

No. 137, Original  
IN THE SUPREME COURT OF THE UNITED STATES  
VOLUME 6 OF 25 VOLUMES  
TRANSCRIPT OF TRIAL PROCEEDINGS

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

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

James F. Battin United States Courthouse  
2601 2nd Avenue North  
Billings, Montana 59101  
9:01, Thursday, October 24, 2013

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Proceedings recorded by machine shorthand  
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1 THURSDAY, OCTOBER 24, 2013, 9:01 A.M.

2 SPECIAL MASTER: Good morning, everybody. So  
3 I'm going to take just one minute here to get myself  
4 organized.

5 Mr. Draper, so I assume we're going to start  
6 out with a continuation of the testimony of Mr. Davis,  
7 and then after that, we'll have Mr. Hayes today?

8 MR. DRAPER: Kevin Smith is on the stand.

9 SPECIAL MASTER: Sorry. Mr. Smith.

10 MR. DRAPER: Yes, and we will continue with  
11 him to be followed by Mr. Hayes. I might mention,  
12 also, we've been discussing between the states about  
13 adding one joint exhibit that I wanted to bring to your  
14 attention. It's the joint appendix that we jointly  
15 filed with you. And it's on your website. But we had  
16 neglected to include it among the joint exhibits here.

17 So we've agreed we'd like to submit that as a  
18 further joint exhibit. And if it's all right with Your  
19 Honor and Wyoming -- I think there's a lot of pages  
20 there -- it might not be necessary, in light of the  
21 message you gave us from the clerk's office about not  
22 needing hard copies on some of these things, that we  
23 provide an electronic copy of that.

24 And as the parties desire to use it, we would  
25 simply provide copies of those portions that were going

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1 to be used.

2 SPECIAL MASTER: Mr. Kaste?

3 MR. KASTE: We don't object to including the  
4 joint appendix as an exhibit in these proceedings.

5 SPECIAL MASTER: So does it have a number?

6 MR. DRAPER: I would propose we give it the  
7 next number, which is J72.

8 SPECIAL MASTER: Okay. So then we will admit  
9 that as J72. And, again, to the degree that it is  
10 actually utilized as part of the examinations, then the  
11 specific portions of that will then be presented to the  
12 witness?

13 (Exhibit J072 admitted.)

14 MR. DRAPER: Yes, Your Honor.

15 SPECIAL MASTER: Okay. Then that sounds  
16 fine. Anything else this morning?

17 MR. DRAPER: Not that I can think of, Your  
18 Honor. We're -- I think we're ready to resume with  
19 Mr. Smith.

20 SPECIAL MASTER: Okay. Thank you very much.  
21 So, Mr. Smith, can you come back up and take you're  
22 place again in the witness box. Sorry. This morning  
23 I'm having problems with names. Sorry I referred to  
24 you as Mr. Davis earlier.

25 THE WITNESS: That's quite all right, sir.



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1           SPECIAL MASTER: And so, Mr. Smith, you're  
2 aware you're still under oath.

3           THE WITNESS: Yes, sir.

4           SPECIAL MASTER: Thank you. So,  
5 Mr. Wechsler.

6                           KEVIN SMITH (CONT.),  
7 having been first duly sworn, testified as follows:

8                           DIRECT EXAMINATION

9 BY MR. WECHSLER:

10           Q. Thank you, Your Honor. Good morning,  
11 Mr. Smith.

12           A. Good morning, sir.

13           Q. Very glad to see you didn't leave town last  
14 night.

15                           Yesterday we had a discussion about the  
16 historic operations of Tongue River Reservoir. And we  
17 started with the operations prior to the compact, prior  
18 to 1950; do you recall that discussion?

19           A. Yes, sir.

20           Q. And I think when we left off, we were talking  
21 about the period of time between 1950 and the 1978  
22 flood; is that your recollection as well?

23           A. I believe so, sir.

24           Q. And I think you may have talked about this  
25 yesterday. But to orient us, were the operations

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1 between 1950 and 1978 consistent with the operations of  
2 the reservoir prior to 1950?

3 A. Yes, sir.

4 Q. When we stopped yesterday, we were looking at  
5 an exhibit. And I just have a couple more questions on  
6 that exhibit. And the exhibit is 309A, M309A. If you  
7 could let me know when you have that.

8 A. I have it now. You can go ahead.

9 Q. If you'd turn, please, with me to page 2.  
10 And just before the heading -- well, this 309A, if I  
11 recall correctly, was a document produced by the  
12 predecessor agency to yours; is that right?

13 A. Yes, sir. By the State Water Conservation  
14 Board.

15 Q. And it's dated October 19th, 1967?

16 A. Yes, sir.

17 Q. And it was talking about the operations of  
18 the reservoir; right?

19 A. Yes.

20 Q. If you look with me, please, to page 2. And  
21 just before the heading "how the reservoir should have  
22 operated"; do you see that?

23 A. Yes, sir.

24 Q. And here in parens it indicates that there's  
25 an attachment of some copies of the US geological

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1 reservoir storage records for the period 1939 through  
2 1960; you see that?

3 A. Yes, I do, sir.

4 Q. Great. Let's take a look at those records if  
5 you would, please. You have those before you?

6 A. Yes, I do.

7 Q. And so I'm looking at something that has a  
8 couple of tables on it. At the top it reads  
9 "Yellowstone River Basin," and to the left it seems to  
10 indicate 478; do you see that?

11 A. Yes, sir.

12 Q. Yesterday we had a discussion about the  
13 capacity of the reservoir when it was originally built.  
14 And I'd like you to look with me, please, under the  
15 heading at the top here. And if you could read the  
16 language under the heading "streams."

17 A. Under the heading of streams is "1938-50,  
18 maximum month-end contents, 75,760 acre-feet, June 30,  
19 1944 (elevation, 3424.9 feet); no storage October 1939  
20 to February 1940."

21 Q. So here, I'm understanding that the maximum  
22 contents prior to 1950s, according to the U.S.  
23 geological surveys, is 75,760 acre-feet; is that how  
24 you understand that statement?

25 A. Yes, it is.

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1 Q. Is that consistent with your testimony  
2 yesterday?

3 A. Yes, it is.

4 Q. And then moving down here to the remarks,  
5 could you read that, please?

6 A. Under remarks?

7 Q. Yes, please.

8 A. "Dam completed in May 1939. Prior to  
9 October 1947, the usable capacity was 73,900 acre-feet.  
10 Present usable capacity, 68,000 acre-feet at spillway  
11 crest elevation 3424.4 feet. Water used for  
12 irrigation."

13 Q. So this indicates that prior to 1947, the  
14 used usable capacity was 73,9; is that how you  
15 understand that?

16 A. Yes, sir.

17 Q. And then -- and then it indicates present  
18 usable capacity is 68,000 acre-feet. Do you see that?

19 A. Yes, sir.

20 Q. And this, we can -- we looked at the  
21 statement which suggested that this was relatively  
22 contemporaneous records from the USGS. So it might be  
23 from the period 1967 or thereabouts; is that a fair  
24 conclusion?

25 A. Yes, sir.

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1 Q. Can you explain how the usable capacity might  
2 have gotten from 73,900 prior to 1947 to 68,000 in the  
3 time period around 1967?

4 A. When you have reservoirs onstream, you have  
5 sedimentation rates that will slowly fill up reservoirs  
6 with sediment and displace the water.

7 Q. The usable capacity of the reservoir gets  
8 reduced over time from the sedimentation?

9 A. Yes, it does.

10 Q. And, again, yesterday we talked about when a  
11 water right in Montana for the State Water Projects  
12 Bureau is perfected, meaning it's fully usable in the  
13 maximum amount. And can you remind us, when is a  
14 reservoir, a state project perfected?

15 A. With the State Water Conservation Board,  
16 those projects were built for marketing water for sale.  
17 And storage was the issue to collect the water for  
18 sale. So once that project was built and was storing  
19 water, that water right was perfected.

20 Q. A maximum amount for the --

21 A. To the full amount of that reservoir.

22 Q. And we were talking about this period between  
23 1950 and 1978. During this time the contracts to the  
24 water user changed. Does that impact the maximum  
25 amount of the water right?

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1           A.    No, it does not.

2           Q.    Let's turn to the 1978 flood.  Can you please  
3 describe that flood?

4           A.    There was a flood -- flood of record, I  
5 believe, in that basin.  And it did occur May of 1978.  
6 From the historical documentation, primarily from the  
7 USGS website's reading, it appeared that the peak of  
8 that flood was approximately 18, 19,000 CFS.  If I  
9 remember correctly, I believe the reservoir filled  
10 within one or two days.  I believe it came up to 30,000  
11 acre-feet rather quickly and then started spilling.  
12 The routing effect of the reservoir with the storage  
13 and the length of the reservoir dropped the peak of the  
14 flood from that 18 or 19,000 down to 10 or 11,000 CFS  
15 discharge.

16                   The aftereffects of that flood were numerous.  
17 In the short-term, of course, there was damage  
18 downstream.  The normal flows, I believe, downstream  
19 for the floods from the last 60 years were anywhere  
20 between 3000 to 5000 CFS, I believe.  So when you have  
21 double that amount in that flat basin, there's going to  
22 be definitely a large amount of property damage and  
23 other damage downstream.

24                   Other damage specifically was to the project  
25 and on the spillway structure and immediately

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1 downstream of the spillway structure and tailrace.

2 Q. And what does that mean?

3 A. At your terminal end of the spillway, where  
4 the water discharges, it discharges typically into an  
5 area we call a tailrace. That area itself is an area  
6 that if -- if the spillway has not taken out the energy  
7 of the water that is spilling, that area is utilized  
8 and used to try to expend the energy in the water, the  
9 kinetic energy. So when the water leaves a tailrace  
10 area, it's -- causes less damage. Is a more tranquil  
11 flow.

12 What became apparent with the spillway design  
13 that was in place was that was not occurring. The --  
14 there is a lot of head cutting and scouring in the  
15 tailrace area. Wing walls of the principal spillway  
16 were exposed, other issues occurred.

17 The long-term effect of that flood pointed  
18 out the serious deficiencies in the capacity and  
19 capabilities of that project to handle what should have  
20 been a run-of-the-mill flood event in that basin.

21 Q. You mentioned that there was damage  
22 downstream. I wonder if you would expand on that a  
23 little bit. What kind of damage occurred below the  
24 Tongue River Reservoir in Montana?

25 A. From my discussions with Art Hayes and

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1 others, the damage was erosion, property damage, damage  
2 to bridges, bridge abutments. Typically what you'd  
3 see, what we've seen recently in other recent floods  
4 with the high flows when they exceed the floodplain and  
5 erode soil, it basically -- well, as I said, it's  
6 primarily property damage and damage to roads and  
7 bridges.

8 Q. Are you familiar with the designation  
9 high-hazard dam?

10 A. Yes, I am, sir.

11 Q. What is that designation?

12 A. There is some confusion sometimes when people  
13 say high-hazard dam, they immediately assume unsafe.  
14 And that's not the issue. High-hazard dam is simply a  
15 classification of the project. High-hazard structures  
16 in Montana are regulated by the State Dam Safety  
17 Program.

18 If it was a hydropower facility, it would be  
19 regulated by the Federal Energy Regulatory Commission.  
20 If it's a BOR dam, they regulate their own. Corps of  
21 Engineers regulate theirs in their own dam safety  
22 programs.

23 The high-hazard classification is -- for the  
24 State of Montana is should that project fail, there  
25 would be loss of life downstream. And there are some



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1 other constraints tied to that, specifically with the  
2 volume or height of dam and items. But primarily  
3 high-hazard is defined by loss of life downstream.

4 Q. In this time period, we're talking 1978, was  
5 the Tongue River Reservoir considered a high-hazard  
6 dam?

7 A. Yes, it was.

8 Q. Has that designation changed? In other  
9 words, is the Tongue River Reservoir still considered a  
10 high-hazard dam?

11 A. Yes, it is.

12 Q. And can you explain why?

13 A. The downstream risks are still the same, if  
14 not expanding with population growth.

15 Q. Does the designation of the Tongue River  
16 Reservoir as a high-hazard dam, does that impact the  
17 operations of the reservoir?

18 A. Yes, it does, inasmuch as we are operating  
19 under approved dam safety operating permit that we  
20 receive from the dam safety program. Every five years  
21 we do a thorough five-year inspection and review of the  
22 project with the dam safety program. And within those  
23 issues, constraints may be put on projects or  
24 qualifications. Such as Tongue River, we are required  
25 to monitor the project through a series of monitoring

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1 wells, flume vault measurements.

2 But the monitoring of -- the monitoring  
3 wells, flume vault measurements. We also are required  
4 to revisit the performance of the structure on the  
5 seepage monitoring. We just recently redid a report  
6 that's on draft mode that's on my desk waiting for my  
7 review to evaluate the performance of the system.

8 Q. Did you say the designation of the Tongue  
9 River Reservoir as a high-hazard dam impacts the amount  
10 of water that you want to have stored at the beginning  
11 of fall?

12 A. Yes, it does indirectly. An issue here is  
13 prudent and reasonable operations of your project.  
14 Downstream users, if we are operating the project  
15 unsafely, i.e, if we go into wintertime with the  
16 reservoir lapping at the spillway crest, that allows us  
17 zero opportunities to mitigate flows or regulate flows  
18 through the system. It also puts us at extreme risk of  
19 ice damage on the property, on the structure, as well  
20 as passing sheets of ice downstream into the river  
21 downstream, which was -- can also cause some damage by  
22 changing -- altering the stream channel itself.

23 To that end, if -- there is always the  
24 understanding that you're going to be operating a  
25 reservoir according to a reasonable standard of

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1 practice.

2 Q. And so does the designation as a high-hazard  
3 dam also impact the amount of flows that are passed  
4 through the reservoir during the winter?

5 A. Yes, it does. Because it comes into the  
6 issue of your reservoir pool elevations and how to  
7 control those pool elevations.

8 Q. So we've talked about the designation as a  
9 high-hazard dam. And in one of your answers, you also  
10 mentioned that there is a distinction between being a  
11 high-hazard dam and being unsafe; is that right? Is  
12 there a distinction?

13 A. Yes, sir, very much so.

14 Q. And after the 1978 flood, was the Tongue  
15 River Reservoir also considered unsafe?

16 A. Yes, it was considered as an unsafe dam. And  
17 there were reservoir restrictions placed on that  
18 structure to minimize the opportunity for it to fill  
19 and spill.

20 Q. We talked about the operations of the  
21 reservoir pre-Compact. We talked about the operations  
22 of the reservoir between that period from the compact  
23 and to the 1978 flood. And you said that those  
24 historic operations were consistent; right?

25 A. Yes, sir.

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1 Q. Did the operations of the Tongue River  
2 Reservoir change after the 1978 flood?

3 A. Yes, sir. It did.

4 Q. In what sense?

5 A. After the 1978 flood, there were restrictions  
6 on the project to ensure that -- it's described in the  
7 final environmental impact statement from 1995 for the  
8 rehabilitation of the project. But if I remember  
9 correctly, the attempt was to keep the storage down to  
10 about 20,000 acre-feet until the historic filling  
11 period of the spring, at that time, not to let it fill  
12 more than to satisfy its contracts, which would be -- I  
13 think they restrict it to elevation 3420, which would  
14 be about 50,000 acre-feet, I believe. A little over on  
15 that.

16 Q. It has a little designation for a foot mark;  
17 right?

18 A. Yes, sir.

19 Q. Is the elevation above sea level?

20 A. Yes, it is.

21 Q. So I want to talk, then, about the operations  
22 of the reservoir during the time that it was being  
23 rehabilitated. And to get there, I want to first talk  
24 about the events that led up to the rehabilitation of  
25 that reservoir. So are you familiar with the Northern

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1 Cheyenne Compact?

2 A. Yes, I am familiar with that compact, sir.

3 Q. Can you just generally describe the Northern  
4 Cheyenne Compact?

5 A. In general, sir, the Northern Cheyenne  
6 Compact between Montana and the Northern Cheyenne Tribe  
7 and the federal government, the compact was written to  
8 satisfy the tribe's compact rights, water rights.

9 Q. Would you turn with me, please, to  
10 Exhibit M527?

11 A. I have it, sir.

12 Q. What is this document?

13 A. This is entitled "Montana Code Annotated  
14 2011: The Water Rights Compact, State of Montana,  
15 Northern Cheyenne Tribe, United States of America."

16 Q. You've read this compact before?

17 A. Yes, I have read it.

18 Q. Would you take a second to take a look at it,  
19 and let me know if this looks consistent with your  
20 understanding of it.

21 A. Yes, it does.

22 Q. This is also codified in the Montana Water  
23 Use Act at 85-20-301; is that right?

24 A. Yes, sir.

25 Q. And in the compilation we provided to the

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1 Court, that's at page 297.

2 MR. WECHSLER: Your Honor, it's a publicly  
3 available statute. For convenience, we would offer it  
4 so it can be part of the record.

5 MR. KASTE: No objection.

6 SPECIAL MASTER: Okay. Exhibit M527 is  
7 admitted.

8 (Exhibit M527 admitted.)

9 BY MR. WECHSLER:

10 Q. Mr. Smith, could you turn, please, to article  
11 2A, 2B, which on Exhibit M527 is on page 4 of 16?

12 A. Okay. I'm on page 4 of 16.

13 Q. Do you see the small B under the title  
14 "Storage and Exchange Water"?

15 A. Yes, I do.

16 Q. Could you please read that first sentence?

17 A. "Storage and Exchange Water. The tribe has a  
18 right to divert or deplete, or permit the diversion or  
19 depletion of, up to 20,000 acre-feet per year from a  
20 combination of water stored in the Tongue River  
21 Reservoir and exchange water."

22 Q. Is that your understanding of the storage  
23 right of the Northern Cheyenne Tribe?

24 A. Yes, sir.

25 Q. And is it your understanding that that was

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1 pursuant to the Northern Cheyenne Tribe Compact?

2 A. Yes, sir.

3 Q. Do you know if the right of the Northern  
4 Cheyenne Tribe was determined in the statewide  
5 adjudication?

6 A. Yes, sir.

7 Q. And was it?

8 A. Yes, it was.

9 Q. What was the priority date of the storage  
10 right in that adjudication?

11 A. In the adjudication, the storage right of the  
12 Northern Cheyenne Tribe's water was to equal the most  
13 senior right in the reservoir. Since our right is the  
14 only other right in the reservoir, their target date is  
15 the same as ours.

16 Q. 1937?

17 A. Yes, sir.

18 Q. Turn with me, please, to page 10 of Exhibit  
19 M527. Are you there?

20 A. Yes, sir.

21 Q. I'm looking under the heading D, "operation  
22 of Tongue River Reservoir"; do you see that?

23 A. Yes, I do.

24 Q. And if you could, please, read -- let's start  
25 with the first sentence of that revision.

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1           A.    "Item No. 1, to provide for Tongue River  
2 Reservoir operation, procedures that are consistent  
3 with the purposes of this compact, a reservoir  
4 operation plan shall be developed by a five-member  
5 advisory committee."

6           Q.    Does that advisory committee exist?

7           A.    Yes, it does.

8           Q.    What's it called?

9           A.    It's called the Tongue River Reservoir  
10 Operating Committee.

11          Q.    Advisory Committee?

12          A.    Yes.

13          Q.    And yesterday you testified that you are a  
14 member of that advisory committee; is that right?

15          A.    Yes, I am.

16          Q.    Okay. Please read the next sentence.

17          A.    "The committee shall have representatives  
18 from the state of Montana, the Tongue River Water  
19 Users' Association, the Northern Cheyenne Tribe, the  
20 United States, and a fifth member to be selected by the  
21 other four."

22          Q.    Is that the composition of the Tongue River  
23 Advisory Committee?

24          A.    Yes, it is.

25          Q.    And there's a fifth member that's selected by



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1 the other four. Currently who are the members of the  
2 Tongue River Reservoir Advisory Committee?

3 A. Membership of the advisory committee, of  
4 course, myself as the bureau chief of the State Water  
5 Projects Bureau, Art Hayes as the state president of  
6 the Water Users' Association. The BIA is also a member  
7 of the committee, and I don't remember the name of that  
8 person right off the top of my head. For the Northern  
9 Cheyenne Tribe -- Shanara Gion is the member for the  
10 Northern Cheyenne Tribe. And the fifth member is Roger  
11 Muggli out of Miles City from the T & Y Diversion  
12 District.

13 Q. Those -- well, you were on the basin tour  
14 that was part of this case; right?

15 A. Yes.

16 Q. And many of those people joined us at various  
17 parts of that tour?

18 A. Yes, I am. And it just hit me. William  
19 Walksalong has become the Northern Cheyenne Tribe  
20 member. Shanara Gion has become, I believe, the BIA  
21 rep for the advisory committee, if I remember that  
22 correctly.

23 Q. Moving to the next sentence. It starts "the  
24 advisory committee." It says, "The advisory committee  
25 shall annually agree upon on reservoir operation

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1 schedule setting forth proposed uses of storage and  
2 direct flow for the year"; do you see that?

3 A. Yes, sir.

4 Q. And does that occur?

5 A. Yes, it does.

6 Q. Is that what's now known as the operating  
7 plan?

8 A. Yes, it is, sir.

9 Q. Next, it indicates the Department of Natural  
10 Resources and Conservation or its successor shall  
11 thereupon be responsible consistent with the terms of  
12 this compact and other applicable law with the daily  
13 operations of the reservoir and implementation of the  
14 reservoir operation plan; do you see that?

15 A. Yes, I do.

16 Q. So could you please explain the relationship  
17 between the advisory committee and the DNRC and the  
18 State Water Projects Bureau representing the DNRC?

19 A. The advisory committee and with the bureau  
20 chief of the State Water Projects Bureau, myself in  
21 this instance as a member of the committee, and the  
22 DNRC, the issues are listening to the concerns and the  
23 issues that are ongoing within the basin, deal with the  
24 operations to ensure that we build a reservoir in a  
25 prudent and safe manner, to make sure we have the water

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1 for the Northern Cheyenne Tribe Compact water and also  
2 for our contractual obligations of the Water Users'  
3 Association. There were other components within the  
4 compact that also were general guidelines we follow.  
5 And we try to implement those.

6 The underlying responsibility of the project  
7 and the safety of the project and performance of the  
8 project still lies with the state. The state still  
9 owns the Tongue River Reservoir Dam and the pertinent  
10 structures.

11 So the underlying responsibilities for safety  
12 and operations still lie with the state on that  
13 project.

14 Q. This Northern Cheyenne Tribe Compact is state  
15 law?

16 A. Yes, it is.

17 Q. And so within those confines that you just  
18 described, you are obligated to follow this compact; is  
19 that right?

20 A. Yes, we are, sir.

21 Q. Turn with me, please, to Exhibit 528.

22 A. Yes, sir.

23 Q. Do you understand that the Northern Cheyenne  
24 Tribe Compact was ratified by the federal government?

25 A. Yes, sir. That is my understanding.

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1 Q. Looking to Exhibit M528; what is that  
2 document?

3 A. This is Public Law 102-374 from the  
4 102nd Congress. This is the Settlement Act -- let me  
5 rephrase that. It's titled "An Act to Provide for the  
6 Settlement of the Water Right Claims of the Northern  
7 Cheyenne Tribe and for Other Purposes."

8 MR. WECHSLER: And, again, Your Honor, it's a  
9 public document. But we would offer it to complete the  
10 record.

11 MR. KASTE: No objection.

12 SPECIAL MASTER: Okay. Thank you. So  
13 Exhibit M528 is admitted into evidence.

14 (Exhibit M528 admitted.)

15 BY MR. WECHSLER:

16 Q. If you'd turn with me, please, to page --  
17 what's marked at the bottom with the Bates No. MT15147,  
18 which is the second page, I believe, of the document.

19 A. Yes, sir.

20 Q. And I'm looking at the heading at the bottom  
21 section for "ratification of compact"; you see that?

22 A. Is that under Section 4? Yes, I have it.

23 Q. And could you read Subsection A there?

24 A. Yes, sir. "Subsection A, In general, except  
25 as modified by this Act, the Water Right Compact

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1 entered into by the Northern Cheyenne Tribe in the  
2 state of Montana is hereby approved, ratified, and  
3 confirmed."

4 Q. Do you also understand the Northern Cheyenne  
5 Tribe Compact to be federal law?

6 A. Yes, sir.

7 Q. And so that's another reason why you're  
8 obligated to follow it?

9 A. Yes, sir.

10 Q. Subsection C under that same Section 4, that  
11 indicates, "Except for the authorizations contained in  
12 subsection 7B1 and 7B2, the authorization of the  
13 appropriations contained in the Act shall not be  
14 effective until such time as the Montana Water Court  
15 enters and approves a decree as provided in subsection  
16 D of this section"; do you see that?

17 A. Yes, sir.

18 Q. And do you understand that to mean a decree  
19 must be adopted in Montana adjudication?

20 A. Yes, sir.

21 Q. After the adoption of the NCT Compact and its  
22 subsequent ratification by Congress, was there an  
23 environmental impact statement completed?

24 A. Yes, sir, there was.

25 Q. And I think you referred to that earlier in

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1 your testimony; right?

2 A. Yes, sir.

3 Q. Let's take a look at that document which is  
4 Exhibit M335. Do you have that before you?

5 A. Yes, sir, I do.

6 Q. What is Exhibit M335?

7 A. This exhibit is the Tongue River Basin  
8 Project, Final Environmental Impact Statement, dated  
9 March 19, 1996.

10 MR. WECHSLER: I believe, Your Honor, a copy  
11 of this is Exhibit M335. I believe we've also provided  
12 to the Court an original bound copy.

13 SPECIAL MASTER: That's correct. You did.

14 BY MR. WECHSLER:

15 Q. Is this a document you're familiar with,  
16 Mr. Smith?

17 A. Yes, I am.

18 Q. And is it a document that you had  
19 responsibility for working with when you were in the  
20 process of constructing the Tongue River Reservoir.

21 A. Yes, sir.

22 Q. And did you work with it on a daily basis?

23 A. No, sir.

24 Q. Regularly?

25 A. Regularly, sir.

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1 Q. Taking a look at Exhibit M335, does this look  
2 like a complete and accurate copy of the Tongue River  
3 Basin Project Final Environmental Impact Statement?

4 A. Yes, sir.

5 MR. WECHSLER: Your Honor, at this point we'd  
6 move the admission of Exhibit M335.

7 MR. KASTE: No objection.

8 SPECIAL MASTER: Exhibit M335 is admitted  
9 into evidence.

10 (Exhibit M335 admitted.)

11 BY MR. WECHSLER:

12 Q. Turning to the -- it's the third page of the  
13 document. It's labeled with the Bates stamp MT04891;  
14 do you see that?

15 A. Sir, my copy doesn't have Bates stamps on it.

16 Q. You have the original?

17 A. I have the original copy here.

18 Q. At the -- it's a letter on State of Montana  
19 letterhead indicating, Dear Reader, signed by Arthur R.  
20 Clinch, Director; do you see that?

21 A. Yes, sir.

22 Q. The first sentence reads: "The project  
23 sponsors, the Montana Department of Natural Resources  
24 and Conservation, Northern Cheyenne Tribe, and the U.S.  
25 Bureau of Reclamation prepared this Tongue River Basin

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1 Project Final Environmental Impact Statement, (final  
2 EIS) incorporating comments received from the draft EIS  
3 released to the public in June 1995"; do you see that?

4 A. Yes, sir, I do.

5 Q. Is that consistent with your understanding  
6 that the project sponsors of this project were the  
7 Montana DNRC, the Northern Cheyenne Tribe, and the  
8 United States Bureau of Reclamation?

9 A. Yes, sir. It was a three-way partnership for  
10 this project.

11 Q. And did those three entities, were they also  
12 responsible for the content of the environmental impact  
13 statement?

14 A. Yes, sir.

15 Q. So let's take a look at some of that content.  
16 If you'll turn with me, please, to page 1-1. I'm  
17 looking at under the heading "introduction." I believe  
18 it's the second full sentence beginning with "this  
19 project"; do you see that?

20 A. That was a long first sentence. Yes, sir.

21 Q. It indicates that the project is -- and I'm  
22 skipping through the first phrase in the sentence --  
23 "is being proposed to alleviate dam safety concerns and  
24 protect downstream lives and property, to protect all  
25 existing water use contracts held in the Tongue River



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1 Reservoir, and to provide up to an additional 20,000  
2 acre-feet per year of water to the tribe"; do you see  
3 that?

4 A. Yes, I do, sir.

5 Q. Is that consistent with your understanding of  
6 why the project was built?

7 A. Yes, sir.

8 Q. Let's turn to page 2-3.

9 A. Pardon me, sir?

10 Q. 2-3. Under the heading "effects of dam  
11 failure on human safety and property downstream of the  
12 project"; do you see that?

13 A. Yes, sir.

14 Q. And the first sentence seems to be talking  
15 about the operations of the dam since 1978; right?

16 A. Yes, sir.

17 Q. Is that consistent with what you described  
18 earlier?

19 A. Yes, it is, sir.

20 Q. And then the next sentence there indicates  
21 that there's consequences if the dam were to fail;  
22 right?

23 A. Yes, sir. The -- it lines out if the project  
24 had a catastrophic failure, which with the spillway in  
25 its configuration at that time was not out of the

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1 question, it was estimated between 300 million to  
2 \$500 million worth of damage should that project fail.

3 Q. That's a lot.

4 A. Not accounting for the loss of life.

5 Q. Can we turn, please, to page 3-5? And what's  
6 shown on page 3-5 of the FEIS?

7 A. On page 3-5 is Figure 3-1, which is titled  
8 "Tongue River below the dam historic streamflows."  
9 The -- it's an X, Y chart with a mean -- median monthly  
10 streamflows and CFS on the Y axis and time and months  
11 along the X axis.

12 Q. This is a figure that you attached to your  
13 original expert report, which is Exhibit M3; right?

14 A. Yes, it is, sir.

15 Q. Why did you attach it to your expert report?

16 A. It shows quite well the established practice  
17 of the project throughout its 70-plus year history. It  
18 also demonstrates very clearly that the primary fill  
19 period for this project, as with most any intermountain  
20 project on the eastern slope, is through the spring  
21 months, April through June or May through July.

22 Q. And there's been an awful lot of discussion  
23 in this case about winter flows. And does this figure  
24 3-1 on page 3-5 also show anything about winter flows?

25 A. Yes, it does. Looking through the period

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1 from October through February or March, its  
2 historically median monthly flows are between 220 CFS  
3 to 175 and 180 CFS.

4 Q. What does that term "median" mean?

5 A. Median is defined as the middle point of your  
6 data set. So half of your data set is higher than that  
7 number, and half your data set is lower than that  
8 number.

9 Q. If you'd turn with me, please, to page 3-7.  
10 And what's shown on page 3-7?

11 A. On page 3-7 are two photos showing the Tongue  
12 River Reservoir spillway. One is a picture of the  
13 spillway itself during the 1978 flood. And the other  
14 photo is an aerial photo showing the extent of  
15 flooding.

