

No. 137, Original
IN THE SUPREME COURT OF THE UNITED STATES
VOLUME 4 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
9:03, Tuesday, October 22, 2013

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

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

1 APPEARANCES

2 FOR PLAINTIFF STATE OF MONTANA:

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

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

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

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

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

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APPEARANCES CONTINUED

FOR DEFENDANT STATE OF WYOMING:

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

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

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

FOR DEFENDANT STATE OF NORTH DAKOTA:

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

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1 TUESDAY, OCTOBER 22, 2013, 9:03 A.M.

2 SPECIAL MASTER: So good morning. Everybody
3 can be seated. So before we begin with continued
4 examination of Mr. Stults, are there any issues to
5 discuss this morning? There's nothing on my side.

6 MR. DRAPER: Good morning, Your Honor.

7 SPECIAL MASTER: Good morning, Mr. Draper.

8 MR. DRAPER: We were talking about the
9 courtroom logistics just now. And we wanted to alert
10 you to one thought that we're considering. That is for
11 tomorrow when we have to find another courtroom in the
12 afternoon, if we're going to have trial, it might make
13 sense, given the logistics of transferring down to the
14 jury room and setting up the technical aspects of
15 things and so on, to consider starting as early as we
16 can tomorrow morning, say, 8:30 instead of 9:00, and go
17 as long as the Court will let in here us given enough
18 time. If the Court really is requiring us to take our
19 boxes out, enough time to do that and not try to push
20 everything down there.

21 We're having a little trouble with a certain
22 witness for tomorrow afternoon. And the better part of
23 valor might be just to go as long as we can and then
24 shut it down for the day and take it up first thing the
25 next morning. But that's kind of a nascent thought at

1 this point, but I wanted to mention it.

2 SPECIAL MASTER: Okay. Mr. Kaste.

3 MR. KASTE: I think we'd be okay with the
4 idea of shutting down early on Wednesday rather than
5 moving everything into that space downstairs and just
6 trying to get organized for the next day in the
7 courtroom where we're going to be for the duration.

8 SPECIAL MASTER: That sounds fine. So what I
9 will do is as soon as I know when it is that we
10 actually have to be out of this courtroom tomorrow,
11 I'll let everyone know.

12 And I am fine if we want to take off tomorrow
13 afternoon. Because I realize that there's a lot of
14 moving around just for those couple of hours in the
15 afternoon. I'm also willing to start as early in the
16 morning as we can. I believe the courtroom itself or
17 the courthouse doesn't open up until 8:00 a.m., which
18 would probably suggest to me we can't probably start
19 any earlier than 8:30.

20 But, again, on those sort of questions, I'm
21 willing to leave it to counsel for Montana and Wyoming
22 to work out exactly what the schedule for tomorrow
23 should be once I know when we have to be out of this
24 courtroom. And from my standpoint, the key things will
25 be making sure we meet tomorrow morning and that we're

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1 out of here in plenty of time.

2 And, in fact, maybe with that in mind, if
3 people don't mind, we'll certainly go until 4:30 this
4 afternoon. And maybe we can even sort of push that a
5 little in order to get in some more time today. But
6 we'll see how the witnesses are coming along in that
7 particular point in time.

8 So, Mr. Stults, good morning. And you're
9 aware you're still under oath?

10 THE WITNESS: I am, Your Honor.

11 SPECIAL MASTER: Okay. Thank you. So, then,
12 Mr. Swanson, you can continue your direct examination.

13 MR. SWANSON: Thank you. Good morning, Your
14 Honor.

15 JOHN EDWIN STULTS (CONT.),
16 having been first duly sworn, testified as follows:

17 DIRECT EXAMINATION CONTINUED

18 BY MR. SWANSON:

19 Q. Good morning, Mr. Stults.

20 A. Good morning.

21 Q. I guess just to review where we left off
22 yesterday, we were discussing a series of messages,
23 e-mails, and letters that had been exchanged between
24 Montana and Wyoming in the summer of 2004 after
25 Montana's letter to Wyoming asking for more water. And

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1 I think we'll move to just a couple of documents that
2 will finalize that issue. And I don't think we'll take
3 too much longer this morning.

4 But in terms of where we go from here, I'd
5 ask you to look at an exhibit that you should have
6 before you. Exhibit Wyoming 139; do you have that?

7 A. I do.

8 Q. Can you identify it, please?

9 A. It's an e-mail -- printout of an e-mail on
10 the Montana e-mail system, State of Montana e-mail
11 system from Keith Kerbel to Jack Stults, Wednesday,
12 December 1st, 2004. The subject is Wyoming water.

13 MR. SWANSON: Your Honor, I'd move admission
14 of Exhibit Wyoming 139.

15 MR. KASTE: No objection.

16 SPECIAL MASTER: Exhibit W139 is admitted.

17 (Exhibit W139 admitted.)

18 BY MR. SWANSON:

19 Q. And, Mr. Stults, could you look at the item
20 that's numbered No. 1 and just read that No. 1, please?

21 A. "We placed a call for water on the Tongue.
22 Wyoming never placed a water commissioner on the main
23 stem of the Tongue all summer. They did some piddly
24 little survey on the water users and said -- they said
25 they screwed some down. How much and -- pardon me.

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1 How many and how much?"

2 Q. So this is a statement from Mr. Kerbel. Did
3 that agree with your understanding of the situation at
4 that time?

5 A. Yes.

6 Q. And when it mentions the main stem of the
7 Tongue --

8 A. Well, can I?

9 Q. Go ahead.

10 A. I didn't know what the situation was until he
11 reported back to me.

12 Q. And when he mentions the main stem of the
13 Tongue, can you just describe the situation there?

14 A. Say that again, please.

15 Q. Mr. Kerbel's statement is that Wyoming never
16 placed a water commissioner on the main stem of the
17 Tongue all summer. Can you just describe the situation
18 as you understand it?

19 A. Well, Keith was involved in communication
20 with his counterparts in Wyoming and had -- and had the
21 instruction from me to keep me informed of what he was
22 discovering. And this is his report back. I'm not --
23 maybe I'm not clear on your question.

24 Q. Did you know whether there was post-1950
25 irrigation going on in Wyoming on the main stem of the

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1 Tongue?

2 A. I had been told that there was.

3 Q. And if you look at item No. 2, and just read
4 that item, please.

5 A. "I forget, but need to research how much
6 water is post-1950 storage in Wyoming, which should
7 have been turned down to us. Roy forecasted there
8 would be an additional runoff of 10,000 to 20,000
9 acre-feet of water which we never received. I don't
10 perceive this as a good faith effort on their part."

11 Q. And do you recall -- do you know who Roy is?

12 A. Roy, I believe, is the -- frankly, his last
13 name just escapes me. But he worked for the Natural
14 Resource Conservation Service, and he was a specialist
15 in surface water monitoring in Montana and Wyoming.

16 Q. And I guess the last statement from
17 Mr. Kerbel, about "I don't perceive this as a good
18 faith effort on their part," did you agree or disagree
19 with Mr. Kerbel's statement?

20 A. I was not surprised to have him say that.

21 Q. If we could look at the next item, which is
22 Exhibit Montana 161.

23 A. I have it.

24 Q. Can you identify it, please?

25 A. It's an e-mail -- printout of an e-mail from

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1 Jack Stults to Bob Davis, Pat Tyrrell, William Horak,
2 dated Tuesday, March 1st, 2005. Subject line is
3 Montana's recommendations on YRCC 12/6/2004 draft
4 minutes.

5 Q. And there's a second page of this exhibit.
6 And I'm looking at the -- I guess, the very bottom --
7 below your name, Jack, on the e-mail that shows a
8 December 6, 2004, meeting draft minutes. Does that
9 indicate an attached document to this e-mail?

10 A. Yes. That's the -- an indicator attached by
11 the system itself identifying that there was an
12 attachment. Also up in the heading, the heading
13 identifies an attachment.

14 Q. And the second page of the exhibit, is that
15 the attached document?

16 A. Yes.

17 MR. SWANSON: Your Honor, I move admission of
18 Montana Exhibit 161.

19 MR. KASTE: No objection.

20 SPECIAL MASTER: Thank you. Exhibit M161 is
21 admitted.

22 (Exhibit M161 admitted.)

23 BY MR. SWANSON:

24 Q. Mr. Stults, can you just explain the context
25 of this document?

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1 A. I can. We had a December meeting, the annual
2 formal meeting of the commission. And the secretary of
3 the commission is the representative from the USGS; in
4 this case it was William Horak. And USGS drafts up a
5 set of minutes for the meeting and distributes them to
6 the Montana and Wyoming commissioners. And we review
7 them and send in comments for changes, deletions,
8 additions to the minutes.

9 Q. And looking at these numbered paragraphs, 1
10 through 5, can you just generally characterize what
11 you're trying to communicate in these paragraphs?

12 A. We had a number of additional items we wanted
13 included. It's mostly additions, it looks like, to the
14 minutes.

15 Q. What was the subject of these additions?

16 A. Mostly it's talking about the fact that we
17 believe that -- or that at the meeting, we did discuss
18 factors having to do with our belief that water was not
19 being delivered to Montana in the way that it should
20 have been.

21 Q. So why was it necessary for you to ask to
22 insert these into the minutes?

23 A. There was -- these items were not appearing
24 at all in the minutes. And they had been discussed.
25 So we felt these are substantive, and there should be

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1 language in the minutes reflecting that discussion.

2 Q. Did you ever find out why they were not
3 include in the first draft by the secretary?

4 A. I -- no, I don't think I did. I think we
5 just made our comments and went from there. I can say,
6 however, it was not unusual for the USGS to somewhat
7 avoid -- maybe that's too strong a word -- putting
8 things into the minutes that were -- they considered
9 elements of a controversy.

10 Q. So can you just explain that statement? They
11 were avoiding putting --

12 A. It was the pattern of the USGS to avoid
13 getting in between the two states in any kind of
14 controversy. They routinely abstain from voting. And
15 the minutes were usually very generally stated. And so
16 it was not surprising to us that we would have to make
17 or suggest to them that these things be added in.

18 However, I didn't -- this is personal
19 impression, and -- impression of others as well. I can
20 say that. But I did not discuss it explicitly with the
21 USGS representative.

22 Q. So do you know if the 2001 and 2002 meeting
23 minutes had similar discussions in their minutes or
24 whether those items had also been left out?

25 A. I can't remember.

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1 Q. But you made a point in this year of
2 inserting these into the minutes; correct?

3 A. Correct.

4 Q. But you didn't make a point of inserting them
5 into the minutes in 2000, 2001, 2002; can you tell us
6 why?

7 A. We had sent the letter for the call in July.
8 And the copies of that letter went to the USGS. So
9 they're part of the record of the commission. So this
10 was a continuation of what had already been a
11 documented discussion, a written exchange. And so it
12 seemed to me that because of that, you needed to have
13 to continue the paper trail, the written documentation,
14 of this discussion.

15 Q. And do you know for certain whether the
16 discussions of Montana's earlier years of asking for
17 water, whether they were done on the record at the USGS
18 meetings or whether they were done off the record?

19 A. As I said yesterday, my memory is that we did
20 discuss it at the commission meetings and discussed
21 it -- some aspects of it around the table on the
22 record, and other times we discussed it on break and
23 also discussed it in other circumstances, other venues
24 and other times that we got together in other places
25 for other things.

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1 Q. I'm going --

2 A. And --

3 Q. Go ahead.

4 A. And as I explained yesterday, it was my
5 intent at that time to try to work collaboratively and
6 not move in the direction of implicating the language
7 of the compact. So the fact it was not explicitly
8 stated in the minutes was actually something that I
9 felt was more consistent with that strategy than it
10 would be to have it in the minutes.

11 It seemed to me that if I was trying to
12 continue to move things towards the scientific approach
13 and away from the compact, but not having it explicitly
14 stated in the minutes at this early stage of this
15 strategy, was more consistent with moving it towards
16 the scientific approach and away from the approach that
17 ended us up in the point that they'd been in in the
18 '80s of debating over the language of the compact.

19 Q. I'm going to ask you to look at a document
20 that's going to come up on the screen. It's Montana
21 Exhibit 552. It was introduced yesterday. And I'm
22 just going to ask you a couple questions about it. So
23 I didn't provide you a hard copy. This was a document
24 that came up when Mr. Tim Davis was doing his
25 testimony.

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1 A. I remember the discussion.

2 Q. And did you have -- do you have any
3 involvement or history with the idea of DNRC helping
4 Montanans resolve water disputes?

5 A. I did. At the time of this -- the first
6 draft of this was developed, I was the regional offices
7 supervisor. I believe I was the regional offices
8 supervisor for the division. And Gary Fritz was the
9 division administrator. And he asked me to convene a
10 committee and recommended people to be on it to draft a
11 dispute resolution. We called it a dispute resolution
12 policy at that time. And that was the first initial
13 draft of what this has since become. And it is still
14 quite consistent with what we put together initially.

15 Q. Do you recall the conversation yesterday
16 about contacting your neighbor first before you contact
17 the state?

18 A. I do. And I remember that the discussion by
19 the committee was that we wanted to make sure that we
20 put in the document that it was the expectation of the
21 Department of Natural Resources that if they had a
22 conflict, that the water user who was concerned would
23 initially contact his neighbor immediately to try to
24 get the resolution to the issue between the two of
25 them.

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1 The motivation for having that in the policy
2 was that -- kind of three-fold. The two should be
3 talking so that they can get along. It's generally the
4 position of the State of Montana that things are
5 handled better locally than they are centrally. And
6 thirdly, water is a quantity that fluctuates so much
7 and so -- can fluctuate so quickly that the more you
8 can get things down on the ground at the spot and dealt
9 with immediately, the more likelihood you're going to
10 have a resolution that is fast enough to deal with the
11 fluctuations of the water supply.

12 Q. And we know from the discussion yesterday
13 that when disputes among water users goes to court or
14 to the agency, that they require documents and
15 something in writing. Did the agency require that
16 first communication between water users to be in
17 writing?

18 A. No. No. As a matter of fact, I think --
19 well, the picture I had in my mind was that it would be
20 a phone call or they would meet at the fence line.

21 Q. And do you recall the discussion yesterday
22 from Mr. Kaste about calls from Wyoming to Montana --
23 correction. From Montana to Wyoming as kind of an
24 analogy to this same system?

25 A. Yes.

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1 Q. And who would you consider Montana's neighbor
2 to be in this dispute over the Tongue River?

3 A. Wyoming.

4 Q. So is it consistent or inconsistent with your
5 policy of how to handle water disputes in Montana in
6 terms of how you talk to Wyoming?

7 A. Well, it -- it's completely consistent. The
8 idea that -- I mean, the discussions I've had
9 yesterday -- I think we talked about the fact that
10 Keith Kerbel was speaking directly with Mike Whitaker.
11 And it was my expectation, and I know -- I'm confident
12 that he carried it out, that he would be talking to
13 Mike as neighbor to neighbor and trying to tell Mike
14 that this was the situation and the situation needed to
15 be corrected.

16 Q. Thank you. And I think we'll start talking
17 about 2005 a little bit. Do you recall 2005, the water
18 conditions, whether they were wet or dry?

19 A. I don't with any specificity. But I know
20 that it was normal or near normal. It was an anomaly
21 in this extended drought. We'd been dry since 2000,
22 '1, '2, '3, '4. And then we had this moister year.
23 But I can't remember if it justifies being called wet.
24 But it was a significantly better water year. And then
25 we went back into drought '6, '7.

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1 Q. Do you recall if Montana made a call on
2 Wyoming in 2005?

3 A. We did not.

4 Q. I ask you to look at Exhibit Wyoming 145.

5 A. I have it.

6 Q. Can you identify it, please?

7 A. It's a printout of an e-mail from Patrick
8 Tyrrell to Jack Stults dated Friday, September 9th,
9 2005. And the subject line is budget requests.

10 MR. SWANSON: Your Honor, I move admission of
11 Exhibit Wyoming 145.

12 MR. KASTE: No objection.

13 SPECIAL MASTER: Exhibit W145 is admitted
14 into evidence.

15 (Exhibit W145 admitted.)

16 BY MR. SWANSON:

17 Q. Now, Mr. Stults, if you look at the next two
18 pages of that exhibit, can you just explain what you
19 understand those to be? They appear to have been sent
20 from Mr. Tyrrell as well.

21 A. It is a copy of what looks like a formal
22 budget request within the Wyoming state budgeting
23 system from the state engineer's office asking for what
24 looks like \$200,000 for Yellowstone River Compact
25 Administration.

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1 Q. And do you recall if Wyoming ever received
2 this funding to do this project?

3 A. I can't remember whether they received the
4 200,000. But I do have memory that they received some
5 funding about this time in addition to their regular --
6 or the continuing budget.

7 Q. So what was your view of working with
8 Mr. Tyrrell in 2005? Were you trying to work towards a
9 solution still, or were you -- had you lost the
10 optimism that you talked about yesterday in your
11 testimony?

12 A. No. I was still optimistic that we could
13 come to a conclusion that was positive for both states.
14 When I said I lost my optimism, when I mentioned that
15 yesterday, that was that we would get water delivered
16 to us in 2004.

17 Q. If you would look at the very bottom of the
18 second page. It's actually the numbered page 1 of the
19 attachment.

20 A. Okay.

21 Q. And, really, in the last three, four lines of
22 that, do you see the sentence that begins "Montana has
23 stated that litigation"?

24 A. Yes, I do.

25 Q. Could you just read that -- actually, that

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1 and the following sentence?

2 A. "Montana has stated that litigation is being
3 contemplated to force Wyoming to deliver water to their
4 pre-1950 water rights. The work that would be done
5 jointly under this funding request might alleviate this
6 litigation threat once the number of acres under
7 production in both states and with both pre- and
8 post-Compact water rights are determined. Determining
9 Wyoming's exposure, if any, under the compact depends
10 upon how the two states can work together under the
11 joint contract."

12 Q. So as we finish 2005 and go into 2006, was it
13 your understanding that the seriousness of this had
14 been communicated to Wyoming?

15 A. Yes.

16 Q. Do you know if that -- and you may not know
17 this. Do you know from communications with Wyoming
18 whether that affected how they responded to requests
19 for water in 2006?

20 A. Say that again, please.

21 Q. Do you know if Wyoming communicated to you
22 whether they were changing how they respond to your
23 requests in 2006 because of the discussion of possible
24 litigation?

25 A. I don't believe so. I don't believe they --

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1 I don't believe I had an impression that they were
2 going to change it. And I don't think they were giving
3 me the impression that they were going to change it.

4 Q. If I could ask you to look at the next
5 exhibit. It's Wyoming 146.

6 A. However, let me clarify that.

7 Q. Go ahead.

8 A. At this point in time, I don't remember -- I
9 don't remember anything especially clearly. But my
10 memory is that they -- it wasn't that they were saying
11 we're not going to -- you know, forget it, you're not
12 getting any water. It was more that we are down this
13 different path. And I hadn't gotten any general
14 indications that they were inclined to change their
15 behavior.

16 Q. Thank you. Can you look at Exhibit Wyoming
17 146, please?

18 A. I have it.

19 Q. Can you identify this document?

20 A. Looks like memorandum to Pat Tyrrell and Bill
21 Horak from Jack Stults, dated February 23rd, 2006. And
22 I can't really tell whether it's an e-mailed document
23 or not.

24 Q. Can you look at the following pages that are
25 attached to that and identify what those are?

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1 A. What -- let's see. I can't tell if they are
2 attached or not. Hang on a second. It's a series
3 of -- of tables. And it's entitled Tongue River
4 watershed permitting stakeholder meeting requested
5 information. December 6, 2005.

6 Q. Just for clarification, there's some poor
7 quality pages there. And in your letter, you say the
8 fax machine cut off part of the table. So I think that
9 explains that.

10 MR. SWANSON: But, Your Honor, I move
11 admission of Exhibit Wyoming 146.

12 MR. KASTE: No objection.

13 SPECIAL MASTER: Exhibit Wyoming 146 is
14 admitted into evidence.

15 (Exhibit W146 admitted.)

16 BY MR. SWANSON:

17 Q. And, Mr. Stults, I just wanted to ask you a
18 couple questions about the information you're seeking
19 here. If you look at the heading A on page 1.

20 A. I've got it.

21 Q. That first paragraph, could you just read the
22 first sentence? You may end up needing to read the
23 whole paragraph. But go ahead and read the first two
24 sentences, and I'll ask you about that.

25 A. "For a number of wells, prior minutes had

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1 identified 20,000. But that is an old number, and it
2 is not clear whether this is basin-wide or specific to
3 certain major tributaries such as the Powder. What was
4 the total number as of 2005 for each major drainage in
5 the Yellowstone Basin?"

6 Q. And I guess I should have clarified at the
7 beginning that we're talking about coalbed methane
8 wells.

9 A. I see that.

10 Q. And then if we look at the next two
11 sentences -- you could look at those, and I'm going to
12 ask you just about your understanding of what
13 information you were seeking about water from CBM
14 wells.

15 A. Well, the memo is talking about trying to get
16 a handle on as precise as possible number of wells and
17 the amount of water and outflows from those coalbed
18 methane development wells.

19 Q. And going down to heading B, it's farther
20 down the page, regarding the amount of water being
21 produced.

22 A. I have it.

23 Q. If you could just read those first several
24 sentences. And you can stop where it begins talking
25 the Ruckelshaus report.

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1 A. "The Wyoming DEQ said that 58 CFS was the
2 cumulative amount of water being produced from the
3 wells. But if we divide that out by the two -- pardon
4 me -- the 20,000 wells, it comes out to just
5 1.3 gallons per minute per well, which is not
6 consistent about statements of average water production
7 per CBM well. Based on past information from Wyoming,
8 we understand the range of water produced to be about 5
9 to 15 GPM per well. This would equate to a total
10 discharge of from 290 to 800 CFS."

11 Q. So can you just summarize what your concerns
12 were at this time regarding CBM relevance in Wyoming?

13 A. Coalbed methane development was a new
14 phenomenon. It was rapidly expanding, and it was
15 becoming very large. And it was -- it's a process that
16 involves an extraction of a significant amount of
17 water, and the discharge of that water as well as
18 the -- that's primarily what we were concerned about
19 is, again, you're dealing with a large activity that's
20 moving a large amount of water. So our concern was
21 what are the implications of that in terms of water
22 availability, also in terms of long-term viability of
23 the aquifer recharge, surface water flows, and also the
24 implications in terms of any water quality issues?

25 My concern about water quality is it's not

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1 explicitly stated in the compact, but were something to
2 happen that meant that the beneficial uses of the water
3 that is in the compact could not be exercised, then it
4 seemed to us that it would implicate the compact.

5 Q. Do you know if Wyoming ever provided this
6 complete information that you were asking for?

7 A. I cannot remember. I suspect that they did
8 because generally our exchange of information was going
9 very well.

10 Q. Now turning to the year 2006. Do you recall
11 the water conditions in 2006?

12 A. Not with any precision. But it was another
13 very dry year. We had returned to the type of pattern
14 that we were seeing in the drought years that preceded
15 2005.

16 Q. And were you monitoring water conditions and
17 water supply conditions on the Tongue River as you went
18 into 2006?

19 A. Yes. As we had through 2005. We never
20 stopped.

21 Q. You mentioned yesterday that you were
22 involved in the Drought Advisory Council in all those
23 years?

24 A. That's correct.

25 Q. Do you recall if the Drought Advisory Council

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1 was still meeting or had reconvened?

2 A. It was. I believe we may have taken a one-
3 or two-month break during 2005. There was a time at
4 which we took a little break. But it was only very
5 temporary. And we were still back -- we were back into
6 meeting monthly in 2006.

7 And the Drought Advisory Committee was
8 chaired by the lieutenant governor. I was kind of the
9 lead staff. And then the Water Management Bureau from
10 my division provided staff support to the group.

11 Q. So just to reiterate, the Drought Advisory
12 Committee, were you focused on water supply as well as
13 forecasts of water supply statewide?

14 A. Yes.

15 Q. And you testified -- I couldn't recall if you
16 testified 2000 or 2001 was when you began actively
17 working in that committee.

18 A. I was appointed -- the committee had been in
19 place for decades. And it was typical that the
20 division administrator was the lead representative from
21 the agency on the committee and that it was -- the
22 committee was always staffed by the DNRC.

23 And so even when we got a new lieutenant
24 governor, we would still meet. As a matter of fact,
25 the committee was required to meet at, I think,

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1 semiannually in statute. The committee is a statutory
2 entity. And it was required by statute that it meet, I
3 think, at least twice a year, and one of them was
4 explicitly to be at a certain time in the spring.

5 But because of the drought conditions that
6 came in, we started meeting regularly, I believe, in
7 2000.

8 Q. What kind of updates would you get -- what
9 kind of information would you look at at these
10 meetings?

11 A. We would get the Natural Resource
12 Conservation Service, USDA would give us streamflow
13 information across the entire state. We would get --
14 USGS would give us streamflow information. We'd get
15 reports from the Bureau of Reclamation about
16 reservoirs. We'd get reports from the Agricultural
17 Statistic Service on crop yields. We would get reports
18 from the -- from the National Weather Service on
19 climate and weather patterns, and also broader things,
20 such as global climate patterns that had effect on
21 water availability in Montana, such as the southern
22 oscillation index and things like that.

23 Q. So as you're receiving information through
24 this committee, would you have focused on the Tongue
25 River during those years?

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1 A. The committee did not focus on the Tongue
2 River. But the information that was provided at the
3 committee was useful for the Tongue -- for management
4 of the Tongue.

5 Q. So in 2006, that would have remained the
6 same, the Drought Advisory Committee and the
7 information you were receiving?

8 A. Correct.

9 Q. In 2006, do you have -- did you have an
10 opinion whether Montana was receiving all of its
11 pre-1950 water rights on the Tongue River?

12 A. In 2006, once again, we were not.

13 Q. And did you have an opinion on whether any
14 activity on the Wyoming side of the border was
15 contributing to that?

16 A. Just much the same as what -- what I remember
17 is it was much the same as what we'd had before. That
18 it was mostly anecdotal, but that there was more
19 certainty among the people that were telling us about
20 it because they had been watching it so closely for so
21 long and had a little bit -- what I remember is that
22 there was more talking about this area by Dayton and
23 that area by Goose Creek, things like that.

24 Q. Who was telling you?

25 A. The same as what I mentioned yesterday. It

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1 was my own staff, the water users in the area.

2 Q. Mr. Kerbel's message that we looked at a
3 minute ago said Wyoming did not regulate the main stem
4 of the Tongue River in 2004. Do you know whether that
5 changed in 2006?

6 A. I can't remember whether it did or not.

7 Q. Do you know if the Tongue River Reservoir
8 filled in 2006?

9 A. It did not.

10 Q. Can you say that again? I'm sorry.

11 A. What I remember is it did not.

12 Q. It did not. Okay.

13 Do you know if you asked Wyoming verbally in
14 2006 to release more water to Montana?

15 A. Well, consistent with what I was saying
16 yesterday, we were continuing to work on the issue and
17 putting quite a bit of effort into it. And the effort
18 was increasing. And the issue that we were dealing
19 with was the fact that Montana felt that there was more
20 development -- or more use of water in Wyoming that was
21 not -- not proper and that that -- the water use should
22 not be taking place and that that water should be
23 crossing the state line.

24 Q. I'm going to ask you to look at -- go ahead.

25 A. Again, I may not have explicitly said, "close

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1 down your headgates and release the water to us." But
2 there was just no question that Montana was in a
3 position of trying to get Wyoming to reduce its use so
4 that water could cross the state line. I'm convinced
5 that that would be obvious to any water manager.

6 Q. I'm going to ask you to look at Joint
7 Exhibit 68. And this document was admitted at the
8 beginning of the trial.

9 A. I have it.

10 Q. Just ask if you could identify that once you
11 get it before you.

12 A. It's a letter on Department of Natural
13 Resource and Conservation letterhead, State of Montana,
14 to Pat Tyrrell from Jack Stults, dated July 28th, 2006.

15 Q. So is this the 2006 call letter to Wyoming?

16 A. Yes.

17 Q. And in the first paragraph, could you just
18 read that very first sentence?

19 A. "I am writing today to request that Wyoming
20 administer the waters of the Tongue and Powder Rivers
21 by curtailing post-1950 diversions or storage to the
22 extent required by the Yellowstone River Compact
23 ("Compact") under current conditions. I was unable to
24 contact you by telephone on Friday to let you know this
25 was coming. But I will try again on Monday morning."

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1 Q. Now, can you just talk about the conditions,
2 I guess, at that point? I'm looking at the -- really,
3 the second sentence under the Tongue River heading. It
4 begins with "the river flow." Do you see that
5 sentence?

6 A. I do.

7 Q. Could you just read the next two sentences?

8 A. "The river flow is now about one-fourth of
9 the previously recorded low and is supporting only the
10 first right on the river. We were unable to fill the
11 reservoir this year in part, we believe, because during
12 the normal filling period, Wyoming was in a 'free
13 river' situation and had no regulation of its post-1950
14 water uses. Article 5A of the Yellowstone River
15 Compact provides that each state is entitled to satisfy
16 it's pre-1950 water rights before either state may
17 supply a supplemental or post-1950 uses."

