the compacts in
5 Montana; is that correct?

6 A. Correct.

7 Q. So if you would look, please, with me at page
8 273. Is this the codification of the Yellowstone River
9 Compact in Montana?

10 A. Yes.

11 Q. And in this case, we've also discussed the
12 Northern Cheyenne Compact. If you'd turn, please, to
13 page 297.

14 A. Okay.

15 Q. And this is the codification of the Northern
16 Cheyenne Compact; is that correct?

17 A. Correct.

18 Q. So then moving back to the adjudication
19 process. You mentioned there's public notice of the
20 preliminary decree; how is that public notice given?

21 A. There is a -- notice is mailed to water users
22 in the basin, as well as public notice is posted in
23 whatever the local paper is.

24 Q. That public notice alerts other water users
25 of the preliminary decree?

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1 A. Yes, of the preliminary decree and the
2 opportunity to object.

3 Q. So at that point, water users who think that
4 it's improper or that it might impact their water have
5 the opportunity to object?

6 A. Correct.

7 Q. And if there are objections, are hearings
8 held?

9 A. If the objection is not settled, then, yes,
10 typically a hearing is held.

11 Q. So the water users themselves could work out
12 an agreement on the objections?

13 A. Correct.

14 Q. That would be filed with the adjudication
15 court?

16 A. Correct.

17 Q. If necessary, who holds a hearing?

18 A. Either a water judge or, if directed, a water
19 master.

20 Q. At this stage, if there are no objections, is
21 this when the issue remarks are resolved?

22 A. If there are no objections, then issue
23 remarks are typically -- the water court will often
24 direct the Department of Natural Resources and
25 Conservation to try to resolve the issue remarks

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1 informally. If that does not succeed, then it would go
2 back to the water court to make a decision upon the
3 issue remarks.

4 Q. Eventually, the whole process ends up in a
5 final decree?

6 A. Correct.

7 Q. Turning now to the Tongue River adjudication.
8 What's the status of the Tongue River adjudication?

9 A. There's a preliminary decree currently on the
10 two basins in the Tongue River. The objection period
11 has closed, and objections are being heard or resolved
12 at this point.

13 Q. What does that mean for water users in the
14 Tongue River Basin?

15 A. The water users can use water according to
16 that preliminary decree.

17 Q. So currently that preliminary decree forms
18 the basis that -- upon which they can use their water
19 right?

20 A. Correct.

21 Q. Including -- if it contains a flow rate,
22 including that flow rate?

23 A. Correct.

24 Q. Up to the maximum amount of that flow rate?

25 A. Correct.

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1 Q. Do you have before you Exhibit M6, which has
2 been previously admitted?

3 A. I believe so.

4 Q. I think it may be in the --

5 A. Oh, in here? Yes.

6 Q. Could you turn, please, to page D1, which is
7 found at page 125 of Exhibit M6?

8 A. Okay.

9 Q. And turn, please, to page 126.

10 A. Okay.

11 Q. And so for the next four pages is a series of
12 maps. At the top it indicates Department of Natural
13 Resources and Conservation examination report; do you
14 see that?

15 A. Yes.

16 Q. And what are these documents?

17 A. These documents are the comparison by the
18 department of the claimed place of use and -- as
19 compared to the water resource survey and the digital
20 photographs that were examined by the department when
21 examining this claim.

22 Q. This is one of the products of that claims
23 examination that the DNRC does?

24 A. Correct.

25 Q. On that page 125, it indicates the owner is

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1 Nance Cattle Company. Are you familiar with this
2 right?

3 A. Yes.

4 Q. And is this the first right on the river?

5 A. The first irrigation right, correct.

6 Q. Are there any rights before it?

7 A. There are several filed stock rights that are
8 more senior.

9 Q. So if you look at the series of maps found on
10 pages 126 through 129 of M6 here, it's looking at the
11 way the examination is done using the water resource
12 survey and the aerial photography; is that right?

13 A. Correct.

14 Q. Now, if you recall, we looked at -- on
15 Thursday, at Exhibit M243, which was the 1914 Miles
16 City Decree; do you remember that?

17 A. Yes.

18 Q. And do you remember that this particular
19 water right was included in that decree?

20 A. Yes.

21 Q. So how does the current ongoing adjudication
22 process relate to that previous 1914 decree?

23 A. Currently, the 1914 decree is the only
24 enforceable decree on the Tongue River. It will be
25 eventually replaced by an -- a new enforceable decree

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1 or final decree at the end of the adjudication process.

2 Q. So those rights are actually included in the
3 current ongoing adjudication?

4 A. If the claimants filed the -- there may be
5 cases where you would have an enforceable -- a historic
6 enforceable decree like the Miles City Decree where not
7 all of the claims were filed with the -- in the
8 adjudication process, in which case they would not have
9 those claims. It's my understanding, however, that
10 most of the claims were filed, from the 1914 decree, in
11 the current adjudication process.

12 Q. Turning to page 133 of Exhibit M6.

13 A. Okay.

14 Q. And what is this document?

15 A. This document is a master's report. There
16 was an objection by the United States Government, the
17 Bureau of Indian Affairs, to the Nance water right
18 claim. And this is a master's report outlining the
19 master's recommendation of the stipulation that came
20 out of the settlement of that objection.

21 Q. And then if you look back on page 130 and
22 131.

23 A. Okay.

24 Q. What is that document?

25 A. That is the abstract for the water right

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1 claim.

2 Q. It lists the owner and the priority date; is
3 that right?

4 A. Correct.

5 Q. And it goes on to list the flow rate and the
6 place of use?

7 A. Correct.

8 Q. And in this case, there's an examination
9 where it indicates remarks; do you see that?

10 A. Yes.

11 Q. And it indicates that there were no
12 significant facts?

13 A. Correct.

14 Q. To report to the water court?

15 A. Correct.

16 Q. Now, we heard from Mr. Book that here, if you
17 look at the maximum acres, is listed as 426?

18 A. Yes.

19 Q. And then was that changed by the master's
20 report?

21 A. It was not changed by the master's report.
22 It was changed by the former Chief Water Judge Lobel's
23 order adopting the master's report and adopting the
24 stipulation and modifying the claim pursuant to that
25 stipulation.

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1 Q. In other words, for this particular right
2 there were objections?

3 A. Yes.

4 Q. And then there was -- it appears to be a
5 hearing held before the water master?

6 A. I don't know if there was a hearing or if it
7 was simply a -- the objection was settled prior to a
8 hearing.

9 Q. Then reviewed by the water master?

10 A. Correct.

11 Q. And then you see on page 137 there's an order
12 adopting the water master's report?

13 A. Correct.

14 Q. So that's essentially the way the
15 adjudication process proceeds?

16 A. Correct.

17 Q. You are the current commissioner for the
18 Yellowstone River Compact Commission; is that right?

19 A. Correct.

20 Q. And in that role, have you had the
21 opportunity to review the minutes of previous YRCC
22 meetings?

23 A. Not comprehensively, but I've reviewed some
24 of them.

25 Q. And in your general review of those minutes,

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1 are you aware that Montana kept Wyoming generally
2 informed of the stage and process at which the
3 adjudication was in?

4 A. Yes.

5 Q. Do you know how far that dates back?

6 A. My -- the documents that I have reviewed go
7 back to the 1990s.

8 Q. And does that include the period when the
9 objections would be open to water right?

10 A. Yes.

11 Q. Staying on the issue of adjudications in
12 Montana, I want to ask you a little bit about the stock
13 water rights. And you said earlier that stock water
14 rights were not required to file an adjudication; is
15 that correct?

16 A. Correct.

17 Q. They could option -- they could elect to do
18 that optionally?

19 A. Yes.

20 Q. And you had the opportunity to check and see
21 how many stock water claims have been filed in the
22 Tongue River Basin prior to 1950?

23 A. Yes.

24 Q. How many rights is that?

25 A. Approximately 48 rights.

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1 Q. And as we said, that doesn't include -- it
2 likely does not include all of the stock water claims
3 in the Tongue River Basin?

4 A. Correct.

5 Q. And why is that?

6 A. There was -- as I stated earlier, there were
7 stock water -- instream stock water rights were not
8 required to be claimed. And in many cases, people did
9 not claim them for that reason.

10 Q. Does DNRC have guidelines that determine how
11 much water is consumed by a stock?

12 A. Yes. As outlined by the Montana Supreme
13 Court Claims Examination Rules.

14 Q. And what are the guidelines?

15 A. It's generally 30 gallons per day per animal
16 unit, which translates to a cow/calf pair, for example.

17 Q. Turning to the Tongue River Reservoir water
18 right, when was that claim filed?

19 A. The water right was filed in 1937. And then
20 it was -- a claim was filed, I believe, in '82, 1982.

21 Q. So when you mean the claim was filed in 1982,
22 you mean in the adjudication process?

23 A. In the adjudication process. But the
24 original claim was filed with the clerk of the district
25 court in 1937.

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1 Q. In the adjudication process, was there an
2 objection filed?

3 A. Yes.

4 Q. Do you know by whom?

5 A. The objection was filed by, again, the United
6 States of America. I believe it was the Bureau of
7 Reclamation.

8 Q. There may have been other parties involved?

9 A. Yes.

10 Q. Were there negotiations over those
11 objections?

12 A. Yes.

13 Q. And at the time, you were the administrator
14 of the Water Resources Division; is that correct?

15 A. During the negotiations, correct.

16 Q. So were you generally kept informed about the
17 negotiations?

18 A. Yes.

19 Q. If you could turn, please, to Exhibit M526.

20 A. Okay.

21 Q. Do you recognize this document?

22 A. Yes.

23 Q. What is it?

24 A. This is the amended stipulation to that --
25 settling that objection to the Tongue River Reservoir

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1 rights.

2 Q. Ultimately, the parties resolved their
3 differences?

4 A. Correct.

5 Q. And this is the product of that stipulation?

6 A. Yes.

7 Q. Or of those negotiations?

8 A. Yes.

9 Q. If you could turn with me to what's labeled
10 at the bottom as MT15119; do you see that?

11 A. Yes.

12 Q. Was this document, to your knowledge, filed
13 in the adjudication?

14 A. Yes.

15 Q. And then if you continue to the next page,
16 page 7 of 10; do you see that?

17 A. Yes.

18 Q. This appears to be a signature from a
19 Mr. Fred Robinson; do you know who Mr. Robinson is?

20 A. Mr. Robinson is the attorney for the State
21 Water Project Bureau within the Water Resources
22 Division of DNRC.

23 Q. Part of the DNRC?

24 A. Correct.

25 Q. The next page here, page 8 of 10, this

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1 appears to be a signature from the United States Bureau
2 of Reclamation. And I think you said that they were
3 involved; is that correct?

4 A. Correct.

5 Q. Now, the next page on my version is not
6 particularly legible. But if you move to the next page
7 at 9 of 10; do you see that?

8 A. Yes.

9 Q. And here this appears to be the signature of
10 a Ms. Brenda Lindlief Hall; do you know who she is?

11 A. Ms. Lindlief Hall is the attorney for the
12 Tongue River Water Users' Association.

13 Q. Next page appears to be the signature of a
14 Jeanne Whiteing; do you see that?

15 A. Yes.

16 Q. Who is Ms. Whiteing?

17 A. Ms. Whiteing is attorney, is counsel for the
18 Northern Cheyenne Tribe.

19 MR. WECHSLER: Your Honor, at this point I
20 would move the admission of Exhibit M526.

21 MR. KASTE: No objection.

22 SPECIAL MASTER: Thank you. So Exhibit M526
23 is admitted into evidence.

24 (Exhibit M526 admitted.)

25

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1 BY MR. WECHSLER:

2 Q. How did this stipulation fit into the
3 adjudication process?

4 A. This stipulation settled all of the
5 objections to the Tongue River Reservoir right. It is
6 currently before a water master who would draft a
7 master's report to the water judge. And then the water
8 judge would decide whether to adopt it as --
9 essentially adopt it into the decree itself.

10 Q. In this particular case, we went and looked
11 at the signatures. Who were the stipulating parties?

12 A. The Northern Cheyenne Tribe, the Bureau of
13 Reclamation, the Tongue River Water Users' Association,
14 and the State of Montana.

15 Q. What is the status of this particular right
16 for the Tongue River Reservoir?

17 A. It is currently as listed -- Tongue River
18 Reservoir right is currently -- until the stipulation
19 is acted upon, it is currently as listed in the
20 preliminary decree.

21 Q. Are there any remaining objections for this
22 right?

23 A. No.

24 Q. And the period for filing objections on this
25 stipulation has passed?

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1 A. Yes.

2 Q. Have you had an opportunity to see other
3 cases in which a stipulation was filed in an
4 adjudication?

5 A. Yes.

6 Q. And in your experience, how has the water
7 court addressed those?

8 A. In my experience, the water court has adopted
9 the stipulation typically as a consent decree,
10 essentially adopting the stipulated language, the
11 changes to the claim into the decree itself.

12 Q. Could you turn to page 3 of 10, please.

13 A. Okay.

14 Q. And I'm looking at paragraph 6. And the
15 third sentence indicates that the two rights, meaning
16 the Montana right that's the subject of this
17 stipulation and the NCT, Northern Cheyenne Tribe right,
18 are commingled and administrative we -- let me start
19 over.

20 "The two rights, however, are commingled and
21 administered conjunctively according to an operation
22 plan developed pursuant to the compact"; do you see
23 that?

24 A. Yes.

25 Q. What compact do you understand that to be

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1 referring to?

2 A. The Northern Cheyenne Tribe Compact with the
3 State of Montana.

4 Q. You understand there was an operating plan
5 that was developed pursuant to that compact?

6 A. Yes.

7 Q. And we'll hear more about that from Mr. Kevin
8 Smith. What does it mean for a right to be commingled
9 and administered conjunctively?

10 A. The two rights share the same priority date
11 and shortages and there's only one operator that
12 supplies both rights.

13 Q. Let's turn away from the adjudication and to
14 the administration of water in Montana. And we talked
15 earlier, but can you remind me, please, how you
16 understand administration of water? What do you
17 understand administration of water to mean?

18 A. Administration of water in Montana is the
19 distribution and enforcement of water by priority.

20 Q. If you could, please, turn to Exhibit M552.

21 A. Okay.

22 Q. Do you have that?

23 A. I do.

24 MR. WECHSLER: Your Honor, may I approach? I
25 understand you may not have a copy.

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1 SPECIAL MASTER: If it is M552 entitled Water
2 Right Dispute Options, I do have a copy.

3 MR. WECHSLER: Thank you.

4 BY MR. WECHSLER:

5 Q. Could you please describe Exhibit M552?

6 A. Exhibit M552 is a two-page document put out
7 by the Water Resources Division of the Department of
8 Natural Resources and Conservation that lays out the
9 different options for resolving water right disputes if
10 the informal call process, that I talked about the
11 other day, does not work.

12 Q. This is a document, it indicates at the top,
13 that was produced by the Water Resources Division?

14 A. Yes.

15 Q. And of which you are in charge?

16 A. Yes.

17 Q. And this was done by a staff of the DNRC
18 Water Resources Division?

19 A. Correct.

20 Q. Is it also currently available on the website
21 of the DNRC?

22 A. I believe so.

23 Q. And, in fact, if you look at the second page
24 here, it indicates the site.

25 A. I see that.

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1 MR. WECHSLER: Your Honor, at this point, I
2 would move the admission of Exhibit M552.

3 MR. KASTE: No objection.

4 SPECIAL MASTER: Okay. Thank you. Exhibit
5 M552 is admitted into evidence.

6 (Exhibit M552 admitted.)

7 BY MR. WECHSLER:

8 Q. I want to -- there's been a lot of discussion
9 in this case about the way that water disputes in
10 Montana are resolved. And so I actually want to walk
11 down each of these options and have you say a little
12 bit about them.

13 So if you would, please, starting with No. 1
14 listed on Exhibit M552, please summarize that option.

15 A. If an informal call is unsuccessful at
16 addressing dispute between water users, then the first
17 option would be to -- as laid out on this sheet, is to
18 file a court action with the appropriate district court
19 asking for a temporary restraining order or a
20 preliminary injunction to stop the water use from the
21 junior.

22 Q. So I want to back up again. And you said if
23 a call is not honored. So in Montana, please remind us
24 how a call is made.

25 A. A call is typically made informally between

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1 water users.

2 Q. Neighbor to neighbor?

3 A. Yes.

4 Q. Potentially simply talking to each other?

5 A. Yes.

6 Q. Now, can I get you to turn to what should be
7 before you and is Exhibit J68?

8 A. I have it.

9 Q. Are you familiar with this document?

10 A. Generally.

11 Q. You've reviewed it as part of your work in
12 this case?

13 A. Yes.

14 Q. And what do you understand this to be?

15 A. I understand this to be a letter from the
16 former division administrator of the Water Resources
17 Division, Jack Stults to Pat Tyrrell, the state
18 engineer of Wyoming, requesting that Wyoming administer
19 the waters of the Tongue and Powder Rivers to curtail
20 their post-'50 diversion.

21 Q. A formal written call letter?

22 A. Yes.

23 Q. In Montana, are formal written call letters
24 required?

25 A. No.

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1 Q. Is a call letter required to be in writing at
2 all?

3 A. No.

4 Q. And does the call have to be from any
5 particular person?

6 A. No.

7 Q. Based -- so would you describe the way in
8 which calls in Montana are made as informal?

9 A. The -- it can take many different forms. But
10 it can be as simple as a water user picking up the
11 phone and calling a junior -- a senior water user
12 picking up the phone and calling a junior water user
13 and asking them to shut off because they are not
14 receiving their water.

15 Q. Based on your experience, is that an
16 effective way of making calls?

17 A. In many cases.

18 Q. Why is that?

19 A. That it -- if you look at the -- I would use
20 the Tongue River as an example of how sometimes the
21 systems are fairly simple to administer when it comes
22 to priority. On, for example, the Tongue River --
23 really, once the flows across the -- the direct flows
24 across the border drop below, I believe it's 197.98
25 CFS, there are really only two direct flow rights in

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1 priority below the reservoir. And those -- and so when
2 the T & Y Canal calls for their flow rate, there's only
3 one other water user above them who has a direct flow
4 right, and that would be Mr. Nance. So it's a fairly
5 easy system to administer from that perspective because
6 every other water right on the system, at that point,
7 would be contract water.

8 Q. Many times you're talking about small river
9 systems involving a number of people who mostly know
10 each other?

11 A. Correct.

12 Q. And they tend to be reliant on the same
13 source of water?

14 A. Correct.

15 Q. And have to have dealings and communications
16 with each other on a regular basis?

17 A. Correct.

18 Q. And so if you can resolve disputes simply by
19 discussing it amongst each other, do you think that's
20 preferable?

21 A. Yes, I think it's preferable. It doesn't
22 work in every case, but I think it's preferable in most
23 cases.

24 Q. And so you talked about, No. 1, on Exhibit
25 M552. If it doesn't work, then the first option I

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1 think you described was a filing in district court?

2 A. Correct.

3 Q. Moving down, now, to No. 2 on Exhibit 552.

4 Could you please summarize that water right dispute
5 option?

6 A. The second option on this list is if an old
7 decree exists, like an enforceable decree like the
8 Miles City Decree, 1914 decree on the Tongue exists,
9 the water user could petition the district court to
10 have a water commissioner appointed to distribute water
11 by priority.

12 Q. Was that done in Montana prior to 1973?

13 A. Yes.

14 Q. Okay. Moving down, now, to No. 3; could you
15 please describe that option?

16 A. No. 3 involves in a case where not all of the
17 existing pre-1973 water rights have been conclusively
18 determined by the water court. Any party in a
19 controversy may petition the district court to have the
20 chief water judge make a determination of the existing
21 rights, so in other words, to resolve the priority --
22 issues of priority and create an enforceable decree.

23 Q. Again, moving down to No. 4.

24 A. No. 4 outlines when you have an enforceable
25 decree. So when all of the -- an enforceable decree

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1 can be a temporary preliminary, a preliminary, or a
2 final decree. This is a post-'73 decree. When all of
3 the objections have been resolved, that decree can be
4 enforceable, and a district court can be petitioned to
5 put a water commissioner on to distribute water
6 according to that decree.

7 Q. Can you please describe the process by which
8 a water commissioner is appointed?

9 A. The 15 -- there's numerous ways. But the
10 district court appoints a water commissioner upon
11 petition by 15 percent of water right holders, a
12 irrigation district, or the DNRC.

13 Q. To your knowledge, have water commissioners
14 been appointed on the Tongue River in the past?

15 A. Yes.

16 Q. Once a water commissioner is appointed, what
17 are the responsibilities of the water commissioner?

18 A. To distribute water according to the priority
19 as defined by the decree.

20 Q. Do you have before you Exhibit M229?

21 A. Yes.

22 Q. And what is this document?

23 A. This document is a training manual that the
24 Department of Natural Resources and Conservation
25 puts -- put together to train water commissioners.

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1 Q. Again, in the front, it indicates Water
2 Resources Division. Was this a document that was
3 produced by the Water Resources Division?

4 A. Yes.

5 Q. And this is a document used by your staff in
6 trainings of water commissioner?

7 A. Yes.

8 MR. WECHSLER: Your Honor, at this point, I
9 would move the admission of Exhibit M229.

10 MR. KASTE: No objection.

11 SPECIAL MASTER: Okay. Thank you. Exhibit
12 M229 is admitted into evidence.

13 (Exhibit M229 admitted.)

14 BY MR. WECHSLER:

15 Q. Who in your staff is responsible for training
16 water commissioners?

17 A. The Water Management Bureau. But in
18 particular, it is a surface water hydrologist named
19 Mike Roberts.

20 Q. We talked about the fact that Mr. Roberts
21 will be testifying in this proceeding; correct?

22 A. Correct.

23 Q. And, unfortunately, he couldn't be here today
24 because of a family emergency?

25 A. Correct.

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1 Q. But he will be here when he is able. And at
2 that point, we'll have him discuss much more in detail
3 the training that the DNRC does for water
4 commissioners.

5 But I do want to ask you, what is the
6 relationship between the DNRC and water commissioners?

7 A. The DNRC, we provide training, and then we
8 assist in producing maps as well as indices of water
9 rights by priority for district courts and
10 commissioners.

11 Q. Does the DNRC oversee water commissioners?

12 A. No.

13 Q. Who oversees water commissioners?

14 A. District courts.

15 Q. Turning back, if you would, please, to
16 Exhibit M552. And I'm looking now at the second page
17 of the document, paragraph 5.

18 A. Okay.

19 Q. Could you please summarize the option that's
20 described in paragraph 5?

21 A. This is a -- this described the petition
22 process in which a district court can be petitioned to
23 appoint a water mediator to help mediate any water
24 disputes.

25 Q. So what are the responsibilities of a water

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1 mediator?

2 A. The -- a water mediator doesn't have any
3 binding authority but essentially to try to resolve
4 issues of disputes over water rights between water
5 users.

6 Q. Provide a neutral party for water users to
7 use -- in part of dispute resolution?

8 A. Yes.

9 Q. Does the DNRC oversee the water mediator?

10 A. No.

11 Q. And who oversees the mediators?

12 A. I believe it would be the district court.

13 Q. Turning to paragraph 6, Exhibit M552, would
14 you please summarize the dispute option that's
15 described in paragraph 6?

16 A. Paragraph 6 outlines the DNRC's water
17 enforcement authority, which is primarily limited to
18 water users wasting -- if we receive complaints about
19 water users wasting water, unlawfully using water,
20 preventing water from moving to another person with a
21 prior priority date, or otherwise violating the Water
22 Use Act. But DNRC does not typically get into issues
23 of priority between water users.

24 Q. If there's disputes other than that that are
25 brought to the attention of the DNRC, there's someone

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1 available who might be able to help resolve those
2 disputes between water users?

3 A. Correct.

4 Q. And does your staff receive this type of
5 complaint?

6 A. Yes.

7 Q. Are there members of your staff who are in
8 regular contact with water users in the Tongue River
9 Basin?

10 A. Yes.

11 Q. Are you aware of any complaints in the Tongue
12 River Basin?

13 A. I am not.

14 Q. Let's turn to the topic of CBM and
15 groundwater regulation.

16 A. Okay.

17 Q. First, what do the letters CBM stand for?

18 A. Coalbed methane.

19 Q. Does Montana have a groundwater code?

20 A. Yes.

21 Q. When was it adopted?

22 A. The first groundwater code was adopted in
23 1961 and then was replaced by the Water Use Act.

24 Q. What is the significance of first the Montana
25 groundwater code, and now its replacement, in the Water

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1 Use Act?

2 A. The 1961 groundwater code was the first time
3 that a water user could get a filed water right for
4 groundwater.

5 Q. And now groundwater use is regulated under
6 the Montana Water Use Act?

7 A. Correct.

8 Q. How is groundwater regulated in Montana?

9 A. Before a water user can get a permit for a
10 groundwater appropriation they need to show that water
11 is legally available and that there will not be an
12 adverse effect to other water right holders.

13 Q. Is it their burden to show that no other
14 rights will be impacted?

15 A. Yes.

16 Q. Are groundwater rights adjudicated?

17 A. Yes.

18 Q. And now, if you would look with me, please,
19 in the Water Use Act at 85-2-501, which is at page 116.

20 A. Okay.

21 Q. And is this the statute you were referring to
22 for groundwater in the Montana Water Use Act?

23 A. Correct.

24 Q. Are you generally aware of CBM production in
25 Montana?

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1 A. Generally, yes.

2 Q. It's not your responsibility to regulate CBM
3 production in Montana?

4 A. Not unless the water is being put to a
5 beneficial use.

6 Q. So just the production of the CBM itself,
7 what agency is responsible for regulating CBM in
8 Montana?

9 A. The Board of Oil and Gas Conservation and the
10 Department of Environmental Quality.

11 Q. Based on your answer previously, it sounds
12 like you're aware that water is produced as part of the
13 CBM process?

14 A. Correct.

15 Q. And do you know if the Oil and Gas
16 Conservation Division keeps track of the water that is
17 produced?

18 A. I believe so.

19 Q. Now, your agency, the Water Resources
20 Division of the DNRC, is responsible for regulating
21 water; right?

22 A. Correct.

23 Q. Including groundwater?

24 A. Correct.

25 Q. Is a permit necessary to -- for CBM-produced

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1 water?

2 A. Not unless the water is being put to a
3 beneficial use, no.

4 Q. So if water is being put to beneficial use by
5 a CBM producer, that water requires a permit from you?

6 A. For the beneficial use, correct.

7 Q. And it would go through the evaluations
8 process that you described?

9 A. Correct.

10 Q. Now, how about water that is not put to a
11 beneficial use from CBM? It does not need a permit;
12 correct?

13 A. Correct; not from the Department of Natural
14 Resources and Conservation.

15 Q. Does that mean that there's no protection for
16 surface water users who are impaired by that water
17 production?

18 A. No.

19 Q. So what protection is there for surface water
20 users who might be impaired?

21 A. If a surface user, water right holder felt
22 they were being adversely affected by coalbed methane
23 development, they could conceivably take the coalbed
24 methane producer to court for that adverse effect.

25 MR. WECHSLER: No further questions.

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1 SPECIAL MASTER: Thank you. Actually, before
2 cross-examination, I just have a couple of questions of
3 my own. And these are all, again, largely background
4 questions. And just like Mr. Wechsler, I'm not asking
5 you for any type of a legal opinion, but I'm just
6 trying to understand what the practice is in Montana in
7 various areas.

8 EXAMINATION

9 BY SPECIAL MASTER:

10 Q. So first of all, you talked about the
11 adjudication process in Montana. And one of the
12 exhibits that you discussed was Exhibit M233, which
13 shows the basin location saying adjudication status.
14 And I believe that you said during that, that as part
15 of the overall adjudication process there were
16 priorities set for which basins would be adjudicated
17 first; is that correct?

18 A. Correct.

19 Q. Could you just explain for me how or -- how
20 those priorities were established, to the degree you
21 know?

22 A. They were -- the priorities were established
23 by statute when the adjudication process went forward.

24 Q. Okay. Thank you. And do you know when the
25 preliminary decree was made in the case of the Tongue

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1 River adjudication?

2 A. I believe it was 2008. I know that that's
3 when the objection process began.

4 Q. And could you explain for me briefly what the
5 objection process is?

6 A. An -- the objection process in the
7 adjudication is -- it's the ability of a group or a
8 person that has an interest in water in the basin that
9 believes that they will be adversely affected, or they
10 have a concern about the claim, to come in and
11 challenge the claim itself. And they have to show that
12 they will likely be adversely affected by the claim.

13 Q. And is there a set period of time during
14 which you can make those objections?

15 A. There is. There's a notice period. In the
16 case of the Tongue River, the two basins in the Tongue
17 River, I believe it began in February of 2008 and ended
18 in August of 2008.

19 Q. One of the things that you discussed earlier
20 was an objection by the U.S. Bureau of Indian Affairs
21 to one of the claims in the Tongue River adjudication.
22 Not limiting yourself just to the Tongue River, but
23 generally in the adjudication process, have there
24 generally been a number of objections by various parts
25 of the U.S. government?

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1 A. Yes.

2 Q. And do you have any sense of how common that
3 is?

4 A. It really depends on which basin it's located
5 in and which -- if it's like the Tongue River Basin or
6 the basins around different reservations, it's
7 typically -- it's not uncommon to have the BIA submit
8 an objection.