16 Q. Turn with me, please, to page 3-26. Do you  
17 have that?

18 A. Yes, sir.

19 Q. I'm looking at the heading "3.13.6.3 Tongue  
20 River Basin agricultural economy"; do you see that?

21 A. Yes, sir.

22 Q. And here's a description of the -- how the  
23 Tongue River Basin has an awful lot of reliance on  
24 agriculture in that area. I'm not going to ask you  
25 about the specific numbers shown in this document. But

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1 is it your understanding that agriculture is important  
2 in the Tongue River Basin?

3 A. Most definitely so, sir. There's 120 miles  
4 or so, as the crow flies, from the project to Miles  
5 City. And it's primarily all agricultural communities,  
6 whether they're ranches or farm operations.

7 Q. Turn with me, please, to page 4-19; do you  
8 have that?

9 A. Yes, I do, sir.

10 Q. Here I'm looking under the heading "reservoir  
11 ice." And the second sentence reads: "Historically  
12 the reservoir has been drawn down by irrigation  
13 releases through the summer and maintained at a low  
14 elevation during the winter months, see Figure 4-5, to  
15 avoid use of the spillway in the spring"; do you see  
16 that?

17 A. Yes, I do, sir.

18 Q. Is that consistent with your testimony that  
19 the reservoir is drawn down in the irrigation season  
20 and then maintained at a low elevation during the  
21 winter months?

22 A. Yes, sir.

23 Q. Over on the next column there's a heading  
24 "downstream river rights"; do you see that?

25 A. Yes, sir.

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1 Q. And here it's talking about river ice in the  
2 Tongue River Reservoir. Could you explain, please, the  
3 concern with the downstream river rights?

4 A. Yes, sir. Well, this is Montana, and eastern  
5 Montana at that. It's -- it can get fairly cold in the  
6 minus 20-, minus 30-degree sections and is at risk,  
7 when you have a river that the base level in the  
8 summertime for irrigation is 400 CFS, give or take, it  
9 seems. And spring runoff puts water through there  
10 approximately between 2000 to 5000 CFS. The river  
11 channel is a developed, wide channel.

12 In wintertime flows, there needs to be  
13 sufficient depth to prevent ice from forming from the  
14 bed of the river coming up. So it's very desirable to  
15 get, what I would call, an ice shelf formed for the  
16 initial part of the cold season at a higher level if  
17 you can, so if you need to adjust flows, you can adjust  
18 flows without freezing up the river. Because once you  
19 do freeze up the river, restrict the flows, if we have  
20 to pass additional flows to deal with flood issues and  
21 mitigation, it's very likely you end up creating ice  
22 jams and/or putting the river on top of your river ice,  
23 which then, in turn, ends up flooding out at the banks  
24 and going through your farm fields and taking out  
25 bridges and whatnot.

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1 Q. The FEIS, Exhibit M335, at page 4-19 uses the  
2 term anchor ice. Are you familiar with that term?

3 A. I am familiar with that term.

4 Q. What's that mean?

5 A. Anchor ice is ice that forms from the bed of  
6 the river coming up as opposed to forming on the  
7 surface of the water coming down. There's not enough  
8 warmth in the water in the bed of the stream so that it  
9 is cold enough to start forming ice.

10 Q. From your perspective, is it important to  
11 operate the Tongue River Reservoir in a way that  
12 minimizes any damage from anchor ice or ice jams?

13 A. Most definitely. Most definitely so.  
14 Especially as to our public entity as well.

15 Q. And historically, has the Tongue River  
16 Reservoir been operated in such a manner?

17 A. Yes, it has.

18 Q. Is it important, from your perspective, to  
19 have some flexibility in the winter operations in order  
20 to adjust for winter ice and anchor ice?

21 A. Yes. Yes. This is a large basin from the  
22 mountains in the Big Horns to where the headwaters are  
23 to Miles City. There is a lot of topographic relief.  
24 I guess you could say that there are different  
25 climates. The river basin is, I want to say,

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1 approximately 300 miles long or so, give or take. A  
2 lot of changes in that river basin at one point to  
3 another. So flexibility is greatly desired in any  
4 system like this where we have a reservoir close to the  
5 middle of the basin.

6 Q. Could you turn with me, please, to the next  
7 page, page 4-20? And this appears to be a Figure 4-9  
8 titled "Tongue River below the dam." And do you  
9 understand that to be below Tongue River Reservoir?

10 A. Yes, sir, my understanding is below the  
11 reservoir.

12 Q. And this indicates proposed releases  
13 following construction; do you see that?

14 A. Yes, sir.

15 Q. What do you understand that to mean?

16 A. This was taken from the modeling studies and  
17 appears to be the agreed upon -- or showing examples of  
18 a flow regime and the possible development of the  
19 water.

20 Q. And, again, we see that this is a median  
21 monthly streamflow. So there's an equal number of  
22 years -- or months that it would be above that number  
23 and an equal number that would be below; is that right?

24 A. Yes, sir. Yes, sir. Based on the  
25 assumptions.

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1 Q. And so what do you understand the -- it uses  
2 the term "proposed." What do you understand that to be  
3 referring to?

4 A. That this is -- that this is the desired  
5 results after construction and rehabilitation of the  
6 project, this was the intent during the EIS of  
7 establishing flow rates and how they would affect the  
8 operations of the river.

9 Q. You say the "intent." Do you mean the intent  
10 of the project sponsors meaning DNRC and Northern  
11 Cheyenne Tribe and the United States Bureau of  
12 Reclamation?

13 A. Yes, sir.

14 Q. And so this was how they were proposing to  
15 operate the dam?

16 A. Correct. I also may state that this is still  
17 proposing to maintain the historical pattern of the  
18 winter months but still recognizing a primary fill  
19 period from that April through July period.

20 Q. So it's consistent with historic operations?

21 A. Yes, sir.

22 Q. And we can see a little more with the model  
23 results and the proposals if you turn to page E11,  
24 which is towards the back of the document. Do you have  
25 that before you?



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1 A. Yes, sir.

2 Q. So what is this page showing?

3 A. Page E11 has three tables: Tables E5, E6,  
4 and E7. The tables -- the first Table E5, shows  
5 historical streamflows below the Tongue River Dam from  
6 the period of 1946 to 1989. Table E6 shows streamflows  
7 during construction below Tongue River Dam. And Table  
8 E7 shows the model streamflows below Tongue River Dam.

9 Q. All consistent with historic flows?

10 A. Yes, sir.

11 Q. Was this final environmental impact  
12 statement, was that adopted?

13 A. Yes, sir. The final environmental impact  
14 statement was done to meet the National Environmental  
15 Protection Act, the NEPA criteria under the Bureau of  
16 Reclamation. It also satisfied the Montana  
17 Environmental Policy Act criteria. And it was accepted  
18 with the record of a decision as well.

19 Q. Shortly after it was approved, that was when  
20 you started working; right?

21 A. Yes, sir. I starting working in June or July  
22 of '96.

23 Q. So it was your responsibility to make the  
24 rehabilitation happen?

25 A. In a nutshell, yes, sir. There were a lot of

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1 people involved --

2 Q. You had a lot of help. We might still be  
3 constructing if it was just you.

4 A. It would be somewhere, sir.

5 Q. What I would like to do is talk about the  
6 operations of the Tongue River Reservoir during that  
7 period that construction was going on. And so can you  
8 first give me an idea, when was construction of the  
9 rehabilitation project, when was that going on?

10 A. When I came on board, sir, as I said earlier,  
11 I was walking in on the preconstruction meeting in June  
12 or July of 1996. Construction began at that time. It  
13 was a three-phased construction. The construction ran  
14 through 1999.

15 As I said before, it was a three-phase  
16 project. The first phase was building the roads to the  
17 dam and mining aggregate at several locations and  
18 processing that aggregate for future production of the  
19 roller-compacted concrete at the dam. I believe there  
20 was approximately 100,000-plus cubic yards of that  
21 material provided and stockpiled in the wintertime in  
22 '96 at the dam site.

23 The second phase of the project -- the second  
24 phase of the project involved the emergency spillway  
25 construction. The emergency --

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1 Q. Before you go on to the second phase, can you  
2 explain how phase one of the project impacted  
3 operations of the reservoir?

4 A. Phase one of the project impacted operations  
5 of the reservoir a couple ways. We built a bridge  
6 downstream of the dam to access the toe of the dam for  
7 stockpiling. So we maintained flows to make sure we  
8 could build the bridge at that location.

9 One of our primary mining areas today is  
10 called Camper's Point. And today at the higher pool  
11 levels, you have a lake inside surrounded by land at  
12 Camper's Point. That is an area that we had drafted  
13 down to make sure -- the reservoir was drafted down to  
14 make sure we were able to mine that area not in the  
15 water, to process materials.

16 There were also some rough grading of the  
17 state parks while we were doing the mining operations  
18 in the same areas. I believe we also installed one  
19 boat ramp, which meant we had to draft the reservoir  
20 down to below elevation, 3400 probably, to install the  
21 key -- or the cutoff on the boat ramp itself at the  
22 base.

23 So those criteria, those issues, while we  
24 were doing construction -- and I should point out that  
25 whenever we're doing construction and rehab efforts on

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1 our projects, we work within what schedules we can to  
2 mitigate and minimize the effect for water deliveries  
3 downstream. And many times those goals are mutually  
4 exclusive. Prime construction weather and issues would  
5 dictate we would do everything in summertime. And we  
6 would have a minimal reservoir pool.

7 Q. And we looked at the environmental impact  
8 statement actually describes the way in which you're  
9 trying to mitigate or limit the change in the  
10 operations; right?

11 A. Yes, sir. We try to minimize the change in  
12 the flow regime as much as we can to reduce the impacts  
13 downstream.

14 Q. When did phase two occur?

15 A. Phase two fired up in 1997. The phase two is  
16 an interesting project. It was the roller-compacted  
17 concrete spillway that was over the crest of the dam.

18 That project, at the time, was the largest  
19 roller-compacted concrete overlay in the nation. And I  
20 think it was recognized internationally as well. It  
21 was quite a structure. Or it is quite a structure.  
22 The crest length is about 650 feet wide. The spillway  
23 itself covers most of the crest length of the dam.

24 The restrictions that this caused for  
25 operations, we were cutting through the crest of the

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1 dam. So in essence, we're taking out the freeboard.  
2 Because we put the crest of the roller-compacted  
3 concrete spillway at about -- it's about three feet  
4 higher than our primary spillway right now. So it's an  
5 elevation 3431.6, I believe.

6 When we do things like that, we evaluate the  
7 flood hydrology. I believe for that project we looked  
8 at the 100-year recurrence event to ensure that we  
9 would have the reservoir down to an appropriate level  
10 to at least capture the 100-year flood event before we  
11 would crest our excavation through the crest of the dam  
12 to make sure we wouldn't breach the dam.

13 So there's -- when you get into construction,  
14 and as I'm talking, there are actually more things that  
15 are coming to mind. So I might sound like I'm  
16 rambling, and I should stop. But one thing always  
17 leads to another.

18 And dealing with construction on the dam, a  
19 lot of constraints when you start cutting through crest  
20 of dams or work on spillways, you have to time that  
21 work to coincide with minimal risk of flooding. If --  
22 eliminate or mitigate or minimize the risk of  
23 overtopping. Because once you overtop the dam  
24 embankment itself, there is very little -- there is  
25 very little recourse on preventing your dam from start

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1 failing. It's just earth on the downstream side. And  
2 the erosional process will take off, and you have a  
3 very serious issue at that time.

4 So as with any construction project on dams,  
5 evaluating and working with the hydrology of the system  
6 is paramount to ensure you minimize your risk to  
7 downstream landowners.

8 Q. Phase three, when did it start?

9 A. Immediately after. And I should say it was  
10 probably -- phase two was probably not quite finished  
11 when phase three started. In fact, there was overlap  
12 on phase three and phase two.

13 Phase three involved tearing out the primary  
14 spillway, the existing spillway that was --

15 SPECIAL MASTER: Can I just stop for a  
16 second? So the question was, when did it start?

17 THE WITNESS: Oh, my apologies, sir.

18 SPECIAL MASTER: That's okay. You're just  
19 anticipating his next question.

20 BY MR. WECHSLER:

21 Q. So my next question is: Could you please  
22 describe phase three?

23 SPECIAL MASTER: Is there a date on phase  
24 three?

25 THE WITNESS: It would be 1998, sir.

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1           SPECIAL MASTER: Thanks.

2 BY MR. WECHSLER:

3           Q.    So once phase three began -- you were  
4 describing phase three.

5           A.    Yes, sir. It was concurrent, the end of  
6 phase two to phase three. And I just started running,  
7 sir, I'm sorry.

8                    The phase three work included removing the  
9 existing spillway and also tunneling and putting in a  
10 new low-level output works adjacent to the existing  
11 low-level output works.

12           Q.    You talked in general about how construction  
13 projects changed the operations of the reservoir and  
14 how the operations changed as part of this project.  
15 And I think it might be helpful if we look again at  
16 Montana demonstrative Exhibit 3; do you have that with  
17 you? That's the one that has Table 4A from Mr. Book's  
18 original report and also Table 2 from Mr. Dalby's  
19 expert report.

20           A.    Yes, sir, I have that.

21           Q.    What I'd like to look at is the label at the  
22 bottom of page 3 of Mr. Book's report. That's Table  
23 4A. Do you have that before you?

24           A.    Yes, sir.

25           Q.    And looking at this period when construction

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1 was going on, can you see that there were some changes  
2 in the operations?

3 A. Yes, sir.

4 Q. What is it that you're seeing here?

5 A. I'm looking toward the end of the 1997 line,  
6 you see drafting reservoir down through July and  
7 through August into September and October. And then  
8 the operations '98 of go back -- we drafted down to  
9 about 6000 acre-feet. We're actually at the top of our  
10 intake structures.

11 Q. Does that mean it's about as low as you can  
12 take it?

13 A. It's not to dead pools, sir. It's to the top  
14 of our intake towers.

15 Q. Where is dead pool?

16 A. Dead pool elevation is 3474 and something.

17 Q. Do you know how much that is in terms of  
18 acre-feet?

19 A. The acre-feet at dead pool is 711 acre-feet.

20 Q. I'm sorry. I interrupted you. You were  
21 describing how Table 4A shows the change in operations  
22 during the construction.

23 A. Yes. From 1997, 1998, and 1999, we were --  
24 had very low pools. We were working on -- and  
25 actually, we built a copper dam into the lake to



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1 isolate the intake tower, or both intake towers, I  
2 should say, to do construction. We had to build one  
3 intake tower, and we modified the other one.

4 Q. Overall, were the operations of the Tongue  
5 River Reservoir during the construction periods, were  
6 those consistent or inconsistent with the historic  
7 operations of the Tongue River Reservoir?

8 A. Are you saying were the operations during  
9 construction inconsistent or consistent?

10 Q. Which one was it?

11 A. Oh, the operations during construction are  
12 inconsistent with the historical pattern of operations.

13 Q. And so the rehabilitation project was  
14 complete when?

15 A. It was completed in 1999.

16 Q. I might get you to turn now, to -- we have  
17 Montana Demonstrative Exhibit 2, which is the pictures.  
18 And if you look at Exhibit 2W.

19 A. Yes, sir.

20 Q. What's that a picture of?

21 A. That's a picture of the plaque that's on our  
22 primary gatehouse at the Tongue River Dam site. And  
23 it's a dedication plaque saying Tongue River Dam  
24 rehabilitation dedicated July 1, 1999.

25 Q. That confirms your testimony as to when the

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1 construction was complete?

2 A. Yes, sir.

3 Q. All right. Let's move to operations of the  
4 Tongue River Reservoir following the rehabilitation.  
5 And we looked earlier at the Northern Cheyenne Tribe  
6 Compact and related documents and saw the existence and  
7 makeup of the advisory committee; do you remember  
8 talking about that?

9 A. Yes, sir.

10 Q. So what is the role of the advisory  
11 committee?

12 A. The role of the advisory committee is to meet  
13 at least annually. We actually have tried to do it  
14 quarterly. But the role is to meet and discuss the  
15 operations of the reservoir, look at the basin climate  
16 conditions, needs, what it looks like we're going to  
17 have for runoff for our contract deliveries and for the  
18 Northern Cheyenne Tribe Compact waters, and to  
19 generally make recommendations for setting outflows.

20 Q. And you're on the advisory committee. How  
21 often do you meet?

22 A. As I said, we try to meet quarterly. At  
23 least annually, but we try to meet quarterly.

24 Q. What makes a difference between meeting  
25 quarterly and annually?

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1           A.    If we are -- if the basin hydrology looks  
2 good, Art Hayes and I will contact each other. We'll  
3 visit. And Art will follow up by calling and  
4 contacting other board members of the committee. And  
5 we'll make the call to not have a meeting because our  
6 flows are not going to change. We are going to have a  
7 full reservoir pool. And deliveries will be as normal.

8                    If we have additional meetings, it's  
9 perhaps -- there are concerns in the basin, low flows  
10 or bad snowpack. And we're trying to bring in  
11 technical experts from the NRCS to discuss what they  
12 think is -- are good projections for later on for the  
13 spring runoff.

14           Q.    Turn with me, please, to Exhibit M524.

15                    Do you have that book with you?

16           A.    Yes, sir.

17                    SPECIAL MASTER: Can we take a ten-minute  
18 break? So do you want to just -- is there a little  
19 section you want to finish up here?

20                    MR. WECHSLER: No. Now's a great time.

21                    SPECIAL MASTER: Then why don't we actually  
22 take -- rather than a 10-minute break, why don't we  
23 take a full 15-minute break at this particular point.  
24 So why don't we plan to come back at 25 after the hour.  
25 And I'm actually going to stay here for a second and

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1 clear some things up. So people can be seated.

2 (Recess taken 10:10 to 10:25  
3 a.m., October 24, 2013)

4 SPECIAL MASTER: Okay. Everyone can be  
5 seated.

6 Okay. Mr. Wechsler, you can proceed. Do you  
7 have an estimate of how much longer you think the  
8 direct exam is going to go? I'm just asking for  
9 Mr. Kaste's experts.

10 MR. WECHSLER: I still have a little bit more  
11 left. Maybe an hour.

12 SPECIAL MASTER: Okay. Thanks.

13 BY MR. WECHSLER:

14 Q. Mr. Smith, we are about to take a look at the  
15 Tongue River Dam Manual for Operation and Maintenance,  
16 which is Exhibit M524. So can you please take a look  
17 at that document?

18 A. Yes, sir.

19 Q. And can you describe what Exhibit M524 is.

20 A. This is the Tongue River Dam Manual for  
21 Operation and Maintenance. This is the first 46 pages,  
22 which is the manual itself. The rest of the manual is  
23 not attached, which are all the attachments.

24 Q. And is this a document that's created and  
25 drafted by your bureau?

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1 A. Yes, it is.

2 Q. And it's a document that you use in the  
3 operations of the Tongue River Reservoir?

4 A. Yes, it is.

5 MR. WECHSLER: Your Honor, I would move the  
6 admission of Exhibit M524.

7 SPECIAL MASTER: Any objection?

8 MR. KASTE: No objection.

9 SPECIAL MASTER: Okay. Exhibit M524 is  
10 admitted into evidence.

11 (Exhibit M524 admitted.)

12 BY MR. WECHSLER:

13 Q. Mr. Smith, what's the purpose of this  
14 document?

15 A. These documents -- and, again, we have  
16 operation maintenance manuals on our other 20 water  
17 storage projects. The purpose of this document is to  
18 provide general guidelines on the operations. And if  
19 there's any specific maintenance issues or details to  
20 be addressed, they are covered in here as well.

21 Q. You talked about a number of factors that go  
22 into reservoir operations, at the beginning of your  
23 testimony. Are those factors a consideration when the  
24 State Projects Bureau is drafting a manual for  
25 operation and maintenance?

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1 A. Yes, sir.

2 Q. You consider things like the characteristics  
3 of the basin?

4 A. Yes, sir.

5 Q. And the physical limitations of the  
6 structure?

7 A. Of course.

8 Q. And the water rights both upstream and  
9 downstream?

10 A. Yes, sir. For the issue of filling and our  
11 general operations.

12 Q. And this document sets guidelines for the  
13 operations of the reservoir?

14 A. Yes, sir.

15 Q. Let's look, please, at page 10. Or 9 and 10.

16 A. Yes, sir.

17 Q. And what I'd like you to do, Mr. Smith, is  
18 describe the features of the Tongue River Reservoir.  
19 And as I look at Exhibit 524, there's a series of  
20 diagrams. It looks like page 10 is the general layout.  
21 The next page, page 11, shows contours. And then on  
22 page 12, Figure 5 is the Tongue River Dam survey  
23 monuments. So if you could use these figures and  
24 please describe the features of the Tongue River  
25 Reservoir.

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1           A.    Yes, sir.  I'll just use the figure on page  
2 12, which is Figure 5, the Tongue River Dam survey  
3 monuments.  This specific diagram is put into the O & M  
4 manual to provide us a quick reference when we go out  
5 to do physical surveying at the site and see if we have  
6 any movement at the site.  However, it's about the  
7 cleanest picture to offer for descriptions.

8                    Going from left to right on the dam  
9 structure -- and I should say, once I get talking --  
10 when we're working on dams, generally speaking, we  
11 assume that we're standing on the dam crest looking  
12 downstream.  And then we put things in terms of left or  
13 right and not directions.  It's just something we've  
14 gotten used to.  And it's kind of a matter of rule of  
15 thumb.

16                   So starting from the left-hand side of the  
17 structure itself, we come across from the county road  
18 and coming into the site.  The first thing we get to is  
19 the recently rebuilt spillway.  That is a five-cycle  
20 labyrinth.  I believe the crest width of that is  
21 175 feet from side wall to side wall.  And it has a  
22 design capacity of 40,000 CFS for discharge.

23                   SPECIAL MASTER:  So just excuse me for one  
24 second.  So I don't know how long you're actually going  
25 to be talking about this particular exhibit.  But I

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1 know from over there you can touch the screen, and it  
2 actually will indicate where you're actually looking.  
3 And I wonder whether or not you have the same ability.

4 MR. WECHSLER: I believe he does.

5 THE WITNESS: Is it going to work? So how do  
6 I clean that off, sir?

7 SPECIAL MASTER: That's the next question.

8 THE CLERK: She can do it, or else there's a  
9 spot on it. Touch the screen that says "undo last."  
10 Up in the top right corner, it will say "undo last."  
11 Just touch the actual screen.

12 SPECIAL MASTER: And I wonder if there's a  
13 different -- can we control the colors?

14 MR. WECHSLER: Yes.

15 SPECIAL MASTER: How do we control the  
16 colors?

17 We can be off the record for a moment.

18 (Discussion held off the  
19 record.)

20 SPECIAL MASTER: We'll go back on the record.

21 THE WITNESS: Thank you, sir. As I was  
22 saying, when we stand on the top of the dam crest, we  
23 like to look downstream going left to right. And with  
24 that, that would be the left side, and this would be  
25 the right side. So the reservoir would be at this --



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1 on this side of the structure.

2 Looking at the project itself, when we come  
3 in off of the county road onto the left abutment, we  
4 immediately get to the spillway. It's a 5-cycle  
5 labyrinth spillway with a design capacity of 40,000  
6 CFS.

7 SPECIAL MASTER: Where is that on the  
8 picture?

9 THE WITNESS: That is at this location, sir.  
10 I can just do this.

11 SPECIAL MASTER: Yeah.

12 THE WITNESS: The labyrinth spillway is the  
13 weir walls. And those are, I believe --

14 BY MR. WECHSLER:

15 Q. So for the transcript, you circled a series  
16 of what looks to be almost triangles on the lower  
17 left-hand side of the document?

18 A. Yes. And, according to type and shape,  
19 what's defined as the labyrinth walls. And they are, I  
20 believe, 12-foot-high walls. The side walls of the  
21 spillway itself are probably 40-foot high at that  
22 location to contain the flood flows.

23 Crossing over from the -- well, let me just  
24 go downstream. The tailrace and terminal structures as  
25 circled are on the top of the page. And that's where

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1 the water discharges, either from the two low-level  
2 outlets or from the flip bucket of the principal  
3 spillway.

4 Q. And that -- there's actually an arrow  
5 pointing to it saying outlet channel Tongue River?

6 A. Yes, sir. Going across to the right, it  
7 should be noted that that principal spillway is not  
8 built into the dam. It's built through a -- basically  
9 a hillside.

10 Going across the bridge across the spillway  
11 onto the left abutment of the dam itself, we come to  
12 the emergency spillway, which is this structure here.  
13 The emergency spillway is cut through the crest of the  
14 dam, 650 feet wide. And it has a standard ogee,  
15 o-g-e-e, ogee crest spillway on it. The interesting  
16 thing on this, though, is it's called a stair-stepped  
17 spillway. That's an important feature on this project  
18 for design capacity is 60,000 CFS. And for that flow,  
19 the only way to build a relatively smaller stilling  
20 basin on the toe of the dam, we have to dissipate the  
21 energy of the system of the water flowing over. The  
22 stair step is a method to remove a lot of that energy  
23 as it cascades down.

24 Q. And that's actually, on the document itself,  
25 labeled auxiliary spillway; is that right?

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1           A.     Correct.  That's labeled as the auxiliary  
2 spillway.  And I should say that sometimes I use the  
3 terms interchangeably: emergency spillway and auxiliary  
4 spillway.

5           Q.     Please continue.

6           A.     Yes.  And that spillway was designed to  
7 operate, assuming that the reservoir is full and we  
8 have a 100-year event, this spillway would start to  
9 flow.

10                     And that brings us to the right abutment  
11 which is tied into the hillside.  And that's this area  
12 here.  And there's really nothing too remarkable to be  
13 noted on that.

14                     Of interest, I guess, is during construction,  
15 this whole area in here, where the left abutment is  
16 tied into the existing hillside, we found out that it  
17 was what we would call an unprotected surface.  So we  
18 had claimed embankment against a large coursework of  
19 open gap graded rock.  And we actually -- during  
20 construction, we actually found a void in the  
21 embankment.  The void was approximately 8 to 12 feet in  
22 diameter, maybe 60 or 70 feet long.

23                     It was by happenstance, we found it.  It was  
24 during the excavation for the spillway itself.  And it  
25 actually was about a six-inch hole when we first saw it

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1 and told somebody to go out there and see what it was,  
2 and they fell in. True.

3           So we did have to do some mitigation  
4 measures. And the other item to point out is we do a  
5 lot of field investigations. And this site had been  
6 explored, drilled, sampled, I believe geophysical  
7 methods done on it. And when we started overlaying the  
8 data, we had this void area mapped out very well, just  
9 around it. And we never did intercept this area. So  
10 it's, again, typical to always identify everything in  
11 the foundation.

12           And that basically is our project. The  
13 auxiliary spillway, we did rough-in a channel to go  
14 back down following the old pre-dam river channel  
15 around in a slough back down to the main river channel.

16           Q. Turn with me, please, to the demonstrative  
17 Exhibit 2, which has the pictures. And I think we have  
18 some pictures of the reservoir beginning at Montana  
19 Demonstrative Exhibit 2T.

20           A. I'm there, sir.

21           Q. What is this picture showing?

22           A. This picture is showing the Tongue River  
23 Reservoir. And it actually is a very good  
24 representation of showing that this is a long lake.  
25 The photo was taken -- it looks like this photo was

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1 taken from the new gatehouse location, which is on the  
2 left side of the dam, and looking toward the south,  
3 toward the Big Horn Mountains. And on to the left side  
4 of the photo, you can catch what we have monumented.  
5 It's an old landslide that's right immediately upstream  
6 of the project as well that we monitor that on occasion  
7 to make sure it's not still moving.

8 Q. You testified yesterday that the physical  
9 feature of it being a long reservoir impacts the  
10 evaporation.

11 A. Yes, I did, sir. Insomuch as surface area is  
12 a driving feature. The other item is prevailing winds  
13 to drive evaporation. And the winds, for as much that  
14 I have been there working on the project for several  
15 years in a row, seem to drive toward the southeast.

16 Q. Turn to Montana Demonstrative Exhibit 2-U.

17 A. Yes, sir.

18 Q. What does this picture show?

19 A. Sir, this picture shows the labyrinth weir  
20 itself. I believe the person who took the first photo  
21 just turned 90 degrees and took this photo at the same  
22 location. And it appears that the reservoir level is  
23 about two feet from full in this photo looking at the  
24 spillway walls.

25 Q. What's the elevation at full?

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1 A. Full pool elevation is 3428.4.

2 Q. What does that correspond to in terms of  
3 acre-feet?

4 A. A little over 79,000 acre-feet.

5 Q. And do you have a table that shows the  
6 relationship between the elevation and the amount of  
7 water in the reservoir?

8 A. Yes, sir. That is part of the -- one of the  
9 appendices in the operations and maintenance manual.

10 Q. So you can see if it's two feet below full,  
11 then you have a pretty good idea of what the contents  
12 are?

13 A. Yes, sir. I should say that that rating  
14 chart or that storage chart was derived from a 1995 --  
15 I believe 1995 at the metric survey conducted by  
16 Western Water Consultants as part of this overall  
17 project.

18 Q. And the bathymetric survey looks at  
19 sedimentation and various factors; is that right?

20 A. Well, the bathymetric survey by itself is  
21 strictly just a given depth from the -- down to the  
22 lake bed. It's simply a topographic -- for lack of a  
23 better term, it's just simply a topographical survey of  
24 the lake bed when the lake's in place. Then the survey  
25 that was conducted by Western Water was generated into

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1 four-foot contours, and then storage was interpolated  
2 from that.

3 Q. Let's look at Montana Demonstrative 2-V.  
4 What does this picture show?

5 A. This is inside the primary gatehouse. And it  
6 shows the -- there Art Hayes is getting ready to  
7 operate the gate system for us on this.

8 This is the control panel that operates the  
9 primary and secondary gates in the primary gatehouse.

10 Q. We already looked at Exhibit 2-W. So turn,  
11 please, to Exhibit 2-X. What does that show?

12 A. This is a photo of the emergency or auxiliary  
13 roller-compacted concrete spillway. I would just as  
14 soon say RCC from this point on for that. It would be  
15 simpler for me.

16 Again, this photo was taken probably from  
17 about where the bridge crosses the principal spillway  
18 overlooking the roller-compacted spillway.

19 Q. Next picture is Montana Demonstrative 2-Y.  
20 What does this show?

21 A. This is a photo of standing over the  
22 downstream tailrace, looking back at the principal  
23 spillway and also the two low-level outlet discharge  
24 points. If you look to the -- past the principal  
25 spillway to the side hill, you'll see concrete on the

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1 side hill going up. That's the remnants of our old  
2 spillway.

3           It's interesting to note that during the  
4 1930s, in the design, it wasn't uncommon for the  
5 designers to take the low-level outlet works and  
6 discharge them out through the spillways. And this one  
7 was the same. Our low-level outlet works, the existing  
8 one, was in the center of the old spillway, which  
9 actually created quite some hydraulic issues and other  
10 items for the flow regimes that we had.