18 Q. Actually, go ahead and read the next
19 sentence, and then I'll ask you several questions.

20 A. "As a practical matter, that means that the
21 upstream state, Wyoming, cannot allow its post-1950
22 users to take their water if pre-1950 users in Montana
23 are not being satisfied."

24 Q. So at the beginning of that statement, it
25 says the low flow is supporting only the first right on

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1 the river; what does that mean?

2 A. It means that there is not enough water for
3 any other water user on the Tongue River other than the
4 very most senior right.

5 Q. And then going down a couple lines when
6 you're talking about the reservoir, you say, "Wyoming
7 was in a free river situation." You have that in
8 quotes. Can you tell us what that "free river"
9 statement means?

10 A. I'm not sure where the term came from. But
11 what we mean by it is that it's not under regulation.
12 There's no water commissioner on it. There are no
13 other kinds of officials that are -- or no mechanism in
14 place that's actually regulating, administering,
15 admeasuring and allocating water formally, according to
16 priority.

17 Q. And then going to the very bottom of that
18 paragraph, the sentence beginning "the status of the
19 river."

20 A. I have it.

21 Q. Could you read that to the end of the
22 paragraph, please?

23 A. "The status of the river as of July 1st,
24 2006, is indicated in the enclosed affidavits. Flows
25 since then have been as low as 10 CFS at the state line

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1 gauge while the Dayton gauge was at 67 CFS and the
2 Monarch gauge at 13 CFS. This is consistent with
3 Wyoming's statement at the compact commission meeting
4 in April that Wyoming does not regulate any uses on the
5 main stem."

6 Q. What do you mean by that statement that this
7 is consistent with not regulating the main stem?

8 A. I can't remember the explicit statements
9 being made at the compact commission. But from this,
10 it just means that they are -- there must have been an
11 exchange at the commission where they were asked or
12 volunteered that they do not regulate uses on the main
13 stem.

14 Q. And when you say "the Dayton gauge," is that
15 the Dayton, Wyoming, gauge?

16 A. Yes.

17 Q. And then if we could go to page 2 of that
18 document. In that first full paragraph, if you could
19 read those first two full sentences.

20 A. "Wyoming is required by the compact to
21 regulate its post-1950 uses on the Tongue, including
22 uses on the main stem, until Montana's pre-1950 uses
23 are satisfied. From the information provided at the
24 April meeting, we understand that there is stored water
25 in the headwaters of the Tongue that is post-1950 and

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1 was stored while Montana's pre-1950 uses were being
2 shorted."

3 Q. Now, I'm going to refer back to the letter
4 from 2004, which is Joint Exhibit 64.

5 A. I have it.

6 Q. If you could look at page 2 of that letter.
7 There's a large paragraph that's below the small
8 paragraph that's headed "Clark Fork of the
9 Yellowstone." Do you see that large paragraph?

10 A. I do.

11 Q. So there's a sentence in there "we are
12 calling."

13 A. I see it.

14 Q. Could you just read that sentence, please?

15 A. "We are calling for all pre-1950 junior water
16 in Wyoming to satisfy our senior pre-1950 water on the
17 Tongue and Powder Rivers."

18 Q. So that language is slightly different than
19 the 2006 letter. Do you recall why the difference?

20 A. To my mind the difference is slight, but
21 there is a difference. And, frankly, I don't remember
22 precisely why the difference.

23 Q. But I guess as a fundamental nuts and bolts
24 matter, did it matter to you where the additional water
25 came from so long as there was more water to satisfy

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1 Montana?

2 A. No, it didn't matter at all. As a matter of
3 fact, they could do whatever they wanted to. They
4 could curtail whatever they wanted to. Didn't matter
5 to us as long as there was water coming across the
6 state line sufficient to satisfy our prior rights. And
7 whatever they felt that they had to do on their side to
8 do it was their business.

9 What the letter here is doing is it's trying
10 to change their behavior, which is what you do with
11 almost any letter you send, is you're trying to express
12 your perspective, say something that's accurate,
13 something that you have confidence in that you hope
14 will change the behavior of the person that's receiving
15 the letter.

16 Q. And then I'm going to ask you to look at
17 several pages that are later in this letter.

18 MR. SWANSON: And, Your Honor, this is the
19 same situation as yesterday. There are two affidavits
20 attached to this letter that were affidavits submitted
21 with this letter to Wyoming, and they were previously
22 admitted as part of Joint Exhibit 68. They're not new
23 affidavits that I'm asking to introduce this morning.

24 BY MR. SWANSON:

25 Q. Mr. Stults, there's an affidavit by Art

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1 Hayes, Jr.; do you see that affidavit?

2 A. I do.

3 Q. Could you go to page 4, please, paragraph 13?

4 A. I have it.

5 Q. Could you read paragraph 13, please?

6 A. "Water quality sufficient to meet the --

7 Q. I'm sorry. We're on the wrong -- are you on
8 Joint Exhibit 68, the 2006 letter?

9 A. Oh, I'm on 64. Sorry. Okay. I have the
10 Hayes exhibit, or affidavit, and I'm on page 4. And
11 you said paragraph 13?

12 Q. Please, yes.

13 A. "June 17th, 2006, is the last date that the
14 river contained sufficient water to satisfy the 1914
15 Montana decreed rights in the Tongue River. By
16 July 15th, 2006, the river had dropped to a flow
17 sufficient to satisfy only the first water right on the
18 Tongue River."

19 Q. And then if you could go to the next
20 affidavit, which is by Mr. Charles Kepper; do you see
21 that document?

22 A. I have it.

23 Q. If you could go to page 2 of his affidavit.
24 Page 2, paragraph 5.

25 A. Okay.

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1 Q. And paragraph 5, the second sentence, if you
2 could read from there to the end of the paragraph.

3 A. "The Tongue River flow dropped below the
4 amount of decreed water being called for on June 17th,
5 2006. And so I began to enforce the priorities on the
6 river on that day. On June 21st, 2006, the flow at the
7 state line was 233 CFS. That is enough to satisfy only
8 the first six water rights of the 22 in the 1914
9 decree."

10 Q. And could you read the first two sentences of
11 paragraph 6, please?

12 A. "On July 19, 2006, there is only 15 CFS
13 coming into the reservoir. That is only enough to
14 satisfy the first right of the 22 in the decree. The
15 first right is for Nance Cattle Company, priority date
16 July 6, 1886, for 10.49 CFS. I delivered that amount
17 to Nance Cattle Company headgate and allow the
18 remainder, less than 5 CFS, to travel downstream for
19 the second right in the decree. T & Y Ditch
20 Company" -- or -- then it says, "7 and Y Ditch has an
21 August 9, 1886, right for 187.5 CFS. Due to conveyance
22 losses, T & Y is now receiving essentially no water at
23 all from the decree."

24 Q. And is it likely that that 7 and Y Ditch is a
25 typo, and that's supposed to say T & Y Ditch?

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1 A. That's what I would guess.

2 Q. I mean, is this common on the Tongue River
3 that flows would change and drop this much in the
4 summer?

5 A. This is extraordinarily low. I can't
6 remember what the flow patterns are of the Tongue
7 River. And I'm not the best person to be answering
8 that question in terms of what are the historic low
9 patterns of the Tongue River. But this is
10 extraordinarily low.

11 Q. And you retired from the department shortly
12 after this letter; is that correct?

13 A. I did. A few weeks later.

14 Q. And was the reason unrelated to your
15 testimony today?

16 A. Absolutely. Completely.

17 Q. So just in summarizing and recapping your
18 years dealing with this, do you remember any time when
19 Wyoming responded favorably to your requests for water
20 and asked -- and said, yes, we'll find a way to give
21 Montana more water for its pre-'50 rights?

22 A. No, not at all. There was never an instance.

23 Q. And in the 2000, 2001, 2002 era when you were
24 verbally and your staff was verbally asking Wyoming for
25 water, was it clear what you were asking for, or was it

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1 something that could be misunderstood or
2 misinterpreted?

3 A. I believe at the time, and I believe today
4 that they knew exactly what I was concerned about, both
5 through statements and actions.

6 MR. SWANSON: Your Honor, if I can have a
7 minute to confer with my co-counsel, I may be done with
8 direct.

9 SPECIAL MASTER: You may.

10 MR. SWANSON: Your Honor, I'll be done with
11 direct at this point and then just request the
12 opportunity for redirect.

13 SPECIAL MASTER: Okay. Thank you very much,
14 Mr. Swanson.

15 So I am going to have some questions for
16 Mr. Stults. But I actually think that rather than how
17 I've done it with the prior witnesses, that it would
18 probably end up being more time efficient for
19 Mr. Kaste, you, to have an opportunity to cross-examine
20 at this point. And then before you sit down from your
21 cross-examination, then I'll ask my questions.

22 Can we go off the record, though, for one
23 second.

24 (Discussion held off the
25 record.)

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1 SPECIAL MASTER: Mr. Kaste.

2 MR. KASTE: Are we ready?

3 SPECIAL MASTER: We are.

4 CROSS-EXAMINATION

5 BY MR. KASTE:

6 Q. Okay. Good morning, Mr. Stults.

7 A. Good morning, Mr. Kaste.

8 Q. How are you?

9 A. I'm fine. And you?

10 Q. Ready to be done. We have a lot to talk
11 about, unfortunately. I want to talk to you about your
12 conversations with the folks in Wyoming between 1997
13 when you started and 2003. All right?

14 In your conversation with the folks from
15 Wyoming, during this period of time, before 2004, isn't
16 it true that you were not seeking to enforce the
17 Yellowstone River Compact but rather to work out a
18 solution informally to maximize the resource?

19 A. Broadly stated, yes.

20 Q. Okay. And, in fact, you avoided using
21 certain terms like "call" in your communications with
22 Wyoming before 2004, didn't you?

23 A. I -- I don't know if I ever used the word
24 "call" in conversations saying I'd like to avoid a call
25 or something like that. But I did -- I never

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1 explicitly said Montana is calling for water.

2 Q. And you never explicitly said Montana is
3 demanding that you curtail your diversions, did you?

4 A. Not that phrase.

5 Q. Not that phrase --

6 A. But I was saying things that with respect
7 to -- especially with respect to storage and with
8 respect to post-1950 water, that it was taking water
9 that -- or it was taking water that should have been
10 released to Montana.

11 Q. A lot of those communications happened after
12 the irrigation season, didn't they, during commission
13 meetings where you spoke to Mr. Tyrrell and Ms. Lowry
14 and during Western States Water Council meetings when
15 you had the opportunity to speak with them; isn't that
16 right?

17 A. That's correct.

18 Q. So if there's a meeting in December, you're
19 not really asking us to take action with regard to
20 irrigation rights in Wyoming that happened in the past,
21 are you?

22 A. No. Certainly not that happened in the past.
23 But we were in a long-term drought that I had every
24 belief -- or I had all the scientific knowledge telling
25 me it was going to continue and so, therefore, continue

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1 to be focused on that issue year-round was appropriate.

2 Q. And what you wanted to do, if I understand
3 right, is you wanted the parties to get together and
4 kind of work out a system, sort of outside of the
5 compact, to deal with this drought; isn't that right?

6 A. Well, not kind of. That's explicitly what I
7 was hoping we'd be able to do consistent with what we'd
8 done in Montana and what other states had done around
9 the west in terms of coming up with a scientific method
10 of marshaling water that would be able to get more use
11 out of the water through the basin and not be
12 explicitly tied to priority.

13 Q. So you wanted this system to distribute the
14 water in a way that didn't really take into account the
15 priority dates? Am I understanding that right?

16 A. It is not tied solely to priority date.

17 Q. Okay.

18 A. It's tied to where the water occurs and how
19 the water is used, how it returns to the source. And
20 that's not necessarily consistent with priorities. You
21 know, most priority dates around the west, the highest
22 priority -- the most senior priority date is often at
23 the mouth of a river, 'cause that's the area that was
24 first settled.

25 And so you have a system that, with a

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1 priority system, calls for that initial right that's
2 all the way at the bottom to be served completely
3 before anybody else gets up, gets their water. Well,
4 that can be very harmful to a community's economic
5 system if everybody has to shut down for the senior
6 right. So the hydrologic system can be -- or is -- not
7 that it can be. It is more beneficial to more people.

8 Q. And we can agree that there's a difference
9 between the system that you were interested in pursuing
10 and demand that Wyoming take action under the compact;
11 right?

12 A. I believe there was.

13 Q. I think I understand that the first time you
14 approached Montana's governor about making a call on
15 Wyoming was in the fall of 2003; is that correct?

16 A. I can't remember whether it was the fall of
17 2003 or the spring of 2004 or what, but...

18 Q. But it was relatively close in time to the
19 time where you sent Wyoming the letter in 2004? It
20 wasn't ten years before that or anything like that?

21 A. No, it certainly wasn't.

22 Q. And I have your deposition here if we need to
23 refresh your recollection. But it was fall 2003 or
24 spring 2004 where you first approached Governor Martz;
25 correct.

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1 A. I can't contradict that.

2 Q. Would it refresh your recollection to see the
3 answer you gave in your deposition?

4 A. Actually, it would.

5 Q. Okay.

6 A. I've covered a lot of ground, so I apologize
7 if I can't remember.

8 Q. That's fair enough. It's been a long time.
9 I have in my hand a copy of your deposition, which I'll
10 hand to you with the Court's permission.

11 SPECIAL MASTER: You have it.

12 BY MR. KASTE:

13 Q. You gave a deposition in this case on
14 April 25th, 2011; correct?

15 A. Correct.

16 Q. And Mr. Michael took your deposition;
17 correct?

18 A. Yes.

19 Q. Do you remember him being there; he's fairly
20 tall?

21 A. Yes.

22 Q. All right. And at that time, you were under
23 oath, of course.

24 A. Yes.

25 Q. Would you look with me at page 51 of your

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1 deposition? And as that page begins, you're in the
2 midst of an answer. But the last paragraph of that
3 answer -- are you on 51?

4 A. I am.

5 Q. All right. Do you see there's an answer
6 continuing from page 50? And the last page -- or the
7 paragraph of that answer says, "And so I did not
8 approach Governor Martz about this until I was at a
9 point where I was no longer confident in my ability to
10 get a collaboration between the two states. And that
11 would have been 2003, 2004, probably 2000."

12 And then Mr. Michael interrupts your answer
13 and says, "It certainly would have been before the
14 letter of May 18th, 2004."

15 And then your answer is: "Yeah, definitely.
16 Probably -- my guess is it probably would have been
17 fall of 2003. And there's probably some documents
18 someplace that --" and Mr. Michael interrupts again.

19 Does that help refresh your recollection
20 about when you first approached Governor Martz about
21 making a call on Wyoming?

22 A. Not with any more clarity than what's stated
23 here. This is clearly showing that I was having
24 trouble remembering exactly when it was.

25 Q. Fair enough. I'll take that back if that's

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1 all right.

2 Now, during the time that you were employed
3 by the State of Montana from 1997 through 2006, you
4 were Montana's compact commissioner; correct?

5 A. Correct.

6 Q. And you went to the commission meetings;
7 correct?

8 A. Correct.

9 Q. And you reviewed the draft record of those
10 meetings before it was signed; correct?

11 A. Correct.

12 Q. And you signed off on the Yellowstone River
13 Compact reports every year in your capacity as
14 commissioner; right?

15 A. I did.

16 Q. When you signed off on a report, was it
17 accurate?

18 A. To the best of my knowledge.

19 Q. To the best of your knowledge, if you signed
20 it, you made an attempt to ensure its accuracy;
21 correct?

22 A. Correct.

23 Q. All right.

24 MR. KASTE: Do you have the joint exhibits
25 with you, Your Honor?

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1 SPECIAL MASTER: I'm sure I have them in the
2 box.

3 MR. KASTE: That's all right. I can give you
4 a copy if you'd like.

5 SPECIAL MASTER: That would be excellent.

6 MR. KASTE: Unfortunately, it doesn't have a
7 staple.

8 SPECIAL MASTER: If it's a joint exhibit that
9 has already been used during Mr. Swanson's examination,
10 then I do have it in front of me. If it's a different
11 one, then I don't.

12 MR. KASTE: Different.

13 BY MR. KASTE:

14 Q. What I'm going to hand you is Exhibit J50.
15 The joint exhibit is the annual report for the 2000 --
16 year 2000. Okay. Mr. Stults, I handed you Exhibit
17 J50; do we agree that that's the annual report for the
18 year 2000?

19 A. Yes.

20 Q. For the Yellowstone River Compact Commission.
21 And if you turn to the first page, were you at the
22 meetings of the Yellowstone River Compact Commission in
23 2000?

24 A. Yes.

25 Q. And if you turn to the signature page.

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1 A. Okay.

2 Q. Did you sign this annual report?

3 A. I did.

4 Q. All right. There's nothing in this annual
5 report that says Montana made a call on Wyoming in the
6 year 2000, is there?

7 A. I haven't seen this report in a long time,
8 but I assume there isn't.

9 Q. There's something else interesting in this
10 report, and we're going to take a little divergence as
11 we talk through these reports. So if you'll turn with
12 me to page 9 in the back. And it's entitled "Tongue
13 River at Miles City, Montana." And does that contain
14 stream gauge data for Miles City, Montana?

15 A. Yes.

16 Q. So this shows every day of the year what the
17 stream gauge read at Miles City, Montana; correct?

18 A. Yes.

19 Q. And that's typical in these reports to have
20 this page identifying the streamflow at Miles City;
21 correct?

22 A. Correct.

23 Q. All right. I just want to look at a couple
24 of months here. For example, October, this would be
25 1999.

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1 A. Okay.

2 Q. Is that right? It's 1999 October?

3 A. Yes, it would have been.

4 Q. Okay. And so for the month of October in
5 1999, you can see day 1 through 31 what the flows are
6 at Miles City; correct?

7 A. I see it.

8 Q. And do you see any reported flows at Miles
9 City below 198 in that month, and that's in CFS?

10 A. No, I see one that's 198.

11 Q. Okay. What's the lowest flow in the month of
12 November?

13 A. It looks like it may be 230.

14 Q. Okay. And as we move into December, January,
15 February, March, April, are the flows consistently over
16 120, seems like the lowest number I see.

17 A. Well, the majority of December, January, and
18 February, are estimates. But they're 120 -- looks like
19 there's a couple 110s. That seemed to be the lower
20 range.

21 Q. And that's quite a few of them that are over
22 200 or 250 in, say, March, April?

23 A. Yes.

24 Q. All right. Now I'm going to hand you Joint
25 Exhibit 51. And is Joint Exhibit 51 the annual report

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1 for the Yellowstone River Compact Commission for the
2 year 2001?

3 A. Yes.

4 Q. All right. And did you attend the meetings
5 of the Yellowstone River Compact Commission in 2001?

6 A. Yes.

7 Q. Did you sign this report?

8 A. Yes.

9 Q. And is there any mention in this annual
10 report that Montana made a call on Wyoming in 2001?

11 A. Without reading it, I wouldn't be able to say
12 with certain, but I assume that there isn't.

13 Q. I'm happy to give you the time if you need
14 it. I don't want you to assume.

15 A. Just in scanning it, I don't see one.

16 Q. Fair enough. Can we look again at the Miles
17 City gauge data for the year 2001? The page number I
18 have on mine is page 9?

19 A. I have it.

20 Q. All right. And, again, this would show the
21 extreme flow at Miles City beginning in October of 2000
22 working its way through September of 2001; correct?

23 A. Yes.

24 Q. And if we look at the flow values at Miles
25 City between October and April, again, do we see values

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1 in the hundreds and 200s predominantly?

2 A. Yes.

3 Q. All right. Now I'd like to hand you Joint
4 Exhibit 52. I'm sorry there's so much paper for such
5 few questions. But it's a paperwork intensive case.

6 Joint Exhibit 52, is that a copy of the
7 Yellowstone River Compact Commission annual report for
8 the year 2002?

9 A. Yes.

10 Q. All right. Did you attend the meetings of
11 the Yellowstone River Compact Commission in 2002?

12 A. Yes.

13 Q. Did you sign this report?

14 A. Yes.

15 Q. Would you take a look through that annual
16 report and tell me whether it says anything about
17 Montana making a call on Wyoming in the year 2002?

18 A. Not explicitly a call, but there is a
19 paragraph on the bottom of page iii.

20 Q. Roman numeral iii; right?

21 A. Correct. Beginning with "the commissioners,"
22 if I may, can I read a little bit of it?

23 Q. Yes, please.

24 A. "The commissioners discussed the need for and
25 benefit of planning for the current and continuing

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1 drought situation and agreed to a meeting of technical
2 specialists in late March -- late March 2003." And
3 then I'll skip down a bit.

4 And it says, "The purpose of the meeting will
5 be to provide information and education to help the two
6 states better understand operations within the basins
7 and identifying possibilities for improving
8 operations." And then it goes on to more detail.

9 That is a statement that captures the fact
10 that we were concerned about water availability and
11 were working to try to improve water availability.

12 Q. Sure. And so --

13 A. Or improve -- yeah, improve water
14 availability.

15 Q. Sure. So what you did is you tried to get
16 the technical experts from Wyoming and Montana to sit
17 down and figure out, what should we do? What should
18 our plan be; right? And part of that would be --

19 A. No.

20 Q. No?

21 A. No. The plan was to try to improve the
22 system by which we -- well, the recommendation from me
23 had been that we try to come up with a system that
24 operates the basin according to hydrologic principles
25 so that we can maximize the use of the water that is

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1 available. I was not asking for a plan from the
2 technical advisers at first. At first, we were just
3 talking to come up with better technical information
4 about where water was used, how much was being used,
5 when it was being used. Things like that.

6 Q. I see the distinction. So at this point in
7 time, you're getting your technical people together to
8 do data collection?

9 A. And analysis.

10 Q. Okay. You didn't have that data up to that
11 point, fair?

12 A. Correct.

13 Q. Okay. And we can agree that this language
14 that we see here talking about getting your technical
15 people together to get data is very different than a
16 demand on Wyoming under the compact to deliver water,
17 isn't it?

18 A. Yes.

19 Q. All right. Is there any other portion of
20 that report that you would like to point out?

21 A. No. Hang on.

22 Q. Or do we agree that there's no reference to a
23 call?

24 A. I have to go through the rest --

25 Q. Fair enough.

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1 A. That's it.

2 Q. All right. Let's turn to the Miles City
3 gauge real quick. Again, it's on page 9 of this
4 report.

5 A. I have it.

6 Q. Now, the flows at Miles City from the period
7 October 2001 through November 2002 are reflected on
8 this page; correct?

9 A. Yes.

10 Q. All right. And the reason I'm pointing this
11 out is you agree with me that the flows at Miles City
12 would give us some indication over the course of the
13 winter what the flows are at the dam; right?

14 MR. SWANSON: Objection. Foundation.

15 BY MR. KASTE:

16 Q. Over the course of the winter, is anybody
17 really using water between the dam and Miles City?

18 A. I'm not the person to answer that question.
19 I did not manage the basin directly. I have no
20 firsthand knowledge of that. And so what -- anything I
21 said would just be speculative.

22 Q. Fair enough. I won't ask you about those
23 anymore then. And we'll ask the people that run the
24 dam what the flows were during those periods of time
25 then, fair?

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1 All right. Let's look at Exhibit J53. We
2 can agree that Exhibit J53 is the annual report for the
3 Yellowstone River Compact Commission for the year 2003;
4 correct?

5 A. Yes.

6 Q. Did you attend the meetings of the
7 Yellowstone River Compact Commission in 2003?

8 A. Yes.

9 Q. Did you sign this report?

10 A. Yes.

11 Q. Same question: Is there anything in this
12 report that says Montana made a call on Wyoming during
13 the year 2003?

14 A. No.

15 Q. Thank you. I believe you testified -- well,
16 making a call on Wyoming, you'll agree with me, that's
17 kind of a big deal, isn't it?

18 A. Well, under the compact, yeah. A formal
19 call, I think, is a big deal between states, yes.

20 Q. When you made a formal call on Wyoming in
21 2004, you made sure that was reflected in the records
22 of the Yellowstone River Compact Commission?

23 A. Yes. It was a formal call that implicated
24 the compact. So I made sure that it was on the record.

25 Q. Okay. And we looked earlier at Exhibit M61;

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1 you have that one still in front of you?

2 SPECIAL MASTER: M61?

3 MR. KASTE: Yes.

4 SPECIAL MASTER: I have an M161.

5 MR. KASTE: 161. I'm sorry.

6 THE WITNESS: I have it.

7 MR. KASTE: It does say that on my exhibit
8 too. I just misread it. Sorry.

9 SPECIAL MASTER: No problem.

10 BY MR. KASTE:

11 Q. Exhibit M161 is an e-mail that you sent to,
12 among other people, Mr. Horak, the USGS representative
13 on the compact commission; is that right?

14 A. Correct.

15 Q. And you made sure in 2005 that the 2004
16 annual report included language set forth in page 2 of
17 this exhibit, Section 1, that Montana specifically
18 requested that Wyoming release post-1950 stored water
19 so the pre-1950 users in Montana could satisfy their
20 water rights. You did that; right?

21 A. Yes. As I told Mr. Swanson, I did.

22 Q. It's fair to say that you never wrote a
23 letter like this to Mr. Horak before saying these
24 minutes in 2000, 2001, 2002, 2003 should have language
25 in it that says Montana made a call on Wyoming;

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1 correct?

2 A. Say that again, please.

3 Q. You didn't write a letter like this before?

4 A. No, I did not, as I explained to Mr. Swanson.

5 Q. Is it fair to say that you didn't make this
6 formal call on Wyoming before 2004 because you
7 understood that Wyoming would take that seriously?

8 A. I knew that they would take something like
9 that seriously. But that wasn't the reason why I
10 didn't make a formal call. As I've explained, the
11 reason for not making the formal call, knowing that
12 they took things seriously, as we did on both sides,
13 that that would move us towards the compact and not
14 towards the hydrologic system.

15 Q. So if you had made a formal call on Wyoming
16 before 2003, you figured that any attempt to create a
17 system based on the hydrology of the system, that would
18 just go away?

19 A. No. I don't think anything that black and
20 white. But there are -- things trend. In any kind of
21 interaction, things trend. And the thing is try to
22 keep trending in the direction you want in your
23 strategy rather than having it trend in the direction
24 you don't want.

25 So as I've explained, my strategy was to try

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1 to get towards the hydrologic system. My strategy was
2 also to avoid getting back in the 1980s conflict over
3 the language of the compact. So my actions were to try
4 to avoid a reaction from Wyoming that would trend
5 towards getting us back into the box of the compact.

6 Q. During this period of time, 2000 through
7 2003, would you agree there was this need to gather
8 information?

9 A. Yes. There's always a need to gather
10 information.

11 Q. All right. Let's look at -- and I'm going to
12 try to go as chronologically as I can. And,
13 unfortunately, the exhibits are all over the place
14 numerically. But I want to work through in time from
15 2001 through 2006, all right?

16 So I have on my list that the earliest date
17 exhibit that you probably have in front of you is
18 Wyoming Exhibit 54 -- excuse me. Sixty-four. Wyoming
19 64. Certainly I could be wrong about that, but that's
20 the one I want to talk about.

21 Do you not have that one --

22 A. I'm not sure that I do. I thought I was
23 organized here. But sometimes things get a little --

24 Q. If it's all right with you, I can hand you
25 one.

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1 MR. KASTE: May I approach?

2 SPECIAL MASTER: You mean Wyoming 64, not
3 Joint 64?

4 MR. KASTE: No, I mean Wyoming 64. Perhaps
5 it's one that you didn't talk about with Mr. Swanson.

6 SPECIAL MASTER: Okay. So...

7 MR. KASTE: I'll hand you Wyoming Exhibit 64,
8 and I'll establish the foundation for it.

9 SPECIAL MASTER: That's fine, Mr. Kaste. And
10 just to be clear so the witness is not confused, this
11 is not an exhibit that was utilized in your direct
12 examination.

13 THE WITNESS: I don't recognize it as such,
14 Your Honor.

15 SPECIAL MASTER: I'm just saying it was not.
16 You were not given this document yesterday. So this is
17 the first time you've been given it in this proceeding.

18 MR. KASTE: Yes, I should have known that
19 because it was in this folder and not one of these
20 other ones. I'm sorry.

21 BY MR. KASTE:

22 Q. Do you recognize Exhibit W64?

23 A. I recognize it as a printout of an e-mail
24 that was sent on the State of Montana e-mail system
25 from -- and it's -- yes, I do recognize it as that.

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1 Q. And who is it from?

2 A. It's from Rich Moy.

3 Q. And who is it to?

4 A. Jack Stults.

5 Q. On what date?

6 A. Friday, November 30th, 2001.

7 Q. Did you receive this e-mail from Mr. Moy?

8 A. Undoubtedly.

9 Q. Undoubtedly.

10 MR. KASTE: I move for the admission of
11 Wyoming Exhibit 64.

12 MR. SWANSON: No objection, Your Honor.

13 SPECIAL MASTER: Exhibit Wyoming 64 is
14 admitted into evidence.

15 (Exhibit W064 admitted.)

16 BY MR. KASTE:

17 Q. And if you look with me into the body of the
18 e-mail, I think it's the third sentence. This is from
19 Mr. Moy to you. Can you read this third sentence
20 beginning "further"?

