

No. 137, Original  
IN THE SUPREME COURT OF THE UNITED STATES  
VOLUME 8 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, Monday, October 28, 2013

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

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1 MONDAY, OCTOBER 28, 2013, 9:01 A.M.

2 SPECIAL MASTER: Good morning, everyone. Be  
3 seated. So I hope everyone had a nice weekend. I was  
4 able to get out on Saturday and see some of the area  
5 around here, which was really quite a pleasure.

6 Unfortunately, I was too optimistic at the  
7 end of Friday when I estimated how much time we've  
8 actually taken so far. I went back and I took a look  
9 at the amount of time that had been predicted by the  
10 various sides. And if we take the most optimistic  
11 scenario that Montana had, we're a day behind there.

12 I think that's sort of the good news. The  
13 bad news is they are only two days ahead of the worst  
14 scenario. At this stage, there's not a lot of  
15 difference. But as we go on in the trial, there's  
16 likely to be more difference that will develop. And we  
17 seem to do well on some witnesses, and then we seem to  
18 fall behind on the next witness.

19 And I don't want to end up where -- there was  
20 a story that Everett Dirksen once told about -- he was  
21 talking about the federal budget or was trying to tell  
22 a story about the federal budget. And it involved a  
23 boy in second grade. And the math teacher said, Billy,  
24 can you take out a sheet of paper? And let's assume  
25 there's a cat that fell down a 300-foot well. The

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1 cat's trying to get out. And assume that the cat is  
2 able to climb up a foot. And every time it climbs up a  
3 foot, it falls down two feet. How long will it take  
4 before the cat can climb out of the hole?

5 And Billy worked for half an hour. And the  
6 teacher said, have you come up with an answer yet? And  
7 Billy looked up and said, well, if you give me a few  
8 more pieces of paper that I can work with and a couple  
9 of hours, I'm sure I can get that cat in hell pretty  
10 soon.

11 That's not what I want to end up with in this  
12 particular case. If you look at Wyoming's estimate,  
13 we're about two days behind sort of even more  
14 aggressive scenario that Wyoming had.

15 So at this point, I'd like to ask counsel to  
16 do several things. Number one, speed up to the degree  
17 that you can. I realize that sometimes speeding up  
18 takes a little bit, even more preparation. This is my  
19 morning for quotations. But as Mark Twain's famous  
20 quotation of he didn't have time enough to write a  
21 short letter, so he wrote a long letter instead. So it  
22 takes a little bit of time, so let's do that.

23 Second of all, on the exhibits, as I  
24 mentioned before, you can certainly draw on the  
25 exhibits later. And I realize that sometimes you want

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1 to have the witness read a portion of an exhibit,  
2 either because you want to ask some follow-up questions  
3 to that portion of the exhibit, or because you want the  
4 witness to actually testify that, in fact, what the  
5 exhibit said happened did happen or you need it for  
6 context or a foundation.

7           But if you're only having the witness read  
8 something in order to draw it to my attention, I'm  
9 perfectly happy for you to say, Your Honor, there's the  
10 following passage, and we'd really draw your attention  
11 to that particular passage. That's fine. I will then  
12 look at it. I will mark it. I will read it carefully.  
13 And, of course, you can rely on it later.

14           Expert qualifications. From my standpoint,  
15 most of the qualifications that are set out in the  
16 expert reports, that's fine. If you want to expand on  
17 it a little bit for purposes of the Supreme Court,  
18 that's fine too. But you don't need to go through  
19 great lengths unless the other side is actually going  
20 to challenge. And if the other side challenges, then  
21 I'll permit you to have even more time to set out the  
22 expert qualifications.

23           One of the reasons why I suggested that we  
24 exchange exhibits or identify exhibits two days ahead  
25 of time is so that there would be time to resolve any

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1 type of questions that came up at the end of Friday  
2 with respect to the new exhibit that we had. And, you  
3 know, I think at this point, if you can cut down on any  
4 extraneous topics, that's great. From my standpoint,  
5 it's hard sometimes to know whether something is an  
6 extraneous topic because I don't necessarily know  
7 exactly where you're headed. And so that's why both  
8 sides should continue to feel free to just raise a  
9 concern if they think that you're going in a  
10 direction -- the other side is going in a direction  
11 that is not really necessary. Because you have a much  
12 better sense of the case and whether or not something  
13 is actually moving in the wrong direction.

14 I would start at 8:45 a.m. in the morning,  
15 except I have a feeling the court reporter might  
16 immediately get up and leave if I suggested that we  
17 would do that on a regular basis. But, if necessary,  
18 we can go in that particular direction.

19 So anyway, those are all suggestions, but  
20 it's just a request that we try to move things a little  
21 bit faster in order to -- what I'd love to do is to  
22 finish up all the cases in chief by November 21st. And  
23 at this stage, we can probably do it if we don't fall  
24 any further behind. But we certainly will not be able  
25 to achieve that if we didn't.

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1           The other concern, I know, Mr. Kaste, that I  
2 think it was Mr. Schreüder that has a time limit as to  
3 when can he testify; is that correct?

4           MR. KASTE: Yes. Dr. Schreüder has a trip to  
5 South Africa. We've worked with Montana to make sure  
6 Mr. Larson and Dr. Schreüder will testify on the 12th,  
7 probably following a little bit into the 13th of  
8 November, which will allow Dr. Schreüder to get to  
9 South Africa. We'll interrupt wherever we are to  
10 ensure those two individuals testify by that time.

11           SPECIAL MASTER: Excellent. So thank you,  
12 Mr. Draper.

13           Thank you, Mr. Kaste, for working that out.

14           But, again, in addition to that, there's just  
15 the desire to get this case completed so that we can  
16 then go on to the posttrial briefings.

17           Okay. I think that's it. And, again, I'm  
18 not sure any of my suggestions will individually add up  
19 to a lot of saved time. But, again, as Everett Dirksen  
20 actually didn't say, but paraphrasing what he didn't  
21 say, a minute here and a minute there, ultimately we'll  
22 be talking about real time.

23           So, Mr. Draper, do you want to have  
24 Mr. Aycock come back up at this stage, or do we have  
25 some other matters that we need to discuss?

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1 MR. DRAPER: Yes, Your Honor, I would like to  
2 report that we did take out some of the responsive  
3 questions to Exhibit M557, the series of Bureau of  
4 Reclamation report excerpts. We have attained the  
5 reports that we didn't already have and provided those  
6 to Wyoming this morning. So we have those available  
7 for review today from the Bureau of Reclamation. And  
8 we're prepared to make copies if Wyoming requests that.

9 We've also subdivided the exhibit and put the  
10 reports in chronological order to follow your  
11 suggestion.

12 Further, because we have witness scheduling  
13 issues where witnesses are coming in from out of town,  
14 sometimes far away, we are breaking Mr. Aycock's  
15 testimony now to take several witnesses today. And  
16 then we expect Mr. Aycock to come back on this  
17 afternoon.

18 So we would propose to start with our first  
19 witness today being Mr. Christopher Tweeten. And the  
20 examination will be done by Ms. Yates.

21 SPECIAL MASTER: Okay. Thank you.

22 MR. DRAPER: So we would call Mr. Tweeten to  
23 the stand, please.

24 THE CLERK: Please take a seat. State your  
25 name and spell it for the court reporter.

Direct Examination by Ms. Yates  
CHRISTIAN TWEETEN - October 28, 2013

1 THE WITNESS: My name is Christian, not  
2 Christopher. Excuse me. Christian is spelled like the  
3 religion; David, D-a-v-i-d; the last name is Tweeten,  
4 spelled T-w-e-e-t-e-n.

5 MS. YATES: Your Honor, pursuant to your  
6 request, the purpose of Mr. Tweeten's testimony is to  
7 inform the Court about the function of the Montana  
8 Reserved Water Rights Compact Commission, its role in  
9 the settlement of the Northern Cheyenne Tribe's federal  
10 reserved Indian water rights, and the actual water  
11 right compact among the Northern Cheyenne Tribe, the  
12 Federal Government, and the State of Montana.

13 SPECIAL MASTER: Okay. Thank you.

14 CHRISTIAN TWEETEN,  
15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MS. YATES:

18 Q. Good morning, Mr. Tweeten.

19 A. Good morning, Ms. Yates.

20 Q. What is your current business address?

21 A. My current address is 101 West Artemos Drive,  
22 and it's spelled A-r-t-e-m-o-s. And that's in  
23 Missoula, Montana.

24 Q. And by whom are you currently employed?

25 A. I am self-employed as an attorney. I also

Direct Examination by Ms. Yates  
CHRISTIAN TWEETEN - October 28, 2013

1 serve as an adjunct professor of law at the University  
2 of Montana School of Law in Missoula.

3 Q. And what do you teach at the School of Law?

4 A. I teach several courses in the clinical  
5 program. And in the spring semester, I'll be teaching  
6 administrative law.

7 Q. Could you please describe your postsecondary  
8 education?

9 A. The first two years of my college education  
10 were taken at what was then known as Northern Montana  
11 College, now known as Montana State University Northern  
12 in Havre, Montana. I then transferred to the  
13 University of Montana. I received my bachelor's degree  
14 in English at the University of Montana in 1974 and my  
15 law degree from University of Montana School of Law in  
16 1977.

17 Q. Could you please describe your work  
18 experience after law school?

19 A. I clerked for a year here in Billings for the  
20 Honorable William J. Jameson, Sr., United States  
21 District Judge. After that, I worked from 1978 until  
22 1989 as an assistant attorney general in the Office of  
23 the Attorney General in Helena.

24 I spent three years in private practice then  
25 with the firm of Hughes, Kellner, Sullivan & Alke --



Direct Examination by Ms. Yates  
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1 it's K-e-l-l-n-e-r; Alke is A-l-k-e -- in Helena.

2 In January of 1993, I returned to the  
3 Attorney General's Office as the chief deputy attorney  
4 general. I served in various leadership attorney roles  
5 in the Attorney General's Office from 1993 to 2010.