11           Q.    If there's water coming over the spillway  
12 shown here, what happens to it?

13           A.    Typically, for the lower flows, and that's  
14 even up to the 3000 or 4000 CFS, as it comes over the  
15 spillway, it discharges, and it comes into what looks  
16 to be a small pool. That's called a flip bucket. Up  
17 to about 5000 or 6000 CFS, the water will simply come  
18 down the chute. It will roll in the flip bucket and  
19 just cascade out of the spillway.

20                   Once we get to flows in the 6000 plus, 7000,  
21 I believe, is the number, that spillway, actually it's  
22 called sweeping. The flow will actually sweep through  
23 the flip bucket. It won't pond up there. It will just  
24 be like a sheet flow. And the flip bucket is designed  
25 to throw the water vertically up into the air. And



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1 then it comes back down into the plunge pool. And  
2 that's how the energy is dissipated in this type of  
3 spillway.

4 Q. And we already looked at the next picture.  
5 So let's turn back to Montana Exhibit M524, the  
6 operating manual. And if you could turn with me,  
7 please, to page 19. Under the heading "dam operator,"  
8 there it indicates, "The responsibility of the daily  
9 operations of the dam and reservoir rest with the  
10 association and its dam operators."

11 And I think that's what you described  
12 earlier; right?

13 A. Yes, it is.

14 Q. Is there a dam tender?

15 A. Yes.

16 Q. Who is that?

17 A. That would be Mark VanHale.

18 Q. He works with the association?

19 A. Yes, he works for the association.

20 Q. What are his responsibilities?

21 A. For the day-to-day operations on the project,  
22 if I may just go through a typical season.

23 Q. Please.

24 A. After runoff flows are through and we're into  
25 delivering contract water, contract holders will

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1 contact Art and/or Mark via leaving voice mail messages  
2 or direct contact and make requests for contract  
3 deliveries. Mark then will adjust gates as necessary  
4 to work with those contract deliveries.

5 If there are commissioners on board to  
6 monitor and deliver water, then I believe it goes to  
7 the commissioners then, but Mark is responsible for the  
8 operation of the gates themselves.

9 SPECIAL MASTER: Can I just interrupt just  
10 for clarity of the record? What gates are you talking  
11 about?

12 THE WITNESS: The primary or auxiliary gates  
13 in low-level outlet works.

14 SPECIAL MASTER: So these are gates for the  
15 reservoir?

16 THE WITNESS: Yes, sir. These are the actual  
17 gates in the reservoir itself.

18 BY MR. WECHSLER:

19 Q. Turning to page 20, please. Under the  
20 heading "method and schedule of operation"; do you see  
21 that?

22 A. Yes, sir.

23 Q. Second paragraph there says, "The date  
24 irrigation releases begins varies from year to year  
25 with May 1 usually being the earliest"; do you see

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1 that?

2 A. Yes, sir.

3 Q. That's consistent with what you testified to  
4 yesterday?

5 A. Yes, sir.

6 Q. And I think you also described the fill  
7 period. And remind us, what's the fill period on this  
8 reservoir?

9 A. Our fill period is tied to the hydrograph,  
10 which is that April through June time period.

11 Q. And then it indicates, "Irrigation releases  
12 usually end by September 30th as specified in the water  
13 purchase contracts." And I think that's also  
14 consistent with what you said yesterday?

15 A. Yes, sir.

16 Q. And then it says, "The actual dates that  
17 releases begin and end depend on the year's actual  
18 climatological and hydrological conditions"; do you see  
19 that?

20 A. Yes, I do.

21 Q. And that sentence, does that reflect on the  
22 description that you gave of the need for flexibility?

23 A. Yes. It most certainly does.

24 Q. Because if the year's climatological or  
25 hydrological conditions are different than normal, you

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1 have to be able to adjust that; right?

2 A. Yes.

3 Q. Turn, please, to page 21. Here it indicates  
4 "maximum winter storage"; do you see that?

5 A. Yes, I do.

6 Q. What is this describing?

7 A. In our operations and maintenance manuals, we  
8 will set out parameters that we like to see our  
9 reservoirs operate at. Maximum winter storage is the  
10 pool level that we would like to see in the wintertime  
11 during operations for the -- and not to exceed value, I  
12 should say.

13 Q. This indicates that the maximum reservoir  
14 elevation for winter storage is elevation 3417.5 feet  
15 with 45,000 acre-feet of storage; right?

16 A. Yes, it does.

17 Q. Why is the maximum storage set at 45,000 for  
18 the Tongue River Reservoir?

19 A. The 45,000 acre-foot storage -- more  
20 importantly, it's the elevation of 3417.5. It  
21 correlates to the base of the spillway walls. The  
22 intent with that elevation is to minimize the amount of  
23 water on the concrete surfaces, especially the vertical  
24 surfaces, to minimize the freeze-thaw and ice damage to  
25 the concrete and prolong the life of the structure.

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1 Q. If the structure is damaged, it can't really  
2 serve its purpose; right?

3 A. Yes. It does increase O & M costs, repair  
4 costs. The other issue that's tied to that elevation  
5 is we start getting up to higher elevations, we have  
6 thinner dam crest zones. So we have issues with making  
7 sure we don't damage the outer shell riprap arming  
8 protection of the reservoir too.

9 Q. And next sentence here says, "This winter  
10 maximum helps prevent damage to the riprap and  
11 embankment from wind driven waves and ice."

12 A. Yes.

13 Q. That confirms your testimony that you just  
14 gave?

15 A. Yes, sir.

16 Q. Next heading says "minimum winter storage."  
17 What is that referring to?

18 A. Very much like the other items, we have  
19 guidelines to -- we try to operate between on our  
20 reservoirs. Minimum winter storage can be tied to  
21 various things. For most of our projects, I think for  
22 all of our projects, where we have a minimum winter  
23 storage is to protect the concrete structures in the  
24 reservoir, primarily the intake control towers. At --  
25 these projects were built back in the 1930s. And

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1 typically when we do rehabilitation work, we don't  
2 replace the intake towers because we don't have the  
3 opportunity to drain our reservoirs completely.

4           With the concrete built in the 1930s, they're  
5 very susceptible to freeze-thaw damage in the  
6 wintertime if they are exposed. So the intent is to  
7 minimize that exposure and to minimize the exposure of  
8 the structures to stress of ice. Because the other  
9 component to that is we're not always certain how well  
10 these structures were reinforced and if they can resist  
11 straight ice loading on the structures.

12           Q. In this operating manual, it says that "The  
13 minimum elevation for winter storage is 3396 feet with  
14 10,800 acre-feet of storage."

15           Since the rehabilitation of the reservoir,  
16 have you gone below this number?

17           A. Since the rehabilitation? No, we have not.

18           Q. Next section is the "minimum outlet  
19 discharge." And what's that describing?

20           A. This is the minimum releases that we  
21 determined through the Tongue River operating committee  
22 and final environmental impact statement, flows  
23 necessary to be released through our project to  
24 maintain the system, keep the river flowing, prevent  
25 the ice jams downstream and to -- and to maintain our

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1 historical practice of operations.

2 Q. Here this indicates that the minimum outlet  
3 discharge is 175 CFS. It says -- to read the actual  
4 language it says, "Pursuant to the operating plan,  
5 Appendix A, the minimum flow to be maintained at the  
6 dam outlet to help maintain the fishery and Tongue  
7 River, will generally be the inflow or 175 CFS,  
8 whichever is less; right?

9 A. Yes, it is.

10 Q. And the next sentence, can you read that,  
11 please?

12 A. "The cutting outflows to below the minimum  
13 will be allowed only as needed to accommodate necessary  
14 dam safety inspections, maintenance, drought  
15 conditions, or other emergency purposes."

16 Q. What does that mean?

17 A. That the 175 is the flow that we strive to  
18 have. However, there are going to be conditions arise  
19 that we know we're going to have to be able to adjust  
20 that flow.

21 Q. Next is the "winter operations of tunnels."  
22 Do you see that?

23 A. Yes, I do, sir.

24 Q. What is that referring to?

25 A. At the Tongue River Reservoir, it's unique

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1 amongst our projects because during the rehabilitation,  
2 in order for us to maintain summer releases, and winter  
3 releases for that matter, and still work on this  
4 project, we had to build a second low-level outlet as  
5 part of the project.

6           So most other projects we have releases, we  
7 don't have to deal with splitting flows. At Tongue  
8 River, the old conduit, again, concrete built in the  
9 1930s, after the first year of operation, we had  
10 swapped to the primary outlet. And we didn't put flows  
11 through the auxiliary or the old existing conduit. And  
12 for the first 100 to 150 feet up the conduit entrance,  
13 the portal, we had a lot of concrete, I would say,  
14 slaking or the surface of the concrete peeling off from  
15 freeze-thaw damage.

16           So from that point, our intent was to put  
17 enough flow through the system for the river to provide  
18 a heat sink, as it were, to help prevent freezing. And  
19 the association also attempts to put canvas cover over  
20 the outlet works as well to minimize the amount of air  
21 flow going through the system at the low flows to  
22 reduce the chance of freezing there.

23           The other conduit, we found out during a  
24 winter inspection where we had minimal flows going  
25 through, we had about a two-foot wall of ice at the



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1 exit portal with a small opening that you could just  
2 about slide through to get into it. And that was from  
3 some slow seepage and dripping water just built up over  
4 time, and a little bit of water that, perhaps, melted  
5 and ran down from the face of the hillside.

6           So we need to make -- ensure that we have a  
7 little bit of water flowing through there to make sure  
8 that when this does form in cold periods, that there's  
9 sufficient water to keep it cut through and to flush it  
10 out when it forms and gets too large.

11           Q.   Essentially, there has to be water flowing  
12 through both outlets?

13           A.   Yes.

14           Q.   In the winter?

15           A.   Yes. It's very important to minimize damage.

16           Q.   Before we leave this page, I intended to ask  
17 you about this. We talked about the minimum winter  
18 storage and whether or not it had ever gotten below the  
19 10,800 acre-feet of storage. And I think you said it  
20 had not; right?

21           A.   Correct.

22           Q.   We also look at the maximum winter storage of  
23 45,000 acre-feet. In recent years, have you gone above  
24 the 45,000 acre-feet of winter storage?

25           A.   Yes, we have.

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1 Q. And why have you done that?

2 A. Well, as an instance this year, we went where  
3 we're above it right now about 57,000 acre-feet. And  
4 it was -- that was not intended. There was a large  
5 precipitation event late September. And it seemed we  
6 have quite a bit of flows coming in on the system. And  
7 we are -- we're not grafting yet or lowering the pools  
8 down. But we're releasing 300 CFS and still gaining  
9 right now.

10 Past years, and in conversations with the  
11 association and the end users, had discussions about  
12 since we have a new concrete structure at the dam, the  
13 principal spillway structure, and they're built to  
14 current standards and with -- I would like to say, with  
15 the latest in technology and admixtures and  
16 preventative measures that will help mitigate or  
17 minimize some of the freeze-thaw damage, that we wanted  
18 to evaluate the performance of the concrete walls with  
19 some water against them, knowing full well that this  
20 will in a short term probably not have any effect. In  
21 the long term, it will increase the operation and  
22 maintenance costs because of the repairs that are going  
23 to have to happen because we're putting through  
24 additional cycles of freeze-thaw.

25 The association agreed to that. And really

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1 for the intent of trying to mitigate some of the  
2 unknowns in this system because of the size of the  
3 basin, we're trying to predict with a crystal ball from  
4 six months to eight months in advance what we're going  
5 to get for a primary fill season. So if we have some  
6 water in there extra, we have some more flexibility  
7 through the winter months.

8 Q. Have you attempted to go above the 45,000  
9 acre-feet maximum in response to the shortages that  
10 lasted up through 2006?

11 A. I'm sure that that might have prompted the  
12 association members to accept the additional risk of  
13 higher O & M costs in the long run.

14 However, in the short term, it's an issue  
15 that we thought was a prudent thing to do just to have  
16 the flexibility to -- to have the flexibility through  
17 the year to try to minimize some of the risks of  
18 predicting summer flows or spring runoff flows.

19 Q. You say -- you talk about the higher O & M  
20 for the Users' Association. What do you mean by that?

21 A. The association is part of the agreement, the  
22 water marketing agreement, pays for 100 percent of the  
23 operation and maintenance costs and all the, I'll say,  
24 small repair costs which might not be so small on  
25 occasion, probably, say, under 20 or \$25,000-type costs

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1 and others.

2 And so when we go through operational  
3 changes, like, you know, something like this, we need a  
4 visit with the association because they are going to be  
5 bearing the brunt of the expense.

6 Q. In other words, if you go above that 45,000  
7 and it causes damage, they have to pay for it?

8 A. Yes, they do.

9 Q. And when you're making an operational change  
10 like this and going above the 45,000, is it important  
11 to be cautious?

12 A. Yes, it is. And that's why we don't have  
13 50,000 reflected in the O & M manual. We determined we  
14 have the opportunity to be prudent here and basically  
15 empirically test this and evaluate it over a 5- or  
16 10-year period. And if that works out well and works  
17 out well for the system, then we'd incorporate it into  
18 the O & M manual.

19 Q. At that point you might be able to change the  
20 operation and maintenance manual?

21 A. Yes, sir.

22 Q. Now, the operations -- this operation and  
23 maintenance manual, in your experience, is it  
24 consistent with industry standards?

25 A. Yes, it is.

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1 Q. And is that including the maximum winter  
2 storage, minimum winter storage, minimum outlet  
3 discharge, and winter operation of tunnels?

4 A. Yes. And the Dam Safety Program requires, in  
5 the state of Montana, requires all high-hazard dams to  
6 have an operation and maintenance manual.

7 Q. Let's turn to Exhibit 316.

8 A. Excuse me, sir. Did you say 316?

9 Q. 316.

10 A. I found it.

11 Q. What is Exhibit M316?

12 A. This is the operating plan for the Tongue  
13 River Reservoir.

14 Q. Is this the operating plan that's referred to  
15 in the Northern Cheyenne Tribe Compact?

16 A. Yes, it is.

17 Q. It's what was adopted pursuant to that  
18 process?

19 A. Yes, it is, sir.

20 Q. Is this a document you're familiar with?

21 A. Yes, I am.

22 Q. And it relates to the operations of the  
23 Tongue River Reservoir; right?

24 A. Yes, it does.

25 Q. And you actually had a copy of this attached

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1 to your original expert report?

2 A. Yes, I believe as Appendix A.

3 Q. If you turn to the last page, Appendix A8 --  
4 yeah, page A8.

5 A. I'm there, sir.

6 Q. And this has a series of signatures?

7 A. Yes, sir.

8 Q. And this shows one of the signatures, the  
9 second one, is that of Glen McDonald's; who is he?

10 A. Glen McDonald was my predecessor, State Water  
11 Projects Bureau chief.

12 MR. WECHSLER: Your Honor, at this time, I'd  
13 move the admission of Exhibit M316.

14 MR. KASTE: No objection.

15 SPECIAL MASTER: So actually, before -- I'm  
16 just curious. I assume this is exactly the same as  
17 M525?

18 MR. WECHSLER: Your Honor, I believe it is,  
19 yes.

20 SPECIAL MASTER: So you're not planning on  
21 introducing M525?

22 MR. WECHSLER: No, I'm not.

23 SPECIAL MASTER: Okay. Thanks. Then Exhibit  
24 M316 is admitted.

25 (Exhibit M316 admitted.)

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1 BY MR. WECHSLER:

2 Q. How does the operating plan relate to the  
3 operating manual?

4 A. The operating manual refers to the operating  
5 plan as -- well, they're combined. The operating plan  
6 in Appendix A is our -- meets our goals and guidelines  
7 for the operations of the project. And the operations  
8 manual is written around the operating plan.

9 Q. Who is responsible for developing the  
10 operating plan?

11 A. For developing the operating plan?

12 Q. Yes.

13 A. That was required through the Northern  
14 Cheyenne-Montana Compact. And the parties that were  
15 involved were the project sponsors, being the State of  
16 Montana, the federal government, and the Northern  
17 Cheyenne Tribe.

18 Q. Looking back at the records, do you know if  
19 there were revisions and comments made on the operating  
20 plan?

21 A. Yes. I believe there were. I was in  
22 deposition and I was shown some work product copies of  
23 it and other -- yes.

24 Q. And those revisions are actually documents  
25 that are kept in your bureau; correct?

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1 A. Yes, there are.

2 Q. Because you're responsible for the Tongue  
3 River Reservoir?

4 A. Yes, sir.

5 Q. Can you turn with me, please, to Exhibit  
6 M340?

7 A. Sorry for the delay, sir. I'm getting a  
8 little bit disorganized.

9 Q. No problem. We have a lot of documents to  
10 look at.

11 You just mentioned that you have a file  
12 showing the revisions and comments on the Tongue River  
13 Reservoir. And are those documents shown in Exhibit  
14 M340?

15 A. Yes, sir.

16 SPECIAL MASTER: I'm sorry. If we can just  
17 stop again for a second. So how long is M340?

18 MR. WECHSLER: Half an inch thick.

19 SPECIAL MASTER: Should be over here  
20 somewhere. Why don't you go ahead and proceed. I'll  
21 find it later.

22 BY MR. WECHSLER:

23 Q. Let's look at a couple of these documents. I  
24 won't ask you to go through all of them. Look at the  
25 first page. It indicates at the top is the logo for



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1 the DNRC; right?

2 A. Yes, sir.

3 Q. And it shows it's from the State Water  
4 Projects Bureau?

5 A. Yes, sir.

6 Q. And it seems to be from a Craig Stiles; who  
7 is that?

8 A. Craig Stiles no longer works for the State  
9 Water Projects Bureau. But at the time, he was -- I  
10 believe his title was Tongue River Project Coordinator.

11 Q. And the document is to Ms. Jeanne Whiteing;  
12 do you see that?

13 A. Yes, sir.

14 Q. Do you know who Ms. Whiteing is?

15 A. Yes, sir. She's an attorney for the Northern  
16 Cheyenne Tribe.

17 Q. I'll pause for a second.

18 MR. WECHSLER: Your Honor, should I wait  
19 until you have it? Or would you like me to proceed?

20 SPECIAL MASTER: I hate to use up any court  
21 time while we try to find it. Oh, okay. We have found  
22 it. Okay. Thanks.

23 BY MR. WECHSLER:

24 Q. If you'll turn with me, please, Mr. Smith, to  
25 page, what's at the bottom listed as MT07735.

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1 A. I'm there, sir.

2 Q. And here it indicates that it's a fax  
3 transmittal from Mr. Allen Clubfoot; do you see that?

4 A. Yes, sir, I do.

5 Q. Do you know who he is?

6 A. Allen Clubfoot is a member of the Northern  
7 Cheyenne Tribe.

8 Q. And then who is this transmission to?

9 A. This transmission is to -- labeled the Tongue  
10 River Advisory Committee, Glen MacDonald, Craig Stiles.

11 Q. You just mentioned who Mr. McDonald is. Who  
12 is Mr. Stiles?

13 A. Well, Allen Clubfoot wrote Greg Stiles. I'm  
14 assuming he means Craig. And Craig is, as I said, the  
15 project coordinator for the Tongue River.

16 Q. And then it indicates that these are comments  
17 from the BIA for your review?

18 A. Yes, sir.

19 Q. If you'd turn a couple pages in -- actually,  
20 let's look at the next page. And this is labeled  
21 MFT00737; do you see that?

22 A. Yes, sir.

23 Q. And this is, again, the subject matter is  
24 "Operating plan for the Tongue River Reservoir-review  
25 and comment." And do you know either of those two

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1 individuals?

2 A. I know Rose Rennie.

3 Q. Who is she?

4 A. She works -- she's an attorney that works for  
5 either the Bureau of Reclamation or the Solicitor's  
6 office. I don't know correctly which one.

7 Q. Turn to the next page. And actually, I mean  
8 MT07739. And this is from Mr. Gordon Aycock; do you  
9 see that?

10 A. Yes, I do, sir.

11 Q. The subject matter is Tongue River Reservoir  
12 operating plan; do you see that?

13 A. Yeah.

14 Q. And the date is 8/22/2000. Do you know who  
15 Mr. Gordon Aycock is?

16 A. Yes, I do, sir.

17 Q. Who is he?

18 A. He is a Bureau of Reclamation engineer who is  
19 retired.

20 Q. At the time was he working for the Bureau of  
21 Reclamation?

22 A. Yes, sir.

23 Q. And just to pick out one more -- or two more  
24 there. Page MT07745. Again, this is on letterhead  
25 from Ms. Whiteing's law firm, dated August 24th, 2000.

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1 And is that about the time that the operating plan was  
2 being discussed by the advisory committee?

3 A. To my knowledge, yes.

4 Q. This is from Ms. Whiteing. We talked about  
5 Mr. Clubfoot. And there's also an individual listed  
6 here, Mr. Jason Whiteman; do you see that?

7 A. Yes, sir.

8 Q. Who is he?

9 A. Again, Jason Whiteman is with the Northern  
10 Cheyenne Tribe. I believe at that time period he was  
11 with their Natural Resources Department.

12 Q. And finally, here you have page MT07771.  
13 07771. You have that before you?

14 A. I'm getting there, sir. I have it.

15 Q. And so this is -- appears to be a fax, again,  
16 from Mr. Stiles to Mr. Art Hayes and Mr. Roger Muggli.  
17 And you know who those individuals are?

18 A. Yes, I do, sir.

19 Q. Who are they?

20 A. Art Hayes is the president of the Tongue  
21 River Water Users' Association. And Roger Muggli is  
22 the manager for the T & Y Irrigation District.

23 Q. Do you understand this to be the contents of  
24 a folder that's kept at the State Water Projects Bureau  
25 containing the comments on the operating plan?

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1 A. Yes, sir.

2 Q. And looking at it, does it appear to be a  
3 complete copy of those documents?

4 A. Yes, sir.

5 MR. WECHSLER: Your Honor, at this point, I'd  
6 move the admission of Exhibit M340.

7 MR. KASTE: No objection.

8 SPECIAL MASTER: Okay. Then Exhibit M340 is  
9 admitted.

10 (Exhibit M340 admitted.)

11 BY MR. WECHSLER:

12 Q. So based on your review of the records, it  
13 looks like the operating plan went through a fairly  
14 rigorous review; would you agree with me?

15 A. Yes, I think most things with this project  
16 and through the course of the project went through  
17 rigorous review.

18 Q. And that included a review by the Northern  
19 Cheyenne Tribe; right?

20 A. Yes, sir.

21 Q. And also a review by individuals at the  
22 Bureau of Reclamation?

23 A. Yes, sir.

24 Q. And also the Bureau of Indian Affairs?

25 A. Yes, sir.

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1 Q. As well as from your office?

2 A. Yes.

3 Q. If you'd turn back to the operating plan for  
4 the Tongue River Reservoir.

5 A. Which exhibit was that, sir?

6 Q. M316. M316. First, looking at page A3,  
7 under the heading "guidelines." And what are  
8 guidelines in this operating plan?

9 A. The guidelines appear to be established to  
10 provide a means and mechanism to operate the committee  
11 to ensure that the goals were met for the operating  
12 plan.

13 Q. Looking at guideline No. 7, this confirms  
14 your testimony earlier about the membership of the  
15 advisory committee; right?

16 A. Correct.

17 Q. Turning to page A4, under the heading  
18 "regulation of reservoir levels and outflows." What do  
19 you understand that to be?

20 A. The underlying goals and criteria for  
21 establishing the operating plan.

22 Q. If you look at the -- under goals, the sixth  
23 goal there indicates "fill the reservoir during spring  
24 runoff"; do you see that?

25 A. That would be item No. 6, yes, sir.

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1 Q. Is that consistent with your testimony about  
2 the fill period and the historic fill period?

3 A. Yes. That ties in with the hydrograph of  
4 this basin.

5 Q. Goal No. 10 indicates "maintain appropriate  
6 winter outflow from the reservoir, minimize downstream  
7 icing problems."

8 And you've talked about that as well; right?

9 A. Yes, I have.

10 Q. Now, do you have some flexibility in  
11 operating the winter outflows?

12 A. Yes, sir, we do.

13 Q. Why is that flexibility important?

14 A. To deal with the day-to-day changing  
15 conditions. Just using this year as an example, in  
16 about middle of September, we're at about the 3418,  
17 3417 levels for the 45,000 acre-foot. And the  
18 southeastern Montana, northeastern Wyoming, and western  
19 South Dakota got hit with a very large precipitation  
20 event that I think South Dakota is still coming out of.

21 We're currently -- we're releasing 175, 200  
22 CFS. And we gained, I want to say, 11,000 or 12,000  
23 acre-feet of water since that time period. So we are  
24 adjusting our gate flows upward to try to bring that  
25 back to a manageable level for the winter conditions.

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1           Likewise, we've gone into wintertime  
2   discharging 175 CFS or 200 CFS and managing our inflows  
3   and maintaining the flows and watching snowpack.  
4   Snowpack being good in the end of November and  
5   December, but then nothing gaining. And then we will  
6   have to adjust our flows downward to match the inflows.

7           It's -- like I say, it's a large basin. And  
8   things never stay the same in this basin.  
9   Historically, every year we have high spring runoff  
10  from April through June. And we are predicting ahead  
11  of time to catch those flows, mitigate downstream  
12  risks, and fill the reservoir to meet our obligations.

13         Q.   Under the guidelines, which is on that same  
14  page, A4, then if you'll turn to the next page, A5,  
15  guideline No. 4, I'd like to discuss that with you.

16                 Here it indicates that "By March 1 of each  
17  year, the DNRC shall evaluate reservoir storage,  
18  snowpack, streamflow, streamflow forecast, total  
19  moisture, and the extended weather forecast outlook";  
20  do you see that?

21         A.   Yes, I do, sir.

22         Q.   Do you do that?

23         A.   Yes, sir, to the best of our abilities.

24         Q.   How do you do that?

25         A.   When we -- of course, the physical



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1 measurements and monitoring, we have currently realtime  
2 data for reservoir storage and outflows. Inflows may  
3 or may not be there because of the river, stream ices  
4 up. So we have the physical data for the reservoir.  
5 We contact the National Resource Conservation Services,  
6 being the NRCS, and their experts out of Bozeman to try  
7 to obtain forecasting from the SNOTEL sites. We also  
8 contact the National Weather Service. Sometimes  
9 they're interacting with the NRCS at this time to try  
10 to do predictions on flows.

11 We try to bring all that together about that  
12 time period to make our final determinations.

13 Q. And that impacts the way in which you operate  
14 the reservoir?

15 A. Yes, it has to.

16 Q. Staying with guideline 4 here, skipping a  
17 sentence, the next sentence says, "If the reservoir  
18 elevation is higher than average and indications are  
19 that a wet, high runoff spring could exist, the DNRC  
20 and TRWUA will consider increasing the outflow so that  
21 some storage capacity is available to control  
22 downstream flooding"; do you see that?

23 A. Yes, sir.

24 Q. And I think you've talked about the need to  
25 operate the reservoir as to control downstream

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1 flooding; right?

2 A. Yes, sir. To mitigate as much as we can.  
3 The primary purpose, as indicated in that sentence, is  
4 that we are here to fill our contractual water  
5 marketing needs as well as Northern Cheyenne Compact  
6 water rights. But as a high-hazard dam owner, we have  
7 to take into consideration the downstream properties  
8 and lives at risk.

9 Q. Next, it indicates, "If the reservoir  
10 elevation is lower than average and conditions indicate  
11 the potential for a dry low runoff spring, the DNRC  
12 will inform the advisory committee of a potential for a  
13 water shortage that year"; do you see that?

14 A. Yes, sir.

15 Q. Goes on to say, "The advisory committee will  
16 implement the storage plan to minimize the impact of  
17 such a shortage."

18 And you talked earlier about the need to  
19 operate the reservoir in case of a shortage as well;  
20 right?

21 A. Yes, sir.

22 Q. And so is this consistent with that  
23 testimony?

24 A. Yes, it is.

25 Q. Does this happen?

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1           A.    Yes.  However, if it's -- we have a dry year,  
2 typically, prior to March 1st -- March 30th, we were  
3 having discussions on flows and river flows much  
4 earlier on.  And after this, too, the issues on --  
5 discussions on establishing pro rata shortages amongst  
6 the users occurs at this time period as well.

7           Q.    What do you mean by pro rata sharing of  
8 shortages?

9           A.    If we're not full, we will discuss, Art Hayes  
10 and myself, about what we think would be a reasonable  
11 amount of contract water to be delivered, ensuring that  
12 we're not affecting the Northern Cheyenne Tribe  
13 contract water, although their water is also under the  
14 same shortage criteria as ours, and determine what  
15 percentage of contracts can be delivered.  And then the  
16 shareholders' amounts under the agreements are reduced  
17 by that amount.  However, they make full payments on  
18 those water right contracts.

19          Q.    This guideline No. 4 is talking about  
20 evaluating conditions going into a year.  Do you try to  
21 do that as early as possible?

22          A.    We do, sir.  We, across all of our projects,  
23 start in probably end of December, first of January of  
24 every winter months.  We've established the appropriate  
25 SNOTEL sites that we tap into to just monitor snowpack

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1 and what we see for our running averages. We maintain  
2 that for our 21 projects.

3 Q. And that's all forecasting. And you talked  
4 yesterday about the variability of climate conditions  
5 in the basin. Are there times when you forecast the  
6 snowpack to be one thing and then it turns out to not  
7 be as it was forecasted?

8 A. Yes. That has definitely happened.

9 Q. It happens on, unfortunately, a common basis?

10 A. Well, in this basin, yes. Because this basin  
11 is prone to spring rains. And that will change  
12 everything in a forecast.

13 Q. Let's look at guideline No. 9 here. This  
14 indicates that "The advisory committee recommends that  
15 the maximum preferred carryover be 45,000 acre-feet  
16 (elevation 3417.5 feet) in order to minimize  
17 freeze-thaw damage to the dam by allowing water to  
18 remain at the bottom of the concrete walls"; you see  
19 that?

20 A. Yes, sir.

21 Q. And that's pretty consistent with the  
22 operating manual?

23 A. Yes, sir.

24 Q. It's for the same reason you described  
25 before?

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1 A. Yes.

2 Q. Looking at No. 11, this indicates, "The  
3 minimum outflow of the reservoir during the winter low  
4 flow period from October 1 to March 1 will generally be  
5 the inflow or 175 CFS, whichever is less. Cutting out  
6 flows to below the minimum will be allowed only as  
7 needed to accommodate necessary dam safety inspections,  
8 maintenance, dam safety, or other emergency responses";  
9 do you see that?