21 A. "Further, before you can divided the
22 post-1950 water, you need a handle on pre-1950 water,
23 and that has never been done."

24 Q. Okay. So Mr. Moy says, before you can figure
25 out how to divide the post-'50 water, you need to

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1 understand what's going on with the pre-'50 water;
2 fair?

3 A. That's what he said.

4 Q. And it's never been done; fair?

5 A. That's what he said.

6 Q. And is that true in Montana and Wyoming at
7 that time?

8 A. Well, I think we had a handle on pre-'50
9 water in Montana through two mechanisms: The Miles
10 City Decree, as well as the filings in the
11 adjudication, as well as a third would be just a
12 management -- the knowledge and management of the basin
13 by the people, such as Art Hayes, and their records.

14 Q. Okay. So you think you have a pretty good
15 handle on what's going on in Montana but not in
16 Wyoming?

17 A. Correct.

18 Q. All right.

19 A. And just to clarify as well, that was my
20 understanding at the time.

21 Q. Let's look at Exhibit M141.

22 A. I have it.

23 Q. All right. And this is a letter from you to
24 Representative Bixby; correct?

25 A. Correct.

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1 Q. And this is in May of 2002?

2 A. Yes.

3 Q. All right. Now, the second sentence says,
4 "We at DNRC Water Resources Division are concerned
5 about the post-1950 development in Wyoming"; correct?

6 A. Yes.

7 Q. If you look on the back pages, there's a CC
8 on here. Is there anybody from Wyoming copied on this
9 letter?

10 A. No.

11 Q. Okay. Then it says in the second paragraph,
12 "The Water Resources Division has been pursuing funds
13 to do an initial assessment of the amount of
14 development so we can clearly describe our concerns and
15 our next interactions with representatives of the State
16 of Wyoming"; correct?

17 A. Yes.

18 Q. So would you agree with your statement back
19 in 2002, that up to this point, you hadn't done an
20 assessment of post-'50 use in Wyoming; right?

21 A. Not that I was aware of.

22 Q. All right. And you still needed to describe
23 your concerns with the representatives of the State of
24 Wyoming clearly; correct?

25 A. Yes.

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1 Q. Okay. Then it talks about in the next
2 paragraph, "A preliminary proposal to seek funds from
3 the legislature to prepare a comprehensive technical
4 and legal justification for administering and enforcing
5 and/or amending the Montana/Wyoming compact of 1950";
6 correct?

7 A. Yes.

8 Q. And you never got any money to do that
9 comprehensive technical or legal justification;
10 correct?

11 A. We were not appropriated any money by the
12 legislature. We found money internally.

13 Q. Found money internally. All right. But up
14 to this point in 2002, that hadn't been done; correct?

15 A. Not to my knowledge.

16 Q. All right. Can you look, then, at Montana
17 Exhibit 142?

18 A. I have it.

19 Q. And that's a letter from Mr. Hayes to you;
20 correct?

21 A. Correct.

22 Q. And it's May 3rd, 2002, is the date; correct?

23 A. Yes.

24 Q. Is that copied to anybody in Wyoming?

25 A. No.

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1 Q. And Mr. Hayes tells you in May of 2002, that
2 "Board members of the Tongue River Users' Association,"
3 and I'm looking at the second paragraph, last sentence,
4 "believe that it is Montana's best interest to continue
5 gathering the information needed in order to ensure
6 that Montana gets its fair share of water from the
7 Yellowstone Compact"; correct?

8 A. Yes.

9 Q. He told you that. Do you agree that you
10 still needed to gather information to ensure that
11 Montana gets its fair share?

12 A. Yes.

13 Q. All right. Can you look at Montana
14 Exhibit 144?

15 A. I have it.

16 Q. This is a letter from Representative Bixby to
17 you; correct?

18 A. Correct.

19 Q. All right. And that's dated May 6, 2002?

20 A. Yes.

21 Q. And this is her response to your earlier
22 letter?

23 A. Yes.

24 Q. All right. And in this, in the second
25 paragraph, this Representative Bixby said, "The DNRC

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1 should be protecting and assuring Montana's water is
2 not being overused by the Wyoming ranchers and
3 definitely not being contained by the coalbed methane
4 development"-- contaminated, I'm sorry, not contained.
5 "This assurance can only be documented by good baseline
6 data"; right?

7 A. Yes.

8 Q. And you agree with Representative Bixby that
9 you still needed good baseline data at this point in
10 time?

11 A. I'm not sure what she means by baseline data.
12 But in a general way, yes. I took this to mean she
13 agreed with us in our additional pursuit of
14 information.

15 Q. Additional what?

16 A. That she agreed with us in our attempt to
17 pursue additional data and other information.

18 Q. Okay. Thank you. Sorry. I didn't hear
19 that.

20 MR. SWANSON: Your Honor, I'm not sure how
21 much longer Mr. Kaste intends to go, but it might be
22 time to give everybody a short break.

23 MR. KASTE: I intend to go for a while
24 longer.

25 SPECIAL MASTER: Okay. And is this fine with

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1 you as a time for a break?

2 MR. KASTE: It's fine with me, yes. Thank
3 you.

4 SPECIAL MASTER: Okay. Then why don't we
5 take the morning recess. We will be in recess until
6 five to 11:00. So that's a 15-minute break.

7 I intend to remain here in the courtroom and
8 sort out all of my own copies of the exhibits. And so
9 there is no reason for people to rise at this
10 particular point. And, again, we are in recess until
11 five to.

12 (Recess taken 10:41 to 10:58
13 a.m., October 22, 2013)

14 SPECIAL MASTER: We will proceed with the
15 cross-examination of Mr. Stults.

16 BY MR. KASTE:

17 Q. Like I said, I was trying to go in
18 chronological order through some of these documents.
19 And I think when we ended, we were talking about year
20 2002; correct?

21 A. Yes.

22 Q. All right. Let's look at Exhibit M434.

23 A. I have it.

24 Q. And that's the summary report prepared by HKM
25 Engineering in October 2002?

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1 A. Correct.

2 Q. Okay. The first line under the heading
3 introduction says that Montana entered into an
4 agreement with HKM in June 2002; is that correct?

5 A. That's what it says.

6 Q. And you received the report in October of
7 2002?

8 A. Yes.

9 Q. All right. Let's look at page 2. And I
10 think you've answered this question already. Do you
11 know whether the maps associated with this report were
12 ever provided to Wyoming?

13 A. I don't have an explicit memory of it, but
14 I'm confident they were because our exchange of
15 information was going very well.

16 Q. All right. Now, down at the bottom of page
17 2 --

18 A. Let me say also, if they hadn't been, I would
19 have expected them to let me know, and I would have
20 ensured that they were.

21 Q. Do you remember looking at an e-mail
22 yesterday from Ms. Lowry saying we hadn't received the
23 maps?

24 A. Yes.

25 Q. All right. If we look down at the last

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1 paragraph on page 2.

2 A. I have it.

3 Q. One of the things that HKM told you in this
4 summary is that it made no attempt in this study to
5 review water right transfers associated with lands in
6 Wyoming; correct?

7 A. I'm not tracking where you're --

8 Q. Third sentence from the bottom, last
9 paragraph.

10 A. Starting with "this was the most prevalent"?

11 Q. Starting there and going into the next
12 sentence, "HKM has made no attempt."

13 A. Oh, I see.

14 Q. Okay. That accurately represented what they
15 told you; right?

16 A. Could you repeat your question, please?

17 Q. They told you they didn't make an attempt to
18 review water transfers in their analysis; right?

19 A. Correct.

20 Q. And one of the things you can do in Wyoming
21 or in Montana is that you can transfer water right from
22 one location to another so long as you go through the
23 appropriate process; right?

24 A. I know that's true in Montana, and I do
25 remember there being some type of process like that in

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1 Wyoming.

2 Q. Sure. And when that happens, the water right
3 holder keeps his original priority date; correct?

4 A. Yes.

5 Q. And what HKM did in this study didn't look at
6 all of those things that might have occurred with
7 regard to water rights transfers; right?

8 A. That's what they say.

9 Q. If you turn with me to page 4 of the
10 report -- and I think you said, "This report confirmed
11 our suspicions," or something along those lines; is
12 that right?

13 A. Yes.

14 Q. All right. Let's look at page 4 under the
15 heading "water rights have recently developed
16 irrigation." Do you see that heading?

17 A. Yes.

18 Q. About midway through the paragraph, there's a
19 sentence that says, "Of the 3,180 acres of irrigated
20 lands developed after the signing of the compact,
21 241 acres only had water rights with priorities junior
22 to the compact date." Did I read that correctly?

23 A. Yes.

24 Q. So of the 3,180 acres of the irrigated land,
25 only 241 of those had priorities junior to 1950?

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1 A. Correct.

2 Q. So there's 241 acres of post-'50 land in
3 Wyoming that this report identifies; is that fair?

4 A. Correct.

5 Q. And that confirmed your suspicion, that we
6 had, what, 241 acres of the post-'50 land?

7 A. Yes. That there was -- this original
8 analysis done by HKM was showing things consistent with
9 what we were concerned about.

10 Q. Do you know how many acres of irrigated land
11 there are in Montana from the state line to Miles City,
12 irrigated with post-1950 rights?

13 A. I may -- I do not.

14 Q. Would you be surprised to know it's more than
15 240?

16 A. I wouldn't be surprised or otherwise.

17 Q. Okay. You didn't hear Mr. Book testify that
18 he had identified about 4000 acres of post-1950 lands
19 in Montana?

20 A. I was not here for his testimony.

21 Q. Okay. Let's look down at the bottom of that
22 page. And the last paragraph on that page says, "So of
23 the approximately 3200 acres of the land brought under
24 irrigation since the compact was signed, approximately
25 240 acres only have water rights that postdate the

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1 compact." Did I read that correctly?

2 A. Correct.

3 Q. It's probably just a reiteration of the
4 conclusions and proceeding section; right?

5 A. Yes.

6 Q. Turn to the next page if would you, please.
7 The last paragraph begins with the sentence, "HKM also
8 observed that additional small reservoirs were
9 constructed in intervening years following the signing
10 of the compact"; correct?

11 A. Correct.

12 Q. And it identifies three specific reservoirs:
13 Wagner, Fivemile, and the Dzendolet Reservoir; right?

14 A. It does.

15 Q. And the capacity of these reservoirs is
16 identified in this paragraph; correct?

17 A. I see what their rights are. I don't see
18 capacity.

19 Q. All right. Well, let's talk about the
20 rights. There have a figure in there for one of these
21 reservoirs, 274.85 acre-feet; correct?

22 A. Yes.

23 Q. And the next one talks about 535.5 acre-feet;
24 right?

25 A. Yes.

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1 Q. And then the Dzenolet Reservoir has 68.59
2 acre-feet; right?

3 A. Yes.

4 Q. Do you know how much additional post-1950
5 storage has been developed in Montana since the signing
6 of the compact?

7 A. No, I don't.

8 Q. You're aware --

9 A. I can't remember. I may have known at the
10 time.

11 Q. All right. You're aware that the Tongue
12 River Reservoir was enlarged in 1999 to give the
13 reservoir about 10,000 acre-feet more storage; right?

14 A. As a result of the Northern Cheyenne Compact.

15 Q. Sure. And are you aware that when the
16 reservoir was first built, that there were water
17 contracts for 32,000 acre-feet of water, and that
18 changed after 1950 to 40,000 acre-feet of water?

19 A. I don't remember those figures.

20 Q. Okay. Fair enough. All right. Let's talk
21 about 2004. Do you recall talking to the governor
22 about -- Governor Martz, about making a call on Wyoming
23 prior to doing so in May of 2004?

24 A. I don't recall the conversation well. I
25 think I may have been talking more with Tom Beck. But

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1 I also did confer with her and Tom, and Tom was her
2 chief of staff.

3 Q. Did you prepare talking points for Governor
4 Martz to prepare her for a phone conference with
5 Governor Freudenthal?

6 A. I believe we did. I remember that we did.

7 Q. When you say "we," who is that?

8 A. Oh, a document like that would have been
9 prepared by me. And I would have solicited input from
10 staff.

11 MR. KASTE: If I may approach?

12 SPECIAL MASTER: You may.

13 BY MR. KASTE:

14 Q. Can I hand you a copy of Wyoming Exhibit 310?

15 MR. KASTE: I'm sorry, Your Honor. I don't
16 have a copy handy that doesn't have someone's
17 highlighting on it.

18 BY MR. KASTE:

19 Q. Have you had a chance to look through that?

20 A. Not entirely. Okay.

21 Q. Are those talking points that you prepared
22 for Governor Martz in 2004?

23 A. Yes.

24 Q. All right. Did you hand this to Governor
25 Martz at some point?

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1 A. I believe I did in meeting with her and Tom
2 Beck.

3 Q. All right. Is that a true and accurate copy
4 of the talking points that you prepared?

5 A. To the best of my memory.

6 MR. KASTE: I would move --

7 THE WITNESS: I would have no reason to doubt
8 that it is.

9 MR. KASTE: All right. I'd move the
10 admission of Exhibit W310.

11 MR. SWANSON: No objection, Your Honor.

12 SPECIAL MASTER: Then Exhibit W310 is
13 admitted into evidence.

14 (Exhibit W310 admitted.)

15 BY MR. KASTE:

16 Q. Had you ever prepared talking points like
17 this for Governor Martz or a prior governor before
18 May 2004?

19 A. On this topic?

20 Q. Yes, sir.

21 A. No.

22 Q. All right. Are you --

23 A. I don't remember that I did. And I'm pretty
24 comfortable with that memory.

25 Q. Are you aware of any conversations between

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1 the governors of Montana and Wyoming before this one
2 referenced in Exhibit W310 relating to a call by
3 Montana on Wyoming?

4 A. Not at the time that I was in my position as
5 commissioner.

6 Q. Sure. Fair enough. And I wouldn't want to
7 ask you about things that happened before you were
8 there or after.

9 Now, the second -- well, the first bullet
10 point, let's just talk about that one, it says what?

11 A. "Just wanted to tell you personally that we
12 have made a call for the water on the Yellowstone
13 tributaries."

14 Q. All right. And that bullet point is in there
15 why?

16 A. I think to establish -- as an introduction to
17 the topic and to make it clear that she wanted to
18 establish a personal conversation between the two of
19 them on that topic.

20 Q. Is it such a big deal that the governor needs
21 to have a personal conversation with the governor of
22 Wyoming?

23 A. At this point, I think it was, yes.
24 Obviously, I think it was. We encouraged them to talk.
25 Again, it's along the same lines of establishing a

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1 strong relationship and, as she says here, personally,
2 to deal with the issue.

3 Q. All right. And let's look at the second
4 bullet point. Would you read that one for me, please?

5 A. I authorized Jack Stults, Yellowstone compact
6 commissioner for Montana, to send a letter to Pat
7 Tyrrell calling for post-1950 water in Wyoming be
8 released to satisfy pre-1950 water rights in Montana.
9 The letter was sent Tuesday.

10 Q. And the governor specifically authorized you
11 in 2004 to send that call letter; correct?

12 A. Yes.

13 Q. Had you received specific authorization from
14 a governor prior to that time to send a call on
15 Wyoming -- or to Wyoming?

16 A. No.

17 Q. Have you received specific authorization from
18 a governor before that time to make a verbal call on
19 Wyoming?

20 A. No. Not explicitly. Although, I had the
21 confidence of my director and the governor to handle
22 the issues that were coming before the compact
23 commission in accordance with my -- how I described it,
24 I'd wish to deal with those issues.

25 Q. All right. Can we turn to the second page?

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1 And the first bulleted point on the second page says
2 what?

3 A. "For the past two years there has been an
4 effort through the staff in both our states to find a
5 practical way to increase the efficiency of
6 distribution to maximize the benefits of greatly
7 reduced water right supply in these years of drought.
8 At the April Yellowstone Commission meeting, this
9 effort stalled."

10 Q. Now, does the April Yellowstone Compact
11 Commission meeting referenced in this bullet point
12 refer to the April meeting in 2004?

13 A. Yes.

14 Q. All right. And that's a fair
15 characterization of what had gone on between the folks
16 in Wyoming and Montana up to this point? That an
17 effort through the staff in both states to find a
18 practical way to increase the efficiency of
19 distribution to maximize the benefits, that's what was
20 going on; right?

21 A. Correct. I think it's consistent with that
22 paragraph we read in the -- one of the annual reports.

23 Q. All right. So there's a phone call on or
24 about May 17th, 2004, between the governors; right?

25 A. I don't remember the date.

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1 Q. Sometime near May 18th, 2004, when you sent
2 the letter; correct?

3 A. Yeah, I can't tell you what the date was.

4 Q. Sure. But right about the time you sent the
5 letter, the governors talked; do you remember that?

6 A. I don't remember whether they talked. But I
7 assume that they did because we set it all up.

8 Q. All right. Fair enough. Let's look, then,
9 at Joint Exhibit 64. That's -- should be your letter
10 of May 18th, 2004.

11 A. I have it.

12 Q. All right. This letter starts by saying,
13 "This is the letter I mentioned would follow our
14 telephone call regarding the current need for
15 administration of the compact"; correct?

16 A. Correct.

17 Q. Do you recall when you had that conversation?
18 I assume it was with Tyrrell.

19 A. I don't remember. It was a few days before
20 this, I believe, letting him -- talking about this
21 upcoming letter.

22 Q. All right. So a couple days in advance, you
23 told him this was on its way; right?

24 A. That's what I remember.

25 Q. All right. The next sentence says, "Also at

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1 the Yellowstone River Compact meeting in April I agreed
2 to send you a letter stating our concerns and needs";
3 correct?

4 A. Yes.

5 Q. And I believe Mr. Swanson pointed this
6 sentence out specifically and asked you what you meant
7 by that. My recollection is that you meant you were
8 trying to clarify your perspective; do you recall that
9 testimony?

10 A. Yes.

11 Q. And I have it about right, don't I?

12 A. Yes.

13 Q. All right. So as of May 18, 2004, Montana
14 still needed to clarify its perspective for Wyoming;
15 correct?

16 A. Correct.

17 Q. All right. Let's turn to the second page,
18 please, to the larger paragraph following the heading
19 "Clark's Fork of the Yellowstone." You talked with
20 Mr. Swanson about this paragraph; correct?

21 A. Correct.

22 Q. And it says in the first line, "As compact
23 commissioner for Montana and as directed by Governor
24 Martz, I'm notifying you that this letter constitutes
25 Montana's call under the terms of the compact for our

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1 valid and protected pre-1950 water rights on the Tongue
2 and Powder Rivers"; correct?

3 A. Yes.

4 Q. And can we agree that this statement right
5 here is different in kind from the statements you made
6 before May 18th, 2004?

7 A. Yes, it is.

8 Q. All right. Now, the next sentence says, "We
9 are calling for all pre-1950 junior water in Wyoming to
10 satisfy our senior pre-1950 water on the Tongue and
11 Powder Rivers"; correct?

12 A. Yes.

13 Q. And do you understand that Wyoming is not
14 obligated to deliver pre-1950 water to Montana ever?

15 A. Not my understanding.

16 Q. Okay. Fair enough. And I assume you haven't
17 followed this litigation very closely since your
18 retirement; right?

19 A. I haven't paid -- I have paid as little
20 attention to this as I could possibly pay.

21 Q. I envy you. I envy you, sir. Fair enough.
22 So your understanding at the time of --

23 A. Not out of a matter of avoidance really. I
24 shouldn't be flippant. My life is very different. I
25 just have not had any reason or interest, frankly, in

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1 the things that I did in the past. It's just kind of a
2 natural occurrence in -- that I noticed in many people
3 in retirement. I shouldn't be flippant. I was not
4 avoiding it. I just didn't have a reason to.

5 Q. Fair enough.

6 A. Reasons to do other things.

7 Q. And good for you. And someday I hope to be
8 in your position with regard to this case.

9 A. You'd be lucky if you were. It's a great
10 place to be.

11 Q. Now, you also understand, I assume, that
12 Wyoming has a substantial number of pre-1950 irrigation
13 rights along the Tongue River; correct?

14 A. Say that again, please.

15 Q. Wyoming has a substantial amount of pre-1950
16 water rights along the Tongue River.

17 A. Correct.

18 Q. I heard somebody say once, and you tell me if
19 this comports with your understanding, that there are
20 45,000 acres in Wyoming with rights that are senior to
21 the first right in Montana.

22 A. I don't know whether that's true or not.

23 Q. All right. But we agree that there's a lot
24 of pre-1950 irrigated acreage in Wyoming?

25 A. Yes.

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1 Q. All right. And I'll tell you the way this
2 case is shaking out, those pre-1950 rights in Wyoming
3 do have a right to irrigate, even though it might mean
4 that Montana's pre-1950 irrigators don't receive all of
5 their water; you with me?

6 A. You're telling me your perspective.

7 Q. No. I'm telling you what the Supreme Court
8 ruled and the Special Master has ruled. They ruled
9 that there are some tiers outlined in the compact, and
10 Wyoming's pre-1950 rights get to irrigate up to their
11 right. And if that results in a shortage of water from
12 Montana's pre-1950 rights, Montana doesn't have the
13 ability to call off the pre-1950 rights in Wyoming.

14 MR. SWANSON: Objection, Your Honor. I'm
15 wondering if Mr. Kaste is testifying or Mr. Stults.

16 SPECIAL MASTER: I think it was probably a --
17 probably reasonable to set out a context. But you
18 might want to get to the actual question.

19 MR. KASTE: Sure.

20 BY MR. KASTE:

21 Q. I just want to know if -- did you understand
22 at the time that you made this letter, when there was
23 not very much water coming across the state line, that
24 some of that water could have legitimately been used by
25 Wyoming substantial pre-1950 appropriators?

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1 A. Yes.

2 Q. But it was your understanding that there was,
3 what, a lot of post-1950 development in Wyoming that
4 was taking water from Montana?

5 A. Say that again, please.

6 Q. So was it your understanding that there was a
7 lot of post-1950 development in Wyoming that was taking
8 water from Montana?

9 A. I -- not a lot necessarily, but enough to be
10 of substance and of use.

11 Q. All right. Later on in this letter, you ask
12 Mr. Tyrrell, the state engineer of the State of
13 Wyoming, to release all these stored waters
14 immediately; correct? And you refer -- the these in
15 that sentence refers to 9,369 acre-feet of post-'50
16 water in the Tongue River drainage and 24,722 acre-feet
17 of post-1950 water in the Powder River Basin; right?

18 A. Yes.

19 Q. Did you know when these waters you were
20 identifying had been stored?

21 A. At this point in time, I can't remember
22 whether we did or not. But this was all based on
23 analysis done by our staff with the information we had
24 available.

25 Q. Did you make an effort on your own to

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1 determine when these waters you had requested from
2 Wyoming had been stored?

3 A. I cannot remember whether we did or not. You
4 may have to ask somebody that was more directly
5 involved in the data development.

6 Q. All right. You understand that water stored
7 in the previous year in the reservoir wouldn't be
8 subject to a call from Montana; right?

9 A. Well, it's getting into --

10 MR. SWANSON: Objection. Asking for a legal
11 conclusion.

12 SPECIAL MASTER: That's --

13 MR. KASTE: I'm asking for his understanding
14 as the administrator of the Water Resources Division of
15 the State of Montana who is asserting his rights
16 against Wyoming what he understood those rights to be.

17 MR. SWANSON: And probably no foundation
18 'cause he's asking about Wyoming law regarding storage.

19 SPECIAL MASTER: I think it would be fair to
20 ask for his understanding at the time.

21 THE WITNESS: Well, my response is that
22 you're getting into very technical aspects of reservoir
23 management. And they differ from state to state, and
24 they differ from use to use and onstream and off
25 stream. So it's not a yes-or-no answer.

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1 BY MR. KASTE:

2 Q. All right. Would it be fair to characterize
3 your request here to say, "I know you have post-'50
4 reservoirs; I want it"?

5 A. As a starting point you might say that.

6 Q. Okay. Let's move --

7 A. Especially, again, you have to -- the intent
8 of this was to begin -- was to refocus, try to refocus.
9 So that there's -- it begins a negotiation, so to
10 speak. And you can stake out a position. You have
11 confidence that that data is accurate. And you have
12 confidence that your position is one that is a starting
13 point that was -- that you have confidence that it's
14 a -- it can begin the conversation, and it can be the
15 type of thing that will draw the -- your communicant
16 into a conversation with you.

17 Q. All right. Fair enough. Let's look at some
18 of the attachments to your letter. The first
19 attachment is an affidavit from Mr. Hayes; correct?

20 A. Yes.

21 Q. All right. I'm interested in paragraph 7.

22 A. I see it.

23 Q. On page 2. But midway through, seems like
24 it's a long, one sentence. It says, "I try to run the
25 dam so that there's 50 CFS of water at Miles City"; do

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1 you see that?

2 A. I do.

3 Q. All right. Was that your understanding of
4 how the Tongue River Reservoir was operated?

5 A. I -- I can't tell you now what my
6 understanding was about how the Tongue River was
7 operated. But I was not involved in the day-to-day
8 operation. There's an operations manual that we have
9 that comports with industry standards. And I am
10 confident that it was run according to that manual and
11 according to industry standards.

12 Q. Fair enough. In the next paragraph,
13 paragraph 8, Mr. Hayes records the inflow on May 15,
14 2004, is 205 CFS, which is 10 to 20 percent of average;
15 did I read that right?

16 A. Yes.

17 Q. I don't think you were present for the
18 testimony of Mr. Book.

19 A. Correct.

20 Q. Okay. Did you ever do an analysis yourself
21 for DNRC under your direction of the demands on the
22 Tongue River?

23 A. I don't remember doing it under my direction.
24 I -- all I can say is it seems -- well, I don't know.
25 I don't remember it under my direction.

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1 Q. Okay. Now, Mr. Book testified -- and he's
2 got a big fancy report. But in there it says in May,
3 the folks on the river need 195 CFS to satisfy their
4 rights using his methodology. Mr. Hayes is reporting
5 that there was 205 on May 15th, 2004.

6 Do you have any basis to ferret out whether
7 Mr. Hayes is right, that they weren't meeting their
8 needs, or Mr. Book is right, that that would be
9 sufficient to meet their needs?

10 A. I guess sitting here today, no.

11 Q. Fair enough. Let's turn to the back of
12 Mr. Hayes' affidavit, and attached to it is a
13 spreadsheet. And that outlines the folks along the
14 Tongue River who are part of the 1914 Miles City
15 Decree; is that right?

16 A. Yes.

17 Q. So this is a list of folks with water rights
18 under the 1914 decree and a list of where they fall in
19 priority and how much flow rate they are entitled to
20 divert up to; correct?

21 A. Yes.

22 Q. Did you or anybody from DNRC go through this
23 list and verify the needs and the situation of these
24 individual appropriators before making a call on
25 Wyoming?

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1 A. I don't know specifically what conversations
2 and research was done by staff. But there was
3 considerable research and conversation done by staff
4 with the managers of the systems, both T & Y and Tongue
5 River Reservoir Association, as well as the water
6 commissioners and others as well, I believe. So I
7 would say yes.

8 Q. Fair enough. Let's keep moving backwards
9 through this letter. And you'll come to a point where
10 you have attached to your letter streamflow data, I
11 assume by the United States Geological Survey, for a
12 series of basins; do you see that list?

13 A. I do.

14 Q. If you go through, I think it's the fourth
15 page, you get to the Yellowstone River Basin. And on
16 the fourth page, it starts talking about the Tongue
17 River, right? It's the fourth page of the list from
18 the USGS. It's got a Bates stamp on it of WY031314.

19 A. I think I see it. Okay.

20 Q. Got her?

21 A. Yeah, the two listings?

22 Q. It starts, the first one on Tongue River
23 says, "Tongue River at state line near Decker,
24 Montana"; do you see that line?

25 A. Yes, I do.

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1 Q. Can you tell me what the streamflow was on
2 May 17th, 2004, for Tongue River at the state line?

3 A. 986.

4 Q. We must be looking at a different page. Mine
5 says 165.

6 A. I see it. I had the wrong column. Sorry.
7 165.

8 Q. If it was 986, that would have been great.

9 A. Yeah. I see. I was looking at the median.
10 Sorry.

11 Q. So on May 17, 2004, the streamflow at the
12 state line was 165 CFS; correct?

13 A. Yes.

14 Q. And the next line down shows the streamflow
15 coming out of the dam; correct?

16 A. Correct.

17 Q. And that was what?

18 A. 255.

19 Q. So the dam added 90 CFS to the natural flow;
20 correct?

21 A. Yes.

22 Q. The next line down shows a gauge on Hanging
23 Woman Creek near Birney, Montana, and that added a
24 quarter of a CFS; right?

25 A. Yes.

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1 Q. All right. And then the following gauge is
2 at Birney Day School near Birney, Montana; correct?