6 I left the Attorney General's Office at the  
7 end of 2010, immediately began teaching at the law  
8 school in Missoula, and started to organize my private  
9 practice, which is what I've been doing since then.

10 Q. Are you a member of the Montana Reserved  
11 Water Rights Compact Commission?

12 A. Yes.

13 Q. And how long have you been a member of the  
14 Montana Reserved Water Rights Compact Commission?

15 A. I was appointed to the compact commission in  
16 1984.

17 MS. YATES: Your Honor, I'm just going to  
18 start referring to the Montana Reserved Water Rights  
19 Compact Commission as the compact commission because  
20 it's just easier than trying to say the entire name  
21 every time I want to talk about the compact commission.

22 SPECIAL MASTER: I think any time you can  
23 save by reducing a name, sounds great. Can I just  
24 verify, also, that Mr. Tweeten is testifying as a  
25 percipient witness and not as an expert?

Direct Examination by Ms. Yates  
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1 MS. YATES: Correct.

2 SPECIAL MASTER: Thanks.

3 BY MS. YATES:

4 Q. Are you chairman of the compact commission?

5 A. I am.

6 Q. How long have you been chairman of the  
7 compact commission?

8 A. I was elected chairman -- the chairman is an  
9 elected position selected by the other members of the  
10 compact commission. And I was elected some time in the  
11 mid-'90s. I can't put my finger on the exact day.  
12 I've never traced the documents back. But probably  
13 '94, somewhere in that range.

14 Q. And could you explain what the compact  
15 commission is.

16 A. Certainly. The compact commission was  
17 created as part of the legislation that put on the  
18 statewide water association in Montana. In 1979, the  
19 legislature substantially revamped the water use laws  
20 in Montana and created a Statewide Water Adjudication,  
21 which I'm sure you've heard about. It divided the  
22 state into 80 or 90 water basins and required anyone  
23 holding a water right in Montana to make a filing  
24 before the Montana Water Court by a certain date and  
25 then to conduct an interstate state litigation of their

Direct Examination by Ms. Yates  
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1 water rights claims against all of their neighbors in  
2 that particular basin.

3           The result would be a decree in each basin  
4 that would set forth the amount and priority of water  
5 rights in that particular basin. This was required by  
6 the 1972 Montana Constitution, which required the  
7 legislature to create the centralized record keeping  
8 system for water rights.

9           Unlike Wyoming, Montana never had one until  
10 after the 1972 constitution. Our water rights records  
11 were scattered from one side of the state to the other  
12 and every place in between. Some water rights had no  
13 documenting records at all. Some were filed in county  
14 courthouses. And there was simply no way to know on a  
15 consistent basis how water rights would be proofed up  
16 if there were to be a general stream adjudication on a  
17 particular stream.

18           So the constitutional conventions fixed that  
19 by requiring the state to create this statewide  
20 database of water rights. And implementing that  
21 constitutional requirement, the legislature decided  
22 that the only rational way to do that was by a  
23 statewide general stream adjudication, where all the  
24 streams would be adjudicated. Extraneous claims would  
25 be thrown out. And only those claims that could be

Direct Examination by Ms. Yates  
CHRISTIAN TWEETEN - October 28, 2013

1 verified would be included in this centralized  
2 database.

3           The adjudication pertained to claims up to  
4 July 1st of -- that existed prior to July 1st of 1973.

5           Q.    Mr. Tweeten, if I could just interrupt you.  
6 We've had discussion on the adjudication.

7           A.    Okay. Well, in putting the adjudication  
8 together, the legislature understood, based on advice  
9 from some of the preeminent water lawyers in Montana,  
10 that in indication to the water rights that existed  
11 under state law, there were these creatures called  
12 federal reserved water rights which arose under federal  
13 law, not state law, and had completely different  
14 attributes than a water right that existed under state  
15 law.

16           Based on a survey of the landscape of the  
17 adjudications that included federal reserved water  
18 rights, the legislature concluded that while it needed  
19 to have those federal reserved water rights in the  
20 adjudications in order to make them general stream  
21 adjudications, it did not want, necessarily, to clog up  
22 the litigation process with years- or decades-long  
23 litigation of a federal reserved rights claim.

24           So they -- the legislature decided it would  
25 be preferable to settle those claims out of court and

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1 put in an alternative dispute resolution process for  
2 those claims.

3           And that's what the compact commission is.  
4 The commission is obligated by statute, or was  
5 obligated by statute to make contact with all of the  
6 Indian tribes and federal agencies in Montana that  
7 could conceivably claim federal reserved water rights,  
8 and to solicit them to enter into negotiations with the  
9 Commission, with the aim of reaching an out-of-court  
10 settlement of those federal reserved water rights  
11 claims that could then be plugged into the adjudication  
12 decrees without further litigation before the Water  
13 Court.

14           So the compact commission was created. It  
15 consists of nine members. Four of those members are  
16 appointed by the governor. Four are appointed by the  
17 leadership of the legislature. And the legislative  
18 members are bipartisan. The statute requires that two  
19 be appointed by the leaders of the House of  
20 Representatives and two by the Senate. And within  
21 those houses, there has to be one republican and one  
22 democrat.

23           So that consists of eight of the nine. The  
24 ninth member is a member appointed by the Attorney  
25 General. So those nine members make up the compact

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1 commission.

2           By practice, the compact commission divided  
3 itself up into negotiating teams because there were  
4 close to 20 entities that wished to engage in  
5 negotiations of federal reserve rights claims in  
6 Montana. So rather than have all nine compact  
7 commission members working on all 20 projects at the  
8 same time, we divided ourselves into negotiating teams  
9 so a smaller group of commission members, supported by  
10 staff, would be assigned to each negotiation that we  
11 undertook.

12           So the compact commission split all of the  
13 federal agencies and tribes in Montana. All of the  
14 tribes responded affirmatively to the requests that  
15 they come to the commission and negotiate.

16           SPECIAL MASTER: If I could interrupt you for  
17 a moment. I'm just curious, given that I'd already  
18 ruled on, I think, one of the major interpretation  
19 questions with respect to the Northern Cheyenne Tribe's  
20 Compact, where this particular testimony is ultimately  
21 going to head.

22           MS. YATES: Your Honor, it's important to  
23 understand the negotiation process of the compact.  
24 Because they are bargained-for compromises. Each  
25 component is integral to the compact, and we still have

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1 the 20,000 acre-feet of storage for the Tongue River  
2 Reservoir for the Northern Cheyenne Compact right at  
3 issue and how it's going to be fulfilled.

4 SPECIAL MASTER: Okay. That's fine. Just  
5 in -- again, you sort of walked in where I'm now really  
6 interested in saving time. What I'm not sure is  
7 whether I need all of the background on exactly the  
8 makeup, for example, of the Montana commission.

9 MS. YATES: We'll pick up speed, Your Honor.

10 SPECIAL MASTER: Okay. Thanks.

11 BY MS. YATES:

12 Q. I do have one further follow-up question on  
13 your explanation of the compact commission. What is  
14 the staffing level for the compact commission?

15 A. Well, there was a time when we had a staff of  
16 ten or more scientists and technicians. We had  
17 hydrologists and soil scientists, attorneys. We had a  
18 GIS specialist who was responsible for mapping all of  
19 the necessary things that require mapping with respect  
20 to the commission. So we had a very large staff at one  
21 point.

22 As the Commission's work has wound down, the  
23 size of our staff has wound down as well to the point  
24 where we're now -- our staff consists of one attorney.  
25 We have a hydrologist. We have an agricultural

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1 engineer and our GIS specialist. So now we have a  
2 staff of four that supports the work that the  
3 commission is doing. We've resolved all of the federal  
4 reserved water rights claims in Montana, with a  
5 singular exception of the rights pertaining to the  
6 Flathead Indian Reservation in northwestern Montana.

7 So we have 17 compacts that have been  
8 approved by the Montana legislature. And three of the  
9 six Indian compacts have been approved by Congress as  
10 well. One of them, Fort Peck, has been determined  
11 doesn't require congressional approval. The other two  
12 are the subject of bills that are currently before the  
13 Congress. Those will be Blackfeet and Fort Belknap.

14 We have federal agency compacts with the Park  
15 Service and Forest Service, the Fish & Wildlife  
16 Service, and the U.S. Department of Agriculture dealing  
17 with their respective federal reserved water rights  
18 claims in Montana. So we've negotiated 18 compacts,  
19 including Flathead. Seventeen of the eighteen have  
20 been ratified by the Montana legislature as required by  
21 our statutes.

22 And one, the Flathead Compact, remains. It  
23 was submitted for ratification. Didn't pass last  
24 session; we expect to submit it again in the 2015  
25 session, which would complete the compact commission's



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1 work.

2 Q. And, Mr. Tweeten, are these compacts found  
3 in Title 85 Chapter 20 of the Montana Code Annotated?

4 A. Yes, they are.

5 Q. Are you aware of any other state that has an  
6 entity similar to the compact commission?

7 A. No.

8 Q. If reserved water rights are not compacted,  
9 what happens?

10 A. Well, under the Montana adjudication, they  
11 have to be quantified one way or the other. So they  
12 would be quantified through negotiation or put into the  
13 Water Court litigation process and litigated in front  
14 of the Montana Water Court.

15 Q. What are the filing deadlines?

16 A. The filing deadline for general water rights  
17 claims was, I believe, in 1984. Filing deadline for  
18 federal reserved rights claims, as it stands right now,  
19 is June 30th of 2015.

20 Q. And were protective filings made by the  
21 Federal Government at the beginning of the claim filing  
22 period?

23 A. To my knowledge, they were, yes.

24 Q. And what is the process to finalize a compact  
25 with federal Indian reserved water rights?

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1           A.     The process is that the compact is agreed to  
2 between the tribes and negotiating parties and the  
3 compact commission. It is then reduced to writing,  
4 submitted to the Montana legislature in the form of a  
5 bill. Our statute requires legislative approval for  
6 all of our compacts, so it then goes through the  
7 Montana legislature.