10 A. Yes, sir.

11 Q. And this also is very consistent with the  
12 operating manual?

13 A. Yes.

14 Q. Is this operating plan consistent with  
15 industry standards?

16 A. Yes. I would say so.

17 Q. You consider it to be a reasonable operating  
18 plan?

19 A. Yes, especially for the site.

20 Q. Which, of course, you have to consider in  
21 operating a reservoir?

22 A. Yes, sir.

23 Q. Now, I want to turn to the water rights in  
24 the Tongue River Reservoir. And so let's turn to  
25 Exhibit M526, which has previously been admitted; you

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1 have that before you?

2 A. Yes, I do.

3 Q. Are you familiar with this stipulation?

4 A. Yes, I am.

5 Q. So what is this amended stipulation?

6 A. This is the amended stipulation that's been  
7 signed amongst parties and submitted to the Water Court  
8 for the State's water right atonement.

9 Q. At the time the amended stipulation was  
10 entered into, were you the State Water Projects Bureau  
11 chief?

12 A. Yes, I was.

13 Q. I want to take a look at a couple of things  
14 in this. Paragraph 6 of the amended stipulation first.  
15 At the end there, the final two paragraphs, could you  
16 read that?

17 A. Paragraph 6, the final two sentences?

18 Q. Yes, please.

19 A. "The two rights, however, are commingled and  
20 administered conjunctively according to an operation  
21 plan developed pursuant to the compact. Both rights  
22 are dependent on the DNRC's ability to fill and refill  
23 the project continuously subject to physical and legal  
24 water availability and capacity in the reservoir."

25 Q. Do you understand the two rights to mean the

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1 Northern Cheyenne Tribe right and the DNRC right?

2 A. Yes, sir.

3 Q. What does it mean to be "commingled and  
4 administered conjunctively"?

5 A. Well, we have the unique situation where both  
6 water rights have the same priority date. With that,  
7 they store at the same time. They're delivered at the  
8 same time. Within the compact itself, there is  
9 language that the Northern Cheyenne Tribe's storage  
10 water is also -- shares pro rata shortages with the  
11 State's water right.

12 Q. If the Tongue River Reservoir does not fill,  
13 does that impact the Northern Cheyenne Tribe right?

14 A. Yes, it does.

15 Q. Why?

16 A. The Tongue River Reservoir does not fill the  
17 shortages that are shared amongst the two parties.

18 Q. Turn, please, with me to page 4, paragraph 9;  
19 do you have that?

20 A. Yes, sir.

21 Q. Here it indicates that "The United States of  
22 America Bureau of Reclamation objected." Let me stop  
23 there. Do you recall the Bureau of Reclamation  
24 objecting to the original preliminary decree?

25 A. Yes, sir.

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1 Q. Continues "to the volume in the decree."  
2 Does that refer to the preliminary decree?

3 A. Yes, sir.

4 Q. And then it indicates a volume there of  
5 134,316 acre-feet; do you see that?

6 A. Yes, I do, sir.

7 Q. Was that the volume in the original decree?

8 A. I believe so, sir.

9 Q. What's the capacity of the Tongue River  
10 Reservoir after the rehabilitation project?

11 A. After the rehabilitation project was just  
12 over 79,000 acre-feet.

13 Q. So that volume would have allowed  
14 approximately a one-and-a-half fill; is that right?

15 A. Yes, sir.

16 Q. Are you familiar with the term "one-fill  
17 rule"?

18 A. I have heard that term.

19 Q. What do you understand it to mean?

20 A. My understanding of that term is that you're  
21 allowed to fill just to the storage of the reservoir  
22 and no more.

23 Q. Once during the year?

24 A. Yes, sir. Per water year.

25 Q. In Montana, are you -- well, as State Water



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1 Projects Bureau chief is it your experience that  
2 Montana has a one-fill rule?

3 A. Speaking to State Water Projects, none of our  
4 projects are limited to a one-fill rule.

5 Q. Let's look a little bit at the amended  
6 proposed abstract, which is towards the back of this  
7 document. And it's at the page MT15126; do you have  
8 that?

9 A. Yes, I do, sir.

10 Q. And looking at the owner, it has a  
11 description there. It also talks about the water right  
12 being commingled which we just looked at. And here the  
13 priority date -- what's the priority date on the Tongue  
14 River Reservoir, as you understand it?

15 A. April 21st, 1937.

16 Q. And it indicates, consistent with your  
17 testimony, that this was a filed right. The purpose,  
18 then, says sale; do you see that?

19 A. Yes, sir.

20 Q. What does that mean?

21 A. That the State of Montana, through the State  
22 Water Conservation Board and now the State Water  
23 Projects Bureau, as the owner of the water right,  
24 stores the water for sale to market to others.

25 Q. You testified both yesterday and today that

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1 once the project was completely built and filled and  
2 then that -- the water was offered for sale. Then the  
3 water right was perfected up to the maximum amount of  
4 the reservoir.

5 And I'm wondering, is this part, the purpose,  
6 consistent with that testimony?

7 A. Yes, it is, sir.

8 Q. Here under this amended proposed abstract we  
9 talked about a couple of days ago, this particular  
10 reservoir has no flow rate; do you see that?

11 A. Are you on page 1, sir?

12 Q. I am.

13 A. Yes, I see that, sir.

14 Q. And is that consistent with an onstream  
15 reservoir?

16 A. Yes, sir.

17 Q. Do you have any onstream reservoirs in the  
18 State Water Projects Bureau that have flow rates?

19 A. Not that I can recall. It's just simply tied  
20 to storage.

21 Q. In the volume section here, this indicates a  
22 specific volume has not been decreed for this water  
23 right, meaning the Tongue Reservoir water right. And  
24 is that a common feature for your State Water Projects  
25 Bureau --

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1 A. That is --

2 Q. -- projects?

3 A. I'm sorry. That is not a common feature  
4 amongst our other 20 water storage projects.

5 Q. Would the number we looked at before that was  
6 134,000 and change, would that -- as a volume, would  
7 that be more consistent with other projects in Montana?

8 A. Yes, it would be. Well, other projects  
9 within the State Water Conservation -- other projects  
10 under the purview of the State Water Projects Bureau.

11 Q. Are there any other State Water Projects  
12 Bureau projects that have no volume set?

13 A. I believe there is the Fred Burr project in  
14 the Bitterroot Valley. And it does not have a volume  
15 tied to it either.

16 Q. Moving to page 2 of this document. At the  
17 top here, it indicates that the water is diverted into  
18 storage and released under the operation plan for  
19 Tongue River Reservoir developed pursuant to the  
20 Northern Cheyenne-Montana Compact.

21 Do you understand that to be the operating  
22 plan we just looked at?

23 A. Yes, sir.

24 Q. And so that's actually a component of your  
25 water right?

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1 A. Yes.

2 Q. Let's talk a little bit about the operations  
3 of the reservoir since the enlargement. The capacity  
4 of the reservoir is now 79,000 and change; right?

5 A. Yes, sir.

6 Q. Have the operations of the enlargement -- I'm  
7 sorry -- the operations of the reservoir since the  
8 rehabilitation, have they been consistent with historic  
9 operations?

10 A. Definitely so, sir.

11 Q. How so?

12 A. The minimum -- or the minimum. The winter  
13 release recommendation of 175 CFS is very consistent  
14 with historical practices. The pattern of use that --  
15 the historical pattern of use is still followed very  
16 well. And it is -- the pattern of historical use has  
17 followed that because of basin characteristics and the  
18 volume of water that comes through for storage that's  
19 available for storage is typically always in the spring  
20 months.

21 Q. Since the rehabilitation, has the Northern  
22 Cheyenne Tribe used its reservoir storage right?

23 A. Since the rehabilitation, I believe the  
24 Northern Cheyenne Tribe has marketed one year, maybe  
25 two years, during the drought years some of their

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1 water, but not very much.

2 Q. Otherwise they haven't used it?

3 A. Correct.

4 Q. And so has the amount -- has the amount of  
5 water that's been stored in any given year in the  
6 Tongue River Reservoir, has that amount been consistent  
7 with prior to the Yellowstone River Compact?

8 A. Yes, sir.

9 Q. And I'd like to take a look a bit at the  
10 winter flows through the reservoir. And to do so, I'll  
11 ask you, again, to use that Montana Demonstrative  
12 Exhibit 3. This time I'll be looking at the flows from  
13 Table 2 of Exhibit M11, which was Mr. Dalby's expert  
14 report. And the last page of that Montana  
15 Demonstrative Exhibit 3, I think shows historic flows  
16 and CFS after the rehabilitation project in -- below  
17 the reservoir; do you have that?

18 A. Yes, I do, sir.

19 Q. And here the columns are the months; right?

20 A. Yes, sir.

21 Q. So working from January across and the last  
22 is December?

23 A. Yes, sir.

24 Q. Do you understand the term water years?

25 A. Yes, sir.

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1 Q. What is a water year?

2 A. For us a water year runs October 1st through  
3 September 30th.

4 Q. So let's say you take a year, 2013, the water  
5 year for 2013 actually starts in October of 2012; is  
6 that right?

7 A. Yes, sir.

8 Q. And goes all the way through to  
9 September 2013?

10 A. Yes, sir.

11 Q. Okay. Looking at the -- you said that the  
12 rehabilitation project was completed in '99. And  
13 looking at the flow rates during the winter months,  
14 October through March, has that generally been  
15 consistent with what you understand to be -- let's  
16 first start with pre-compact, pre-1950 operations?

17 A. Generally so, sir.

18 Q. And, in fact, the flows recently have been a  
19 little bit less than prior to the compact; right?

20 A. Yes, sir.

21 Q. And do you understand the flows during this  
22 period to be generally consistent with the period from  
23 1950 to the flood in 1978?

24 A. Yes. The pattern of use is very much the  
25 same.

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1 Q. I want to talk about a couple concepts  
2 related to reservoir operations during a typical year.  
3 And you've described at length the operations during  
4 the year and when the spring runoff is. But I don't  
5 think we've talked a lot about carryover storage.

6 Will you please explain to me what carryover  
7 storage is?

8 A. At the end of the water year, if all the  
9 contracts were not delivered and the Northern Cheyenne  
10 Tribe Compact water was not marketed and/or delivered,  
11 at the end of that year, the start of the new water  
12 year starts, and the water just becomes part of the  
13 next year's accounting. It's not carried over. It  
14 becomes the next year's accounting, and that's your  
15 carryover.

16 Q. After water is carried over in any given  
17 year, does the State of Montana still have the right to  
18 fill up the maximum amount of its water right?

19 A. Yes, sir.

20 Q. In other words, even after the carryover,  
21 you're allowed to use 69,000 acre-feet plus of water;  
22 correct?

23 A. Yes, sir. And the carryover's feature as  
24 well of trying to mitigate back to back dry years.

25 Q. And each year, even if the Northern Cheyenne

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1 Tribe didn't use their 20,000 acre-feet for the next  
2 water year, they still have only 20,000 acre-feet of  
3 water?

4 A. Correct.

5 Q. You talked quite a bit about the forecasting  
6 that you do in any given year and that you make  
7 adjustments based on that forecasting; right?

8 A. Yes, sir.

9 Q. Are you in regular communication with the  
10 Tongue River Water Users' Association throughout the  
11 winter?

12 A. I'm in fairly regular conversations with Art  
13 Hayes through the winter months and summer months as  
14 well.

15 Q. And irrigation season as well?

16 A. Yes.

17 Q. Exhibit 337, let's look at that, please.

18 A. Excuse me. Was that 367?

19 Q. 337.

20 A. Oh, 337.

21 Q. Do you have that?

22 A. Yes, I just found that.

23 Q. Actually, before we talk about Exhibit M337,  
24 I think you -- we looked yesterday at a list of  
25 contract holders from the Tongue River Water Users'



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1 Association and how they have shares; right?

2 A. Yes, sir.

3 Q. If the Tongue River Reservoir does not fill,  
4 do you know what happens to the amount of each of those  
5 shares?

6 A. They are all equally reduced.

7 Q. So if it doesn't fill, those shares get  
8 reduced?

9 A. Yes, sir.

10 Q. Farmers don't get the same amount of water?

11 A. No. It's a pro rata reduction.

12 Q. Turning to the exhibit we were just talking  
13 about, Exhibit M337; do you recognize this document?

14 A. Yes, sir, I do.

15 Q. And starting with the first two pages, what's  
16 that document?

17 A. The first two pages are minutes or notes from  
18 the Tongue River Water Users' Association secretary and  
19 treasury, Pat Helm, about a annual meeting we had in  
20 2006, dated November 2nd.

21 Q. Were you at that meeting?

22 A. Yes, I was.

23 Q. And did you receive this document from the  
24 Tongue River Water Users' Association?

25 A. Yes. We received this document after that

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1 meeting.

2 Q. Look at the next page, which is labeled  
3 MT07371; do you see that?

4 A. Yes, sir.

5 Q. And what is this document?

6 A. This is a standard form that we send to the  
7 associations, to all our associations, for them to fill  
8 out and send back to us outlining the time, date, and  
9 place of where they are going to be holding their  
10 annual meeting.

11 Q. From the same meeting?

12 A. Yes, sir.

13 Q. Next page. Do you know what that is?

14 A. Are we talking 07372, sir, or 73, sir?

15 Q. Seventy-two. Do you know what that is?

16 A. Yes. However, this is something that doesn't  
17 come from our office. This comes from the association  
18 itself and the board to its shareholders.

19 Q. Looking at the next page, 7373; what is that?

20 A. This is a standard letter that we send out on  
21 a yearly basis to the associations across the state,  
22 reminding associations to provide us their annual  
23 meeting dates. And if there's specific information or  
24 problems that we have, we might identify those in the  
25 letter for points of discussion during the meeting.

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1 Q. This is a letter from you to the secretary of  
2 the Tongue River Water Users' Association?

3 A. Yes, sir.

4 Q. Do you understand -- all of these documents  
5 are related to the annual meeting in 2006; right?

6 A. Yes, sir.

7 Q. Do you understand these documents to be  
8 connected?

9 A. Yes, sir.

10 MR. WECHSLER: Your Honor, at this point, I'd  
11 move the admission of Exhibit M337.

12 MR. KASTE: No objection.

13 SPECIAL MASTER: Exhibit M337 is admitted.

14 (Exhibit M337 admitted.)

15 BY MR. WECHSLER:

16 Q. First, looking at the first page of the  
17 document. And here it indicates that you gave a report  
18 on transfers; do you see that?

19 A. Yes, sir.

20 Q. Do you know how transfers are done?

21 A. Yes, sir.

22 Q. How?

23 A. The -- oh, in general, between the shares  
24 that are marketed, end users can sell their shares of  
25 stock and divest themselves of interest in the

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1 association via the selling of their contracts.

2           The process they go through is the one end  
3 user will have another purchaser of the stock, as it  
4 were. And they'll go through a release and transfer  
5 documentation process through the board. The board  
6 will verify the information and make sure it's clear  
7 and correct and sign that document and send the  
8 paperwork up to the department for our review and  
9 approval of the release and transfer and then our  
10 approval of the signed water purchase agreement.

11           Q. And then looking at the letter that you wrote  
12 to Pat Helm in September of 2006, I think you indicate  
13 in here that that meeting information has to be  
14 provided to you; is that right?

15           A. Yes, sir.

16           Q. And does that happen every year?

17           A. Yes, it does.

18           Q. And that allows you to keep track of what's  
19 going on with the association?

20           A. Yes. And it's a means for us to keep our  
21 O & M manuals updated and our records updated, yes.

22           Q. We were talking about a typical year. And I  
23 was asking you questions about that. But is it fair to  
24 say that every year is different?

25           A. That would be the typical year is a different

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1 year, yes.

2 Q. That's why it's important to have  
3 flexibility?

4 A. Yes, sir.

5 Q. I want to talk about the operations in the  
6 specific years that are issued for damages in this  
7 case. So starting with 2001, could you please describe  
8 the operations of the reservoir in 2001?

9 A. With any water year, the caveat on anything  
10 is a -- well, a few caveats. With any water year, you  
11 have to look at the previous year and issues going on  
12 within that previous water year for conditions. And  
13 that will also flavor somewhat your actions of the  
14 upcoming year. And you also have to deal with, again,  
15 the issues of looking at that crystal ball and trying  
16 to project six months in advance what you should be  
17 able to see coming down your stream during the high  
18 flows and the spring runoff.

19 2000 -- the 2001 water year was a lot  
20 different than others. We had just finished off the  
21 Tongue River rehabilitation in '99. We -- that summer  
22 of '99, spring/summer of '99, we flooded out in Decker  
23 Coal on their north extension, specifically the pit 16  
24 south that we discussed. The -- we had issues with  
25 Decker Coal on the head walls in their pits. The east

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1 side of the reservoir swelled, so we were trying to  
2 help monitor and mitigate some of those with the  
3 company there.

4 In the spring of 2000 before the beginning of  
5 the 2001 water year, we had an issue with the primary  
6 gate, secondary gate in the gatehouse during  
7 operations. I believe Keith Kerbel and then dam tender  
8 Randy Fulmer were in the gate chamber and operating the  
9 auxiliary gate, raising it. And the bonneted slide  
10 gate, which is the primary operator in that gate  
11 system, was closed.

12 The gate -- the fixed wheel gate experienced,  
13 the nondescript term is an uplift issue. What happened  
14 is the gate was catapulted out of its gate chamber. It  
15 came up into the gate chamber with the water pressure  
16 pushing it up. When the water pressure equalized, the  
17 ten-ton gate then came down and took apart the various  
18 steel couplings and connectors.

19 So we had that issue in the spring of 2000.  
20 And through the forensics and rebuild, that was  
21 rescheduled and was reinstalled in the spring of 2001.

22 In the interim of that work, we discovered  
23 some defective work from the contractor on some other  
24 issues. So we had to -- instead of drafting the  
25 reservoir down to dead pool or trying to put a bulkhead

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1 gate in the reservoir to isolate the whole system, we  
2 had to utilize divers in the middle of winter to do  
3 some underwater construction work as well.

4           And the other issues going on, I believe --  
5 and I can't say this for certain, but Decker Coal, part  
6 of the mitigation plan for their flood work mitigation,  
7 due to the geology of that area, especially along the  
8 west side, they were changing their mine operations to  
9 put in cuts, precutting some of their areas so they  
10 could mine out the clinker zone or this fractured rock  
11 zone, mine the coal out of that stretch and backfill it  
12 with finer materials, overburden, to act as a dam. So  
13 the next year when the reservoir would come up, it  
14 would have an area of their permit area that they could  
15 mine without risk of flooding. Basically, they would  
16 cut out coal seam and backfill the dam and build an  
17 underground dam and mine that area afterwards.

18           And last but definitely not least is, again,  
19 right after construction, I described that we'd found  
20 that void in the dam embankment, it was at a relatively  
21 high elevation. And it was actually an issue if we had  
22 not discovered it, it would have been either partial or  
23 full failure of the dam within a few years of operation  
24 at high pool. Because the void itself was about an  
25 elevation starting around 3420. So it was a -- and

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1 considering how few times the reservoir was at the high  
2 elevations, it was surprising how much material was  
3 moved out of area.

4           So with that, we were being conservative and  
5 cautious in some of our filling operations. And we had  
6 extensive monitoring across the board to keep track of  
7 any evidence that our mitigation repairs that we took  
8 were working and try and make sure and verify they were  
9 working through the monitors.

10           So with all of those issues in mind, I guess,  
11 that sort of flavored how we went into the 2001 water  
12 year.

13           Q. Was 2001 a dry year?

14           A. The end result of 2001 was a very dry year.  
15 I believe we went into winter running about 90 percent  
16 of average of snowpack, maybe less. I believe we  
17 probably minimized our flows through the wintertime  
18 months, and then we didn't have much of a runoff.

19           Q. Did the reservoir fill?

20           A. The reservoir did not fill at that time.

21           Q. Did it come close to filling?

22           A. I would have to look at the data. Because I  
23 can't remember off the top of my head.

24           Q. Sure. Let's look. You're looking at  
25 Demonstrative Exhibit 103?



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1 A. Yes, sir.

2 Q. From Table 4A of Mr. Book's report we can see  
3 2001. Does it look like the reservoir came close to  
4 filling?

5 A. No, sir. We got up to about -- we were at  
6 45,000 -- 44,000, 45,000 in April. And it -- that was  
7 as high as we got in May.

8 Q. And if you turn to the back of that, the  
9 table of the flows for 2003.

10 A. For 2003, sir?

11 Q. I'm sorry. 2001.

12 A. Okay, sir.

13 Q. And so 2001, the beginning in water year,  
14 2001 water year, you have to look at October of 2000;  
15 is that right?

16 A. Yes, sir. And I'm just looking at the  
17 outflows.

18 Q. If you look at the label of the table, I  
19 think it says "monthly mean discharge of the Tongue  
20 River at Tongue River Dam"; do you see that?

21 A. Yes, sir. Thank you. It is the outflows.

22 Q. So is this consistent with historic  
23 operations?

24 A. Yes. Well, the flows in 2001, if we're going  
25 to the end of 2002 October, we had 270 CFS discharging

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1 through October. And that's very likely tied to many  
2 of those issues that I just previously discussed. And  
3 going into November and December, it was apparent that  
4 we were aware of what appears to be lower snowpack,  
5 about 90 percent of snowpack.

6 Q. And that's because the flows are relatively  
7 low?

8 A. One hundred fifty, one hundred. And the  
9 hundred might very well be from the issue of where we  
10 had divers going through and swapping our gates around  
11 and working on the project.

12 Q. And other than October, those are actually  
13 below the 175; right?

14 A. Yes, sir.

15 Q. How about the water year 2002, can you talk  
16 about that a little bit?

17 A. Yes, sir. After the irrigation season of  
18 2001, I believe you can just continue on that same path  
19 on the discharges. We just went down.

20 Q. At this point you're heavily into a drought;  
21 is that right?

22 A. Yes. We were low and just went down in our  
23 releases. We were at 80 and 75 CFS releases until we  
24 got into May.

25 Q. At this point, you're doing everything you

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1 can to try to maximize your storage; right?

2 A. Yes, sir. And when I see going into that  
3 2002, we see the May value, this is a monthly mean  
4 value. And it's going up to 160 CFS. That's either  
5 contract deliveries are starting or senior rights  
6 downstream are calling for water. And it was just a  
7 terrible year.

8 Q. Do you remember what the snowpack was like  
9 going into 2002?

10 A. 2002, you're taxing me now. I want to say  
11 that most of these years were very similar. They seem  
12 to have decent snowpack in December or average or close  
13 to average. And then it seemed like we ended up not  
14 getting any more precipitation or snow through the  
15 winter months.

16 And that's the other thing compared to this,  
17 snowpack is one indicator. It's a good indicator. But  
18 it's not the only indicator. It even comes into the  
19 temperatures in the daytime and nighttime and the  
20 weather patterns in the spring and how that snow comes  
21 out. If it's a cool spring, snow is not going to melt  
22 too fast, and it's going to be a slow runoff. And if  
23 it's a slow runoff, there's a lot of senior rights, and  
24 water gets used. If it melts quick into a dry matrix  
25 that didn't freeze up, the soil matrix, we lose a lot

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1 to percolation.

2           There's many variables tied into snowpack.  
3 So it's a great indicator, but it's not the only item  
4 that affects that runoff.

5           But now, yeah, 2002, I think we're about 90  
6 to 100 percent of average in the December months, but  
7 it just went down after that.

8           Q.   Dropped off?

9           A.   Yes.

10          Q.   Let's talk about the water year in 2004.

11          A.   In 2004 -- going back to 2003. 2003 was  
12 interesting because we were going into -- I have to  
13 bring up 2003 to go into 2004. If you go through this,  
14 2003 was not looking that good either. But, again,  
15 this basin, nothing is typical. And we ended up  
16 filling and spilling in the May and June time period of  
17 2003. And with that, we had a good reservoir pool.

18           We went into the wintertime, I think with a  
19 decent reservoir. But we weren't seeing the flows, and  
20 we had reduced our own flows down. And we were about  
21 100 to 120 CFS range.

22          Q.   Talking about the winter of the water year  
23 2004?

24          A.   Yes, sir. Yes, sir. Going into 2004, the  
25 winter year. So we were trying to store if we could.

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1 And, again, snowpack did not develop. And we just  
2 didn't get any runoff.

3 Q. Did the reservoir fill in either 2003 or  
4 2004?

5 A. No, sir, it did not.

6 Q. How about water year 2006?

7 A. It did not fill in 2006 either.

8 Q. Can you describe the water year 2006?

9 A. Yes, sir. Again, going back to the year-end  
10 of 2006, the water year for 2005 was actually -- this  
11 is one reason it does stand out. 2005 water year, the  
12 snowpack was the worst of all the years that we had.  
13 And if you look at the hydrographs, the winter base  
14 flows in 2005 were as bad as 2004 if not maybe worse.

15 However, in 2005, we received spring rains in  
16 that basin. And given the size of that basin and  
17 conditions, we filled and spilled the reservoir.

18 And the -- this is the mean monthly flow. So  
19 it shows 1500 CFS discharging in June of 2005. Well,  
20 that's the monthly mean flow CFS for that. And so it  
21 went up. It was a considerable flow, I think about 4  
22 or 5000 CFS discharge for a peak that year.

23 So going into water year 2006, we had a good  
24 reservoir pool. We had water in the system. We  
25 thought we were doing good. I believe at the end of

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1 December -- I believe in the end of December of that  
2 year, we -- I want to say we had, like, 150 or  
3 200 percent of snowpack. That's my recollection  
4 anyway. And it was very good. However, it started  
5 going down after that. And it seemed we didn't get  
6 anything for snowpack.

7           And if you look at the flows, our monitoring  
8 the snowpack in that issue was reflected in the flows.  
9 We are a little high in December, of 216, and we're  
10 just kind of matching the flows. We don't see the snow  
11 coming down. In January we start dropping. And by  
12 February we are setting the flows down to more minimum  
13 levels because we do not see the moisture coming in, or  
14 we do not also see the inflows at the state line  
15 maintaining our reservoir pool.

16           Q. Looking back at all of that information and  
17 the reservoir operations in 2001, 2002, 2004, 2006, did  
18 you think the operation at the reservoir at that time  
19 was reasonable?

20           A. Given the knowledge known at the time and  
21 what we're doing, yes.

22           Q. Was it consistent with historic flows?

23           A. Well, albeit it was lesser flows than  
24 anything we've ever seen. But it was consistent on our  
25 operations, yes.

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1 MR. WECHSLER: Your Honor, I'm trying to go  
2 as quickly as I can. I still think I have another 30  
3 minutes of questions. I don't know if you'd like me to  
4 continue or to break for lunch now.

5 SPECIAL MASTER: Sort of expands  
6 exponentially.

7 MR. WECHSLER: I apologize. Bad estimate on  
8 my part.

9 SPECIAL MASTER: Mr. Kaste, there's two  
10 options: We could take a break now and then come back  
11 and finish up the direct, or I'm happy to plow on  
12 through.

13 MR. KASTE: I don't suppose it matters. I  
14 think we could all take our break now and come back  
15 refreshed.

16 SPECIAL MASTER: Okay. Sounds good. So then  
17 let's take the noon break now. So let's plan to come  
18 back at ten after 1:00. And I'm going to actually stay  
19 up here for a second and sort through my various  
20 papers. So everyone can be seated or pack up to head  
21 off to lunch. So thank you.

22 (Recess taken 12:07 to 1:13  
23 p.m., October 24, 2013)

24 SPECIAL MASTER: Everyone can be seated.

25 BY MR. WECHSLER:

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1 Q. Good afternoon, Mr. Smith.

2 A. Good afternoon.

3 Q. We have three more topics to go through, and  
4 I don't think they'll take as much time. The first is  
5 we've talked about a number of things with winter  
6 flows. I want to talk about that and just close that  
7 loop. The second is to talk briefly about the  
8 operations of reservoirs in other parts of Montana  
9 because the Special Master has indicated that it is  
10 relevant, not just what was done in the Tongue River  
11 Basin but also that it's not different here than it is  
12 elsewhere. And then, finally, I'll ask you to  
13 summarize your opinions, your rebuttal opinions.

14 So let's start just with the winter flows.  
15 And we've talked about a number of different reasons  
16 why those winter flows are necessary; right?

17 A. Yes, sir.

18 Q. And the winter flows that you had in your  
19 rebuttal report and opening report as well, I believe  
20 are 175 CFS?

21 A. Yes, they are.

22 Q. That's consistent with the operating plan and  
23 the operating manual?

24 A. Yes, it was taken from that manual.

25 Q. So the first reason that I have heard you



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1 talking quite a bit about are historic operations. And  
2 so can you just briefly summarize how winter  
3 operations -- I'm sorry -- historic operations lead to  
4 the winter flows of 175 CFS?

5 A. To put this, I guess, in the perspective of  
6 historical practice and historical operations, the  
7 practice of the operations of the reservoir has been  
8 developed and -- over time. That project was built in  
9 1939 and put in to service in 1939 and has gone  
10 through, so about 74 years of service to date.

11 The historical operations that were developed  
12 is based on the basin characteristics. This basin,  
13 it's a large basin, and it is prone to large runoff  
14 events. And the volume of water that is available for  
15 storage for fillings, especially with our priority date  
16 of 1937, while it's a pre-1950 right, it is a junior  
17 right to most of the rights on the Tongue River below  
18 us. So we have to fill during that historical runoff  
19 time frame.

20 So for that matter, the historical practice  
21 becomes the water right because that's how that system  
22 works well.

23 Q. And the historic flows have been at least 175  
24 CFS during the winter?

25 A. Yes, they have. I believe the median and

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1 mean flows are a little bit higher than the 175 CFS.

2 Q. The second reason that we've talked about for  
3 winter flows is stock water. Can you explain how stock  
4 water forms a basis for meeting the winter flows?

5 A. Within the system, and especially in  
6 agricultural communities and ranching communities, the  
7 source of water to water the stock is from the water  
8 source, in this case, the Tongue River Reservoir -- or  
9 the Tongue River.

10 To that end, we have to pass river flows  
11 through to satisfy those rights.

12 Q. Mr. Davis indicated that there were 48 filed  
13 pre-1950 stock water rights from the Tongue River; do  
14 you recall that?

15 A. I believe I do, yes, sir.

16 Q. And are there more that have not been filed?

17 A. According to testimony, yes.

18 Q. And then a certain amount of water is  
19 necessary associated with that stock water in order to  
20 carry it down to where the stock are taking water; is  
21 that right?

22 A. Yes, sir.

23 Q. And it's the winter, so you also have to make  
24 sure there's no icing in order for the stock to get  
25 water?

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1           A.    Yes, sir.  It's not just the amount cows or  
2 sheep can drink.  It's getting the water down the  
3 system and making it available to the stock.

4           Q.    Which leads to the third justification for  
5 the winter flows, and that is prevent icing of the  
6 river.  Could you talk about that a little bit?

7           A.    Yes.  And we touched briefly on this earlier.  
8 This is a river that has -- it's a relatively slow-flow  
9 river.  The flows we're talking about, the flow is, for  
10 lack of a better term, laminar.