3 A. Yes.

4 Q. And there's 252 CFS in the river at that
5 point; correct?

6 A. Yes.

7 Q. Can we agree that there are diversions
8 between the dam and Birney Day School?

9 A. I don't remember.

10 Q. I don't remember? All right. Otter Creek
11 near Ashland, Montana, looks like it wasn't running;
12 correct?

13 A. Correct.

14 Q. And the next one down is Tongue River below
15 Brandenburg Bridge near Ashland, and it was 243 CFS;
16 correct?

17 A. Yes.

18 Q. All right. And, again, I -- there are
19 diversions between Birney and the Brandenburg Bridge;
20 correct?

21 A. I don't know. I can't remember.

22 Q. You can't remember where specific diversions
23 are. But can you remember there are diversions all up
24 and down that river?

25 A. There are.

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1 Q. Very good. Next one is Pumpkin Creek, and
2 it's not running; right?

3 A. Correct.

4 Q. And then the next one is Tongue River at
5 Miles City, and it has a blank. But I can tell you if
6 you look in the annual report for 2004 under that Miles
7 City page that we looked at before, it says 13. All
8 right?

9 Now, what's interesting to me about this is
10 there's 165 CFS coming in at the state line the day
11 before you made your call; correct?

12 A. Yes.

13 Q. And what you're telling us in your letter is
14 the second right on the river isn't getting satisfied;
15 right?

16 A. Yes.

17 Q. And that's the T & Y Canal, and it has a
18 right to divert 187.5; correct?

19 A. Yes.

20 Q. Do you have any idea what it was actually
21 diverting on May 17th, 2004?

22 A. I don't remember. I don't even remember if I
23 knew.

24 Q. All right. Fair enough. Isn't it true that
25 of the return flows from the 90 CFS storage water and

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1 165 CFS of natural flow there's plenty of water to
2 satisfy the T & Y Canal's right?

3 MR. SWANSON: Objection. Foundation.

4 SPECIAL MASTER: Sustained.

5 BY MR. KASTE:

6 Q. Fair enough. Let's turn to Joint Exhibit 65.

7 A. I have it.

8 Q. This was Mr. Tyrrell's response to your
9 May 18th, 2004, letter; right?

10 A. Yes.

11 Q. He responded to your letter in a formal way,
12 did he not?

13 A. Yes.

14 Q. Yeah. And in the first paragraph,
15 Mr. Tyrrell tells you, "We, too, are regulating water
16 rights back to the 1880s in the Tongue and Powder River
17 Basins and have numerous pre-1950 rights going
18 unfulfilled"; correct?

19 A. Yes.

20 Q. And if we go to the next two sentences, he
21 says, "But that is the priority system; the right to
22 make beneficial use of water in priority when its
23 available. Neither of our states can guarantee a water
24 right will always be fulfilled just because it gets
25 water in more normal years"; correct?

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1 A. That's what he says.

2 Q. That's what he says. Do you agree with that
3 under a priority system, that when water is short,
4 people don't get their water?

5 A. That's correct.

6 Q. The junior water user is just out of luck
7 under the priority system; correct?

8 A. Correct.

9 Q. Would you have any reason to disagree with
10 Mr. Tyrrell that there were a number, perhaps a lot, of
11 water rights in Wyoming who weren't receiving any water
12 either?

13 A. From some of the documents we've looked at,
14 that you've had me look at -- or you and Mr. Swanson,
15 there were statements being made that Wyoming was not
16 regulating and that the Tongue was a free river, as was
17 stated in one of the documents.

18 So from that, there's no way of knowing who
19 was getting water and who wasn't getting water.

20 Q. You understand we have a system in place, and
21 it's a hundred years old in Wyoming, where we regulate
22 water rights according to the priorities?

23 A. I've been told that over and over again.

24 Q. Over and over again. All right. And you
25 understand when water is short in Montana, it's

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1 probably short in Wyoming too; right? Everybody is in
2 this drought together, aren't they?

3 A. That's correct. However, it doesn't mean
4 that -- I don't -- I agree with your second part of
5 that statement. I don't necessarily agree with the
6 first part of it, that when it's short in Wyoming it's
7 short if Montana. There could be enough for everybody
8 in Wyoming to get all that they need, and then there'd
9 be none left for Montana.

10 Q. Well, that's true. And that is how the
11 doctrine of appropriation works, right? Seniors get
12 their water first; correct?

13 A. I -- I'm concerned with you joining those two
14 statements together. I can't agree to what you said as
15 a totality being accurate and correct.

16 Q. All right. Let's turn to -- do you have
17 Joint Exhibit 66 in front of you?

18 A. I have it.

19 Q. And that's a letter from Mr. Tyrrell to you?

20 A. Yes.

21 Q. And it's dated July 6, 2004; right?

22 A. Yes.

23 Q. And in this letter, Mr. Tyrrell is talking
24 about the information requests that had passed between
25 the states after the call letter; right?

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1 A. Yes, he is.

2 Q. So Montana requested some information from
3 Wyoming, and Wyoming requested some information from
4 Montana; correct?

5 A. Yes.

6 Q. And you thought that process was working well
7 and was cooperative; correct?

8 A. That's my memory.

9 Q. And, in fact, I think you responded to
10 Mr. Tyrrell -- do you have Joint Exhibit 67 in your
11 hand?

12 A. I do.

13 Q. Is that your letter in response to
14 Mr. Tyrrell's letter of July 6th?

15 A. It is.

16 Q. So on July 19th, 2004, you gave him a list of
17 things that you'd like to know from Wyoming; right?

18 A. Yes, I did.

19 Q. All right. And to your knowledge, Wyoming
20 attempted to get you this information?

21 A. Yes. I remember there was difficulty on both
22 sides. And some of these records were in archival
23 storage and things like that. But my memory is both
24 sides were working to try and satisfy the requests of
25 the other.

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1 Q. Fair enough. Do you recall having a
2 conference call with the folks from Wyoming after you
3 gave Mr. Tyrrell the call letter on May 18th, 2004?

4 A. Boy, I don't. But you're starting to reach
5 into some areas that -- with further information I
6 might remember.

7 Q. Well, I'll --

8 A. What I should say is that there were
9 conference calls. And I can't remember the times and
10 dates.

11 Q. All right. Well, I'm going to help you if I
12 can.

13 MR. KASTE: May I approach, Your Honor?

14 SPECIAL MASTER: You may.

15 BY MR. KASTE:

16 Q. I'm going to hand you Exhibit M148. The
17 first page of this exhibit is an agenda for a
18 conference call on June 30, 2004. And it's followed by
19 some handwritten notes purporting to outline the
20 discussions during that meeting.

21 Have you ever seen this agenda before?

22 A. It's familiar.

23 Q. Familiar? All right. It indicates that you
24 and Mr. Tyrrell were participants in this conference
25 call; does that sound right to you?

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1 A. Yes.

2 Q. All right. And then I'd like to look at the
3 handwritten notes and ask you some questions about
4 that. At the top it says "Conference call June 30,
5 2004"; correct?

6 A. Yes.

7 Q. And there's a list of participants:
8 Yourself, Mr. Moy, someone named Candy West who we
9 haven't heard about, Mr. Smith, Larry Dolan, Jim
10 Robinson, Sarah Bond, Keith Kerbel, and then it says
11 Pat -- presumably Pat Tyrrell -- you, Brit, Harry, and
12 Whitaker, presumably Mr. Mike Whitaker.

13 Do you recall being on a phone conference
14 with these individuals in June of 2004?

15 A. Not specifically. But...

16 Q. You remember conference calls generally
17 occurred?

18 A. Yes.

19 Q. Fair enough. Now, there's a sentence here
20 that says -- it's attributed to Mr. Tyrrell. It says,
21 "Pat, it's hard for Wyoming to respond when we haven't
22 seen any quantification of this alleged lack of
23 parity"; do you see that?

24 A. I do.

25 MR. SWANSON: Objection. Just want to know

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1 if it's going to be offered as an exhibit prior to
2 testifying about the contents. And we would object on
3 foundation at this point. We don't know whose
4 handwritten notes these are.

5 SPECIAL MASTER: Mr. Kaste.

6 BY MR. KASTE:

7 Q. I believe these are Ms. Lowry's handwritten
8 notes. Have you seen Ms. Lowry's handwriting before?

9 A. I couldn't --

10 MR. SWANSON: Objection. Foundation.

11 BY MR. KASTE:

12 Q. Fair enough.

13 MR. KASTE: He said, I have no idea whose
14 handwriting this is.

15 I can ask him questions without it in his
16 hand, or he can look at it. I don't care.

17 SPECIAL MASTER: I think it's fine for you to
18 actually show this exhibit to the witness and ask him
19 questions about whether or not he remembers anything
20 about the meeting. But the exhibit itself is not
21 entered into evidence at this point in time.

22 MR. KASTE: Nor would I attempt to offer it.

23 SPECIAL MASTER: And, furthermore, to the
24 degree that you read anything out of it, obviously that
25 won't be part of the evidence for purposes of the truth

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1 of the statements themselves.

2 MR. KASTE: Fair enough. Exactly.

3 BY MR. KASTE:

4 Q. My question is: Had Montana, by June 30th,
5 2004, made an attempt to quantify what Mr. Tyrrell
6 refers to as lack of parity?

7 A. Sitting here today, I can't tell you what a
8 lack of parity means in the context of June 30th, 2004.

9 Q. Had you made an attempt to quantify what your
10 complaints were with Wyoming, to give us specific
11 numbers? Here's what you're doing wrong specifically;
12 here's what we want done specifically.

13 A. We'd included it in the letter.

14 Q. The letter that says I'd like you to dump
15 200,000 acres out of Lake DeSmet and 10,000 acres out
16 of your remaining reservoirs; right?

17 A. I didn't say dump.

18 Q. Release.

19 A. Correct.

20 Q. Fair enough. What would happen, just as
21 interesting, if we allowed 200,000 acre-feet to leave
22 Lake DeSmet immediately? Would the farmers in Montana
23 be able to capture that?

24 MR. SWANSON: Objection. This isn't relevant
25 because that's the Powder Basin. That's not the Tongue

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1 Basin. No longer at issue in this case.

2 MR. KASTE: I think it is relevant. The
3 credibility of the call that was made on Wyoming is
4 important. I mean, we were asked to do something that
5 the compact doesn't provide for. It's shocking, I
6 guess, that we would respond with something other than
7 no.

8 SPECIAL MASTER: In the same way that I
9 earlier didn't permit any questions regarding water
10 quality, I'm also not going to permit any questions at
11 this point regarding the Powder River.

12 MR. KASTE: Fair enough. Thank you.

13 BY MR. KASTE:

14 Q. All right. Let's look at a different portion
15 of these notes and see if you have any memory of this
16 conference call. There's a line there just below --

17 MR. SWANSON: Objection. Is this -- if this
18 is on the notes, Mr. Kaste is continuing to ask and
19 read into the transcript contents of the notes which,
20 at this point, have only been admitted -- or have been
21 allowed to refresh Mr. Stults' memory.

22 SPECIAL MASTER: So just to make absolutely
23 clear, to the degree that Mr. Kaste asked you --
24 actually refers to any of this exhibit on the record,
25 none of those statements are coming in for the truth of

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1 the statement itself. And that will apply for the
2 remainder of the examination on this particular
3 witness.

4 BY MR. KASTE:

5 Q. Do you see the sentence there that says,
6 "Jack, hoping by end of week to have date for potential
7 governors meeting firmed"?

8 A. Yes.

9 Q. And then I don't want to read the remaining
10 portion of the note. But it ends at the end of the
11 page with a dash or a bullet point that says "want govs
12 to sign in July"; right?

13 A. Yes.

14 Q. Did you have discussions with the folks in
15 Wyoming about the governor of Montana and the governor
16 of Wyoming entering into an agreement governing
17 something relating to the Tongue River?

18 A. I hadn't thought about it before, so, again,
19 I don't have an immediate memory of it. But we were
20 talking generally about how to structure the work that
21 we'd be doing together from this point on. And,
22 frankly, I can't remember whether it was something that
23 we were planning to have the governor sign or not. I
24 don't remember whether or not it was -- I don't
25 remember the nature of it and the details about it.

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1 Q. In general, do you recall whether or not the
2 parties discussed having the two governors sign an
3 agreement to resolve the dispute?

4 A. I don't remember that.

5 Q. Fair enough. Okay. Turn to the next page if
6 you would, please. Little over halfway down the page,
7 it says "Rich." And there's a sentence after that that
8 says, "need to define and not act on a hunch, but can't
9 do that without knowing what's water supply and what's
10 being diverted in both states."

11 Do you recall Mr. Moy saying that during the
12 course of this conference call?

13 A. Frankly, I don't.

14 Q. Fair enough. Do you believe Montana was
15 acting on a hunch at that point in time?

16 A. No.

17 Q. You had gathered enough information to know
18 it's time to act.

19 A. I was confident that we had.

20 Q. All right. And that happened in May of 2004;
21 right?

22 A. Yes.

23 Q. Thank you. During these discussions with
24 Wyoming after the call letter in 2004, did you hear
25 from Wyoming concern about the operations of the Tongue

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1 River Reservoir?

2 A. Say that again.

3 Q. When you were talking with Wyoming after
4 submitting the call letter in May, do you recall
5 discussions about how Montana was operating the Tongue
6 River Reservoir?

7 A. I don't recall.

8 Q. You don't. Fair enough. Do you have Exhibit
9 M168 in your hand -- or available?

10 SPECIAL MASTER: Which number are you talking
11 about? M168?

12 MR. KASTE: M168.

13 SPECIAL MASTER: Has that been admitted into
14 evidence yet? No. I don't have a copy of it, and it
15 apparently has not been introduced into evidence yet.

16 MR. KASTE: We do, probably --

17 SPECIAL MASTER: So, Mr. Stults, just so you
18 understand, I don't think you have a copy of that
19 document. And Mr. Kaste will be giving you a copy.
20 This will be something you haven't seen before.

21 MR. KASTE: I apologize. I got a list from
22 Montana identifying the M version of this exhibit. I
23 think the witness talked about the Wyoming version of
24 the exhibit. So I'm a little off on my numbering.

25 MR. BROWN: Seventy-six, Mr. Kaste.

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1 BY MR. KASTE:

2 Q. How about W76?

3 SPECIAL MASTER: That has been introduced
4 into evidence. And so the witness should have a copy
5 of that.

6 THE WITNESS: W --

7 SPECIAL MASTER: W, so Wyoming 76.

8 THE WITNESS: I have it.

9 BY MR. KASTE:

10 Q. Do you remember talking with Mr. Swanson
11 about this exhibit?

12 A. Yes.

13 Q. Does it start with, "Jack, well, whatever
14 differences we have should not be anything we as states
15 didn't discuss in the '80s when this issue was hot
16 previously"?

17 A. Actually, the exhibit doesn't. But one of
18 the internal messages does start "Jack, well" whatever
19 it is.

20 Q. And that's part of an e-mail from Mr. Tyrrell
21 to you?

22 A. Yes.

23 Q. And that e-mail is June 8, 2004?

24 A. Yes.

25 Q. If I understand right, you started with -- or

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1 in your position with DNRC in 1997; correct?

2 A. Correct.

3 Q. And if I understand your background
4 correctly, you didn't work for the State of Montana in
5 the 1980s; correct?

6 A. I did. I started with the State of Montana
7 in 1984.

8 Q. In which position? I'm sorry.

9 A. It was an entry level position. I was
10 reviewing claims -- water right claims in the
11 adjudication in a regional office.

12 Q. Did you have anything to do with the
13 administration or the Yellowstone River Compact prior
14 to 1997?

15 A. No, nothing at all.

16 Q. There you go. So you don't have personal
17 knowledge of the things that may have gone on with
18 regard to the Yellowstone River Compact in the 1980s
19 that Mr. Tyrrell is referring of?

20 A. That's correct.

21 Q. Thank you.

22 A. I don't have firsthand knowledge. The
23 knowledge I do have was obtained by briefings and
24 documentations.

25 Q. Do you know Mr. Dalby?

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1 A. Yes.

2 Q. In the 1980s, do you think he would have
3 firsthand knowledge of what went on between the
4 parties?

5 A. I have no idea what he was doing in the
6 1980s.

7 Q. Okay. Fair enough. Now, there was talk
8 amongst Wyoming and Montana after this call letter
9 setting up certain meetings; right?

10 A. Yes.

11 Q. You don't need to look at that exhibit. It's
12 not in there.

13 A. I'm sorry. I was distracted.

14 Q. All right. And some meetings occurred, and
15 some did not; right?

16 A. I can't remember specifically. But that's
17 not unusual.

18 Q. Yeah. But you felt that the parties were
19 still working together cooperatively towards the end of
20 2004?

21 A. Yes. I was feeling less and less, though.
22 Because it was getting in to that type of dynamic where
23 there's, it seems like, an overabundance of requests.
24 That we were getting mired into the -- just digging
25 deeper and deeper without making any -- without making

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1 any progress on what we were obtaining in the way of
2 information. That the scope of the documentation that
3 was being exchanged was going beyond what was necessary
4 to start making progress.

5 Q. All right. I think you talked with
6 Mr. Swanson about Exhibit W139.

7 A. Yes.

8 SPECIAL MASTER: 139 is introduced?

9 THE CLERK: (Nods head.)

10 SPECIAL MASTER: Okay. Thanks.

11 BY MR. KASTE:

12 Q. There was an e-mail between Mr. Kerbel and
13 yourself in December 2004; correct?

14 A. From Keith Kerbel to me; correct.

15 Q. And then this paragraph marked No. 1, he
16 talked about a "piddly little survey." Do you know
17 what he's referring to there?

18 A. I can't remember with any specificity.

19 Q. All right. And then the second bullet point,
20 he says somebody named Roy. Do you know who Roy is?

21 A. I assume it was Roy. And, again, I still
22 haven't been able to remember his last name, which I am
23 embarrassed about because he was a superb scientist.
24 But I assume it was Roy with the Natural Resources
25 Conservation Service.

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1 Q. All right. And Mr. Kerbel is reporting to
2 you that Roy forecasted there would be an additional
3 runoff of 10 to 20,000 acre-feet of water which we
4 never received; right?

5 A. It says that.

6 Q. So was it your understanding in December of
7 2002 that there was 10 to 20,000 acre-feet of water in
8 Wyoming that you should have got?

9 A. No, I don't think that's a correct
10 characterization. I think Roy's forecasts are never
11 precisely accurate, which is something that any
12 hydrologist can say anywhere in the world. But they
13 do -- Roy is a superb scientist. And his predictions
14 are generally reliable for anticipating the trend and
15 general nature of the kind of water availability that
16 there would be.

17 So I would not be sitting here on
18 December 1st, 2004, saying we should have gotten 10 to
19 20,000 acre-feet of additional water. What I would
20 have said is that Roy, who I trust thoroughly, was
21 saying that things were looking better than what we
22 experienced.

23 Q. I just want to know if that was your
24 expectation of what Wyoming's conduct meant to Montana
25 and whether you thought there was 10 or 20,000

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1 acre-feet in Wyoming that you weren't getting?

2 A. I felt that there was additional water
3 supply. And this seemed to be consistent with that
4 perspective that some of that should have come to us
5 and didn't.

6 Q. I take it from your earlier statement that
7 you haven't had any dealings with this case. You
8 haven't had an opportunity to review Mr. Book's report
9 quantifying the impacts to Montana from Wyoming's
10 conduct; correct?

11 A. Correct.

12 Q. Okay. Now, I think you talked with
13 Mr. Swanson about Exhibit W145.

14 A. Yes.

15 Q. And that's an e-mail from Mr. Tyrrell to
16 yourself on September 9th, 2005; correct?

17 A. Correct.

18 Q. All right. And attached to that letter is
19 that budget request that you talked about in your
20 testimony; right?

21 A. Yes.

22 Q. And I think you testified Wyoming asked for
23 this money from the legislature, but you weren't sure
24 whether we got it or not; is that fair?

25 A. Yes.

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1 Q. All right. Did Montana ever get any money to
2 do this joint study?

3 A. We requested an appropriation from the 2003
4 legislature. But in the budget process, well before
5 2003, it would have been in the summer sometime, as
6 evidenced from the letters we've already gone through,
7 we did not get -- that appropriation was not continued
8 on through the budgeting process. So knowing that this
9 was important, as I told Norman Tyrrell [sic] in the
10 letter that we already looked at, we went into our own
11 budget and re-prioritized and obtained funding in order
12 to make sure that the work was continuing.

13 Q. So you got funding. Now, you were talking
14 2003 when we were talking about that \$8000 study. And
15 I understood that to be internal to Montana. I'm
16 talking about 2005 and the joint state study.

17 A. Oh, I'm sorry.

18 Q. Those are kind of different; right?

19 A. Yes.

20 Q. All right. Did you ever get money to do a
21 joint state study?

22 A. No.

23 Q. But you had talked with Wyoming about the
24 benefits of doing one; correct?

25 A. Correct.

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1 Q. What would the benefits have been to both
2 states had this study been done?

3 A. We would have had a clear and -- clear
4 picture in the data to support it of water use in the
5 Tongue River Basin.

6 Q. About the same time Wyoming is trying to get
7 some money for this joint study -- that's the September
8 2005 e-mail -- Montana was in the process of gearing up
9 for litigation, wasn't it?

10 A. September 2005?

11 Q. Yeah.

12 A. That -- we were running on two tracks. There
13 was the continuation of the technical and the approach
14 to try to come up with information that would be useful
15 in any circumstance that we found ourselves in going
16 forward. We were also realizing that this was trending
17 towards something that might result in litigation. So,
18 therefore, I was working with legal staff to make sure
19 that they were on -- aware of what was going on and
20 could get themselves into position in case it could go
21 in that direction.

22 However, I would not want to characterize
23 this as gearing up for legislation. We were working --
24 if we were gearing -- if we had gears, it was still
25 trying to come up with -- it was still running on the

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1 strategy of trying to settle this thing without going
2 to litigation. But it would have been remiss of me in
3 my position not to realize that there was a potential
4 for litigation and to have the state in a position to
5 be prepared for that possibility.

6 Q. In fact, DNRC had, as a goal, I think on its
7 website or -- in 2006 of preparing for litigation with
8 Wyoming even before it made a call on Wyoming in 2006,
9 didn't it?

10 A. I don't know. I'd have to see something to
11 help me -- help my memory.

12 Q. Did DNRC prepare goals for each year and
13 share those with the legislature and public and things
14 like that?

15 A. Not every year but, we did biannually and --
16 yes.

17 Q. And you don't recall preparing a goal for the
18 year 2006 that was preparing for litigation with
19 Wyoming?

20 A. Frankly, until you mentioned it, I didn't.
21 But I hadn't been exercising my memory in that area.
22 But in a biennial budgeting process, you have to look
23 out into the future. And, again, if I felt that there
24 was a potential for something like that to happen,
25 which is very -- a very significant event that would

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1 cost -- that has at least a pattern across the west of
2 being expensive and also something that I couldn't
3 handle the cost of internally and our staff could not
4 have handled the cost of internally, it was going to be
5 of the nature of something that would have to be dealt
6 with by the legislature.

7 We have a two-year budgeting process. And it
8 was incumbent upon me in my position to anticipate such
9 eventualities. And, therefore, yes, it had to be in
10 the documentation that established what was the
11 framework to -- and the justification and the basis for
12 requesting any money from the legislature.

13 So it would be remiss on me not to put
14 something like that in there because if I didn't, it
15 would be -- I would not have put in a justification for
16 something that might be necessary in case of the
17 eventuality that was possible. That was my job.

18 MR. DRAPER: Your Honor, it's now noon. Can
19 you inform us as to what your pleasure is about when
20 we're going to be taking lunch today?

21 SPECIAL MASTER: So let me start out by
22 asking Mr. Kaste how much more he thinks he has of
23 cross-examination?

24 MR. KASTE: My stack has dwindled of things
25 to ask about. Maybe 30 minutes.

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1 SPECIAL MASTER: Why don't we go ahead then,
2 if you don't mind, and take the break.

3 MR. KASTE: Sure.

4 SPECIAL MASTER: So we will take the noon
5 break at this point. We will come back, let's say, at
6 five to -- five after 1:00.

7 Also, just before we break, I did receive an
8 e-mail from the chief deputy of the district court.
9 And it appears as if we will need -- the hearing
10 tomorrow will probably begin at 1:00, which means we'll
11 need to have all the boxes and everything out of here
12 by 12:30.

13 MR. KASTE: Will we have access to the other
14 courtroom to stack them up?

15 THE CLERK: We can't put them in that
16 courtroom.

17 SPECIAL MASTER: So we can go off the record
18 on this.

19 (Discussion held off the
20 record.)

21 (Recess taken 12:03 to 1:08
22 p.m., October 22, 2013)

23 SPECIAL MASTER: Everyone can be seated.

24 So, Mr. Stults, I think that Mr. Kaste still
25 has some questions for you.

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1 MR. KASTE: A few.

2 SPECIAL MASTER: Just a reminder again,
3 you're under oath.

4 THE WITNESS: Yes, sir.

5 MR. KASTE: And I told Mr. Stults that I
6 lied; it probably isn't going to be a half hour.

7 SPECIAL MASTER: I'm sure he'll be pleased to
8 hear that.

9 MR. KASTE: He was.

10 BY MR. KASTE:

11 Q. We were kind of moving through time
12 chronologically talking about the events surrounding
13 this case. And I think we've gotten to about 2006,
14 okay. And so I want to just ask you a couple quick
15 questions about Joint Exhibit 68.

16 A. Say that again. I couldn't quite hear.

17 Q. Joint Exhibit 68.

18 A. Okay.

19 Q. It should be the letter that you wrote to
20 Mr. Tyrrell.

21 A. I have it.

22 Q. July 28, 2006; correct?

23 A. Yes.

24 Q. Okay. And I'd like to look real quick at the
25 second page and talk to you about the paragraph that

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1 you talked about with Mr. Swanson. It's the second
2 paragraph. First sentence of that paragraph says,
3 "Wyoming is required by the compact to regulate its
4 post-'50 uses on the Tongue, including uses on the main
5 stem, until Montana's pre-1950 uses are satisfied."

6 Do you recall talking to Mr. Swanson about
7 that sentence?

8 A. Yes.

9 Q. And isn't it fair to say that what you're
10 asking for in 2006 is somewhat different than what you
11 asked for from Wyoming in 2004?

12 A. I don't think so with respect to the general
13 purposes to begin having some delivery of water across
14 the state line. As I've said before, our purpose was
15 to try to have more water come across the state line.
16 And how Wyoming went about doing it was something that
17 was up to them. But we did have these criteria -- or
18 positions that we were setting out as ways of -- to go
19 about doing that.

20 Q. And I'm just interested in the distinction
21 between the positions you set out in the two letters.
22 The one in 2004 talked about Wyoming possibly
23 curtailing pre-'50 rights, and in 2006 it talks about
24 curtailing post-'50 rights; correct?

25 A. May I take a quick look?

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1 Q. Sure.

2 A. There's some difference. But I think there's
3 quite a bit of similarity too.

4 Q. And in the main, the letters are very
5 similar. This is a call on Wyoming under the
6 Yellowstone River Compact; right?

7 A. Yes.

8 Q. Fair enough. Thank you. I believe you
9 talked with Mr. Swanson briefly about Wyoming
10 Exhibit 146?

11 A. Yes.

12 Q. And that's a memorandum to Mr. Tyrrell,
13 Mr. Horak from yourself; correct?

14 A. Yes.

15 Q. And in this memorandum, you have some
16 questions about CBM production in Wyoming; right?

17 A. Yes.

18 Q. Okay. I'd like to hand you Wyoming
19 Exhibit 147. Take a minute to look through that, if
20 you would.

21 A. Okay.

22 Q. All right. The first page of Exhibit 147 is
23 an e-mail; right?

24 A. Yes.

25 Q. And who is it from?

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1 A. From Sue Lowry.

2 Q. And who is it to?

3 A. Jack Stults, Keith Kerbel, Sarah Bond, Art
4 Compton, Chuck Dalby.

5 Q. What is the date on that exhibit?

6 A. April 24, 2006.

7 Q. Did you receive this e-mail from Ms. Lowry?

8 A. Yes.

9 Q. Does it reference that there are documents
10 attached to it?

11 A. Yes, it does.

12 Q. And those are identified as what? It says in
13 the attachment line on the e-mail.

14 A. Right. It's Tongue info, Malcolm Hutton,
15 032106.doc, Yellowstone Commission questions.doc,
16 d-o-c.

17 Q. So one of them is -- there's two attachments.
18 One is related to Tongue info, and one is Yellowstone
19 Commission questions; right?

20 A. Yes.

21 Q. Do those appear to be attached to the e-mail?

22 A. Yes.

23 Q. All right.

24 MR. KASTE: I'd move for the admission of
25 Wyoming Exhibit 147.

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1 MR. SWANSON: No objection.

2 SPECIAL MASTER: No objection being stated,
3 Exhibit W147 will be admitted.

4 (Exhibit W147 admitted.)

5 BY MR. KASTE:

6 Q. All right. If we look at the body of the
7 e-mail, there's just one sentence of text; correct?

8 A. Two sentences, but, yes.

9 Q. Oh, sorry. Can you read those two sentences,
10 please?

11 A. "At John Wagner's request, I am forwarding on
12 to you this response to the questions Montana raised
13 following the November 30th, 2005, Yellowstone
14 Commission meeting. Please let me know if you have
15 questions."

16 Q. And if you look at the second attachment to
17 that e-mail, we see the answers to the questions that
18 you had posed in Exhibit 146; correct?