8                     The next step for a tribal compact is to go  
9 to Congress. Because we've been advised by the Justice  
10 Department that federal law requires that tribal  
11 compacts be ratified by Congress in most cases. So all  
12 of our compacts, with the exception of Fort Peck, have  
13 gone to Congress. Once Congress ratifies the compact,  
14 it is then placed before the tribe for final  
15 consideration under whatever process tribal law  
16 provides.

17                     The tribes get the last crack at the compact  
18 approval process because the tribes are desirous of  
19 seeing the entire package that includes not only the  
20 compact but also whatever federal funding and federal  
21 programs might be put in place for the implementation  
22 of the compact. And those are all added on during the  
23 congressional ratification process. So, for example,  
24 in Crow, the compact came back from Congress with a  
25 \$435 million federal appropriation. And that package

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1 was then placed in front of the tribe by referendum,  
2 and the tribal members approved it.

3 Rocky Boy's, on the other hand, that was  
4 ratified by the Tribal Council because it was  
5 determined that's what tribal law required. But in any  
6 event, once it comes back from Congress, the tribe's  
7 then allowed to review the entire package, the compact,  
8 as well as the federal legislation and then give its  
9 final approval or disapproval.

10 So once that occurs, then the next step is to  
11 take the water rights component of the compact and  
12 integrate it into the water court decree for the  
13 affected basins. And that's done by a filing that's  
14 made by the Attorney General in the Water Court. The  
15 Attorney General will move for the inclusion of the  
16 compact. It's then placed before the Water Court,  
17 which uses a consent decree standard in evaluating the  
18 compact for purposes of determining whether it should  
19 or should not be incorporated in the decree. That is,  
20 is it a reasonable settlement? Is it fair to all  
21 parties? Is it within the scope of what might be  
22 achieved if the matter were litigated?

23 And applying that standard, the Water Court  
24 then makes a determination as to whether the compact  
25 ought to be included in the decree or not. And the

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1 inclusion of the water rights portion of the compact is  
2 the final step in finalizing the compact process.

3 Q. And is there an opportunity for state-based  
4 users to participate in the Water Court process?

5 A. Yes, there is. State-based water users can  
6 object to the inclusion of the compact in the Water  
7 Court decrees. The scope of their objection is fairly  
8 limited. The Water Court does not have the authority  
9 to rewrite the compact's water rights provision. It  
10 can either approve them or disapprove them. So  
11 objections can be made as to the legality or  
12 fundamental fairness of the compact with respect to  
13 water user's water rights. And the Water Court can  
14 then review those objections and make rulings on them  
15 as it sees fit.

16 Historically, most of those objections have  
17 been resolved through negotiations and discussions.  
18 And relatively few of them get to the point where the  
19 Water Court has had to rule on them.

20 Q. And could you please briefly describe the  
21 process the compact commission goes through when it  
22 negotiates a federal Indian reserved water right  
23 compact.

24 A. Certainly. All of them are different,  
25 obviously, 'cause all the reservations are different.

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1 They have different organic documents. Some have  
2 executive orders by the Northern Cheyenne. So most of  
3 them are treaty-based reservations. So --

4 SPECIAL MASTER: Just as background, what I'm  
5 most interested in, obviously, is the negotiation  
6 process for the Northern Cheyenne. So I know you were  
7 just asked a general question, but if you could focus  
8 it as much as possible on the Northern Cheyenne  
9 situation, that would be great.

10 THE WITNESS: Certainly. And, again, these  
11 are events that took place more than 20 years ago. My  
12 recall of them is not absolutely perfect at this stage.  
13 But we solicited negotiations with the Northern  
14 Cheyenne Tribe. We agreed to enter the negotiation  
15 process. Communication went back and forth informally  
16 between the compact commission and the tribes over a  
17 period of several years.

18 Ultimately, during that period of time also,  
19 a good deal of legal and technical work would have been  
20 done with respect to researching the executive order  
21 and its administrative history, trying to figure out  
22 what produced the executive order that created the  
23 reservation and what the circumstances were that led  
24 the president to make that declaration.

25 A good deal of work would have been done to

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1 gather existing water rights records dealing with the  
2 streams that flow through the reservation. In this  
3 case, there are principally two: Tongue River  
4 Reservoir and Rosebud Creek.

5 Any existing water rights records that could  
6 be gathered would be gathered. That would include a  
7 review of the claims that had been filed in the Water  
8 Court Adjudication to try to determine just how much  
9 water was being claimed out of these water sources by  
10 people claiming rights under state law.

11 We discovered at that time that Rosebud Creek  
12 arises on the Crow Reservation. So there was a  
13 potential reserved water rights claim on the part of  
14 the Crow and Rosebud Creek as well.

15 There had been historically, over the years  
16 and decades prior to that time, a good deal of  
17 technical work done regarding soils classification.  
18 And so all of that information would have been  
19 reviewed. Whatever water supply records that were  
20 available would have been reviewed so we could get some  
21 sense of the hydrology of these two water rights bases.  
22 How much water do they typically produce?

23 On the Tongue River, we had the interesting  
24 artifact that there was a dam that had been built in  
25 the 1930s by the State of Montana to contain the waters

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1 of the Tongue River and store them for future release  
2 downstream.

3           And there were contract rights that existed  
4 out of that dam. The tribe actually had one. The  
5 Tongue River Water Users' Association had another.  
6 There may have been -- I'm not completely familiar with  
7 all of them. But I know those two existed.

8           Miles City sits is the mouth of Tongue River.  
9 It's a substantial municipality by Montana standards.  
10 And the water needs of Miles City would have been  
11 examined, and attempts would have been made to project  
12 how much water might be necessary in the future to  
13 sustain the population of Miles City. So all of the  
14 technical would have been done during this initial  
15 period of time.

16           Ultimately, as a result of the discussions  
17 that took place, it was decided that the tribe would  
18 make the initial proposal with respect to the terms of  
19 a compact for the Northern Cheyenne Tribe reserved  
20 water right. And that was done. They made a proposal  
21 that called for a large allocation of direct flow water  
22 out of the Tongue River.

23           The perpetuation of the tribe's storage  
24 contract behind the Tongue River Dam contained some  
25 fairly limited provisions for the protection of

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1 existing uses, which was one of the most important  
2 issues, obviously, for us as a state representative at  
3 the negotiating table. There are -- in every situation  
4 on where you're dealing with tribal reserved water  
5 rights, the tribe's treaty-based priority date or its  
6 executive order-based priority date will always be  
7 among the earliest if not absolutely the earliest  
8 priority date in the basin.

9 BY MS. YATES:

10 Q. Mr. Tweeten, if I could interrupt you, I'd  
11 like you to go through the process first, and then  
12 we'll talk about some of the details. Are these  
13 sovereign-to-sovereign negotiations?

14 A. By statute we are obligated to treat them as  
15 government-to-government negotiations. The contacts  
16 made with the tribal government is recognized by the  
17 United States as the official governmental  
18 representative of the reservation. We also include the  
19 United States in our discussions as a party because the  
20 United States is frequently the holder of at least some  
21 of the federal reserved water rights that exist on  
22 every reservation. So the United States -- and it's  
23 also the trustee for the tribes, obviously. So we  
24 include the United States in our discussions as well  
25 both through the Department of Interior and the



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1 Department of Justice. So we make these -- we're  
2 required to make them government-to-government,  
3 sovereign-to-sovereign negotiations.

4 Q. And do you enter into memorandums of  
5 understanding that govern the negotiations?

6 A. We do. We have both substantive and more  
7 procedural shape of the table type memorandums that we  
8 enter with our negotiating partners.

9 Substantively, the major one is the  
10 acknowledgment by all parties that these are  
11 negotiations for settlement of litigation and,  
12 therefore, any statements made or information developed  
13 as a result of these negotiations is covered by Rule  
14 408 of the Federal Rules of Evidence.

15 Procedurally, we have -- we would  
16 traditionally have a memorandum of understanding with  
17 the tribes and the United States about things like open  
18 meetings, whether our negotiating sessions would be  
19 open to the public or conducted in private, how  
20 relationships with the media would be conducted. In  
21 other words, typically, if we wanted to talk to some  
22 representative of the press, if we were contacted by a  
23 newspaper reporter who wanted information, our  
24 obligation under the MOU would be to notify the other  
25 parties of the MOU to let them know that the press had

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1 been inquiring about this particular issue.

2           The tribe, in particular, are, I think,  
3 interested in making sure that their side of the story  
4 gets told in the press as well as the state  
5 government's side of the story. So they are interested  
6 in making sure that when the compact commission would  
7 be contacted for information or comment, that the tribe  
8 would have an opportunity to participate in that  
9 discussion with the media as well.

10           Q. Mr. Tweeten, when your staff reviews the  
11 potential scope of federal reserved water right, is  
12 this just a paper review of executive orders and  
13 treaties, or is it something further?

14           A. One of the major components of an analysis of  
15 a federal reserved water right is to determine the  
16 purpose for which the reservation was created. Because  
17 that purpose, again, governs how much water would be  
18 necessary to meet the federal reserved water right  
19 requirement under the Winters Doctrine.

20           So we need to determine what the purpose was  
21 for the establishment of the reservation. East of the  
22 Continental Divide in Montana, all of the treaties and  
23 executive orders are to a greater or lesser extent  
24 agriculturally oriented. The attempt on the federal  
25 government's part was in an attempt to review and

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1 domesticate the tribes and culturated them to the idea  
2 of agricultural living as opposed to the hunting and  
3 gathering society that they had been previously.

4           So the reservations would be set aside.  
5 Indian irrigation projects would be set up typically on  
6 the reservations. And the intention of the Government  
7 was that agriculture would be the dominant industry on  
8 the reservation. So for these east of the mountains  
9 tribes, irrigated agriculture was obviously a focus.  
10 And in order to analyze that problem, it requires not  
11 just a review of all the documentation that you can  
12 find, but also you need to understand the soil  
13 characteristics and the agricultural irrigation water  
14 duties that are required in order to raise a crop in  
15 the particular soils that are found within the  
16 reservation.