9 Q. And in addition to the BIA, are you aware of
10 objections made by other U.S. governmental agencies?

11 A. Yes. In terms of -- as in the Tongue River
12 Reservoir right, it was the Bureau of Reclamation, and
13 the Bureau of Reclamation, part of their objection was
14 an objection to the volume that was in the claim and in
15 the preliminary decree. And they asserted that -- in
16 the negotiations over their objection, they asserted
17 that there was a one-fill rule in Montana. And in the
18 end, they accepted that there was not a one-fill rule
19 and settled their objection.

20 Q. And so in addition to the BIA, Bureau of
21 Reclamation, have there been any objections by U.S.
22 agencies asserting federal reserve water rights for
23 other than Indian reservations?

24 A. Not that I'm aware of. Because, if I may,
25 the -- Montana has what's called the Reserved Water

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1 Right Compact Commission, which was set up specifically
2 to negotiate with the U.S. federal reserve and tribal
3 water rights. And most of those have been successfully
4 negotiated up to this point.

5 Q. Are you aware of any states objecting to --
6 other than, I assume, Montana might. But other than
7 Montana, are there any states that have objected?

8 A. I am not personally aware.

9 Q. And one of the exhibits that you were
10 discussing earlier is M526, which is the amended
11 stipulation regarding the claim by DNRC State Water
12 Projects Bureau. If you turn to what is stamped page
13 MT15126, which is Exhibit A to the amended stipulation.

14 A. Okay.

15 Q. Do you know what this is?

16 A. So MT -- it's page 4 out of 10? Is that
17 where --

18 Q. No. It's actually MT15126.

19 A. Oh, 126. Yes, this is the proposed amended
20 abstract that resulted from the settlement as a result
21 of the stipulation.

22 Q. So prior to this amended stipulation, do you
23 know what documents would have been produced regarding
24 the claim with respect to the reservoir? I will walk
25 you through this. Initially, there would have been a

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1 claim filed by the State Water Project?

2 A. Correct.

3 Q. And then after that claim was filed, what
4 steps would have been taken?

5 A. There would be -- the next step would be a
6 claims examination. And I should note that even though
7 the Water Adjudication Bureau and the State Water
8 Projects Bureau are both within the Water Resources
9 Division, there is -- they have -- and this is where
10 Mr. Robinson comes in, the attorney for the State Water
11 Projects. He's firewalled off from the other attorneys
12 within the division.

13 So the Water Adjudication Bureau examine the
14 claim. And then I believe in the case, the water court
15 directed the Adjudication Bureau to reexamine the
16 claim. So I believe it had two examinations before
17 including it in the preliminary decree.

18 Q. So after the examination, what is it that
19 would have been produced as part of that claims
20 examination in terms of a physical document?

21 A. The examination would have -- well, it would
22 have been included in the summary report. And then
23 there would have been an abstract produced that this
24 stipulated abstract is replacing, that defined the
25 volume, the place of use, all the other provisions of

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1 the water right.

2 Q. So first of all, there would have been an
3 actual report that the reservoir claim would have been
4 part of?

5 A. Correct.

6 Q. All right. And in addition to that, there
7 would have been a proposed abstract; is that correct?

8 A. Correct.

9 Q. And I noticed at the very top of page 1, that
10 underneath Exhibit A, it says "proposed abstract of the
11 water right."

12 A. Correct.

13 Q. Do you know whether that means whether this
14 would have been the abstract that would have been
15 produced as part of the examination?

16 A. This would -- this proposed abstract would
17 replace the -- is proposed in the stipulation to
18 replace the abstract that was developed through the
19 examination and the preliminary decree process. So
20 this is the abstract that was negotiated as part of the
21 settlement negotiations, and they produced this in the
22 proposal. It's in the stipulation that this would
23 replace that earlier abstract.

24 Q. So one of the things in looking at this
25 document, you will see that there is the proposed

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1 abstract at the top. And then at the bottom of that
2 page, it says "amended proposed abstract," although it
3 then has the same number after it. And then at the
4 bottom of page 2, it again says "amended proposed
5 abstract."

6 And what's unclear to me is whether the thing
7 at the bottom there is simply saying that this is the
8 amended abstract or whether or not what happens is you
9 have the proposed abstract and then you have an
10 amendment to it and another amendment to it.

11 A. I believe this is -- since this is an amended
12 stipulation, that there's simply -- this is all one
13 proposed abstract that would replace the earlier
14 abstract that was produced. So this is all -- that
15 pages 1, 2, and 3 are all part of the same proposed
16 abstract.

17 Q. And then on page 1, at the bottom of it,
18 there's a heading that says flow rate and a heading
19 that says volume.

20 A. Correct.

21 Q. Could you explain what normally is indicated
22 for flow rate and volume? In other words, what is that
23 supposed to indicate?

24 A. The flow rate and the volume typically
25 indicates the amount that may be diverted. And the

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1 volume is the volume that may be used for beneficial
2 use from a reservoir right.

3 Q. Okay. And I don't want to ask you to
4 speculate. I just want to know whether or not you
5 know. For both the flow rate and for the volume, here
6 it says it has not been decreed for this water right;
7 do you know what that means?

8 A. There is not a limit on the amount that
9 the -- there's not an upper limit on the flow rate nor
10 on the volume as stipulated.

11 Q. And then also on the next page, this is page
12 2 of the amended proposed abstract, there are the two
13 paragraphs at the top of the page. And in the second
14 paragraph, there's -- the second sentence says, "These
15 amounts do not define the amount of water that may be
16 diverted into storage in any year or carried over for
17 release in following years but do define the amounts to
18 be delivered in any one year."

19 Do you have an understanding of what that
20 language means?

21 A. If you look at the sentence before that,
22 where it's the, "Tongue River Reservoir provides up to
23 40,000 acre-feet of stored water per year to the Tongue
24 River Water Users' Association under this water right
25 and up to 20,000 acre-feet of stored water per year to

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1 the Northern Cheyenne Tribe under the Northern Cheyenne
2 and Montana Compact." So this effectively -- this
3 limits how much water may be contracted from the Tongue
4 River Reservoir in any given year.

5 The lack of the flow rate and a cap on the --
6 the fact that there is not a flow rate and a volume
7 does not limit the fact that we may only market and
8 actually deliver that 60,000 acre-feet.

9 And one of the reasons for that -- and Kevin
10 Smith, my State Water Project Bureau chief, can speak
11 to this in more detail -- but that that -- this is what
12 we believe to be -- these are the contracts that we
13 have with the Tongue River Water Users' Association as
14 well as with the -- under the Northern Cheyenne
15 Compact. And this is what we believe is a firm yield
16 that we have and can deliver.

17 Q. And from your experience with reservoir
18 rights throughout the state, is it common for reservoir
19 rights not to have a flow rate?

20 A. From my experience, it is not.

21 Q. It is not common?

22 A. Not common.

23 Q. And similarly, is it common for a reservoir
24 not to have a volume?

25 A. Typically, it is, in my experience, it's not

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1 common either.

2 Q. In your experience, have you dealt with other
3 reservoirs in the state that do not have either a flow
4 rate or a volume?

5 A. Well, the volume is -- this does effectively
6 have a volume in that what can be delivered, which is
7 the 60,000 acre-feet of the two commingled rights. It
8 just doesn't have a cap on the volume that can be
9 stored. But that is the volume that can be delivered
10 for beneficial use.

11 But this -- the stipulation -- so while it
12 has that -- the stipulated abstract is not common.

13 Q. All right. One of my questions -- and,
14 again, I only want to know if you actually have
15 experience in this -- is how the DNRC would actually
16 administer a reservoir without a flow rate or a decreed
17 volume if there were an objection over how much that
18 reservoir was actually taking?

19 A. That is -- it's probably a better question on
20 reservoir operations for Kevin Smith to delve into
21 rather than me.

22 Q. Okay. Thank you. And then another question
23 with respect to -- what I am looking for was the Manual
24 on Water Rights that you were -- that's right. Which
25 exhibit is that?

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1 A. It's M230.

2 Q. Okay. And when I looked at M230, one of the
3 things that struck me was that there was no section on
4 storage rights. Is there any -- well, first of all, is
5 there a reason why there's not a separate section on
6 storage rights?

7 A. There -- if you look at the adjudication
8 section, we don't call out all the different types of
9 rights that could be adjudicated. We basically --
10 since this is for general information and public
11 information as well as information for legislators
12 about the Water Use Act and water rights in Montana, we
13 did not try to capture all the different types of
14 rights. Those would be covered by the standards and
15 procedures in the Montana Supreme Court Claims
16 Examination Rules.

17 Q. And you've referred several times to the
18 Montana Supreme Court rules for -- let me restate.

19 You referred several times to the Montana
20 Supreme Court Claims Examination Rules, and what are
21 those?

22 A. Those rules are -- were established -- they
23 essentially establish the standards and the procedures
24 for the department and the water court to use when
25 examining claims and preparing a summary report.

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1 Q. And where are those rules found?

2 A. They can be found both on the website or we
3 have hard copies within the division. I believe
4 they're over 600 pages long. So they are quite
5 comprehensive.

6 Q. And then final question: When you are trying
7 to determine what rules you need to follow with respect
8 to your responsibilities, you look to the Montana
9 statutes; is that correct?

10 A. Correct.

11 Q. And you also will look to the judicial
12 decisions; correct?

13 A. Correct.

14 Q. Are there a set of regulations for water
15 rights in Montana?

16 A. There are. We have administrative rules in
17 Montana that we also use.

18 Q. And then are there other documents that you
19 refer to?

20 A. We -- the department also refers to, if we
21 have policy documents or policy guidance documents
22 that -- so it would be statutes, case law, rule, and
23 then any policy guidance or guidelines that were
24 adopted by the department but aren't as firm of
25 guidance as the rules or statute.

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1 Q. And are those policy guidelines normally
2 available on your website?

3 A. I believe we -- not always.

4 Q. Okay. Okay. Thank you. I think -- oh,
5 finally, on the groundwater produced from CBM wells,
6 are there situations in Montana where water produced
7 from CBM wells is being placed right now to beneficial
8 use, to your knowledge?

9 A. I believe so, but I don't have any personal
10 knowledge.

11 Q. So do you know whether or not they've
12 actually applied for permits?

13 A. Not -- I do not have firsthand knowledge.

14 Q. Okay. Thank you.

15 SPECIAL MASTER: Those are my various
16 questions. Mr. Wechsler. If you want to ask any other
17 direct questions, you're free to do that before I hand
18 things over to Mr. Kaste.

19 MR. WECHSLER: Yes, please, Your Honor, just
20 a few follow-up questions.

21 REDIRECT EXAMINATION

22 BY MR. WECHSLER:

23 Q. The first, Mr. Davis, the Special Master
24 asked about whether the United States was -- commonly
25 objected to water rights claims; do you recall that

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1 question?

2 A. Yes.

3 Q. And earlier we looked at the Nance objection;
4 do you remember that?

5 A. Yes.

6 Q. Which is found in M6, I believe pages 126 and
7 several pages after that. Do you know who filed an
8 objection in that particular case?

9 A. The Bureau of Indian Affairs.

10 Q. And, in fact, the Bureau of Indian Affairs
11 has filed a number of objections in the Tongue River
12 adjudication; is that correct?

13 A. I believe so.

14 Q. And many of those documents are listed in
15 Appendix D of Mr. Book's rebuttal report?

16 A. I believe so, yes.

17 Q. And that's Exhibit M6.

18 Next, the Special Master asked if there were
19 states that had filed objections in any of the
20 adjudications in Montana. Is there a reason you can
21 think of why a state would not be entitled to file an
22 objection?

23 A. Not that I can think -- not that occurs to me
24 at this point.

25 Q. Next, if you'd turn with me, please, to

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1 Exhibit M526, which is the water -- the amended
2 stipulation.

3 A. Yes, I have it.

4 Q. Now, I believe, first, you had a discussion
5 with the Special Master about when the claim was filed
6 for the Tongue River Reservoir; do you recall that?

7 A. Yes.

8 Q. Now, when that was filed, and I believe you
9 said in 1982, at that time, did the DNRC have a process
10 by which it filed a separate claim on each of the types
11 of use? Do you know?

12 A. I don't recall.

13 Q. Fair enough. We'll ask that of another
14 witness.

15 Looking specifically at the abstract or the
16 a -- I'll call it the proposed abstract. Do you recall
17 the abstract that was part of the preliminary decree?

18 A. Generally, yes.

19 Q. The Special Master asked you about the
20 volume. Do you recall what the volume listed in that
21 preliminary decree was?

22 A. I believe the original -- when the water
23 right was originally examined, I believe the volume was
24 135,000 acre-feet and that in the reexamination it was
25 changed to 127,000 acre-feet or -- give or take.

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1 Q. All of which was greater than the capacity of
2 the reservoir?

3 A. Yes.

4 Q. And the Special Master asked if it was common
5 to have reservoir rights that had no specific volume;
6 do you remember that?

7 A. Yes.

8 Q. Is it common to have reservoir rights with
9 the volume set in the abstract that's greater than the
10 capacity of the reservoir?

11 A. Very common.

12 Q. And, in fact, you mentioned that the rules
13 for examinations -- well, could you remind us of what
14 the rules are for claims examination?

15 A. Generally, if a claim -- if the volume on a
16 reservoir claim did not exceed the capacity by two
17 times, there was not an issue remark put on the claim
18 for that reason. And that's typically to allow for
19 carryover capacity as well as the ability to fill.

20 MR. WECHSLER: I will, for the record, Your
21 Honor, note that the claims rules, or a version of the
22 claims rules, is found at Exhibit M32, which was
23 admitted on Thursday. And I would also note that there
24 were additional materials related to that that I
25 believe was provided in response to the questions that

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1 you had posed as part of the summary judgment argument.

2 BY MR. WECHSLER:

3 Q. One more question about those rules,
4 Mr. Davis: I think you also mentioned that the DNRC
5 also has rules and guidelines for claims examinations;
6 is that right?

7 A. Correct.

8 Q. Are those publicly available?

9 A. I believe -- yes, they are publicly
10 available.

11 Q. Is there an easy way to access them? Do you
12 know?

13 A. I do not know if they are available online or
14 just available by request from the department. But
15 they are publicly available.

16 MR. WECHSLER: Thank you very much. No
17 further questions.

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

20 Mr. Kaste, it is about 10:35. If you want --
21 I have no idea how long you expect to go. But if you
22 want to take a break now, this is fine with me.

23 MR. KASTE: I'll probably be succinct, but I
24 could sure use a break.

25 SPECIAL MASTER: Then why don't we take a

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1 15-minute break. We'll come back at ten after the
2 hour, and everyone can remain seated.

3 MR. KASTE: Ten to the hour?

4 SPECIAL MASTER: Did I say ten after? Ten
5 to; that's correct. Thank you, Mr. Kaste.

6 (Recess taken 10:37 to 10:51
7 a.m., October 21, 2013)

8 SPECIAL MASTER: You can be seated.

9 Mr. Kaste.

10 MR. KASTE: Thank you.

11 CROSS-EXAMINATION

12 BY MR. KASTE:

13 Q. Good morning, Mr. Davis.

14 A. Good morning.

15 Q. At some point in your testimony as you were
16 talking about the adjudication that's going on in the
17 Tongue River Basin, I think you mentioned Wyoming
18 didn't file any objections; is that right?

19 A. To my knowledge, Wyoming didn't file any
20 objections to the Tongue River Reservoir right.

21 Q. Okay. Thank you. Do you know if the State
22 of Wyoming owns any water right in the Tongue River
23 Basin in Montana?

24 A. I do not.

25 Q. Isn't it true that without such a right,

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1 Wyoming doesn't have standing to file a claim in that
2 adjudication?

3 A. No.

4 MR. WECHSLER: Objection. Calls for a legal
5 conclusion.

6 SPECIAL MASTER: I think that in the same way
7 Mr. Wechsler is -- you asked a variety of questions
8 that did not go to the witness' legal interpretations,
9 I'll permit this question based on what Mr. Davis'
10 understanding is and recognizing that he is not giving
11 a legal opinion.

12 MR. WECHSLER: Thank you.

13 THE WITNESS: No. That's not the case. It's
14 my understanding that the Montana Supreme Court ruled
15 that you just had to have a substantial interest in the
16 water to file an objection in Montana during the
17 adjudication process. You did not actually have to
18 have a water right.

19 BY MR. KASTE:

20 Q. The stipulation in this case that you
21 referred to, M556, the Court didn't take any evidence
22 in that case, did it?

23 A. Um --

24 Q. The parties just agreed?

25 A. Yes.

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1 Q. Okay. Wyoming wasn't one of those parties;
2 right?

3 A. No.

4 Q. All right. You talked a little bit about CBM
5 wells, and I think I heard you say CBM wells don't get
6 a water right from the Water Resources Division unless
7 they are going to take some of the water that they
8 produce and put it to a separate beneficial use, like
9 irrigation; right?

10 A. Right.

11 Q. Okay. And I think, if I understand right,
12 the water commissioners in the state of Montana can
13 only enforce decreed water rights; do I have that
14 right?

15 A. Correct.

16 Q. Okay. So none of the CBM wells have decreed
17 water rights; right?

18 A. Correct.

19 Q. So the water commissioner is not empowered to
20 regulate any of them in priority, is he?

21 A. Correct, if they're not put to a beneficial
22 use.

23 Q. And if I understand your testimony, you don't
24 know if any CBM water has been permitted to be put to a
25 beneficial use?

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1 A. Not personally, no.

2 Q. Do you still have in front of you Exhibit
3 M230?

4 A. Yes.

5 Q. It's entitled "Water Rights of Montana."

6 A. Yes.

7 Q. Special Master stole a bunch of my thunder by
8 asking you where you might find information about
9 reservoirs in there. And I think you testified that
10 you won't in this particular document; right?

11 A. Correct.

12 Q. Okay. Now, I have the same question, though,
13 with regard to the Montana Water Use Code. When I look
14 at the table of contents for Title 85, Chapter 2, I
15 don't see anything in here about reservoirs. Do you?

16 A. Which page are you on?

17 Q. Just the table of contents for Chapter 2.

18 And when I say "about reservoirs," what I'm really
19 looking at is some direction from your legislature
20 giving us guidance about the operation of reservoirs.
21 'Cause I know there's some information in the Montana
22 statutes about safety of dams; correct?

23 A. Correct.

24 Q. Is there anything about the operation of
25 reservoirs in the Montana statutes?

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1 A. Not that I see on -- are you on page 37?

2 Q. The table of contents is longer than one
3 page.

4 A. Okay.

5 Q. But, yes, beginning on page 37, ending on
6 page 41.

7 A. Not that I see in the table of contents.

8 Q. Okay. And you talked about the Water
9 Resources Division also has promulgated some
10 administrative regulations; correct?

11 A. Correct.

12 Q. And I don't have those in my hand today, but
13 I looked at them, and I didn't see anything in your
14 administrative regulations that governs the operations
15 of reservoirs either. Is there such a regulation?

16 A. The -- not off the -- I can't, off the top of
17 my head, point to a specific regulation.

18 Q. I'll tell you, there is a safety of dams
19 regulation in there that talks about construction
20 standards and permits to build those kinds of things.
21 But I didn't see one on reservoir operations. And you
22 agree, off the top of your head, you don't know of one
23 either?

24 A. As it relates to reservoir operations, I do
25 not know off the top of my head.

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1 Q. Okay. In Exhibit M230, if you'll turn with
2 me to page 23.

3 A. Okay.

4 Q. This is a page, the section beginning with
5 groundwater, second paragraph under that section says,
6 "A person is not required to apply for a permit to
7 develop a well or groundwater spring with an
8 anticipated use of 35 gallons a minute or less, not to
9 exceed 10 acre-feet a year." Did I read that right?

10 A. Correct.

11 Q. And that's true, isn't it, there are these
12 certain wells that based on their size are exempted
13 from the permitting process; right?

14 A. Correct.

15 Q. Mr. Brown informs me that's going to be
16 important. I'm excited to see why.

17 Let's look again at the Montana Water Use
18 Code. Earlier in your testimony, so back on Thursday,
19 and I think maybe again a little bit today, you
20 discussed a little bit of what you perceived to be
21 differences in terminology between Wyoming and Montana;
22 do you remember that?

23 A. Yes.

24 Q. All right. And one of the terms where we
25 seem to have a difference, in your mind, is with regard

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1 to the use of the word "regulation"; right?

2 A. Correct.

3 Q. I think you said in Montana that means
4 permitting and change of use; right?

5 A. Correct.

6 Q. All right. Well, would you turn with me in
7 your book to page 85 -- that's not right -- page 46,
8 and look at Montana Code Annotated 85-2-114.

9 A. Okay.

10 Q. All right. It's actually entitled "Judicial
11 Enforcement"; right?

12 A. It is.

13 Q. Would you read Section 1 through the end of
14 Subsection 1A?

15 A. "If the department ascertains by a means
16 reasonably sufficient by it, that a person is wasting
17 water, using water unlawfully, preventing water from
18 moving to another person, having a prior right to use
19 the water, or violating a provision of this chapter, it
20 may petition the district court supervising the
21 distribution of water amongst appropriators from the
22 source to, A, regulate a controlling works of an
23 appropriation as may be necessary to prevent the
24 wasting or unlawful use of water or to secure water to
25 a person having a prior right to its use."

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1 Q. Okay. And we can agree that in Subsection A
2 it uses the word "regulate"?

3 A. Yes.

4 Q. Okay. And do we agree that it means, in this
5 context, in Montana's statutes, to curtail a diversion
6 by the offending party?

7 A. Yes.

8 Q. All right. Let's look at sub -- or Section 2
9 of the same statute, and it's on the next page. It
10 begins with the words "upon the issuance." Would you
11 read that?

12 A. "Upon the issuance of an order or injunction,
13 the department may attach to the controlling works a
14 written notice properly dated or signed setting forth
15 the fact that the controlling works have been properly
16 regulated by it. The notice constitutes legal notice
17 to all persons interested in the appropriation or
18 distribution of water."

19 Q. So that statute subsection also uses the word
20 "regulate"; correct?

21 A. Correct.

22 Q. And it means essentially the same thing as
23 the section before; right?

24 A. Correct.

25 Q. Okay. So regulation in Montana, in general,

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1 can mean what you describe as permitting and change of
2 use, and it can mean what we describe in Wyoming, which
3 means curtailing the diversion works of the junior
4 priority; right?

5 A. Correct.

6 Q. Okay. I just want to make sure we don't have
7 a failure to communicate, which is what I heard on
8 Thursday.

9 All right. Let's talk a little bit more
10 about the Montana statutes. I think you'll find this
11 in your book -- after I misplaced it. In the Montana
12 Water Use Code, can you find Title 85, Chapter 20,
13 Section 102?

14 A. 102?

15 Q. Yes.

16 A. Yes.

17 Q. Are you familiar with this chapter of the
18 Montana Water Use Code?

19 A. Generally, yes.

20 Q. Okay. So you know that this is a series of
21 statutes that was designed by the Montana legislature
22 to ensure compliance with the Yellowstone River
23 Compact; right?

24 A. Right.

25 Q. All right. It says that in more words in

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1 Section 102; right?

2 A. Yes.

3 Q. All right. And in section -- Title 85,
4 Chapter 20, Section 105, that's a section entitled
5 "Duty to Install Measuring Devices"; correct?

6 A. Correct.

7 Q. And that statutory section says that anybody
8 in the Tongue River Basin who gets a water right after
9 1950 is supposed to install a measuring device; right?

10 A. Correct.

11 Q. And the next statute, Section 106, is
12 entitled "Duty to Measure Water"; right?

13 A. Correct.

14 Q. And it says that all these people who just
15 got their brand-new measuring devices with their
16 post-1950 rights are supposed to keep accurate records
17 of their water use and then submit them to your office
18 in Helena; right?

19 A. Correct.

20 Q. And they're supposed to do that 15 days after
21 November 1 of each year; right?

22 A. Yes.

23 Q. Do you have those records?

24 A. Not to my knowledge for all of those. But I
25 believe we may have records for permits issued after --

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1 some, if not all, the permits issued after 1973. I
2 don't know which we have and which we do not have.

3 Q. You have daily and seasonal diversion records
4 for diversions post-1973?

5 A. Post-1973, many of our permits, not all,
6 require that there be measurements and reporting for
7 many of our -- like I said, many of the permits. I
8 can't tell you what percentage.

9 Q. And the water users in the Tongue River Basin
10 are filing these reports with your office?

11 A. They are supposed to according to their
12 permit conditions.

13 Q. And my question's a little bit different. Do
14 they really? I know they're supposed to. Do they
15 really?

16 A. I can't answer your question.

17 Q. Okay. I can tell you, I haven't seen them in
18 the course of this case. And my understanding is this
19 statute's never been enforced; is that your
20 understanding?

21 A. And -- can I ask for clarification, what you
22 mean by enforcement?

23 Q. I mean, nobody's ever made these
24 appropriators submit these reports.

25 A. If it is a condition of their water right,

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1 they are -- they need to report whether they have or
2 not. But we have not gone out there and, as far as I
3 know, forced them to submit those records.

4 Q. Okay. Let's look at Exhibit M552.

5 A. Okay.

6 Q. And that is the exhibit summarizing the water
7 right dispute options; correct?

8 A. Correct.

9 Q. And I'm really interested in paragraph -- or
10 Section 6.

11 A. Okay.

12 Q. So if you have a dispute with your neighbor,
13 you can contact the nearest DNRC regional office;
14 right?

15 A. You can contact the regional office; correct.

16 Q. And this says, "The DNRC has jurisdiction
17 over water users wasting water, using water unlawfully,
18 preventing water from moving to another person having a
19 prior right to use water, or otherwise violating the
20 provisions of the Montana Water Use Act"; correct?

21 A. Correct.

22 Q. You have some jurisdiction to take action
23 when those things are occurring; correct?

24 A. Correct.

25 Q. All right. But before you do that, M552

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1 says, "If your situation involves your water not
2 reaching your point of diversion, the DNRC requires you
3 to contact the offending party to make a call for your
4 water, document the call, and file a formal written
5 complaint." Did I read that right?

6 A. Correct.

7 Q. So before DNRC is going to exercise its
8 regulatory authority, such as set forth in this
9 paragraph, you require the complaining party to
10 document and file a formal written complaint; is that
11 right?

12 A. That's correct.

13 Q. Now, there's a difference, of course, between
14 this call, document, file a formal written complaint,
15 and just a call to your office complaining about the
16 water conditions, isn't there?

17 A. Yes.

18 Q. And you wouldn't take any action just 'cause
19 somebody called you up and said, it's really dry on my
20 farm, and it's not good; I don't like it. You wouldn't
21 take any regulatory action, would you?

22 A. No.

23 Q. Of course not. Now, and you require
24 documentation and a formal written call before you take
25 action. I think we established that; right?

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1 A. Correct.

2 Q. Do you think it's reasonable to hold Wyoming
3 to a different standard?

4 A. The DNRC's authority is different in that we
5 do not enforce in Montana the water -- disputes over
6 water priority. And in this case, we're talking about
7 the -- our authority is limited and separate from the
8 district court's authority. You can have a
9 commissioner put on and distribute -- and have a junior
10 shut off their use. That resides with the district
11 court. Our interpretation of the statute is limited to
12 illegal use, water users wasting water, and/or
13 interfering as an -- interfering with somebody's
14 getting their water, shutting off their headgate, for
15 example, or blocking their headgate.

16 Q. Sure. But we can agree that the enforcement
17 agency is the district court? We agree about that?

18 A. Yes.

19 Q. All right. That when a water user feels
20 they're not getting the water they are entitled to
21 under their priority and they go to the district court,
22 they give the court something in writing, do they not?

23 A. Correct.

24 Q. Okay. Do you think it's reasonable to hold
25 Wyoming to a different standard?

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1 A. A different standard than -- I've discussed
2 several times, Montana first relies in our disputes
3 over priority on neighbors being able to ask neighbors
4 to provide them water according to their priority. And
5 typically that works in most cases.

6 Q. Sure.

7 A. If that doesn't work, then, yes, it would be
8 reasonable to require something in writing.

9 Q. So before the state, whether through the
10 district court or DNRC, marshals its assets and takes a
11 regulatory action or judicial action, there's a piece
12 of paper submitted by the complaining party?

13 A. Correct.

14 Q. Okay. Now, one of the terms you've talked
15 about consistently throughout your testimony that I
16 don't think we disagree on the meaning of is a "call";
17 right?

18 A. Right.

19 Q. There's no difference of opinion on Wyoming's
20 side of the line and Montana's side of the line about
21 what a real call is; right?

22 A. I assume so.

23 Q. Assume so. Okay. Do you have the authority,
24 as the administrator of the Water Resources Division to
25 make a call on Wyoming?

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1 A. I assume so.

2 Q. When I say make a call, I mean under the
3 provisions of the Yellowstone River Compact. You
4 assume you have that authority?

5 A. I assume we have that authority, but it
6 has -- we have yet to see that authority be proven by
7 Wyoming actually responding to a call.

8 Q. Who is we?

9 A. The State of Montana.

10 Q. I'm asking about you. Are you the person
11 that can make the call?

12 A. I assume so.

13 Q. Okay. Have you authorized anyone below you
14 on the organizational chart that you described earlier
15 in your testimony to make a call on Wyoming under the
16 Yellowstone River Compact?

17 A. No.

18 Q. Before you made a call on Wyoming, would you
19 check with your boss?

20 A. Yes.

21 Q. And he's who?

22 A. The director of the Department of Natural
23 Resources and Conservations.

24 Q. Mr. Tubbs?

25 A. Mr. Tubbs.

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1 Q. All right. If somebody on your staff
2 attempted to make a call on the State of Wyoming, would
3 you expect to hear from them before they did it?