11          Q.    What does it mean?

12          A.    Tranquil, uniform flow.  It's a very steady  
13 state of flow which allows for the -- there's not as  
14 much energy in the system to resist ice formation.  So  
15 when you get to the very low flows, it's easier for ice  
16 to form.  And the other issue with it, once ice  
17 forms -- once ice forms -- and typically, if you are  
18 driving down the road you'll notice when you're coming  
19 through areas, the areas that are getting damaged the  
20 most from ice are places where you have constrictions,  
21 such as bridge abutments and other locations.  That's  
22 where ice breaks up and flows down, it can get caught  
23 up at those locations, and it starts jamming up or  
24 backing up water.  And that's where you'll see  
25 typically -- not always, but typically you'll see more

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1 of your ice jams and the first formation of the ponds  
2 behind them and flooding issues.

3 So having enough flow to maintain the river  
4 channel and maintain an ice shelf is very important.  
5 Especially in a system that has the wide range of  
6 temperature fluctuations that we do.

7 Q. The fourth justification for the winter flows  
8 that I've heard you talk about was prevent icing on the  
9 reservoir facilities itself. So could you talk a  
10 little bit about that?

11 A. Yes. As discussed and as described in the  
12 operating plan and the maintenance manual, the desire  
13 is to not have ice on the concrete wall structures and  
14 to have the ice either set at or not fluctuate too much  
15 on the reservoir surface to prevent moving the  
16 armoring, the rock, the riprap protection on the dam  
17 face. If you have a fluctuating lake surface during  
18 freeze-up, you'll start moving rock around and riprap  
19 around. And that can -- leaves long-term maintenance  
20 issues, repair issues that have to be repaired and  
21 taken care of.

22 Q. Sounds like what you're describing relates to  
23 the 45,000 maximum storage limit?

24 A. Yes, it does.

25 Q. And what about icing in the tunnel?

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1           A.     That refers back to the operating of both  
2 tunnels.   Again, the old tunnel -- I'll call it the  
3 auxiliary tunnel, concrete in that structure, once you  
4 get away from the entrance portal, is very competent,  
5 very strong concrete.   It's been curing for 74 years.  
6 And it's very strong.

7           The issue is the concrete at the portal  
8 stress, the first hundred or 200 feet.   And the issue  
9 is to make sure we have flow through there to  
10 protect -- to generate enough warmth to protect that  
11 concrete from going through repeated freeze and frost  
12 cycles and to mitigate and stop or slow up the damage  
13 that we're seeing.   And the other tunnel was, of  
14 course, we described through seeps and other things.  
15 If it's not operated, it does have the very high  
16 potential of being able to plug the outlet portion of  
17 the pipe with ice.

18          Q.     And the fifth reason I've heard you discuss  
19 about the need for water flows has to do with to  
20 prevent flooding and damage downstream; is that right?

21          A.     Yes, sir.

22          Q.     Could you talk about that a little bit?

23          A.     Well, it would be reckless of us in that  
24 basin to go into winter with a full pool at spillway  
25 crest.   Given the issue of maintaining a set flow and

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1 then being at the whim of the river, when below us has  
2 not seen that for going into its eighth decade of use,  
3 it is -- an anti-operating plan is called out. One of  
4 the issues and items that we are to address is to  
5 mitigate flood damage downstream if we can. And I say  
6 if we can because in this basin, sometimes we just get  
7 flows that fill and spill the reservoir very quickly.

8 Q. Can I get you to turn, please, to Exhibit  
9 M310?

10 A. I have it.

11 Q. Do you recognize Exhibit M310?

12 A. Yes, I do.

13 Q. What is it?

14 A. This is dated December 1982. And the title  
15 is "Documentation and supporting data for the Tongue  
16 River project direct flow right for stock watering."

17 Q. Is this a document that was created -- you  
18 understand to have been created by the DNRC?

19 A. Yes, sir.

20 Q. And is this a document that you understand to  
21 relate to the Tongue River Reservoir?

22 A. Yes, sir.

23 Q. Is it a document that you've reviewed as part  
24 of your work in this case?

25 A. Yes, it is.

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1 Q. And is it also a document that's kept in your  
2 records at the State Water Projects Bureau?

3 A. Yes, it is.

4 Q. It relates to the winter flow?

5 A. Yes, sir.

6 MR. WECHSLER: Your Honor, at this time I'd  
7 move Exhibit M310.

8 MR. KASTE: No objection. I notice it's a  
9 duplicate of 309B. Did that one already come in?

10 MR. WECHSLER: No, we only put in 309A, I  
11 believe.

12 MR. KASTE: Okay.

13 SPECIAL MASTER: So I understand, in fact,  
14 that 309B has not been introduced. And so at this  
15 stage, M310 will be admitted.

16 (Exhibit M310 admitted.)

17 MR. WECHSLER: Thank you. And we have no  
18 intention of admitting 309B, for obvious reasons.

19 BY MR. WECHSLER:

20 Q. If I -- Mr. Smith, if I can get you to look  
21 here, middle photograph, it indicates, "A preliminary  
22 report on the Yellowstone River Basin entitled  
23 'Compilation of Factual Data for Use of the Yellowstone  
24 River Compact Commission,' published by the Federal  
25 Power Commission, Bureau of Engineering in December

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1 1940." And I'll stop there. December of 1940 is prior  
2 to the compact right?

3 A. Correct.

4 Q. And here it actually indicates for use of the  
5 Yellowstone River Compact Commission; right?

6 A. Yes, sir.

7 Q. And here it indicates, it says "indicated  
8 that 'a probable schedule for storage and release  
9 operations' for the Tongue project would include." And  
10 then before I go into what it's showing, do you  
11 understand -- well, at what stage was the Tongue River  
12 Reservoir in December of 1940?

13 A. Well, the project was completed in late 1939.  
14 And I believe in 1940 they were still going into  
15 filling operations.

16 Q. And so when they talk about probable, you  
17 understand that to be this is what they think it's  
18 going to be?

19 A. When I see a probable schedule for storage  
20 and release operations written in 1940 prior to the  
21 reservoir getting filled is, perhaps, not what they  
22 think it's going to be but here is a possible operation  
23 schedule to look at.

24 Q. And then it shows here October releases of  
25 3600 acre-feet; you see that?



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1 A. Yes, sir.

2 Q. And then in parens it says 61 CFS. I don't  
3 want to ask you to do math on the stand, but in rough  
4 numbers, does it look like 3600 acre-feet would  
5 translate into roughly 61 cubic feet per second for a  
6 month? Looks like you're doing math.

7 A. Yes, sir.

8 Q. If you want to, that's fine.

9 A. No. It's -- it looks approximate.

10 Q. And for -- then No. 2 there indicates  
11 November to March releases of 33,000 acre-feet; do you  
12 see that?

13 A. Yes, sir.

14 Q. And it looks again like somebody wrote in  
15 there 111 CFS. And does that look roughly correct?

16 A. Yes, sir.

17 Q. And I'll ask you the same question about  
18 April. It then says release of 1800 acre-feet. And  
19 then it's got an indicator of 30 CFS; do you see that?

20 A. Yes, sir. If the other two are correct, that  
21 one is.

22 Q. And then if you turn -- well, starting at the  
23 bottom of this page, which is labeled MT3298, "As a  
24 result of this agreement," turning to the next page,  
25 "historic releases during October through April have

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1 been greater than the" -- and it looks like someone has  
2 written there FPC's original estimates; do you see  
3 that?

4 A. Yes, sir.

5 Q. So would you agree with the notion that the  
6 historic flows have been greater than the probable  
7 schedule that was indicated in 1940?

8 A. Yes. The historic flows, actual flows were  
9 higher than the probable flow suggested.

10 Q. It -- continuing in that paragraph, it shows  
11 that the historic releases are presented below. And it  
12 says, "One notes that the 80 percentile flows are  
13 approximately equal to the 167 CFS target release." Do  
14 you see that?

15 A. Yes, sir.

16 Q. And I think they're referring to this Table

17 A. Now, what is 80 percentile flows?

18 A. In the sense of this document, 80 percentile  
19 flows are those flows that are exceeded 8 out of 10  
20 years. So for this context, the 167 CFS target release  
21 would be exceeded or the flows are exceeded by that --  
22 exceed that eight years out of ten.

23 Q. And then in the last paragraph here, it talks  
24 about a report entitled "Tongue River project basic  
25 design, DNRC 1969"; you see that? I'm looking at the

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1 last paragraph.

2 A. My apologies, sir.

3 Q. On -- last paragraph on page 3299.

4 A. Yes, sir.

5 Q. So my question is: Do you know -- are you  
6 with the document Tongue River project basic design  
7 DNRC 1969?

8 A. Yes, sir.

9 Q. And what is that document?

10 A. That document, the basic design report from  
11 1969 was the report conducted by Bechtel Corporation.  
12 And it was a report looking at -- it was a basic design  
13 report looking at possible scenarios of building, one  
14 would say, the largest facility that could be built on  
15 this system to generate the most maximum firm yield to  
16 catch all the water it could.

17 Q. And so it might not be relevant for the  
18 current state of the Tongue River Reservoir; is that  
19 right?

20 A. No. The project that they were promoting in  
21 that report, they are looking at different reservoir  
22 sites on the Tongue River system. And I believe one of  
23 the preferred alternatives that were presented had a  
24 dam that was 100 feet taller than our dam with the  
25 storage volume capacity of 320,000 or 400,000

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1 acre-feet. I believe 320,000 acre-feet. And in that  
2 four-fold increase, they were only going to generate --  
3 calculated their firm annual yield would go up to about  
4 a hundred thousand acre-feet per year.

5 Q. Turn with me, please, to Exhibit 284. M284.  
6 Do you have that?

7 A. Found it, sir.

8 Q. First, in looking at the title, it looks  
9 pretty similar to the title of the last document we  
10 looked at; would you agree with me?

11 A. Yes, sir.

12 Q. So what is Exhibit M284?

13 A. Exhibit M284 is dated December 1982, and its  
14 title is "Documentation and supporting data for the  
15 Tongue River Project direct flow right for winter stock  
16 watering."

17 Q. Now, the numbering at the bottom of this  
18 document indicates that this was a Wyoming document.  
19 But is -- are you familiar with this document?

20 A. Yes, sir.

21 Q. And is this a document that's kept at the  
22 State Water Project Bureau as well?

23 A. Yes, sir.

24 Q. And do you know this to be a document that  
25 was created by the DNRC?

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1 A. Yes, sir.

2 Q. And is it something that you reviewed as part  
3 of this case?

4 A. Yes, it is.

5 Q. Does it relate to the Tongue River Reservoir?

6 A. Yes, it does.

7 MR. WECHSLER: Your Honor, I would move the  
8 admission of Exhibit M284.

9 MR. KASTE: No objection.

10 SPECIAL MASTER: Exhibit M284 is admitted.

11 (Exhibit M284 admitted.)

12 BY MR. WECHSLER:

13 Q. And looking at Exhibit M284, it appears to go  
14 down a number of the things that we've already talked  
15 about. And I don't want to belabor all of those  
16 points. You look at one, it's talking about the  
17 original filing. And we've talked about that. It  
18 talks about the historic flows in the 80th percentile.  
19 And we've talked about that; right?

20 A. Yes, we did.

21 Q. And we talked about the 167; right?

22 A. Yes, we did, sir.

23 Q. Now, one thing we haven't talked about, if  
24 you look at the right there of the 167, it talks about  
25 the Tongue River decree, 1914?

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1 A. Yes, sir.

2 Q. And here it says, "419.17 CFS were claimed  
3 for the purposes of irrigation, domestic supply, and  
4 stock watering. In total 16,778.27 acres were found to  
5 be under irrigation. Assuming a diversion rate of 3.28  
6 acre-feet per acre, this leaves approximately 167 CFS  
7 for stock watering purposes during the nonirrigation  
8 months"; right?

9 A. Yes, sir.

10 Q. Does that look to be a reasonable way of  
11 evaluating that 167 CFS for stock water?

12 A. Yes.

13 Q. Now, No. 4 we did talk about. This is the  
14 information on the probable winter release operations  
15 from that 1940 report.

16 I think we've talked earlier about the 1969  
17 amendatory contract.

18 No. 7 appears to be referring back to the  
19 Donald Sullivan memo that we looked at.

20 And finally, No. 8 appears to be the Bechtel  
21 report that you just discussed; is that right?

22 A. Yes, sir.

23 Q. And then the last one here is 9, is 50 CFS.  
24 And it says, "Statement of claim for existing filed  
25 water rights from the Tongue River Project, by DNRC in

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1 April 1982." And this document actually comes after  
2 April 1982; right?

3 A. Yes, sir.

4 Q. And this is also from the DNRC?

5 A. Yes, sir.

6 Q. And so it would be logical to understand this  
7 to be with updated information after April of 1982?

8 MR. KASTE: I think that's leading.

9 SPECIAL MASTER: So I think you can just ask  
10 him what the April --

11 MR. WECHSLER: Sure.

12 BY MR. WECHSLER:

13 Q. How does this relate, do you think, to the  
14 April 1982 number?

15 A. How does 50 CFS relate to the April 1982  
16 number?

17 Q. Yes.

18 A. This 50 CFS was what my review -- was an  
19 attempt by DNRC to try to make water rights look more  
20 similar to other crop water rights within the state.  
21 So they're trying to find means and methods to account  
22 for and apply for every water -- every use or drop of  
23 water that they thought they had instead of just going  
24 back to the original application as it is now, as our  
25 water is for sale, and market it to the association.

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1 I think it's simply just an exercise in  
2 finding calculations to say, if we had to sell stock  
3 water, we want to have a stock water right to sell.

4 Q. At the DNRC is it common to continue to  
5 evaluate the technical issues?

6 A. Yes, it is.

7 Q. And so the thinking in the DNRC on technical  
8 issues, does it evolve over time?

9 A. Yes, it does.

10 Q. And No. 9 there is listed April 1982; is that  
11 right?

12 A. Yes, sir.

13 Q. And this document is December of 1982; is  
14 that right?

15 A. Yes, sir. This was --

16 Q. Do you recall the date on the previous  
17 document we looked at, Exhibit M310?

18 A. I will, sir.

19 Q. Please.

20 A. Exhibit M310 date was December 1982.

21 Q. Looking at that number that's there, 50 CFS,  
22 do you think that that number is a reasonable number  
23 for winter operations?

24 A. No. That's not a -- that's not a reasonable  
25 number for winter operations.



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1 Q. Why not?

2 A. It's -- aside from not being close to the  
3 practice that's been formed and developed over the last  
4 70 years, that flow would be very susceptible to  
5 causing a lot of damage downstream. There would be  
6 some adverse effects within the entire system if we  
7 were to maintain a flow of something like that.

8 Q. Now, we've seen in some expert reports  
9 submitted in this case the notion that what should be  
10 done essentially is setting the gauge at 75 CFS in  
11 October and leaving the gauge at 75 CFS over the course  
12 of the winter.

13 What would happen if you did just that; if  
14 you set it at 75 CFS for the whole winter?

15 MR. KASTE: Object to the characterization of  
16 the contents of our expert reports.

17 SPECIAL MASTER: I think it would be fair in  
18 this particular case, rather than relating it to any  
19 statement made elsewhere, simply to ask the question of  
20 whether or not it would be reasonable to set a gauge at  
21 75 CFS and maintain it at that.

22 MR. WECHSLER: Sure.

23 BY MR. WECHSLER:

24 Q. Do you think it would be reasonable to set  
25 the gauge at 75 CFS?

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1           A.    If the standard operating procedure is  
2 rewritten, to rewrite our maintenance manual to be a  
3 standard operation to set our winter flows at 75 CFS  
4 and then stand down and let it store through the  
5 wintertime for the season, I would -- well, that would  
6 be reckless and irresponsible.

7           Q.    What would the impact be?

8           A.    The basin or reservoir elevations going into  
9 wintertime between 40,000 or 45,000 acre-feet of  
10 storage, if we just set the gate at 75 CFS and  
11 anticipate median flows across state lines, it is very  
12 likely that we'd be pushing water over the spillway in  
13 February of the year.  Once that occurs, we've lost any  
14 and all capabilities of managing that reservoir.  
15 It's -- it -- we also put ourselves at risk for ice  
16 flow should the -- when the ice breaks up on the lake  
17 and we have wind pushing the ice into the spillway  
18 while the spillway weir walls have been designed for  
19 ice loading, it was not intended to be an every-year  
20 occurrence.  That would severely -- could severely  
21 damage the spillway weir walls, should it get to that  
22 point where the members are starting to be  
23 overstressed.

24                   The other issue is after 70 years of  
25 controlling flood events down below reservoirs, we have

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1 now put our system back into a river condition that the  
2 downstream users haven't seen for 75 years, which,  
3 again, changes the basin hydrology. So, yes, it would  
4 be irresponsible, reckless, and it -- well, for our  
5 existing prior maintenance manual, it would be against  
6 our dam safety operating permit as well.

7 Q. Turn with me, please, to Exhibit M320.

8 A. I have it, sir.

9 Q. What is this document?

10 A. This is another operations and maintenance  
11 manual. This one is titled "Middle Creek Dam, also  
12 known as Hyalite Dam." Spelled, H-y-a-l-i-t-e.  
13 "Manual for operation and maintenance, the State Water  
14 Projects Bureau, Water Resource Division, revised  
15 December 2011."

16 Q. This is a document that was produced by the  
17 Water Resources Division of DNRC?

18 A. Yes, sir.

19 Q. And specifically, your bureau?

20 A. Yes, sir.

21 Q. And this one was revised in 2011. Were you  
22 the bureau chief at that time?

23 A. Yes, sir.

24 Q. And where is Middle Creek Dam?

25 A. Middle Creek Dam is located on Hyalite Creek

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1 directly above -- in Hyalite Canyon above Bozeman in  
2 Gallatin County.

3 MR. WECHSLER: Your Honor, at this point, I'd  
4 move admission of Exhibit M320.

5 MR. KASTE: There's a whole bunch of these,  
6 so I'm going to just do this once, understanding how  
7 it's likely to turn out. I have to object on the  
8 grounds of relevance.

9 You asked about reservoir operations in other  
10 areas, which is important. But these operating and  
11 maintenance manuals are developed separately for each  
12 reservoir and, therefore, have variations in them. And  
13 they don't contain the information which we need, which  
14 is how are we counting the amount of water coming into  
15 the reservoir for purposes of the junior appropriators  
16 upstream. And, therefore, I don't think they are  
17 terribly relevant to the question at issue in this  
18 case.

19 SPECIAL MASTER: So, Mr. Kaste, I think your  
20 points will be very relevant to the question of the  
21 degree to which ultimately I or the Supreme Court can  
22 actually rely upon these documents without additional  
23 information. But I do think that they are relevant to  
24 the proceedings in general at the moment. So I will  
25 permit this to be entered into evidence.

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1 I understand that your objection is one that  
2 will be continuing for all similar exhibits. And so  
3 all you have to do is simply say you object for the  
4 same reason as before.

5 MR. KASTE: Thank you.

6 SPECIAL MASTER: Okay. You're welcome.

7 MR. WECHSLER: Your Honor, it might expedite  
8 things and allow me to talk in a more general manner if  
9 Wyoming does not object to simply putting in all five  
10 of the operating and maintenance manuals now.

11 MR. KASTE: I don't object to that.

12 SPECIAL MASTER: Great. Why don't you go  
13 ahead and do that.

14 MR. WECHSLER: So at this point, Your Honor,  
15 I would move not only the admission of Exhibit M320 but  
16 also Exhibit M321, M322, M323, and M324.

17 SPECIAL MASTER: So, Mr. Kaste, I understand  
18 the same objection that you made to Exhibit M320  
19 applies to the others. Do you have any other objection  
20 other than that objection to these other exhibits?

21 MR. KASTE: No.

22 SPECIAL MASTER: Okay. Thank you. So then  
23 Exhibits M320 through M324 are all admitted into  
24 evidence.

25

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1 (Exhibits M320, M321, M322,  
2 M323, M324 admitted.)

3 BY MR. WECHSLER:

4 Q. Mr. Smith, you talked earlier about how these  
5 manuals are developed; correct?

6 A. Yes, sir.

7 Q. And so this one follows much the same format  
8 as the Tongue River Reservoir Operating Manual; is that  
9 right?

10 A. Yes, sir. The format should be very similar.

11 Q. If you'll turn with me, please, to page 20 of  
12 Exhibit M320. And first, in the paragraph under  
13 "method and schedule of operations," it indicates that  
14 there are contracts for 10,184 acre-feet; do you see  
15 that?

16 A. Yes, sir.

17 Q. And so is this a smaller project than the  
18 Tongue River Reservoir?

19 A. Yes, sir.

20 Q. Below there it has a section there entitled  
21 "Maximum winter storage"; you see that?

22 A. Yes, sir.

23 Q. And so this project also has a maximum winter  
24 storage like the Tongue River Reservoir?

25 A. Yes, it does.

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1 Q. And it also, for similar reasons, it looks  
2 alike?

3 A. Very much so.

4 Q. It also has a minimum storage; is that right?

5 A. Yes, sir.

6 Q. And then we can see it also has a minimum  
7 outlet discharge. In this case it looks to be 10 CFS.

8 A. Yes, sir.

9 Q. And so the minimum outlet discharges, do they  
10 vary from project to project throughout the state?

11 A. Yes, sir, based on the site conditions.

12 Q. And do the winter maximum storage levels, do  
13 those also vary from project to project?

14 A. The storage level restrictions for wintertime  
15 operations will have very similar reasons for having  
16 them. But, of course, yes, the elevations themselves  
17 will be different.

18 Q. I won't ask you to go through each one of the  
19 maintenance manuals. They're in the record. We can  
20 look at them. But of the 21 state projects -- let me  
21 first ask you: Are any of them limited to a single  
22 fill?

23 A. No, they are not.

24 Q. And what typical fill are those projects?

25 A. On the half tracks, the volumes of the

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1 reservoirs range from anywhere from 1.3 to 2 or  
2 slightly over 2, I believe, fills in volume of the  
3 reservoirs. Typically, the volumes were calculated by  
4 doing a full fill, a partial refill, and evaporative  
5 losses.

6 Q. How many of your 21 projects are onstream  
7 reservoirs? Is it easier to ask how many are not?

8 A. I believe -- sir, I believe we have three,  
9 maybe four, reservoirs that are not onstream.

10 Q. So in the range of 17 or so are onstream  
11 reservoirs?

12 A. Yes, sir.

13 Q. Of those 17 or so state water projects that  
14 are onstream reservoirs, how many of them allow for  
15 winter flows or provide for winter flows through the  
16 reservoir?

17 A. All except for, I believe, the East of Rock  
18 Creek Reservoir, and that's due to we have a butterfly  
19 valve operator in that system that is very prone to  
20 cavitation damage when it's just cracked open.  
21 Luckily, we have excessive seepage in the foundation of  
22 this project that is controlled through a filter system  
23 and drain system that we generate through the  
24 foundation in its glacial valley, of about 5 CFS in the  
25 stream below us, which is sufficient to maintain the



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1 river.

2 Q. And that was the exception?

3 A. Yes, sir.

4 Q. Of the 21 state projects, how many have  
5 winter maximum storage levels?

6 A. All the projects that we have have maximum  
7 winter storage levels. And that's strictly to make  
8 sure we do not overflow and spill these projects or  
9 cause excessive damage.

10 Q. Okay. Last, I'd like to turn to your  
11 rebuttal report and move quickly through your -- some  
12 of your opinions in that report. And that exhibit is  
13 M4; do you have that before you?

14 A. Yes, sir.

15 Q. Could you turn first to page 7?

16 A. Yes, sir.

17 Q. In your opinion, is it important to have  
18 experience operating a reservoir in order to  
19 effectively evaluate reservoir operations?

20 A. Yes, sir.

21 Q. And is that true for the Tongue River  
22 Reservoir?

23 A. Yes, sir.

24 Q. Why?

25 A. To effectively be able to discuss and

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1 evaluate reservoir operations, one has to have a sense  
2 of responsibility and liability for their decisions on  
3 that project. We're owners; we are liable for this  
4 project; we're liable for the safety considerations of  
5 this project. We have our contractual obligations and  
6 our obligations to the Northern Cheyenne Tribe as well.

7 Our decisions are always tempered with the  
8 evaluation of trying to evaluate and maximize mutually  
9 exclusive goals of filling the reservoir, ensuring we  
10 do it safely and dealing with any operational  
11 constraints we have.

12 The other issue here is unless you are trying  
13 to do this by projections six to eight months in  
14 advance on a system where your primary fill period is  
15 in the spring runoff, it is very difficult to just  
16 assume, well, let's do a simple accounting on the data  
17 that we already know and back count and say we could  
18 have done better here.

19 In that sense, you've eliminated whatever  
20 risks that you were trying to mitigate or minimize or  
21 accept in your filling of the operations of a  
22 reservoir.

23 Q. In your opinion, is realtime operation of a  
24 reservoir different than evaluating the operations  
25 after the fact?

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1 A. Very much so, sir.

2 Q. Turn, please, to page 8. Could you please  
3 generally describe here your concern about the  
4 evaluation conducted by Mr. Hinckley?

5 A. Yes. I think, to wrap it down to a short  
6 issue, is that Mr. Hinckley referred to 1950 storage of  
7 the reservoir as opposed to the after rehabilitation  
8 storage of the reservoir, knowing full well that the  
9 expansion of the reservoir from 1996 to 1999 was done  
10 to satisfy and meet needs of the Settlement Act of 1992  
11 and had to do with meeting the obligations and  
12 requirements under the state and federal law of the  
13 Northern Cheyenne Tribe-Montana Compact.

14 Ignoring those values and ignoring the  
15 obligations of those two water rights is -- well, it  
16 was wrong.

17 Q. Turn to page 9, please.

18 A. Yes, sir.

19 Q. And I think this concern talked about the  
20 concerns you had with the data set used by Mr. Hinckley  
21 in his analysis. Can you please describe that concern?

22 A. The data set for state line flows was  
23 probably okay. However, the data set used for the  
24 releases from the Tongue River Reservoir included the  
25 reservoir restriction time period for his analysis,

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1 knowing full well that from 1978, 1979 through 1999,  
2 outflow releases were adjusted to make sure the  
3 reservoir -- or attempted to keep the reservoir below  
4 elevation 3420. Using those flows within the analysis  
5 would skew those results.

6 Q. We talked at length before about the  
7 operations after the flood and before the  
8 rehabilitation project; right?

9 A. Yes, sir.

10 Q. And those operations were different than  
11 historic operations because of the damage?

12 A. Yes, sir. There was more of a sense of  
13 urgency of keeping the reservoir drafted down.

14 Q. And then we also looked at the changes that  
15 were done when the construction was actually occurring,  
16 where you had the levels very low?

17 A. Yes, sir.

18 Q. Could you turn, please -- at the back you  
19 have page 22 is Figure 1. What does this show?

20 A. Figure 1 is the daily mean inflows and  
21 outflows for Tongue River Reservoir for selected time  
22 periods. And the selected time periods for the outflow  
23 daily mean is 1942 to 1950. And the outflow daily mean  
24 from 2003 to 2012. And the inflows were also included  
25 from -- inflows state line gauge, daily mean time

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1 period from 1960 to 2012.

2 Q. We talked yesterday about the basin having a  
3 steep hydrograph; do you remember that?

4 A. Yes, sir.

5 Q. Does this figure show that steep hydrograph?

6 A. Yes, it does, sir, from the end of April  
7 through the end of June.

8 Q. And what conclusions do you draw from Figure  
9 1?

10 A. The conclusions from Figure 1 is our  
11 operations post-rehabilitation, all a pattern of  
12 operation, historical pattern of operation of the  
13 reservoir from day one. The -- looking at the outflow  
14 daily means, even with that, we have been operating  
15 more conservatively and trying to and making less  
16 releases than we have historically through the winter  
17 months. And our primary fill period, as always, has  
18 been from the April -- end of April through June time  
19 period.

20 Q. All right. This actually shows you're being  
21 slightly more conservative in operations compared to  
22 historic operations since -- let me try that question  
23 again.

24 Does Figure 1 show that you are being more  
25 conservative in the operations of the reservoir since

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1 the rehabilitation project, as compared to historic  
2 operations?

3 A. Our average operations have been more  
4 conservative since post-operations --  
5 post-rehabilitation than pre, yes.

6 Q. Let's turn to Figure 2 before we stumble over  
7 our words more.

8 What does Figure 2 show?

9 A. Figure 2 is the daily mean outflows for  
10 Tongue River Reservoir for selected time periods.  
11 Again, this is for all outflows from the project. And  
12 this includes the daily mean outflows from 1961 through  
13 1970 as well.

14 Q. What conclusions do you draw from this  
15 figure?

16 A. Again, what I was attempting to do was just  
17 break out the mean outflows from 10-year periods as  
18 opposed to looking at a 50- or 60- or 70-year period to  
19 see if there were trending issues going on. And,  
20 again, it's showing for the outflows that we have  
21 currently going on, is that we're following the  
22 historic pattern of use that's been well established.  
23 And, again, we are operating more conservatively than  
24 we have in the past.

25 Q. Turn please, to Figure 3. What does Figure 3

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1 show?

2 A. Figure 3, again, is the daily mean outflows  
3 for Tongue River Reservoir. This one has the time  
4 period from 1991 through 1999 included into it, as  
5 shown by, if you have a colored graph, the green line.

6 What the issue here was to show was that even  
7 with -- between the historical flows of pre-1950 to the  
8 time period where we're dealing with construction  
9 operations, our pattern of use is still the same. And,  
10 again, we are still operating more conservatively than  
11 the other conditions, than the post-rehabilitation  
12 efforts.

13 Q. Turn with me, please, to the text on page 14.  
14 Do you have that?

15 A. Yes, I do.

16 Q. Could you please describe the concern that  
17 was raised -- or that you have with Mr. Hinckley's  
18 analysis, and describe your response?

19 A. This concerns the paragraph F operations,  
20 winter releases and storage?

21 Q. Yes.

22 A. The issues that I had with the report was  
23 that Mr. Hinckley was going off of the 1982 memo that  
24 we discussed earlier, the April 1982 memo concerning  
25 the 50 CFS for stock water.

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1           It appeared to me that there was an attempt  
2 to say, well, the 50 CFS is the minimum allowance. And  
3 anything above that release was a foregone opportunity  
4 in the reservoir operations. I took issue with that,  
5 again, based on our historical pattern of use but even  
6 more so from dam safety and operational issues on this  
7 project.

8           This was a large basin. And we are balancing  
9 many different components in this basin and operating  
10 this project in a prudent and safe manner.

11           Again, the issues of trying to state that if  
12 we release more than 50 CFS or 75 CFS is a foregone  
13 opportunity ignores common sense.

14           Q. You also have a problem with the sources that  
15 were relied upon by Mr. Hinckley?

16           A. Yes. And the McBeath memo, spelled  
17 M-a-c-B-e-a-t-h [sic].

18           Q. And what's your concern with that memo?

19           A. Has -- again, as I said earlier, the write-up  
20 of the stock water claim from Mel McBeath appeared more  
21 to be just the vacation of issue of trying to add a  
22 stock water right to the State's underlying water right  
23 for the purposes of selling stock waters, I suppose.