17           Fortunately, the soils in virtually all of  
18 eastern Montana have been classified at one point or  
19 another in time. So there were good records available  
20 as to what the soil characteristics have been on  
21 reservations that we've dealt with. And we know from  
22 talking to individual farmers out there how much water  
23 they have been using to irrigate those lands.

24           So scientists can look at all of that data  
25 and determine what a water duty is for a particular

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1 acre of soil and a particular classification. And  
2 using all of those numbers, it's possible to come up  
3 with an estimate of what the agricultural water right  
4 would be for potentially irrigable lands on the  
5 reservations. So it's both a scientific study and an  
6 examination of the organic documents.

7 Q. And is it standard for the compact commission  
8 to review the purposes of the reservations from the  
9 tribe's perspective?

10 A. Federal law requires that. Federal law  
11 requires the treaties be interpreted as the tribes  
12 would have understood them since the -- I guess in the  
13 same sense that any document traditionally is  
14 interpreted most directly against the person that  
15 drafts it.

16 In this case, I think that rule applies with  
17 extra force because the tribes were not skilled in  
18 drafting documents. They didn't speak the English  
19 language. And their understanding would have been, in  
20 some cases, substantially different from the intention  
21 that the drafter of the document might have intended to  
22 purvey. And the Supreme Court has said in those  
23 circumstances the tribe interpretation has to be  
24 controlling. So we try to read those documents as we  
25 think the tribes would have understood them and take

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1 that into consideration in assessing what the purposes  
2 of the reservation might be.

3 Q. And in looking at the purposes of the  
4 reservation, do you consider existing uses as well as  
5 future uses?

6 A. For the tribes, certainly.

7 Q. And you discussed previously about tribes  
8 east of the Divide tend to have an agricultural basis.  
9 Would they also be entitled to domestic water?

10 A. Certainly. Anything that the tribes -- that  
11 would be necessary in order to make the reservation a  
12 habitable homeland for the tribes would have been  
13 included in the purposes of the federal reserved water  
14 right.

15 Q. Would that also include municipal and  
16 domestic uses?

17 A. It would include municipal, domestic,  
18 potential future industrial uses that might be  
19 available as well.

20 Q. And I just want to confirm with you that you  
21 were a member of the Northern Cheyenne Tribe  
22 negotiating team?

23 A. That's right.

24 Q. And could you please just briefly inform the  
25 Court where your statutes are in the Montana Code

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1 Annotated that govern the compact commission.

2 A. Certainly. There are two, actually, sets of  
3 statutes. One is simply the statute that creates the  
4 compact commission and places it in the organization  
5 chart of state government, if you will. And those are  
6 found historically in Title 2 of the Montana Code  
7 Annotated.

8 The statutes that actually determine what the  
9 powers, duties, and responsibilities and limitations  
10 are on the compact commission are found in Title 85 in  
11 the water use portions of the statutes.

12 And there are particular statutes there that  
13 deal with the resolution of Indian rights within the  
14 context of the water adjudication.

15 Q. What were the State's goals in negotiating a  
16 settlement with the Northern Cheyenne Tribe and the  
17 Federal Government?

18 A. Several. Most basically, our objective was  
19 to resolve the tribe's claim with out-of-court  
20 settlement so we would achieve the ultimate purpose of  
21 trying to compact rather than litigate. More  
22 specifically, we went into every negotiation with the  
23 tribes and the United States with the objective of  
24 preserving, to the greatest extent possible, those  
25 water rights that had come into existence under state

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1 law between 1973 and the time that the reservation had  
2 been created.

3 Federal reserved rights are unquantified  
4 water rights that can expand association in the future  
5 as tribal needs expand. And when, in the interim  
6 between the creation of the reservation and the time  
7 when those tribal rights finally come to be put into  
8 use, there are numerous water rights that are required  
9 in those water sources by persons acting under state  
10 law. The tribe's rights, because of their early  
11 priority date, have the opportunity to displace those  
12 later state law-based rights in times of water  
13 shortage, which can be -- you know, in Montana,  
14 droughts can last for years or a decade or more. And  
15 when water is short chronically and the tribes get  
16 their water first in every year, the continued  
17 existence of these irrigation-based farmlands that have  
18 been acquired and operated by non-Indian families for  
19 sometimes generations, can be jeopardized by the early  
20 priority date that the tribes have.

21 And our principal fact-based objective in all  
22 of these negotiations is to try to minimize to the  
23 greatest extent we possibly can the chance for the  
24 tribes to displace those existing state-based water  
25 rights, which is why all of our compacts have to a

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1 greater or lesser extent some provision in which the  
2 tribes agree to recognize and protect existing uses  
3 under state law up to the date of the compact. The  
4 tribes have been extraordinarily generous, I think, in  
5 understanding the potential damage that can occur to  
6 the regional economies when agriculture is put at risk.

7           So they've agreed to, in exchange for bargain  
8 for consideration, allow those uses to continue in dry  
9 years under certain conditions, despite the fact that  
10 the tribes have the earlier priority date.

11           Q. Mr. Tweeten, did the state have any goals  
12 with respect to the Tongue River Dam and Reservoir?

13           A. Certainly. Even more specifically with  
14 Northern Cheyenne, we had the unsafe dam problem. The  
15 state built the Tongue River Dam in the 1930s up to  
16 engineering standards that were then in place.

17           As I believe the Court knows, there had been  
18 a fairly large flood event in the late 1970s. One  
19 thing that happened during the flood event was the  
20 spillway of the Tongue River Dam nearly failed as a  
21 result of the huge amount of water that had to be  
22 passed out of the dam because of the snowmelt that  
23 occurred during that flood event.

24           There was a recognized unsafe dam on the  
25 federal safety of dams list. And the state was faced



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1 with a dilemma as to how we were going to get this  
2 reservoir repaired. The state had not deemed itself to  
3 be financially able to conduct the repair itself. One  
4 idea that was passed to us as a compact commission was  
5 the idea that perhaps it would be possible to, as part  
6 of our compact, secure the repair and rehabilitation of  
7 the Tongue River Dam to eliminate the dam safety  
8 problem.

9 Q. Turning now to the actual negotiations on the  
10 Northern Cheyenne Tribe Federal Water Compact, what  
11 were the possible priority dates for the Northern  
12 Cheyenne federal reserved water right?

13 A. Well, I can't list them specifically at this  
14 point in time. But I can tell you that the 1881 date  
15 of the original executive order was one possible  
16 priority date. There was a later executive order that  
17 was around the turn of the Twentieth Century, I  
18 believe, that could have been another possible priority  
19 date. I believe there were one or two others that were  
20 under consideration.

21 Q. And as you stated previously, the Northern  
22 Cheyenne Tribe made the first settlement proposal; is  
23 that correct?

24 A. That's right.

25 Q. Do you recall what the first settlement

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1 proposal included for a water right out of the Tongue  
2 River?

3 A. I believe it called for 85,000 acre-feet of  
4 direct flow water from the Tongue River.

5 Q. Did it also include a storage component?

6 A. It also included retaining the existing  
7 contract that the tribe had. I believe it also  
8 provided that part of their direct flow right was to be  
9 stored behind the dam.

10 Q. If I were to tell you that approximately  
11 17,500 acre-feet were proposed for storage in the dam,  
12 would you agree with that?

13 SPECIAL MASTER: I think this is, at this  
14 point, leading the witness. If you want to point to a  
15 document, you're welcome to.

16 MS. YATES: We don't have a document in  
17 evidence right now.

18 SPECIAL MASTER: Okay.

19 THE WITNESS: Well, prior to the time that  
20 you asked me the question, I would not have recalled  
21 the number.

22 BY MS. YATES:

23 Q. Okay. Did the 1988 proposal also include  
24 other sources, other water sources?

25 A. It did cover water in Rosebud Creek as well.

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1 It also proposed a fairly large allocation of stored  
2 water from behind Yellowtail Dam on the Big Horn River  
3 as well.

4 Q. Mr. Tweeten, could you please take out  
5 Exhibit M527, which has previously been admitted.

6 A. Yes.

7 Q. Is this the compact ultimately reached with  
8 the Northern Cheyenne Tribe and the Federal Government  
9 to settle the Northern Cheyenne Tribe's reserved water  
10 rights in the Tongue River?

11 A. Yes.

12 Q. Okay. If you would, please, take a look on  
13 the first page. And take a look at the fifth and  
14 sixth whereas clauses.

15 A. Okay.

16 Q. And could you please read those.

17 A. The fifth clause is "Whereas, the Northern  
18 Cheyenne Tribe and the United States agree that the  
19 Tribal water right described in this compact shall be  
20 in satisfaction of the tribes' reserved water rights  
21 claims and any claims to water rights made on behalf of  
22 the tribe by the United States."

23 And the sixth clause is "Whereas, it is in  
24 the best interest of all parties that the reserved  
25 water right claims of the Northern Cheyenne Tribe be

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1 settled through a water compact."

2 Q. And with respect to the fifth whereas clause,  
3 is that your understanding of one of the primary  
4 purposes of the compact?

5 A. Certainly. Conclusively determining the  
6 quantity of the tribe's water right is certainly one of  
7 the purposes.

8 Q. And turning your attention to the sixth  
9 whereas clause. Why was it in the best interest of the  
10 parties to settle through a compact?

11 A. Well, first of all, it is almost always  
12 better to settle than to litigate in any context.  
13 Settlement eliminates substantial uncertainty on both  
14 sides. And if an amicable settlement that meets the  
15 needs of both parties can be reached without having to  
16 go through costly and lengthy litigation, that's always  
17 a benefit.

18 With respect to federal reserved water rights  
19 claims, it is -- the compact commission has certainly  
20 believed, and I think that's a belief that's shared by  
21 the United States and the tribes that we've negotiated  
22 with, that because of the limitations on a decreed  
23 water right as opposed to one that's settled, a  
24 settlement has substantial advantages.