19 A. Yes.

20 Q. For our purposes, I don't even know that it's
21 necessary to go through all those answers. But is this
22 kind of response from the folks in Wyoming typical of
23 your interaction over the years with regard to
24 information requests?

25 A. Yes.

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1 Q. Thank you. I have one more exhibit that I'd
2 like you to look at. And it's Exhibit W69. If I may,
3 I'll hand you a copy. Can you take a moment to look
4 through that?

5 A. Okay.

6 Q. The first page of that exhibit appears to be
7 a handwritten note; is that your handwriting?

8 A. Yes.

9 Q. And your signature down at the bottom, Jack?

10 A. Yes.

11 Q. And what day was this handwritten note
12 created?

13 A. 9/23/03.

14 Q. All right. And it's to someone named Don M.;
15 do you know who Don M. is?

16 A. Don McIntyre, chief legal counsel with the
17 Department of Natural Resources and Conservation.

18 Q. All right. And the last several pages of the
19 exhibit appear to be a letter from someone named Larry
20 Sare; am I saying that right?

21 A. I don't know.

22 Q. Don't know? Have you ever seen the letter
23 dated August 18, 2003, signed by Larry Sare?

24 A. Doesn't jump to mind as something I'm
25 familiar with and remember well, or remember much at

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1 all. But given the note on top of it, the note seems
2 to be referring to what is following.

3 Q. Okay. The last two or three pages of the
4 exhibit are a document that appears to be a sample
5 water well mitigation agreement; is that correct?

6 A. Yes.

7 Q. Are you familiar with water well mitigation
8 agreements in Montana?

9 A. I was at the time.

10 Q. You were at the time. Does this look like
11 one of them?

12 A. Yes.

13 Q. Fair enough. Do you recall sending this
14 handwritten note with these two attachments to Don M.?
15 I forgot his last name.

16 A. Don McIntyre.

17 Q. McIntyre.

18 A. No, I don't.

19 Q. Fair enough. Let's look at the water well
20 mitigation portion of that exhibit that appears to be a
21 water well mitigation agreement from the State of
22 Montana.

23 A. No, it is not.

24 Q. It's not. Do you know what it is?

25 A. It is a water mitigation agreement that would

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1 be signed by both a surface landowner with water
2 rights, I suspect, and a coalbed methane development
3 company. It was required by a process we put in
4 place -- I think it was called the Yellowstone River --
5 Yellowstone Basin controlled groundwater area that was
6 put in place specifically to deal with the incoming
7 coalbed methane development.

8 And that development, as we've discussed
9 before, is significant because of the amount of water
10 it withdraws and discharges and the potential impacts
11 both on water availability and potential impacts on
12 specific water users.

13 So our controlled groundwater area which is
14 implemented by our department under statute, it's a
15 statutory-type structure, required that every coalbed
16 methane development company enter into a water well
17 mitigation agreement with any water well owner in the
18 area of -- within a certain distance of their
19 development. And this is one of those agreements.

20 Q. All right. And this is what they generally
21 look like? Is this a fair representative sample of one
22 of these agreements?

23 A. I think so, yes.

24 Q. Well, since your memory isn't terribly good
25 on the first two pages, what I'd like to do is take

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1 Exhibit W69 and tear it into little pieces if we can
2 and make this water well mitigation agreement W69-1.
3 All right.

4 MR. KASTE: And I would move for the
5 admission of W69-1.

6 SPECIAL MASTER: Which parts -- just to be
7 absolutely clear, which parts of it are W69-1?

8 MR. KASTE: Just the mitigation agreement.

9 SPECIAL MASTER: So it's the last three pages
10 of what is a five-page document?

11 MR. KASTE: Yes, Your Honor.

12 SPECIAL MASTER: Any objection?

13 MR. SWANSON: Your Honor, we don't have any
14 objection to any of the other pages. It's clearly --
15 he's testified it's his handwriting. We would just ask
16 if that's what it's going to be limited to, to specify
17 the Bates pages on the bottom.

18 MR. KASTE: We can do the existing exhibit if
19 there's no objection, or I can tell you the Bates
20 stamps for the last three. Whatever you prefer. I
21 certainly think he's established foundation for the
22 first page of the exhibit.

23 SPECIAL MASTER: So I'm sorry. Now I'm
24 confused again. So is 69-1 the last three pages;
25 correct?

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1 MR. KASTE: Yes.

2 SPECIAL MASTER: So what you're asking for is
3 the admission of 69-1 or 69?

4 MR. KASTE: I don't care. I just want 69-1
5 in there.

6 SPECIAL MASTER: You want 69-1, which are the
7 last three pages, which is the actual water well
8 mitigation agreement?

9 MR. KASTE: Yes.

10 MR. SWANSON: Montana does not object to
11 that, Your Honor.

12 SPECIAL MASTER: Then under those
13 circumstances, the record will have admitted Exhibit
14 W69-1, which, for the Bates stamps, is Montana 13121
15 through Montana 13123.

16 (Exhibit W069-1 admitted.)

17 SPECIAL MASTER: And, Mr. Kaste, I don't know
18 if you forget anything. But you are not at this point
19 seeking to have entered into evidence any of the rest
20 of this document?

21 MR. KASTE: No. My understanding is that
22 those came attached. And our belief was that they were
23 part of the same correspondence. But since he's able
24 to establish independent foundation for the mitigation
25 agreement, we don't need the other pages.

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1 SPECIAL MASTER: That's fine. Just wanted to
2 check.

3 MR. KASTE: And this is another one of those
4 things Mr. Brown tells me is important.

5 BY MR. KASTE:

6 Q. So I don't have any questions about it
7 substantively. I do have just a couple more questions
8 for you. And they relate to some statements you made
9 very early in your testimony yesterday about, I think,
10 some information you received that at certain points in
11 time, it was green in Wyoming and brown in Montana; do
12 you recall that testimony?

13 A. Yes.

14 Q. Okay. And what time periods were you talking
15 about?

16 A. Beginning as early as 2000. Certainly in
17 2001. And it was a continuing characterization. It's
18 my characterization. But it -- that type of
19 representation about the nature of things on the two
20 sides of the state line was continuing through 2001,
21 2002, 2003, 2004, and then again in 2006.

22 Q. Fair enough. And did you have any
23 understanding about how many of those green acres in
24 Wyoming may have been irrigated with water produced
25 from CBM?

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1 A. I was told, at times, that -- certain areas
2 were pointed out to me when I was down there visiting
3 the area on -- for different reasons, for different
4 purposes -- by staff and by water users.

5 Q. You were shown different areas and said this
6 is being irrigated with water from CBM production?

7 A. Correct.

8 Q. And my question is really, did you have any
9 understanding of the acreage being irrigated with CBM?

10 A. Not through those communications, no.

11 Q. Fair enough. So it's true that some of that
12 green area that you may have seen or heard about may
13 have been irrigated by CBM wells; right?

14 A. My impression at the time was no.

15 Q. Fair enough.

16 A. As a matter of fact, at the time, if I
17 remember correctly, very little CBM water was being
18 used to irrigate crops.

19 Q. And during this time that you saw a disparity
20 between conditions in Wyoming and conditions in
21 Montana, did you take a look at the operations of
22 Tongue River Reservoir as a potential cause for that
23 disparity?

24 A. Ask that again, please.

25 Q. Well, there is this period where you

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1 recognized a disparity between conditions in Wyoming
2 and in Montana; correct?

3 A. Yes.

4 Q. And what I want to know is did you look at
5 the operations of Tongue River Reservoir as a potential
6 cause of that disparity?

7 A. I'm not sure I could understand how it could
8 be a cause of the disparity.

9 Q. That's sort of different from my question.
10 Did you take a look to try and determine whether the
11 operations in the reservoir in Montana might have had a
12 causal relationship to the brown conditions there?

13 A. Other than -- well, yes, that there was
14 insufficient water to be delivered, particularly to the
15 instream flow rights.

16 Q. Did you ever look at changing the operations
17 of the Tongue River Reservoir to store more water?

18 A. I can't answer that. You'd have to ask that
19 of somebody that was managing the reservoir. But the
20 reservoir was being managed in accordance with its
21 operating manual and the best practices of the
22 industry.

23 MR. KASTE: Thank you. I have no further
24 questions.

25 SPECIAL MASTER: Okay. Thank you, Mr. Kaste.

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1 conversations that you had with officials in Wyoming in
2 2001. And I'm going to start out by just going over
3 some of the things I think you've already stated. So I
4 believe that you said that in those conversations, you
5 made it clear that Montana was not getting enough water
6 for its pre-1950 users; is that correct?

7 A. Yes, sir, I'm convinced I was clear.

8 Q. Okay. And did you also state that you
9 believed that Wyoming was using water for post-1950
10 uses?

11 A. Yes, sir.

12 Q. And did you say that some of the post-1950
13 water that Wyoming was using needed to pass the line
14 into Montana?

15 A. I can't say for certain that I said exactly
16 that. But I know that I was working with Keith
17 Kerbel -- or instructing Keith Kerbel and giving him
18 the authority and making sure that he was talking with
19 his counterpart, Mike Whitaker, about those issues,
20 those -- that very request.

21 Q. And when you talked with Wyoming officials --
22 and at the moment I'm just interested in your own
23 conversations. When you were talking to Wyoming
24 officials at that particular point in time about
25 pre-1950 uses in Montana that you believe were not

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1 getting enough water, post-1950 uses in Wyoming that
2 you thought were receiving water, did you ever then go
3 on to say, therefore, Wyoming should do something?
4 Whatever that might be.

5 A. I can't say that I had a conversation that
6 succinct and constructed in that way. It was more
7 talking about the fact that there was water being used
8 in Wyoming, there -- it was my understanding that
9 people were using it on lands that were junior to our
10 1950 rights and that that shouldn't be taking place.

11 Q. And you've talked before -- well, you
12 mentioned just a moment ago your belief that there were
13 post-1950 uses taking place in Wyoming. So what was
14 the basis for your belief?

15 A. The reports I got from my own staff as well
16 as the statements made by the water users in the Tongue
17 River Basin that were observing what was going on in
18 Wyoming.

19 Q. All right. And you mentioned earlier that
20 you observed a green and brown effect. So did you
21 actually tour Wyoming as part of that?

22 A. Yes, sir. Well, tour might be too strong a
23 word. The Tongue River Reservoir is right directly on
24 the state line between Montana and Wyoming. And to get
25 to it, you drive south out of Billings, past Hardin,

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1 and you actually drive into Wyoming, and then you come
2 along next to Dayton and fields and Goose Creek and
3 places like that. And then you curve back up into
4 Montana at the south end of the reservoir and go up
5 under the reservoir.

6 And then at other times, we just would be
7 looking at -- I toured the area a couple times for CBM
8 tours, coalbed methane tours. There was one tour given
9 to the Montana legislature that I participated in in --
10 I can tell you exactly when that tour was. It was
11 September 11, 2001. So we were driving around the very
12 remote area of coalbed methane listening to the radio
13 in horror. So that's one memory that's very clear to
14 me.

15 So in just going -- and going to meetings in
16 Wyoming, Sheridan, other places, I was seeing
17 irrigation in Wyoming, and I would be seeing irrigation
18 in the Tongue River Basin in Montana. And there was a
19 significantly greater amount of it going on -- greater
20 amount is too -- the crops were significantly healthier
21 and more extensive in Wyoming than they were in
22 Montana.

23 Q. And would you bring that to the attention of
24 Wyoming officials?

25 A. My memory is that I did.

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1 Q. So you talked before about wanting to run the
2 Tongue River as a hydrologic system. Can you explain
3 in a little more detail than you have before as to what
4 you mean by that?

5 A. Yes, sir. Irrigation is generally conducted
6 in the west under the priority system. And that's a
7 system where the location of diversions is somewhat
8 random with respect to the water occurrence on the
9 stream. As I mentioned before, generally the oldest
10 right is at the very mouth. And so in order to satisfy
11 that, everybody upstream has to shut down.

12 The hydrologic approach is one we used in
13 Montana on a number of streams, the Shields River, the
14 Upper Blackfoot River, and a few others where you
15 add -- the Flint Creek. You analyze the inflows,
16 precipitation, the water input into the basin. Then
17 you analyze the soils, the nature of the flows. And
18 you analyze where the diversions are and the timing of
19 the diversions. You analyze how much is being diverted
20 and where and what kind of return flows you have.

21 So you have an understanding of the -- all of
22 the components of water as it comes into the basin and
23 is used and then flows out. So you have the best
24 picture you can devise of the hydrologic system in that
25 basin. And that can show you that it is not -- it is

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1 okay for this junior user up here to take water out and
2 do his irrigation. Because by the time everything
3 sifts through the system, the guy at the bottom will
4 get his.

5 And that's out of priority, but it means that
6 you don't -- you can run a system where you don't do
7 fatal harm to any component of any single person or
8 economic entity within that basin. And that's
9 healthier for the community to not -- to have a system
10 that avoids fatal harm to any one entity.

11 And it also gives you the opportunity to,
12 like, share. You know, you can get sophisticated
13 enough that somebody up here can be taking a third,
14 somebody down here two-thirds. And you can get quite
15 sophisticated. And you can have a basin where the
16 ranchers talk to each other and farmers talk to each
17 other. And they are into managing water. At least in
18 Montana we found them to grasp on to this system very
19 tightly.

20 And they'll have meetings regularly, weekly
21 often, at the coffee shop in the mornings, 7:00 in the
22 morning. They will talk how we're going to manage the
23 basin this week, given the system we helped them devise
24 with our hydrologic analysis. And they will talk to
25 each other, okay, Charlie, you take six, and I'll take

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1 five. And, Ed, you take it on Tuesday. And, Walt, you
2 take it on Wednesday. And sometimes they're
3 experimenting; sometimes they are not.

4 But it -- it runs a system where they get
5 more economic benefit out of the water that's available
6 within the system than they would if they went with
7 strict priority.

8 And then also, we never forget that the water
9 rights are all there and the priority system is all
10 there. So that is a check on behavior. Okay. If
11 things are going well, everybody feels comfortable. If
12 things are not going well and -- anybody in the system
13 can raise their hand and say, wait a minute. Let's
14 stop and go back to priority because this isn't working
15 for me. And they have to because it's the law.

16 An analogy is two neighbors that have kids.
17 And they know where their property line is, but they
18 don't have a fence. So the kids play, and they play
19 baseball and football back and forth across the whole
20 yard, two yards together. Everything is going fine.
21 But if one kid starts beating up on the other kid, the
22 neighbor can say, that's where the line is. You keep
23 your kids on your side. I'll keep my kids on my side.
24 And that's the law.

25 So the law is always there. And you're not

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1 breaking the law. You're not bending the law. You
2 just come up with a system that allows you to work it.
3 And the law is always there to protect you, which is
4 what the law is supposed to do.

5 Q. So under the hydrologic system that you're
6 describing, senior most water users can always demand
7 water to which they're entitled under their water
8 rights?

9 A. Yes, sir. Yes, sir. Absolutely.

10 Q. And the only difference is that you might
11 actually be able to expand the total amount of users
12 that are able to obtain the water that they need?

13 A. Yes. Through sharing, through a more
14 sophisticated allocation according to hydrologic -- the
15 hydrologic characteristics of the basin.

16 Q. So during the 2001 year, you were working
17 with Wyoming officials to try to see whether or not a
18 hydrologic system could be adopted for the overall
19 Tongue River system?

20 A. Yes. That's what I described to them as what
21 I would like to see happen. And they were not
22 unfamiliar with it. As I said before, we are -- both
23 Wyoming and Montana were active members of the Western
24 States Water Council. And Montana had given
25 presentations about this approach to water management

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1 at conferences of that organization. And also we watch
2 each other.

3 So I think that they were -- I'm confident
4 that they were aware of what we had been doing. And
5 I'm confident they understood what I was talking about.

6 Q. Okay. Thank you. If you could turn to
7 Exhibit W64. I just have one small question with
8 respect to that. So, again, this is Exhibit W64.

9 A. I have it.

10 Q. Okay. And you'll see at the very bottom of
11 the page, there is an e-mail to you from Faye Bergan.
12 First of all, do you know who Faye Bergan is?

13 A. She's an attorney, if I remember correctly.

14 Q. For Wyoming or Montana?

15 A. For the Department of Natural Resources and
16 Conservation. She did work at some time with the
17 Reserved Water Rights Compact Commission. And I don't
18 know who she was working for at the time.

19 Q. In this she says, "I'm sorry. I will be
20 unable to attend the Yellowstone River Compact meeting
21 next week. The streamflow and lake level management
22 plan is not yet effective and will not be until the
23 compact is. As it stands now, finalizing the compact
24 will take some time."

25 Do you know which compact she's referring to

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1 there?

2 A. I do, Your Honor. This must have been when
3 she was working for the Reserved Water Rights Compact
4 Commission and they were working on the compact with
5 the Crow Tribe.

6 Q. Okay. Thank you. If you can turn to Exhibit
7 J51, which is the Yellowstone River Compact Commission
8 2001 annual report.

9 A. I have it.

10 Q. At the very top of the page, it says,
11 "Mr. Stults recommended that discussions and close
12 communications among technical people be maintained to
13 deal with water availability during 2002, particularly
14 in the Tongue River Basin."

15 If you recall, could you describe to me what
16 your recommendation was?

17 A. I believe my recommendation at this time was
18 consistent with the approach to having the technical
19 people being in contact with each other and getting a
20 better and better understanding of what was going on.
21 But also anticipation of another drought year in 2002,
22 'cause we'd just gone through a terrible one, terrible
23 drought in 2001.

24 My understanding from the drought scientists
25 is -- was we were likely to have another one in 2002

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1 plus the carryover effect of an -- as dry as we were in
2 2001, there would definitely be lingering effects into
3 2002 in terms of the surface water being used to
4 recharge depleted groundwater. And that would end up
5 making 2002 a particularly -- another bad year.

6 Q. And when you say that you recommended that
7 the technical people be maintained to deal with water
8 availability during 2002, what did you mean by "to deal
9 with water availability"?

10 A. That there was likely to be shortages and
11 that that would mean that we'd be dealing with
12 allocation questions.

13 Q. And when you refer to technical information,
14 who were the technical information?

15 A. Hydrologists and other water management
16 people on both sides. People like Rich Moy's
17 hydrologic staff and people that worked in the state
18 engineer's office on hydrology and water management.
19 So staff under Mike Whitaker in Wyoming and staff in
20 Rich Moy's office or Keith Kerbel in Montana.

21 Q. And you testified you're sure you had
22 conversations with Wyoming officials in 2001. But you
23 weren't sure about 2000. Can you say whether or not
24 you think it was more likely than not that you had them
25 in 2000?

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1 A. I can't with enough confidence to be of help
2 to you.

3 Q. Okay. Thank you. So let's move on, then, to
4 2002. And here, again, you talked about conversations
5 you had in 2002. Would the conversations in 2002 have
6 been any different in substance than those in 2001?

7 A. No, except -- possibly to a degree, because
8 it was getting more tense and we'd been at it -- "at
9 it" meaning dealing with this issue both technically
10 and in communication already for over a year.

11 Q. And you said yesterday -- and I wrote it
12 down, so I might not have written it down exactly
13 verbatim. But they had discussions with the problem
14 when Wyoming was storing water and how much water was
15 being stored.

16 And my question is: Can you tell me what was
17 the nature of the concerns you had about Wyoming water
18 storage in 2002 that you would have discussed with
19 Wyoming officials?

20 A. We talked about the reservoirs that they had
21 both on the Tongue and also Lake DeSmet, about whether
22 any of that water was available to be -- well -- well,
23 was the water being stored? When was it being stored?
24 Was it being used? Was it just being held? Should it
25 be released?

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1 Q. And then if you can turn to M141.

2 A. I have it.

3 Q. So this is the letter you wrote to
4 Representative Bixby in May of 2002. And in the second
5 paragraph, you discussed the fact that "The Water
6 Resources Division has been pursuing funds to do an
7 initial assessment of the amount of development so we
8 can clearly describe our concerns and our next
9 interactions with representatives of the State of
10 Wyoming."

11 So why did you need to do an initial
12 assessment at this stage?

13 A. We wanted more specificity with respect to
14 what had been irrigated and when it had begun to be
15 irrigated, what its priority date was and the amount of
16 acreage it involved so that I could get more detailed
17 about it in discussions with Wyoming.

18 Q. And why did you feel as if you needed more
19 specificity at this point?

20 A. This -- we'd already been talking in 2001
21 about there being a disparity between the amount of
22 water being used in Wyoming and the water being used in
23 Montana and that there was a need for more water to
24 come across the state line to Montana. And there was
25 a -- response was, you know, what do you mean? What

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1 lands? And things like that. I felt I would be better
2 grounded and more persuasive if I could go with more
3 detail about the specific lands and specific
4 diversions.

5 Q. So had Wyoming asked you for more specific
6 information?

7 A. Well, my memory is yes. They would say, what
8 do you mean? What lands? And where?

9 Q. Had you ever asked Wyoming for a list of what
10 they believed were the post-1950 acres being irrigated?

11 A. We did.

12 Q. And what was the response?

13 A. We did receive the material. But that was
14 later. It was beyond this time. That's my memory of
15 it, and it is not real strong.

16 Q. So I guess just coming back to this question.
17 I guess the question I have is: Rather than do your
18 own assessment, was there any reason why you couldn't
19 rely upon what Wyoming told you?

20 A. I think we felt it would be good to do both,
21 frankly. To get information from them but also to be
22 able to verify it with our own analysis.

23 Q. And then if you turn to W67.

24 A. I have it.

25 Q. So I'm just going to walk you through various

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1 parts of this. And this is a letter from you to Art
2 Hayes. So on the very first paragraph, after thanking
3 Mr. Hayes for his letter, you say, "Post-1950
4 development in Wyoming is an important issue. It was
5 good to have the issue brought out at the last
6 Yellowstone River Compact Commission meeting."

7 What commission meeting would that have been?

8 A. We were meeting more frequently at a certain
9 point in time. So I'm not sure if it is the December
10 meeting, which was the annual meeting, or if we had an
11 April meeting in 2002. And I can't remember which one.
12 But it would be one of those two.

13 Q. Would it have been the most recent one that
14 you'd had?

15 A. Yes.

16 Q. And when you say the -- was good to have the
17 issue brought out, do you remember what the discussion
18 was of the issue at that meeting?

19 A. Not specifically. But I know that it was
20 talked about. I know even -- my memory is Art even
21 talked about it, not necessarily on the record but
22 talking at break about it with -- among -- in a group,
23 that this is a problem, and we need to be doing
24 something about it. And I would be participating in a
25 conversation like that.

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1 Q. And the next paragraph, you say, "We met with
2 Wyoming in an attempt to informally manage water supply
3 in this year of continuing drought."

4 Do you recall what meeting you're referring
5 to there?

6 A. I don't specifically know, sir.

7 Q. And do you recall during this period of time
8 meeting with Wyoming to attempt to informally manage
9 water supply during that period of time?

10 A. Yes, I do.

11 Q. And what would you have discussed during that
12 meeting?

13 A. At this time I think we would have continued
14 to be talking about whether we can come up with this
15 hydrologic system and how we would go about it. And
16 the response was, no, we can't do that. And I took
17 that to mean that they were committed to the priority
18 system and didn't feel that they had the latitude to
19 break out of that.

20 So I -- it was my -- we also talked about
21 continuing to do some data development that would help
22 give them the rationale or argument to take to whoever
23 was resistant to the idea to make it possible for them
24 to convince whoever was resistant that this was the
25 right way to go.

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1 Q. And in the next sentence, then, you say,
2 "That meeting did not result in a plan to manage this
3 year's short supply to maximum advantage to all users
4 in the Tongue River Basin." Are you referring there,
5 again, to the hydrologic plan?

6 A. Yes, sir.

7 Q. Okay. And I think you may have just answered
8 this, but I'll ask the question again: You say here
9 the meeting did not result in a plan; do you recall
10 why?

11 A. It is what I just said, that they said they
12 didn't think -- they could not do that. It was my
13 understanding that they meant they were committed to
14 the priority system.

15 Q. And then if you could turn to Montana 186.

16 A. I have it.

17 Q. So in the -- in the second paragraph, it
18 refers -- or Sue Lowry here refers to receiving in
19 electronic format the spreadsheets of your water
20 rights. Do you recall why you were sending her the
21 spreadsheets of your water rights?

22 A. It was a standard part of the information
23 exchange between the two technical teams, I believe.
24 I'm pretty sure of that.

25 Q. So then further on, it talks about the GIS

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1 coverages for the various basins in Montana. And
2 Ms. Lowry says, "We'd like to create similar coverages
3 for the Wyoming portions, and our GIS technicians would
4 find it helpful to have your files."

5 Do you know whether Wyoming created a similar
6 coverage?

7 A. I can't remember.

8 Q. Then if you look at Montana 434.

9 A. I have it.

10 Q. So my only question here is: Once you
11 received the summary report, what did you do with it?

12 A. Frankly, I can't remember specifically what
13 we did with it. It went into the work that was being
14 done by the technical team on our side. And that was
15 being led by Rich Moy with his staff. And so he would
16 have probably closer now -- possibly better memory than
17 I do of what exactly happened to this.

18 Q. And do you know whether or not you provided
19 this to Wyoming?

20 A. I can't remember whether we did or not.

21 Q. So next, then, Exhibit J52, which is the
22 Yellowstone River Compact Commission annual report for
23 2002.

24 A. I have it.

25 Q. You were discussing with Mr. Kaste, I

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1 believe, the paragraph at the bottom of the page iii,
2 small Roman Numeral iii. And you mentioned earlier
3 that you were discussing -- or that this portion of the
4 minutes discusses the need for technical information
5 and analyses.

6 And I'm curious as to what type of technical
7 information and analyses this paragraph is discussing.

8 A. History of water use and where it was used
9 and the amount that was being used. And the area of
10 land under different appropriations. That's primarily
11 it. There may have been some additional hydrologic
12 data that we were trying to pull together as well.

13 Q. Okay. Thank you. And then again in 2003,
14 you talked about various conversations. I don't expect
15 you to try and remember everything that you said
16 before. But other than anything that you might have
17 mentioned earlier, would those conversations have,
18 again, been similar in character and substance to those
19 that you would have had in 2001 and 2002?

20 A. Yes. Except that I think we were probably
21 more intense about our need to be moving forward and
22 the need to come up with some program, some means of
23 getting water across the state line.

24 Q. Okay. So next, then, let's move on to the
25 year 2004. And in the year 2004 -- if you turn to

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1 Exhibit J64, which is the call for water under the
2 Yellowstone River Compact, dated May 18th, 2004.

3 A. I have it.

4 Q. You say in the second line, "Also at the
5 Yellowstone River Compact Commission meeting in April,
6 I agreed to send you a letter stating our concerns and
7 needs."

8 Could you tell me about the conversation
9 during which you agreed to send this letter or send a
10 letter?

11 A. I don't have a strong enough memory to say
12 exactly what was said back and forth. But I have
13 enough of a memory to characterize it generally. And
14 that is that we were talking about the fact that we
15 thought that there was a problem and that we weren't
16 getting our supply of water. And the response was,
17 well, what do you mean? What do you want us to -- what
18 do you think that we're doing that's wrong? And -- and
19 that sort of thing.

20 Q. So did you, then, agree to send a letter in
21 response to those questions?

22 A. Yes.

23 Q. And why did you send a formal call for water
24 under the Yellowstone River Compact of the nature found
25 in Exhibit J64 in 2004 but not in prior years?

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1 A. The conflict over the water and
2 interpretation of the compact had gone back -- had been
3 ongoing for decades between Montana and Wyoming. Not
4 continuously but there were -- my knowledge was that
5 there was a particularly significant one back in the
6 1980s. And that the compact was a dead end. To get
7 into the language of the compact was a dead end.

8 It was also an area where Wyoming had
9 extensive experience with other states dealing on those
10 kinds of issues, and they had deep pockets. And we
11 were poor and with little experience. And so I didn't
12 want to go down this dead end, 'cause that would go
13 nowhere. And I was -- I did not want to initiate
14 something that would become litigation especially -- I
15 just did not want to get into litigation because we
16 seemed weak and they seemed strong.

17 So my goal, my strategy was to do everything
18 in a way that would not allow or encourage or end up
19 having Wyoming going back down the same road right into
20 the compact. And it seemed to me that sending this
21 kind of letter would do exactly that. And it seems to
22 me that it has.

23 And so my -- that's why I held off from
24 taking what I -- what we've been calling the formal
25 route of sending a formal call letter. Because to my

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1 mind, it always seemed like it was going to make it
2 more likely than not -- that it would increase the
3 possibility of going down the litigation road, going
4 into the language of the compact, which historically
5 had been a dead end.

6 Q. And what was it in 2004 that led you, then,
7 to actually send Exhibit J64?

8 A. In a word, frustration. But we spent already
9 a lot of time and a lot of staff time trying to move in
10 the direction. And it was no change of behavior on the
11 part of Wyoming. So I felt that there needed to be
12 something different that would hopefully refocus them
13 and get them to change their behavior.