24           In truth, the bottom line is the right of the  
25 State Water Projects is for sale and marketed for sale



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1 to the association.

2 Q. And we saw there was subsequent analysis by  
3 the DNRC; right?

4 A. Yes, sir.

5 Q. And I think that McBeath memo was part of the  
6 adjudication. Do you know if the adjudication ever  
7 adopted a 50 CFS winter flow for stock water?

8 A. No, sir, it did not.

9 Q. You also -- in your report at page 15, you  
10 mention a concern with the GeoResearch report and that  
11 information. Can you explain that concern?

12 A. Excuse me. Were you looking at the last  
13 paragraph on page 15?

14 Q. Yes.

15 A. Yes. One of the issues brought up is  
16 Mr. Hinckley was using the GeoResearch report. And I  
17 believe he was using the September -- I hope he was  
18 using the September 7 GeoResearch report. I don't  
19 know. I can check references.

20 What's important to note is the GeoResearch  
21 report was done -- I should back up. The Tongue River  
22 modeling studies, I believe there were two modeling  
23 reports in 1990. There was a final report written in  
24 June of 1990. Then later on, there was a draft report  
25 after that report and then another draft GeoResearch

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1 report in 1991 looking at additional scenarios of the  
2 models.

3 That was in 1991. The Tongue River filed an  
4 environmental impact statement. In part of the  
5 environmental impact statement, to meet the  
6 requirements for the project, they incorporate the  
7 model into the document and the various runs. And they  
8 took the cases from that same modeling study and came  
9 out with a 150 CFS median outflow for the winter flows.

10 Mr. Hinckley kept with the original reports  
11 that were using 75 CFS as their assumption and not  
12 going forward to the final environment impact statement  
13 where the models were run with the other numbers.

14 Q. On page 16, you indicate that a reasonable  
15 standard of care must be used when making operational  
16 decisions on high-hazard structures that affect public  
17 health and safety; do you see that?

18 A. Would you direct me to the part of the page,  
19 sir?

20 Q. You bet. It's in the middle paragraph,  
21 second sentence from the bottom of that paragraph.

22 A. Yes, sir.

23 Q. And I think you've described that earlier in  
24 your testimony; is that right?

25 A. Yes, sir.

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1 Q. I think it will help if we turn to Figure 4.  
2 And that might help you illustrate this point. Do you  
3 have Figure 4 before you?

4 A. Yes, sir, I do.

5 Q. And this is done in a series of Figure 4, 5,  
6 6. If you'll start with Figure 4, what does Figure 4  
7 show?

8 A. Figure 4 shows -- it's a state line inflow  
9 comparison of water year 2002 and 2003. And this  
10 correlates -- I was putting back-to-back years  
11 together; basically showing variability that we have in  
12 this system for inflows.

13 The 2002 water year was our drought year out  
14 of those two years. And it shows on the inflow  
15 hydrograph, we didn't get a lot of water across the  
16 state line.

17 However, the 2003 water year was showing to  
18 have the same base flows in the wintertime. But we  
19 have -- and this year we had the precipitation event in  
20 March, prior to runoff, that actually put a lot of  
21 water into our system. We had about 2000 CFS crossing  
22 state line in a very short duration.

23 These are the issues that if we were going  
24 into the wintertime and setting our flow, our outflows  
25 at a minimum release upward of 75 CFS, and not going

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1 back, we would have had -- we would have been full  
2 already before this end of March. And we would have  
3 passed that straight through the system. And if it  
4 would have been a colder year or ice had not come off  
5 the reservoir at that time yet, we would have pushed  
6 the ice over the system as well. These are just  
7 situations that point that out.

8 Q. You have to be prepared for that kind of  
9 variability?

10 A. We have to be aware of the situation in the  
11 basin as with all of our basins.

12 Q. Turn, please, to -- the next page, Figure 5.

13 A. Yes, sir.

14 Q. What does Figure 5 show?

15 A. It's a continuation, just a four-year time  
16 period between Figure 4 and Figure 5. Figure 5 is  
17 water year 2004 and 2005. And for good measure to show  
18 a very wet year of 2011.

19 And I will just say shortly, 2011 we had  
20 flooding across Montana from one side to the other. It  
21 was a very large precipitation year for the entire  
22 state.

23 The base flows are relatively the same. And,  
24 in fact, 2004, we had nothing for runoff in that year,  
25 and that was a bad drought year. Going into water year

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1 2005, it was actually looking worse than 2004. Our  
2 inflows were lower than 2004 until the end of May, and  
3 then we had precipitation events that filled and  
4 spilled our reservoir rather quickly.

5           And to put things in perspective of this  
6 basin, the 2011 system, which is an unusual event, but  
7 we had five back-to-back storm events come through in  
8 May. And we filled and spilled our reservoir after the  
9 first peak came through and mitigated that first peak.  
10 But at that point in time, we were full. And inflows  
11 to outflows was for the other three or four events. So  
12 even with storage, we could only mitigate so much.

13           Q.    And finally, if you'd turn, please, to Figure  
14 6.

15           A.    Yes, sir.

16           Q.    What does Figure 6 show?

17           A.    Figure 6 is a USGS printout for the Tongue  
18 River at state line near Decker, Montana, gauge. The  
19 reason I put Figure 6 in is this is the annual peak  
20 streamflow in cubic feet per second of values per year.  
21 So it's nothing more than just a point in time and the  
22 peak flow going across state line. But that ties into  
23 the runoff events.

24                   And primarily, I think one could look at the  
25 data set there and say that the vast majority of flows

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1 will be -- peak flows will be above 2000 CFS. Between  
2 2000 to 5000 CFS would sandwich the peak flows crossing  
3 state line. Again, pushing into the issue of our  
4 primary fill period for this project is the spring  
5 runoff.

6 Q. Thank you.

7 MR. WECHSLER: I have no further questions.

8 SPECIAL MASTER: Okay. Can I just ask one  
9 quick question, which is not a question of the witness.  
10 But has the April 1937 declaration of intent, with  
11 respect to the Tongue River Reservoir, has that been  
12 introduced into evidence?

13 MR. WECHSLER: I don't believe so, Your  
14 Honor.

15 SPECIAL MASTER: Are you planning on doing  
16 that at any stage?

17 MR. WECHSLER: I'm not sure that that's  
18 listed as an exhibit.

19 SPECIAL MASTER: By either side?

20 MR. KASTE: I don't believe so.

21 MR. WECHSLER: I don't believe so either.

22 SPECIAL MASTER: Okay. So I was just curious  
23 because I'd seen several references to it. But I  
24 didn't see it on the exhibit list. So I wanted to make  
25 sure I hadn't forgotten anything.

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1           So I would suggest at this point, I think I'm  
2 going to wait for my questions, again, until you've  
3 asked your cross-examination questions, Mr. Kaste. And  
4 I know that the court reporter, given the highly  
5 technical level of the questions today, would love to  
6 have slightly more frequent breaks today. So I would  
7 suggest maybe we take our 15-minute break right now.  
8 And then we can take, like, a little five-minute break  
9 in between when we come back and when we get to the  
10 very end of today. Does that sound fine?

11           MR. KASTE: That's fine. And I appreciate  
12 you not trying to steal my thunder.

13           SPECIAL MASTER: So let's come back at 2:30.

14                           (Recess taken 2:13 to 2:32

15                           p.m., October 24, 2013)

16           SPECIAL MASTER: Okay. Everyone can be  
17 seated excepted Mr. Kaste. There's no chair.

18           MR. KASTE: Are you --

19           SPECIAL MASTER: Yes.

20                           CROSS-EXAMINATION

21 BY MR. KASTE:

22           Q. Good afternoon, Mr. Smith.

23           A. Good afternoon.

24           Q. I want to start just a little bit and talk  
25 with you about some of your testimony in which you

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1 talked about the process through which you and the  
2 Tongue River Advisory Committee make predictions about  
3 what the flow is going to be like in a certain year and  
4 what actions you take in response. Do you remember  
5 testimony about that?

6 A. Yes, I do.

7 Q. And I think you talked to us about a whole  
8 host of factors that you take into consideration in  
9 deciding what to do with your reservoir; right?

10 A. Yes.

11 Q. And sometimes you make a decision we need to  
12 store, and sometimes you make a decision we need to  
13 draft; right?

14 A. Yes. And in tossups, yes.

15 Q. Sure. And those decisions are made, if I  
16 understand right, by the Tongue River Reservoir  
17 Advisory Committee?

18 A. Those recommendations are made by the  
19 Advisory Committee.

20 Q. And then day to day, the operational  
21 decisions are made primarily by the Water Users'  
22 Association in consultation with you?

23 A. Correct?

24 Q. That's a fair way to describe it?

25 A. Yes. The association is responsible for the



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1 day-to-day operations under our guidance.

2 Q. All right. Nobody from Wyoming is a member  
3 of the Tongue River Advisory Committee, are they?

4 A. No, they are not.

5 Q. Nor are they participants in your  
6 decision-making process in consultation in the Water  
7 Users' Association; correct?

8 A. No, they are not.

9 Q. We can agree, however, that the decisions  
10 that you make can have an adverse effect on upstream  
11 junior appropriators, can't they?

12 A. I don't know if I can agree to that, sir.

13 Q. Well, if you make a decision to release water  
14 and then you call on the junior appropriators, that  
15 could adversely affect them, couldn't it?

16 A. The issue here is if we're approximating the  
17 river flows downstream to meet our historical  
18 operations and historical practice, I wouldn't call  
19 that as an adverse effect to the upstream juniors.

20 Q. It could affect their ability to use water;  
21 how is that? Isn't that more neutral?

22 A. Yes.

23 Q. Thank you. You used the term "fill" many  
24 times during the course of your testimony. And I don't  
25 think anybody ever asked you to define how you were

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1 using the term fill. So when you said fill, what do  
2 you mean?

3 A. Could you put that in a specific context of  
4 the --

5 Q. Sure. At various points, I think you said  
6 Tongue River Reservoir filled and sometimes it filled  
7 and spilled, for example, in 2005 after the big spring  
8 rains.

9 A. Thank you, sir. Yes. In that context,  
10 filling to -- when I said fill, I'd mean to elevation  
11 3428.4, which is the spillway crest elevation.

12 Q. And that's the current spillway crest  
13 elevation; is that right?

14 A. Yes, sir.

15 Q. All right. And what date -- do you have a  
16 specific date where you measure whether or not the  
17 reservoir has filled or not?

18 A. The -- are you asking me that we consider the  
19 reservoir not filled if it doesn't meet a certain date,  
20 or is it --

21 Q. Well, I'm trying to figure out if you just  
22 look at the peak level inside your reservoir and make a  
23 determination about whether it filled or not based on  
24 that peak level or if you've picked a date and said,  
25 for example, July 1 is the date we're looking to

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1 ascertain whether or not the reservoir has filled or  
2 not?

3 A. Oh, no. We ascertain whether it's filled or  
4 not through the runoff that we have it filled. There  
5 is no specific date.

6 Q. Are you looking, then, at the peak level of  
7 the reservoir to make that determination?

8 A. Yes.

9 Q. And that can happen on different days in  
10 different years; right?

11 A. That has happened in May, and this has  
12 happened in July, yes, sir.

13 Q. All right. You talked to us a lot about the  
14 historic operations of the reservoir and the -- as  
15 we've gone through time, the various changes. And can  
16 we agree that there have been a lot of changes in  
17 Montana with regard to the Tongue River Reservoir since  
18 1950?

19 A. I would tend to not agree with that from the  
20 standpoint we've had -- we had rehabilitation of the  
21 project. I would not consider that a lot of changes.

22 Q. Okay. Let's go through some of them. And if  
23 at the end we get to a lot, we do. The first thing I'd  
24 like to talk about is in Exhibit M309A.

25 A. Yes, sir.

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1 Q. You talked about this exhibit with  
2 Mr. Wechsler. And I'm really interested in the first  
3 sentence of that exhibit. And I'll read it so we can  
4 go slow. It says, "As can be verified by the records  
5 of storage published in the U.S. Geological Survey  
6 reports, the reservoir was not operated at the maximum  
7 capacity of 68,000 acre-feet. Instead it was operated  
8 near 45,000 acre-feet, with the exception of 1944,  
9 1959, 1964, 1965, and 1967."

10 Did I read that correctly?

11 A. Yes, sir.

12 Q. And that's --

13 SPECIAL MASTER: Actually, sorry to  
14 interrupt. Can you tell me what page?

15 MR. KASTE: M309A, first page.

16 SPECIAL MASTER: First page, thanks.

17 MR. KASTE: First sentence after the heading  
18 "Historical operation."

19 SPECIAL MASTER: Thanks.

20 BY MR. KASTE:

21 Q. And we can agree that that's true; back in  
22 the 1950s, this reservoir was operated at a level about  
23 45,000 acre-feet consistently with some outliers?

24 A. Well, I would say the first three years were  
25 operated for filling operations and then filled in

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1 1944. And then whatever the flow rates were  
2 afterwards, yes.

3 Q. And that's because at the time, the people  
4 running the reservoir were trying to create a firm  
5 yield of 32,000 acre-feet in order to meet the  
6 contracts with the Tongue River Reservoir Water Users'  
7 Association; right?

8 A. No, sir.

9 Q. No? It is true that there were contracts for  
10 the -- between the Tongue River Water Users'  
11 Association and the board up to 32,000 acre-feet of  
12 water when the reservoir was initially constructed and  
13 through 1969; right?

14 A. Yes. There were 32,000 shares marketed.

15 Q. And that's what the reservoir -- the people  
16 running the reservoir were trying to satisfy, are those  
17 32,000 shares; right?

18 A. Yes. But there's more to it than just that,  
19 sir.

20 Q. All right. Well, let's look at the contract,  
21 which is Exhibit M529A.

22 A. I have it.

23 Q. All right. And this is the contract from  
24 1937 between the Tongue River Water Users' Association  
25 and the board; right?

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1           A.     This is the State Water Conservation Board  
2 and the Tongue River Water Users' Association contract;  
3 yes, it is, sir.

4           Q.     All right. I just want to look at a couple  
5 pieces in this contract. First, I'd like to look at  
6 Section 4 on page 3. Well, first, we can agree that  
7 the purpose of this contract was to allow the board to  
8 sell 32,000 shares to the Water Users' Association;  
9 right?

10          A.     Yes, it is.

11          Q.     And in exchange, the water users were going  
12 to help reimburse the board for the cost of the  
13 reservoir; right?

14          A.     Yes, sir.

15          Q.     All right. And then in Section 4, in the  
16 second sentence, it says, "The association further  
17 agrees that in the event that the live capacity of the  
18 project, when completed, is greater than that estimated  
19 and the amount of water available from that project  
20 will permit the furnishing of more than 32,000  
21 acre-feet of water annually, the association promptly  
22 will enter into additional water purchase contracts so  
23 that water in the amount of the actual live capacity of  
24 the project will be sold annually pursuant to  
25 outstanding water purchase contracts. The association

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1 shall not furnish or deliver to any water purchaser in  
2 any year an amount of water which shall be in excess of  
3 the amount to which such water purchaser is entitled  
4 under his water purchase contract."

5 Did I read that right?

6 A. Yes, sir.

7 Q. So this is back right when they're getting  
8 ready to start delivering water. And the contract  
9 says, if it turns out we got more water, we're going to  
10 have to sell more contracts; right?

11 A. Yes, sir.

12 Q. And the people who have these contracts  
13 aren't entitled to any more water than is provided in  
14 their contracts; correct?

15 A. That is what that says, yes.

16 Q. All right. Let's turn the page and go to  
17 page 5. And look at Section 6. It says, "In the event  
18 that from time to time, a supply of water is available  
19 from the project temporarily in excess of the amount  
20 needed and to be needed to furnish all water purchasers  
21 under contract therefor, the association shall sell  
22 such water at the highest price obtainable, but in no  
23 event shall such waters be sold at a price less than  
24 the amount being paid by persons under water purchase  
25 contracts."

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1 Did I read that right?

2 A. Yes, you did.

3 Q. So in times of excess supply, the contract  
4 says, we need to go sell some more contracts for that  
5 water; right?

6 A. It says -- it doesn't say you need to. It  
7 says you can.

8 Q. I'm sorry. I didn't hear that.

9 A. It says you can sell more water if you have  
10 it. You do not need to.

11 Q. Right. What I'm getting at is they don't  
12 give water away for free; right?

13 A. No, sir.

14 Q. Very good. And we can agree that back in  
15 1950, the amount of water the Tongue River Water Users'  
16 Association could lawfully, pursuant to their contract,  
17 put to beneficial use was 32,000 acre-feet except in  
18 times of excess when they sold additional shares;  
19 correct?

20 A. Well, except for the other clause that you  
21 pointed out, sir, that to market the yield, I believe.  
22 Although they did not have additional markets in 1950.

23 Q. Right. That just didn't happen. They didn't  
24 do that additional marketing in 1950; right?

25 A. No, sir.



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1 Q. In fact, we know from the next contract in  
2 1969, which is Exhibit M529C, if you look on the third  
3 page of that contract, in the second whereas clause on  
4 that page, it's the largest paragraph on page 3, it  
5 says -- do you have it?

6 A. Yes, sir.

7 Q. Page 3, big paragraph. I'll just read the  
8 beginning: "Whereas" -- and this is 1969; right?

9 A. Yes, sir.

10 Q. "Whereas, the association has never been able  
11 to market, to the date hereof, as much as 32,000  
12 acre-feet annually."

13 Did I read that right?

14 A. Yes, sir.

15 Q. So we know as of 1969, they hadn't been able  
16 to sell the 32,000 acre-feet of water that they had  
17 originally contemplated; right?

18 A. That's the statement here, sir.

19 Q. Okay. So back in 1950, when they were  
20 operating the reservoir at capacity, generally, of  
21 45,000 acre-feet, they were providing to the water  
22 users something somewhat less than 32,000 acre-feet of  
23 water; right?

24 A. If I may try to explain something else in  
25 those averages that you've been stating for the

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1 pre-1950 volumes of the reservoir, sir. Immediately  
2 after the filling of that reservoir and the first  
3 filling operations, there were some severe seepage and  
4 leakage issues, I believe in 1941 or '42. And some  
5 other periods that you have, you'll see some excessive  
6 discharges in the fall, winter. There were different  
7 grouting programs and repair work that occurred. So  
8 the reservoir had been drafted substantially in some of  
9 those years.

10           So to say that the reservoir wasn't any more  
11 than 45,000 an average is somewhat of a misstatement.  
12 Yes, that was the averages. But that's including two  
13 or three years of probably very low elevations that  
14 were due to construction issues that are put into that.

15           Q. Those are the first couple years after  
16 completion you're talking about?

17           A. There were a couple issues in there. And I  
18 cannot remember the specific dates. But there were  
19 some flows where they did some exceedingly high  
20 drafting operations in the wintertime to wrap up and  
21 finish their grouting operations.

22           Q. Okay. Well, Exhibit M309A, of course, goes  
23 up to 1967. So it includes a whole bunch of years  
24 after 1950, too; right?

25           A. Yes, sir.

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1 Q. And that was t-o-o, as in also. Not the year  
2 1952.

3 So let's go ahead and look at, then, so maybe  
4 we can get a better sense of this, Montana  
5 Demonstrative Exhibit 3; do you have that?

6 A. One minute, sir.

7 SPECIAL MASTER: It's the one that looks like  
8 this.

9 THE WITNESS: Yes, sir. I was hoping to be  
10 done, so I sort of missed my --

11 SPECIAL MASTER: Understood. It's fine. It  
12 helps sometimes to actually know what the exhibit is  
13 that you're looking for.

14 THE WITNESS: Bear with me, Mr. Kaste. I  
15 seem to have rearranged some things.

16 BY MR. KASTE:

17 Q. That's all right. You have a big stack.

18 So I'm looking at the first page of Montana  
19 Demonstrative Exhibit No. 3. That's a Table 4A from  
20 Mr. Book's report; right?

21 A. Yes, sir.

22 Q. All right. Which month do you think we ought  
23 to look at if we want to determine -- Exhibit M309A  
24 calls it "operated near 45,000 acre-feet." So which  
25 month should we look at to determine what they were

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1 operating near on a typical basis? Should we look at  
2 May or June?

3 A. I would -- these are end-of-month contents.  
4 So I'd probably look at June. It should be the end of  
5 month June.

6 Q. Okay. Well, let's look at June 1940. The  
7 end-of-month contents were 36,900; correct?

8 A. Correct.

9 Q. 1941, are 45,000; correct?

10 A. Yes. And '58 and '65, we see apparently  
11 runoff was sooner those years.

12 Q. All right. So let's go June of 1943, 40,000;  
13 right?

14 A. Yes, sir.

15 Q. And then we have this 75,760 acre-feet of  
16 water at the end of June 1944; right?

17 A. Yes, sir.

18 Q. You talked with Mr. Wechsler about that one.

19 A. Uh-huh.

20 Q. And if I understand it, that's some  
21 indication to you that the operating -- or the original  
22 capacity of the reservoir is somewhere in the 72 or  
23 73,000 acre-feet range; right?

24 A. Yes, sir.

25 Q. What's a surcharge pool?

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1 A. Surcharge pool, sir?

2 Q. Yes.

3 A. Are you asking about the pool capacity above  
4 the spillway crest?

5 Q. Yes.

6 A. Surcharge pool is exactly that, then, for  
7 that purpose. Some people call it a flood pool; some  
8 people call it surcharge. It is the available storage  
9 located above the spillway crest. And it's part of the  
10 system that helps route your flood events through your  
11 reservoir.

12 Q. So that is the level above which your  
13 reservoir starts spilling; right?

14 A. Yes, it is.

15 Q. And that's water that ultimately you can't  
16 keep because it's over the spillway; right?

17 A. Yes, sir.

18 Q. All right. And that happens not just with  
19 the dam back in the old days, but we can see that,  
20 can't we, in 2008? If you look at May 2008 on the  
21 second page. You see a capacity for an end-of-month  
22 contents of 82,565 acre-feet; right?

23 A. Yes, sir.

24 Q. And that's almost 6000 acre-feet over the  
25 current capacity of the Tongue River Reservoir; right?

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1 A. No, sir. A little over 3000.

2 Q. Little over 3000? I -- oh, 79. I can't add.  
3 I'm sorry. Or subtract, whichever of the two I'm  
4 supposed to be doing.

5 But that happens sometimes, right, when you  
6 get a big runoff event, you get higher than your  
7 spillway, and all that water eventually makes its way  
8 over the top; right?

9 A. Yes, sir.

10 Q. So that's not an indication in and of itself  
11 of the capacity of your reservoir; it's an indication  
12 that it's over the top of the spillway?

13 A. Yes, sir. But the data from that, I think it  
14 was a USGS page that was brought up from 1944 had a  
15 statement in the remarks column that put the elevation  
16 of the spilling event at that higher value at 3424.8 or  
17 .9. It was, I think, .4 or .5 feet higher than the  
18 spillway crest. So it defines surface pool that you're  
19 talking about, your flood pool.

20 Q. I see. If you turn a little bit farther back  
21 in this exhibit. Nope not this one. We'll get to it.  
22 It is this one, M309A. And there is page -- the second  
23 to the last page has the No. 478 in the top.

24 A. Yes, sir.

25 Q. All right. In there, it talks about

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1 extremes. And it talks about this 1944 event where the  
2 reservoir reached 75,760 acre-feet; right?

3 A. Yes, sir.

4 Q. At an elevation of 3424.9 feet; right?

5 A. Yes, sir.

6 Q. And then in the next section, in the remarks  
7 section, it talks about the present usable capacity  
8 being 68,000 acre-feet at the spillway crest, which is  
9 at an elevation of 3424.4 feet; right?

10 A. Yes, sir.

11 Q. So at the spillway crest, the capacity was  
12 68,000 acre-feet; right?

13 A. No, sir. Not during that extreme event.

14 Q. During that event, there was water over the  
15 spillway; right?

16 A. On the statement in the remarks column on  
17 that same site, sir, it says, "Dam completed in May of  
18 1939. [And] Prior to October 1947, usable capacity was  
19 73,900 acre-feet. [This is] Present usable capacity of  
20 68,000 at spillway crest." And I would take that to be  
21 the present for whenever this document was printed,  
22 which is 1967.

23 Q. Correct. All right.

24 SPECIAL MASTER: Can I just stop for a  
25 second? I want to make sure I'm exactly the same place

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1 you are. Which exhibit?

2 THE WITNESS: This was Exhibit M309A, sir.

3 SPECIAL MASTER: Yep. And you're talking  
4 about the remarks column?

5 THE WITNESS: Yes, sir. On the Bates  
6 No. 03296, the top of the page, we have "location,"  
7 "drainage area" -- the title is on the side -- "gauge,"  
8 and then we have "extremes" and "remarks."

9 SPECIAL MASTER: Okay. I see where you are.  
10 Thank you.

11 THE WITNESS: Yes, sir.

12 BY MR. KASTE:

13 Q. Now we're going to leave that. So let's --  
14 now we understand why we can have a number that's  
15 75,000 acre-feet in June of 1944. So let's move on  
16 from 1945 to 1950.

17 So we're past that feeling-out period  
18 following construction of the reservoir; right?

19 A. Yes, sir.

20 Q. All right. Fair enough. And we look at  
21 June 1945 and the end-of-the-month contents were  
22 38,640; correct?

23 A. Excuse me, sir. Are you looking at the  
24 contents in acre-feet on the same chart here? Of the  
25 309A.



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1 Q. I'm sorry. I went back to Montana  
2 Demonstrative Exhibit 3. Got sidetracked. Now I'm  
3 back.

4 A. Which year, again, sir?

5 Q. 1945?

6 A. I'm there, sir.

7 Q. June, the end-of-month contents are 38,640  
8 acre-feet; right?

9 A. Yes, sir.

10 Q. And then it looks like the reservoir stored  
11 throughout the remainder of the summer, didn't it?

12 A. Yes, sir, it does.

13 Q. That's kind of odd; right?

14 A. Sir, it's not -- does not follow the general  
15 trend.

16 Q. Fair enough. The next year, 1946, in June,  
17 the end-of-month contents were 41,730; right?

18 A. Yes, sir.

19 Q. 1947, I have 40,220 in June; correct?

20 A. Yes, sir.

21 Q. 1948, I have 46,490; correct?

22 A. Yes, sir. You show a 26,000 bump from May to  
23 June, yes.

24 Q. All right. And 1949, I have 37,820 in June;  
25 correct?

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1 A. Yes, sir.

2 Q. 1950, I have 34,550 acre-feet in June;  
3 correct?

4 A. 1950?

5 Q. Yes.

6 A. Yes, sir, I got it.

7 Q. Okay. So the five years preceding 1950, in  
8 June, the reservoir doesn't actually even get over  
9 45,000 acre-feet; right?

10 A. No, sir. But it's filled from the 1950 from  
11 5000 acre-feet to the 36,000. There is some serious  
12 drafting occurring in some of these years. And I  
13 would -- I would not know what was going on in that  
14 time without going through a lot of engineering reports  
15 and records that apparently haven't been found yet.  
16 'Cause these are some very low numbers. We actually --  
17 it appears that 1947, the reservoir was drained.

18 Q. Do you know whether, during these period of  
19 years preceding 1950, whether the board was able to  
20 satisfy the contractual demands of the Water Users'  
21 Association?

22 A. You would have to confer with the association  
23 on their records. But I believe they were satisfied on  
24 some of their needs. But I cannot verify that.

25 Q. Okay. Now, after 1950, we get to 1969, and

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1 we have this second contract that you talked about.  
2 And that's Exhibit M529B; correct? I meant C. Did you  
3 find it?

4 A. 529C, sir?

5 Q. Yes.

6 A. Yes, I did.

7 Q. That's the 1969 contract between the board  
8 and the Tongue River Water Users' Association?

9 A. Yes, it is, sir.

10 Q. And that contract allowed the Tongue River  
11 Water Users' Association to sell 8000 more shares;  
12 correct? From 32 to 40.

13 A. Yes, sir.

14 Q. Okay. And in addition, here's a bit in this  
15 contract on page 15, and I'm looking at Section 13 on  
16 page 15. Are you with me?

17 A. Yes, sir. Section 13?

18 Q. Yes. And most of the way down that  
19 paragraph, there's a sentence that says, "The board  
20 commits itself to permit a sufficient amount of water  
21 to flow out of the reservoir and down the river in the  
22 wintertime as for water for livestock and to keep the  
23 river a live river."

24 Did I read that correctly?

25 A. Yes, sir.

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1 Q. Okay. That's new, isn't? That was new in  
2 1969; right?

3 A. The language is new, yes, sir.

4 Q. All right.

5 A. I don't believe the operations changed,  
6 though.

7 Q. After 1969, you have the flood event that you  
8 described in 1978; right?

9 A. Yes, sir.

10 Q. And that constrained your operations from  
11 1978 until the reservoir was rehabilitated; correct?

12 A. It did.

13 Q. It did. And I want to make sure I understand  
14 this. 'Cause I thought I heard you say that between  
15 1978 and the time that the reservoir was rehabilitated,  
16 the board was able to meet the contractual needs of the  
17 Water Users' Association. Did I hear that right?

18 A. Would you say that again, please, sir?

19 Q. During that period of time, from 1978 through  
20 the reservoir rehabilitation project, was the board  
21 able to meet the contractual needs of the Water Users'  
22 Association?

23 A. I don't know if I said that, sir. I'm not  
24 aware that they did or did not make the obligations.

25 Q. Maybe you said, and tell me if this is right,

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1 that the reservoir was operated solely to meet those  
2 contractual obligations.

3 A. Yes, sir. I think the term was to the height  
4 now sufficient to make the contractual obligations.

5 Q. And they were able to do that even though the  
6 reservoir was impaired to a certain extent?

7 A. They were able to do that if there was enough  
8 water in the system to get the reservoir up to  
9 elevation 3420, which then precluded any care of the  
10 water or additional waters for shortages for the next  
11 year.

12 Q. And then you have the rehabilitation project.  
13 That's completed, adding to the life of this reservoir.  
14 And the reservoir capacity is increased by  
15 approximately 10,000 acre-feet; correct?

16 A. Yes, sir.

17 Q. All right. Now, during the winter months,  
18 back in 1950 during this period you've been talking  
19 about, historic operations, am I correct in  
20 understanding that once irrigation ends, over the  
21 course of the winter months, the only people with water  
22 rights downstream of the reservoir are the people with  
23 stock water rights?

24 A. I don't know if that's true, sir.

25 Q. Nobody is irrigating during the winter,

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1 right?

2 A. No, sir, not to my knowledge.

3 Q. I think you mentioned it was cold during the  
4 winter; right? My understanding is that there are some  
5 stock water rights between the reservoir and the  
6 Yellowstone River; correct?