4 A. Yes.

5 Q. All right. Would you expect, if either you
6 or someone on your staff attempted to make a call on
7 the on State of Wyoming for water under the Yellowstone
8 River Compact, that there would be paper generated as a
9 result?

10 A. In one form or another?

11 Q. Yeah.

12 A. Yes.

13 Q. E-mails, memorandums, telephone notes, things
14 of that sort?

15 A. Yes.

16 Q. 'Cause it's a big deal, don't you think?

17 A. Yes.

18 Q. And in your position as the commissioner of
19 the Yellowstone River Compact, on behalf of the State
20 of Montana, that's you, right, right now?

21 A. Yes.

22 Q. Would you anticipate that the minutes of the
23 Yellowstone River Compact meeting would reflect if a
24 call was made in a given year?

25 A. I would assume so.

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1 Q. 'Cause it's a big deal; right? I say right;
2 you say yes.

3 A. Yes.

4 Q. You have to answer out loud.

5 Here's a question that occurred to me during
6 the course of your testimony about the workings of the
7 Tongue River in Montana. At one point you said
8 something to the effect of, it's an easy river to
9 administer because we know when it gets -- the flow at
10 the state line gets below, I think you said, 197.5.
11 Only the first two rights are being satisfied; do you
12 remember that?

13 A. Yes.

14 Q. So you're saying Mr. Nance and the T & Y
15 Irrigation Canal, the conglomeration of their two water
16 rights, the flow rates in those rights is 197.5;
17 correct?

18 A. 197.98, I believe.

19 Q. .98. All right. Now, that analysis, you
20 agree with me, assumes that nothing happens along the
21 Tongue River between the state line, Mr. Nance's
22 diversion, and the T & Y Canal, doesn't it?

23 A. Yes.

24 Q. Okay. It's as if none of the other water in
25 the system exists in order for you to make that

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1 statement; correct?

2 A. It assumes that there's no -- there's no need
3 for carriage water and that there's no other decreed
4 rights. There's no other direct flow rights in the
5 system at that time, being used in the system at that
6 time.

7 Q. And you agree with me that practically,
8 during the course of the irrigation season, the Tongue
9 River Reservoir releases a substantial amount of
10 storage water in conjunction with its pass-through of
11 the natural flow of the river; correct?

12 A. Yes.

13 Q. Okay. So at any given time, there's usually
14 a whole bunch of storage water and some natural flow in
15 the river during the irrigation season; right?

16 A. Yes.

17 Q. And you agree with me that once storage water
18 is used at the place of use, at the farm, and it makes
19 its way back into the river, whatever portion of it
20 returns, that becomes natural flow, doesn't it?

21 A. Yes. But there is nothing in the -- but the
22 irrigator -- you cannot assume, at least under Montana
23 law -- or my interpretation is that you have to -- that
24 Montana State Water Project water rights could be
25 completely consumed when they're diverted.

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1 Q. All right. But in reality, we know they're
2 not. Some water makes its way back to the river;
3 right?

4 A. Right.

5 Q. And that water becomes available to
6 downstream appropriators to divert so long as they are
7 in priority; correct?

8 A. Correct.

9 Q. All right. And here's my problem with the
10 system in Montana -- and you tell me if this is what
11 happens or not -- there is no mechanism in place to
12 ascertain at any given point in the river what is the
13 exact natural flow and what is not; am I wrong about
14 that?

15 A. There is the -- in the Tongue River, there is
16 a fairly simple way to ascertain the natural flow as it
17 enters the system, which is what is the direct flow
18 coming across the border.

19 Q. Sure. And my point is, is there the same
20 easy way to ascertain the natural flow as it makes its
21 170-mile journey to Miles City?

22 A. And by natural flow, you're referring to any
23 return flows that come back in and accounting for
24 those?

25 Q. Yes.

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1 A. And we're talking about how the T & Y and
2 Nance rights add up to almost 200 CFS. And so I use
3 that marker as just a -- that's 1886 in those rights.
4 As we move up to 1950, I believe Mr. Book lays out how
5 much other -- how many other rights, flow rights. We
6 do not account for -- we cannot -- we do not account
7 for how much returns from each diversion.

8 Q. Okay. And all I'm trying to assess is
9 whether I can go to any particular point on the river
10 and really differentiate what's natural flow and what's
11 return flow so I can get an accurate accounting of who
12 is actually in priority. In order to do that, you
13 agree with me that you have to be able to separate the
14 storage water from the natural flow? To do that
15 accounting, you have to separate them; right?

16 A. You have to separate the -- from the way
17 you're describing, you have to be able to separate the
18 natural flow that is passing through the river, the
19 direct flow from return flows from contract water. We
20 can differentiate contract water that's released and
21 the direct flow that's coming across the border.

22 Q. You can differentiate that at the dam?

23 A. Correct.

24 Q. But then lots of things probably happen over
25 the next 170 miles, and that differentiation is not

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1 occurring as we make our way down the river?

2 A. I would defer to the water commissioners
3 who've been on the stream as to how they've operated
4 the system.

5 Q. Okay. I think you said at some point in your
6 testimony that the water commissioners, they are
7 authorized to distribute waters as decreed; correct?

8 A. Correct.

9 Q. All right. And you talked about a decree in
10 your testimony. You talked about Exhibit M243. I
11 think that's the Miles City Decree; right?

12 A. Correct.

13 Q. And do you still have that in front of you?

14 A. 243?

15 Q. Yes.

16 A. Yes.

17 Q. Okay. That is the 1914 Miles City Decree?

18 A. That is the judgment and decree; correct.

19 Q. All right. Would you turn with me to the
20 last page of the judgment and decree.

21 A. Okay.

22 Q. On my copy, it is identified as MT016798; is
23 that the same on yours?

24 A. Yes.

25 Q. All right. Now, this is the court's order.

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1 This is the decree that the water commissioners can
2 enforce; correct? This is what they are supposed to
3 do; correct?

4 A. I'm still reviewing it.

5 Q. I haven't asked you to read anything yet.

6 A. Okay. I believe so.

7 Q. All right. And the second to last paragraph
8 says, "It is further ordered adjudged and decreed each
9 and every party to this action be and they are hereby
10 perpetually enjoined from in any manner." And then it
11 says some things they are not allowed to do. But I'm
12 focused on the last two.

13 If you go down to the bottom three lines, it
14 says "and from, in anywise wasting the waters of said
15 Tongue River or diverting at any time any more thereof
16 than is reasonably necessary for the use to which it is
17 applied as herein set forth." Did I read that right?

18 A. Yes.

19 Q. So the decree says these folks covered by its
20 provisions can't waste water, and they can't use any
21 more at any time than is reasonably necessary; correct?

22 A. Correct.

23 Q. All right. And that's consistent with your
24 understanding of beneficial use in Montana, isn't it?

25 A. Yes.

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1 Q. Beneficial use is limited to what you can
2 reasonably use. What are your reasonable needs, that's
3 what you can beneficially use. And we can agree that's
4 the limit of your right in Montana, isn't it?

5 A. Yes.

6 Q. All right. Will you turn with me to Exhibit
7 M526, amended stipulation.

8 A. I have it.

9 Q. All right. Would you turn to the second page
10 of the amended stipulation and read the first sentence
11 of Section 4.

12 A. "The original project completed in 1940 had a
13 capacity of 69,400 acre-feet at the crest of the
14 spillway." You want me to keep reading the whole
15 thing?

16 Q. No. I'm just interested in that one number.
17 And I think you went through earlier and you explained
18 to us all the folks that had signed off on this
19 stipulation; right? There was Montana. There was who
20 else?

21 A. There was Northern Cheyenne Tribe. There was
22 the United States Government and the Tongue River Water
23 Users' Association.

24 Q. So amongst all those folks, there was not any
25 dispute but that the original project completed in 1940

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1 had a capacity of 69,400 acre-feet; right?

2 A. As listed in the stipulation; correct.

3 Q. Okay. Would you turn to page 4 of 10,
4 Section 12. Section 12 has got some information in it
5 that Special Master should have already flagged and
6 that we find later in the proposed abstract. About
7 midway through that paragraph, it says, "The reservoir
8 is filled and refilled and water carried over from year
9 to year in order to reliably provide up to a maximum of
10 40,000 acre-feet per year to the Tongue River Water
11 Users' Association under this right and 20,000
12 acre-feet per year under the Northern -- to the
13 Northern Cheyenne Tribe under the compact"; correct?

14 A. Correct.

15 Q. And I think you talked a little bit about
16 that, and you said that that 60,000 acre-feet
17 represents the volume that can be delivered for
18 beneficial use in any one year; correct?

19 A. Correct.

20 Q. All right. First, did you know in 1950 the
21 volume of the Tongue River Water Users' Association's
22 contract, if you will, was 32,000 acre-feet?

23 A. No.

24 Q. You didn't know that that was changed in 1969
25 to the 40,000 acre-feet?

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1 A. No.

2 Q. Okay. We'll see that in Mr. Smith's report.

3 So we can agree that the water right is limited to what
4 could be beneficially used. You said that earlier;
5 right?

6 A. Correct.

7 Q. And that the reservoir in the Tongue River
8 Water Users' Association and the Northern Cheyenne
9 Tribe can only beneficially use 60,000 acre-feet of
10 water in any given year; right?

11 A. Yes.

12 Q. Okay. Isn't that the limit of their water
13 right then?

14 A. That is the limit of the beneficial use in
15 any one given year. It does not limit the ability to
16 carry water over in order to ensure a firm yield of
17 that water right and delivery in any given year.

18 Q. And let me ask you this -- this is fun -- if
19 enough water got past the state line for the reservoir
20 to get to that 60,000 acre-feet plus its dead pool,
21 could anybody in Montana be harmed? Because they can
22 only deliver 60; right?

23 A. Say that again.

24 Q. Could anybody in Montana be harmed if 60,000
25 acre-feet of water got to that reservoir in any given

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1 year?

2 A. That assumes that the other water rights that
3 may be senior to the Tongue River right are being met.

4 Q. No, no. I'm just talking about if there was
5 enough water for the reservoir to store 60. Whether it
6 did or not, then the Tongue River Water Users'
7 Association and the tribe can't be harmed 'cause they
8 couldn't use any more, could they?

9 A. If you're including dead pool, you're
10 including other -- the other water rights that were
11 going through that they -- 60 on top of all those other
12 rights and they could deliver 60 in any given year --
13 in that given year, then these -- these contracts would
14 be -- could be fulfilled.

15 Q. Thank you.

16 MR. KASTE: No further questions.

17 SPECIAL MASTER: Okay. Thank you, Mr. Kaste.
18 I just have two just quick clarifying questions for the
19 record.

20 FURTHER EXAMINATION

21 BY SPECIAL MASTER:

22 Q. First of all, you just referred a moment ago
23 to the dead pool. Could you describe what that is?

24 A. That's the pool in the reservoir that can't
25 be accessed for release. I believe it's just below the

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1 outlet works.

2 Q. And do you know what the size of the dead
3 pool is in the case of the Tongue River Reservoir?

4 A. I don't.

5 Q. And then second of all, when you were talking
6 to Mr. Kaste earlier about M552, on page 2 of that
7 document -- this is a document entitled Water Right
8 Dispute Options. On page 6, it notes that the DNRC has
9 jurisdiction over water users wasting water, using
10 water unlawfully, and then preventing water from moving
11 to another person having a prior right to use water.

12 So it's your interpretation of this, for
13 purposes of administering your agency, that that
14 language does not include people who are taking water
15 out of priority?

16 A. Correct.

17 Q. Okay. Thank you.

18 SPECIAL MASTER: So, Mr. Wechsler, redirect.

19 MR. WECHSLER: I'm sorry, Your Honor. I
20 didn't hear you.

21 SPECIAL MASTER: I said, do you have
22 redirect?

23 MR. WECHSLER: Yes, please.
24
25

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1 FURTHER REDIRECT EXAMINATION

2 BY MR. WECHSLER:

3 Q. Mr. Davis, are you ready?

4 A. Yes.

5 Q. First, I want to ask you about the CBM.

6 Mr. Kaste asked you a little bit about protections for
7 water users from water that is produced related to CBM;
8 do you recall that?

9 A. Yes.

10 Q. Are you familiar with the CBM Protection Act?

11 A. Very generally.

12 Q. And who would be the best person to talk to
13 about the CBM Protection Act?

14 A. I believe that possibly Art Compton or one of
15 the conservation districts.

16 Q. What's your understanding of the CBM
17 Protection Act?

18 A. Just very generally, that it provides a
19 mechanism for conservation districts to play a role in
20 coalbed methane development.

21 Q. Next, Mr. Kaste asked you a series of
22 questions based on the language -- the difference in
23 language between administration and regulation. For
24 the purposes of your testimony and -- you're intending
25 to use the word "regulation" in what sense?

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1 A. For -- I have intended to use the word
2 "regulation" as it relates to water distribution and
3 enforcement -- I mean, for permitting -- excuse me --
4 for permitting and changes of water rights.

5 Q. Are you familiar with the Water Use Code
6 provisions dealing with water commissioners?

7 A. Generally, yes.

8 Q. If I could get you to turn to 85-5-101.

9 A. Okay.

10 Q. And this section deals with water
11 commissioners; is that correct?

12 A. Correct.

13 Q. In fact, I think we looked earlier at the
14 training manual, and it includes a copy of many of
15 these statutes; is that correct?

16 A. Correct.

17 Q. So if you look with me here at Section
18 85-5-101, here in the -- looks to be the second
19 sentence that starts "the commissioners"; do you see
20 that?

21 A. Which subsection?

22 Q. 85-5-101 subsection 1.

23 A. Okay. The commissioners. Yes.

24 Q. And here it's talking about the authority to
25 add, measure, and distribute; do you see that?

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1 A. Correct.

2 Q. What do you understand that to be?

3 A. That is distributing water according to the
4 priorities in a decree.

5 Q. You were asked by Mr. Kaste is there any
6 provision in here having to do with reservoirs. First
7 of all, would you agree that Kevin Smith is probably
8 the best person to ask about reservoir operations and
9 laws?

10 A. Yes.

11 Q. And second, if you could turn with me,
12 please, to 85-2-305. And if you could please read that
13 section, including the heading there.

14 A. 85-2-305, "Appropriation permit for
15 reservoir. A person intending to appropriate water by
16 means of a reservoir shall apply for a permit as
17 prescribed in this chapter."

18 Q. Do you understand that the rules of this
19 chapter also apply to reservoirs?

20 A. Yes.

21 Q. And so if someone wanted a reservoir, they
22 could simply go through the process outlined in this
23 chapter; is that right?

24 A. Correct.

25 Q. If you'll turn with me, please, again in the

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1 Water Use Act, to 85-20-102.

2 A. Okay.

3 Q. And I believe with Mr. Kaste you talked about
4 85-20-105 and also 85-20-106; correct?

5 A. Correct.

6 Q. One of the things I heard you say was that
7 for permits you typically do require the measurement
8 and reporting of water use in the Tongue River Basin;
9 is that correct?

10 A. Yes.

11 Q. Were there water commissioners appointed at
12 any time on the Tongue River Basin in the beginning, in
13 2000?

14 A. I believe so.

15 Q. Do you know exactly what years those were
16 appointed?

17 A. I don't.

18 Q. The court records would reflect when those
19 water commissioners were appointed; is that right?

20 A. Yes.

21 Q. Do you know if one was appointed in 2001?

22 A. I believe so.

23 Q. 2002?

24 A. I believe so as well.

25 Q. 2004?

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1 A. I believe so as well.

2 Q. 2006?

3 A. And, again, I believe so.

4 Q. Now, remind us of the duties of a water
5 commissioner.

6 A. To distribute water according to the
7 priorities.

8 Q. Are they also measuring water?

9 A. Yes.

10 Q. Now, the order -- I think we talked earlier,
11 and you said that the water commissioners are appointed
12 by the district court; correct?

13 A. Correct.

14 Q. And they are under the authority of the
15 district court?

16 A. Correct.

17 Q. The order appointing a water commissioner is
18 ultimately going to determine what -- that water
19 commissioner's authority for any given year; is that
20 right?

21 A. Correct.

22 Q. Now, you were asked a series of questions by
23 Mr. Kaste having to do with the amount of water at the
24 T & Y and Mr. Nance; do you recall that?

25 A. Yes.

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1 Q. Do you know if the water commissioners in
2 those years were determining the amount of direct flow
3 versus storage water that was used by, say, the T & Y?

4 A. I believe so.

5 Q. And the -- where is the T & Y located on the
6 Tongue River Basin?

7 A. Towards the bottom of the Tongue River Basin
8 just up from the mouth where the Tongue River meets the
9 Yellowstone River.

10 Q. Over a hundred miles downstream?

11 A. Correct.

12 Q. Any idea what the water right for the T & Y
13 Canal is?

14 A. The flow rate?

15 Q. Correct.

16 A. I believe it's 187.5 CFS.

17 Q. Now, I want to look at some flow rates. But
18 first, I want to ask you, if you're administering
19 stored water being released from the reservoir, is it
20 going to be possible, in your opinion, to make sure
21 that people are only getting stored water without
22 also -- or only getting their direct flow water without
23 also making sure that they're only taking their share?

24 A. Can you restate?

25 Q. In order to -- so if a water commissioner is

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1 assigned to administer the stored water -- you follow
2 me -- does he also have to make sure that nobody is
3 taking more than their share of direct flow water?

4 A. Yes.

5 Q. And why is that?

6 A. My understanding, because he would be
7 measuring -- a water commissioner would be measuring
8 the amount of water that each water user is entitled to
9 divert according to priority. And if the only amount
10 that they could divert would be their contract water,
11 they would not be able to divert an additional amount
12 of their decreed right.

13 Q. Okay. Now, let's look at the flow rates.
14 Now, we talked about the T & Y Canal. And it's down
15 towards the bottom. Do you understand it's the largest
16 direct flow water right on the Tongue River in Montana?

17 A. That's what I understand.

18 Q. Can you take a look at Exhibit M6, please?

19 Do you have that before you?

20 A. I do.

21 Q. I want you to look at page 32, if you would,
22 please.

23 A. Is that page D32?

24 Q. No. I'm actually looking at Table 5A, page
25 32.

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1 A. Okay.

2 Q. This is Mr. Book's rebuttal report. At the
3 top it says, "Table 5A, comparison of state line flow
4 to direct flow demand."

5 A. Okay.

6 Q. You have that?

7 A. Yes.

8 Q. Now, do you recall Mr. Kaste asked you a
9 series of questions about return flows; correct?

10 A. Yes.

11 Q. The implication seemed to be maybe there was
12 enough water for Montana's pre-1950 water users. Did
13 you understand that round of questioning?

14 A. Yes.

15 Q. Let's look here at these flow rates in 2001.
16 So do you know -- under the Miles City Decree, do you
17 know the total number of CFS to satisfy those rights?

18 A. Not off the top of my head, no.

19 Q. Over 400?

20 A. I believe it's around 400.

21 Q. And I think you said that it needed
22 approximately 200 in order to make sure sufficient
23 water gets to the T & Y; is that right?

24 A. To Nance and to T & Y rights; correct.

25 Q. Looking at 2001. So in June of 2001, what

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1 was the mean flow rate at the state line?

2 A. 176 CFS.

3 Q. So that wouldn't have satisfied even the
4 T & Y?

5 A. Correct.

6 Q. Looking at July, what's the flow rate there?

7 A. Fifty-five CFS.

8 Q. How about August?

9 A. Thirteen CFS.

10 Q. And September?

11 A. Seventy-three CFS.

12 Q. Now, I think you said that the T & Y is the
13 second oldest water right on the river; is that
14 correct?

15 A. Second oldest irrigation right.

16 Q. Any idea how many pre-1950 direct flow
17 irrigation rights there are in Montana?

18 A. I don't know.

19 Q. Let me get you -- do you have M6 there?

20 A. M6?

21 SPECIAL MASTER: Is this the same exhibit?

22 MR. WECHSLER: Yes, same exhibit.

23 BY MR. WECHSLER:

24 Q. And if I could get you to look at the
25 beginning of Appendix D, which I can get you the page

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1 momentarily. So it looks like Appendix D starts on
2 page 120 of Exhibit M6.

3 A. Yes.

4 Q. Do you have that?

5 A. I apologize. It's mixed up a bit.

6 Q. No problem.

7 A. Yes.

8 Q. And so here on page 121 is a water right
9 index; do you see that?

10 A. Yes.

11 Q. And the Appendix D, if you look at page 120,
12 is entitled "Montana pre-1950 water rights"; do you see
13 that?

14 A. Yes.

15 Q. Looking at page 124, how many pre-1950 direct
16 flow rights are listed in this appendix?

17 A. Seventy-seven.

18 Q. And I think you said that the T & Y is No. 2;
19 is that right?

20 A. Yes.

21 Q. And so if you look back at Table 5A. And in
22 those months, I think we looked at June, July, August,
23 September, there was not even enough water to satisfy
24 the second oldest right; is that correct?

25 MR. KASTE: I have to object. I think I

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1 asked Mr. Davis about some general principles. He's
2 not an engineer; he's not a hydrologist. When we get
3 to specific math, I think he doesn't have specific
4 foundation, education, training, or experience to
5 answer those kinds of questions. But with regard to
6 general principles, I'm okay. I object on that.

7 SPECIAL MASTER: So I'm going to sustain the
8 objection only because I actually think that at this
9 point, the numbers and the information is actually
10 available in the record.

11 MR. WECHSLER: Fair enough.

12 BY MR. WECHSLER:

13 Q. Mr. Kaste asked you a series of questions
14 about Exhibit 552; do you have that before you?

15 A. Yes.

16 Q. And I think his point here was, he had you
17 look at No. 6, which was complaints to the DNRC; do you
18 remember that discussion?

19 A. Yes.

20 Q. And the point seemed to be, well, if there's
21 a complaint to the DNRC, you require documentation; do
22 you recall that?

23 A. Yes.

24 Q. Now, is documentation required for a call
25 water user to water user?

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1 A. No.

2 Q. And -- now, the DNRC is the body that
3 regulates the water users; correct?

4 A. Yes.

5 Q. We talked -- you indicated that you had read
6 the Yellowstone River Compact; correct?

7 A. Correct.

8 Q. And who are the two states under the
9 Yellowstone River Compact as relevant to this
10 proceeding?

11 A. Montana and Wyoming.

12 Q. Is there a body that regulates those two
13 states?

14 A. Per the compact?

15 Q. Yes.

16 A. Yes. The Yellowstone River Compact
17 Commission.

18 Q. What's the composition of the Yellowstone
19 River Compact Commission?

20 A. There's one representative from both Wyoming,
21 one representative from Montana, and then a
22 representative from the USGS.

23 Q. Historically over the years, are you aware of
24 the -- well, first, if there are disputes under the
25 Yellowstone River Compact Commission, how are those

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1 disputes resolved?

2 A. They are -- typically there's an attempt to
3 resolve them through the compact commission and to get
4 an interpretation or -- by the compact commission
5 typically through a vote to resolve disputes.

6 Q. Wyoming gets one vote?

7 A. Yes.

8 Q. Montana gets one vote?

9 A. Yes.

10 Q. Anybody else get a vote?

11 A. The federal representative is typically the
12 USGS.

13 Q. Are you aware of the USGS ever exercising its
14 vote?

15 A. I am not aware.

16 Q. Are you aware that there had been disputes
17 between Montana and Wyoming over compact interpretation
18 for years?

19 A. Yes.

20 Q. Do you know how far those disputes go back?

21 A. In my experience, they would go back -- I
22 mean, they go back for decades.

23 Q. And in your -- are you aware of Wyoming ever
24 agreeing to provide any water to Montana under the
25 compact?

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1 A. No.

2 Q. Now, you talked about -- again, with
3 Mr. Kaste, you were looking at No. 6 here, which is
4 complaints to the DNRC. Let me get you to look back at
5 No. 1. And will you remind us what No. 1, what remedy
6 that is?

7 A. The No. 1 details that if an informal call
8 does not work or an informal attempt to resolve a water
9 right dispute does not work, that the water user can
10 file a court action in the appropriate district court.

11 Q. And so the documentation would be the legal
12 complaint initiating the action?

13 A. Yes.

14 Q. And there's no further documentation that's
15 required?

16 A. No.

17 Q. Now, I think you had some discussions with
18 Mr. Kaste about would you expect documents, that sort
19 of thing. Now, you were not involved with the
20 Yellowstone River Compact Commission until, remind me,
21 what year?

22 A. This year.

23 Q. Now, in the past, if you were told that calls
24 were made in previous years by Mr. Stults, would you
25 believe that that had happened?

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1 MR. KASTE: Relevance what he believes.

2 MR. WECHSLER: He's put into issue, Special
3 Master, the -- you know, whether or not calls were made
4 because there's a lack of documentation. But there
5 will be witnesses on the stand who are providing sworn
6 testimony that, in fact, those did happen over a course
7 of a number of years.

8 MR. KASTE: Sure. Just not this one. Let's
9 ask them.

10 MR. WECHSLER: And we certainly will be doing
11 that. But this goes to whether or not the documents
12 are the best source of evidence or whether or not, you
13 know, he would believe those witnesses.

14 SPECIAL MASTER: I guess I'm -- my question
15 is exactly what you're asking the witness. Are you
16 asking Mr. Davis about what he believes is Mr. Stults'
17 credibility?

18 MR. WECHSLER: Yes.

19 MR. KASTE: I object to that.

20 SPECIAL MASTER: I agree. So I'll sustain
21 the objection.

22 MR. WECHSLER: Very well.

23 BY MR. WECHSLER:

24 Q. Have you seen the orders that were appointing
25 water commissioners?

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1 A. I believe so.

2 Q. Do you know what they were charged with doing
3 in each of the years that we were discussing here?

4 A. I believe in most of the, if not all, of the
5 years that we're discussing, they were appointing to
6 deliver contract water by priority.

7 Q. Mr. Kaste asked you about Exhibit 243. This
8 is the Miles City Decree?

9 A. Yes.

10 Q. Do you have that before you?

11 A. Yes.

12 Q. Looking at the end, I think Mr. Kaste's
13 questions had to do with beneficial use and whether
14 there was a waste of water; do you recall those
15 questions?

16 A. Yes.

17 Q. Are you aware of any indication that there is
18 waste of water on the Tongue River in Montana?

19 A. I am not aware.

20 Q. Any -- aware of any indication that there was
21 waste of water in 2001?

22 A. I am not aware that there was waste of water
23 in 2001.

24 Q. How about 2002?

25 A. I am not aware of any waste of water in 2002

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1 either.

2 Q. 2004?

3 A. No.

4 Q. How about 2006?

5 A. No.

6 Q. The adjudication, ultimately that will
7 determine the water rights based on historic beneficial
8 use; is that right?

9 A. Yes.

10 Q. Do you still have before you Montana Exhibit
11 M526?

12 A. Yes.

13 Q. Who in your office is the most knowledgeable
14 person about reservoirs?

15 A. Kevin Smith would be -- the State Water
16 Projects Bureau Chief would probably be the most
17 knowledgeable person about reservoirs.

18 Q. Is he also the most knowledgeable person
19 about the Tongue River Reservoir?

20 A. Yes.

21 Q. You were asked by Mr. Kaste about paragraph 4
22 on page 2 of 10; do you recall that?

23 A. Yes.

24 Q. Are you aware that in reservoirs,
25 sedimentation occurs over the years?

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1 A. Yes.

2 Q. And that might affect the volume or capacity
3 of the reservoir?

4 A. Yes.

5 Q. And so it might not be a statement as to the
6 original capacity of the reservoir?

7 A. Correct.

8 Q. You were asked by Mr. Kaste about the amount
9 of water that was put to beneficial use. Are you aware
10 of what, in Montana, has become known as the Painted
11 Rocks decision?

12 A. Yes.

13 Q. And can you describe, please, what that
14 decision is?

15 A. The Painted Rocks decision was a -- it was a
16 settlement that determined that the water from State
17 Water Projects needed to be put to a historic
18 beneficial use unless changed.

19 Q. And the amount that's put to beneficial use
20 under that decision is the amount that's actually
21 stored; is that correct?

22 A. I believe so.

23 Q. And the water is then available for sale?

24 A. Yes.

25 Q. And sale is actually the beneficial use?

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1 A. That marketing is the -- yes. Sale and
2 marketing is the beneficial use for that historic
3 purpose.

4 Q. So under Montana law, the amount of water
5 that was historically put to beneficial use, i.e., the
6 measure of the Tongue River Reservoir, would have been
7 the amount that was historically stored; is that
8 correct?

9 A. You can only put -- it's the amount that's
10 stored for a beneficial use. There is not a water
11 right just for storage in Montana law. You have to
12 store it for a beneficial use. And that beneficial use
13 can be for marketing, and it can be for other
14 beneficial uses.

15 Q. The current capacity of the Tongue River
16 Reservoir is 79,000 or roughly that, thereabouts?

17 A. I believe so, yes.

18 Q. And of that, how much can you market?

19 A. Sixty thousand.

20 Q. If you only stored 60,000 acre-feet in the
21 reservoir, would you be able to market 60,000
22 acre-feet?

23 A. No.

24 Q. Why is that?

25 A. That would take into account the dead pool.

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1 It would take into account -- and in very few years
2 would we be able to actually store and release the
3 exact amount that we -- the amount coming in, the
4 amount stored, and the amount released are not always
5 lined up because of the -- because of sedimentation,
6 because of the dead pool, and operating restrictions.