14 And hopefully the change in behavior would be
15 to say, okay, we don't want to go down the road of
16 litigation either because we've learned in past that it
17 hasn't worked so well. As a matter of fact, we're
18 trying to settle with Nebraska, and that's looking
19 pretty good. So we agree with you that this -- we
20 should get more serious about this to avoid litigation.

21 That was my hope. And that was what I was
22 hoping that this 2004 letter would do, that it would
23 refocus, intensify the focus and get us moving with
24 more commitment to resolving that issue.

25 My fear -- I knew at the time, too, that it

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1 had a risk that we would go into a more formal
2 structure that could lead into litigation.

3 Q. And was it your initial decision to send J64?

4 A. Yes. And then I'd have to get approval, of
5 course, up the line.

6 Q. And then if you look at J65, which is
7 Mr. Tyrrell's response to your letter.

8 A. I have it.

9 Q. On page 2 of that letter in the first full
10 paragraph, it starts out by saying, "And as I stated
11 earlier, the compact makes no provision for any state
12 to make a call on a river."

13 Do you recall what your understanding was of
14 that statement?

15 A. I was a little dumbfounded. In my
16 understanding of appropriation doctrine, anybody with a
17 water right always has the right to call somebody else
18 with a water right. And I know you had a state line
19 intervening. But it just seemed inconceivable to me
20 that you could have a circumstance where one holder of
21 rights could not make a call on another holder of
22 rights. So it seemed inconceivable that anybody could
23 think Montana could not make a call on Wyoming.

24 Q. So was it your understanding of Mr. Tyrrell's
25 response to your letter that the call encompassed by

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1 your letter was not permitted under the compact?

2 A. That's what I understood it to mean.

3 Q. And then if you look at J66 and J67. These
4 were the exchanges of information -- or exchanges of
5 letter in July 2004 that you've previously discussed
6 dealing with various technical data and information.
7 Given the -- Mr. Tyrrell's response to your letter, why
8 did you then go on to collect technical information?

9 A. Again, I was hoping that we would be
10 refocusing and becoming more serious about the attempt
11 to develop something that would be a non-litigation
12 solution to the conflict. And they were always
13 bringing up the fact that there needed to be more
14 specificity about what needed to be shut down, what
15 needed to be -- or what was -- what we were
16 characterizing as out of compliance. So we thought,
17 well, from the perspective -- that's a legitimate thing
18 to say. And we should try to meet that legitimate
19 concern.

20 Also, it's the kind of thing that would make
21 it easier and better to manage the whole system even if
22 we were going to go down the hydrologic system,
23 hydrologic approach, to be able to have more
24 information about how the system worked. So that was
25 an activity that would be beneficial to us if we were

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1 going to go down the hydrologic system. It would be
2 beneficial to us to get them to respond to the call.
3 It would be beneficial to us even if we went into a
4 litigation situation. Because we'd provide more of a
5 basis for resolution of our settlement of litigation.
6 It would provide a better basis for a judge to make a
7 decision if we were in litigation.

8 So I saw -- and then if I can expand a little
9 bit. These kinds of conflicts have, in past, have had
10 extremely long time lines. And some of the time line
11 was developing this kind of information. So I thought
12 in a sense you're kind of front-loading the system to
13 get it right now, especially if you can get it in
14 cooperation between the two sides and have agreement on
15 the data. And so it seemed to me that the time taken
16 and effort taken was something that was going to be
17 beneficial on several levels.

18 Possibly, having looked at the conflicts
19 across the west over water, the agreement on the data
20 is really big. And so that would be one of the most
21 important things. And also it would develop this
22 comanagement attitude and consciousness about dealing
23 with the Tongue River Basin, that we're in a
24 comanagement kind of approach to it. So let's work
25 together on getting the information that we could use

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1 to manage it as a team.

2 Q. And did Mr. Tyrrell or other officials in
3 Wyoming indicate to you that depending on what the
4 information might ultimately show, that they might be
5 willing to regulate post-1950 uses in Wyoming in order
6 to permit more water to come down into Montana?

7 A. I don't remember that ever happening.

8 Q. Then if we look at W84. And W84 is, again, a
9 series of e-mails.

10 A. I have it.

11 Q. There's discussion in here about a letter.
12 So you'll see in the e-mail portion at the top of the
13 page and the, I guess, third line down says, "Your
14 suggestion about the timing of the letter is something
15 I'll propose to them as an option." And then down
16 below, in the e-mail from Pat Tyrrell to you in the
17 third paragraph, it says "Regarding your letter
18 formally requesting our entering dispute resolution."

19 Do you recall what that letter is that's
20 being referred to here?

21 A. We'd talked -- the compact commission had
22 adopted dispute resolution rules. And we had talked
23 about me sending a letter to Pat, I believe, that we
24 should take this dispute and use the rules process, the
25 process established in the rules, to deal with that

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1 dispute.

2 Q. And do you know whether or not a letter was
3 ever sent?

4 A. I think that it wasn't because I think that
5 we -- it was decided -- and I can't remember if it was
6 mutual or not -- that the rules were -- that we had
7 elements of disagreement here that the rules would not
8 be sufficient to deal with. That's my memory. To be
9 candid -- I'm always candid. But my memory is such
10 that I can't say whether that was something that was
11 going on right at this time or at a later time.

12 Q. Okay. And do you recall what the nature of
13 those issues were that could not be resolved through
14 dispute resolution?

15 A. What's contained in the call letters.

16 Q. And what do you mean by that?

17 A. The fact that we were certain that we were
18 not -- that water was being used in Wyoming that should
19 be coming across the state line into Montana.

20 Q. And were they factual issues you didn't think
21 could be resolved or legal issues or both?

22 A. Mostly factual.

23 Q. All right. Then if you look at Exhibit W113.

24 A. I have it.

25 Q. In this particular document, there's a

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1 reference here to a -- in the second line, "we work up
2 a terms of reference-type document."

3 Do you recall what this is referring to?

4 A. I can't for sure. No, I can't.

5 Q. Okay. Thank you. And then turning to M161.

6 A. I have it.

7 Q. So in paragraph 3, it's talking about a
8 question Montana posed concerning how water rights with
9 priority dates prior to March 1945 were administered.
10 And it then goes on to talk about "Wyoming indicated
11 that those rights were allowed to divert 1 CFS per
12 40 acres instead of the normal 1 CFS per 70 acres
13 during times of runoff events. Wyoming appropriators
14 can take more water when their system is full, and no
15 one is making a call for water."

16 So do you recall what that discussion
17 referred to?

18 A. All I remember is that there was some
19 question about the duty of water in Wyoming and that it
20 seemed to be something that was a moving target from
21 our perspective. And so we were trying to understand
22 what the duty of water was in Wyoming. And I wanted to
23 get that discussion on the record. Because we had --
24 we were uncomfortable about what we'd been hearing
25 because it was -- it sounded like it was a flexibility

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1 in the system that was quite convenient to the Wyoming
2 water users that would be harmful to us or possibly
3 harmful to us.

4 Q. And then I had a question regarding Wyoming
5 310, but I don't have Wyoming 310. That was the one
6 that apparently the only copies were ones that were
7 already marked up.

8 A. I do have it.

9 Q. Can I just look at it for one second? There
10 was a discussion that you had with Mr. Kaste regarding
11 the paragraph at the top of page 2. "For the past two
12 years there's been an effort through the staff in both
13 our states to find a practical way to increase the
14 efficiency of distribution to maximize the benefits of
15 greatly reduced water supply in these years of
16 drought."

17 And what is that referring to?

18 A. That's referring again to taking some
19 hydrologic approach or even a shared use approach that
20 some water users use where you share the -- you ration
21 the water across the -- in order to try and maintain
22 the minimum amount of productivity for everybody so
23 that nobody is fatally harmed. That kind of approach.

24 And it would have been good -- fine for us if
25 we just even come up with a system like that that could

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1 have been used -- triggered by certain drought or water
2 shortage data. So that if you were coming into a
3 situation where water was short, you could exercise
4 some kind of approach that would minimize the impacts
5 to the economic system throughout the entire basin.

6 Q. And you go on to say that "The April
7 Yellowstone Commission meeting, this effort stalled."

8 What happened at that meeting that led you to
9 believe the effort had stalled?

10 A. It's hard for me to remember specifically
11 what happened at what meeting. But in -- at that time,
12 we just -- we had tried to convince Wyoming to come up
13 with something like that. And it was clear that
14 we'd -- we were getting no change in perspective or
15 behavior.

16 Q. Okay. And I think I have just one other
17 quick question which is on -- so this is on J68, which
18 is the call for water under Yellowstone River Compact
19 dated July 28th, 2006.

20 A. I have it.

21 Q. And the second paragraph at the very bottom,
22 it says, "This is consistent with Wyoming's statement
23 at the compact commission meeting in April that Wyoming
24 does not regulate any uses on the main stem."

25 And my question in this case is: Do you

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1 recall what the general discussion was in April of the
2 compact commission meeting at which you believe this
3 statement was made?

4 A. I can't remember the explicit -- or precise
5 nature and language of the discussion. But it was that
6 we found out at that meeting that Wyoming was not doing
7 any regulation on the Tongue. And we were, frankly,
8 dumbfounded. Because circumstances were so severe that
9 it seemed, to us, that you would necessarily be
10 allocating water amongst your diverters, especially
11 when we had been told over the many years -- well,
12 before I was even a -- even before I was the
13 commissioner, I was -- I had been told that Wyoming had
14 a system where there was -- it was a hundred years old.
15 It went back to 1885, and they had very strong
16 management and -- of allocation of water and that their
17 regional offices were allocating water. And I had
18 heard that over and over again, even while I was the
19 commissioner.

20 So to find out that in a severe drought year
21 there was no management whatsoever on the main stem of
22 the Tongue, a compact river, that they had been in
23 discussion with us about for five years about shortages
24 was -- I was flabbergasted.

25 So my frustration was part of my motivation

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1 to go ahead and send this second letter. It was clear
2 that even with the first letter, even with the
3 additional work that we'd been doing, even with the
4 attempt to try to work collaboratively and
5 collegiately, they just were using water willy-nilly.
6 And so I -- that's what I'm saying here.

7 Q. Do you recall whether or not there was
8 discussion at the April meeting regarding whether
9 Wyoming should regulate post-1950 uses for the benefit
10 of Montana?

11 A. We felt -- I am confident that there was a
12 discussion saying that they -- we are surprised that
13 they are not regulating water in a year like this.

14 Q. Do you recall whether or not there was any
15 discussion at that meeting of whether or not you wanted
16 Wyoming to regulate post-1950 uses?

17 A. Maybe not regulate post-1950 uses in that
18 explicit of term but that they should be regulating
19 their water in a year like this.

20 Q. And would you have said that in order to have
21 more water in Montana?

22 A. That would be the only reason I'd say it.

23 Q. Okay. Thank you.

24 SPECIAL MASTER: Those are my only questions.

25 Mr. Kaste.

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1 remember that this was the exhibit. But the second
2 sentence in that later paragraph says -- from Ms. Lowry
3 says, "We appreciated receiving the report. However,
4 the accompanying maps, sheets 1 through 7, described in
5 the summary report were not transmitted to us."

6 Do you remember our discussion about the maps
7 earlier?

8 A. Yes.

9 Q. And I couldn't remember which e-mail it was.
10 It's this one.

11 All right. One more thing. You talked about
12 your feeling that the duty of water in Wyoming is a
13 moving target. Do you remember that?

14 A. Yes.

15 Q. All right. Do you understand that the duties
16 of water in Wyoming are established by statute?

17 A. Yes.

18 Q. And the statute says you get 1 per 70 acres,
19 1 CFS per 70 acres; right?

20 A. I don't know.

21 Q. All right. Do you know if there's another
22 statute that says in times of surplus you get 2 CFS per
23 70 acres?

24 A. Sounds familiar.

25 Q. As far as I know, those are the only two

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1 statutes we have on duty of water. Is that consistent
2 with your understanding?

3 A. Well, I have no understanding of that.

4 Q. Fair enough.

5 A. Of what the statutes are.

6 Q. Fair enough. Are you aware, in the
7 preliminary decree on the Tongue River, that the duties
8 of water in Montana vary between 1 CFS per 1.7 acre and
9 1 CFS per 180 acres?

10 A. Say that again, please.

11 Q. All right. In the preliminary decree for the
12 Tongue River adjudication, the duties of water in
13 Montana vary 1 CFS per 1.7 acres, all the way up to 1
14 CFS per 180 acres?

15 MR. SWANSON: Objection. Foundation.

16 BY MR. KASTE:

17 Q. The question is are you aware of that fact?

18 SPECIAL MASTER: I'll permit that question.

19 THE WITNESS: I'm not familiar with the
20 details of the Tongue River preliminary decree at all,
21 so, no, I'm not aware of that.

22 MR. KASTE: All right. Thank you.

23 SPECIAL MASTER: Thanks, Mr. Kaste.

24 Mr. Swanson?

25 MR. SWANSON: Good afternoon, Your Honor.

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1 REDIRECT EXAMINATION

2 BY MR. SWANSON:

3 Q. Good afternoon, Mr. Stults. We're close to
4 the end here.

5 A. It's okay with me.

6 Q. I thought it was interesting, a statement
7 that you made in response to a question from the
8 Special Master just a moment ago. You were talking
9 about regulation of the main stem of the Tongue River
10 in Wyoming or lack thereof. And the Special Master
11 asked you if you asked Wyoming for a regulation at an
12 April meeting. And he asked, "Did you ask for a
13 regulation to get more water?"

14 And you stated, "That would be the only
15 reason I would ask for it."

16 Do you recall that statement a moment ago?

17 A. Yes.

18 Q. So as we look at all the conversations that
19 you had with members of the Wyoming State Engineer's
20 Office and other officials, is that a fair
21 characterization of the reason you were asking for a
22 hydrologic study and new ways of trying to manage the
23 river better?

24 A. Yes.

25 Q. Meaning the end result was you're asking for

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1 more water for Montana?

2 A. Yeah. That was the overall goal of all that
3 I was doing was trying to get more water across the
4 state line.

5 Q. So one of the first questions from the
6 Special Master, you were talking about post-1950
7 irrigation in Wyoming and your times when you visited
8 the state of Wyoming. And you said you saw there were
9 post-1950 uses in Wyoming. And you said that shouldn't
10 be done or that shouldn't be happening.

11 Do you remember saying that?

12 A. I'm not sure that that was exactly what I
13 said, but, yes, I remember it.

14 Q. So do you believe you conveyed that to
15 Wyoming in 2001 and 2002 that that post-1950 irrigation
16 shouldn't be happening when the pre-1950 rights in
17 Montana were not satisfied?

18 A. I believe I did communicate that to them at
19 that time.

20 Q. And when you asked Wyoming to consider a way
21 of managing the river as a hydrologic system, what was
22 motivating you for that -- to even ask that of Wyoming?

23 A. Well, it's not a simple motivation. It's a
24 complex motivation. The primary one is that it's the
25 right way to manage water hydrologically. It doesn't

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1 matter where you are.

2 My secondary motivation is it's the right way
3 to -- it's the best way to protect the economic
4 viability in the basin as a whole. It's also a way in
5 which you can build community. It's a very complex
6 motivation.

7 But it also has the advantage of making sure
8 that the most number of people get the most benefit out
9 of the water that's available in the system. And the
10 Tongue River, I think, is a classic example of where
11 that needs to happen.

12 Q. So is each year that we talk about, where you
13 were talking to Wyoming actively about this, and you
14 said actually that the -- I think you said the
15 intensity of the conversations increased in 2004. Were
16 those conversations motivated by the beginning of
17 point -- whether you need the water in Montana -- more
18 water in Montana on the Tongue?

19 A. Could you say that again or maybe restate it
20 a little bit? I'm not sure I understand.

21 Q. Each of these conversations that you had with
22 the officials from Wyoming specifically of how to
23 manage the water better and manage the river better,
24 was the motivating point of that, that you were looking
25 for more water in Montana on the Tongue River?

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1 A. I thought I just gave some of the motivation.
2 But, yes, it was because we were in a circumstance
3 where our needs were not getting met. And it appeared
4 to be, in part, because water was being used on the
5 Wyoming side of the line that we didn't feel that they
6 had the standing or the basis or the right to use.

7 So it wasn't that I just thought that it
8 would be cool to have more water in Montana. It was
9 because -- I thought I'd said this already --

10 Q. You probably said it many times to all of us.
11 I apologize. I'm just trying to clarify.

12 A. I'll try to continue.

13 Q. If you'd like, we can move on.

14 A. I was trying to get water to Montana because
15 we were in deficit. And there seemed to be a surplus
16 in Wyoming.

17 Q. One of the ways you talked about seeing that
18 surplus was when you were visiting the state during the
19 irrigation seasons -- and when I say "the state," I
20 mean the state of Wyoming -- and you said you saw a
21 difference across the state line. You mentioned the
22 brown in Montana and green in Wyoming. And when you
23 saw that, Mr. Kaste had suggested earlier that you
24 waited until December, after the irrigation season to
25 tell Wyoming officials.

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1 So my question to you is: When you saw those
2 stark differences, did you notify the officials in
3 Wyoming, either you or your staff, actually during the
4 irrigation seasons?

5 A. Say that again, please.

6 Q. You mentioned that you had visited Wyoming
7 during the irrigation season and had seen differences
8 between Montana and Wyoming as far as the quality of
9 the crops. You used the term, "It was brown in Montana
10 and green in Wyoming"; do you recall that?

11 A. Yes.

12 Q. And Mr. Kaste had suggested during his
13 cross-examination that you had waited until December to
14 notify officials from Wyoming about the need for water.
15 And I just want to ask you, did you or your staff, when
16 you saw those differences between the two states during
17 the irrigation season, did you notify those officials
18 at that time while it was still during the irrigation
19 season?

20 A. Frankly, I'm having a harder time remembering
21 things as we go through this. But if I didn't
22 personally, I asked and authorized my staff to do that.

23 Q. Okay.

24 SPECIAL MASTER: Can I suggest this might be
25 a good time for the afternoon break. And let me also

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1 say, Mr. Stults, that I know you've been on the stand
2 for a long time, and I appreciate your being here
3 today. And the reason why you've been on the stand for
4 a long time is that your testimony is important to one
5 element of the case. But I know that this can be
6 difficult.

7 So let's take a 15-minute break at this point
8 in time. And then we'll come back, finish up the
9 redirect examination, and then give the next witness an
10 opportunity to actually take the stand today.

11 MR. SWANSON: Thank you, Your Honor.

12 SPECIAL MASTER: Thank you very much. So,
13 again, let's come back -- well, let's come back at five
14 to 3:00.

15 (Recess taken 2:37 to 2:42
16 p.m., October 22, 2013)

17 SPECIAL MASTER: So, Mr. Swanson.

18 MR. SWANSON: Thank you, Your Honor. And
19 we're nearly done. I just have two brief questions of
20 Mr. Stults.

21 BY MR. SWANSON:

22 Q. Mr. Stults, looking back on your years of
23 2001, 2002 and communicating with the Wyoming
24 officials, based on your communications, do you believe
25 Wyoming understood that you were asking them to take

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1 action to get water to Montana in those years?

2 MR. KASTE: Objection. Calls for
3 speculation. He can't possibly know what we
4 understood.

5 SPECIAL MASTER: I think the question as
6 phrased is okay. This is simply asking what
7 Mr. Stults' belief was. And without any further
8 inquiry, we can ultimately determine what the
9 credibility of that is.

10 THE WITNESS: Yes. I was always convinced in
11 my own mind that they understood what I was asking for
12 for a couple reasons: First of all, I wouldn't have
13 continued down the road, all the effort we put into it
14 all those years, if I didn't believe that.

15 And second of all, I've been around water
16 professionals, and being one myself, I couldn't imagine
17 any water professional not understanding what I was
18 meaning. I think you would be deluded if you didn't
19 understand that.

20 BY MR. SWANSON:

21 Q. And then the counsel for Wyoming had talked
22 about the 2004 letter, the 2006 letter and some
23 differences in the language within those two letters.
24 Do you recall if Wyoming ever communicated to you that
25 if you reworded the call letter a different way, that

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1 they may be able to respond and give you more water?

2 A. No, I don't. There was never any suggestion
3 from them about how to do something that would make it
4 so that they would be providing more water to Montana.

5 Q. And then the Special Master had asked you
6 about the technical information. And I couldn't recall
7 if you said that you didn't recall or specifically what
8 the answer was.

9 So I'll just clarify. Did the Wyoming
10 officials ever indicate to you that based on the
11 results of some of the technical information, that they
12 may be able to provide more water to Montana?

13 A. No. As a matter of fact, it was -- this
14 blossoming request and exchange of information seemed
15 to be not going anywhere and just increasing our
16 frustration and almost appeared to be a way of not
17 moving forward.

18 MR. SWANSON: Thank you, Your Honor. I have
19 no further questions.

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

22 So, Mr. Stults, at this point, you're
23 excused. And I just want to thank you very much for
24 your testimony. It's clear that you care a great deal
25 about water management. And I hope you continue to

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1 enjoy your retirement.

2 THE WITNESS: I do. I do very much.

3 SPECIAL MASTER: Mr. Draper.

4 MR. DRAPER: Your Honor, we would call our
5 next witness, with your permission, Mr. Keith Kerbel.

6 (Keith Kerbel sworn.)

7 THE CLERK: Please have a seat. If you'd
8 state your name and spell it for the court reporter,
9 please.

10 THE WITNESS: My name is Keith Kerbel,
11 K-e-i-t-h K-e-r-b-e-l.

12 KEITH KERBEL,
13 having been first duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. DRAPER:

16 Q. Mr. Kerbel, we provided you with a set of
17 exhibits earlier. Did you bring those to the stand
18 with you?

19 A. No, I didn't. I can get them.

20 Q. If you can tell us where to find them.

21 MR. DRAPER: If you would indulge us for a
22 minute, Your Honor.

23 SPECIAL MASTER: That would be fine. Why
24 don't we just go off the record for a moment.

25 (Discussion held off the

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1 record.)

2 SPECIAL MASTER: Why don't we go back on the
3 record while Mr. Kerbel is doing that. I want to let
4 counsel know that it appears as if we're on basically
5 the same schedule as I talked about for tomorrow. But
6 the good news is that my deputy has gotten permission
7 to be able to move the boxes from this courtroom, over
8 the lunch hour tomorrow, directly into the Snowy
9 Mountain courtroom so that we don't have to move them
10 twice -- or you don't have to move them twice in the
11 next couple days.

12 So it will require us to make sure that we
13 move those boxes probably no later than about
14 12:00 here. But we also have to make sure the judge
15 who's in the Snowy Mountain courtroom has finished the
16 morning session there. I think everything will work
17 out, but it might require a little bit of fine-tuned
18 coordination.

19 MR. DRAPER: Well, that's very good news,
20 Your Honor. Thank you for arranging that.

21 And the parties have talked, and we are in
22 agreement that we should shut things down after
23 tomorrow morning's session and not try to do an
24 afternoon session.

25 SPECIAL MASTER: Okay. And in case I forget

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1 when we finish today, is 8:30 a good starting point for
2 tomorrow?

3 MR. DRAPER: 8:30, yes.

4 MR. KASTE: Yes.

5 SPECIAL MASTER: Okay. Great. We will start
6 at 8:30 tomorrow morning, and we will go until probably
7 just slightly after noon.

8 MR. DRAPER: Very good, Your Honor.

9 SPECIAL MASTER: Welcome back to the stand,
10 Mr. Kerbel.

11 Mr. Draper.

12 MR. DRAPER: Thank you, Your Honor. The
13 purpose of Mr. Kerbel's testimony is to describe his
14 participation and discussions between the two states at
15 critical periods based on his intimate involvement with
16 the water users in Montana and his counterpart water
17 officials in Wyoming and Wyoming water users.

18 BY MR. DRAPER:

19 Q. With that, Mr. Kerbel, please state your
20 address.

21 A. 297 Quiet Water, Billings, Montana 59105.

22 Q. By whom are you currently employed?

23 A. I'm currently employed by the Bureau of
24 Reclamation.

25 Q. In what capacity are you employed?

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1 A. I'm a water rights specialist working on the
2 adjudication in the state of Montana.

3 Q. How long have you held that position?

4 A. Three years.

5 Q. Since sometime in 2010?

6 A. Yeah, 2010. I started that position
7 September 27th, 2010. September 27th.

8 Q. Please describe your postsecondary
9 educational background.

10 A. Went to school at the University of Montana.
11 Went to school at the School of Forestry, graduated
12 with a bachelor of science in natural resources
13 conservation in 1974, I believe.

14 Q. You formerly worked for the Montana
15 Department of Natural Resources and Conservation; isn't
16 that right?

17 A. Yeah, I worked for them for 34 years. I
18 started working for the Department of Natural Resources
19 and Conservation June 28th, 1976. And I retired from
20 that agency, from DNRC, in September of 2010. In
21 September, yeah.

22 Q. What positions did you hold at the Department
23 of Natural Resources and Conservation?

24 A. I originally started out as a water rights
25 specialist, water rights analyst for the adjudication

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1 on the Powder River. And I started in Billings and
2 trained in Billings. I spent a considerable amount of
3 time in the Billings office under Ralph Saunders
4 learning how to sectionize and interpret aerial
5 photography. And after we did an extensive amount of
6 sectionizing aerial photos, which was a lot of fun, and
7 spent days and weeks doing it for the Powder River on
8 our 1967 photos, then I went out into the field for the
9 rest of the summer and worked on the Powder River
10 investigating historical water uses that were pre-1973.

11 And they required declarations be filed on
12 the Powder River. And the Department of Natural
13 Resources was charged with going out there and
14 investigating and interviewing water users and water
15 uses and documenting those historical uses.

16 After that, I became a new appropriations
17 specialist. And I was in Miles City, Montana, moved
18 from Broadus to Miles City. And basically I worked in
19 the permitting program with new water rights. And
20 after 1973, the Montana Use Act required any new uses
21 of water or any changes of water that an individual or
22 an irrigator or water user would have to apply for and
23 receive a new permit or a change authorization if they
24 are moving water around from one location to another or
25 portions of the right or changing the purpose.

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1 After that point in time, I believe it was
2 1981, I received -- I started working in Billings as a
3 regional manager for the Billings office. And I then
4 worked with six counties around this area. And I've
5 been doing that ever since January of 1981 until I
6 retired in 2010.

7 Do you want me to describe some of the duties
8 I had in my job as a regional manager?

9 Q. Yes, I do. But I'd like first to have you
10 confirm, using Exhibit M232, the organizational chart
11 for the Department of Natural Resources and
12 Conservation.

13 A. Yes, I have it right here.

14 Q. If we look at page 2 of that exhibit, the one
15 that is entitled in the upper left-hand corner, Water
16 Resources Division, does that organizational diagram
17 show the position that you held for 29 years as
18 regional manager in Billings?

19 A. Yes. It would be the Billings region. And
20 the present regional manager is Kim Overcast. It would
21 be on the far bottom left.

22 Q. And what areas did you deal with in your
23 position over the 29-year period as regional manager?

24 A. Well, pretty much most of our job duties that
25 we held in the Billings office when I first started

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1 were water rights. We worked with the adjudication of
2 water rights in northeastern Montana and south central
3 Montana. And I also worked with permitting. We worked
4 with receiving new applications for new uses of water
5 and changes of uses of water plus groundwater, not just
6 surface water but groundwater as well.

7 And then later on in my career, we had a
8 change, and we acquired more duties. It's easy to do.
9 But we required more duties. And we also started
10 working with the Board of Water Well Contractors. We
11 also worked with the Floodplain Management Program here
12 in southeastern Montana and south central Montana. We
13 worked with dam safety issues. We worked with state
14 projects.

15 We went out and did a lot of work, rehab
16 work. And a lot of it was just management. We didn't
17 operate the state projects. We just did a lot of
18 safety issues around the projects and measured
19 piezometers on a monthly basis, or sometimes even more
20 often depending on if there was a high water event.
21 And we basically were the eyes and ears for the Project
22 Bureau in Helena for the most part.

23 There's other things. Enforcement of water
24 rights was another thing I spent a lot of time on. But
25 that's enough. The list could go on.

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1 Q. All right. Well, I don't want to cut you off
2 prematurely.

3 A. That's all right.

4 Q. You mentioned the word dosimeter. Would you
5 spell that and tell us what you meant by that?

6 A. Oh, God. You're going to ask me to spell
7 that?

8 Q. Here, I can try, and you can tell me if I'm
9 right.

10 A. It's piezometer. And basically what they are
11 is they're just -- maintain the hydrostatic pressure,
12 and they are drilled along the dam, around the dam
13 location to see if there's any leakage within the dam
14 location or the surrounding area of the dam. And we
15 would go out monthly and measure those. And then we'd
16 just do some -- look for seepage on the face of the dam
17 or behind the dam or anywhere else.

18 And we had three state projects that we
19 monitored. One is at Glacier, which is 10,000 feet.
20 But we didn't do that very often. That was done once a
21 year. And then the one we had at Cooney and the one at
22 Tongue River.

23 Q. Those other state projects, just so we -- one
24 was Glacier?

25 A. Yeah. Glacier is above Red Lodge. And

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1 that's just a high mountain lake that was added onto in
2 the 1930s. And another one is Cooney. It was one of
3 the first state projects built in the state of Montana.
4 And it's right above -- it's close to Red Lodge right
5 above -- it's on Red Lodge Creek.