25 A decreed water right consists of a priority

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1 date and an amount of water. There is no provisions in  
2 a decreed water right for administration governing how  
3 that water right is to be administered. There is no  
4 consideration of whether the decreed water right can  
5 actually be converted by the tribe into a wet water  
6 right; in other words, whether the tribe actually will  
7 have the wherewithal to take that decreed water and put  
8 it to use for irrigation, for example.

9           Our experience has been that with most of our  
10 reservations in Montana, the reservation's creation  
11 coincided with the creation of an irrigation project  
12 for the Indians on the reservation. In almost every  
13 case, in fact, in every case, the Government fell down  
14 badly in its obligation to keep those projects in good  
15 repair. As a result, the tribal irrigation projects in  
16 Montana are all delapidated, all require substantial  
17 upgrading before they can actually carry water to their  
18 greatest potential.

19           The fact that the irrigation, the means of  
20 irrigation on our reservations are so poor makes a  
21 simple decree that the tribe is entitled to X amount of  
22 acre-feet of water for its present and future needs  
23 substantially less useful to the tribe than it might be  
24 if there were also provisions in a settlement, for  
25 example, that provide the means to upgrade those

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1 irrigation processes to make them actually deliver  
2 water for irrigation for the use by the Indians. And  
3 that's what we've accomplished in our settlements is  
4 providing substantial federal contributions to  
5 settlement that resolve claims by the tribes that the  
6 Government breached its trust responsibility by letting  
7 these irrigation projects become delapidated.

8           The tribe releases those claims in exchange  
9 for federal appropriations to make the Government's  
10 default good by making those irrigation projects  
11 usable. We're able to do that in a compact that can't  
12 be done in a negotiated settlement. Congress won't  
13 appropriate money for just general purposes of  
14 improving irrigation districts. They will appropriate  
15 money for an Indian water rights settlement.

16           And historically that's been the case in the  
17 last two decades, that when tribes come to Congress  
18 asking for money for programmatic needs like  
19 irrigation, they go away empty handed. When they come  
20 to Congress with a settlement, Congress is willing to  
21 open the federal checkbook and spend substantial sums  
22 of money to try to make that settlement effective. And  
23 that's a substantial benefit of settling as opposed to  
24 litigating, from the tribe's perspective. They get not  
25 only resolution of the uncertainty as to the amount and

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1 priority date of their water right, but they also get a  
2 large infusion of federal resources to try to make sure  
3 that they can use that water in the way that they were  
4 originally promised that it would be used to provide a  
5 livelihood for tribal members on the reservation.

6           Whereas, I'm sure you know, poverty rates are  
7 high, unemployment rates are the highest in the United  
8 States.

9           Q.    Mr. Tweeten, could we take a look at Article  
10 2.

11           A.    Sure.

12           Q.    Page 3 of 16 of the exhibit.

13           SPECIAL MASTER:   Ms. Yates, can I just also  
14 ask a question?  I'm sort of curious as to how this all  
15 fits into the case.  So I assume that Wyoming is not  
16 planning on challenging the reasonableness of the  
17 settlement itself of the Northern Cheyenne Tribe's  
18 claims.  Although, what you're probably going to argue  
19 is that it's perfectly fine settlement, but Wyoming  
20 shouldn't have to have any responsibility for meeting  
21 its terms.

22                    Am I correct on that?

23           MR. KASTE:   Pretty much, yeah.  And we  
24 weren't there.  We weren't parties to this compact.  It  
25 says what it says.  So explaining what it says seems to

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1 be a bit superfluous at this point. You're familiar  
2 with the provisions of the compact.

3 MS. YATES: Your Honor, I disagree that it's  
4 superfluous. I think it's important to understand,  
5 again, that these are bargained-for compromises and we  
6 settled what could have been a huge direct flow water  
7 right straight from the Tongue River with an 1881  
8 priority date in part for 20,000 acre-feet stored in  
9 the Tongue River Reservoir with a 1937 priority date.  
10 Had we litigated, the tribe would have had a direct  
11 flow right from the Tongue River with an 1881 priority  
12 date.

13 So it's important for the Court to understand  
14 that in the process of accomplishing this settlement,  
15 it was not a rubber stamp. It was a very rigorous and  
16 active settlement with experts and public  
17 participation.

18 MR. KASTE: And, again, our point is great.  
19 We weren't parties to that. It doesn't affect the  
20 obligations of the parties under the Yellowstone River  
21 Compact.

22 SPECIAL MASTER: So my only point -- and,  
23 again, I'm not going to cut off the testimony at this  
24 point, but instead, that Wyoming, I think -- I'm going  
25 to actually ask them. Do you concede this was a



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1 reasonable settlement from the standpoint of Montana?

2 MR. KASTE: Sure. Doesn't matter.

3 MS. YATES: Your Honor, if they are willing  
4 to recognize the 20,000 acre-feet with a 1937 priority  
5 date, which can be done.

6 MR. KASTE: For purposes of that compact, for  
7 purposes of internal administration within the state of  
8 Montana, it has a 1937 priority date. Does it for  
9 purposes of the Yellowstone River Compact? Different  
10 question. Not informed by this testimony.

11 MS. YATES: I disagree. I think it's  
12 important for the Court to understand.

13 SPECIAL MASTER: Okay. So, again, what  
14 I'm -- what I think the U.S. Supreme Court, which  
15 obviously has dealt with a variety of these types of  
16 cases before, and, therefore, has strong familiarity  
17 with Indian reserved water rights cases, I think that  
18 the most important thing here is any questions with  
19 respect to the relationship between the compact itself,  
20 the Northern Cheyenne Compact and the Yellowstone River  
21 Compact or between the Northern Cheyenne Compact and  
22 reservoir operations. I just don't want to go into  
23 great detail with respect to the specific terms of the  
24 Northern Cheyenne Compact because, again, I think they  
25 speak for themselves.

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1           And I think we can probably fairly easily  
2 establish that, in fact, the State of Montana spent a  
3 lot of time negotiating this compact and reached a  
4 reasonable settlement, which, again, I don't think is  
5 something which Wyoming is going to challenge.

6           MS. YATES: Your Honor, I'll try to adapt the  
7 question.

8           SPECIAL MASTER: Okay. Thank you.

9 BY MS. YATES:

10          Q. Okay. Mr. Tweeten, can the tribal water  
11 right in the compact be lost by nonuse?

12          A. No.

13          Q. Is that provided for in the compact?

14          A. It is.

15          Q. Does the compact discuss operation of the  
16 Tongue River Reservoir?

17          A. It does.

18          Q. And does the compact provide for an advisory  
19 committee on reservoir operations?

20          A. It does.

21          Q. Was that important to the tribe and the  
22 Federal Government in negotiations?

23          A. It was. The -- again, the tribes are very  
24 interested in making sure that these are wet water  
25 rights with respect to storage. The storage component

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1 in a state-owned reservoir, the tribes wanted to have  
2 some level of assurance that the operation of the  
3 Tongue River Dam from year to year would be done with  
4 consideration of the obligations of the state to store  
5 20,000 acre-feet of water for the use of the tribe.

6 And they weren't willing to simply leave that  
7 up to the Montana Department of Natural Resources and  
8 Conservation. So the parties agreed on the creation of  
9 this advisory board that would from year to year create  
10 an annual operating plan for the reservoir. The  
11 membership on the advisory council includes membership  
12 designated by the tribes -- tribe, as well as by the  
13 United States. And the advisory council then comes up  
14 with the operating plan that would be put in place for  
15 the subsequent year so the tribes have some guarantee  
16 that their needs with respect to stored water in the  
17 reservoir are going to be taken into consideration  
18 every year when the operating plan is devised.

19 Q. Did the compact also resolve pending  
20 litigation?

21 A. It did.

22 Q. Is that addressed in the compact?

23 A. It is. There is a -- there are terms dealing  
24 with the lawsuits that had been filed by the United  
25 States in the 1970s seeking a decree, general stream

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1 adjudications in federal court. Those federal court  
2 cases have been dismissed as they pertain to the  
3 Northern Cheyenne Tribe's claims. And also the  
4 litigation of the Northern Cheyenne Tribe's claims  
5 before the Montana Water Court has also been concluded  
6 at this point.

7 Q. And are the water rights provided for in the  
8 compact in full satisfaction of the Northern Cheyenne  
9 Tribe's federal reserved water rights based on the  
10 Winters Doctrine?

11 A. Yes.

12 Q. Is that provided for in the compact?

13 A. It is.

14 Q. When was the compact initially passed by  
15 Montana, the Montana legislature?

16 A. It was submitted to the legislature in 1931  
17 and passed by a large margin in both houses and signed  
18 by the governor in 1991.

19 Q. And when was the compact ratified by  
20 Congress?

21 A. 1993 or '4, I think.

22 Q. And would you please take a look at Montana  
23 Exhibit 528 previously admitted. And is this the  
24 Settlement Act ratifying the compact?

25 A. It is. My recollection now is refreshed, it

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1 was 1992.

2 Q. Okay. What was one of the primary purposes  
3 of the Settlement Act?

4 A. Well, ratification of the compact by Congress  
5 in order to make it fully able to be implemented,  
6 obviously, from the State's perspective. In addition,  
7 the question of cost share and what the federal  
8 contribution to settlement would be was also addressed  
9 in the settlement legislation.

10 Q. And does the Settlement Act provide for  
11 rehabilitation of the Tongue River Reservoir to  
12 implement the Compact's reserved water rights claims in  
13 the Tongue River Basin?

14 A. Yes.

15 Q. Is that provided for in the compact?

16 A. Yes. The two pieces of legislation lock  
17 together in that way.

18 Q. And, again, did the Settlement Act require  
19 approval by the Northern Cheyenne Tribe before the  
20 settlement became effective?

21 A. It did.

22 Q. And was it approved by the tribe?

23 A. It was.

24 Q. And did the Settlement Act require entry of a  
25 decree in the Montana Water Court approving the

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1 compact?