7 Q. In other words, you have to store more water
8 in the reservoir in order to deliver the contract
9 amount?

10 A. Yes.

11 MR. WECHSLER: Your Honor, may I ask -- when
12 Mr. Book testified, I believe we provided to the Court
13 Exhibit M32; and I'd like to inquire whether you still
14 have that at the bench?

15 SPECIAL MASTER: Remind me what exhibit --

16 MR. WECHSLER: It is the Water Rights Claims
17 Examination Rules amended by the Montana Supreme Court.

18 SPECIAL MASTER: Let me just check.

19 M32?

20 MR. WECHSLER: Yes, sir.

21 SPECIAL MASTER: I have it.

22 BY MR. WECHSLER:

23 Q. Mr. Davis, do you have Exhibit M32 before
24 you?

25 A. Yes.

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1 Q. If I could get you to turn, please, to page
2 41.

3 A. Okay.

4 Q. And this is under the heading Rule 14B
5 Guideline. And then if you'll look there at the
6 subsection at 2; do you see that?

7 A. Yes.

8 Q. Could you read that, please?

9 A. "The flow rate guideline for reservoirs
10 associated with irrigation use claims will be as
11 follows: I, for onstream reservoirs a flow rate
12 guideline will not be identified. II, for off-stream
13 reservoirs the flow rate guideline for storage will be
14 the capacity of the diversion and the conveyance
15 system. If there is no information regarding the
16 capacity of the diversion or the conveyance system or
17 the system is shared by more than claimant, the flow
18 rate guideline of 17 gallons per minute per acre will
19 be used."

20 Q. Turning to the Tongue River Reservoir, is it
21 an onstream reservoir or an off-stream reservoir?

22 A. It's an onstream reservoir.

23 Q. So it's consistent with this guideline, at
24 least, that a flow rate would not be applied to the
25 reservoir?

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1 A. Yes.

2 MR. WECHSLER: Your Honor, could I have just
3 a moment to confer with my colleague?

4 SPECIAL MASTER: Brief moment, yes.

5 MR. WECHSLER: Thank you, Your Honor. No
6 further questions.

7 SPECIAL MASTER: Okay. Thank you very much,
8 Mr. Wechsler.

9 So I'd like to actually begin examination of
10 the next witness only because we haven't really spent a
11 lot of time this morning. And the afternoon is a
12 little bit longer.

13 So unless people have an objection,
14 Mr. Draper, are you ready for your next witness?

15 MR. DRAPER: Yes, Your Honor, if you'd like
16 to use the time between now and noon.

17 SPECIAL MASTER: I would suggest maybe we
18 stop at about a quarter after noon. Does that sound
19 fine?

20 MR. DRAPER: Very good. Our next witness is
21 Millie Heffner. The examination will be conducted by
22 Ann Yates.

23 SPECIAL MASTER: Thank you.

24 (Millicent Heffner sworn.)

25 THE CLERK: Could you please state and spell

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1 your name for the court reporter, please.

2 THE WITNESS: My name is Millicent Heffner,
3 M-i-l-l-i-c-e-n-t H-e-f-f-n-e-r.

4 SPECIAL MASTER: So, good morning,
5 Ms. Heffner. I'm sure you were probably hoping that
6 you would be able to get by until after lunch before
7 you took the stand. So my apologies for forcing you up
8 here. But I want to make sure that we keep on schedule
9 as much as possible.

10 So, Ms. Yates.

11 MS. YATES: Good morning, Your Honor. Just
12 for the record, my name is Ann Yates, and I'm a special
13 attorney general for the State of Montana and also
14 chief counsel for the Department of Natural Resources
15 and Conservation.

16 Pursuant to your request, I'd just like to
17 give you a quick statement about what Ms. Heffner will
18 testify to. She will briefly inform the Court about
19 the regulation. And let's stop with regulation.
20 Regulation as in new permitting and grants of changes
21 to existing water rights under the Montana Water Use
22 Act for the State of Montana, also the maintenance of
23 the centralized database for water rights in the state
24 of Montana maintained by the Department of Natural
25 Resources and Conservation, and also our enforcement

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1 responsibilities at the Department of Natural Resources
2 and Conservation.

3 SPECIAL MASTER: Thank you.

4 MILLICENT HEFFNER,
5 having been first duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MS. YATES:

8 Q. Ms. Heffner, could you please state your
9 current business address?

10 A. It's 1420 9th Avenue in Helena, Montana.
11 P.O. Box 201601 -- 1424, excuse me, 9th Avenue. 59620.

12 Q. And by whom are you currently employed?

13 A. The Department of Natural Resources and
14 Conservation.

15 Q. And sometimes we refer to that agency as the
16 DNRC; is that correct?

17 A. Correct.

18 Q. And what is your current position with the
19 DNRC?

20 A. I'm the Water Rights Bureau Chief.

21 Q. And could you please describe your
22 postsecondary education?

23 A. I have a bachelor of science in forest
24 resource management with an emphasis in hydrology. And
25 I have some graduate work in natural resource

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1 management, again with an emphasis in hydrology.

2 Q. Have you taken any other courses since your
3 graduate studies?

4 A. I have taken a GIS course and a water
5 resources course through Helena College of Technology.

6 Q. Could you please summarize your work at the
7 DNRC before becoming the Water Rights Bureau Chief?

8 A. In 2005, I started in the Lewistown regional
9 office as a -- examining claims for the adjudication
10 program. And then I became the modernization program
11 manager in the Water Operations Bureau in Helena
12 working with FEMA and local communities in updating
13 their floodplain maps.

14 Then in 2008, I became the -- a new
15 appropriations program specialist in the Water Rights
16 Bureau helping the new appropriations program manager
17 provide guidance to the regional offices on how to
18 process, permit, and change applications, in addition
19 to helping to review the decision documents that were
20 coming out of the regional offices.

21 Shortly thereafter, I became the new
22 appropriations program manager and supervised the new
23 appropriations program specialists and helped to
24 develop some of those processes and procedures that the
25 regional offices would then utilize in order to process

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1 the permits and change applications.

2 Q. And how long have you held your current
3 position at the DNRC?

4 A. Since 2011.

5 Q. And are you ever called upon to educate other
6 individuals about the Montana Water Use Act and DNRC's
7 requirements?

8 A. Yes. We do education for our regional office
9 staff in addition to other agencies. And we've also
10 conducted educational programs for continuing education
11 for realtors. And I have also presented at the annual
12 Montana Water Law CLE.

13 Q. How many times have you been a presenter
14 there?

15 A. Twice.

16 SPECIAL MASTER: Just for the reporter, by
17 the way, I think that's CLE.

18 THE WITNESS: Yes.

19 BY MS. YATES:

20 Q. Okay. Previously, we've had admitted
21 Exhibit 232, Montana 232, the DNRC organizational
22 chart. Where does the Water Rights Bureau fall in the
23 DNRC organization?

24 A. It's within the Water Resources Division.

25 Q. Who is your supervisor?

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1 A. Tim Davis.

2 Q. Could you briefly explain the different
3 functions of the Water Rights Bureau?

4 A. There is the new appropriations program,
5 which deals with the processing of the permit and
6 change applications and reviews the decision documents
7 coming out of the regional offices.

8 We also have the hearings unit. And that
9 unit holds contested case and show cause hearings on
10 those permit and change applications.

11 In addition, there is the records unit. And
12 that unit is responsible for maintaining the paper
13 records of all of the water rights. They make sure
14 that they have an inventory and know where those files
15 are located at any given time. They're also in charge
16 of scanning all of the images in those paper files and
17 providing them to the public.

18 We also do, as I have stated, some public
19 outreach on -- to various entities. We look at
20 enforcement in the sense of illegal uses of water as
21 Tim Davis previously testified to. We look at those
22 cases where someone is using water without a permit or
23 a change.

24 Q. And just to clarify a little bit, we use the
25 term "change applications" quite a bit. What do you

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1 mean by "change application"?

2 A. If a person wants to change their point of
3 diversion, their place of use, their purpose, or their
4 place of storage, then they have to submit an
5 application to the DNRC.

6 Q. Okay. And approximately how many files is
7 the DNRC responsible for maintaining as part of its
8 water rights records unit in the database?

9 A. There are approximately somewhere in the
10 neighborhood of 450,000 files.

11 Q. And what specifically are your duties as
12 bureau chief?

13 A. My duties are supervising the management of
14 those things that I had just stated in addition to
15 reviewing the preliminary determinations by the
16 regional offices on the permit and change applications.

17 I also draft administrative rules, new and
18 revised administrative rules. I assist in drafting
19 legislation that might be presented by the department,
20 in addition to helping to review legislation that might
21 be proposed by other entities.

22 I also help create and implement guidelines
23 and policies statewide for the processing of the water
24 rights.

25 Q. And are you also responsible for the general

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1 budgetary and administration of the unit?

2 A. I am.

3 Q. Approximately how many staff do you supervise
4 in Helena either directly or indirectly?

5 A. Fourteen total and four direct.

6 Q. And are there other staff outside of Helena
7 that help carry on the functions of the Water Rights
8 Bureau?

9 A. Yeah, as I had alluded to, there are eight
10 regional offices, and these regional offices process
11 the permit and change applications. And we provide the
12 guidance to those regional offices under which they
13 operate.

14 Q. Okay. We'll turn briefly to how to obtain a
15 water right in Montana. Prior to your testimony,
16 there's been much discussion about the July 1, 1973,
17 date. Why is that date important?

18 A. Any water rights that were put to use prior
19 to July 1, 1973, are -- were required to be filed under
20 the adjudication process. Any water rights
21 post-July 1, 1973, any new use of surface water or
22 groundwater need to apply to the department in order to
23 obtain a water right. They also need to come to the
24 department if they would like to have a change of use
25 of their water rights.

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1 Q. Can a person divert, impound, or withdraw
2 water for a beneficial use in the state of Montana
3 without obtaining a water right from DNRC?

4 A. No.

5 Q. Okay. On average, about how many permit
6 applications has the bureau processed in each of the
7 last three years?

8 A. Approximately 70 per year.

9 Q. And on average, about how many change
10 applications has the bureau processed in the last three
11 years?

12 A. Approximately 40.

13 Q. Okay. And what criteria does DNRC use to
14 determine whether to issue a beneficial water use
15 permit?

16 A. We use the criteria under 85-2-311 MCA. And
17 that criteria -- well, the applicant has to show by a
18 preponderance of the evidence that the water is
19 physically available during the period of time they
20 wish to appropriate. They have to show that the water
21 is legally available during the time that they wish to
22 appropriate. And they have to show that the water is
23 going to be beneficially used and that the flow rate
24 and volume being requested is the amount needed for
25 that beneficial use. They have to show that the means

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1 of diversion are adequate and that they have a
2 possessory interest in the proposed place of use.

3 Q. And how does the burden being on the
4 applicant to affirmatively prove these criteria compare
5 to the process that was in place prior to July 1, 1973?

6 A. Prior to July 1, 1973, it was prima facie
7 evidence. And so -- and post-July 1, 1973, now the
8 burden is on the applicant.

9 Q. How did one obtain a water right prior to
10 July 1, 1973?

11 A. As Tim testified, they could just simply put
12 the water to use as use right, or they could file with
13 the courthouse.

14 Q. And was there any central authority that
15 granted water rights at that time?

16 A. No, there was not.

17 Q. And if someone was injured, let's say, by a
18 filed right that had been put into practice, what was
19 their recourse?

20 A. District court.

21 Q. All right. Could you please explain the
22 actual process that an applicant has to go through when
23 they would like to obtain a water right from the
24 Department of Natural Resources and Conservation?

25 A. An applicant would file an application. And

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1 once the application has been filed, the department
2 will look at that application to determine whether it's
3 correct and complete. In other words, is there enough
4 information provided on that application for the
5 department to do a technical analysis of the proposed
6 use.

7 Once the application is deemed correct and
8 complete, then the department will look at the criteria
9 and do an analysis of the criteria and draft a
10 preliminary determination document and preliminarily
11 determine whether to deny the application or grant the
12 application. If the department -- that decision
13 document comes to the central office where myself and
14 my staff will review that document to ensure that it is
15 consistent with statute administrative rule and other
16 decisions that have been issued across the state.

17 If it is a preliminary determination to
18 grant, that application will be publicly noticed. And
19 then if there are no objections, the preliminary
20 determination will be adopted as the final order, and
21 the water right will be issued.

22 If there is an objection to the preliminary
23 determination, then the department will hold a
24 contested case hearing, and then the hearings examiner
25 will issue a final order.

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1 After that final order has been issued, then
2 that could be appealed to district court.

3 If the preliminary determination is to deny,
4 the department will hold a show cause hearing. And
5 then the hearings examiner will issue a final order.
6 If the final order is to grant, then it will proceed
7 through the public notice process.

8 Q. Ms. Heffner, I'm holding up a book entitled
9 Water Rights In Montana; are you familiar with this
10 document?

11 A. I am.

12 Q. It's already been admitted as M230. The date
13 on the document is April 2012. Were you Water Rights
14 Bureau Chief at that time?

15 A. I was.

16 Q. Is the process that you just described
17 contained within this manual?

18 A. It is.

19 Q. Could you please turn to Exhibit M553? And
20 do you recognize this document?

21 A. I do.

22 Q. And what is it?

23 A. It is an application for beneficial water use
24 permit for surface water.

25 Q. Was it prepared by DNRC?

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1 A. It was.

2 Q. And it was prepared under your direction?

3 A. It was.

4 Q. And is this version of the document
5 substantially as it exists today?

6 A. Yes. There might be some minor changes, but
7 yes.

8 Q. And is this document available on the DNRC
9 website?

10 A. It is.

11 Q. Could you briefly describe what this document
12 contains?

13 A. It contains information the applicant needs
14 to provide in order for us to look at the criteria. So
15 it asks for the flow rate and volume that's being
16 requested. And it asks for, you know, some physical
17 availability information. If there's not a USGS gauge
18 station, then we ask them to submit measurements. It
19 asks for what their plan is not to create an adverse
20 effect. It asks for diversion means information so
21 that we can make a determination of adequacy. And it
22 also asks why the flow rate and volume is being
23 requested so that we can determine whether that's
24 needed for the beneficial use.

25 MS. YATES: Your Honor, I move for admission

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1 of Exhibit Montana 553.

2 SPECIAL MASTER: Okay. Thank you, Mr. Kaste.

3 So --

4 THE REPORTER: I didn't hear what you said.

5 MR. KASTE: I said, no objection.

6 SPECIAL MASTER: Then he said, "Your Honor,"

7 I think.

8 So Exhibit M553 is admitted into evidence.

9 (Exhibit M553 admitted.)

10 BY MS. YATES:

11 Q. Ms. Heffner, just for clarification, are
12 there additional documents that can be filed with M553,
13 the application?

14 A. Yes. This is just a base application, I
15 guess you could say. We have addenda that we have for
16 each type of application so that we can tailor the
17 application to the specific item that's being
18 requested.

19 Q. And are those addenda available on the DNRC
20 website?

21 A. They are.

22 Q. What factors does DNRC examine in determining
23 whether a surface water applicant for a beneficial
24 water use permit has proven lack of adverse effect to
25 other appropriators?

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1 A. First what we're going to look at is legal
2 availability of the surface water source. And how we
3 do that is we'll look at a comparison of the legal
4 demands on the source in comparison to the physical
5 availability and the source of supply.

6 Then we're going to look at what the
7 applicant's plan is not to create an adverse effect.
8 And that could include -- that does include in times of
9 water shortage. So even though water may be legally
10 available, they have to have a plan to be able to honor
11 a call in case of a water shortage.

12 Q. Does DNRC follow a similar process in
13 criteria for processing an application for a
14 groundwater beneficial use permit?

15 A. It is a similar process. However, we do look
16 at -- in addition to the legal availability of the
17 groundwater, we also look at the connectivity to
18 surface water and any effects that that groundwater
19 appropriation may have on surface water. And we will
20 look at induced infiltration. In other words, is the
21 well directly causing surface water to be pumped? Or
22 we also look at prestream capture, water that would
23 otherwise get to the source as if being captured by
24 that cone of depression prior to being able to reach
25 the source.

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1 And then we would look at what that amount is
2 being depleted from the surface water source and
3 whether that would create an adverse effect.

4 Q. Is there additional information that needs to
5 be filed with a groundwater application?

6 A. In a closed basin, the applicant is required
7 to provide information obtained through a hydrogeologic
8 assessment which looks at the aquifer properties and
9 looks at the depletion to surface water sources.

10 In open basins, that is analysis that the
11 department does.

12 Q. And is the requirement for the hydrogeologic
13 assessment, is that statutory?

14 A. It is statutory.

15 Q. Do you happen to know which statutes those
16 are?

17 A. It is 85-2-360, 361 MCA.

18 Q. And so in both open and closed basins, does
19 the department conduct the same kind of analysis with
20 the groundwater, surface water interaction?

21 A. It does.

22 Q. Could you please turn to what's been marked
23 as M554? Do you recognize this document?

24 A. I do.

25 Q. What is it?

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1 will save a few minutes at least.

2 (Exhibits M555 and M556
3 admitted.)

4 MS. YATES: Thank you, Your Honor. I see
5 that it's 12:15.

6 SPECIAL MASTER: That's what I'm thinking.
7 So why don't we take a break now, and then we will come
8 back at 1:15 this afternoon. So everyone can again
9 stay seated. Thank you.

10 (Recess taken 12:16 to 1:20
11 p.m., October 21, 2013)

12 SPECIAL MASTER: You can be seated.

13 Okay. Ms. Heffner, I hope you enjoyed your
14 lunch. And you understand you're still under oath?

15 THE WITNESS: Yes.

16 SPECIAL MASTER: Thank you. You can proceed.

17 MS. YATES: Thank you, Your Honor.

18 BY MS. YATES:

19 Q. I believe where we left off before lunchtime
20 was Exhibit M554, which is the application for
21 groundwater beneficial water use permit. Ms. Heffner,
22 do you have that in front of you?

23 A. I do.

24 Q. Could you briefly describe the kinds of
25 information that this form requests?

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1 A. It's similarly to the surface water
2 application. We ask for the flow rate and volume being
3 requested and why that amount's needed for the purpose.
4 We look at -- we ask for information on physical
5 groundwater availability by means of an aquifer test
6 report. We look for diversion means information. And
7 we ask for what their plan is not to create an adverse
8 effect.

9 Q. Ms. Heffner, I see on this application that
10 there are also a list -- there's also a list of
11 addendums. Could you briefly explain those?

12 A. Yes. One's the -- the first addendum here is
13 the aquifer testing report. And administrative rule
14 requires that an aquifer test be conducted. And the
15 results of that test are to be reported in that aquifer
16 test addendum. There's also a reservoir addendum which
17 asks for information on the reservoir regarding the
18 capacity information of that nature.

19 If the groundwater appropriation is in a
20 closed basin, we'll ask for a basin closure addendum to
21 be completed. And if it's the Yellowstone control
22 groundwater area, we'll also ask that a separate
23 addendum be completed.

24 Q. And does DNRC also have administrative rules
25 that apply to the permit application process?

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1 A. Yes, we do.

2 Q. What factors does DNRC look at when they're
3 trying to determine whether or not an applicant for a
4 groundwater beneficial use permit has proven lack of
5 adverse effect to other appropriators?

6 A. The primary thing we look at is their plan.
7 And as I alluded -- as I spoke about earlier, their
8 plan has to include any adverse effect, potential
9 adverse effect to both groundwater, other groundwater
10 appropriators and surface water appropriators. And
11 typically, what we'll see with depletions to surface
12 water is a mitigation plan not to create an adverse
13 effect. And most of that mitigation plan would have to
14 be in the form of the same rate, timing, location, and
15 duration of that depletion. For example, an applicant
16 could propose to retire acres if the depletion were
17 going to be seasonal in order to offset that depletion.
18 So they'll retire a consumptive use in order to
19 mitigate for a new consumptive use.

20 Many times, those plans have to take into
21 account that because of the delay in the timing of a
22 groundwater appropriation, most of the time, even
23 though the appropriation may be for -- maybe April
24 through October, the depletions are likely going to
25 occur year-round. So their plan is going to have to

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1 be -- accommodate for that year-round depletion as
2 well.

3 Q. How do you determine whether or not an
4 applicant needs to have a mitigation plan?

5 A. We would do a net depletion analysis. In
6 other words, we would look at whether there was a
7 depletion to that surface water source. And that
8 analysis is typically done by our groundwater
9 hydrologist and the Water Management Bureau using the
10 aquifer properties that are determined from that
11 aquifer test that has been submitted by the applicant.

12 Q. Do you also look at legal availability of the
13 surface water?

14 A. Yes.

15 Q. And could you explain how that works with the
16 depletion?

17 A. What we would do is we would look at, again,
18 with the surface water -- as with the surface water
19 application, you look at the legal demands on the
20 source. In this case, you would look at the legal
21 demands in the area where the depletion would be
22 occurring. And then you would compare that with the
23 water that's physically available. And then you would
24 determine whether there's enough water available to
25 accommodate for that depletion.

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1 And if there is not, then they have to have a
2 plan not to create an adverse effect due to the
3 additional depletion that does not have water
4 availability.

5 Q. And would you also go through this process
6 for aquifers that are not diluvial?

7 A. Yes. This is for any aquifers we look at.
8 Because although it may not be immediately connected,
9 it is connected at some point in time. And so we would
10 look at the depletion there as well, yes.

11 Q. So are applicants required to make --
12 assuming any adverse effect, required to mitigate only
13 depletions that are measurable?

14 A. No. They also have to -- as long as it's
15 calculable, they have to have a plan for that
16 depletion.

17 Q. And the mitigation plan would address what
18 kinds of characteristics about the depletion?

19 A. It would, again, have to be -- it would have
20 to accommodate for the same rate, timing, and location
21 that the depletion was occurring.

22 Q. Okay.

23 A. And the amount.

24 Q. How does DNRC determine whether or not a
25 groundwater source and a surface water source are

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1 hydrologically connected?

2 A. The aquifer test report is used by our
3 groundwater hydrologists, who determine the aquifer
4 properties. And then they do an analysis to determine
5 the amount of prestream capture that would be occurring
6 and any induced infiltration that would be occurring
7 and in what sources that -- source or sources that
8 depletion might occur, because the depletion may not
9 manifest just in one source. The depletion may
10 manifest in multiple sources.

11 Q. And could an applicant be required to
12 mitigate in those multiple sources?

13 A. Yes.

14 Q. In your experience in reviewing permit
15 applications, is most groundwater connected to surface
16 water?

17 A. Typically there is a connection.

18 Q. Now that we're finished talking about
19 permits, I'd like to ask you a few questions about
20 whether there are any exceptions to the process.

21 A. There are a few exceptions to the permitting
22 process. The most common is the notice of completion.
23 And that is the groundwater appropriation for
24 35 gallons per minute not to exceed 10 acre-feet. And
25 that comes into the department after the water has been

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1 put to use in a permitting process. You have to come
2 to the department prior to putting the water to use
3 under this exception; that would come in after.

4 Q. And in -- what do you call that kind of water
5 right?

6 A. That's a certificate and notice of a
7 completion.

8 Q. Okay. Are there other exceptions to the
9 permitting process?

10 A. There is a stock water surface water permit.
11 And that exception is for stock water that has a
12 maximum appropriation of 30 acre-feet with a reservoir
13 capacity that does not exceed 15 acre-feet. It has to
14 be on a nonperennial source and accessible by 40 acres
15 or more.

16 Q. And are there other exceptions as well?

17 A. There is a geothermal exception that is also
18 a notice of completion. And there is a fire exception.

19 Q. And if one were to look for these in the
20 Montana Code Annotated, where would they find them?

21 A. They would find them in 85-2-306.

22 Q. Let's talk about the stock pit exception just
23 briefly. As you mentioned, it's for less than 30
24 acre-feet with a capacity of less than 15 acre-feet.
25 Under this exception, is a volume appropriated limited

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1 to the actual capacity of the reservoir built?

2 A. No, it's not.

3 Q. So, for example, if someone built a reservoir
4 that was 6 acre-feet, how much water could they
5 appropriate under this exception?

6 A. Thirty acre-feet.

7 Q. And if they had a capacity of 10 acre-feet,
8 how much water could they appropriate?

9 A. Up to 30 acre-feet.

10 Q. Could someone come in for a new permit which
11 would include storage with greater than one fill of the
12 capacity of the storage?

13 A. Yes.

14 Q. Under what conditions could they do that?

15 A. We would -- what the department would be
16 looking at is the amount, the volume that would be
17 needed for their beneficial use. So if that beneficial
18 use is -- amount is greater than the capacity, then
19 that is what would be granted.

20 Q. Would that be consistent with your
21 understanding of all permitting since July 1, 1973?

22 A. Yes.

23 Q. We're going to turn right now to change
24 applications. Does the Water Rights Bureau also
25 process change applications?

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1 A. Yes.

2 Q. And, again, we've talked briefly about change
3 applications, but just for a reminder, what are change
4 applications?

5 A. If a water user wants to change their point
6 of diversion, their place of use, their purpose, or
7 their place of storage, they need to apply to the
8 department to do so.

9 Q. And if they wanted to add storage, would they
10 also have to come in for a change?

11 A. Yes.

12 Q. What criteria does DNRC apply to determine
13 whether or not a change application should be granted?

14 A. We look at the criteria under 85-2-402
15 Montana Code Annotated. And, again, the applicant has
16 to show, by a preponderance of the evidence, the
17 criteria which are a lack of adverse effect to both
18 senior and junior users on the source. They have to
19 show that the water is a beneficial use and that the
20 flow rate and volume is needed for the purpose,
21 diversion means are adequate, and that there is a
22 possessory interest in the place of use where the water
23 is being proposed to use.

24 Q. Could you please explain how DNRC would
25 process an application for a change?

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1 A. It would be similar to permit application, in
2 that we would receive the application and look for --
3 look at whether the application is correct and
4 complete. Do we have all the information needed in
5 order to review it for the criteria? Once it's deemed
6 correct and complete, then we would go through the rest
7 of the process as stated under the permit. Do you want
8 me to go through all of that?

9 Q. I think you're fine.

10 A. Okay.

11 Q. I will just ask you if those decisions, those
12 draft decisions come to the central office for review
13 before they're issued?

14 A. Yes.

15 Q. Why does DNRC look at adverse effect to
16 junior as well as senior appropriators?

17 A. The reason that the department looks at
18 adverse effect both to junior and senior water users is
19 because an appropriator has a right to the stream
20 conditions as it was substantially when they came on.

21 Q. And what factors does DNRC examine when it's
22 determining whether or not an applicant has proven lack
23 of adverse effect to both senior and junior
24 appropriators?

25 A. The first thing, and probably the most

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1 important thing, we look at is the historic use, how
2 that water right was historically beneficially used.
3 And the information that we look at when determining
4 that is -- and one of the questions we ask on the form
5 is how have you historically used that water from the
6 point of diversion all the way to the place of use? So
7 we look at how it was diverted, how it was sent through
8 the conveyance facilities, and then how it was used.

9 For example, with irrigation, did they divert
10 that water 24/7, or did they have to stop diverting at
11 certain times of the irrigation season in order to hay?

12 So we do look at that pattern of use. It is
13 important in determining what the volume is for that
14 water right. In many instances, that may not be --
15 have a number assigned to it through the adjudication
16 process. So we have to look at what that historic
17 diverted volume was.

18 And then what we look at is what the historic
19 consumptive use of that water right was. So we'll look
20 at the purpose and how they use that water to determine
21 an amount. For irrigation, we do have some consumptive
22 rules that we would apply if an applicant doesn't have
23 additional information. And then we take that
24 information for the diverted volume and the consumptive
25 volume and the pattern of use and look at the rate,

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1 timing, and location of the historic return flows.

2 Once we have that information, we'll compare
3 it to what the new use is and see whether there is a
4 change in that rate, timing, and location of return
5 flows based on what their proposed change is and
6 whether that change will create an adverse effect. In
7 other words, is there reduced return flow somewhere
8 that other users have been reliant on historically?

9 And that could be due to increased
10 consumption. That could be due to a change in the
11 pattern of use. That could be due to completely -- to
12 moving downstream of other users so that there is no
13 return flow in that stretch anymore where it
14 historically was. And that could lead to additional
15 call on the source and this adverse effect.

16 Q. Could you, for example, walk us through the
17 elements that you just discussed in a potential change
18 from flood irrigation, and you're changing the place of
19 use and you're going to use sprinkler irrigation?

20 A. So if -- typically, for flood irrigation --
21 and a lot of this is source specific too. For example,
22 if water was only available from April through July and
23 you needed a certain head of water to get through your
24 ditch, and you're now going to sprinkler irrigation --

25 THE REPORTER: Excuse me. I'm sorry. My

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1 machine froze up again. Okay, so "...and you're now
2 going to sprinkler irrigation..."

3 THE WITNESS: And you're now proposing to
4 change to flood irrigation -- or to sprinkler
5 irrigation. Generally, with sprinkler irrigation, you
6 don't have to divert as much, particularly if you're
7 going to be using a pump. And so you're going to be
8 diverting less earlier in the season. And while you
9 may not exceed that overall seasonal volume, you're
10 going to be able to potentially divert it further down
11 in the season, because you don't need as much head of
12 water. You can take it with that pump a lot longer
13 than you could with that headgate. So we would look at
14 things like that.

15 In addition, because sprinkler irrigation is
16 more efficient, it's likely that you're going to be
17 consuming more if you're proposing to irrigate the same
18 amount of acres. So we would be looking at that as
19 well.