7 A. Yes, sir.

8 Q. And those stock water rights are all  
9 year-round 'cause cows need to drink in winter, too;  
10 right?

11 A. Yes, sir.

12 Q. And so those water rights would have the  
13 ability to call on the reservoir during the course of  
14 the winter and say, release some water for my  
15 preexisting stock water right; correct?

16 A. I would not say in those terms. I'd say we  
17 just need to pass the river through.

18 Q. Fair enough. But if there wasn't sufficient  
19 water passing through, then they could call your  
20 reservoir and say, you need to change your operations  
21 to make sure I get my water?

22 A. It would be up to the inflow of the  
23 reservoir, sir.

24 Q. Okay. I get it. If there was sufficient  
25 water coming in to meet their needs, then you could

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1 accommodate them?

2 A. Yes, sir.

3 Q. All right. Fair enough. So do I understand,  
4 you're not aware of other rights between the reservoir  
5 and the Yellowstone River that could call on the  
6 reservoir during the winter months?

7 A. There are other rights, I believe, Fish and  
8 Game, that are junior to us. However, they have been  
9 accustomed to a pattern of use, and it's a historical  
10 pattern over the last 70 years that they should be  
11 accustomed to. If we adversely change our operations,  
12 then I think they would have a right to complain on  
13 that.

14 Q. Is the Game and Fish right 1973 or 1978?

15 A. I believe it was 1978. But I don't know for  
16 certain.

17 Q. Fair enough. Well, let's finish up on stock  
18 water while I'm thinking of it. One of the things you  
19 talked about is Exhibit -- and I'm going to have to ask  
20 you to tell me. Which exhibit did you look at that had  
21 the list of the various winter release levels? It was  
22 a two-page document created by DNRC. Do you have that  
23 one in front of you?

24 A. Would that be Exhibit M284? Yeah, M284.

25 Q. Yes. You talked to Mr. Wechsler about M284.

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1 And it has justifications for various numbers that  
2 people were looking at for winter releases; is that  
3 fair?

4 A. Yes, sir.

5 Q. Okay. And the very last one, number -- I  
6 think it's No. 9, says 50 CFS. And that's based on a  
7 memorandum from a guy named Melvin McBeath; right?

8 A. McBeath, sir.

9 Q. Thank you. I'm going to hand you, if I may,  
10 Exhibit W11 and ask you if that's Mr. McBeath's  
11 memorandum to which you were referring?

12 A. I believe it is.

13 Q. That's an April 16th, 1982, memorandum;  
14 correct?

15 A. Yes, it is. It's a memorandum dated  
16 April 16, 1982.

17 Q. Who is it from?

18 A. This is from Melvin F. McBeath.

19 Q. And did he work at -- for the State of  
20 Montana in some capacity?

21 A. Yes, sir. Here he's titled Water Management  
22 Bureau.

23 Q. And who is the memorandum to?

24 A. It is to Richard L. Bondy, chief of the  
25 Engineering Bureau.



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1 Q. And he worked for the State of Montana, too,  
2 at the time; right?

3 A. Yes, he did.

4 Q. Is this a record that's kept by the  
5 Department of Natural Resources and Conservation here  
6 in Montana?

7 A. Yes, sir.

8 Q. And you've seen it before?

9 A. Yes, I have seen this document.

10 Q. And I assume you reviewed it in the course of  
11 preparing your opinions for this case?

12 A. Yes, I did review it some time ago.

13 Q. All right.

14 MR. KASTE: I'd move for the admission of  
15 Exhibit W11.

16 MR. WECHSLER: No objection.

17 SPECIAL MASTER: Exhibit W11 is admitted.

18 (Exhibit W011 admitted.)

19 BY MR. KASTE:

20 Q. All right. Now, at the end of this  
21 memorandum, before the citations to the literature,  
22 Mr. McBeath tells Mr. Bondy that it is his estimation,  
23 based upon professional judgment, that a flow of 50 CFS  
24 would be required to deliver the consumptive flow rate  
25 a minimum of 190 miles downstream from the dam.

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1 Therefore, the livestock flow rate claim will be 50 CFS  
2 with a consumptive annual volume of 29 acre-feet per  
3 year.

4 Did I read that right?

5 A. Yes, sir.

6 Q. Okay. And if I understand your testimony,  
7 this is Mr. McBeath saying, Mr. Bondy, this is what our  
8 DNRC claim for stock water rights should be; correct?

9 A. Melvin McBeath, at this time, he was with the  
10 Water Management Bureau, which was not part of the  
11 Engineering Bureau. So it looks like he was doing an  
12 evaluation for Mr. Bondy at the time to see, well, if  
13 he was going to try to file another right, it would be  
14 in this process.

15 Q. And if I understood your testimony, you're  
16 saying this right would belong to DNRC, or its  
17 precursor?

18 A. Well, it looks like he was doing this to  
19 justify more water for the DNRC.

20 Q. Does DNRC own any cows?

21 A. We do not own a cow, sir.

22 Q. Did you own cows in 1982?

23 A. I was not there, sir, to check. But I don't  
24 believe we did.

25 Q. All right. Did Mr. McBeath go down and talk

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1 to the irrigators along the Tongue about their needs?

2 A. The memo does discuss he went down to meet  
3 and talk and discuss this with the water users.

4 Q. Okay. And I think it says he interviewed the  
5 water users -- this is on page 1 -- and from the data  
6 he gathered, he says, "I was able to plot the irrigated  
7 land areas on a map of the project, estimate the  
8 livestock numbers, and calculate the flow rates and  
9 annual volumes."

10 Did I read that right?

11 A. I'm sorry. Where are you on the first page?

12 Q. The last full paragraph. Last sentence.

13 A. Yes, sir.

14 Q. Okay. Have you done, yourself, a  
15 quantification of the stock water rights between the  
16 Tongue River Reservoir and the Yellowstone River?

17 A. No, I have not.

18 Q. All right. Fair enough.

19 A. And this was not a quantification of stock  
20 water rights, sir. This was a survey of cattle  
21 operations. It appears to be an incomplete one because  
22 he surveyed people that were at the meeting and not  
23 everyone else.

24 Q. Let's turn our attention to minimum winter  
25 flows. All right?

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1 A. Yes, sir.

2 Q. The operating plan says minimum winter flow  
3 for the Tongue River Reservoir currently should be 175  
4 CFS; right?

5 A. Yes, sir.

6 Q. All right. And we can agree that the  
7 operating plan sets guidelines; correct?

8 A. Yes, sir.

9 Q. And at times, you have made the decision to  
10 vary from those guidelines; correct?

11 A. Most definitely.

12 Q. In fact, you have made the decision at times  
13 to store more than the maximum winter capacity;  
14 correct?

15 A. Yes, sir, we have.

16 Q. And at times you have made the decision to  
17 release less than the minimum winter flow of 175 set  
18 forth in that plan; correct?

19 A. Yes, sir.

20 Q. All right. And, in fact, if we look at  
21 Montana Demonstrative Exhibit 3, if you look at the  
22 last page of that exhibit, if I'm saying that right,  
23 this chart prepared by Mr. Dalby shows monthly mean  
24 discharge of the Tongue River at Tongue River Dam;  
25 right?

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1 A. Yes, sir.

2 Q. All right. So that gives us a pretty good  
3 idea of the winter flows from the dam; right?

4 A. Yes, it does.

5 Q. And we can look, if we want, starting in  
6 October of 2000 and get a feel for how much water was  
7 being released from the dam in that month.

8 In that month, it was 270.9 CFS; correct?

9 A. Yes, sir.

10 Q. That represents the monthly mean; yes?

11 A. Yes.

12 Q. All right. The next month it was 149.4 CFS;  
13 correct?

14 A. Correct.

15 Q. And so on and so forth. Special Master can  
16 look at various values. But we do see on occasions in  
17 some of these winter months, particularly after 2001,  
18 we see numbers below 100 CFS over the course of the  
19 winter; correct?

20 A. Yes, we do.

21 Q. And the lowest one I see is 69.8 CFS in 2005;  
22 right?

23 A. That looks like the lowest value on the  
24 chart, sir.

25 Q. All right. So at that time you made the

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1 decision you needed to go that low; right?

2 A. Yes, sir.

3 Q. And you have the flexibility under the  
4 operating plan to do that; right?

5 A. Yes, we do.

6 Q. And, in fact, you have provisions in the  
7 operating plan for drought; right? I mean, you  
8 recognize that's a possibility and give -- have given  
9 yourself the flexibility to try and deal with that?

10 A. Yes. We have flexibility to deal with  
11 drought or flood, basically. It's a complex basin, so  
12 we have to have some variability.

13 Q. All right. But if I understand right,  
14 sometimes your predictions about when you need to store  
15 and when you don't need to store can be off; fair?

16 A. Yes, sir.

17 Q. And if I understand right, Wyoming doesn't  
18 get to participate in making decisions about when to  
19 store and when not to; right?

20 A. No, sir.

21 Q. I have a quick question about the contract  
22 between the -- or arrangement between the Tongue River  
23 Water Users' Association and the board. I see your  
24 reference on page 7 of your report, and you don't have  
25 to go there and look at it. But it says the rights are

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1 measured where the water leaves the reservoir; do you  
2 recall that?

3 A. Not right, sir. Contract shares. I measure  
4 that at the terminus of the low-level outlet structure.

5 Q. So do I understand right that once the water  
6 leaves the outlet structure, it becomes, in a sense,  
7 the property of the Water Users' Association?

8 A. In a practical manner of speaking, yes. And  
9 the accurate description of it, it becomes theirs to  
10 deliver to the end users to carry through the system.

11 Q. And then are they responsible for any  
12 evaporation relation losses that occur between the  
13 reservoir and the place where they actually use the  
14 water?

15 A. Yes, they establish their loss pattern.

16 Q. Fair enough. All right. I found a reference  
17 that said in 2006, the peak storage was 73,400  
18 acre-feet in the Tongue River Reservoir; is that  
19 correct?

20 A. Say again, sir.

21 Q. I understand that the peak storage in 2006,  
22 in Tongue River Reservoir was 73,400 acre-feet?

23 A. The peak storage in 2006?

24 Q. Yes.

25 A. Where was that reference from, sir?

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1 Q. Well, I'll show you. I'm going to hand you  
2 Joint Exhibit 56. That is an annual report of the  
3 Yellowstone River Compact Commission for 2006; correct?

4 A. Yes. It's the Yellowstone River Compact  
5 Commission fifty-fifth annual report, 2006.

6 Q. Can I ask you to turn to page 10. Well,  
7 Roman Numeral X, so page X.

8 A. I'm there, sir.

9 Q. All right. In the last paragraph on that  
10 page, does it say, "Mr. Kevin Smith reported that  
11 Montana was about 6000 acre-feet short of filling the  
12 Tongue River Reservoir this year. The peak storage was  
13 about 73,400 acre-feet"?

14 A. Okay. My mistake, sir. I was off  
15 10,000 feet in my head.

16 Q. Is that what the report reflects?

17 A. Yes, sir.

18 Q. And is that what happened in 2006, the peak  
19 storage was 73,400 acre-feet?

20 A. I believe it was. I would like to confirm  
21 that to get the actual numbers. The -- from the Table  
22 4A end-of-month contents report in 2006 end-of-month  
23 June was nearly 70,000. So 73,400 is probably  
24 accurate.

25 Q. All right. Can I get that back from you? So



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1 on the date you determined fill in 2006, you had 73,400  
2 acre-feet of water in your reservoir; right?

3 A. Yes, sir.

4 Q. Do you know what peak storage was in 2004?

5 A. Not off the top of my head, sir.

6 Q. I don't either. I was hoping you did. Do  
7 you have the operating manual in front of you?

8 SPECIAL MASTER: I suppose this is the  
9 operating manual, not the operating plan?

10 MR. KASTE: Correct.

11 SPECIAL MASTER: Do you remember which  
12 exhibit number that is?

13 MR. KASTE: I have on my notes on the one  
14 attached.

15 SPECIAL MASTER: Is it 524, Tongue River Dam  
16 Manual for Operation and Maintenance?

17 MR. KASTE: I think so.

18 THE WITNESS: I'm there, sir.

19 BY MR. KASTE:

20 Q. Is it Montana 524?

21 A. It is Montana 524.

22 Q. Would you turn to page 30 of the operating  
23 manual, please. I'm looking at a section that says  
24 "interaction with other dams"; do you see that?

25 A. Yes, sir.

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1 Q. Would you read that section, please?

2 A. "Interaction with other dams: There are no  
3 major dams upstream or downstream of the Tongue River  
4 Dam. Therefore, interaction with other dams is not a  
5 concern of the normal operation of the Tongue River  
6 Reservoir."

7 Q. Do you not consider the reservoirs in the  
8 Tongue River Basin in Wyoming to be major dams?

9 A. I consider them to be important dams and to  
10 their users, major dams. However, in the -- probably  
11 the operations of this project, should they fail, they  
12 would not fail Tongue River Reservoir. That's -- when  
13 we're looking at that comparison to this to make sure  
14 that we're not going to either -- if we have to have  
15 emergency releases or we have a breach above a dam, we  
16 have to make sure we have that dam included in our  
17 emergency action plan and other components to make sure  
18 they know when something is coming down the pipe so we  
19 don't breach them or they activate their emergency  
20 action plan and, likewise, above us, if there is a  
21 large structure or a structure that should have a major  
22 event to come down into the system so we can deal with  
23 dam safety issues and make sure that we can contain  
24 that flood.

25 Q. All right. Do you take into consideration in

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1 the course of your operational decision, the activities  
2 of the reservoirs in Wyoming? Or are you just  
3 primarily just looking at snowpack?

4 A. Sir, we are primarily looking at snowpack and  
5 weather forecasting. Yes, sir.

6 Q. You have an operations manual and you have an  
7 operation plan?

8 A. Yes, sir.

9 Q. I was looking through the Montana statutes  
10 and the administrative regulations promulgated by DNRC.  
11 And I did not see either a statute or a regulation that  
12 tells us how we count the inflows and outflows from a  
13 reservoir; am I wrong about that?

14 A. I don't know, sir. I don't think I've ever  
15 looked at a statute to see if there's a way to count  
16 for inflows or outflows. The water rights are our  
17 historical pattern of use in the storage of our  
18 reservoir.

19 Q. You keep saying your water right is based on  
20 the historical pattern of use. Have you, in your  
21 position, heard that beneficial use is the basis for  
22 measuring and the limit of the right?

23 A. Yes, I have heard that, sir.

24 Q. All right. Fair enough. Now, when the dam  
25 was rehabilitated and prior to that, the State of

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1 Montana and United States of America entered into a  
2 compact with the Northern Cheyenne Tribe which you  
3 testified about; correct?

4 A. Yes, sir.

5 Q. Okay. And you understand that the Northern  
6 Cheyenne Tribe Compact can't change anything in the  
7 Yellowstone River Compact; correct?

8 MR. WECHSLER: Objection, Your Honor. That  
9 calls for a legal conclusion.

10 MR. KASTE: Your Honor. I'm pretty sure he  
11 read portions of the contract and opined during  
12 Mr. Wechsler's exam.

13 MR. WECHSLER: Whether or not the Northern  
14 Cheyenne Tribe might impact the Yellowstone River  
15 Compact is a different and legal question.

16 SPECIAL MASTER: Unfortunately, the question  
17 has now gone past me on the screen.

18 MR. KASTE: It doesn't matter. I'll ask a  
19 different question.

20 SPECIAL MASTER: Okay. Appreciate that.

21 BY MR. KASTE:

22 Q. The Northern Cheyenne Tribe Compact, which  
23 you did read to us, it contemplates that some years  
24 there will not be a fill of the reservoir; some years  
25 there will be shortages; right?

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1           A.    I'd have to revisit, but I think that might  
2 be right.

3           Q.    Well, in fact, it makes a provision for  
4 sharing on a pro rata data basis of shortages between  
5 the tribe and state?

6           A.    Yes, it does.

7           Q.    All right. Since the dam has been  
8 rehabilitated and with the promulgation of the Northern  
9 Cheyenne Tribe Compact, has that made it more difficult  
10 for the board or the DNRC now, whichever group you want  
11 me to call it, to meet contract demands of the Tongue  
12 River Reservoir Water Users' Association?

13          A.    Are you asking that since the enlargement, do  
14 we have more difficulties in meeting our obligations?

15          Q.    Yes.

16          A.    No, sir.

17          Q.    No? Isn't it true that as a result of those  
18 negotiations, the state gave up 10,000 acre-feet of  
19 water to the tribe?

20          A.    I don't know if that's -- would be considered  
21 as a true statement. There was, between the storage of  
22 the reservoir and the contract allocations, the issue  
23 did come into carryover water. We lost or we  
24 transferred probably 9 or 10,000 acre-feet of water,  
25 carryover water, to satisfy the Northern Cheyenne Tribe

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1 Compact.

2 Q. Well, let's look at page 11 of your rebuttal  
3 report. That's M4.

4 A. M4?

5 Q. Yes.

6 A. Getting organized, sir. Please bear with me.  
7 Found it, sir.

8 Q. Page 11.

9 A. Yes, sir.

10 Q. First full paragraph, last sentence, would  
11 you please read that?

12 A. "In other words, starting in 1999, Montana  
13 and the association sacrificed over 10 percent of the  
14 original storage that was previously used as a source  
15 of water to meet contractual needs."

16 Q. All right. And that happened after 1950;  
17 right?

18 A. What happened after 1950, sir?

19 Q. The Northern Cheyenne Tribe Compact and the  
20 rehabilitation and the sacrifice you just described  
21 happened after 1950?

22 A. Yes, sir.

23 Q. All right. So do we now agree that a lot of  
24 things happened since 1950?

25 A. Again, there's been a lot of things going on

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1 for the last 70 years. But the historic operations are  
2 still very close to similar to the same.

3 Q. That raises an interesting point. How much  
4 did it cost to build your dam in 1999?

5 A. You want me to provide you a relatively good  
6 answer?

7 Q. Generally.

8 A. Construction of the three phases, the first  
9 phase was approximately 6 to 7 million. The second  
10 phase was approximately 7.5 million. The third phase  
11 was, I believe, 18 to \$20 million. And that's the  
12 construction cost. Engineering costs for feasibility  
13 studies, geotechnical investigations, design, analysis,  
14 and then construction documentation and then  
15 construction oversight was probably another 9 to 9 and  
16 a half, \$10 million.

17 Then we had some ancillary projects, state  
18 parks, T & Y fish screen -- T & Y diversion fish  
19 screen, is a more appropriate discussion. And there  
20 were some other environmental work of purchasing  
21 conservation easements on various ranches and some  
22 other work.

23 Q. I got into the hundreds of millions of  
24 dollars. Am I --

25 A. I think really it comes out in that

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1 48 million to 50 million range. And then with, of  
2 course, all the staff time on top of that.

3 Q. Forty-eight to fifty million. I can't add.  
4 I've made that clear.

5 So you spent 48 to \$50 million to run your  
6 reservoir exactly the same way as you did before?

7 A. Is that a question, sir?

8 Q. It's rhetorical, I guess. Let me try a  
9 different one.

10 After spending all this money, you intended  
11 to run the reservoir somewhat differently; right?

12 A. We intended to run this reservoir, sir, to  
13 meet our contractual needs and to also honor and meet  
14 our requirements under the Northern Cheyenne Tribe  
15 Compact.

16 Q. Sure. You intended to store more water and  
17 use more water; right?

18 A. Yes, the firm annual yield is larger on this  
19 project.

20 Q. In fact, you still have the environmental  
21 impact statement in front of you?

22 A. Yes, sir.

23 Q. Exhibit M335. I changed my mind. I don't  
24 want to go into that.

25 But it says, essentially, that, doesn't it?



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1 That the point of rehabilitating the reservoir, in and  
2 amongst the series of other concerns about safety, is  
3 to create a larger reservoir that could create a larger  
4 firm annual yield to meet increasing demands; fair?

5 A. Yes, sir.

6 MR. KASTE: Thank you very much. I have no  
7 further questions.

8 SPECIAL MASTER: Okay. Thank you, Mr. Kaste.  
9 I have some questions. And I wonder whether or not the  
10 court reporter would like to take a five-minute finger  
11 break?

12 THE REPORTER: We can do it after yours,  
13 after your questions.

14 EXAMINATION

15 BY SPECIAL MASTER:

16 Q. So I have a variety of questions. And,  
17 again, a lot of these questions are background  
18 information for me so that I have a better  
19 understanding of the context within which to understand  
20 your direct testimony and then the cross-examination.  
21 So I want to start with some questions that will help  
22 me have a better understanding of the relationship  
23 between the State Water Project Board on the one hand  
24 and the Tongue River Water Users' Association on the  
25 other.

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1           So is the Tongue River Water Users'  
2 Association a private entity or public entity?

3           A.    They're a not-for-profit corporation.  
4 Private, sir.

5           Q.    And the water right for the water which you  
6 store in the Tongue River Reservoir, is the water right  
7 held by the State Water Project Board?

8           A.    The water right is held by, I believe, the  
9 Water Resources Division now. And we act for the state  
10 as the owner in the Projects Bureau.

11          Q.    And then does the Tongue River Water Users'  
12 Association contract with the Water Resources Division  
13 for the supply of water from the reservoir?

14          A.    Yes, sir. The underlying -- there are two  
15 different contracts. This is the water marketing  
16 agreement between -- it was the board at that time, the  
17 State Water Conservation Board and the association  
18 where they marketed a block of water to the board and  
19 then they marketed it to the end users.

20          Q.    And then what is the purpose of the  
21 subscription agreement that you showed earlier?

22          A.    The subscription and pledge agreement, this  
23 is a feature of the original construction of the  
24 project because they set it up to sell shares of stock  
25 in a company. And each share was valued at what would

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1 be an acre-foot of water. So the subscription and  
2 pledge agreement was an additional promise that these  
3 contract holders would make payments back on -- based  
4 on those number of shares to pay back the bonds of the  
5 construction for the Public Works Administration.

6 Q. So the way that it was originally set up was  
7 that you would have the water right held by the state,  
8 a contract between the state and the association for  
9 the actual delivery of water, and then individual users  
10 would subscribe to shares in the association?

11 A. Yes, sir.

12 Q. And your subscription would entitle you to  
13 one acre-foot of water per share that you owned?

14 A. Yes, sir.

15 Q. And is that still the arrangement today?

16 A. Yes, sir. We're nothing if consistent with  
17 these forms that were created back in 1937.

18 Q. And this gets back to the question which  
19 Mr. Kaste asked a moment ago. But where is it that  
20 under -- under the contract does the state deliver the  
21 water at a particular point to the association?

22 A. The state considers the water delivered to  
23 the association when it leaves the structure, when it  
24 leaves the dam in the low-level outlet. And then the  
25 association -- the association is responsible for the

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1 delivery of the shares to the appropriate end users.

2 Q. And I'll ask other questions regarding the  
3 association later. So let me turn, then, to an area  
4 which I would still love some additional information  
5 on, which is the actual right of storage. So let me  
6 approach this in several different directions.

7 So since you've been part of the State Water  
8 Project Board or its predecessor, have you constructed  
9 any new instream reservoirs?

10 A. Sadly, no, sir.

11 Q. Okay. So let me ask, then, the question: Do  
12 you understand, from reservoirs that were constructed  
13 prior to the time that you joined the State Water  
14 Projects Board, in constructing a reservoir, what, if  
15 any, legal or administrative steps the state needed to  
16 take -- or let me rephrase that -- the state would take  
17 in order to actually store water in that reservoir?

18 A. Today, sir? Or at the time these --

19 Q. What is your understanding of what the rule  
20 is today?

21 A. Today, I believe we can, if we can show  
22 physical and legal availability and we can show that it  
23 have a -- if we can show that we have a market to  
24 market to -- and I don't know if we would have to  
25 actually have some market or letters of intent in hand

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1 to go to get the new water right. But upon  
2 construction of that project, it would be perfected.  
3 It would be good, then.

4 Q. So the state, then, would obtain a -- an  
5 appropriate right for the water to store in the  
6 reservoir?

7 A. Yes, sir. But -- 'cause they would have  
8 shown they had a market to market it to and have to  
9 have shown physical and legal availability to store the  
10 water without adversely affecting juniors or seniors.

11 Q. If you could turn to Exhibit M526, which is  
12 the amended stipulation. And, again, I have some  
13 questions in here which I think will help me in better  
14 understanding the nature of the storage right in  
15 Montana.

16 So first of all, do you know what the Bureau  
17 of Reclamation's -- I'm sorry.

18 A. I'm getting there, sir. I'm going from 525  
19 to 527, which is not real promising for me, sir.

20 Q. So, again, this is Exhibit M526. And this  
21 was the amended stipulation.

22 A. Found it, sir.

23 Q. So the first question, again, this is  
24 background. Do you know why the Bureau of  
25 Reclamation -- what the Bureau of Reclamation's

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1 interest was in the adjudication which led them to  
2 actually seek, to clarify what their right was?

3 A. Sir, I think the issue was that they  
4 misunderstood our application because we're storing two  
5 rights in the reservoir. And they saw the 137,000 and  
6 knew that the reservoir's at 79,000. And they -- and  
7 our calculations are based on a 69 or 70,000 value.  
8 And it just didn't add up for them. And I think  
9 they -- in the discussions, I think they assumed  
10 everything was tied into the state right and not with  
11 any of the tribal right.

12 Q. So let me clarify. So what you just told me  
13 is what the nature of the objection was by the Bureau  
14 of Reclamation?

15 A. Yes, sir.

16 Q. Do you know why the Bureau of Reclamation  
17 even had an interest in this particular right?

18 A. We were informed that the Bureau of  
19 Reclamation had an interest on behalf -- to protect the  
20 interests of the tribe.

21 Q. Okay. So then if you turn to page 2 --  
22 actually, let me ask you one other question: I assume  
23 that at the time that this stipulation was drafted,  
24 that you saw it at some point?

25 A. Yes, sir.

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1 Q. And that was in your role as -- at this point  
2 in time you were the director of the State Water  
3 Projects Board?

4 A. Bureau chief of the State Water Projects.

5 Q. Bureau chief?

6 A. We no longer have a board, sir.

7 Q. Okay. And then on page 2 in the second  
8 paragraph, at the very end of that second paragraph it  
9 says, "Such appropriations by the board" -- and this is  
10 talking about appropriations for the project -- "by the  
11 board for State Water Conservations Projects were not  
12 subject to the statutory requirements for appropriation  
13 of water on decreed streams."

14 So do you know what that's referring to?

15 A. Sir, I think we'd have to fall back -- I'd  
16 like to talk to my counsel, but that would fall  
17 underneath the Title 89. That was created by our board  
18 originally back in 1933 and 1934 'cause they were given  
19 broad powers to acquire and obtain lands and to build  
20 these projects and to take the water rights to -- as  
21 part of that Public Works Administrator. They had to  
22 put in that statute in order to meet the requirements  
23 of the federal government to show that they had the  
24 means to build projects in a fast manner.

25 Q. So if you look at paragraph 3, it notes that

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1 the claim that this particular stipulation is part of  
2 is for the sale water that is diverted into storage for  
3 later releases; is that correct?

4 A. Yes, sir.

5 Q. So are there two, then, separate rights under  
6 Montana law? One right is to store; the other right is  
7 to then sell the water which is diverted into storage?

8 A. Sir, that -- and I'm a little bit confused on  
9 that one. That is, I would say, almost the same. It's  
10 the same right. It's storage for sale. I say it's a  
11 separate right, but the end purpose of the right or the  
12 beneficial use for the state at this is the sale to the  
13 association.

14 Q. So in the adjudication of the Yellowstone  
15 River system that this stipulation is part of, does the  
16 state have just one claim, which is the claim for the  
17 sale of water that is diverted into storage?

18 A. It does now, sir.

19 Q. It does have just this one?

20 A. I believe so, yes, sir.

21 Q. Okay. So there's no separate -- there's no  
22 separate claim with respect to storage? It's just for  
23 the actual sale of water that is diverted into storage?

24 A. Yes, sir. And the abstracts that define the  
25 right is the last two pages of that document. And it



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1 describes the water right itself. Actually, it's the  
2 last three pages of the document, the abstract of the  
3 water right that has the specifics to it.

4 Q. And if you look on page 3, there's a  
5 discussion at the bottom of page 3 of the 1937  
6 appropriation as amended. And I assume this is the  
7 same as in paragraph 2; there's a discussion of a  
8 declaration of intent to store, control, and divert all  
9 appropriated water of 1937 as amended in 1938?

10 A. Yes, sir.

11 Q. And have you ever seen the 1937  
12 appropriation?

13 A. I have not reviewed that document.

14 Q. One of the things I noticed at the bottom of  
15 page 3 is that it talks about the description of the  
16 general service area in the 1937 appropriation; is that  
17 correct?

18 A. Yes, sir.

19 Q. Do you know whether -- have you ever seen any  
20 reference to whether or not in the 1937 appropriation,  
21 there was any reference to how much water could be sold  
22 pursuant to that appropriation?

23 A. No, sir.

24 Q. You haven't seen any --

25 A. I haven't seen that. And typically on the

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1 appropriation, it would be to store all the  
2 unappropriated waters to market. The rights were filed  
3 typically before the projects were built. So it would  
4 get the rights, they would form an association to  
5 commit to pay back the construction costs, and they  
6 would then have the authority to get the funding to  
7 build the projects.

8 Q. So would the -- and this is just as a general  
9 matter. Would the declarations of intent to store,  
10 control, and divert, those would be actually filed  
11 before the construction of the reservoir?

12 A. Yes, sir.

13 Q. And do you know whether any additional steps  
14 were then taken after the actual construction of the  
15 reservoir?

16 A. I don't believe any other additional issues  
17 were taken with the filings, except this one did have  
18 an amended amendment in 1938, still prior -- prior to  
19 final completion of the construction of the project  
20 that more had to deal with repayment issues and some  
21 other items on the funding.

22 And we have cases where we had assumed  
23 volumes for construction and actual projects might be  
24 larger or might be smaller depending on how it actually  
25 officially got built. We had one project that was

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1 literally stopped in mid-construction. And the  
2 association demanded to enlarge it. So it was enlarged  
3 another 50, hundred feet. And then they walked away  
4 from that project. And the state had it.

5 But, you know, it was quite an interesting  
6 read on the historical perspective of this because  
7 there were about 50 or 60 projects under this very  
8 program. And they were built primarily between 1935,  
9 1936, and 1940 when World War II hit. And a lot of  
10 this work was done very fast. And some of the  
11 references refer back to, follow the shortages of  
12 engineers or trained water professionals and surveyors  
13 to get the work done.

14 It was fairly fast and furious when they did  
15 the setup of all these projects.

16 Q. And so if you -- I'm going to ask basically  
17 the same question again. But in the case of the claim,  
18 the stipulation refers to, which is the claim as part  
19 of the adjudication, the claim itself, talks about a  
20 water marketing contract for up to 40,000 acre-feet.  
21 And it specifically talks about that's the amount of  
22 water to be diverted for use; that's correct?