2 A. It did.

3 Q. And could you please take a look at Exhibit  
4 M362A and B.

5 A. Yes.

6 Q. Could you explain what these documents are?

7 A. These are the Water Court decree implementing  
8 or incorporating the water rights component of the  
9 Northern Cheyenne Compact into the Water Court decrees  
10 in the Tongue River and Rosebud Creek Basins, and the  
11 Big Horn Basin as well actually bought the storage.

12 MS. YATES: Your Honor, I move for admission  
13 of 362A and B.

14 SPECIAL MASTER: Any objection?

15 MR. KASTE: Just a clarification. I'm not  
16 sure where the delineation in M362 is between A and B.  
17 This was an exhibit that was -- had multiple documents  
18 inside it.

19 MS. YATES: Okay. 362A includes Bates Nos.  
20 23573 through 23586. That is Exhibit A, which would  
21 include the order on the decree encompassing the  
22 proposed A. And B is Bates Number Montana 23593, 94.

23 MR. KASTE: Thank you for that clarification.  
24 I have no objection.

25 SPECIAL MASTER: Okay. Thank you. So

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1 Exhibits M362A and M362B are both admitted into  
2 evidence.

3 (Exhibits M362A and M362B  
4 admitted.)

5 BY MS. YATES:

6 Q. And what is the priority date provided for in  
7 the decree for the 20,000 acre-feet stored in the  
8 Tongue River Reservoir?

9 A. It is designated as the earliest water right  
10 for stored water in the reservoir.

11 Q. The Northern Cheyenne were also --

12 SPECIAL MASTER: Yes, Mr. Tweeten.

13 THE WITNESS: Well, the priority date for the  
14 reservoir is 1937. So that would make the water right  
15 for the Northern Cheyenne Tribe to later than 1937.

16 BY MS. YATES:

17 Q. Okay. The Northern Cheyenne were also  
18 decreed 30,000 acre-feet of storage in the Big Horn  
19 Reservoir also known as Yellowtail Reservoir operated  
20 by United States Bureau of Reclamation. And what is  
21 the priority date decreed for that 30,000 acre-feet of  
22 storage? You want some help?

23 SPECIAL MASTER: You should feel free to  
24 point it out if there's a specific section.

25 THE WITNESS: Yeah, I believe it's basin 43P,

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1 Big Horn River.

2 BY MS. YATES:

3 Q. Okay.

4 A. And the decree provides that the Northern  
5 Cheyenne's water rights shall be the same as the  
6 priority date which is ultimately adjudged to be the  
7 priority of the United States storage water in the Big  
8 Horn Reservoir.

9 Q. I just want to step back for a second and  
10 clarify one issue. Did the Settlement Act include  
11 additional financial provisions that then had to be  
12 approved by the Montana legislature after the initial  
13 ratification?

14 A. It did.

15 Q. And were those approved by the Montana  
16 legislature?

17 A. They were.

18 Q. And what year was that?

19 A. That would have been 1993.

20 Q. And is the passage of the acceptance of the  
21 financial provisions, is that found in Montana Code  
22 Annotated?

23 A. It is. It's a statute that immediately  
24 follows the Northern Cheyenne Compact, which is  
25 85-20-301. And immediately following that compact, I



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1 believe under the statutes that -- yes, 85-20-302 is  
2 the statute that accepts the conditions that were  
3 placed on the legislation by Congress that had to be  
4 accepted by the State of Montana.

5 Q. And in your experience as a long-time member  
6 of the compact commission and chairman, are these  
7 compact bargained-for compromises?

8 A. Indeed, they are.

9 Q. And do you typically go beyond your  
10 litigation position in negotiating compacts?

11 SPECIAL MASTER: Could I just interrupt just  
12 for one second? It's really just a clarification  
13 question. When you were asking Mr. Tweeten earlier  
14 about Exhibit M362A, you spoke about 30,000 acre-foot  
15 storage. And I think you meant 20,000. But if you  
16 meant 30,000, I would love to see the particular  
17 provision.

18 MS. YATES: Your Honor, I was talking about  
19 the 30,000 acre-feet in Big Horn Lake.

20 SPECIAL MASTER: So where is -- I'm sorry.  
21 Now I need help. So I know there's the 20,000, which  
22 is mentioned on page 5 of Exhibit M362A under storage  
23 and exchange water. That's the 20,000 acre-feet of  
24 water per year measured at the Tongue River Reservoir.

25 So what's the number that you're referring

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1 to.

2 MS. YATES: It's Bates stamped No. 23584.

3 SPECIAL MASTER: 584.

4 MS. YATES: And that would be basin 43P. The  
5 compact includes a similar storage provision --

6 SPECIAL MASTER: I'm sorry?

7 MS. YATES: -- in a federal reservoir as it  
8 did in a state reservoir.

9 SPECIAL MASTER: Thank you very much.

10 BY MS. YATES:

11 Q. Going back to my last questioning, does  
12 Montana go beyond its basic litigation position in  
13 negotiating these compacts?

14 A. Yes. It's like any other negotiation. You  
15 don't -- if you're negotiating in good faith, you don't  
16 ordinarily enter negotiation for settlement saying, I  
17 will go as far as I think my litigation exposure is and  
18 no farther. It requires compromise on both sides. It  
19 almost always will require some departure from the best  
20 case that you think you can get in litigation and some  
21 additional consideration being added on top of that to  
22 make the deal attractive enough to the other side so  
23 they are willing to settle.

24 Q. In your experience, again, as a long-time  
25 member of the compact commission and as chairman, is

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1 each component to a settlement important to settlement,  
2 overall settlement of the federal reserved water  
3 rights?

4 A. Our saying was that nothing is settled until  
5 everything is settled. All of the parts of the  
6 settlement need to relate with each other. It's very  
7 rare that you have one provision in a compact directly  
8 relating to a provision in the compact so that they can  
9 be said to be equal, quid pro quos on both sides.  
10 Ordinarily you have to look elsewhere in a settlement  
11 in order to find that full extent of the consideration  
12 that's being offered on one side as well as the other.  
13 When you take one piece out, it changes the way the  
14 scales balance for purposes of deciding how the case  
15 should be settled.

16 So I don't think -- you can look at any  
17 individual component of the settlement in isolation and  
18 try to evaluate it and decide what the equal  
19 consideration on the other side is. Everybody puts a  
20 package on the scale. And both sides decide that the  
21 scales balance, and that's how you reach a settlement.  
22 So all of the parts relate to each other, and none of  
23 them can be viewed in isolation.

24 Q. And, again, in your experience as a long-time  
25 member of the compact commission and chairman, do you

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1 consider the 20,000 acre-feet of storage in the Tongue  
2 River Reservoir to be integral to the Northern Cheyenne  
3 Reserved Water Rights Compact?

4 A. Certainly. There wouldn't have been a  
5 settlement without it.

6 Q. Is it your understanding that the State of  
7 Montana's obligated to store the 20,000 acre-feet for  
8 the Northern Cheyenne Tribe each year?

9 A. Yes.

10 Q. And why did the parties agree to satisfy the  
11 tribe's federal reserved water right in the Tongue  
12 River from a combination of direct flow and storage in  
13 the Tongue River Reservoir as opposed to only direct  
14 flow?

15 A. Well, storage is -- stored water is generally  
16 more valuable than direct flow because it provides  
17 greater flexibility for the parties in terms of when  
18 and how they want to use their water. So while tribes  
19 initially demand 85,000 acre-feet of direct flow, it  
20 seemed reasonable that a much smaller amount in terms  
21 of acre-feet might be satisfactory to the tribes if  
22 some component of it consisted of storage in addition  
23 to direct flow.

24 So we proposed that in the course of fixing  
25 the Tongue River Dam, we would raise the level of the

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1 dam, create new storage, and allocate that new storage  
2 to the tribe. And we -- I think the engineers gave us  
3 a sense of how much new storage could be created. And  
4 we settled on a figure of 20,000 acre-feet and reduced  
5 the amount of direct flow substantially to account for  
6 the fact we were offering them 20,000 acre-feet of  
7 storage instead.

8 Q. What is your recollection of the actual  
9 direct flow amount in the Tongue River from the  
10 Northern Cheyenne Tribe?

11 A. 12,500 acre-feet.

12 Q. In your experience as a long-time member of  
13 the compact commission and as chairman, what do you  
14 believe would have happened had the United States and  
15 the Northern Cheyenne Tribe and the State of Montana  
16 not reached a compact?

17 A. Well, as I said, there'd be litigation in  
18 front of the Montana Water Court. There would have  
19 been litigation in front of the Water Court.

20 MS. YATES: Your Honor, I have no further  
21 questions.

22 SPECIAL MASTER: Okay. Thank you very much.  
23 So, Mr. Kaste, any cross-examination?

24 We're going to take a morning --

25 MR. KASTE: It will be, like, two minutes.

Cross-Examination by Mr. Kaste  
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1 CROSS-EXAMINATION

2 BY MR. KASTE:

3 Q. Morning, Mr. Tweeten.

4 A. Morning.

5 Q. If I understand right, the State of Wyoming  
6 was not a party to the negotiations that resulted in  
7 the Northern Cheyenne Tribe Compact; correct?

8 A. Correct.

9 Q. And you understand, being familiar with the  
10 Northern Cheyenne Tribe Compact, that it does not  
11 purport to alter or amend anything in the Yellowstone  
12 River Compact; correct?

13 A. That's correct as well.

14 Q. All right. You said a couple of things in  
15 the course of your testimony. One was that during this  
16 negotiation process, state-based water users could  
17 object. Did I get that right?

18 A. Not during the negotiation process. But once  
19 the attorney general made the motion for incorporation  
20 of the water rights component of the settlement into  
21 the Water Court decrees, that would be noticed out to  
22 all of the claimants in the basin. And there would be  
23 a period of time set during which they could lodge  
24 objections to the compact in the Water Court.

25 Q. Sure. And what I'm interested in is those

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1 folks, those claimants are all from Montana; right?

2 A. They all were the holders of water rights in  
3 Montana.

4 Q. Very good. And I think I heard you say that  
5 one of the goals of the State of Montana in the course  
6 of these negotiations was to minimize displacing  
7 state-based water rights?