20 BY MS. YATES:

21 Q. And why is historic use important as part of
22 the analysis in a change proceeding?

23 A. Because that shows the perfection of your
24 water right, how that water right was perfected.

25 Q. And I realize that you went over this

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1 slightly in the example that I gave you. But what
2 kinds of changes could be an adverse effect to other
3 appropriators?

4 A. Increase in consumption, for example, flood
5 to sprinkler. Changing from upstream to downstream,
6 where water might be more available so that you're
7 capable of diverting water longer and you, perhaps,
8 have people that you could call now that you couldn't
9 previously call. That could be an adverse effect.

10 Q. And would changing the timing of the amount
11 of diversion as part of a change, could that also be an
12 adverse effect?

13 A. Yes. Because that could potentially change
14 the rate timing and return of flows as well.

15 Q. Even if that were within the period of
16 diversion stated on the water right?

17 A. Yes.

18 Q. So if someone proposed to change the pattern
19 of use of their water right as part of the change
20 proceeding, and this change could decrease flows
21 available to other appropriators, even a junior, would
22 DNRC grant that change absent a plan to address adverse
23 effect?

24 A. The only way that we would grant that is if
25 they had a plan to not create an adverse effect. If

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1 there was no plan, then, no, we would not grant that.

2 Q. To your knowledge, is there any exception to
3 the principle of looking at return flows as part of the
4 a change application?

5 A. It is my understanding that State Water
6 Projects has a special provision for that.

7 Q. And is the change process also briefly
8 described in the Exhibit M230, water rights in Montana,
9 previously admitted?

10 A. Yes.

11 Q. Could you please take out Exhibit M555 that's
12 previously been admitted? And what is this?

13 A. This is an application to change an existing
14 irrigation water right.

15 Q. And could you briefly describe the kinds of
16 information the DNRC requests?

17 A. We are asking for, again, the flow rate and
18 volume being requested and why that amount is needed.
19 And we are asking for historic use information so that
20 we can get at that historic pattern of use, what the
21 diverted volume is, and what the consumptive volume is
22 and what their plan is not to create an adverse effect.

23 Q. And as with the other applications that we've
24 examined today, are there also addenda that may go with
25 this application?

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1 A. Yes.

2 Q. And do you recall what those addenda might
3 be?

4 A. There are some listed on the front of the
5 application form. And some of those include historic
6 water use addendum. So if an applicant doesn't want to
7 use the consumptive use amounts that are given in our
8 administrative rule but would like to argue for an
9 amount greater, they can provide Billings' historic use
10 information in that addendum. There's also a change to
11 instream flow addendum, a change in purpose addendum,
12 salvage water addendum. And then we also have a
13 provision for a temporary change. So there would be a
14 separate addendum for that as well.

15 Q. Is the application and are the addenda
16 available on the department's website?

17 A. Yes.

18 Q. Could you please take out what's been marked
19 Montana Exhibit 556, previously admitted? What is this
20 document?

21 A. This is an application to change an existing
22 nonirrigation water right.

23 Q. Could you briefly describe any differences in
24 this application from the other application we just
25 discussed?

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1 A. No. This is all similar-based information
2 that the department would ask.

3 Q. And it would, perhaps, contain the same
4 addenda as Exhibit M555?

5 A. It would, yes.

6 Q. And we've briefly discussed the Department of
7 Natural Resources and Conservation permitting and
8 change procedures and criteria; do these apply
9 statewide?

10 A. Yes.

11 Q. Would they apply in the Tongue River Basin?

12 A. Yes.

13 Q. Are there any special rules regarding
14 permitting or change applications that would be applied
15 in the Tongue River Basin?

16 A. No special rules, no.

17 Q. Let's talk a little bit about storage. That
18 seems to be the hot topic today. Does DNRC consider
19 storage of water a beneficial use in Montana?

20 A. In and of itself, storage is not a beneficial
21 use.

22 Q. Would DNRC ever issue a beneficial water use
23 permit just for storage, something called a storage
24 right?

25 A. No.

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1 Q. And what kinds of beneficial uses could a
2 storage reservoir -- water stored in a storage
3 reservoir be used for?

4 A. It could be used for any number of purposes.
5 It could be used for irrigation. It could be used for
6 industrial. It could be used for marketing.
7 Municipal. It could be used for any number of
8 purposes.

9 Q. And when you say "marketing," do you also
10 mean sale?

11 A. Yes.

12 Q. Could it also be stored for recreation?

13 A. Yes.

14 Q. Ms. Heffner, have you ever heard of anything
15 called the one-fill rule?

16 A. I have heard of it, but I'm not familiar with
17 it.

18 Q. Okay. I'm going to describe to you what I
19 understand to be the one-fill rule. So if you'll just
20 bear with me.

21 A. Okay.

22 Q. You're allowed to fill to capacity of your
23 reservoir. There's no accounting for evaporation. So
24 there's no water right that would cover the evaporation
25 from the reservoir. And to the extent that you don't

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1 store every day that water is not called downstream, to
2 a downstream water right, the water not stored is
3 counted against that capacity volume for your water
4 right for the year.

5 In your experience, does Montana have
6 anything that resembles this rule?

7 A. No.

8 Q. Does DNRC require off-stream reservoir
9 storing water for beneficial use without a permit?

10 A. Yes.

11 Q. Do they require onstream reservoirs storing
12 water for a beneficial use to have a permit?

13 A. Yes.

14 Q. And what is the difference between those, if
15 they were to be permitted?

16 A. The only difference would be that an onstream
17 reservoir would not be designated a flow rate, whereas
18 an off-stream reservoir would.

19 Q. Is that standard?

20 A. Yes.

21 Q. When someone applies to DNRC for a new
22 permit, including storage, are there any standard
23 volumes placed on the storage component of the right?

24 A. There are no standards. That volume is
25 determined by the beneficial use.

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1 Q. Would Department of Natural Resources and
2 Conservation allow carryover storage for the storage
3 component of a new water right?

4 A. Yes.

5 Q. What is your understanding of the term
6 "carryover storage"?

7 A. It would be an amount that would be stored in
8 one year in order to offset a lack, perhaps, in the
9 next year.

10 Q. And are you aware of DNRC ever conditioning
11 the permit such that carryover storage would count
12 against an appropriator for their next water year's
13 fill?

14 A. No.

15 Q. Does DNRC allow a new appropriator to
16 appropriate water that would cover evaporation of the
17 storage component of a water right?

18 A. Evaporation has to be included. That goes
19 towards the beneficial use component.

20 Q. To your knowledge, has DNRC ever required as
21 a condition of a permit that the permittee divert water
22 into storage every day under their period of diversion
23 until the storage reservoir is full?

24 A. No.

25 Q. To your knowledge, has the department ever

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1 conditioned a permit to require permittee to store
2 water every day when water is physically and legally
3 available?

4 A. No.

5 Q. Now I'm going to turn to the centralized
6 database, which is also a function the Water Rights
7 Bureau. Could you briefly explain what the database is
8 when we talk about the centralized database?

9 A. The database is a digital reflection of all
10 of the paper water rights that the department has on
11 file. And it tracks the ownership and all of the
12 elements of that water right that would be reflected in
13 the paper file.

14 Q. And what kinds of water rights would be found
15 in the database?

16 A. Statements of claim of permits, certificates
17 of water right, any type of water right that would be
18 on file with the department.

19 Q. And when you say "statements of claim," are
20 those the water rights reflected in the statewide
21 adjudication for pre-July 1, 1973? What are statements
22 of claim?

23 A. Statements of claim are water rights that
24 were filed in the adjudication pre-July 1, 1973.

25 Q. And would the database also include what are

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1 "water reservation"?

2 A. Yes.

3 Q. Briefly, what's a water reservation?

4 A. A water reservation is a provision in statute
5 that allowed for a public entity to reserve water for a
6 current or future need. And we have water reservations
7 for Fish, Wildlife and Parks, for local conservation
8 districts, for municipalities.

9 Q. And does the database also include what we
10 called "compact rights"?

11 A. Yes.

12 Q. What are compact rights?

13 A. Those are water rights that are determined
14 through compacts, either through -- with the federal
15 government or with the tribes.

16 Q. And does the centralized database also
17 include change applications granted by the department?

18 A. It does.

19 Q. And is the database periodically updated to
20 reflect water court activity?

21 A. Yes.

22 Q. And could you explain that just a little bit?

23 A. Typically, what occurs in that process, when
24 the water court may adjust any element of the water
25 right, they'll send that information to the department.

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1 And then the department will reflect that. And the
2 database will update that information.

3 Q. So generally, if one were to pull up a water
4 right in the centralized database, it would reflect the
5 current water court activity on the water right
6 adjudication; is that correct?

7 A. Yes.

8 Q. And so does the database contain all the
9 water rights in Montana?

10 A. It contains all the water rights with the
11 exception of those claims that were exempt from the
12 filing process that Tim had talked about earlier.
13 Those are the stock direct from source and domestic
14 direct from source and then the groundwater for
15 domestic and stock.

16 Q. Okay. Now I'm going to turn to the
17 department's enforcement responsibilities. Could you
18 briefly explain what kind of enforcement the department
19 carries on?

20 A. The Water Rights Bureau will look at
21 enforcement with respect to illegal uses of water. In
22 other words, there is no permit or no change, and there
23 should be.

24 Q. And what is the typical process that brings
25 enforcement into play before the department?

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1 A. Typically the department will receive a water
2 use complaint. And once a complaint is received in the
3 regional office, they will go out and do an
4 investigation of that complaint to determine whether
5 there is, in fact, a violation of the Water Use Act.

6 Most of the time, there is voluntary
7 compliance. So if there is a violation, generally what
8 we do is we work with that individual to help them file
9 the appropriate form, whether it's a change
10 authorization or a permit or even a certificate of
11 water right.

12 If they don't voluntarily comply, which is --
13 has been relatively rare, then that could proceed on to
14 a court action.

15 Q. And has the department taken individuals to
16 court to enjoin illegal use of water?

17 A. Yes.

18 Q. Has that occurred where someone has, let's
19 say, impounded water onstream or beneficial use without
20 a permit? Did the department go in and seek an
21 injunction in that case?

22 A. Possibly. I don't -- yes. I was -- which
23 case are you referring to?

24 Q. The Bowman case.

25 A. Yes. Yes.

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1 Q. So the department has been successful in
2 joining onstream ponds that did not have a water use
3 permit?

4 A. Yes.

5 Q. And has the department also gone in to
6 enforce the change process where an individual was
7 using water without obtaining the required change
8 authorization from the department?

9 A. Yes.

10 Q. Does DNRC, by practice, get involved in
11 disputes with water users who have pre-July 1, 1973,
12 water rights?

13 A. No, we don't get involved with water rights
14 distribution pre-July 1, 1973, no.

15 Q. Typically what do we advise water users in
16 that case?

17 A. To work with the water court.

18 MS. YATES: Your Honor, I have no further
19 questions.

20 SPECIAL MASTER: Okay. Thank you very much.
21 So, Ms. Yates, I'm going to have just a couple of
22 questions for Ms. Heffner.

23 EXAMINATION

24 BY SPECIAL MASTER:

25 Q. Again, just clarifying. Let's start out

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1 again talking about water that is going to be stored.
2 So first of all, just to make clear, if you want to
3 store the water that you will be using, then you need
4 to not only submit the basic claim for a new
5 appropriation, but also the addendum?

6 A. Correct.

7 Q. And can you tell me what type of information
8 is asked for in the addendum?

9 A. The majority of the information goes to the
10 capacity and also the diversion works that we're going
11 to be looking at. You know, is there a spillway? What
12 kind of information? Just basic information about the
13 reservoir.

14 It doesn't -- the beneficial use information
15 is separate in the base application. So really we're
16 just looking for technical information on the
17 reservoir.

18 Q. And if I understood your testimony earlier,
19 when you have reviewed an application for a new permit
20 that's going to involve storage, then when -- if and
21 when you grant the application, issue a permit, it will
22 tell you how much water you can actually use for your
23 beneficial use; is that correct?

24 A. Yes. There will be a maximum volume
25 diverted, and there will also be what we call a

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1 reservoir record. And so that will tell you what the
2 capacity of that reservoir is. And that went from the
3 volume diverted.

4 Q. Okay. So it lists the volume that can be
5 diverted in total?

6 A. Uh-huh. Well, there are two separate fields
7 on the abstract. You'll have the maximum diverted
8 volume, which is on all water rights. And then for
9 those water rights that have a reservoir, there will
10 also be a reservoir record which lists the capacity of
11 the reservoir.

12 Q. And the maximum that you can divert in a
13 year, is that the maximum amount you can divert to put
14 in the reservoir, or is it the maximum amount that you
15 can divert from the reservoir for use?

16 A. That's the maximum amount you can divert from
17 the reservoir for use.

18 Q. Okay.

19 A. So that's your beneficial use, yeah.

20 Q. And that is on a yearly basis?

21 A. Yes.

22 Q. Okay. And in your typical permit, are there
23 any specific restrictions, other than what we've
24 already talked about, as to how you can go about
25 actually storing the water? So in other words, are

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1 there limits on when you can store the water or how
2 much you can divert for -- at any particular point in
3 time for your storage?

4 A. That would go toward the legal demand
5 criteria. So there are times when water isn't legally
6 available to store. Then there may be a condition on
7 the permit stating you can only store during this time.
8 But that would go towards the statutory criteria.

9 Q. Okay. And so if -- assume that there is
10 available water to appropriate year-round at the
11 moment, then if there is legally still water available
12 for appropriation, that type of restriction would not
13 be found?

14 A. Correct. You could store any time during
15 that period of diversion listed on your water right.

16 Q. Okay. And if you are -- so let's assume you
17 normally divert in January and February. If you want
18 to now begin diverting in March and April instead, do
19 you have to come in for a change?

20 A. That would not require a change. However, if
21 that change in pattern results in an adverse effect to
22 other users, those other users could still make a claim
23 at district court of adverse effect.

24 Q. Okay. And then looking at the stock water
25 surface exception. So as I understand it, you do not

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1 have to apply for a permit for using water for stock
2 water purposes if they fall within the confines of that
3 exception?

4 A. Right. You do have to apply for a permit,
5 but it's not until after it's done. And then the
6 department shall issue. So as long as it meets the 30
7 acre-feet and the 15 acre-feet capacity and the 40
8 acre -- you know, as long as it meets all of those,
9 then the department shall issue. And that's -- it's
10 typically submitted again to the department after the
11 impoundment is put in place.

12 Q. So in that sense, it's just like the
13 groundwater process for small groundwater?

14 A. Yes.

15 Q. And I know that earlier there were
16 discussions of -- not while you were on the stand, but
17 there were discussions of stock water exceptions in
18 adjudication. Do you know whether or not we're talking
19 about two different things here?

20 A. They would be two different things.

21 Q. Okay. Thanks. And you do not handle any of
22 the adjudication process?

23 A. I do not.

24 Q. Okay. In terms of when you are reviewing
25 applications for groundwater permits, in talking about

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1 groundwater interference, at one point, I heard you
2 talk about that you look at interference so long as
3 it's calculable; is that correct?

4 A. It doesn't have to be measurable in the
5 surface water source. As long as it's calculable, we
6 consider that.

7 Q. What's the difference between calculable and
8 measurable?

9 A. Say, for example, the Missouri River, a small
10 amount of water won't be measurable because of the
11 error involved in measuring such a large source. But
12 you can calculate it. And so we will look at that
13 amount, even though you can't measure it.

14 Q. And so long as it is calculable, then you
15 require some type of mitigation measure?

16 A. If it's needed, yes.

17 Q. And when would it not be needed?

18 A. If there is water available in the source to
19 accommodate for that depletion. So if there's water
20 legally available, then we would likely not require a
21 mitigation plan.

22 Q. But if a junior or senior -- if -- so if a
23 senior appropriator in that situation would have less
24 water available for them, then you would require
25 mitigation?

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1 A. We would require mitigation, yes.

2 Q. And you talked earlier about requiring
3 aquifer testing. What type of testing is required as
4 part of the permit process?

5 A. What's required is a pump test. And the
6 length of that pump test depends on the amount of water
7 that you want to appropriate. And that is all detailed
8 in our administrative rules. And so what it's really
9 getting at is what is that aquifer capable of
10 producing? So we can get at storativity and the
11 conductivity values for that aquifer so that we can
12 see -- model how that water is moving through.

13 Q. And getting back just for a moment to
14 calculability, are there situations where the impact is
15 calculable but it might not actually be felt for five
16 or more years?

17 A. Yes. We still take that into consideration.
18 Even if it's -- you know, it can be connected at any
19 point in time, we're still going to look at that and
20 what adverse effect might be possible from that
21 depletion, whether it's within six months or five years
22 or ten years.

23 Q. So in determining whether or not you need to
24 develop some type of a mitigation measure, what you
25 look at is simply whether or not it's calculable and

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1 whether or not it will have an impact on downstream
2 seniors; there are no other measures of materiality?

3 A. Each application is fact specific and case
4 specific. So the other thing we're going to be looking
5 at is the rate and the timing and the location of that
6 depletion.

7 So it may not manifest -- you know, it may
8 manifest itself towards the mouth of the source, or it
9 may not manifest until further downstream. So we're
10 going to be looking at that as well when we look at the
11 ramifications with respect to adverse effect.

12 Q. And is the only time, then, when that type of
13 manifestation would be -- would excuse you from
14 designing a mitigation measure is where the
15 manifestation does not affect any senior water right
16 holder?

17 A. Correct.

18 SPECIAL MASTER: Thank you. Those are my
19 only questions.

20 MS. YATES: I have no questions, Your Honor.

21 SPECIAL MASTER: Mr. Kaste.

22 MR. KASTE: A few.

23 CROSS-EXAMINATION

24 BY MR. KASTE:

25 Q. Good afternoon, Ms. Heffner. I think, if I

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1 understand right, when you get an application for a
2 groundwater well, you just talked about the process
3 that you go through to analyze the connection between
4 that groundwater and the surface water; correct?

5 A. Correct.

6 Q. Do I understand right that you don't go
7 through that process for wells that are 35 gallons per
8 minute or less?

9 A. No. We don't go through that process. It's
10 an exception to the permitting process.

11 Q. Okay. Fair enough. And I assume because CBM
12 wells aren't permitted, you don't go through that
13 process for CBM wells either?

14 A. They don't go through the permitting process
15 unless the water's being put for beneficial use. And
16 then they would go through that process.

17 Q. Okay. And do you know whether any
18 CBM-produced wells have got a permit to beneficially
19 use the water in some other way?

20 A. I don't know that there are any permits. I
21 do believe that we have a couple of 602s. But I'd have
22 to look in the database.

23 Q. 602 --

24 A. 602s. I'm sorry. Those are the notices of
25 completion. Those are the exceptions to the permit.

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1 Q. So there are a couple in the pipeline?

2 A. I believe we have authorized, issued, a
3 couple of notices of completion. A handful maybe.

4 Q. When, approximately, did those handful, I
5 think was your word -- when did that happen?

6 A. To my knowledge, it was probably a couple of
7 years ago. But, again, I would have to look in the
8 database to get that information.

9 Q. Okay. And if I understand right, these
10 exempt wells, which would include wells under
11 35 gallons per minute and the CBM wells, they are not
12 reviewed by DNRC and not subject to public notice like
13 a larger well; is that correct?

14 A. That's correct.

15 Q. It's my understanding that the cutoff for
16 these exempt wells used to be a hundred gallons per
17 minute; am I right about that?

18 A. Yes.

19 Q. Can you tell us when that changed to 35?

20 A. I believe it was in the early '90s, if I'm
21 remembering correctly.

22 Q. All right. Tell me if I have this right.
23 This is one I have to read that somebody wrote for me.
24 Prior to 2006, the only connection Montana considered,
25 when it's looking at a groundwater well application,

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1 was whether the well resulted in the pumping of
2 streamflow; is that correct?

3 A. That's correct.

4 Q. That was the old nomenclature?

5 A. Yes, induced infiltration is the way we
6 looked at it. Was it immediately and directly
7 connected? Was it directly pulling the water from the
8 surface water source because of the pumping?

9 Q. And that's what had been historically. And
10 that changed in 2006?

11 A. That's correct.

12 Q. All right. And so the analysis of hydrologic
13 connection that you described in some detail, that all
14 started after 2006; correct?

15 A. That's correct.

16 Q. All right. If I understand the process
17 correctly, if someone comes to you today with a new
18 application to appropriate water, one of the
19 applications that you talked about earlier, one of the
20 things you look at is is there water both physically
21 and legally available; do I have that right?

22 A. That's correct.

23 Q. So if I found permits, say, on the Tongue
24 River beginning in 1973 through the present for
25 irrigation, would that tell me that the department had

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1 determined that there was water physically and legally
2 available?

3 A. If there are -- for those permits, that
4 determination would have had to have been made.

5 Q. You're not part of the adjudication process.
6 But I was wondering, do they make the same
7 determination in the adjudication process?

8 A. Not to my knowledge.

9 Q. Okay. If I wanted to come in -- say I owned
10 a reservoir, and I wanted to come in and enlarge my
11 reservoir. I wanted to build a bigger dam. And I came
12 to you, I would have to fill out a form to change;
13 correct?

14 A. If you wanted to enlarge your reservoir, if
15 you were increasing the amount that you wanted to
16 divert, you would come in for a permit.

17 Q. Okay. I come in prepared, and I would tell
18 you I'm going to change my dam and I'm going to divert
19 more water.

20 A. Uh-huh. And then you would also need to let
21 us know why you needed that additional water. Why do
22 you need that flow rate and volume and for what
23 purpose?

24 Q. All right. You understand the Tongue River
25 Reservoir was enlarged about 1999; right? You don't

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1 know that?

2 A. I don't know that, no.

3 Q. Do you know whether or not anybody filed an
4 application to change anything with your office related
5 to that reservoir?

6 A. I don't know that. I'd have to look in the
7 database.

8 Q. Okay. When you are considering the impacts
9 from a proposed change, you talked about changes and
10 said, we look at the impacts on the juniors and the
11 seniors; right?

12 A. Correct.

13 Q. Okay. Do you look outside the borders of the
14 state of Montana?

15 A. No, we do not.

16 Q. Okay. And I heard something, and I think I
17 just didn't quite hear it. You talked about
18 considering historic return flows when considering a
19 change; correct?

20 A. Correct.

21 Q. Okay. And then you said that there was
22 something different about State Water Projects. And I
23 didn't hear what you said. I'm sorry. What's
24 different about State Water Projects with regard to the
25 consideration of historic return flows?

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1 A. They have -- it is -- to my knowledge, they
2 have a special provision that allows them to consume --
3 to recapture their return flows and consume it.

4 Q. Do you know where I can find that?

5 A. Right offhand, I'm sorry, I don't.

6 Q. Okay. To your knowledge, is there a water
7 reservation on the Tongue River between the state line
8 and Miles City?

9 A. I believe there might be an instream flow
10 reservation. But, again, I would have to check the
11 database.

12 Q. Oh, so when you talk about a water
13 reservation, that could include things like an instream
14 flow for fish?

15 A. Yes.

16 Q. There is one on the Tongue River 1978 or 1973
17 is prior -- okay.

18 When you get a water use complaint -- you
19 remember talking about water use complaints -- is that
20 in writing?

21 A. Yes.

22 Q. Now, I am very confused about some of your
23 testimony with regard to the one-fill rule. And maybe
24 Montana is different than Wyoming. But you have a
25 Supreme Court here; right?

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1 A. Yes.

2 Q. I suspect you guys follow the rules laid down
3 by your Supreme Court; right?

4 A. Yes.

5 Q. Try to?

6 A. Yes.

7 Q. Okay. But you don't -- never heard of and
8 don't follow the one-fill rule at DNRC; is that right?

9 A. I'm not aware of the one-fill rule.

10 Q. Okay.

11 A. And the manner in which we operate the
12 reservoirs is completely based on the beneficial use.

13 Q. Okay. But the reservoir, if I understand
14 right, can refill when it wants?

15 A. During the period of diversion listed on the
16 water right, yes.

17 Q. And if this particular reservoir has no
18 period of diversion listed, then it can fill whenever?

19 A. Then it would show a period of diversion from
20 January 1 to December 31.

21 Q. And they can divert whenever?

22 A. During that period of time, yes, up to the --
23 their beneficial use requirements.

24 Q. Okay. And then carryover doesn't count for
25 the next year? Do I understand that right? So if you

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1 have water in your reservoir, you can fill all of that
2 same water again in the course of one year 'cause that
3 carryover doesn't count?

4 A. As your mere beneficial uses on a yearly
5 basis, what's the amount you need on an annual basis?

6 Q. So if you don't use water from the past,
7 despite the fact you still have it in your possession,
8 that doesn't count?

9 A. Well, because you may need it in order to
10 accommodate for your beneficial use the next year.

11 Q. I'm still having a hard time wrapping my head
12 around it. I do understand this, though. You keep
13 saying your volume is determined by your beneficial
14 use; right?

15 A. Uh-huh.

16 Q. Okay.

17 MR. KASTE: I don't think I have any further
18 questions. I would love to have a reservoir in
19 Montana.

20 SPECIAL MASTER: So actually before,
21 Ms. Yates, you ask some questions, I, again, have just
22 a couple of additional questions.

23 FURTHER EXAMINATION

24 BY SPECIAL MASTER:

25 Q. So going back to the exception for

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1 groundwater that applies if your well is, at the
2 moment, 35 gallons per minute or less. So what is --
3 so my understanding is that the process for that is
4 that you can go ahead and dig your well, begin using
5 the water. But once you've actually completed
6 everything, you then need to come in for your permit;
7 is that correct?

8 A. For your certificate, yes.

9 Q. Okay. And at that point, your issuance of it
10 is generally automatic?

11 A. Yes.

12 Q. Does anyone ever object to the issuance of
13 those permits?

14 A. There is no public notice process involved in
15 those certificates.

16 Q. And if, for a well that's 35 gallons a minute
17 or less, somebody later were to complain that they
18 think that's intervening with their surface water
19 right, is there anything that they can do about it
20 within your agency?

21 A. That would be something that would be dealt
22 with at the district court level.

23 Q. Okay. So at that point, you would go to the
24 courts rather than to you.

25 And second of all, you said prior to 2006,

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1 that the -- that your understanding was that the rule
2 at that point for looking at the interaction of
3 groundwater and surface water was -- and I believe you
4 said a direct connection.

5 A. Uh-huh.

6 Q. Could you explain what you mean by looking to
7 see whether or not there was a direct connection?

8 A. Typically those would be your -- the best
9 example would be an alluvial well in that it is taking
10 water directly out of the source as it's pumping. So
11 that cone of depression is including that surface water
12 source. So it's taking it directly out of the surface
13 water source.

14 Q. So if you were pumping water from a
15 groundwater aquifer which fed a surface water river and
16 by pumping water out of the aquifer it meant less was
17 going into the river, would that be a direct
18 connection?

19 A. Not prior to 2006. That's what changed in
20 2006. We -- because of the TU v. DNRC decision, we had
21 to take into consideration -- and that's what we call
22 prestream capture. In addition to that direct induced
23 infiltration that occurs from the surface water source.

24 Q. So you've anticipated my next question, which
25 was: Why did you change the way in which you were

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1 looking at the groundwater interference in 2006?

2 A. That would be the TU v. DNRC Supreme Court
3 decision.

4 Q. Okay. Thank you. And going back to the
5 question of an enlargement of a reservoir. So if you
6 had an onstream -- instream reservoir and you wanted to
7 enlarge that, enlarging the reservoir would require you
8 to come back in for a permit?

9 A. If you were going to divert more water
10 through that enlargement.

11 Q. And so I want to come back to what we mean by
12 "divert." Because I think we've -- I think you've used
13 it in maybe two different ways. In this particular
14 case, do you mean diverting the water from the
15 reservoir for a beneficial use?

16 A. Yeah. If you're going to ultimately impound
17 more water than you would divert for your beneficial
18 use, then you would need to come in for a permit for
19 that additional amount that you would be using
20 beneficially.

21 Q. So I'm not sure I'm clear now. So let me go
22 back. Let's assume that you have an instream
23 reservoir, and you don't plan to divert any more than
24 you did before for your beneficial use. But just to
25 make sure you have even more next year that's

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1 available, you want to enlarge the reservoir. And
2 you're actually going to impound more for the total
3 amount you're going to divert from that reservoir and
4 actually use for a beneficial purpose remains the same?

5 A. Well, if you're going to be impounding more
6 water over the period of year than you have
7 historically, then you would need to come in for the
8 additional water.

9 SPECIAL MASTER: Okay. Thanks. So I think
10 those are my questions.

11 So, Ms. Yates?

12 MS. YATES: Your Honor, you took most of my
13 questions. I just have a couple of follow-up.

14 REDIRECT EXAMINATION

15 BY MS. YATES:

16 Q. Going back to the Trout Unlimited v. DNRC
17 decision, the Supreme Court took a look at our
18 groundwater permitting process; is that correct?

19 A. Yes.

20 Q. And the Supreme Court admonished the
21 department to take a look at prestream capture in
22 addition to induced infiltration; is that correct?

23 A. That's correct.

24 MR. KASTE: That would be a lot leading. You
25 know, I think, perhaps, the best thing would be to just

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1 give you the citation to that case and let you read it.

2 SPECIAL MASTER: So several points: Number
3 one, I do think it's probably leading the witness at
4 this particular point in time. So I'll sustain the
5 objection to the question.