6 Q. How do you spell that?

7 A. Cooney, C-o-o-n-e-y, Reservoir.

8 Q. And the third project?

9 A. Tongue River Reservoir. T-o-n-g-u-e.

10 Q. Thank you. I appreciate thoroughness in a
11 witness.

12 A. Okay. Just trying to follow my ex-boss'
13 lead.

14 Q. As a regional manager for the Billings office
15 of DNRC, did you have other responsibilities with
16 respect to the Tongue River Basin?

17 A. Later on, they closed the Miles City office.
18 And we acquired another six counties to administer and
19 work with the water users down there. And that
20 included more of the southeastern Montana area, which
21 included Rosebud County, which is where Tongue River --
22 and Custer County, which is the area that Tongue River
23 Reservoir services.

24 And at that particular time -- and that was
25 in -- I'm thinking it was around '94 -- '92, '93,

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1 '94 -- I'm not really totally sure; my memory escapes
2 me -- when we acquired that authority to work with
3 those water users.

4 Q. And other than the work that you did relating
5 to dam safety and the Tongue River Reservoir, what
6 responsibilities, particularly, did you carry out in
7 the Tongue River Basin while you were a regional
8 manager?

9 A. Back in the '80s, early '80s, a lot of times
10 Gary Fritz, our division administrator at the time, he
11 would drive through Billings. And he was -- he would
12 be heading south basically to Cody or Sheridan or parts
13 beyond. And he was attending the Yellowstone River
14 Compact meeting.

15 And a lot of times he was by himself. And
16 he'd swing by the Billings office, and he'd grab me,
17 and I'd keep him company for a couple hundred miles
18 while we ran down there. He attended the meetings and
19 come back again. So a lot of times I don't remember
20 what years it was, but I went down to a lot of the
21 compact meetings that were held in December, late
22 November, and I just observed. I just sat in on those
23 meetings. And I learned a lot about the interactions
24 between Montana and Wyoming regarding all three -- or
25 all the drainages: Powder, Tongue, Big Horn, and

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1 Clark's Fork.

2 And the total, while I administered water --
3 or the Big Horn and Clark's Fork were in my area. So
4 Gary said, well, it might be a good idea to pick up
5 some speed on this and at least gain some interest and
6 gain some knowledge about what this group of people do.

7 So I tagged along and went down there. And I
8 learned a lot, and I met the individuals at the Board
9 of Control and the Powder area and the Tongue area.
10 And then I met the Board of Control individuals,
11 basically, in the Clark's Fork and the Big Horn. So we
12 interacted ever since. I mean, we got to know each
13 other really well. And we always interacted and called
14 each other up from time to time, if nothing more, to
15 BS.

16 And once in a while we talked work. And a
17 lot of times we talked about the drainage. We talked
18 about how much water is in the drainage. We talked
19 about what the water users were doing in the drainages
20 and all of them -- all the way from the Powder River
21 all the way over to the Clark's Fork.

22 And we discussed a lot of things as far as
23 water availability goes. We talked about water use in
24 the rivers and the tributaries. And we talked about
25 storages and the different drainages, when they fill,

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1 when they release, how they operate, and the whole
2 works.

3 And the Tongue River Basin is pretty -- from
4 listening to Mike and going on the tour that Jack was
5 talking about, it's a complicated basin.

6 Q. Let me just stop you for a second to
7 identify. The discussions you were just referring to,
8 those were discussions between you and whom?

9 A. They were discussions basically with Loren
10 Smith over on Clark's Fork and the Big Horn.

11 Q. Is he Wyoming --

12 A. He works with the Wyoming -- yeah, he works
13 with Wyoming, with the Board of Control. He's the
14 superintendent. And the discussions I had also were
15 with Mike Whitaker. It was his counterpart in
16 Sheridan, the Board of Control in Sheridan. And then
17 Carmine. I'll never be able to pronounce his last
18 name.

19 Q. LoGuidice?

20 A. LoGuidice. And then Bill Knapp was there
21 too. He was one of the specialists that worked in
22 there. And we talked a lot about the drainage, how
23 it's operated, how it works, how it doesn't work,
24 different things like that. And we went on different
25 trips together.

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1 Like, Mike and I went over to -- they were
2 adjudicating water rights on the border. And when
3 adjudicating water rights, I think I went with him on a
4 couple occasions to make sure that Montana's interests
5 were part of the -- that we knew what was going on.

6 Q. You went with Mr. Whitaker?

7 A. With Whitaker, yes. With Mr. Whitaker. And
8 so Mike and I got to know each other real well in this
9 process because he was my counterpart in Wyoming.

10 Q. Mike Whitaker was the Division II --

11 A. He was the superintendent, yeah, until he
12 retired.

13 Q. You also mentioned Gary Fritz. Is he -- or
14 was he a Montana official?

15 A. Yes. He was Jack's predecessor, Jack Stults'
16 predecessor. He was the administrator for water
17 resources in the Department of Natural Resources before
18 Jack got the job.

19 Q. And looking back at our Exhibit 232, he held
20 the position that Tim Davis now holds?

21 A. Correct.

22 Q. And, again, as you said, Jack Stults held
23 that previously?

24 A. Yes.

25 Q. Since we're talking about Mr. Fritz, did he

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1 also hold a position on the compact commission?

2 A. Yes, he was the commissioner.

3 Q. Did you become -- as part of your work in the
4 Tongue River Basin, did you become familiar with the
5 water users and their uses along the Tongue River in
6 both states?

7 A. Yes. Yes, I did. Through my job, I felt it
8 was important that I learn and meet the water users in
9 the Tongue River Basin basically. And I made it a
10 point to work with the folks in Montana.

11 The Tongue River Water Users' Association,
12 the Department of Natural Resources own the Tongue
13 River Reservoir. And the Tongue River Water Users'
14 Association operated the Tongue River Reservoir. And
15 basically we assisted them with expertise. And I don't
16 mean on -- the State Projects Bureau did. They
17 provided the assistance basically to maintain the
18 reservoir. They operated the reservoir. They also
19 maintained the reservoir as well because they were
20 using it. So they maintained it with our direction.

21 And we also had -- after we rehabbed the
22 reservoir in '98, '99, from that point on, I also
23 attended meetings. And they had operational meetings
24 on how to operate the reservoir based on inflows,
25 outflows, demands for water downstream and to maintain

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1 and meet contracts downstream. And those were monthly
2 meetings. I tried to go to as many as I could. But I
3 couldn't attend them all, of course. But they did. I
4 tell you, they never missed a one.

5 Q. Did you spend time in Wyoming as well as
6 Montana?

7 A. Oh, yeah. I went down there. A lot of times
8 I was down at the border, and I ran over and grabbed
9 lunch either in Dayton or at -- we were working at
10 Decker a lot of times. We worked in Decker. We'd get
11 down there -- it took us two hours to drive down to
12 Tongue River Reservoir. And then it took us at least
13 another two, two-and-a-half hours to do the
14 piezometers.

15 We rotated who did the piezometers out of our
16 Billings office. Sometimes our engineer did it. And
17 sometimes I did it. And one of the specialists did it.
18 But we kind of rotated the work. And we did it once a
19 year -- or once a month. And we did it more frequently
20 when the dam was filling.

21 But a lot of times I'd get down there early.
22 I'd finish about noon. I usually never packed a lunch.
23 So I'd run over to Dayton or I'd run down to Sheridan
24 and grab a bite to eat. And then I would drive up
25 Tongue River to see how things were going on their end

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1 and on our end.

2 So you observe -- I mean, being a water
3 manager, you're going to look out the window of your
4 vehicle and observe what's going on -- I mean, that's
5 just natural -- and how the creek is flowing and what's
6 it doing and everything that goes on along the Tongue
7 River and the stream and such.

8 And the same thing we did on Powder. I mean,
9 we'd go over to Powder River and try and talk to those
10 boys and see how things were going over there as well.
11 That was part of my responsibility is to communicate
12 with the water users, stay in touch with the water
13 users on all the drainages.

14 And we also worked with the folks on the Big
15 Horn as well. And we spent an inordinate amount of
16 time -- I know we're not here on the Clark's Fork --
17 but we did on the Clark's Fork and the tributaries
18 there too.

19 Q. Did you get to know a number of water users
20 in Montana and the Tongue as a result of your
21 activities?

22 A. Yes. I certainly did, yeah. Especially the
23 president of the association and some of the board
24 members.

25 Q. And who was the president of the Water Users'

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1 Association?

2 A. Currently it's Art Hayes.

3 Q. And that was true back at the time that you
4 were performing your duties?

5 A. Yes. I heard all the complaints.

6 Q. I'd like to ask you to refer to an exhibit
7 that is designated W61. I believe it's been admitted.

8 A. 161?

9 Q. It says W61.

10 SPECIAL MASTER: I have it in front of me.
11 And can I just ask the deputy, has 61 been admitted?

12 THE CLERK: No.

13 SPECIAL MASTER: So 61 -- actually, I do have
14 61 as being --

15 MR. DRAPER: I believe it's been admitted.

16 SPECIAL MASTER: Yeah. I have it being
17 admitted --

18 THE CLERK: On the 23rd. Sorry.

19 SPECIAL MASTER: -- towards the beginning of
20 Mr. Stults' testimony.

21 BY MR. DRAPER:

22 Q. Mr. Kerbel, what is Exhibit W61?

23 A. This was an update that I gave my boss, Jack
24 Stults, on a meeting, a water development meeting I
25 attended in Ucross, Wyoming. And I think the meeting

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1 was somewhere around end of February.

2 And it was a real interesting meeting. They
3 were working on a state water plan, I believe, for
4 Wyoming, in the Powder River and Tongue River Basin.
5 And I went to this meeting here, and I learned a lot.
6 It was a great meeting that Wyoming had.

7 Q. This was a meeting that included various
8 Wyoming officials and Wyoming water users?

9 A. This was with the Water Development
10 Association in Wyoming, which is different than the
11 Board of Control.

12 Q. And is this memo indicative of the kind of
13 visits that you would make and the kind of interactions
14 you would have with various Wyoming officials and water
15 users?

16 A. Yes. I felt it was important in my present
17 position that I stay up on what's going on and borders
18 and issues and any potential development across the
19 state line versus even on our side of the border. I
20 felt that was my -- came with the -- with my job. I
21 had to stay on top. Like I said, one of my positions
22 and duties as a regional manager is enforcement, which
23 I spent a lot of time in Montana with enforcement. So
24 basically I just wanted to make sure that there wasn't
25 a lot of or any expansion of water in Wyoming that I

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1 wasn't aware of.

2 But a lot of these meetings, water
3 development meetings were basically -- that was a good
4 group with the Water Development Association.

5 They're basically looking for opportunities
6 to develop water in Wyoming. And my concern was that
7 you could develop water in Wyoming but just don't take
8 any from Montana, of course. You know, that's
9 basically my job. So I was just looking at any
10 potential impacts that might occur to our state.

11 They were looking at the state water project
12 or state -- it was their state planning process, I
13 believe this was. And all they were looking at is
14 trying to determine their historical uses and their --
15 basically their current uses and if there was any
16 opportunity or any need for future expansion beyond
17 what they used historically. And that was the purpose
18 of the water development. And they had monies in order
19 to fund projects and do studies.

20 And I got invited -- in fact, this one here,
21 I think Carmine, to be honest with you, invited me to
22 the meeting. I mean, we talked quite a bit between
23 each other and stuff. And I think Carmine, we were
24 talking about one of the meetings. And I said, hey, I
25 wouldn't mind going to that.

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1 And he said, come on down, and we'll have
2 lunch or whatever, and then we'll run over and go to
3 the meeting together. So that's how we ended up doing
4 this one.

5 Q. And you're referring to Carmine LoGuidice?

6 A. LoGuidice, in Sheridan at the Board of
7 Control.

8 Q. And do you recall what his position was at
9 that time?

10 A. I don't know the title. But it was an
11 analyst or technician, not a specialist. He wasn't the
12 manager.

13 Q. He wasn't the superintendent?

14 A. Not the superintendent.

15 Q. A water commissioner?

16 A. He might have been a water commissioner.

17 THE REPORTER: I'm sorry, Judge. Can we take
18 a quick break? My machine just froze.

19 (Recess taken 3:27 to 3:33
20 p.m., October 22, 2013)

21 SPECIAL MASTER: So we ready again?

22 MR. DRAPER: So the last portion of the
23 transcript that's --

24 SPECIAL MASTER: It's actually quite fun to
25 look at the realtime transcript because of -- it's sort

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1 of like also watching bloopers go by. And then
2 sometimes they're words that just -- so actually, I
3 would -- it keeps going down.

4 I'm just going back up to -- I'm going to
5 interpret. "And this is indicative of the kind of
6 visits that you would take and the kind of interactions
7 that you would have had with various Wyoming officials
8 and water users?"

9 And you responded, "Yes," and then we're
10 continuing on from there.

11 THE WITNESS: Okay. You want to read that
12 back to me?

13 SPECIAL MASTER: Yes. So the question,
14 again, was whether or not this memo was indicative of
15 the type of encounters, meetings, discussions you would
16 have with officials from Wyoming.

17 THE WITNESS: It was one -- one example. I
18 went to -- actually, I went to quite a few different
19 meetings that were similar to this that were put on by
20 the Water Development Commission. And Lawrence was
21 pretty good -- worked for the State of Wyoming, and he
22 was -- I think he was chair of the commission. I can't
23 remember. It's been a while.

24 And they tried to do a lot of good down there
25 with not just developing water but doing studies for

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1 the water users as well. They were very interesting
2 meetings. And I not only learned a lot from them --
3 not about my -- Wyoming water as well, but just
4 basically learning about hydrology, and water in
5 general, from their perspective and what -- I'm
6 going -- at times I wish our Water Development
7 Commission could be so proactive. But they did a good
8 job. I was impressed by the group, and it was
9 interesting.

10 BY MR. DRAPER:

11 Q. So the meeting that you're reporting on in
12 Exhibit W61 is merely one among many examples of
13 interactions you had with Wyoming water users and
14 officials?

15 A. Yeah. I made a point when I went to those
16 meetings to also talk to the Wyoming water users. And
17 I visited with them. And they're very cordial about
18 their water use. And they asked a lot of questions.
19 There was a lot of questions of me at these meetings on
20 how we operate with our water rights system up here in
21 Montana and comparatively in Wyoming.

22 So there was a lot of give and take at these
23 meetings, not only with members of the Water
24 Development Commission but the local water users as
25 well. So I felt it was fruitful to attend -- I didn't

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1 attend all of them. Don't get me wrong. I didn't
2 spend all my time down in Wyoming as part of the Board
3 of Control. I went down there just to find out how
4 everybody operates. Because we are on the bottom end.

5 You understand how water works. Like I said
6 before, I'm enforcement. It's like Jack pointed out,
7 you can be at the bottom of the creek with the best
8 water right on the record, but if you don't have a big
9 shovel, you're going to be in trouble. So that's
10 basically how a lot of it works.

11 So by me attending these meetings, was
12 proactive in my mind. I was being proactive to try to
13 be ahead of the game on a lot of this stuff locally. I
14 wasn't down there to spy. I wasn't down there -- that
15 wasn't my intent. I went down there to work with
16 people, get to know how the water operates in that part
17 of the state and how we can work together.

18 What Jack said is true. I mean, my whole
19 belief, when I started working in this area, that's how
20 I enforced water rights in Montana, was a lot of it was
21 through education. People stealing water, taking water
22 from folks and everything else, a lot of the times when
23 they did that, they didn't have a clue that they were
24 in the wrong. But when I got done talking to them in a
25 polite way, without getting in their face, I could walk

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1 away with a smile on my face knowing that both parties,
2 at least now from this point on, could work together.
3 That was my goal. That's what I called a water
4 manager. And that's what I tried to be. Tried to be
5 proactive, work with both sides and try to find some
6 common ground. That was my intent.

7 And the folks that I worked with in Sheridan
8 with the Board of Control, I felt that they felt the
9 same way. They were very conscientious. They wanted
10 to make sure that their folks got water. And they
11 wanted to have a fair supply of water and make sure
12 that everybody -- we're all on the same page as far as
13 making sure that there was no harm, no foul, so to
14 speak, that overused phrase.

15 And that's the impression I got from the
16 folks down there.

17 MR. KASTE: Your Honor, I apologize for
18 interrupting. But I think we need to have some
19 questions. This has gotten a little bit far afield
20 from the original question.

21 SPECIAL MASTER: Okay. I actually think this
22 is quite valuable background. But at the same time,
23 I'm obviously aware of time too. So if we can -- if we
24 can keep it relatively short. But at the same time, I
25 don't want to terminate Mr. Draper's effort to set

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1 background on Mr. Kerbel's overall involvement.

2 MR. DRAPER: Thank you, Your Honor.

3 BY MR. DRAPER:

4 Q. And as you think of points in response to
5 that as I ask further questions, I, at least to a small
6 degree, would welcome any additional answers you have.

7 But let me go ahead and turn our attention to
8 the involvement that you may have had with the
9 administration of the Yellowstone River Compact and
10 dealings with the Yellowstone River Compact Commission
11 and people related to that commission, either technical
12 people or commissioners.

13 You mentioned, to begin with, that you began
14 attending meetings with Mr. Fritz, the commissioner, at
15 the time when you were in your early days here in
16 Billings. How did that develop over time? Did you
17 become more involved over time with the Yellowstone
18 River Compact Commission?

19 A. Yeah. Yes, I did.

20 Q. How so?

21 A. Let me think. Well, as with any group -- I
22 don't care if you talk about Kiwanis or any Boy Scout
23 group or whatever group that you're affiliated with --
24 at first, when you start becoming a part of that group,
25 you sit and observe. And that's basically what

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1 happened in the first place. That as you become -- as
2 you attend more meetings and get to know folks --
3 that's what I was saying about knowing the folks in
4 Wyoming. As you get to know those folks, you basically
5 get more comfortable visiting with them, talking to
6 them and learning more about their perception of water
7 management and sharing that perception I had with water
8 management with that group.

9 So as time went on, a lot of times, the
10 meetings I attended were the annual meetings. We
11 didn't have -- that was the only meetings we had until,
12 I believe, Jack came on board. But I just attended the
13 annual meetings. A lot of the annual meetings were
14 just an exchange of information. As I attended the
15 meetings more, Gary felt more comfortable allowing me
16 to talk about things going on in southeastern Montana
17 with Wyoming and exchange ideas with Wyoming on
18 different topics.

19 We talked about everything from our drought
20 task force, their drought task force. We talked about
21 their water commission. We talked about those. I
22 believe Jeff Fassett was the state engineer at the
23 time. And so --

24 Q. Jeff Fassett?

25 A. Jeff Fassett, yeah. And so a lot of the

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1 meetings that we had were very polite, very gracious.
2 But once in a while they would get contentious. And
3 people would start discussing shortages of water. I
4 remember back in the late '80s, things were a little
5 dry. Things at the meeting got a little contentious
6 and got a little heated. But we knew that the USGS
7 wasn't going to break a tie if there was ever a need
8 for a vote.

9 So things, as far as -- that went on during
10 the meetings were restrained in a lot of them because
11 we knew that the USGS received funding from both
12 Wyoming and Montana for gauging stations, as an
13 example. And it was very clear to me they didn't want
14 to disrupt that funding mechanism by if there was any
15 kind of a vote that had to be taken, that they would
16 side with either Wyoming or with Montana. They would
17 rather abstain because they didn't want to jeopardize
18 that funding.

19 So because of that thought process, the
20 meetings basically, in my mind, were pretty formal.
21 But they were pretty relaxed in the sense that we just
22 exchanged information. Like, a lot of things we talked
23 about at the meetings and we discussed was our compact
24 with the Crow, our compact with the Northern Cheyenne
25 and basically our adjudication program.

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1 And all they were were mostly an exchange of
2 information, for the most part, back then. Once in a
3 while a voice might be raised that we're not getting
4 our water, that type thing. And that was made very
5 clear sometimes. And it was some frustration level
6 that happened at some of the meetings. But all in all,
7 most of the meetings were pretty gracious.

8 SPECIAL MASTER: Thank you. And let me just
9 go back to Mr. Kaste's objection a moment ago. One of
10 the things I'm sure Mr. Kaste wants the opportunity to
11 do is if you're going to go into an area that he
12 believes you shouldn't be talking about, have an
13 opportunity to object. And that's one of the reasons
14 why I think he would like to have you stick relatively
15 close to the questions that are asked.

16 And then Mr. Draper will sort of guide you
17 through. And, again, I don't want to make you think
18 you just have to give two- or three-word answers, but
19 if you could fairly stay on the topic that Mr. Draper
20 asks each question for.

21 You're giving a lot of information.

22 THE WITNESS: I'll do my best. I talk too
23 much sometimes.

24 BY MR. DRAPER:

25 Q. Okay. Let me direct your attention,

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1 Mr. Kerbel, to what's been marked as Exhibit M224.

2 A. Yes.

3 Q. That's a two-page document. What is that
4 document?

5 A. Oh, this document -- I was drafting some
6 notes to myself. I'd recently attended the December
7 compact meeting the end of December. And even -- say
8 I'm about a month late, but January 7th. So I sat
9 down, and I was writing up notes to myself what was
10 discussed at the meeting. Because a lot of times the
11 notes from the compact meetings, they didn't get out
12 right away. I mean, they came out months later.

13 So I was just kind of writing up these notes
14 from my notes that I took at the meeting. And then all
15 of a sudden, I decided, you know, I have a staff in my
16 office of a bunch of folks that would probably be
17 interested in this information.

18 So I took my notes, and I basically put a
19 memorandum for them and handed them out to my cohorts
20 in my office. And that's all -- basically, that's the
21 purpose of this thing was to update my staff in the
22 Billings office.

23 Q. So is this indicative --

24 A. This was --

25 Q. -- of an involvement that you had with the

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1 compact commission here in 1999, for instance?

2 A. Yes. Coalbed methane was a big deal then.

3 Q. Yes. There are various subjects discussed
4 here including coalbed methane; correct?

5 A. Correct.

6 Q. I'm not going to tarry --

7 MR. DRAPER: I would move the admission of
8 that exhibit. I don't think it's been admitted into
9 evidence yet.

10 MR. KASTE: No objection.

11 SPECIAL MASTER: Okay. Exhibit M224 is
12 admitted into evidence.

13 (Exhibit M224 admitted.)

14 BY MR. DRAPER:

15 Q. Let me now turn your attention to another
16 exhibit. It's marked W101 in the lower right-hand
17 corner.

18 A. Correct.

19 Q. What is this document?

20 A. This is a document I was sending to Sue Lowry
21 via e-mail. And I scanned a copy of the Miles City
22 Decree. And we could never find a great copy of that
23 decree. So the decree -- there were certain pages that
24 were really difficult to read. So I scanned it and
25 sent it to Sue and apologized for the copy of that we

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1 had to send 'cause it was the best we had.

2 Q. Who is Sue Lowry?

3 A. She's their state coordinator, interstate
4 coordinator for the State of Wyoming for the state
5 engineer's office. That's the title that I remember.

6 Q. At that time, was she one of the state
7 officials in Wyoming that you dealt with in connection
8 with the Yellowstone River Compact Commission?

9 A. Yes.

10 Q. And she's from Cheyenne; is that right?

11 A. Yes.

12 Q. Okay. Is this e-mail and the transmittal you
13 just described --

14 MR. DRAPER: Oh, I would move the admission
15 of this exhibit.

16 MR. KASTE: No objection.

17 SPECIAL MASTER: Exhibit W101 is admitted
18 into evidence.

19 (Exhibit W101 admitted.)

20 MR. DRAPER: Thank you.

21 BY MR. DRAPER:

22 Q. Is this indicative of the kind of
23 relationship that you had at the date of this, 2004,
24 with your counterpart officials in Wyoming?

25 A. Yes.

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1 Q. Let me turn your attention now to another
2 exhibit. It's designated M160. What is this document?

3 A. Well, I'll try to keep this brief. At
4 previous meetings -- what's the date on this? This is
5 dated July 1, 2004. At previous meetings, every time
6 we met with Wyoming they always kept telling us, I
7 mean, from day one, that they had a duty of water in
8 Wyoming. And their duty of water was 1 CFS per
9 70 acres. I heard that at every meeting. They
10 repeated that over and over again. I'm going, okay,
11 that's fine. And then they criticized us because our
12 duty of water was higher. And there's reasons for
13 that. And I'll explain those if asked.

14 But the rationale on this was I happened to
15 be on their website one day. And I was just looking
16 through their website. And I found this -- can't
17 remember if it was a statute or if it was a law or
18 policy or what. I can't remember. I think it was
19 whatever. But I was just asking her a question where I
20 found out that priority dates that were earlier than
21 March 1st, 1945, are entitled to additional CFS, for 2
22 CFS for 70 acres with priority dates -- as I understood
23 the website -- for priority dates that were more senior
24 to 1945. I now -- and as I read that on the website,
25 that caught me by surprise because I'd never seen that

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1 before, and I'd never heard it before.

2 So I was just asking a simple question of
3 Sue; how does this work? When does this work? Does it
4 work? I mean, that's all this was. It was me asking
5 the question of Sue. And -- 'cause I felt we had a
6 pretty good professional relationship. And I could ask
7 her those questions.

8 Q. So, again, is this indicative of the kind of
9 relationship you had with Wyoming officials charged
10 with responsibilities for the compact?

11 A. Yes, sir.

12 Q. Let me turn your attention to Exhibit W161,
13 if you please.

14 A. Yes.

15 Q. What is this document?

16 A. Sue and I were charged to work on the
17 technical team with Mike Whitaker, myself, and Sue.
18 And we basically always put agendas together for the
19 technical team meeting. And they were generally held
20 in April, sometimes March, sometimes, you know, earlier
21 in the year.

22 But sometimes we had, if we needed -- if
23 there was -- I don't know if emergency is the right
24 word. But if there was a need, sometimes we would
25 piggyback our technical team meeting when the

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1 commissioner's meeting was, either before or the day
2 after, but normally they were, like, the morning of.
3 And then the commissioner's meeting might be that
4 afternoon. And then we'd have a two-, three-hour
5 meeting to -- because the -- since the commissioners
6 were there, we wanted to ask the commissioners some
7 questions on how far do we go on certain issues? So a
8 lot of times we'd piggyback the commissioner's meeting
9 with our technical team meeting.

10 And Sue and I worked together to put these
11 agenda items together. That's all it is.

12 Q. And this is for the December 5, 2006, meeting
13 as shown on the second page?

14 A. I believe so, yes. And this was a draft
15 agenda.

16 And since we're hosting it in Billings, I was
17 the person hosting the meeting. So I wanted to make
18 sure we had a final copy before we rolled into it or we
19 got it finalized before we had the meeting. That would
20 be important.

21 MR. DRAPER: I don't know whether I moved the
22 admission of that exhibit or not.

23 SPECIAL MASTER: You did not move the
24 admission of either M160 or W161 yet.

25 MR. DRAPER: Oh, I would like to do so at

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1 this time.

2 MR. KASTE: I don't have an objection to
3 either.

4 SPECIAL MASTER: Okay. Thank you, Mr. Kaste.
5 So Exhibits M160 and W161 are admitted into evidence.

6 (Exhibits M160 and W161
7 admitted.)

8 MR. DRAPER: Thank you.

9 BY MR. DRAPER:

10 Q. Mr. Kerbel, what were your interactions with
11 Mike Whitaker? First, remind us who he -- what
12 position he held.

13 A. Oh, Mike Whitaker is the superintendent for
14 the Board of Control in Sheridan, Wyoming.

15 Q. Did he have responsibility and authority for
16 the Tongue River Basin in Wyoming?

17 A. That was my understanding, yes.

18 Q. And did he have authority, to your
19 understanding, to curtail water rights in
20 administration of the water right system in his
21 division?

22 A. I believed he did. I'm not really totally
23 sure if he did or not.

24 Q. And what were, then, your interactions with
25 Mr. Whitaker?

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1 MR. KASTE: I'm going to object just to get a
2 time frame. We're talking about a fairly lengthy
3 period of time. If we could narrow it down, I'd
4 appreciate it.

5 SPECIAL MASTER: I think that's a reasonable
6 request.

7 MR. DRAPER: Very good.

8 BY MR. DRAPER:

9 Q. But let's first establish, when did you begin
10 to interact with Mr. Whitaker?

11 A. When I first started going to some of the
12 meetings early on in the process, Mike was there.

13 Q. So even as far back as the 1980s?

14 A. I can't remember that far back, to be honest
15 with you. I really can't. But I know I worked with
16 the Wyoming office back then. I can't remember what
17 specific individuals I worked with at the time. But I
18 believe Mike was there then. But I can't be totally
19 sure. But, yeah.

20 Q. And you saw Mr. Whitaker at the compact
21 commission meetings?

22 A. Mr. Whitaker was at most of the commission
23 meetings, yes, along with Sue Lowry and sometimes
24 Carmine.

25 Q. How often did you attend commission meetings?

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1 A. I tried to attend every one of them that I
2 could possibly attend, weather providing. But I drove
3 in some pretty nasty weather to go to the meetings.
4 But, yeah, I tried to attend every meeting I possibly
5 could. I didn't miss very many, if any.