8 A. That's right.

9 Q. That's right? And that means you didn't want  
10 to put a burden on the existing water right holders in  
11 Montana; correct?

12 A. That's right.

13 Q. Okay. Affecting water users in Wyoming  
14 wasn't really a relevant consideration, was it?

15 A. It was certainly a relevant consideration.

16 Q. And let me see if I understand that this is  
17 how you dealt with that consideration. Montana's  
18 obligations under the Northern Cheyenne Tribe Compact  
19 come out of its allocation of water under the  
20 Yellowstone River Compact; correct?

21 A. No.

22 Q. No?

23 A. Not according to the compact.

24 Q. All right. Thank you very much.

25 SPECIAL MASTER: Ms. Yates.

Redirect Examination by Ms. Yates  
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1 MS. YATES: I have just two questions, Your  
2 Honor.

3 SPECIAL MASTER: That's fine.

4 REDIRECT EXAMINATION

5 BY MS. YATES:

6 Q. Mr. Tweeten, are you aware that the Northern  
7 Cheyenne Tribe negotiations were discussed at the  
8 annual Yellowstone River Compact Commission meetings?

9 A. Yes.

10 Q. Okay. Are you also aware that anyone with an  
11 interest in water can object in the Montana Water  
12 Court?

13 A. Yes.

14 MS. YATES: Thank you. That's all I have.

15 SPECIAL MASTER: Okay. Thank you. So,  
16 Mr. Tweeten, thank you very much for your testimony  
17 this morning.

18 Ms. Yates, I know that you sort of probably  
19 were not expecting that I would be trying to push  
20 things a little bit faster this morning. And, you  
21 know, I think one of the reasons why I was also trying  
22 to move us a little bit further along is, again, I  
23 think United States Supreme Court does have a lot of  
24 familiarity with the federal reserved water rights and  
25 negotiation of federal reserved water rights compacts.



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1 But you did an excellent job of adjusting to my  
2 concerns and, I think, getting the relevant testimony  
3 that you needed this morning.

4 So let's take the morning break at this  
5 point. It is a little bit after quarter after the  
6 hour. If we can come back at, say, half past, that's a  
7 little bit less than 15 minutes. But hopefully that  
8 will be a sufficient period of time. So thank you  
9 again very much.

10 (Recess taken 10:18 to 10:32  
11 a.m., October 28, 2013)

12 SPECIAL MASTER: Okay. Thank you.

13 Mr. Kaste, you've moved.

14 MR. KASTE: We've reached that point in the  
15 trial where I'm not going to do a witness, and there's  
16 going to be a lot more going on with Mr. Kuhlmann.

17 SPECIAL MASTER: Okay. Thank you.

18 Mr. Draper?

19 MR. DRAPER: Your Honor, our next witness is  
20 Mr. Jason Whiteman. We would call him to the stand at  
21 this time. And Mr. Swanson will do the direct  
22 examination.

23 SPECIAL MASTER: Okay. Thank you very much.

24 (Jason Whiteman sworn.)

25 THE CLERK: Have a seat, please. State your

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1 name and spell it.

2 THE WITNESS: My name is Jason Whiteman.

3 J-a-s-o-n; Whiteman, W-h-i-t-e-m-a-n.

4 SPECIAL MASTER: So good morning,

5 Mr. Whiteman.

6 Mr. Swanson.

7 MR. SWANSON: Your Honor, I'm well aware of  
8 our admonition regarding the last witness. So we'll do  
9 our best to actually not replot some of the same ground  
10 Mr. Tweeten covered in his testimony. And if at any  
11 point you feel we are, in fact, doing that, feel free  
12 to interrupt, and we'll move on.

13 We do have -- Mr. Whiteman's testimony will  
14 focus on his role -- it will touch on his role as a  
15 member of the Northern Cheyenne negotiating team. But,  
16 in fact, the majority of his testimony is regarding the  
17 tribe's administration of the water rights, uses on the  
18 reservation, and some involvement of their  
19 representative with the reservoir advisory committee.

20 SPECIAL MASTER: Thank you very much. And,  
21 again, I want to emphasize, both for purposes of  
22 counsel and also for the witnesses, the reason why I  
23 was trying to shorten the last piece of testimony was  
24 simply because as I understand it, Wyoming is not  
25 claiming, and I think Mr. Kaste confirmed, that Wyoming

JASON WHITEMAN - October 28, 2013  
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1 is not claiming that Montana entered into an  
2 unreasonable settlement with the Northern Cheyenne  
3 Tribe, but is instead claiming that since they didn't  
4 have anything to do with that particular settlement;  
5 that they shouldn't have to increase the amount of  
6 water that they would otherwise have to release down to  
7 Montana as a result of that.

8 I do think that questions about how the  
9 compact is administered, the ways in which the compact  
10 interrelates with the Tongue River Reservoir are  
11 relevant to this particular proceeding.

12 But you don't have to worry. I will  
13 definitely tell you if I think that we're spending too  
14 much time on an issue that we really don't need to  
15 address at this particular stage.

16 MR. SWANSON: Thank you, Your Honor.

17 JASON WHITEMAN,  
18 having been first duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. SWANSON:

21 Q. Good morning, Mr. Whiteman. How are you?

22 A. Good morning.

23 Q. Could you state your address, please, for the  
24 record?

25 A. My post office is box 382, Lame Deer,

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1 Montana. And the physical address is referred to as  
2 Mile Marker 39, Highway 212.

3 Q. You know you're in rural Montana when mile  
4 marker is an address.

5 A. Yes.

6 Q. Are you a member of the Northern Cheyenne  
7 Tribe?

8 A. Yes.

9 Q. What's your current occupation?

10 A. My current occupation is a counselor for a  
11 higher ed and job-training program. But prior to that,  
12 I worked for the Northern Cheyenne Tribe for 30 years,  
13 from 1976 to 2006.

14 Q. Can you describe some of your positions that  
15 you had working for the tribe in those years?

16 A. Yes. I was first hired as assistant  
17 geologist; assistant hydrologist; hydrographer; water  
18 administrator; Water Resources administrator; and also  
19 director for the Natural Resource Department that  
20 provides oversight to three different branches which  
21 was Environmental, Natural Resource, and Fish and  
22 Wildlife.

23 Q. Can you tell us the years when you were the  
24 Water Resources administrator?

25 A. Yes. I want to distinguish or clarify that

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1 prior to our Tribal Water Code adoption, the Tribal  
2 Water Code, primarily the commission of the  
3 hydrographic water administrator was hydrologic data  
4 collection.

5 Then after the adoption of the Tribal Water  
6 Code, the Water Resources administrator was  
7 implementing the Tribal Water Code.

8 Q. So you were the administrator of the Water  
9 Resources prior to the adoption of the Northern  
10 Cheyenne Water Code?

11 A. Yes.

12 Q. We'll talk more about that water code in a  
13 minute. But it was adopted in 2000; is that correct?

14 A. That's correct.

15 Q. And then were you the Water Resources  
16 administrator after the adoption of that water code?

17 A. At the time, I was the director for Natural  
18 Resources. And Mr. Allen Clubfoot was the Water  
19 Resources administrator. And I'll spell his name.  
20 It's A-l-l-e-n, Clubfoot, C-l-u-b-f-o-o-t, Sr.

21 Q. What were your duties as the natural  
22 resources director at that time?

23 A. My primary role was, again, providing  
24 oversight with the programs, including attending  
25 meetings that, in this case, specifically was a Tongue

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1 River Reservoir Water Users' Association, the Tongue  
2 River Advisory Committee, and, of course, as an  
3 administrator was just involved in input in our water  
4 rights.

5 Q. And so when the -- when Mr. Clubfoot was the  
6 Water Resources administrator and the tribe was  
7 implementing its water code, you were supervising his  
8 implementation of that code?

9 A. Correct.

10 Q. What does that mean? Can you tell us what  
11 activities were involved in implementing that code?

12 A. The primary purpose of the water code was to  
13 regulate the tribe's water rights within the Northern  
14 Cheyenne reservation's boundaries. And, again, that  
15 was after -- there was three dates on there, if I  
16 recall correctly. Water code was '99, 2000, and 2001,  
17 which was amended twice after that with 2000, 2001.

18 The primary was to have tribal members apply  
19 for a water right use on the Northern Cheyenne  
20 reservation. But also it included within the compact  
21 that we could lease water off the reservation, in  
22 simple terms. And we had individuals that were Tongue  
23 River Water Users' Association members that leased  
24 water from the Northern Cheyenne Tribe's water right.

25 Q. So Mr. Clubfoot was involved with those lease

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1 arrangements?

2 A. That's correct.

3 Q. And you supervised him through those  
4 activities?

5 A. Yes.

6 Q. Okay. So before we go into a little bit more  
7 about that code, can you just tell us a little more  
8 about, were there any water projects on the reservation  
9 that either you or Mr. Clubfoot administered?

10 A. As far as?

11 Q. Like, wells or anything like that?

12 A. Okay. Then, again, prior to the water code,  
13 there was no permit process. But after the water code,  
14 there was a permitting process in place that tribal  
15 members would submit their application. And one of the  
16 areas was domestic groundwater use. And that's either  
17 in alluvial or nonalluvial aquifers.

18 Q. Okay. And then were you involved -- in both  
19 of these roles, I would say, the Water Resources  
20 administrator as well as the natural resource director,  
21 were you involved in looking at water supply issues in  
22 the Tongue River?

23 A. Yes, we were involved with -- primarily with  
24 the meeting in the Tongue River Water Association  
25 meetings or advisory committee meetings where the

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1 Montana Department of Natural Resources provide  
2 hydrologic data to -- as an outlook of supply water  
3 that was available, in this case, to the Northern  
4 Cheyenne Tribe.