6 In addition to that, I think probably the
7 most direct way for me to learn about what the opinion
8 actually said is to read it.

9 MR. KASTE: I have the citation, Your Honor.
10 It's Montana Trout Unlimited v. Montana DNRC, 133 P.3d,
11 224.

12 MS. YATES: Your Honor, I just wanted to
13 bring it to your attention because it's a terrific
14 read.

15 SPECIAL MASTER: I appreciate that.

16 BY MS. YATES:

17 Q. I want to follow up a little bit on Special
18 Master's question about the 35-gallon-per-minute,
19 10-acre-feet exception. Is there a process in the
20 statute for objections to be filed for that permit
21 exception?

22 A. No.

23 Q. Mr. Kaste asked you previously about coalbed
24 methane wells. And I just want to clarify, if someone
25 came in today for a permit for a beneficial use for

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1 water produced from coalbed methane wells, what process
2 would they go through?

3 A. They would have to go through the permitting
4 process that they were going to use over 35 gallons per
5 minute or 10 acre-feet.

6 Q. And that would include the analysis that you
7 discussed with the groundwater surface water
8 interaction.

9 A. That's correct.

10 Q. Okay. I want to talk a bit about enlargement
11 of a reservoir. To enlarge a reservoir you must
12 have -- what must you have to enlarge a reservoir?

13 A. You need to have a beneficial use.

14 Q. And would you need a water right?

15 A. Yes.

16 Q. Could that water right be any state water
17 right?

18 A. Yes.

19 Q. So it could be a compact water right to cover
20 an enlargement?

21 A. As long as it was accommodated for in the
22 amount under the compact.

23 MS. YATES: That's all I have, Your Honor.

24 SPECIAL MASTER: Okay. Thank you. So at
25 this stage, Ms. Heffner, we can excuse you. Thank you

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1 very much for your testimony.

2 So, Mr. Draper, unless -- seems a little bit
3 early for the afternoon break. But I'm happy to
4 accommodate either side if you think this is the
5 appropriate point.

6 MR. DRAPER: Your Honor, we can start with
7 Mr. Stults here and take it at the regular time as far
8 as I'm concerned.

9 SPECIAL MASTER: Okay. Mr. Kaste, that's
10 fine with you?

11 MR. KASTE: Whatever everybody's pleasure is.
12 I'm not getting any groans or under --

13 SPECIAL MASTER: Okay. Excellent. Then why
14 don't we go ahead.

15 MR. DRAPER: We'll call our next witness,
16 Mr. Jack Stults. The examination will be performed by
17 Mr. Swanson.

18 (John Stults sworn.)

19 THE CLERK: Please have a seat. And when
20 you're seated, would you state your name and spell it,
21 for the court reporter, please?

22 SPECIAL MASTER: Welcome, Mr. Stults.

23 THE WITNESS: Afternoon, Your Honor.

24 SPECIAL MASTER: You can proceed with the
25 direct.

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1 JOHN EDWIN STULTS,
2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. SWANSON:

5 Q. Good afternoon, Mr. Stults. Can you state
6 your full legal name for the record, please.

7 A. My full name is John Edwin Stults. Last name
8 is S-t-u-l-t-s. First two are the standard spellings.

9 Q. And what's your current address?

10 A. 714 Red Letter Street, Helena, Montana 59601.

11 Q. And what's your current occupation?

12 A. I'm retired.

13 Q. And what was your previous occupation?

14 A. I retired from the Department of Natural
15 Resources and Conservation. I was the department's
16 division administrator for the Water Resources
17 Division.

18 Q. Did you also serve as the compact
19 commissioner for the Yellowstone River Compact
20 Commission for Montana?

21 A. Yes, I did, from 19 -- pardon me -- 1997 to
22 2006.

23 Q. What was your duty in DNRC prior to being the
24 Water Resources Division administrator?

25 A. I worked for the division in Water Resources

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1 for 22 years total. I started out in a regional office
2 in the Helena regional office examining claims, an
3 entry-level position, and worked up through a number of
4 positions of increasing responsibility within the
5 adjudication program to where I was assisting in the
6 writing of rules and manuals and training staff.

7 And then was promoted into a position of
8 being a -- one of the hearings examiners for the
9 division. And I held that position for four years, at
10 which time I was also fortunate enough to go to the
11 National Judicial College for two certificates under
12 the Administrative Law training program that they had
13 there.

14 After that, my position was -- I was promoted
15 to being a position that we had in the division at the
16 time, which was the regional office of supervisor. We
17 had nine regional offices at the time. And I was the
18 supervisor of that system of nine offices.

19 And from that position, I was promoted into
20 the division administrator.

21 Q. So just to clarify, you held the position as
22 the division administrator and also the compact
23 commissioner of that period from 1997 to 2006?

24 A. Correct.

25 Q. Both positions? Okay.

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1 Who was your predecessor in those positions?

2 A. Gary Fritz.

3 Q. And who did you report to in your position as
4 the division administrator and the compact
5 commissioner?

6 A. My immediate supervisor was the department
7 director. And above the department director I -- was
8 the governor. So my immediate supervisor who I most
9 typically reported to was the department director.

10 Q. And in your role as both the administrator
11 and the compact commissioner, do you have regular
12 interactions with the governor of Montana?

13 A. Yes.

14 Q. And did you --

15 A. I'm sorry. That's a little too offhand. I'd
16 have to say that regular might be misunderstood. They
17 would be -- there would be contacts when the need
18 occurred. So it wasn't on an ongoing regular basis.
19 It would be -- but it was not unusual or extraordinary.

20 Q. And did you always go through your boss, the
21 DNRC director, before talking to the governor, or
22 sometimes were you directly talking to the governor?
23 How did that work?

24 A. Sometimes it was directly to the governor, or
25 more typically with the governor's staff. I would --

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1 there would be an issue or -- just general
2 understanding between myself and the director,
3 particularly Bud Clinch, who I served under for the
4 majority of my time as division administrator. He
5 would understand what the issue was, he would
6 understand my grasp of the issue, he would understand
7 my strategy, and he would understand that I needed to
8 be talking with the governor's office. And he would
9 give me permission to go directly to the governor's
10 staff or the governor as I saw fit, so long as I was
11 within the parameters of what we discussed and I kept
12 him informed.

13 Q. And I wonder if you could -- there's an
14 exhibit that's been previously admitted. And I don't
15 think it's one that you have in your stack there. It's
16 Montana Exhibit 232. It will be up on the screen next
17 to you.

18 SPECIAL MASTER: It's not up there yet.

19 And also, can I just ask, on the transcript
20 screen, there is, in my left-hand corner, a box that
21 permits you to call up various types of programs. Is
22 that on yours?

23 THE REPORTER: No. Can I look at it?

24 SPECIAL MASTER: Yes.

25 (Discussion held off the

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1 record.)

2 SPECIAL MASTER: Thanks.

3 THE WITNESS: I have it.

4 BY MR. SWANSON:

5 Q. Do you recognize what this diagram is?

6 A. Not explicitly this one. It's a current one.
7 But this is very similar to the diagrams that we had
8 when I was in my position. It's an organization chart
9 of the agency.

10 Q. Do you know if there are any significant
11 differences between -- just off the top of your head,
12 between how this is organized currently and how it was
13 organized when you were there at DNRC?

14 SPECIAL MASTER: Can I just -- and I assume
15 you mean for purposes of water administration?

16 MR. SWANSON: Yes, Your Honor. For purposes
17 of water --

18 SPECIAL MASTER: I want to make sure he
19 doesn't have to look at everything else.

20 BY MR. SWANSON:

21 Q. It might make sense to look at the second
22 page on that exhibit.

23 A. I don't know. I think I have it now. Water
24 Resources Division at the top?

25 Q. Do you see any significant changes between

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1 the current structure and when you were the division
2 administrator?

3 A. Yes.

4 Q. Would you point those out, please?

5 A. First of all, when I was division
6 administrator, there was not an operations manager,
7 which is the box just below the division administrator.
8 So, therefore, the regional offices were connected
9 directly to me. I -- I supervised the regional offices
10 and the managers there directly. There was no
11 intermediary.

12 And then also, the Water Rights Bureau was a
13 single bureau for both functions. It had not been split
14 into two separate bureaus. Otherwise, it's
15 substantially the same.

16 Q. Sorry for talking over you there.

17 So before you were the administrator, though,
18 did you hold that position of the supervisor of the
19 regional offices?

20 A. Yes. At the time that I became division
21 administrator -- just before I became administrator,
22 that position was eliminated. And -- pardon me. Just
23 after I was made division administrator, that position
24 was eliminated in a streamlining effort to try to
25 reduce costs and also just compress management

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1 structure. And not long after I left the position,
2 it's my understanding that they recreated it. So
3 during the time that I was administrator, there was no
4 operations manager or regional offices supervisor.

5 Q. So you were speaking as administrator
6 directly to the regional office supervisors; is that
7 correct?

8 A. I directly supervised and managed the
9 regional offices among all the other entities that I
10 managed and supervised.

11 Q. Do you recall who was the Billings office
12 manager at that time?

13 A. Keith Kerbel for the entire time.

14 Q. So you had regular communication with Keith
15 Kerbel in the performance of your duties?

16 A. Yes.

17 Q. And what were your -- if you could just
18 briefly summarize, what were your duties as the
19 division administrator?

20 A. You probably heard them from Tim Davis. I
21 did not, but I suspect they are substantially the same.
22 I had final authority and management responsibility,
23 supervisory responsibility for all of the parts of the
24 division, which would include budgetary, personnel,
25 policy. Anything -- any and all functions of the

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1 division I had final responsibility and authority for.

2 And as well as some things that are not in
3 the organizational chart and generally not as
4 immediately known, is that I was the person that was
5 responsible for what I guess you might call extra
6 territorial activities having influence on Montana's
7 waters, such as interaction with states through the
8 Columbia Basin, Yellowstone Basin, and Missouri Basin.
9 And then also interaction internationally with the
10 three provinces with which we border: British
11 Columbia, Saskatchewan, and Alberta on the Milk and
12 St. Mary's Rivers.

13 Q. What were your duties as the commissioner for
14 the Yellowstone River Compact?

15 A. Well, to meet with the -- as the commissioner
16 for the compact from Montana at the required annual
17 meeting but also just to make sure that the compact was
18 being adhered to to the best of our ability.

19 Q. And was there a clear line between your
20 duties as the administrator and the duties as the
21 commissioner, or did you sometimes find you were doing
22 both functions at the same time?

23 A. No, there's no clear line between any of the
24 duties that I had. The responsibilities under the
25 commission were just as much a part of my

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1 responsibilities overall to the state and its
2 management of water.

3 Q. So you reported to the same people in both
4 jobs, I believe you testified a moment ago, to the DNRC
5 director and then the governor?

6 A. Yes, sir.

7 Q. And one of the, I guess, the questions that
8 had been brought up earlier in the day is this idea of
9 authority. Did you understand that you had authority
10 in your job or in both jobs to communicate with Wyoming
11 about water issues in the Yellowstone River Basin?

12 A. Yes, without question.

13 Q. Did you ever have the DNRC director come to
14 you and say, you don't have the authority to call
15 Wyoming and ask for water or something of that nature?

16 A. To the contrary. As I said, he was quite
17 comfortable with me handling that without him being an
18 intermediary or even needing any type of routine
19 frequent involvement in the issue.

20 Q. And did the governor of Montana ever come to
21 you and say, you're beyond your authority, you can't
22 call Wyoming and ask for more water in that area?

23 A. No.

24 Q. Who was your Wyoming counterpart when you
25 were the Montana commissioner?

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1 A. Initially, it was Jeff Fassett. And then
2 subsequently, it was Pat Tyrrell.

3 Q. What was your work relationship like with
4 these gentlemen?

5 A. Great. It was very good. We always had very
6 cordial relations and very candid relations. We had a
7 good personal relationship. And I think we both had a
8 sense of understanding and sympathy with the roles that
9 we were fulfilling and never felt any hesitation about
10 dealing with them on any issue.

11 Q. Did you consider them to be competent and
12 experienced in managing water in Wyoming?

13 A. I certainly did.

14 Q. Did they ever explain to you the functions of
15 Wyoming's regulatory system of water, such as the
16 responsibilities of their division or district offices?

17 A. Yeah, not in the sense of a tutorial or
18 anything like that. But we did talk off and on
19 different times about different things and comparing
20 notes, as you might say, in talking about how they do
21 some things and we do some things.

22 Q. So based on your understanding from Wyoming,
23 who would have been the one or more individuals who
24 would have had authority to regulate water in the
25 Tongue Basin based on what they had communicated to

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1 you?

2 A. It was my understanding the primary
3 responsibility in the Tongue River rested with the
4 division supervisor in Sheridan and that that person
5 had the most immediate and direct authority over
6 managing what happened in terms of water distribution
7 in his district.

8 Q. Do you recall who that was at the time you
9 were there?

10 A. Mike Whitaker.

11 Q. And so who would Mike Whitaker report to?
12 Would he report to Mr. Fassett or Mr. Tyrrell?

13 A. Yes. That was my understanding.

14 Q. So their job title- not only as commissioner,
15 their job title was also division administrator in
16 Wyoming, or what was it called?

17 A. State engineer.

18 Q. Okay. And then I guess when you're in DNRC
19 as administrator and as the compact commissioner, did
20 you have concerns about water quality issues in the
21 Tongue River Basin?

22 A. Water quality issues?

23 MR. KASTE: I have to object. The question
24 is about quality on the grounds of relevance. There's
25 no claims regarding quality in this case. The case is

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1 about quantity.

2 SPECIAL MASTER: So could you explain the
3 relevance?

4 MR. SWANSON: I'm just providing background
5 on the full range of his duties, Your Honor. I'm not
6 trying to assert a new claim.

7 SPECIAL MASTER: At the moment, I'm going to
8 sustain the objection.

9 MR. SWANSON: Okay.

10 BY MR. SWANSON:

11 Q. So let's talk about water quantity then. Did
12 you have any concerns about water quantity or water
13 supply in the Tongue River Basin in your time at DNRC?

14 A. Yes. For most of the years that I was in the
15 division administrator position, I did. Prior to that,
16 no. But especially beginning with the year 2000 and
17 running all the way through until the time that I left
18 the division in 2006, I was -- there was a constant
19 concern about the issue of water availability in the
20 basin. And the fact that we were in a significant --
21 one of the worst droughts that the state had ever
22 experienced -- that the region had ever experienced
23 made it a very critical issue.

24 Q. So when you became the division administrator
25 in 1997 and the compact commissioner, did your

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1 predecessor, Gary Fritz, talk to you at all about any
2 of these -- whether these issues had occurred in the
3 past?

4 A. Yeah. He briefly talked about a couple of
5 things with respect to the commission. First of all,
6 that there had been a conflict in the past that had not
7 gone well. It had not been resolved and had been very
8 frustrating. And that meant that I should be cautious
9 about getting involved with -- or that there was a -- I
10 would characterize it as a tar baby. That's not his
11 phrase. It's my phrase.

12 It was something that didn't work well, and I
13 should watch out for it, but that the commission had
14 drafted a series of -- or a set of rules, conflict
15 resolution rules, in order to try and set up a
16 structure that would avoid that kind of a problem in
17 the future, of intractable conflict.

18 Q. Were those rules --

19 A. Pardon me. And he advised me to -- they had
20 not been adopted, and he advised me strongly to make
21 sure they were adopted by the commission.

22 Q. Did you adopt those as a new commissioner?

23 A. Yes.

24 Q. Were they viewed as rules that were effective
25 in resolving water supply disagreements between the

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1 states?

2 A. I can't say they were ever really put into --
3 we never really put them into action.

4 Q. And then, as you took on your duties, were
5 there any staff members within DNRC that briefed you on
6 the water shortage conflicts in the past?

7 A. Yes. I -- Rich Moy was an excellent
8 historian to give me some background on the commission
9 and what had happened in the past. As well as Keith
10 Kerbel was a long-serving regional manager in Billings.
11 And he talked about some of the problems that had
12 happened in the past.

13 Q. And do you recall if -- at that point, as a
14 new commissioner, if you had an understanding of
15 whether the states had a disagreement over the compact
16 interpretation, or was it over technical issues or
17 something else?

18 A. Mostly it was -- the impression I was given
19 when I first started was that the problem was with the
20 interpretation of the compact.

21 Q. Do you recall what the disagreement over
22 interpretation was?

23 A. It's been a while, so it's a little hard for
24 me to be really confident. But it had to do with
25 pre-'50 rights and post-'50 rights. And it had to do

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1 with the concept of supplemental water. And, frankly,
2 I don't believe I could take it to much more detail
3 than that.

4 Q. All right. We'll come to that in more
5 detail.

6 What would you say was the most common way
7 that you were getting information about the water
8 conditions on the Tongue River and the Tongue
9 Reservoir?

10 A. There would be three main ways -- I'm sorry.
11 Four main ways. There would be -- and this is not in
12 order of any frequency or priority. But I would get
13 information from Keith Kerbel, the regional manger.
14 I'd be getting information from the project's bureau
15 staff, like Kevin Smith. I would be getting
16 information from water users in the basin, like Art
17 Hayes or Roger Muggli. And I would be getting
18 information from the fact that the State of Montana has
19 a water -- pardon me -- a drought advisory committee.
20 And through those drought years, 2000, until I left
21 in -- well, until 2005, we met monthly. And it is made
22 up of a number of scientists from USGS, Bureau of
23 Reclamation, State of Montana, Ag Statistic Service,
24 Natural Resource Conservation Service. And we met
25 monthly, and we had reports on water availability and

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1 climatic trends, in depth every month for six years.

2 So that was a significant source of
3 information about the status of water availability on
4 the Tongue River.

5 Q. And can you just briefly tell us, in those
6 years, say the 2000, 2001, 2002 era, what were the
7 water conditions on the Tongue River?

8 A. Very severely low. 2000 -- 2001 was one of
9 the driest years in history. And 2002 was not much
10 better. 2000 was dry as well.

11 Q. Do you recall if you had an opinion at that
12 time that Montana's pre-1950 water rights were being
13 met on the Tongue River?

14 A. Pre-'50 rights were not being met.

15 Q. And I know you mentioned the drought was a
16 prominent factor. Were there any other factors that
17 you felt were leading to those water rights not being
18 met?

19 A. Yes.

20 Q. Can you tell us what those were?

21 A. It was reported to me consistently from all
22 of my contacts in Montana that the situation was that
23 it was green in Wyoming and brown in Montana. That
24 there was -- it looked as though there was no
25 significant or -- no harmful or damaging diminishment

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1 of application of water in the Wyoming side, whereas
2 water was not available to satisfy -- or even to
3 exercise the majority of rights on the Montana side.

4 And, furthermore, that especially from the
5 people in the area, like the staff at the regional
6 office and the water users, that there were lands being
7 irrigated in Wyoming that were clearly -- or that they
8 knew were post-1950.

9 Q. During the irrigation season of 2001, or do
10 you recall 2000, 2001, 2002, all those years?

11 A. It was consistently throughout all the
12 drought years.

13 Q. And did Montana have a way of tracking which
14 pre-1950 rights on the Tongue were not being fulfilled
15 in those dry years?

16 A. Yes. The Tongue River in those years was
17 under the management of a district court, local
18 district court appointed water commissioner. And they
19 kept records of who were -- who was getting water and
20 who was not.

21 Q. So before I go -- I'm going to ask you
22 specifically about each of those years in detail. But
23 before I do that, I just want to ask you a little bit
24 more about your communications with Wyoming.

25 So in addition to, you mentioned Mr. Whitaker

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1 and Mr. Tyrrell, were there any other Wyoming officials
2 that you or your staff would have communicated with in
3 those early years?

4 A. Yes. Myself, I communicated regularly with
5 Sue Lowry of the state engineer's office. And my
6 staff, especially in the Billings office, would be
7 talking with other people that were employed in the
8 Sheridan office with the state engineer's office in
9 Wyoming, such as Carmine and -- I don't know who else.

10 Q. And of your staff, you mentioned Mr. Kerbel.
11 Would Mr. Kerbel have been communicating with any
12 Wyoming officials?

13 A. Regularly, yes.

14 Q. Who would he have been talking to?

15 A. Most frequently, I suspect Mike Whitaker, who
16 would be his counterpart. But I also remember him
17 having conversations with Carmine.

18 Q. Were there any of your other staff that would
19 have communicated with folks in Wyoming?

20 A. Yes. People in our Water Management Bureau,
21 which is our planning and hydrosciences bureau, were in
22 contact at certain times for certain purposes with
23 people in the -- with their counterparts in Wyoming.

24 Q. And --

25 A. I'm sorry. I didn't get a chance to complete

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1 that. Also, I believe there was communication between
2 my staff and the Water Projects Bureau and staff in
3 Wyoming. But I'm less certain about that. I am
4 certain about the hydrologist and plans.

5 Q. You say Water Projects Bureau, you mean Kevin
6 Smith?

7 A. Well, prior to him. Glen McDonald and then
8 Kevin Smith.

9 Q. All right. And how often were you seeing
10 your Wyoming counterparts? Was it a once-a-year thing,
11 or would you see them regularly?

12 A. No. We'd see each other fairly frequently.
13 Wyoming and Montana are both active members of the
14 Western States Water Council. So we would see each
15 other at meetings and conferences of the Western States
16 Water Council. And then we had the annual meeting of
17 the commission. But we also had -- Jeff Fassett had
18 started a tour program which we did -- I can't remember
19 if it was every year or every two years. But we met
20 then, and that was two days together in the same van.

21 And then there also -- we got into more
22 frequent meetings when we had the technical issues we
23 were trying to work on. So we could be meeting -- Pat
24 and I or Sue and I and others could be meeting as often
25 as five or six times a year.

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1 Q. And you -- what are these tours that you
2 mentioned? You said summer tours.

3 A. They were in the summer. And they were two
4 days. They would alternate between Wyoming and
5 Montana. One year would be Montana; the other would be
6 Wyoming. And we would go around and see things that
7 had do with water resource management on each side of
8 the state line. We'd tour -- like, one year we toured
9 all the -- not all. We toured a significant portion of
10 the coalbed methane pumping fields in Wyoming. Another
11 time we were in Montana and looked at some of the
12 Powder River. And we took them to the Tongue River Dam
13 and showed them our rehabilitation of the dam. And
14 then another time we toured some of the high-elevation
15 reservoirs in Wyoming.

16 Q. So when you mentioned all your staff visiting
17 with folks from Wyoming that were their counterparts,
18 was this under your instructions, or was this just
19 something that you tolerated?

20 A. No. I -- my approach throughout my time as
21 division administrator, and it wasn't something that I
22 invented, it was -- I maybe expanded it somewhat. But
23 our approach was that in water management, immediacy is
24 quite important. Water can be here today and gone
25 tomorrow.

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1 So anybody that had an issue that they -- to
2 deal with or a project to work on should work directly
3 with whomever they thought could solve the problem or
4 advance their project. Two people were to determine
5 whether there was a need for some authorization or some
6 prior communication with supervision before they went
7 ahead. But if they both felt they were on safe ground
8 working on it, then they should go forward and work on
9 it.

10 Q. I'm going to ask you to look at an exhibit
11 that you have with you, Wyoming 61.

12 SPECIAL MASTER: Actually, Mr. Swanson, I
13 wonder if this is a good time to take a break if you're
14 about to launch into a number of the exhibits and
15 specific discussions.

16 MR. SWANSON: This would be a good time, Your
17 Honor.

18 SPECIAL MASTER: Okay. Great. Then it's
19 about ten to 3:00. So why don't we plan to come back
20 at five after the hour, and then we'll go until 4:30.
21 Thank you.

22 (Recess taken 2:52 to 3:09
23 p.m., October 21, 2013)

24 SPECIAL MASTER: You can be seated. So
25 before we continue with the direct examination of

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1 Mr. Stults, why don't I take the time, again, and talk
2 a little bit about what we should be doing later in the
3 week. So things, as you can tell, change by the hour
4 around here. So at this point, things are looking
5 pretty good. But, again, Thursday and Friday we can be
6 back in the Snowy Mountain courtroom. And then we can
7 actually be in this courtroom through Wednesday
8 morning.

9 So rather than moving for half a day out to
10 the Oil and Gas Commission hearing room, there's two
11 other potential options, assuming this doesn't change.
12 It could change by tomorrow morning. But one
13 possibility is that we get as early of a start as we
14 can on Wednesday morning.

15 We have to make sure that this room is clear
16 in time for a 1:00 hearing. So I would probably want
17 to break by about noon so we can move the boxes out of
18 here in case the judge who will be hearing motions in
19 this room wants to come in at all early. But I think
20 we can probably go until noon.

21 The other possibility is that there is the
22 federal grand jury hearing room in this particular
23 building, which is one floor down. It is small.
24 That's the only disadvantage of it that I can see. And
25 my guess is what we would probably want to do is to

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1 put -- sort of stack counsel for each side so that one
2 side didn't look over the other. But it might work.

3 So what I would suggest is that when we break
4 at 4:30, if you can take, like, five or ten minutes, we
5 could go down and take a look at that particular
6 courtroom. And you could decide whether or not you're
7 willing to actually have the hearing in the afternoon
8 that day in that room.

9 Again, if we do that, what I would suggest is
10 we start on the early side so we sort of minimize the
11 period of time that we have to be crammed into that
12 room. But it sounds to me a lot better than having to
13 move to an entire different location, even for the
14 entire day, if we can avoid doing that.

15 So what I'd suggest is let's stop at
16 4:30 exactly today. We can go down there. You can
17 take a look. And I'm actually willing to do any of the
18 two options I just mentioned or go over to the Oil and
19 Gas Commission room. But given the boxes, I think to
20 the degree we can avoid moving out of here to a totally
21 different site for the day, it would make sense. Okay?

22 So we'll do that at 4:30 when we break for
23 the day.

24 So sorry about that, Mr. Stults.

25 And, Mr. Swanson, we'll continue his direct

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1 examination now.

2 And you know you remain under oath.

3 THE WITNESS: Yes, sir.

4 SPECIAL MASTER: Okay. Thank you.

5 MR. SWANSON: Thank you, Your Honor.

6 BY MR. SWANSON:

7 Q. So, Mr. Stults, we had just pulled up an
8 exhibit, which is marked Wyoming 61; do you have it
9 before you and on the screen there? You should have a
10 hard copy, but feel free to look at the screen if you
11 prefer.

12 A. I have it, both on the screen and in front of
13 me in paper.

14 Q. Can you identify this document?

15 A. It's a photocopy of a printed -- printout of
16 an e-mail that was sent on the State of Montana e-mail
17 system. It is from Keith Kerbel to Jack Stults, dated
18 Friday, March 2nd, 2001.

19 Q. And what's the subject on that message?

20 A. Subject line says "Water development meeting
21 in Ucross, Montana -- or Ucross, Wyoming," excuse me.

22 Q. And is this what a document printed out from
23 your e-mail would look like from your DNRC e-mail?

24 A. Yes.

25 MR. SWANSON: Your Honor, I move admission of

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1 Exhibit Wyoming 61.

2 MR. KASTE: No objection.

3 SPECIAL MASTER: Okay. Thank you. And I
4 just want to clarify. This is -- because they were
5 paper clipped together, this is just a two-page
6 exhibit; is that correct?

7 MR. SWANSON: Yes, Your Honor. The second
8 page is just four lines of text and then a conclusion.

9 SPECIAL MASTER: Okay. Thank you. So then
10 Exhibit W61 is admitted into evidence.

11 (Exhibit W061 admitted.)

12 BY MR. SWANSON:

13 Q. So, Mr. Stults, I'm looking at the first two
14 lines of that message. And it indicates that Keith
15 Kerbel had gone to a meeting in Wyoming with Carmine.
16 It says, "Carmine from Mike's shop in Sheridan." Do
17 you know who those individuals are?

18 A. Yes.

19 Q. Could you just tell us who they are?

20 A. Keith Kerbel is the regional offices
21 supervisor in the Billings -- pardon me -- the regional
22 office supervisor in Billings. And Carmine, frankly,
23 at this point, I can't remember either his last name or
24 his job title. But he was an employee of the state
25 engineer's office working in Sheridan.

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1 Q. And then Mike in Sheridan, who would that
2 refer to?

3 A. I'm sorry. Mike, Mike Whitaker, the district
4 supervisor -- I can't remember the exact title -- for
5 the state engineer's office in Sheridan.

6 Q. So is this the kind of report you would
7 receive from your staff upon their interactions and
8 meetings with Wyoming?

9 A. Yes.

10 Q. But you wouldn't always receive -- would you
11 always receive messages like this, or sometimes were
12 they verbal?

13 A. Oh, it could be either a phone call or an
14 e-mail.

15 Q. And was it common for people like Keith
16 Kerbel to go to a meeting in Ucross, Wyoming, related
17 to their duties?

18 A. Yes, it was. It was somewhat expected of him
19 given his schedule. If he could make it to a meeting
20 like this, it was expected he would go.

21 Q. Now, I just have a question about a line
22 that's in the third paragraph. It's the middle of the
23 third paragraph beginning with the words "according to
24 Carmine"; do you see that sentence?

25 A. I do.

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1 Q. Could you read those -- looks like one long
2 sentence, that one long sentence at the end of that
3 paragraph?

4 A. "According to Carmine, Goose Creek, a
5 tributary to the Tongue, has the most water
6 development, and it appears subdivisions are really
7 causing water right problems for them as well and will
8 interfere with future water uses and benefit us in the
9 long run."

10 Q. Did you or your staff receive any indication
11 from Wyoming that they were going to do anything about
12 these new uses that were causing problems on Goose
13 Creek?