23 A. Yes, sir.

24 Q. But you don't know whether or not prior to  
25 this particular claim there was any document with

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1 respect to the appropriation right for the storage that  
2 referred to any particular amount of water to be used?

3 A. I believe the original appropriation, talking  
4 to my counsel, is it's tied to build a project for  
5 marketing the contents of the reservoir. The issue  
6 was -- the issue was to market as much shares as they  
7 could on each project because then it made it easier to  
8 pay that project off.

9 Q. So, again, there would be no specific --  
10 there would be no reference to a specific number but  
11 instead, marketing whatever the contents were that were  
12 stored?

13 A. That is my understanding, sir.

14 Q. If you turn to paragraph 8, which is on page  
15 4, it says at the very top, "The volume issue you  
16 remark includes the statement, 'No determination of  
17 stored volume and evaporation necessary to provide the  
18 historic sale volume has been made.'"

19 Do you know what that's a reference to?

20 A. Sir, I believe that is when we first filed  
21 our amendments to our water right. The adjudications  
22 staff reviewed it and put that issue remark on our  
23 document.

24 Q. And then at the bottom it notes, "The DNRC  
25 Adjudication Bureau reexamined and determined the

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1 volume guideline of 127,324 acre-feet based on claimant  
2 contact with SWPB. This volume included one complete  
3 fill, partial refill for carryover storage, and  
4 evaporation losses."

5           So the Adjudication Bureau is a separate  
6 entity from your portion of the agency; correct?

7           A. Yes, sir. Again, it's -- we're slightly the  
8 odd duck out because we're regulated and managed by  
9 following these other guidelines within other bureaus  
10 within the same division. So they're our sister  
11 bureaus; however, there are firewalls between us. And  
12 sometimes the DNRC logo does not get separated between  
13 the two bureaus when people look at DNRC, and treat us  
14 as a separate entity.

15           Q. So this particular case talks about one  
16 complete fill, a partial refill, and evaporative  
17 losses. And I've heard you separately talk about  
18 filling as to 1.5 times capacity. And I think I heard  
19 you refer once to twice the capacity.

20           If you're trying to figure out, in your role  
21 as bureau chief, how much water you can store in a  
22 reservoir, how do you figure that out?

23           A. Sir, we have a lot of historical records.  
24 And on these trials, we try ensure we have enough water  
25 to meet the contractual obligations year after year

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1 after year. It's not just making opportunity. We  
2 are -- we have to make sure we have bad years covered.

3 My predecessors have kind of worked this out  
4 prior to my getting on board, but it's a statement that  
5 works well. They would look at a full filling of the  
6 reservoir. And then it's the delivery of the contract  
7 while dealing with storage evaporative losses and then  
8 making full contract deliveries and then allowing an  
9 opportunity to make a partial refill back up into the  
10 winter level, flood elevation that we have established.

11 And that provides us -- when the Adjudication  
12 Bureau wanted to have our volumes tied to the storage,  
13 that was a way for us to work through those numbers to  
14 make sure it was sufficient enough for us to have  
15 carryover for the next year's contracts.

16 What this does not include is the winter  
17 flows. Those are not considered in any of these  
18 volumes. They are separate.

19 Q. And, again, in trying to figure out what the  
20 total amount of storage rights are for a particular  
21 reservoir, are there a set of rules somewhere that you  
22 look at?

23 A. Sir, to my knowledge, this is something  
24 that's been developed over the years within the State  
25 Water Projects Bureau itself. And one of the

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1 sideboards on this whole feature is that all of our  
2 projects were built in the 1930s and some of them in  
3 the 1950s or one in 1960. The sideboards that really  
4 control here is our priority date. Because once we get  
5 our spring runoff flows for storage and spring runoff  
6 flows drop, we are basically done storing. Because  
7 everyone is senior to us in most every stream system.  
8 Or at least the predominant number of irrigators  
9 downstream are senior to us.

10           The additional water comes from -- I almost  
11 hate to use this term, sir, but when we have free flow  
12 conditions, i.e. precipitation event, thunderstorm  
13 comes through or other issues that cause a large influx  
14 of water, we'll then have an opportunity to put water  
15 into our reservoir and catch and fill some. And this  
16 allows us to do that.

17           Q. And so in determining what the total  
18 amount -- what the volume guideline is for a particular  
19 reservoir, what you're relying upon, then, is a set of  
20 unwritten practices over time?

21           A. Sir, they become formalized and actually  
22 become more formalized and written within the State  
23 Water Projects. A lot of this was based off of a trial  
24 case that was one of our state water projects called  
25 the Painted Rocks Reservoir. And the Painted Rocks

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1 case was tried and heard in the Water Court of Montana.  
2 And it was recognized, the original right of our  
3 projects, and recognized the actual use of the projects  
4 for sale, storage for sale to an association who, in  
5 turn, delivered within a service area.

6 And the method that would determine to deal  
7 with the fill and refill issues at Painted Rocks was  
8 then accepted by the Water Court. And then that became  
9 a formalized process within our bureau to apply to our  
10 other projects.

11 Q. So, in fact, the Painted Rocks decision is  
12 mentioned in paragraph 7 on page 3; is that correct?  
13 That's the same one?

14 A. Yes, sir. That is the same one.

15 Q. Other than that particular decision, are  
16 there any written documents?

17 A. Not that I'm aware of. But that doesn't mean  
18 a lot, sometimes, when it comes to legal issues, sir.

19 Q. So if you have a reservoir that you're  
20 operating right now and you want to expand the size of  
21 that reservoir --

22 A. Yes, sir.

23 Q. -- do you need to take any steps pursuant to  
24 Montana rules and laws?

25 A. Yes, sir.



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1 Q. And what are those?

2 A. Unlike Tongue River where we had the compact  
3 to satisfy, we have done that very thing at our Middle  
4 Creek project. We enlarged the reservoir. And the  
5 issues go through, of course, the environmental  
6 compliance documentation, the issues of showing yield  
7 that you can -- that the water is physically available  
8 and legally available for the time period that it --  
9 that you can store the water. And you apply for a  
10 water permit and -- for that new water. And it will  
11 have the priority date at the time you apply for that  
12 permit. And the process goes to ensure that you are  
13 not adversely affecting other seniors or juniors in the  
14 system.

15 Q. So if you originally have an amount of water  
16 that you're storing, and since the reservoir was  
17 originally constructed, there are additional  
18 appropriators that have come along and appropriated  
19 water, when you expand the storage capacity, is that  
20 additional capacity then junior to the appropriators  
21 who have come along that middle period?

22 A. Downstream per se, downstream of a project,  
23 yes. If we have these rights where the volumes -- and  
24 you raise your spillway crest so you're physically  
25 storing additional water, you have to address the

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1 issues of if they are relying on that, if they are  
2 relying on the spring flood flows, to what volume, and  
3 to what flow rate to account -- so you could fill your  
4 reservoir.

5           Typically, I'd say some of the caveats, if  
6 you have people coming in downstream of you and then  
7 you raise a reservoir, the issue is not so much going  
8 to adversely affect the senior of you because you'll be  
9 storing when the water is available. And it will be  
10 runoff when people are not trying to take water on a  
11 lot of these systems.

12           Q.    And in this particular case, as Mr. Kaste was  
13 going over, one of the things that has occurred is that  
14 you are now delivering more water than you were  
15 originally delivering for use to the Tongue River Water  
16 Users' Association; is that correct?

17           A.    There is more water committed. The compact  
18 water has not been delivered, really. I think there  
19 was one year they delivered 2000 acre-feet, perhaps.  
20 But other than that, there has been no compact water  
21 delivered out of the system. So it's just been the  
22 40,000 shares.

23           Q.    Right. I want to come back and talk in a  
24 moment about the Northern Cheyenne water. But I want  
25 to stick with, as Mr. Kaste pointed out, the original

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1 contract, you were supplying 32,000 acre-feet of water  
2 and later you agreed to provide 40,000 --

3 A. Yes, sir.

4 Q. -- acre-feet of water.

5 So are there other reservoirs where the  
6 amount of water that you've contracted to deliver have  
7 increased over time?

8 A. We have increased the contract amounts on two  
9 of our other projects. One is Deadman's Basin. And  
10 the other one is East Fork of Rock Creek. Deadman's  
11 Basin is an off-stream storage facility in the  
12 Musselshell River, which is in central Montana. I  
13 believe the contracts went from 26,000 shares. We  
14 market up to 40,000 shares now, 40,400, I believe. And  
15 the East Fork of Rock Creek system, I believe, went  
16 from, I want to say, 16,000 to 26 or 27,000 shares.

17 Q. And in both of those cases, was the expansion  
18 done -- in both of those cases, did you increase the  
19 amount of contracted deliveries without expanding the  
20 size of the reservoir?

21 A. Correct, sir. The reservoir stayed the same.

22 Q. In both of those cases, did the new  
23 contractual deliveries have the same appropriation date  
24 as the original contracted deliveries?

25 A. Yes, sir.

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1 Q. Okay. So a couple quick questions about  
2 sedimentation. Do you ever actually remove  
3 sedimentation from any of your reservoirs?

4 A. No, sir. That's a very expensive  
5 proposition, Tongue River -- every river has  
6 sedimentation. But it is a very expensive proposition  
7 and water will be very valuable to make that possible.  
8 Or as is done mostly, to my knowledge, is done more for  
9 transportation commerce.

10 Q. Okay. And then I want to turn now to the  
11 various winter flows. I think probably Exhibit 524 is  
12 the best exhibit to use in this particular context.

13 A. Can you show me which one.

14 Q. 524 is the Tongue River Dam Manual for  
15 Operation and Maintenance. And Mr. Kaste was asking  
16 about that, if that helps you know which stack that's  
17 to be in.

18 A. I have a feeling we'll go into that. I can't  
19 say I lost it this quickly, can I, sir?

20 Q. No, it's up there somewhere.

21 A. I have it.

22 Q. So I want to ask some questions about page  
23 21.

24 A. Yes.

25 Q. So earlier, I understood you to say that

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1 there were a variety of reasons why you have the 175  
2 CFS minimum outlet discharge; is that correct?

3 A. Yes, sir.

4 Q. If you look on page 21 under "minimum outlet  
5 discharge," it says, "The minimum flow to be maintained  
6 at the dam outlet to help maintain the fishery in  
7 Tongue River will generally be the inflow or 175 CFS,  
8 whichever is less."

9 And my question is: Do you know why it only  
10 refers to fisheries here?

11 A. Yes, sir. Because it was just an editing of  
12 my staff members putting it together. And they were  
13 copying things from the operating plan from the  
14 advisory committee that was established. And that's  
15 the one that got in there. It is for the health of the  
16 river, is for the icing issues and the stock water and  
17 others. I think the person must have been in tune with  
18 fisheries that day when he copied that section over.

19 Q. Okay. And then let me ask a different  
20 question on that. If you think about all the various  
21 purposes you've talked about in terms of stock water  
22 and fish and wildlife, avoiding the river icing over,  
23 is there one factor that has determined that number of  
24 175 with the others also being helped as part of that  
25 175? In other words, is there one that determines the

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1 minimum amount?

2           A.    Sir, that is a good question.  And it  
3 would -- I would have to sit back and reflect on that  
4 issue.  The -- disregarding all the reasons why for the  
5 health of the river and the ice and other items, there  
6 is also the issue of setting a flow, a median flow,  
7 target flow, if you would, to ensure that you have room  
8 in your reservoir to use for either catching the spring  
9 runoff or mitigating a peak of a flood event in the  
10 springtime.  And that's actually another reason for  
11 that number.  It's a median flow as well that deals  
12 well with the basin characteristics so when we get into  
13 the spring runoff conditions as well, from a physical  
14 or practical matter of dam operations, that we won't be  
15 overly full in February or early March.

16               And we'll also take an opportunity to -- that  
17 opportunity with that flow level of 175, that also  
18 provides us an opportunity on the median years to be  
19 able to draft the reservoir in March because we'll  
20 probably be gaining volume.  And again, as it states in  
21 there, for the wet years, we can draft and still have  
22 opportunity to make room for inflow in the runoff.

23           Q.    So let me ask this question in a slightly  
24 different way, which is:  If you look at all the other  
25 various documents that, for example, talk about stock

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1 watering needs, there are a variety of other numbers,  
2 but other than in this document and ones that come  
3 after it, never 175. So do you know how the 175 was  
4 specifically determined?

5 A. Sir, I don't know how specifically -- why  
6 that 175 was specifically determined. That was back  
7 and forth in negotiations with the Bureau of  
8 Reclamation, the Northern Cheyenne Tribe, and the state  
9 back in '99 and 2000 when they were reviewing and  
10 setting up the operating plan to meet the needs of the  
11 settlement act.

12 The Tongue River final environmental impact  
13 statement had recommended 150 CFS. And the operating  
14 plan -- the committee at the time went through and  
15 edited and came through with 175.

16 So I would have to refer back to the minute  
17 notes and go through everything on that to get to that  
18 number.

19 Q. But based on what you recall right now, you  
20 do not remember why 175 was adopted, for example,  
21 rather than 150?

22 A. No, sir.

23 Q. And it says here that the minimum outlet  
24 discharge will generally be the inflow or 175 CFS,  
25 whichever is less. So does that mean that you

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1 generally set the minimum outlet discharge at 175  
2 unless the inflow into the reservoir is less than 175?

3 A. Yes, sir. On the typical years, it's -- it  
4 would be running the river through the system.

5 Q. And when you were talking to Mr. Kaste, I  
6 understood you to say that there are times when you  
7 will vary from even the lesser of 175 inflow; is that  
8 correct?

9 A. Yes, sir.

10 Q. What goes into that determination?

11 A. If we are losing storage out of the reservoir  
12 and we're already at a low pool elevation, sometimes in  
13 the winter months, the upstream gauge, the state line  
14 gauge, will ice over. So we will not have that tool to  
15 help us to keep track of inflow to outflows. So we  
16 have to manage it via, like, a weekly running average  
17 of elevations to find out if we're drafting or not. We  
18 do have the monitoring set up, and we do have it set up  
19 realtime now. But it takes time to determine if you  
20 are losing storage or if you're gaining storage.

21 So if you're losing storage, we would lower  
22 our gauge to match that, to balance that out. Or, as  
23 we brought up earlier, if we have -- if we come out of  
24 a drought year and we're going into the next year and  
25 it's not looking very good, the forecasting from the



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1 National Weather Service and the actual SNOTEL sites,  
2 and even anecdotal mention was, conversations with the  
3 water users, we'll hear from people recreating from  
4 people in the mountains on how far up the trail they  
5 can drive before they have to unload their snowmobiles  
6 or whatever, then we'll lower the gates to minimize  
7 releases. Because we have, then, an idea that we might  
8 not be getting that much more water through the system.

9 Q. So as a general matter, then, you start out  
10 with the proposition that the minimum outlet discharge  
11 or the inflow of 175 CFS, whichever is less; correct?

12 A. Yes, sir.

13 Q. And then one reason you will adjust that is  
14 that you might be concerned that you're actually  
15 releasing water. So if you fear you might be releasing  
16 some water, then at that point, you might decide to  
17 reduce the minimum outlet discharge?

18 A. Yes, sir.

19 Q. And sometimes if it's been a -- coming out of  
20 a drought year and looking ahead, do you think that,  
21 again, it might be a drought year, you -- in that  
22 situation, might also reduce the number for the minimum  
23 outlet discharge?

24 A. Most definitely, sir.

25 Q. Are there any other major factors that you

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1 take into account?

2 A. You know, again, it's a difficult thing to  
3 forecast that far in advance in a basin like that.  
4 That seems to be the primary -- well, for instance,  
5 today, we're talking today amongst ourselves, we are  
6 probably going to raise our outflows to 350 CFS or  
7 maybe a little higher. We have gained 6 or 7000  
8 acre-feet in our storage, or more, in the last three  
9 weeks. And we're sitting about 58,000 acre-feet of  
10 storage right now. But it's all due to a pretty big,  
11 wet storm event that came through the system and all of  
12 us are kind of paying the price of.

13 So those, again, trying to react to the  
14 system. And it's nice that it happened now and not in  
15 the middle of wintertime when the river is iced down  
16 below. 'Cause now we can release the waters and try to  
17 get down so we have storage left for an anticipated  
18 runoff event.

19 Q. Okay. And then turning to the various  
20 discussions in 1982 regarding stock watering. And  
21 these are Exhibits M310 and M284. And then also the  
22 exhibit that Mr. Kaste gave you, W11.

23 A. I have two of the three, sir.

24 Q. I'm not going to have detailed questions  
25 about all of these. So if you can't find them all,

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1 it's probably not going to matter.

2 A. I've got the last one, sir.

3 Q. Okay. So could you explain again why these  
4 memoranda were prepared?

5 A. Sir, I believe the Wyoming Exhibit W11, it  
6 appears to me that this was, again, I believe the State  
7 Water Projects Bureau made a request of a different  
8 bureau to evaluate and see what we could file a claim  
9 for for stock water. I don't know if that was  
10 necessary, but apparently they thought so at the time.  
11 And the reason I don't know why it would have ever been  
12 necessary is the State of Montana doesn't irrigate and,  
13 the State of Montana does not water stock. As  
14 Mr. Kaste said, we sell water.

15 So to see something like that, I think it's  
16 going through, and they're trying to make our rights  
17 look like other rights in the state, I suppose, to what  
18 they really were and really are, which is projects were  
19 built for storage for the purpose of sale.

20 The Montana 310 exhibit --

21 Q. Since this is -- actually, while we're on  
22 M310 --

23 A. Yes, sir.

24 Q. -- since this is a three-page document by  
25 itself, do you know who prepared this?

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1           A.    Do you remember which was the other exhibit  
2 number for that document, sir? 'Cause I have a  
3 three-page -- this one is only two pages. I have the  
4 other one, which is three.

5           Q.    My copy of M310 is three pages.

6           A.    I have it, sir.

7           Q.    Okay.

8           A.    This would have been prepared by the State  
9 Water Conservation Board, but I don't know who within  
10 that organization.

11          Q.    And similarly, do you know who prepared M284?

12          A.    No, I don't, sir. And these are documents  
13 that I could probably go back to a file and find where  
14 they were and work that through. But this appears to  
15 be documentation -- this is four years after the 1978  
16 flood. And the state went after -- went to the state  
17 legislature to go after funding and authority to take  
18 action on getting the projects repaired. I think at  
19 that time, they calculated that the project had a 1 in  
20 10 chance of failure if they saw a 20-year event.

21                   They were very concerned with it. And part  
22 of the discussions in the 1980 presentations to the  
23 legislature was to rehabilitate the project and try to  
24 address the compact issues at that time. So this might  
25 all be part and parcel of the State's initial

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1 investigation and the throes of trying to figure out  
2 how large to build a new reservoir if they could and to  
3 what extent the water would be used for.

4 Q. I'm going to have you -- do you know whether  
5 or not the DNRC ever pursued any claim based on these  
6 documents?

7 A. I'm sorry, sir?

8 Q. So let me go back. So if you look at Exhibit  
9 W11, it actually first starts out, "The purpose of this  
10 memo is to document the manner in which the claim of  
11 existing water rights for the Tongue River Reservoir  
12 project was developed." So this gets back into the  
13 questions that you were discussing with Mr. Kaste.

14 But do you know whether there was any new  
15 claim asserted as part of this?

16 A. No, I'm not aware, sir.

17 Q. Okay. Then on Exhibit M4, which is your  
18 rebuttal testimony, if you look at your Figure 3, which  
19 is a daily mean outflows for the Tongue River.

20 A. Yes, sir.

21 Q. And one of the things that you noted was that  
22 the daily mean for winter months for the 1991 and 1999  
23 period, the 2001 to 2012 period is frequently below the  
24 daily mean for the 1942 to 1950 period; is that  
25 correct?

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1 A. Yes, sir.

2 Q. And you suggested earlier that one of the  
3 things that that indicates was that you were being more  
4 conservative during this period?

5 A. Yes, sir.

6 Q. So for the period of time that you were  
7 involved with the Tongue River Reservoir, do you know  
8 what went into your decisions to actually have outflows  
9 that were lower in these years than they were for some  
10 earlier historical periods?

11 A. One of the primary considerations, sir, is we  
12 did have four years of drought. It also appeared year  
13 2005 in between 2004 and 2006, was just as bad, if not  
14 worse than the winter months. But we had precipitation  
15 events that generated the flows to fill the reservoir.

16 And so the operations, you know, were keyed  
17 into that of making minimal releases and keeping an eye  
18 on the mountain snowpack and everything else that we  
19 could evaluate to try and make sure we met our  
20 obligations.

21 And as pointed out, we cannot always  
22 100 percent hit that mark. But we do what we can and  
23 using the most scientific and detailed approach that we  
24 can and not ever discounting the generations of  
25 landowners down below us that have seen this for a long

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1 time and their evaluations. I say they have a very  
2 vested interest in making sure the project fills to  
3 make their deliveries.

4 Q. So this is just really another way of asking  
5 that same question. But when you were saying you were  
6 being more conservative during this period of time,  
7 what do you mean by "conservative"?

8 A. We did not set the gate at 175 and walk away.  
9 We made sure that if we did not have the available  
10 water or if we did not think we had the water available  
11 coming down the system, that we lowered our gates down  
12 to make sure we were delivering less -- or that's the  
13 wrong term. That we were trying not to draft north of  
14 us. We were trying to either store what we could  
15 without going below 75 CFS.

16 Q. And I assume for all of the various  
17 reservoirs that you operate, to the degree they're on  
18 the main stem of a -- or they're an in-river reservoir,  
19 you're actually taking flood risks into account in the  
20 way in which you're managing it?

21 A. Yes, sir.

22 Q. And is that part of your standard practice?

23 A. Yes, sir. And that's how the operation  
24 manuals are also set up, that's the min and max pool  
25 elevation requirements are somewhat established over

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1 time empirically to help with that as well.

2 Q. Then on Exhibit M316. So if it helps, it's  
3 the Operating Plan for the Tongue River Reservoir.

4 A. Okay. Sorry. If you don't mind, I'll use  
5 525.

6 Q. So if you turn to page A5 of that.

7 A. Yes, sir.

8 Q. Paragraph 4, you were discussing this earlier  
9 with Mr. Wechsler. It talks about March 1st of each  
10 year, you do an evaluation of the reservoir. And it  
11 notes in the second half that if the reservoir  
12 elevation is lower than average and conditions indicate  
13 the potential for a dry, low runoff spring, that, first  
14 of all, DNRC will inform the Advisory Committee of the  
15 potential for a water shortage that year. And then it  
16 goes on to say, "The Advisory Committee will implement  
17 a storage plan to minimize the impact of such a  
18 shortage."

19 Can you explain what goes into that storage  
20 plan?

21 A. Yes, sir. Discussions go into working with  
22 the parties and with the association and with the  
23 tribal members to look at what water is marketed that  
24 year, for what purposes. And the -- a big component of  
25 the mitigation for a dry year is to set how many shares



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1 we're not going to deliver. Because we do have some  
2 carryover water.

3 So we establish where we want to go to in the  
4 reservoir pool, depending on what the needs are that  
5 year and how much of a shortage is relied to -- or that  
6 we need to implement for the contracts and for the  
7 Northern Cheyenne Tribe water.

8 Q. So does the storage plan involve how much  
9 water you're actually going to release for release for  
10 use that year?

11 A. Yes, sir.

12 Q. Does it also involve the way in which you  
13 will then control how much water you permit as an  
14 outflow for the remainder of the year?

15 A. What we probably end up doing is we say we'll  
16 release this water. Again, we cannot affect the  
17 decreed water or the water that's senior to us coming  
18 to the system after runoff. So that will have to pass  
19 through. But it -- we probably will deliver our  
20 contract water and compact water if any was to be  
21 delivered and probably reestablish a follow-up meeting  
22 on a monthly basis or bimonthly basis to evaluate the  
23 conditions and changing conditions to evaluate what  
24 we're going to run into fall and winter the next year.

25 And then we then, yes, deal with the issue of

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1 making recommendations for releases or for pass through  
2 for the following water year until we get back up to a  
3 good storage.

4 Q. Okay. And just one final, really quick set  
5 of questions. Did you say earlier that the Northern  
6 Cheyenne Tribe has only taken stored water in a couple  
7 of years since the compact was negotiated?

8 A. Yes, sir. And that would be the compact  
9 water; not their water marketing contract.

10 Q. Okay. And what, if any, implications has  
11 that had for the way in which you actually operated the  
12 reservoir?

13 A. We always end up with more carryover in the  
14 fall because that water has not been delivered to any  
15 user.

16 Q. Okay.

17 SPECIAL MASTER: Those are my questions.

18 Mr. Kaste?

19 RE CROSS-EXAMINATION

20 BY MR. KASTE:

21 Q. I want to clarify and make sure I understood  
22 this correctly. The Advisory Committee gets together  
23 at, say, the beginning of the irrigation year and  
24 decides what percentage of the shares are going to be  
25 delivered in a given year and then what amount will be

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1 maintained for carryover?

2 A. The discussions would -- I'm sorry,  
3 Mr. Kaste. The discussions would imply to talk to the  
4 association, since Art Hayes would be president of the  
5 association, to work out -- I say prioritizing uses of  
6 the system. And Art would probably have to talk to his  
7 other board members and discuss what water is  
8 available, look at what shortages we have. And it's  
9 not going to be just, we're opening on a meeting, and  
10 here it is, the number is this. There's going to be  
11 some discussions and back and forth.

12 And a follow-up on that would definitely be,  
13 make arrangements and plans for these are the possible  
14 shortages coming up for the year. Now let's evaluate  
15 how spring runoff happens. Let's evaluate and see what  
16 storms come through the basin. Because a perfect  
17 example is in 2005, we had a really bad winter that  
18 year. And I think up until March we were really not  
19 looking for anything to come down the system. And I do  
20 not remember specifically, sir, but I'm almost certain  
21 that we probably had these discussions about, what are  
22 we going to do this next year for shortages? And then  
23 in May, we filled and spilled. And rather for two or  
24 three weeks, I believe.

25 So it's -- yes, we'll make those

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1 determinations. But at that time, it's, like anything  
2 in that basin, that we probably would have to set up  
3 regular meetings to make sure that we're catching the  
4 changes that are coming down the pipe.

5 Q. What I'm trying to get my head around is that  
6 maybe early in the summer after you understand where  
7 you're going to be, if you say you're at capacity,  
8 maybe 50,000, the parties get together and they make a  
9 decision, we want to keep 20 or 25,000 acre-feet in  
10 this reservoir for carryover. And the rest we're going  
11 to divide amongst the tribe and water users and these  
12 proportions to their shares; do I have that right?

13 A. Yes. That sounds appropriate.

14 Q. Okay. And I just hadn't heard, before the  
15 Special Master got to it, anybody explain that there  
16 was a conscious decision to maintain a certain level of  
17 carryover as opposed to what I thought was happening  
18 was that you were reacting to the demand of the  
19 shareholders saying -- and it just turned out that you  
20 had this much left.

21 A. To clarify, I think it's at the end of 2001  
22 or 2002 years, all water was -- all contract water was  
23 delivered. The only water left in the system, in the  
24 reservoir was, I think, Northern Cheyenne Tribe Compact  
25 water. And that's after all the shortages were pro

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1 rata.

2 The decision to be made is if people are  
3 going to say we can gamble, we would like to use what  
4 shares we can and go, or the decision of, okay, we  
5 should leave some here because we're looking at a dry  
6 weather pattern. In 2004 that was sort of more of the  
7 decision, or 2005, we're a little bit concerned.

8 And so you try to stretch out the effects for  
9 a longer period of time.

10 Q. Sure. I'm just, like I said, trying to  
11 clarify my confusion about the way in which carryover  
12 is established. And like I said, my assumption was  
13 that the shareholder said, I want mine, I want mine,  
14 and what you had left after they said that was what you  
15 carried over. But it appears the process is proactive  
16 in that you do try and make some determinations on the  
17 front end about what you should keep for the next year;  
18 right?

19 A. Yes, sir. And dealing with the system, we  
20 try to measure from the top down on the system from the  
21 shares and the deliveries.

22 Q. Thank you.

23 A. You're welcome.

24 BY SPECIAL MASTER:

25

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1 Q. One other quick question. This was in your  
2 original expert testimony, which is M3. I just had a  
3 question on page 6. So it's the second paragraph under  
4 Northern Cheyenne Water Right. You say, "Studies and  
5 data gathered for the NCT Compact negotiations  
6 determined that current flows in the Tongue River were  
7 not sufficient to satisfy decreed water rights and the  
8 amounts of water that had been reserved for historic  
9 tribal and non-tribal water rights."

10 So my first question is: What do you mean by  
11 the word "reserved"?

12 A. My understanding, sir, is that's back to the  
13 satisfy their original water rights for the Indian  
14 tribe and reservations.

15 Q. So you're talking about here they were  
16 reserved in the sense that federal reserved water  
17 rights refer to reserved rights?

18 A. Yes, sir.

19 Q. Okay. And then also you discuss here both  
20 tribal rights and non-tribal water rights. So were  
21 there any non-tribal water rights that you're aware of  
22 that were reserved?

23 A. Sir, I'm drawing a blank here. I know that  
24 there was reservations for some junior rights, DFWP and  
25 stuff. But I don't think that's what it's talking

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1 about. But I'm drawing a blank right now, sir.

2 Q. Okay. Thanks. And when you're talking about  
3 reserves in connection with historic pattern, you're  
4 not talking about the state reserving, but you're  
5 talking about the Federal Government reserving rights  
6 pursuant to the law of federal Indian reserved water  
7 rights?

8 A. Yes, sir.

9 Q. Okay.

10 SPECIAL MASTER: So, Mr. Wechsler?

11 MR. WECHSLER: Yes, sir.

12 SPECIAL MASTER: Do you think that you could  
13 do the redirect today, or would you prefer to do it  
14 first thing in the morning?

15 MR. WECHSLER: I'm happy to start today. I  
16 don't think I'd be able to finish. And so, perhaps,  
17 Mr. Smith is getting tired. I don't...

18 SPECIAL MASTER: Or perhaps the court  
19 reporter is getting tired.

20 MR. WECHSLER: Perhaps she is getting tired.

21 SPECIAL MASTER: So let's go off the record  
22 and just huddle here for a second.

23 (Discussion held off the  
24 record.)

25 SPECIAL MASTER: So we can go back on the

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1 record. So let's adjourn for the day, and my apologies  
2 to Mr. Smith because he's going to have to come back  
3 another day, and also my apologies to Mr. Hayes who has  
4 been sitting there dutifully every day and will have to  
5 come back tomorrow for his testimony.

6 But we will adjourn for today, and we will  
7 start up again at 9:00 a.m. tomorrow morning. And I'm,  
8 again, going to be pulling together all my papers. So  
9 everyone can either be seated or go on your way. Have  
10 a great evening.

11 (Trial Proceedings recessed at  
12 4:35 p.m., October 24, 2013.)

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## REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 240, 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 11th day of February, 2014.



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