6 Q. So you typically saw Mr. Whitaker at those
7 meetings?

8 A. Yes.

9 Q. Did you have any other interactions with him?

10 A. Once in a while I'd be in Sheridan, you know,
11 like I said, for lunch after I'm working on the Tongue
12 River. And a lot of times I ran over to their office.
13 They moved around a lot. They tried to dodge me, as
14 Carmine said. That was a joke.

15 But anyway, they moved their office around.
16 So they said that the reason they moved the office
17 around is, dang, found it again. That's the kind of
18 relationship we had with those guys. We were pretty
19 cordial. And we did a lot of discussions as far as
20 the -- besides golf and fun and games, that type stuff.
21 We'd go out to lunch together. Sometimes we'd catch
22 dinner together before I headed back to Billings.
23 Depended on what we were doing that day.

24 And then we'd discuss the water availability.
25 We'd discuss what next year is going to bring, like, if

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1 we're meeting in the fall, what we're looking at, what
2 kind of snowpack, what we're looking at.

3 And a lot of times we talked about snowpack.
4 And there was one thing that Mike brought up too. He
5 was critical of the location of the SNOTEL sites. Not
6 all of them, but some of them. But we got to talking
7 about the SNOTEL sites, and there were a couple SNOTEL
8 sites where this led to other things. But just to give
9 you an idea to answer your question very briefly.

10 Q. Let me just ask, why are SNOTEL sites
11 important for the work --

12 A. Well, they're important to forecast -- and
13 I'm talking over the top of you again.

14 And I apologize, young lady.

15 They are very important to forecast runoff,
16 potential runoff, for next year and, basically,
17 moisture -- water moisture in the snow. And they had a
18 couple of them. They actually -- I didn't know this.
19 But Mike and his crew actually went up there and
20 checked the SNOTEL sites if they saw something that was
21 abnormal. I mean, they would take snowmobiles and hike
22 in on snowshoes.

23 And sometimes they had one, for example, that
24 because of the wind and where it was placed, it showed
25 no snow. And the reason was it was placed in the trees

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1 in a location where the wind came in and carved out all
2 the snow around it.

3 So the snow around it was, like, 15 to
4 20 feet deep. And the SNOTEL site had nothing. I
5 mean, it was just bare ground.

6 Q. So --

7 A. So most of the things -- you know, we talked
8 about most things.

9 Q. Let me follow up on that. You're basically
10 there looking at potential water supply?

11 A. Yes.

12 Q. Did you continue to watch the water supply as
13 things developed over the winter and into the spring
14 and into the summer seasons?

15 A. Oh, yeah, that was our job. Both Mike and I
16 did.

17 Q. How did you do that?

18 A. We talked back and forth a lot. Not every
19 month; not every day. Don't get me wrong. But on
20 occasion we would call each other up, or he would call
21 me. And he would brief me on what's going on in the
22 basin. So we tried to coordinate our efforts. And
23 then he tried to keep me going on -- abreast on what
24 the snowpack is doing and stuff.

25 And I'd call him up and say, hey, I see this

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1 one here is kind of goofy. Do you know what's going on
2 here? You know. And maybe goofy wasn't the technical
3 term I used. But there would be a problem with this
4 SNOTEL site, and this area here doesn't look like it
5 has enough snow on it compared at the other SNOTEL
6 sites. So, I mean, those are things that we would
7 normally discuss when we're not at the meetings.

8 Q. And did you try to exercise diligence in
9 keeping up with the water supply conditions throughout
10 the developing seasons?

11 A. Oh, that was my job. I had to. I mean, I
12 took that very seriously in order to administer water
13 uses and make sure that we were apprized of what
14 potential development might be forthcoming to the next
15 irrigation season.

16 Q. Now, if water supply conditions became
17 short -- or very short, did you contact Mr. Whitaker or
18 others in Wyoming, as part of your job?

19 A. Oh, yeah. Oh, yeah. That was part of my
20 job. We communicated during those short years. I
21 oftentimes asked Mike or Carmine or Bill, whoever
22 answered the phone, we'd visit about it and say -- the
23 first question out of my mouth was, how things are in
24 Wyoming. Are they as bad down there as they are here.
25 Those scenarios. 'Cause we had some issues. I mean,

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1 there's some dry years. I mean, we did this on wet --
2 not wet years, but on average years, but mostly dry
3 years.

4 And once in a while, you know, I'd usually
5 make that call -- that was a pretty normal call for me
6 midsummer to find out what the conditions were in
7 Wyoming and what they were in Montana, and we would
8 talk and BS about that.

9 And then I would ask Mike, is there any
10 opportunity to get more water down to Montana? You
11 know, how things are going up there. Do you have any
12 excess water? I already knew the answer, I thought.
13 But you have to ask the question and see if there was
14 anything available in Wyoming.

15 I mean, I knew up in Story, they have a
16 diversion in Story that they can kick water into Lake
17 DeSmet or they can kick water down -- what's the creek
18 down there? I can never remember the name of that.
19 But anyway, there's another creek. Horse -- I can't
20 think of the name of it. I drew a blank.

21 Q. You might be thinking of Piney Creek?

22 A. No, I don't think it was Piney Creek.

23 Anyway, they also used CBM water running down that
24 thing too. But they have a diversion up there that
25 they can dump water either on the Tongue River side or

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1 they can dump water over on the Powder River side.

2 And they have storage up there in the
3 mountains. And I was -- and a lot of times I'd ask
4 those guys whether or not they had -- there was any
5 excess storage or any storage available possibly to
6 kick our direction. And the answer pretty much, a lot
7 of it is. We'd either look into it, or, no, we can't,
8 or that type of response.

9 And the typical response was -- and I
10 expected it -- was, we're short of water down here too.
11 But I made that call. Oh, I can't sit here and predict
12 what years I made that call. But I know I made that
13 call in the drier years pretty much. It was --

14 Q. So you typically made that call, especially
15 in dry years?

16 A. Yeah, I tried to. I felt it was our
17 responsibility. Because I had Art, he was calling,
18 they're looking for water. Art Hayes with the Water
19 Users' Association, they're short down there. And they
20 couldn't get reservoirs full some years. So you're
21 always looking for water. That's our job. I mean, Art
22 was looking for water. I'm looking for water. And
23 those guys looked up the -- and you always look
24 upstream. I mean, that's normal.

25 Q. You had interactions by telephone and

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1 personally with people like Mike Whitaker. Did you
2 have these kinds of conversations at the compact
3 meetings that you attended?

4 A. Yeah, we talked about water shortages and
5 that type stuff, especially on the breaks we took. I
6 mean, Mike and Carmine and I were always going around
7 on water availability on the Tongue. And Carmine and I
8 were always arguing back and forth. And this was a
9 standing joke between Carmine and I. And he always
10 called the hill out there the mountain on the Big Horns
11 there, it's a sponge.

12 And I would basically argue back and said, no
13 it can't be a sponge. It's a rock. And, I mean, that
14 was just some bantering that we did all the time,
15 Carmine and I. It was kind of a personal joke between
16 the two of us. And but he says, Keith -- he finally
17 says, Keith, I'm serious. It is a sponge. We don't
18 get a lot of runoff on that thing. I'm going, oh, come
19 on.

20 He was probably serious, and I probably
21 didn't take him serious on that. I thought it was a
22 rock.

23 Q. Now, did these conversations with respect to
24 water shortage and your requests for water, did they
25 tend to show up in the compact commission annual

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1 reports?

2 A. No, 'cause a lot of these conversations were
3 on the side. And a lot of these conversations were
4 just between Mike and I and Carmine and I or Bill and
5 I. I was trying to work out a system with us that we
6 could work together and we could get this thing going.

7 When Jack came on board, we actually tried --
8 I mean, it was my -- it was Jack and I thought
9 basically that -- and I think Pat was involved in that,
10 too, was the technical team. That's kind of when we
11 started the technical team group. I think it was
12 around 2000. I can't remember.

13 Q. Let me ask you: When you talked to
14 Mr. Whitaker, did you have authority from Mr. Stults to
15 pursue water supply issues with Mr. Whitaker and to try
16 to break some water loose from Wyoming?

17 A. Oh, yeah. Jack, he encouraged me to. But I
18 mean, that was my job. I mean, that's what I was --
19 that's what I tried to do. I mean, you're always
20 looking for water. But, yeah, I had his -- yeah.

21 Q. Did you understand Mr. Whitaker to have the
22 authority to curtail water uses in Wyoming?

23 A. I assumed so. I didn't know for sure a
24 hundred percent, but I assumed so. I was kind of
25 like -- Carmine always told me that they ratcheted

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1 everything down in Wyoming. I mean, I was under the
2 impression from folks in Wyoming from the Sheridan
3 office that they had a water commissioner on every
4 ditch and every creek and a padlock that they could
5 slap on every diversion. And that was the impression
6 that I got, you know. And I was trying -- I'm going,
7 hey, this is quite a system. I wish I had a system
8 like that.

9 And I was really taken aback when I found out
10 that they didn't have a water commissioner on the main
11 stem Tongue River. But it sounded like they had them
12 on Goose Creeks, Big Goose and Little Goose. But they
13 didn't have any on main stem Tongue. I assumed they
14 did. And then I was taken aback when I found out they
15 didn't have any measuring devices on any of the
16 diversions of the main stem Tongue. That, to me, was a
17 little bit of a setback.

18 But I worked with Mike. And I think with Pat
19 Tyrrell's approval, Mike was able to work with the
20 water users. And he never shut anybody off that -- to
21 my knowledge, he never shut anybody off. But he
22 actually worked with the water users on main stem
23 Tongue to get measuring devices installed and work with
24 the water users out there to be more diligent in their
25 diversion of water.

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1 SPECIAL MASTER: Mr. Draper, can I interrupt
2 for just a second? I want to go back to a point
3 Mr. Kaste raised a few minutes ago.

4 It would be really helpful, both in your
5 questions and in the witness's answers, to try to be as
6 specific as possible with respect to time periods. To
7 the degree you can't be at this point -- and my guess
8 is Mr. Kaste will start asking about specific years in
9 order to try to be more specific. If he doesn't, I
10 probably will in order to try to get a more specific
11 time frame.

12 So it probably would be faster to the degree
13 both of you can be more specific on time periods, to
14 the degree you can.

15 MR. DRAPER: Thank you, Your Honor. We will
16 do that.

17 BY MR. DRAPER:

18 Q. Mr. Kerbel, let's go right to that. To what
19 degree can you remember specific years in the -- well,
20 during this period that you were performing these
21 functions? I think you said you were heavily involved
22 in the compact commission interstate matters in the
23 '90s and after 2000.

24 Can you recall which years or groups of years
25 you made those? I think up to now you've talked about

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1 most years and especially the dry years. But can you
2 be more specific?

3 A. Well, all I can say is right now, as far as
4 the '90s go, I know I didn't make a request for water
5 in '96, '97, '98, and '99. Those were pretty wet
6 years. I'm pretty sure I didn't make any request
7 whatsoever during that time frame.

8 Before that, we had some dry years in the
9 early '90s. I don't remember which years they were. I
10 can't remember which ones were the dry years in the
11 early '90s. I just know that I -- we discussed water
12 needs in both states. It was very cordial. I wasn't
13 demanding that they did this or did that. I just was
14 asking, is there an opportunity to get water down to us
15 if it's possible? Do you know any way? And to be
16 honest with you, before 1996, I really can't remember
17 which years they were.

18 Q. Well, let's --

19 A. I know we had a heck of a dry spell in '88.
20 You know, but whether I made a call to Mike in '88 or
21 talked to Mike or anybody in Cheyenne in '88, I can't
22 tell you because I can't remember. That's way too
23 long, you know. But I know I made some calls in the
24 '90s, but darned if I can remember what years those
25 were.

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1 Q. Let me --

2 A. I know from -- excuse me.

3 Q. Let me ask you, specifically, in the late
4 '80s -- you mentioned 1988. Do you believe that you
5 would have made a call in dry years during that period?

6 MR. KASTE: I need to object. I think we're
7 getting a little bit loose with our terminology. The
8 way I understood his answer thus far is he's talking
9 about a phone call. And he just nodded. And I want to
10 make sure we don't confuse that with a call in to the
11 Yellowstone River Compact. So if we can preface the
12 word with phone call at times, that would be helpful.

13 MR. DRAPER: Okay.

14 SPECIAL MASTER: I think that's fair. I
15 understand entirely why it's easy to confuse those two
16 terms. So it probably is useful to distinguish that.
17 And, again, if not, then I'll probably try to step in
18 in order to keep that clear.

19 MR. DRAPER: Very good. Yes.

20 BY MR. DRAPER:

21 Q. These are phone calls that you're talking
22 about or in-person meetings when you talked to people
23 like Mike Whitaker?

24 A. These were phone calls.

25 Q. Now, in that period of '87, '88, and '89, do

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1 you believe that, at least in the dry part of that
2 series of years, that you would have spoken to
3 Mr. Whitaker about the need for water in Montana?

4 A. I can't say I spoke to Mike. But I would
5 have probably spoke to somebody.

6 Q. Somebody in the Sheridan office?

7 A. Yeah.

8 Q. Okay.

9 A. But see, '88, I was just getting to know
10 those guys. And basically -- I will be honest -- I
11 mean, in all honesty, '88, that conversation was pretty
12 much more -- in '88, I mean, both sides of the line
13 were dry. And that conversation was probably more
14 like, is it as bad down there as it is here? You know,
15 and how wet is it? That type thing. And then I'd tell
16 them how bad it is up here.

17 Because we both, during a conversation in
18 that particular vain, was more of a social call; find
19 out what's going on on their side and what's going on
20 on our side in that era. That's what -- in '88, that
21 would have been that conversation. It wouldn't have
22 been me asking them for water.

23 Because in '88, I was just getting to know
24 those guys down there, and the bottom line -- and the
25 Tongue River was in the Miles City regional offices

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1 jurisdiction; it wasn't in Billings' jurisdiction.

2 Q. Very good. Let me ask you about the years
3 after 1999. What -- which of those years do you
4 believe you had conversations with Mr. Whitaker or
5 someone in his office trying to reach Mr. Whitaker to
6 indicate water was needed in Montana?

7 A. All of them. 2000 to 2004. Well, after the
8 letter went out in 2004, I know I didn't make that call
9 then. So I know I talked to somebody down there in
10 2000, 2001, and 2002 and '3. And I believe it to be
11 Mike, but I can't swear on the Bible that it was Mike.

12 And I don't know. This was a phone call at
13 your request. It was a phone call. And it was a
14 discussion between them and myself to see if there was
15 any way that we could get -- it was a request. I
16 wasn't making a call on behalf of anything. It was a
17 request.

18 Q. Let me turn your attention to the annual
19 report from 2001. It's marked as Exhibit J51.

20 A. Fifty-one?

21 Q. Fifty-one.

22 A. Okay.

23 Q. Do you have that?

24 A. Yes.

25 Q. This is a meeting you attended or a year in

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1 which you attended the meeting of the Yellowstone River
2 Compact Commission; is that right?

3 A. My name's on the list, so I would say that's
4 there.

5 Q. That's shown on the second paragraph on page
6 II?

7 A. Correct.

8 Q. And looking at III, the next page, in the
9 second partial paragraph, the water supply percentages
10 are reported; is that right?

11 A. Yes.

12 Q. What was the percentage given for the Tongue
13 River?

14 A. Thirty-four.

15 Q. And that's 34 percent of what?

16 A. Of average.

17 Q. So water supply was pretty low that year; is
18 that right?

19 A. Yes, very low.

20 Q. Two paragraphs down, it's noted that Tongue
21 River Reservoir had less water in storage at the end of
22 water year 2001 than at the end of water year 2000;
23 isn't that right?

24 A. That's what it says.

25 Q. Is that another indication of dire water

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1 supply conditions?

2 A. Oh, correct, yes. That was discussed.

3 Q. Is there -- I take it -- if you would take a
4 look at this report, if you're already familiar with
5 the text, which occupies about five pages, is there any
6 indication on this -- in those pages that Montana was
7 indicating to Wyoming that it needed -- that it was
8 short of water and needed water to be turned loose to
9 Montana and Wyoming if possible?

10 A. I think basically what you pointed out was
11 pretty much in tune with everybody. 'Cause everybody
12 in the room -- I mean, during those years, all I can
13 say is that it was dry. I mean, we all knew it. I
14 mean, the whole reason we were there at those meetings
15 was to discuss drought situations, low water
16 situations, and exchange of information.

17 Q. And if the need for water was a central
18 concern of everybody there, why didn't it appear in
19 this description here?

20 A. I don't know. I can't find anything in here
21 that anybody said anything. But basically a lot of
22 these -- like I said earlier, these meetings here were
23 pretty cordial. They were more of an exchange of
24 information.

25 A lot of the things that were discussed, in

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1 my memory, were discussed during breaks, that we
2 discussed at breaks of the water shortage situation.
3 How's it in Wyoming? How's it in Montana? That type
4 thing. What are you guys doing down there? 'Cause I
5 know a lot of times on the breaks I was quizzing
6 Carmine and trying to figure out whether or not -- how
7 the situation was down there, and if it's getting any
8 better or getting any worse.

9 And -- see, Wyoming also had a climatologist,
10 and we didn't have one. So I was already -- and they
11 basically got a lot of information from Wyoming's
12 climatologist sometimes. And I would always quiz him
13 if he had any important things we needed to know.
14 'Cause that was another one of the things that I tried
15 to keep up on, was what that gentleman was trying to
16 do.

17 Q. And did -- was it the USGS that did the draft
18 of the -- of this --

19 A. Yes, USGS put these together. Bob Davis, if
20 I remember right.

21 Q. And you referred to your earlier testimony
22 regarding the reluctance of the USGS to put contentious
23 matters in the body of the report; is that right?

24 A. That was kind of my opinion in these reports.
25 These meetings were pretty much exchanges of

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1 information, for the most part, between the two states.

2 We didn't really get into the nuts and bolts
3 about water shortages between the two states. A lot of
4 the stuff that we talked about was just adjudication,
5 different task forces, different things going on within
6 the states. They were more educational for each state.

7 Q. Let me turn your attention to --

8 A. That was my impression. I'm just giving you
9 my impression.

10 Q. Let me turn your attention, if I may, to
11 another annual report. It's J54 for the year 2004.

12 A. Yes.

13 Q. Is this a report you've seen before?

14 A. Yeah, it's been a while.

15 Q. This is reporting on two meetings during
16 2004: One in April beginning on page II, and the other
17 in December beginning on page V; is that right?

18 A. Yes. That's what it looks like, yes.

19 Q. Now, 2004 was when the first formal call
20 letter was sent by Mr. Stults; is that right?

21 A. Yes, I believe so. It was May of 2004. I
22 don't know the exact date.

23 Q. Now, I was looking here for potential
24 references to the call letter. First meeting was in
25 April, I think was referred to in the call letter

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1 itself as we saw earlier. The closest I can find --
2 and I'll direct your attention to page III, the fourth
3 paragraph up from the bottom. There's a paragraph that
4 begins, "Mr. Stults stated his desire for the
5 commission to establish a process for developing some
6 type of plan for water management in accordance with
7 the compact."

8 Do you see that language?

9 A. Yes, I do.

10 Q. That, I think, if I haven't missed anything,
11 is the strongest statement we have about the impending
12 call letter?

13 MR. KASTE: I object to the characterization.
14 It doesn't indicate in any way that there's going to be
15 an impending call letter.

16 MR. DRAPER: That's exactly my point, Your
17 Honor. And I'd like the witness simply to look this
18 document over and give us his response on that point.

19 THE WITNESS: Well, the technical team
20 meeting that we had that April, the reason we put the
21 technical team together was because we were running
22 into very, very dry situations in southeastern
23 Montana -- well, both states. It wasn't just
24 southeastern Montana. But that was the compacted area.
25 But we ran into a lot of -- I mean, we had water

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1 shortages on both sides of the state.

2 So the reason we put the technical team
3 meeting together -- one of the reasons -- and I don't
4 want to belabor the point -- was to investigate the
5 drainage to see if we could improve forecasting. And
6 where I talked about the SNOTEL sites before, we looked
7 at those SNOTEL sites.

8 And we worked with NRCS at that time. And
9 Roy Kaiser, who is now retired, Roy Kaiser in Montana
10 was basically in charge of SNOTEL sites in both
11 Montana. And he was familiar with the ones on Tongue.

12 Mike Whitaker pointed out the shortcomings of
13 the some of the SNOTEL sites, and this was earlier. I
14 think it was in the late '90s. So we got all of that
15 fixed to improve Roy's forecasting skills. That was
16 one of the reasons for the --

17 BY MR. DRAPER:

18 Q. All right --

19 A. I'll stop there.

20 SPECIAL MASTER: So if I could just interrupt
21 for a moment again. Just trying to get us back on
22 track here. The first thing is with respect to your
23 objection, I'm -- I will actually not -- the question
24 that suggested that there was an impending call letter,
25 that's stricken from the record. Okay.

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1 I actually think that Mr. Kerbel went on to
2 answer a totally different question, which was, what
3 were you doing in the April meeting? So we actually
4 have sort of several issues here.

5 So let me just suggest several things. And I
6 know sometimes it's difficult to follow all these
7 various instructions.

8 But No. 1, if you hear an objection, then if
9 you could wait for a second before you start answering
10 the question in order to have a ruling on whether or
11 not there's actually a question for you to answer. So
12 that would be request No. 1. So just probably a
13 general point, just wait a second before anyone --
14 after anyone has asked you a question before answering
15 it. So that also gives an opportunity to object.

16 The second thing is, again, if you could
17 listen specifically to the question and then answer
18 that one. You have great stories to tell. But in a
19 trial process of this nature, it's really important
20 that you answer the questions that were asked.

21 So I think we have just got an explanation of
22 what the April meeting was about.

23 MR. DRAPER: Thank you.

24 THE WITNESS: Sorry, Your Honor.

25 SPECIAL MASTER: That's fine.

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1 BY MR. DRAPER:

2 Q. Let me then ask you, Mr. Kerbel, to look at
3 the part of the report relating to the December 6th
4 meeting that starts on page V.

5 A. Yes.

6 Q. And I would like to have you look at this.
7 And it's fairly easy to look and see what the different
8 subjects were, the way that USGS has put this together.
9 I'd like to turn your attention to page VIII.

10 A. I'm on VIII.

11 Q. And in the middle of that page, do you see
12 the -- do you see the paragraph that starts,
13 "Mr. Stults stated that the 2004 flows in the Tongue
14 River in Montana were deficient"?

15 A. Yes.

16 Q. And I won't read that to you. This is an
17 admitted document. But is there any specific reference
18 to the 2004 call letter in that paragraph?

19 A. No.

20 Q. Okay. Is it surprising to you that there is
21 no specific reference in that language to a previous
22 call letter?

23 A. Yes. Yes.

24 MR. DRAPER: I think that concludes my
25 questions, Your Honor.

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1 SPECIAL MASTER: Okay. Thank you very much,
2 Mr. Draper.

3 Mr. Kaste.

4 MR. KASTE: I'll be fast.

5 SPECIAL MASTER: Okay. I'm sure that
6 Mr. Kerbel --

7 MR. DRAPER: I will also encourage the
8 witness to be fast, because if they work together, then
9 Mr. Kerbel doesn't have to come back tomorrow.

10 SPECIAL MASTER: That's right.

11 THE WITNESS: Okay. I got the message.

12 CROSS-EXAMINATION

13 BY MR. KASTE:

14 Q. Good afternoon, Mr. Kerbel.

15 A. Good afternoon, sir.

16 Q. My name is James Kaste. I don't know that
17 we've ever met before.

18 A. No, we haven't.

19 Q. I would have remembered. Would you look at
20 that exhibit you were just looking at. It's Exhibit
21 J54.

22 A. Got it in my hands.

23 Q. Go back to that same page, VIII.

24 A. VIII, yes.

25 Q. And if you look at that paragraph you were

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1 just talking about with Mr. Draper, down at the bottom,
2 second to last sentence, does it say, "Montana
3 specifically requested that Wyoming release post-1950
4 stored water so that pre-1950 users in Montana could
5 satisfy their water rights"?

6 A. Where are you look -- I lost you.

7 Q. Okay. Page VIII.

8 A. I'm on page VIII.

9 Q. It's --

10 A. Roman Numeral?

11 Q. Roman Numeral, yes.

12 A. Got it. I have the last paragraph starts
13 with --

14 Q. The fourth paragraph up, the one you were
15 talking about just a moment ago.

16 A. "And Mr. Stults stated the 2004 flows in
17 Tongue River," that one?

18 Q. Yes, sir. If you read the second to last
19 sentence.

20 A. "Montana specifically requested that Wyoming
21 release post-'50 stored water so that the pre-1950
22 water users in Montana can satisfy their water rights."

23 Q. Do you understand that to be a reference to
24 the call letter that was sent in May of 2004 by
25 Mr. Stults?

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1 A. I think I do. But I don't think anybody else
2 reading this who wasn't there would.

3 Q. All right. And in 2004, you can agree with
4 me that things changed between Montana and Wyoming;
5 right?

6 A. Yes, sir.

7 Q. They got real formal 'cause Montana really
8 made a call; right?

9 A. Yes, sir.

10 Q. All right. And you talked a little bit
11 earlier about Mr. Whitaker telling folks down on the
12 main stem of the Tongue to put on measuring devices?

13 A. That was my understanding, yes.

14 Q. And do you know whether that occurred after
15 2004?

16 A. I believe so. But I don't know for sure.

17 Q. Thank you.

18 MR. KASTE: That's all I have.

19 THE WITNESS: Okay.

20 SPECIAL MASTER: Okay. I actually have just
21 one or two quick questions.

22 EXAMINATION

23 BY SPECIAL MASTER:

24 Q. So earlier you indicated that you believe you
25 would have had conversations regarding shortages in

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1 Montana in the 1987 to '89 period; is that correct?

2 A. Probably '88 would be my recollection.

3 'Cause '87 we had a fall -- the fall in '87 was really
4 dry. '88 was just -- we were just totally dry. And
5 then the spring of '89 was dry. And then we started
6 getting some moisture later in the summer. But I'm
7 thinking it was probably -- most likely would have been
8 '88 I'd have had that conversation with Wyoming.

9 Q. And before the Billings office was expanded
10 to include the territory handled by the Miles City
11 office, would you have had responsibility for the
12 Tongue River?

13 A. Not before in -- I believe we closed the
14 office in '94. So, no, I wouldn't have had much
15 responsibility on the Tongue River. But we still
16 worked with the dam with Glen MacDonald sometimes,
17 running down there to help him out once in a while from
18 Billings. 'Cause our staff in Billings was a little
19 larger at the time than they had in Miles City.

20 Q. So would any of the conversations that you
21 may have had in '88 or '89 regarding Montana's
22 shortages, would any of those have involved the Tongue
23 River?

24 A. Yeah. They probably would have just because
25 I knew those guys down there. And I was acquainted

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1 with them. And I was just, you know -- we were just
2 visiting. You know, it's hard to say.

3 Q. Okay.

4 A. I mean, that's a long time ago. I have a
5 hard time remembering that far back, in all honesty.

6 SPECIAL MASTER: Thank you.

7 Mr. Kaste, did you want to follow up on that?

8 MR. KASTE: Nothing further.

9 SPECIAL MASTER: Okay. Mr. Draper?

10 MR. DRAPER: Nothing further, Your Honor.

11 SPECIAL MASTER: Okay. Thank you. Then,
12 Mr. Kerbel, you're the lucky one today. You actually
13 get out between the break and the very end of the day.

14 So let me just -- before we break today, let
15 me just ask one other favor of both counsel. And that
16 is, is that one of the things that people are clearly
17 beginning to do is to actually use the witnesses in
18 order to make a point that actually is right clear on
19 the record itself. And you really don't need the
20 witness's testimony in order to emphasize that
21 particular point.

22 And I recognize that's part of actually
23 laying out your case. And so I'm not going to tell you
24 not to do that at all. But I do want to remind people
25 that you will have an opportunity at the very end of

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1 the trial to also set out your case in a posttrial
2 brief. And so just recognize you don't have to use the
3 witnesses to make all of the various points you're
4 going to do later on.

5 And to the degree you can do that more
6 quickly, that would make the trial go faster. So,
7 again, I'm not telling you you can't. I understand the
8 reason why you're doing that. But it does strike me
9 we're spending a lot of time doing that as well as
10 finding out actually what the witnesses have to testify
11 about.

12 I understood some of that is, of course,
13 context for the witness, to get them oriented. And
14 it's just unavoidable. I understand entirely. And
15 what I'm just asking is that to the degree it's
16 avoidable and there's another way of doing it, then
17 that's great. But as I say, this is not meant to say
18 you can't do it, nor is it meant as criticism. But
19 just -- it might be another way in which we can shorten
20 the trial proceeding itself a little bit.

21 So with that, then, we will recess until
22 8:30 a.m. tomorrow morning when we will be back in this
23 particular courtroom. So with that, we are in recess
24 for the day. So thank you very much.

25 (Trial Proceedings recessed at

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4:38 p.m., October 22, 2013.)

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REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 238, is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Laurel, Montana, this 10th day of February, 2014.



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