14 A. Not that I recall.

15 Q. And I guess I'll ask you a couple more
16 questions about Keith Kerbel since we're on this
17 subject. You mentioned that his counterpart in Wyoming
18 was Mike Whitaker in the Sheridan office. So was there
19 anything special about their communications between
20 Mr. Kerbel and Mr. Whitaker in Wyoming relating to the
21 Tongue River?

22 A. I'm not sure what you mean by "special." But
23 the way that I -- Keith and I saw it was that there is
24 an equivalency in their positions. They are both
25 managing water on the Tongue River Basin on either side

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1 of the state line. There's an equivalency in the level
2 of their authority and responsibility within their
3 organizations, and that they should be in close
4 communications with each other and essentially like
5 comanagers to the best of their ability and to the best
6 that the relationship would allow. But that there
7 would be no hesitation for Keith to contact Mike, and
8 that they should establish that kind of communication
9 on any issue.

10 And, again, if it was an issue where they
11 felt that they needed to get some guidance or
12 authorization or any of that sort of thing, they could
13 certainly go back to -- Keith could come to me for
14 that. But otherwise, they could move ahead on any
15 issue that they felt that they could make progress on
16 and benefit the two states.

17 Q. And had it been represented to you and
18 Mr. Kerbel that Mr. Whitaker had the authority through
19 himself and his employees to regulate the Wyoming
20 portion of the Tongue Basin?

21 A. I can't explicitly say where I learned or
22 formed what was the basis for the understanding that --
23 my understanding that Mike Whitaker had a significant
24 amount of authority for the water delivery within his
25 district, including the Tongue Basin, that his

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1 authority included being able to regulate the delivery
2 of water.

3 Q. Could you briefly explain to us what Chuck
4 Dalby's duties were related to the compact commission
5 during your time as commissioner?

6 A. Chuck Dalby is a hydrologist with our water
7 planning group, Water Management Bureau. And Chuck is
8 a surface water hydrologist. And he was a part of a
9 technical working group that the commission formed to
10 be support in terms of hydrologic analysis.

11 But that was a little later on. I can't
12 remember exactly when we formed it. And I cannot
13 remember exactly when Chuck got involved. Chuck was
14 not in a role where he was directly active in
15 communicating with Wyoming except unless it was to
16 share technical information or gather technical
17 information.

18 Q. Do you recall what Chuck's duties were mainly
19 in the late 1990s and the early 2000s?

20 A. Yes. 1998 was a significant flood year,
21 massive flood year in Montana and Wyoming -- northern
22 Wyoming. And we had a significant amount of damage on
23 the Yellowstone River coming out of Yellowstone because
24 of the reduction in forest cover in Yellowstone Park.
25 And so people in -- on the upper Yellowstone above

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1 Livingston were starting to armor the banks. And that
2 was anathema to anybody that knows anything about flood
3 control.

4 So the governor appointed a committee to work
5 on that issue. Chuck is one of the leading fluvial
6 geohydrologists in the nation, which is the study of
7 how gravels and everything move up and down a river.
8 And he was the lead on that project. The project was
9 number one priority. It was his number one priority.
10 It was direct appointment by the governor for the
11 committee and to get this project done. The project
12 was running -- was very complex. And it required his
13 entire attention. Well into the mid-2000s.

14 It was -- we had asked and received one
15 extension from the governor, and it was going to be no
16 more extensions. And it was running behind schedule.
17 So his responsibility was entirely on that project for
18 several years.

19 Q. Thank you. And so I think now we'll go into
20 actually talking about the specific water years 2000,
21 2001, 2002, and so on. Do you recall in the 2000,
22 2001, 2002 era if you and your staff were having
23 meetings with Wyoming discussing water supply in the
24 Tongue Basin?

25 A. Yes.

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1 Q. Can you tell us if you were having meetings?

2 A. Well, we had the commission meetings. And
3 there was also communication between -- and meeting
4 between Keith and his counterparts. And I, frankly, do
5 not remember exactly when we formed the technical
6 committees and things like that, but there were regular
7 communication meetings on that issue.

8 Q. And you mentioned before our break that water
9 users and your staff were telling you in those dry
10 years that they felt that irrigation on post-1950 uses
11 were happening in Wyoming while Montana was dry. I
12 think you used the term "brown in Montana and green in
13 Wyoming."

14 Were you able to -- did you have an opinion
15 on whether Montana was entitled to more water under the
16 compact based on that communication?

17 A. Yes.

18 Q. What was your opinion?

19 A. My opinion was that the -- a larger number of
20 water rights and more junior water rights by --
21 certainly junior to 1950, were getting serviced in
22 Wyoming while in Montana we were down to only the first
23 two rights getting their direct flow rights. Their
24 direct flow rights getting serviced. So there was a
25 significant amount of use in Wyoming that seemed to be

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1 contrary to what our understanding of the compact was.

2 Q. So did you make any conclusions as far as
3 whether Montana was entitled to more water, and did you
4 communicate that to Wyoming?

5 A. I felt we were entitled to more water. And I
6 made it -- I believe honestly that I made it clear to
7 my counterparts in Wyoming. I know that Keith made
8 clear to Mike that we needed -- that they were using
9 water that they shouldn't be using, and it was water
10 that was owed to Montana. And it should be met --
11 water delivery in Wyoming should be delivered so that
12 there was less diversion in Wyoming and more crossing
13 the Montana/Wyoming state line.

14 Q. And do you recall what year that first
15 request would have been to Wyoming?

16 A. I can't remember if it was 2000 or 2001.

17 Q. Would it have been later than 2001, the
18 first --

19 A. Certainly not. It would have been in 2001 if
20 not before.

21 Q. And the same when you mentioned the Keith to
22 Mike. I believe you're referring to Keith Kerbel
23 communication to Mike Whitaker. Do you recall what
24 year that first communication would have been?

25 A. I don't explicitly. But I know for certain

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1 it would have been -- what I don't know is -- I'm not
2 confident in my memory as to whether it was in 2000.
3 But I know it was in 2001.

4 Q. Did you include a discussion of storage,
5 post-1950 storage rights in that discussion?

6 A. Yes. We actually spent a fair amount of
7 time, even at commission meetings, talking about the
8 storage in Wyoming and what reservoirs they had and
9 when they filled.

10 Q. Do you recall who you would have communicated
11 that to on the Wyoming side?

12 A. Communicated what?

13 Q. The conversation about needing more water in
14 Montana to satisfy compact rights.

15 A. Myself, I remember talking about it at
16 compact commission meetings with Pat and Sue. And --
17 and I cannot remember whether it was on the record or
18 not.

19 Q. Is it possible that it was not on the record
20 at the compact commission meeting?

21 A. Yes.

22 Q. Why is that?

23 A. For two reasons. But the primary one was
24 that I'm -- I knew there had been this intractable
25 conflict earlier on. And so I was hopeful to find a

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1 pathway. And so my strategy was to do what I could to
2 avoid formalizing, is one word, or legalizing what I
3 was doing in such a way that it would implicate the
4 interpretations of the compact.

5 What I wanted to do was set up a system where
6 we managed the basin hydrologically. It is something
7 that we've done in Montana on a number of basins. And
8 it is something that I know even Saskatchewan and North
9 Dakota worked on on the Souris in a more hydrological
10 and maybe extra legal way of doing it. I don't know --
11 I don't have the right term for it. But it's a
12 collaborative approach.

13 So what you do is you work on a system that
14 involves understanding the hydrology such that you can
15 marshal the water that you have to get the maximum
16 amount of use across the greatest number of people and
17 thereby have the greatest economic benefit for the
18 largest portion of the basin. And it does work. And
19 Montana had done it successfully.

20 So my intent was to try and use that strategy
21 rather than using -- moving directly along the pathway
22 that heads you towards struggling over the language of
23 the compact, which had been a dead end before.

24 So toward that end, my intent was to not try
25 to get things on the record and also to talk in a

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1 circumstance where people were less likely to be
2 nervous about being on the record, which included the
3 USGS, our third party on the commission, who was always
4 nervous about anything that looked like conflict.

5 So my -- why it may be that I didn't always
6 talk at the table about it or may not have talked about
7 it at the table commission meetings was in order to
8 maximize my ability to create that basis for that
9 strategy that would go down a path that would avoid
10 leading into the language of the compact.

11 Q. So it sounds like maybe you asked them a
12 couple different things. You mentioned managing the
13 river hydrologically. Was that something that Wyoming
14 had -- what was their response to that?

15 A. As I remember, it was something -- the
16 initial response was that's not something we can do.

17 Q. And then in addition, it sounds like you also
18 asked for them to just release more water to Montana.
19 And what was their response to that?

20 A. I don't think I used those terms. And,
21 frankly, I can't remember exactly what terms I used.
22 But there was always this need being expressed that
23 there needed to be more water crossing the state line
24 from Wyoming into Montana.

25 Q. Well, you testified a little while ago that

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1 you had identified irrigation and water use in Wyoming
2 that was after 1950. And did you identify that
3 practice to Wyoming?

4 A. First of all, if you say "you," it wasn't me.
5 It was our staff and our water users.

6 Q. You and Mr. Kerbel -- I see what you're
7 saying. You're saying that others had communicated to
8 you --

9 A. Right.

10 Q. -- the development of post-'50 uses in
11 Wyoming?

12 A. Right.

13 Q. Is that what you're saying?

14 A. Yes, sir. And we expressed that to Wyoming,
15 that there was -- it was our understanding that there
16 were post-'52 water developments in Wyoming that were
17 being serviced. And our pre-'52 were not getting
18 serviced, as well as continued expansion, more recent
19 expansion of water use in Wyoming.

20 Q. More recent as in how much more recent?

21 A. Within the last -- within the prior few
22 years.

23 Q. And do you know if at that meeting, or at
24 other meetings, that Mr. Kerbel had communicated the
25 same thing to his counterpart?

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1 A. Yes.

2 Q. You know that he had, in fact, done that?

3 A. I know that he talked about that with Mike.

4 Q. What was your understanding of Wyoming's
5 position regarding the compact and their use of these
6 later water uses?

7 A. Could you repeat that, please?

8 Q. What did you understand Wyoming's position
9 was or their interpretation of the compact regarding
10 the use of these later post-'50 rights?

11 A. My understanding was that they felt that
12 there was -- it's been a while, so it's hard for me to
13 be sure that I'm expressing this clearly and have a lot
14 of confidence in -- that I am.

15 But that they felt that there was a concept
16 of supplemental rights and that this expansion had
17 something to do with exercising that part of the
18 compact that they had some -- that gave them some right
19 to some kind of supplemental development.

20 Q. And do you recall who would have communicated
21 that message to you from Wyoming?

22 A. Jeff, Pat, Sue, and Mike in different
23 circumstances.

24 Q. So in other words, the conversation was going
25 on among multiple people on the Wyoming side and

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1 multiple people on the Montana side; is that correct?

2 A. Yes.

3 Q. So we talked about 2001 and 2002 -- sorry.
4 We talked about 2000 and 2001. Going into 2002, what
5 was -- do you recall the water -- what were the water
6 conditions in 2002?

7 A. We were still in drought, extreme drought.

8 Q. Did that include the Tongue River and the
9 Tongue River Basin?

10 A. I can't -- I don't know if it was in the
11 extreme category established by the drought monitoring
12 system. But it was -- if it wasn't in extreme, it was
13 in severe.

14 Q. Do you know if Montana had water
15 commissioners on the Tongue River in 2002?

16 A. We did.

17 Q. So did you have a view whether all of
18 Montana's pre-1950 water rights were being satisfied on
19 the Tongue River?

20 A. They were not.

21 Q. You mentioned earlier that there were pre --
22 I'm sorry -- post-1950 water rights and uses in Wyoming
23 in the earlier year. Did you have a view whether that
24 was continuing in 2002?

25 A. What I remember is that there was no change

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1 in behavior on the part of water users in Wyoming.

2 Q. So in 2002, did you communicate to Wyoming
3 the similar message from 2001, meaning that Montana was
4 short on its pre-'50 rights and needed more?

5 A. Yeah, it was continuing. The discussion was
6 continuing. If I remember, we were starting to get
7 into more talk about the reservoirs and more talk about
8 technical issues and having some technical analysis
9 done by our staff.

10 Q. That was done cooperatively between the two
11 states?

12 A. Yes.

13 Q. Do you know if Mr. Kerbel would have
14 communicated that same message in 2002 to any Wyoming
15 officials?

16 A. I'm certain of it.

17 Q. When you mentioned you communicated it, do
18 you recall specifically who you would have communicated
19 that to in Wyoming?

20 A. It would have been in the same circumstances
21 with the same people: Mike Whitaker, Sue Lowry, and
22 Pat Tyrrell. But at different times in different -- at
23 different occasions.

24 Q. Would these have been -- I'm sorry --
25 in-person conversations that you mentioned you went to

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1 a variety of meetings together.

2 A. What I remember was in person. I don't
3 remember having phone calls or e-mails about it.

4 Q. Again, do you recall if that would have been
5 done on the record at a compact commission meeting? Or
6 would that have been off the record in a private
7 conversation?

8 A. I think it -- my memory is not clear on this,
9 as you can tell. But I'm comfortable saying that I
10 think it happened in both situations to more or less
11 degrees. But, for instance, we did talk about the
12 reservoirs on the record. And it would have come up at
13 that time that we felt that there was a problem with
14 when they were storing water and how much was being
15 stored, et cetera. And that would have been on the
16 record.

17 And about -- the other things which are --
18 where you didn't have as much data right in front of
19 you in terms of how many acres and where were they and
20 that kind of thing, I did not bring up on the record.
21 That was the kind of thing that I -- we would have been
22 talking about on break or we would have -- Keith would
23 have been talking with Mike on the phone or things like
24 that.

25 Q. You mentioned reservoirs, and you had a

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1 concern about reservoirs. Can you tell us what the
2 concern was?

3 A. We were concerned that -- we wanted to
4 understand when they were diverting and how much they
5 were diverting. And our suspicion was that they were
6 diverting water that should have been available to us
7 or holding back water that should have been available
8 to us.

9 Q. Did you have a concern in those years about
10 whether the Tongue River Reservoir was going to fill?

11 A. Yes.

12 Q. Did it fill, do you recall, in 2001 and 2002?

13 MR. KASTE: Foundation. He hasn't
14 established that he has the foundation to answer that
15 question at this point.

16 SPECIAL MASTER: You want to establish the
17 foundation?

18 BY MR. SWANSON:

19 Q. Had you ever received information from the
20 Water Projects Bureau under your supervision about the
21 status of the Tongue River Reservoir?

22 A. Regularly. As well as the drought advisory
23 committee reports.

24 Q. Do you recall if in 2001 and 2002 the Tongue
25 River Reservoir filled?

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1 A. The Tongue River Reservoir did not fill in
2 2001. I know that for certain. And I'm confident it
3 did not fill in 2002. To the best of my knowledge, it
4 did not.

5 Q. Mr. Stults, I'm going to turn to four letters
6 that are really part of a series. And we won't spend a
7 lot of time on them.

8 MR. SWANSON: But, Your Honor, it's Montana
9 exhibit beginning Montana 142.

10 BY MR. SWANSON:

11 Q. And I believe you have it there in front of
12 you, Mr. Stults.

13 A. I have it.

14 Q. Can you identify this?

15 A. It's on Tongue River Water Users' Association
16 letterhead. It's dated May 3rd, 2002. It's a letter
17 from Art Hayes to Jack Stults.

18 Q. Was this your business address when you
19 worked at DNRC?

20 A. Yes.

21 MR. SWANSON: Your Honor, I move admission of
22 Exhibit Montana 142.

23 MR. KASTE: No objection.

24 SPECIAL MASTER: So no objection, Exhibit
25 M142 is admitted into evidence.

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1 (Exhibit M142 admitted.)

2 BY MR. SWANSON:

3 Q. Did you know Art Hayes, Mr. Stults?

4 A. I do know Art Hayes.

5 Q. Can you just summarize the communication that
6 Mr. Hayes had in this letter and I guess how you --
7 whether you took it seriously?

8 A. Yes. Art is talking about the -- what he
9 sees as expansion of water use in Wyoming and the
10 seriousness of the issue. And I would -- I did take
11 this seriously.

12 Q. And then the next exhibit is Montana 144.

13 A. I have it.

14 Q. Could you identify this letter, please?

15 A. This is on the letterhead of the Montana
16 House of Representatives. It's a letter from
17 Representative Norma Bixby to Jack Stults, dated May 6,
18 2002.

19 Q. Can you identify that date stamp in the top
20 right corner, please?

21 A. That's the standard date-received stamp used
22 by the Department of Natural Resources and
23 Conservation.

24 MR. SWANSON: I move admission of Exhibit
25 Montana 144.

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1 MR. KASTE: No objection.

2 SPECIAL MASTER: Thank you. Exhibit M144 is
3 admitted into evidence.

4 (Exhibit M144 admitted.)

5 BY MR. SWANSON:

6 Q. Can you tell us who Representative Norma
7 Bixby is, please?

8 A. She was an elected representative to the
9 House of Representatives, State of Montana,
10 representing District 5, which is in the Tongue River
11 Basin area, including parts of the Northern Cheyenne
12 Reservation in our district.

13 Q. Did you have regular communication with her
14 on these issues?

15 A. We communicated in the sense of how much a
16 person in my position would communicate with a
17 legislator, yes, it was regular.

18 Q. And then the next exhibit is Exhibit Montana
19 141. Could you identify that, please?

20 A. I have it. It's a letter on the letterhead
21 of the Department of Natural Resources and
22 Conservation, dated May 23rd, 2002, to Norma Bixby from
23 Jack Stults.

24 Q. Is that your signature at the bottom?

25 A. Yes.

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1 MR. SWANSON: Your Honor, I move admission of
2 Exhibit Montana 141.

3 MR. KASTE: No objection.

4 SPECIAL MASTER: Exhibit M141 is admitted
5 into evidence.

6 (Exhibit M141 admitted.)

7 BY MR. SWANSON:

8 Q. Before I go to the last letter, I just want
9 to ask you: Is this a follow-up letter to Exhibit 144,
10 the previous letter from Representative Bixby?

11 A. Yes.

12 Q. And then the last exhibit is Wyoming 67.
13 Could you identify that, please?

14 A. I have it.

15 Q. Go ahead and identify it, please.

16 A. It's a letter on the Department of Natural
17 Resources and Conservation letterhead, dated May 29,
18 2002, to Art Hayes, the Tongue River Water Users'
19 Association, from Jack Stults.

20 Q. And on page 2 it's signed Jack; is that your
21 signature?

22 A. It is.

23 MR. SWANSON: Your Honor, I move admission of
24 Exhibit Wyoming 67.

25 MR. KASTE: Apologize for the delay. This

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1 wasn't on the list of exhibits for Mr. Stults.

2 SPECIAL MASTER: No problem. I understand.
3 It's also difficult jumping back and forth between
4 various numbers.

5 MR. KASTE: But I have no objection.

6 SPECIAL MASTER: Okay. Thank you. Exhibit
7 W67 is admitted.

8 (Exhibit W067 admitted.)

9 MR. SWANSON: Thank you, Your Honor.

10 BY MR. SWANSON:

11 Q. So I just want to ask you a couple questions
12 about this series of letters. First of all, it appears
13 you're discussing an appropriation. Can you just tell
14 us, do you recall what that money request was for?

15 A. Yes. It was -- the commission had started
16 talking about doing some technical analysis. And so I
17 had put in a request in the budgeting process, the
18 biannual budgeting process in preparation for the 2003
19 legislature to ask for funds to help support that
20 technical activity.

21 Q. And both Mr. Hayes and Representative Bixby
22 referenced that that study was specifically looking at
23 post-1950 Wyoming irrigation out of the Tongue River;
24 was that part of your request? I should say, was that
25 the focus of your request?

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1 A. Yes.

2 Q. And then going to Exhibit 141, Montana 141,
3 this is your reply to Representative Bixby. So it
4 appears that you make it clear that the budget request
5 just couldn't go forward. Do you recall why it didn't
6 go forward for the 2003 legislature?

7 A. Yes. The state of Montana, during those
8 years, was running a significant multimillion dollar
9 budget deficit. So it was a struggle to get any
10 additional funding for an agency. And so this was
11 denied, among the requests that were sent in.

12 I don't remember whether it was denied by the
13 department director or the budget office. My weak
14 memory is that it was rejected by the budget -- the
15 governor's budget office.

16 Q. So it wasn't dropped because it was no longer
17 a concern to you; is that correct?

18 A. That is very correct.

19 Q. And then going to Exhibit Wyoming 67. This
20 is your response to Mr. Hayes. I wonder if you could
21 just read that second paragraph of that letter, please.

22 A. "As you know, we met with Wyoming in an
23 attempt to informally manage water supply in this year
24 of continuing drought. That meeting did not result in
25 a plan to manage this year's short supply to maximum

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1 advantage to all users in the Tongue River Basin
2 regardless of the political boundary at the state
3 line."

4 Q. So when you mentioned earlier discussions
5 with Wyoming asking for more water, I'm wondering if
6 this paragraph refers to those discussions.

7 A. Yes.

8 Q. And it appears, looking at that second
9 sentence, is it your representation to Mr. Hayes that
10 Wyoming rejected your request for more water?

11 A. Yes.

12 Q. But just to be clear, were you asking to
13 change water rights or to change the compact, in your
14 discussions with Wyoming?

15 A. I was not.

16 Q. And when you asked for technical funding for
17 technical study, how did you think that would help --
18 let me rephrase that 'cause Mr. Kaste might think
19 that's leading.

20 When you asked for funding for technical
21 research on this area, was it -- did you view that it
22 would be helpful to resolving the disagreements?

23 A. There are a number of reasons that I wanted
24 us to get into technical -- working on technical
25 information. The -- technical information in the water

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1 field always helps. Maybe that's overbroad, but it's
2 hardly. But you cannot have too much information,
3 technical information about water. It's such a
4 difficult commodity to know about and understand.

5 So any time you have an opportunity to do
6 some technical work, especially in collaboration with
7 another entity, that will have additional resources and
8 different perspective to bring to bear on it is a good
9 thing to do.

10 In terms of the strategy of trying to resolve
11 what we in Montana saw as a problem on the Tongue, the
12 opportunity to work together on technical information
13 is good. When you get into a conflict, the first thing
14 you want to avoid is a conflict over the facts, over
15 the data. And if you can develop the data jointly, you
16 are one big step down the road to avoiding distracting
17 and sometimes very costly and delaying problems.

18 Also, regardless of what route you take, if
19 you're going to do management of the basin
20 hydrologically, you're going to need the data. If
21 you're going to go to court, you're going to need the
22 data. So it -- even -- and if you're going to go to
23 court -- if you end up going to court, which I was
24 trying to avoid -- if you end up going to court, then
25 the data can often be a basis for a resolution of the

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1 conflict in -- within the litigation.

2 So there's -- it's a multifaceted desire to
3 get into developing data.

4 Q. You mentioned you were not eager to go to
5 court; can you tell us why?

6 A. Wyoming had had conflicts with other states
7 over water that had gone to litigation. States around
8 the nation had gone to litigation over water between
9 states. Montana had not. And -- at least in the
10 classic sense of just going to court in front of the
11 Supreme Court like we are now. And so they had a lot
12 of experience; we did not.

13 We were running multimillion dollar deficits.
14 They were running multimillion dollar surpluses. We
15 had no resources; they had a lot. So it looked like we
16 were in a weak position to begin with.

17 The history between Montana and Wyoming
18 specifically had been that when we got into a -- when
19 we tried to deal with a conflict over the language of
20 the compact, it didn't go anywhere. And so the main
21 thing you're going to get into if you get into a legal
22 situation, I thought, would be the language of the
23 compact and that that was something that just seemed
24 like it -- there are other ways to deal with water and
25 manage water that is more effective, more productive,

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1 less costly than going through litigation. You go
2 through the hydrologic approach.

3 So that -- those were some of the most
4 significant reasons why I wanted to avoid litigation.

5 Q. All right. Thank you. And I'm going to ask
6 you to look at the next exhibit, which is Montana 166.

7 A. I have it.

8 Q. Can you identify it, please?

9 A. It is -- it looks like a copy of a memorandum
10 or e-mail, I'm not sure which, from Sue Lowry to Jack
11 Stults, dated Friday, June 18th, 2004, with the subject
12 line, Wyoming document.

13 Q. And --

14 SPECIAL MASTER: Can I just pause
15 Mr. Swanson? Just because it looks like we may have
16 had the wrong exhibits pulled this morning. Would you
17 mind just telling me what Montana exhibits you're still
18 planning on using this afternoon?

19 MR. SWANSON: Montana 166, Montana 434,
20 Montana 186. There's a couple of joint exhibits. Do
21 you want that list?

22 SPECIAL MASTER: Not at the moment.

23 MR. SWANSON: No, you don't?

24 SPECIAL MASTER: No.

25 MR. SWANSON: Okay. Montana 149, Montana

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1 173, Montana 172, Montana 168, Wyoming -- I'm sorry.
2 Montana 161. I believe that's it for the Montana
3 exhibits.

4 SPECIAL MASTER: Okay. So just off the
5 record for a moment.

6 (Discussion held off the
7 record.)

8 SPECIAL MASTER: Sorry, Mr. Swanson. So you
9 were on Exhibit Montana 186.

10 MR. SWANSON: Yes, Your Honor. Can I confer
11 with my cocounsel for a second?

12 SPECIAL MASTER: Yes, you may.

13 MR. SWANSON: Your Honor, I do intend to call
14 additional Wyoming exhibits. Do you want that list as
15 well?

16 SPECIAL MASTER: So far I seem to have the
17 Wyoming exhibits that you plan to call. It's just a
18 different stack of Montana exhibits. I assume, for
19 example, mine start at -- this is all off the record.

20 (Discussion held off the
21 record.)

22 SPECIAL MASTER: We can go back on the
23 record.

24 BY MR. SWANSON:

25 Q. So, Mr. Stults, I forgot where we left off.

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1 Can you identify this Exhibit Montana 166?

2 A. It looks like an e-mail, a printout of an
3 e-mail from Sue Lowry to Jack Stults, Friday,
4 June 18th, 2004, subject line is Wyoming document.

5 MR. SWANSON: Your Honor, I move admission of
6 Exhibit Montana 166.

7 MR. KASTE: No objection.

8 SPECIAL MASTER: So Exhibit M166 is admitted
9 into evidence. And I'm keeping track of them.

10 (Exhibit M166 admitted.)

11 BY MR. SWANSON:

12 Q. Mr. Stults, I wonder if you could just look
13 at the -- there's kind of a break in the document with
14 a Internet address and line that says, "Please let me
15 know." I'm wondering if you could look at the next
16 section that begins "Keith Kerbel had provided." And
17 I'm interested in that big, long sentence beginning
18 "Keith Kerbel had provided." If you could read that,
19 please.

20 A. "Keith Kerbel had provided us at the
21 commission meeting last December a copy of the
22 five-page summary report completed for you by HKM in
23 the 'reconnaissance study of expanded irrigation water
24 use Tongue River drainage-Wyoming.'"

25 Q. So you provided a document to them, it looks

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1 like in December of 2003. I wonder if you could look
2 at Montana Exhibit 434 and tell us if this is the HKM
3 study that Sue Lowry is referring to?

4 SPECIAL MASTER: Actually, we need to go off
5 the record again just for a second.

6 (Discussion held off the
7 record.)

8 SPECIAL MASTER: So then we're on Exhibit
9 M434.

10 BY MR. SWANSON:

11 Q. So, Mr. Stults, the previous exhibit from Sue
12 Lowry mentioned an HKM report, reconnaissance study of
13 expanded irrigation water use Tongue River
14 drainage-Wyoming that Montana had provided to Wyoming.
15 Can you tell us whether this Exhibit M34 is that study?

16 A. This is the summary report from that study.

17 Q. And if you could look at the first line under
18 introduction, it says that HKM entered into an
19 agreement with Montana DNRC in June 2002. Do you have
20 knowledge of that agreement?

21 A. Not any specific knowledge in terms of being
22 able to tell you what the terms were or anything like
23 that. But I remember we hired HKM.

24 Q. In 2002?

25 A. Correct.

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1 MR. SWANSON: Your Honor, I move admission of
2 Exhibit Montana 434. And I do want to point out that
3 the document has actually only six pages. And I
4 believe the exhibit is 12 because it's the same
5 document repeated twice. So I apologize for that. And
6 we can limit the admission. It would just be page
7 Wyoming 102610 including Wyoming 102615.

8 SPECIAL MASTER: Mr. Kaste?

9 MR. KASTE: It's my understanding this
10 document makes reference to attached maps which are not
11 attached. I guess I don't really have an objection to
12 this exhibit. But it is incomplete in that regard.

13 SPECIAL MASTER: So two or three things:
14 Number one, we will admit Exhibit M434. We'll admit
15 the first six pages of Exhibit M434.

16 (Exhibit M434 admitted.)

17 SPECIAL MASTER: And it will be noted, for
18 the record, that it does not include any maps. And let
19 me just actually ask the witness: I noticed that the
20 letter from Sue Lowry notes that the report that she
21 had received did not include accompanying maps. So do
22 you know whether or not there were any maps attached to
23 this report other than the seven that she mentions
24 there?

25 THE WITNESS: I don't remember whether I

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1 handled the maps or not. I just would have to go with
2 what was said here and my knowledge that they were in
3 communication and trading back data. And it's my
4 understanding that what was asked for was given.

5 SPECIAL MASTER: Okay.

6 You can proceed.

7 MR. SWANSON: Thank you, Your Honor.

8 BY MR. SWANSON:

9 Q. So can you explain why you engaged HKM to
10 conduct that reconnaissance study, or why DNRC did?

11 A. HKM had done some work for Wyoming on their
12 water-planning process. And, therefore, they seemed to
13 be in a good position to be able to do some analysis of
14 water use in Wyoming because of that background that
15 they had. And it seemed as though it was an efficient
16 way to move forward on compiling the information that
17 we were looking for about water use, especially
18 post-'50, in Wyoming.

19 Q. Can you look at page 3 of this Exhibit M434?
20 There's a table there.

21 A. I see it.

22 Q. And there are several column headings across
23 the top. It says fifth level watershed, sixth level
24 watershed. And then it says irrigation era with a
25 number of different time frames across the top; do you

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1 see that?

2 A. I see that.

3 Q. And I'm interested in that second heading
4 that says irrigated in 1940s, 1950s, 1990s.

5 A. I see it.

6 Q. And I'm just guessing, even though I'll get
7 to the 1990s one in a moment, was that acreage that you
8 focused on as post-1950 irrigation, or were you focused
9 on other categories?

10 A. Frankly, I don't remember.

11 Q. Okay. And if you look at the third column,
12 "Irrigated Only in the 1990s," you come down to the
13 bottom. Can you read that total acreage in the column
14 that is at the bottom labeled "Irrigated only in
15 1990s"?

16 A. Three thousand one hundred eighty.

17 Q. Was this information -- number one, we know
18 it was provided to Wyoming because Mrs. Lowry's e-mail
19 told us it was. Was this information involving
20 conversations with Wyoming as far as their extra use
21 taking away water from Montana's earlier rights?

22 A. I -- I don't remember this being a
23 specific -- I did not use this specific number in a
24 conversation with Wyoming, that I remember. And I
25 can't say whether it was used specifically in a

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1 conversation by other staff. I don't remember. But it
2 may well have been.

3 Q. Did --

4 A. My suspicion was that it was because the
5 technical committee was sharing this information and
6 they were meeting. And my expectation is that they
7 would have -- or my assumption -- no, what I believe is
8 that they would have talked about this.

9 Q. Okay. And then going to page 4, there's
10 another table on page 4 labeled Table 2. And it's
11 irrigated acreage by priority date, lands irrigated
12 only in the 1990s. And do you recall, or did you see
13 this table?

14 A. I do recall this one.

15 Q. Did you have any conclusions as a result of
16 seeing the data in this table?

17 A. Yes. It did show that there was -- that our
18 concern about post-'50 development and use of water was
19 accurate, was founded.

20 Q. And then going to the final page of this
21 document, there are two tables actually. One's labeled
22 Wyoming, and one's labeled Montana.

23 But I'm looking -- actually, I apologize.
24 I'm going to ask you to go back to page 5.

25 A. I have it.

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1 Q. And that second full paragraph at page 5
2 referring to reservoirs, I wondered if you could just
3 read that first -- or the first two sentences there.

4 A. "HKM also observed that additional small
5 reservoirs were constructed in the intervening years
6 following the signing of the compact. Three facilities
7 in particular are noted."

8 Q. And then it mentioned three reservoirs. Are
9 you familiar with these reservoirs? It mentions Wagner
10 Reservoir, Five Mile Reservoir, and I'm going to try
11 this pronunciation. Dzenolet Reservoir, I'll spell
12 it, D-z-e-n-d-o-l-e-t. Are you familiar with these
13 reservoirs?

14 A. I don't remember.

15 Q. We can set this aside for a moment.

16 As we move out of the year 2000 into 2003,
17 did Montana's communication to Wyoming regarding your
18 interpretation of the compact change after 2002? Or
19 did you continue to express the same view about
20 Montana's pre-'50 irrigation being protected?

21 A. Our perspective interpretation of the compact
22 did not change.

23 Q. And you don't recall if Wyoming's perspective
24 changed, or did it remain the same?

25 A. I don't remember their perspective changing.

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1 Q. So at the end of 2002, we've had three dry
2 years: 2000, 2001, and 2002. Had Wyoming, at this
3 point, agreed to any of your requests to send more
4 water to Montana for senior pre-1950 water rights on
5 the Tongue River?

6 A. No, they did not.

7 Q. And had they offered any suggestions of how
8 they could supply more water?

9 A. No.

10 Q. And had they shut down or curtailed any
11 post-1950 irrigation or post-1950 storage activities at
12 your request?

13 A. Not that I was aware of.

14 Q. So did you feel your efforts were being
15 fruitful in those three dry years?

16 A. No, they hadn't come up with the fruit that I
17 had intended. But there was some good work done.

18 Q. And what was the progress? What was the work
19 that was being done between the two states at this
20 point?

21 A. Mostly sharing information and developing
22 some new data.

23 Q. Do you recall in 2003 if it was a dry year,
24 or was it an adequate year?

25 A. It was dry.

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1 Q. It was dry?

2 A. Yes.

3 Q. Did you make a request in 2003 for water from
4 Wyoming?

5 A. Of the same type of conversations and
6 discussions and characterization of the problem that we
7 did in the prior years.

8 Q. So you continued to express Montana's
9 position on the compact. But do you recall if you
10 asked them specifically to send more water in 2003;
11 that Montana's rights weren't being met?

12 A. Not in so many words.

13 Q. And then going into 2004, were you -- what
14 was 2004 like as far as the water year goes?

15 A. 2004 was another very dry year.

16 Q. Is it safe to say you were monitoring water
17 levels as you came into the spring and summer months of
18 2004?

19 A. Yes.

20 Q. And you were still working on the Drought
21 Advisory Committee?

22 A. Yes.

23 Q. I'm going to ask you to look at Montana
24 Exhibit 186.

25 A. I have it.

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1 Q. Can you identify this document?

2 A. This is a printout of an e-mail sent on the
3 State of Montana e-mail system from Marty VanCleave to
4 Jack Stults, dated Monday, May 17th, 2004, with the
5 subject line re, r-e, interstate water flows, May 17th.

6 Q. Do you know who Marty VanCleave is?

7 A. Yes. Marty VanCleave was a water rights
8 specialist in the Billings regional office.

9 MR. SWANSON: Your Honor, I move admission of
10 Montana Exhibit 186.

11 MR. KASTE: I don't see anything about the
12 Tongue River, really, in here. I don't understand its
13 relevance. This would be an e-mail about the situation
14 on the Powder.

15 SPECIAL MASTER: Mr. Swanson?

16 BY MR. SWANSON:

17 Q. Can you read the line directly above the
18 salutation, "Thanks Marty," at the end, Mr. Stults?

19 A. "Were you also looking at the Tongue? I know
20 T & Y is 'rationing' water."

21 SPECIAL MASTER: Okay. If there's still an
22 objection, it's overruled.

23 MR. SWANSON: Thank you, Your Honor.

24 SPECIAL MASTER: So Exhibit M186 is admitted
25 into evidence.

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1 (Exhibit M186 admitted.)

2 BY MR. SWANSON:

3 Q. When he says the "T & Y," what do you
4 understand that to mean?

5 A. The T & Y irrigation ditch on the Tongue
6 River.

7 Q. And when he says "rationing water," what do
8 you understand that to mean?

9 A. Just the basic meaning of the term is that
10 when there is a shortage, there is a reduction of the
11 portions given out to the participants.

12 Q. Does that mean that there's a shortage of
13 water as of May 17th?

14 A. I think it's -- yes, it does.

15 Q. So in 2004, did you have an opinion as to
16 whether Montana was receiving all of its pre-1950 water
17 rights on the Tongue?

18 A. We were not.

19 Q. And do you know whether there were water
20 commissioners on the Tongue in 2004?

21 A. There were.

22 Q. And do you know whether the Tongue River
23 filled in 2004?

24 A. Did not.

25 Q. Were you able to communicate any of these

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1 facts to Wyoming in that year?

2 A. Yes. We did. Whether I specifically
3 communicated or it was through the technical team and
4 Keith Kerbel or all of us, it was communicated.

5 Q. It was communicated prior to your sending the
6 next letter we're going to look at, the call letter?

7 A. Yes.

8 Q. Okay. And what was Wyoming's response to
9 those initial communications?

10 A. Same as it had been, that nothing was
11 happening in Wyoming that shouldn't be happening and
12 that it was -- everything happening in Wyoming was
13 consistent with the compact.

14 Q. I'm going to ask you to look at Joint
15 Exhibit 64. Can you identify this document? And it's
16 already admitted. So I -- we won't ask the Court to
17 admit it. But if you could just identify it.

18 A. It's a letter on Department of Natural
19 Resources and Conservation letterhead to Pat Tyrrell
20 from Jack Stults, dated May 18th, 2004.

21 Q. And can you read that first sentence of the
22 letter?

23 A. "This is the letter that I mentioned would
24 follow our phone -- telephone call regarding the
25 current need for administration of the compact."

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1 Q. So you had told him, apparently on a phone
2 call prior to this, that we needed to administer the
3 river; is that correct?

4 A. That's correct. I called him -- I can't
5 remember how many days ahead of time -- before sending
6 this letter.

7 Q. And then in the next sentence, it seems to
8 indicate that you had talked to him about this issue at
9 the compact commission meeting in April?

10 A. Correct.

11 Q. So when you say, "I agreed to send you a
12 letter stating our concerns and needs," do you know
13 whether that means that you had asked him in April for
14 this call and you had then agreed to send a letter? Is
15 that what that statement is supposed to mean?

16 MR. KASTE: That's a little bit leading. Why
17 don't we just ask him, what you did mean?

18 SPECIAL MASTER: I think that would probably
19 be a better phrasing of the question.

20 BY MR. SWANSON:

21 Q. So if you look at that second sentence,
22 Mr. Stults, can you just tell us what you meant by that
23 statement, "At the Yellowstone River Compact Commission
24 meeting in April, I agreed to send you a letter stating
25 our concerns and needs"?

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1 A. Well, that we had talked about the issue and
2 that it was clear that we are in a conflict and in
3 disagreement and that I would follow up with a letter
4 that would explain our perspective, Montana's
5 perspective.

6 Q. And then in this letter going to the section
7 that's Tongue River, which really begins in the second
8 full paragraph, can you just explain generally what you
9 intended or what you communicated with your call to
10 Wyoming for water on the Tongue River?

11 A. Well, that we were not getting our portion of
12 water, that only our first two rights were being
13 satisfied and then the details of that. And that also
14 that I'd notified other water users that we were going
15 to go forward with our request.

16 Q. And had you noticed the Northern Cheyenne
17 that you intended to call on Wyoming for water?

18 A. Yes.

19 Q. And then if you could look at the second page
20 of this letter.

21 A. I have it.

22 Q. It would be the third full paragraph. It's
23 the paragraph below the one that's headed Clark's Fork
24 of the Yellowstone. So this paragraph would begin, "as
25 compact commissioner for Montana and as directed by

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1 Governor Martz." I'm looking at the sentence that
2 begins "as you reported at the April technical
3 meeting."

4 A. I see it.

5 Q. Can you just read the portion of the storage
6 related to the Tongue River drainage?

7 A. "Wyoming is currently storing 9,369 acre-feet
8 of post-1950 water in the Tongue River drainage and
9 214,722 acre-feet of post-1950 water in the Powder
10 River Basin."

11 Q. And then your request is -- skip a sentence,
12 and it begins "we hereby request." Could you read that
13 sentence, please?

14 A. "We hereby request that all these stored
15 waters be immediately released and delivered to the
16 Montana border to begin to satisfy our valid and
17 protected pre-1950 water rights on the Tongue and the
18 Powder Rivers."

19 Q. And then in the following sentence, what
20 article of the compact are you referencing there?

21 A. "This call is for all pre-1950 Montana
22 water -- prior water rights in those drainages as
23 protected in the compact in Article 5A and needed to
24 satisfy the senior appropriative rights in Montana."

25 Q. Now, you attached some supporting documents

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1 to this letter.

2 MR. SWANSON: And, Your Honor, these are part
3 of the joint exhibit, even though it's an affidavit.
4 So I just want to beg your leave to inquire into the
5 affidavit that was already admitted.

6 SPECIAL MASTER: So just to be clear, is this
7 actually part of -- 'cause I actually don't have it in
8 front of me. Is this part of J64?

9 MR. SWANSON: It is, Your Honor. At the time
10 that Mr. Stults sent the letter, he attached an
11 affidavit from Mr. Hayes to Wyoming as well as some
12 additional documents.

13 SPECIAL MASTER: Okay. Mr. Kaste?

14 MR. KASTE: We don't have any problem with
15 this affidavit being part of the joint exhibits. It
16 has an independent legal significance just by virtue of
17 being attached. I want to make sure that -- I'm done.

18 SPECIAL MASTER: Okay. Thank you. And just
19 to clarify, this is part of, then, Exhibit J64, and
20 therefore, you're not asking to have anything new
21 admitted into evidence. This has already been
22 admitted?

23 MR. SWANSON: That's correct, Your Honor.

24 SPECIAL MASTER: Okay. Thank you.

25

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1 BY MR. SWANSON:

2 Q. So, Mr. Stults, there's an affidavit from
3 Mr. Hayes that's following your letter, beginning on
4 page Wyoming -- WYO31304; do you see that?

5 A. I do.

6 Q. And I just want to ask you, it looks like it
7 will be the third page of his affidavit, paragraph 8.

8 A. I see it.

9 Q. And paragraph 10 as well. What was your
10 understanding of the amount of -- I guess, let me say
11 it this way: What was your understanding of the need
12 for -- what was your understanding of the level of the
13 Tongue River Reservoir at that time?

14 A. It was down quite a bit.

15 Q. And did you have an understanding of what
16 impact that has on water users in the Tongue River if
17 the reservoir is down at the beginning of the
18 irrigation season?

19 A. Yes. It's critically bad times.

20 Q. And did you know which water rights were
21 being fulfilled on the Tongue River -- which pre-'50
22 water rights were being fulfilled on the Tongue River
23 at that time?

24 A. I did.

25 Q. Which ones were being fulfilled?

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1 A. I can't remember specifically. But I know
2 that I was -- I had that information, and it was part
3 of my basis for making the decision to send the letter.

4 Q. And do you know if there were water
5 commissioners on the Tongue River in 2004?

6 A. There were.

7 Q. I'm going to ask you to look at the next
8 exhibit, which is Joint Exhibit 65. And we won't talk
9 too much about this one.

10 A. I have it.

11 Q. If you could just identify this for us.

12 A. It's a letter on the state engineer's office
13 letterhead dated May 24th, 2004, to Jack Stults from
14 Pat Tyrrell.

15 Q. Did you receive this letter in -- did you
16 receive this letter?

17 A. Yes.

18 Q. And I understand that Mr. Tyrrell is
19 essentially saying that they're unable to -- or they
20 are not going to honor your call. But I wondered if we
21 could look at the second page briefly. And the
22 paragraph would be the second full paragraph beginning
23 with "what water is apportioned is specified."

24 A. I see it.

25 Q. Can you just read -- you don't need to read

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1 all of it. I would just say read the three lines.

2 A. "What water is apportioned is specified in
3 Article 5 Section B which allocates between the states
4 any water that was not used and not appropriated as of
5 January 1st, 1950. On the Tongue, Montana is to
6 receive 60 percent of the post-1950 direct flow water
7 and post-1950 storable water."

8 Q. That's good. Were you talking about
9 post-1950 allocated water under Article 5B, or were you
10 calling for water to protect your pre-1950 water rights
11 under Article 5A?

12 A. A.

13 Q. Did you expect this letter to result in an
14 agreement or litigation, or did you have any
15 expectation?

16 A. I had -- I had a hope that it would -- that
17 it would refocus our efforts which had not gone very
18 far in terms of resolving the conflict -- the concern
19 that we had in Montana about the use of water in
20 Wyoming. And I hoped that would happen. My
21 expectation was that it might happen. And my fear was
22 that it would not.

23 Q. And did you -- what was your -- did your
24 working relationship with Mr. Tyrrell change after
25 these letters?

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1 A. No, I don't believe it changed at all. I
2 think we still, all the way through the process, the
3 whole time that I was in my position, had a good
4 working and personal relation both.

5 Q. So next we're going to look at a number of
6 letters that are messages -- letters and e-mails back
7 and forth between you and Mr. Tyrrell and your staff
8 and his staff in the remainder of 2004. And I guess
9 what I'd like to do is just, as we go through each one,
10 if you could just briefly comment on the process. But
11 I don't intend to linger very long on any individual
12 document.

13 So we can begin with exhibit -- Joint
14 Exhibit 66.

15 A. I have it.

16 Q. So this letter appears to be from Mr. Tyrrell
17 to yourself. And what is he asking for here?

18 A. Documents and other materials.

19 Q. And it appears that it's a lot of technical
20 data as well as some documents related to -- I'm
21 looking at page 2, No. 6, "For example, Rich Moy
22 alluded to definitive evidence of the change in
23 consumptive use when converting from flood to sprinkler
24 application."

25 I know that's no longer relevant in this

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1 case. But it appears that both sides are -- are they
2 building a case, or are they trying to understand each
3 other?

4 A. I don't know that there's a difference.
5 You're always trying to understand each other
6 regardless which direction you're going. At least I
7 was always -- that was my approach. And that was the
8 approach that I felt was being shared on both sides, is
9 that we were trying to understand the issue and trying
10 to understand each other. And that the direction it
11 took would be -- that I was still intending to not --
12 my hope was that if we did share this information, it
13 would continue to form the basis and the grounds for
14 some kind of agreement.

15 Q. And then the next document, Joint Exhibit 67,
16 this appears to be a letter from you back to
17 Mr. Tyrrell also asking for information. And I guess
18 the question at this point is: Were these information
19 requests being fulfilled by each state; your requests
20 to Mr. Tyrrell and his requests to you?

21 A. My memory is, to the best of our ability,
22 they were. That -- yes.

23 Q. And were you -- did you have any staff
24 members that were spending time gathering this
25 information for you?

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1 A. Yes.

2 Q. Do you know who those were?

3 A. I can't give you -- I can't be confident that
4 I can give you a complete list. But it was staff
5 primarily within the Water Management Bureau under the
6 direction of Rich Moy.

7 Q. And then the next document is Exhibit Wyoming
8 76. Can you identify this document, please?

9 A. I have -- I don't think I have Wyoming 76.
10 Just a second. I have it.

11 Q. Okay. Can you identify this, please?

12 A. It is an e-mail from Patrick Tyrrell to me,
13 J. Stults, using my e-mail address, dated Wednesday,
14 June 9th, 2004, with a subject line, re: legal issues.

15 MR. SWANSON: Your Honor, I move admission of
16 Wyoming Exhibit 76.

17 MR. KASTE: No objection.

18 SPECIAL MASTER: Exhibit Wyoming 76 is
19 admitted.

20 (Exhibit W076 admitted.)

21 BY MR. SWANSON:

22 Q. And, Mr. Stults, the reason that I grabbed
23 this one, it really stood out to me near the bottom.
24 And we can see what this is, is this is an e-mail
25 string of several replies back and forth between you

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1 and Mr. Tyrrell. And near the bottom I see a statement
2 from you that begins "on deeper reading of your
3 letter."

4 A. I see that.

5 Q. Could you that full sentence, please?

6 A. This is me speaking, I believe.

7 Q. It is. It's you speaking, I believe, to
8 Mr. Tyrrell.

9 A. "On deeper reading of your letter and my
10 letter, it is clear to me that interpretation of the
11 compact is an issue, especially Articles 5 and 18.
12 This means there are not just technical things at play.
13 Therefore, I am convinced we do need to have legal
14 staff in Sheridan to hear the discussions about the
15 compact language and give input as we desire to do
16 follow-up research."

17 Q. I appreciate that. That's good. And then I
18 wonder if you could look at Mr. Tyrrell's response to
19 you, which would be the middle of that front page. And
20 it begins "Jack, well, whatever."

21 A. I see it.

22 Q. I wonder if you could read that and just tell
23 us what you understood that to mean.

24 A. "Jack, well, whatever differences we have
25 should not be anything we as states didn't discuss in

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1 the '80s when this issue was hot previously."

2 Q. What did you take that to mean? What did you
3 understand from that statement?

4 A. That he's referring to the conflict that we
5 discussed earlier today that took place in the 1980s
6 over the compact language and use of water in Wyoming.

7 Q. So does it appear it's not a new issue to
8 Wyoming as far as Montana's concerns for water and
9 interpretation of the compact?

10 A. It certainly was not a new issue.

11 Q. And then if we could look at the next
12 exhibit, which is Wyoming 84. And I'm going to try to
13 just speed through these. But the reason I'm looking
14 at this Wyoming 84 --

15 A. I have it.

16 Q. Could you identify it, please?

17 A. It's an e-mail from Jack Stults to Patrick
18 Tyrrell dated 6/17/04, subject line re: status.

19 MR. SWANSON: Your Honor, I move admission of
20 Exhibit Wyoming 84.

21 MR. KASTE: No objection.

22 SPECIAL MASTER: Exhibit W84 is admitted.

23 (Exhibit W084 admitted.)

24 BY MR. SWANSON:

25 Q. And then I'm actually going to look at

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1 Wyoming 113, and we'll just talk about these together.

2 If you could look at Wyoming 113.

3 A. I have it.

4 Q. Could you identify it, please?

5 A. It's an e-mail from Jack Stults to Pat
6 Tyrrell dated 7/9/04 subject line re: gov meeting.

7 MR. SWANSON: Your Honor, I move admission of
8 Wyoming 113.

9 MR. KASTE: No objection.

10 SPECIAL MASTER: Exhibit W113 is admitted
11 into evidence.

12 (Exhibit W113 admitted.)

13 BY MR. SWANSON:

14 Q. So these two messages appear to be a
15 discussion of a possible meeting between the two
16 governors of the states. Can you just explain the
17 conversation that's happening at this time? And then
18 it appears ultimately they didn't discuss it. Can you
19 explain why?

20 A. As I remember it, the governors were going to
21 be getting together for something. And I can't
22 remember what it was. But it was not specifically this
23 issue. But it provided the opportunity for the two
24 governors to talk about this issue. So Pat and I were
25 exchanging communication to see if that was what the

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1 governors wanted to do and encourage that they do it.

2 Q. And then your message said Governor Martz
3 asked the staff to keep working on this. Was there
4 still not a desire in Montana to go to litigation? I'm
5 just wondering -- I'm wondering what your view of the
6 escalation of steps were going to be after the 2004
7 letter.

8 A. Well, I felt at the time that my job was
9 always to try and get us to the most productive, least
10 costly, most effective solution to any problem. So my
11 goal was -- and I believed at the time that litigation
12 was not that.

13 So it was always my intent to try to come up
14 with something, some kind of agreement with us that
15 was -- that would preclude litigation. So I was not,
16 quote, moving to litigation. I was trying always to
17 move in a different direction. However, the motion
18 that we were taking was moving us closer in that
19 direction. There's no question about that.

20 Q. And then I'm going to conclude this
21 particular discussion with two more exhibits that are
22 communication along this line. And that's beginning
23 with Montana 172.

24 A. Montana 172?

25 Q. Yes.

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1 A. I have it.

2 MR. DRAPER: Your Honor, if I might interrupt
3 for a second and point out the time just so that we act
4 consistently with your desires this afternoon.

5 SPECIAL MASTER: Yeah. Thank you,
6 Mr. Draper. I was noticing the clock too. But when
7 Mr. Swanson said that there were two other exhibits
8 that he was going to turn to, I thought maybe I would
9 let him finish with those two, and then we'd break for
10 the day.

11 MR. SWANSON: Yes, Your Honor. I'll do that
12 with alacrity, and then that will give us a good
13 transition point to resume later.

14 BY MR. SWANSON:

15 Q. So Montana 172, could you identify it,
16 please?

17 A. It's an e-mail from Patrick Tyrrell to Sue
18 Lowry, Hugh McFadden, Mike Whitaker, dated 7/29/04,
19 subject, Montana.

20 Q. Do you see a CC line at the bottom of that
21 message?

22 A. I do. It's a CC to me.

23 MR. SWANSON: Your Honor, I move admission of
24 Montana Exhibit 172.

25 MR. KASTE: No objection.

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1 SPECIAL MASTER: Exhibit M172 is admitted.

2 (Exhibit M172 admitted.)

3 BY MR. SWANSON:

4 Q. And then we're going to talk about this next
5 one together with it as a pair. And that would be
6 Exhibit Wyoming 128. If you could identify that one.

7 A. I have it. It's an e-mail from Jack Stults
8 to a group of my staff, headed by Rich Moy, dated
9 July 30th, '04, subject line, Wyoming.

10 MR. SWANSON: Your Honor, I move admission of
11 Exhibit Wyoming 128.

12 MR. KASTE: No objection.

13 SPECIAL MASTER: Exhibit W128 is admitted.

14 (Exhibit W128 admitted.)

15 BY MR. SWANSON:

16 Q. And I would just note, Mr. Stults, that it
17 appears you copied Pat Tyrrell at the bottom of that
18 message as well?

19 A. Correct.

20 Q. So these messages are pretty well mirror
21 messages from Mr. Tyrrell and yourself to your staff.
22 And then you copied each other. So it appears to be an
23 agreed-upon communication. Can you just explain what
24 you resolved to do at this point?

25 A. This is where we're setting up the technical

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1 teams. I can't remember if it's when we were setting
2 them up. But we were giving instructions and guidance
3 to the two technical teams.

4 Q. And did you at this point expect Wyoming to
5 make any more changes in terms of answering your call
6 affirmatively before the end of this irrigation season?

7 A. My optimism was waning.

8 Q. Your optimism was waning, okay. Did you view
9 this as some kind of a foundation to work on for future
10 years?

11 A. Yes.

12 Q. Did you have an impression at this point --
13 we're at the end of the summer of 2004 nearly --
14 whether there could be a technical solution that could
15 be worked out?

16 A. Yes. I still believed there was. And I
17 still believe there is today. And this -- this did not
18 seem extraordinary to me to be doing this when you're
19 given the background of the types of litigation and the
20 time and resources that have been expended across the
21 west on this kind of issue. To be putting together a
22 technical team and trying to come up with the data and
23 information to share it once again. It forms the basis
24 for agreement. And it can form the basis for agreement
25 at any point along the way. It could form the basis

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1 for agreement at 5:30 this afternoon.

2 Q. And as you were at that point in the end of
3 irrigation year 2004, did Wyoming -- had Wyoming given
4 you any indication that they were inclined to go in
5 that direction of finding a solution given sufficient
6 technical data?

7 A. I thought it was possible. I really did. I
8 believed that there was a nature of water resource
9 management in the west that was changing. The
10 collaborative approach was getting much more accepted
11 and successful. And even Wyoming settled with
12 Nebraska.

13 And so it just seemed to me that there was --
14 that it was the right thing to be doing to be moving in
15 that direction. There was no question that the
16 settlement of Wyoming and Nebraska was based on a
17 tremendous amount of information that had been shared
18 and developed over a long period of time.

19 So to take the time to do what we were doing
20 here did not seem in any way extraordinary to me. It
21 seemed like exactly the right path we were going to go
22 down, frankly, regardless of what forum you ended up
23 settling the thing in. And my hope and fear to the
24 roots of my soul were that it would be outside of
25 court.

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1 Q. And just a final question here: As you're
2 moving towards what you optimistically think is going
3 to be a technical solution, did you withdraw your
4 request from 2004 for more water from Wyoming?

5 A. No.

6 Q. Did you withdraw your request from 2002 for
7 more water?

8 A. No.

9 Q. Did you withdraw your 2001 request for more
10 water?

11 A. No.

12 Q. And if there had been a 2000 call from one of
13 your staff, had you withdrawn that 2000 call?

14 A. No.

15 MR. SWANSON: I think that will probably be
16 it for today, Your Honor. And we'll pick up tomorrow
17 morning.

18 SPECIAL MASTER: Okay. Thank you,
19 Mr. Swanson. Just so that we have a sense of timing
20 going into tomorrow, do you have a sense as to how much
21 more direct examination you have of Mr. Stults?

22 MR. SWANSON: Basically, we're going to focus
23 on 2005 and 2006. So I think we're -- and I've got
24 about -- actually, I don't know if I have many more
25 exhibits. I'm looking at the joint exhibits that are

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1 already in the record. And maybe one or two more. So
2 I think we're probably half an hour, 45 minutes, would
3 be probably be my conclusion.

4 SPECIAL MASTER: Okay. And then after that,
5 you're planning on calling tomorrow Keith Kerbel. And
6 then assuming we get to him, Ken Smith?

7 MR. DRAPER: That's correct, Your Honor.

8 SPECIAL MASTER: Okay. And I understood from
9 prior conversations that Mike Roberts has had a family
10 emergency. And so you'll be putting him on later in
11 the presentation?

12 MR. DRAPER: That's correct, Your Honor. We
13 haven't heard when we'll be able to do that. But we'll
14 put him in the order as soon as we do.

15 SPECIAL MASTER: Okay. If not -- oh, if
16 there's nothing else that we need to discuss right now,
17 why don't we then adjourn for today. And we can go
18 down to the grand jury room now and take a look at that
19 and still give everyone ten minutes to gather up their
20 papers and get out of the courtroom or courthouse.

21 MR. SWANSON: Thank you, Your Honor.

22 (Trial proceedings recessed at
23 4:40 p.m., October 21, 2013.)

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REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 271, is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Laurel, Montana, this 10th day of February, 2014.



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