5 Q. Do you remember what years those were when  
6 you were most focused on that?

7 A. I don't specifically remember. Don't recall.  
8 But it's in the 2000s.

9 Q. In the meetings you talked about, do you  
10 remember what meetings you went to or where they were?

11 A. The meetings -- I want to clarify that it was  
12 generally two sets of meetings that we were -- really  
13 three sets of meetings there. One was a Tongue River  
14 Water Association meeting where the United States was  
15 an official committee member of the Association. Then  
16 the advisory committee is a tribe -- is an official  
17 committee member of the advisory committee and the  
18 United States as well.

19 Q. Go ahead.

20 A. There were meetings held throughout -- what I  
21 refer to as the Tongue River Basin, both the Miles  
22 City, Ashland, Lame Deer, and sometimes Sheridan,  
23 Wyoming. And we actually had -- we were hosted by  
24 different -- that was to allow Water Users' Association  
25 members and the tribe and United States to attend these



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1 meetings here.

2           And the third one was the meeting prior to  
3 2006 is when I resigned. And 2006, there were at least  
4 two meetings, if not three, two meetings that I  
5 attended between Wyoming and -- excuse me -- the State  
6 of Montana to address some concerns about water issues  
7 or water supply. One was in Sheridan; the other was in  
8 Thermopolis, Wyoming.

9           Q.    Were those Yellowstone River Compact  
10 meetings?

11           A.    Yes, they were in regards to the Yellowstone  
12 Compact.

13           Q.    So, Mr. Tweeten testified a moment ago. Were  
14 you able to see his testimony?

15           A.    Yes.

16           Q.    And he talked quite a bit -- and we won't go  
17 into all the details, but he talked a bit about the  
18 negotiation process for the Northern Cheyenne Compact.  
19 Were you a member of that negotiating team for the  
20 tribe?

21           A.    Again, for clarification, of course, as a  
22 tribal employee at that time, I was appointed by the  
23 Northern Cheyenne Tribal Council on the Northern  
24 Cheyenne Tribe Water Rights Negotiation Committee. And  
25 I was invited to a lot of these meetings as a

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1 committee, both through the negotiation and after the  
2 ratification of our public law 102 -- ratification by  
3 Congress, public law 102374. We also were still  
4 implementing the compact provisions. And that's what I  
5 just mentioned earlier.

6 Q. And Mr. Tweeten described it as a long  
7 process going back and forth between the entities.  
8 Would you agree with that testimony?

9 A. That's correct. The process was well over a  
10 decade of negotiations and implementing the compact.

11 Q. And Mr. Tweeten testified as to the water  
12 right that the tribe received in the compact as a  
13 result of that. And he testified about a direct flow  
14 right of 12,500 acre-feet. Do you agree with that?  
15 Was that your understanding?

16 A. Yes. Again, that was to satisfy the tribe's  
17 reserved water right within a compact and, of course,  
18 ratified by Congress.

19 Q. And then he also testified that there was a  
20 storage right in the reservoir of 20,000 acre-feet. Do  
21 you agree with that?

22 A. Yes, that's correct.

23 Q. And he testified that the storage right, he  
24 felt, was important to the tribe. And I just want to  
25 ask you that question: Was the storage right important

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1 to the tribe as part of your negotiation process?

2 A. As part of the negotiations, the tribe  
3 subordinated their -- the 1881 date to the -- pursuant  
4 to the Miles City Decree and also to protect the Miles  
5 City Decree water users and senior water rights users  
6 and to negotiate the additional storage water and  
7 expansion of storage water in the Tongue River  
8 Reservoir, which is equivalent to up to 20,000  
9 acre-feet of reserved water right.

10 Q. When you say the tribe agreed to subordinate  
11 the 1881 right, are you referring to subordinating the  
12 direct flow right that the tribe had?

13 A. It's -- that, again, it was -- yes, pursuant  
14 to Miles City Decree in the compact.

15 Q. Okay. And so I'm looking; you may have some  
16 documents there in front of you, Mr. Whiteman. And I'm  
17 going to just refer you briefly to Montana Exhibit 527.

18 At the bottom of page 3, we're discussing the  
19 tribe's water rights. Before we talk about the direct  
20 flow, I wonder if we could look at No. 1 where it says  
21 "existing nonagricultural uses." And if you could look  
22 at that first sentence and explain what the tribe  
23 wanted to get out of that particular sentence where  
24 it's protecting existing uses.

25 A. Those particular uses were exempt -- or

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1 grandfathered in, not exempt -- but grandfathered in  
2 from the water rights. And nonagriculture use is  
3 either including some of the alluvial aquifers use and  
4 also the nonalluvial. It doesn't specifically mention  
5 that, but that's what I recall.

6 Q. Okay. And then going to the top of the next  
7 page.

8 A. Okay.

9 Q. The -- top of page 4, please.

10 A. Okay. "The water rights of the Northern  
11 Cheyenne Tribe are as follows: Existing  
12 nonagricultural uses and also where the Tongue River on  
13 A 2" -- excuse me, I'm sorry. "The tribe's direct flow  
14 water right in the Tongue River and its tributaries may  
15 not be used in a manner that adversely affects the  
16 Miles City Decree water rights."

17 Q. So is that what you referred to when you said  
18 that the tribe agreed to subordinate its direct flow  
19 right to the Miles City Decreed rights?

20 A. That's correct.

21 Q. And, again, you did that in exchange for the  
22 storage right in the reservoir?

23 A. That's right.

24 Q. Okay. Now, Mr. Tweeten testified that he  
25 understood that the priority date for that reservoir

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1 right was 1937; is that your understanding?

2 A. Yes, that's my understanding.

3 Q. Since we're on Exhibit 527, I think I'll just  
4 cover a couple of things briefly before we move on.

5 On page 4, which is the page we're on, under  
6 kind of the middle of the page there, there's a heading  
7 that says "c: Shortages." Do you see that?

8 Can you tell us, what was your understanding  
9 of whether the tribe has experienced shortages in its  
10 reservoir and direct flow rights under this compact?

11 A. Okay. My understanding from the -- I'll  
12 start with the direct flow is the Montana Department --  
13 or referred to its acronym, DNRC, were our technical,  
14 basically hydrologic data, provided hydrologic data to  
15 determine when the direct flow right users that's  
16 included in the Northern Cheyenne Tribe was -- during  
17 the water shortage years, there was some limitations on  
18 the direct flow right. I'll give an example where  
19 maybe sometime in July would be an example where the  
20 direct flow right was ceased. And then also the  
21 contract water in the Tongue River Reservoir, that's  
22 included in Northern Cheyenne's -- the hydrologic data  
23 provided the storage waters of what was available for  
24 the Northern Cheyenne Tribe. And pursuant to our  
25 compact, we did agree to share shortages with, in this

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1 case, the contract users.

2 Q. So when would that shortage situation for  
3 your reservoir rights kick in? Is that only years when  
4 the reservoir doesn't fill all the way?

5 A. That's correct, yes.

6 Q. Do you remember any years when that has  
7 happened?

8 A. In the 2000s.

9 Q. Okay. We'll come back to that. And then I  
10 think we'll just cover one more thing on this document  
11 before we move on. That's at the bottom of page 8.

12 Now, is it your understanding under the  
13 compact that the tribe can allow the use of its water  
14 rights off of the reservation?

15 A. Yes.

16 Q. How does that work?

17 A. We would provide notifications to the State  
18 of Montana, that specific agency was Montana DNRC,  
19 180-day notice. And we did experience some  
20 notification issues that, where after that, we notified  
21 the Montana DNRC of -- to meet that criteria, 180-day  
22 notice period.

23 Q. I'm looking at the bottom of page 8 of this  
24 compact document, 527. Is that what you're referring  
25 to the 180 days' advanced written notice?

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1 A. Yes.

2 Q. And then is there a restriction on where that  
3 water can be used off the reservation?

4 A. There is some restrictions to -- number one  
5 just primarily 180-day notice. And also their -- most  
6 of it was the Tongue Water Association members applied  
7 for the tribe's water right. And this was not the  
8 direct flow, but the contract or the 20,000 acre-feet  
9 of storage water that was available.

10 Q. I'm looking at the bottom of page 8 there.  
11 Under 4ai, it says "Within the Tongue River Basin." Is  
12 it your understanding that that water has to be used  
13 within the Tongue River Basin?

14 A. Yes.

15 Q. And I think since you discussed it briefly,  
16 we'll look at Exhibit 528, Montana 528, which I believe  
17 you have there.

18 MR. SWANSON: And I believe this was already  
19 admitted, Your Honor, through Mr. Tweeten.

20 SPECIAL MASTER: That's correct.

21 BY MR. SWANSON:

22 Q. And the only thing I want to ask you about  
23 this, Mr. Whiteman, is did you or any tribal members  
24 have any role in asking for this to be ratified by  
25 Congress?

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1           A.    This particular act is, as I mentioned, or as  
2 Christian mentioned earlier, is -- to add to this is  
3 that Montana -- what led up to this was the Montana --  
4 excuse me. The Northern Cheyenne Tribe legislation had  
5 approved of this compact. The next step was to the  
6 Montana legislation that also put -- including the  
7 Congress here, which was public law -- was ratified by  
8 Congress by public law 102374.

9           Q.    Okay. And if we go to page 3 of this  
10 document, the Bates number on the bottom is MT-15148.  
11 There's a Section 5 near the top that says "Use and  
12 transfer of the tribal water right." And I wondered if  
13 you could look at the sub-A "Administration and  
14 Enforcement" sentence and read that for us, please?

15           A.    From memory here, that provision provides  
16 where United States regulates the tribe water right  
17 until the tribe had their tribal water code approved by  
18 the Secretary of the Interior.

19           Q.    So until the tribe had adopted its own Water  
20 Court, the Secretary of the Interior administered your  
21 water; is that right?

22           A.    That's correct, yes.

23           Q.    Did that lead the tribe to adopt the water  
24 code?

25           A.    Yes.



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1 Q. And if we could go ahead and turn to that  
2 document now. That document should also be there in  
3 front of you. Montana Exhibit 365. Could you identify  
4 that for us when you get to it? I know you're still  
5 looking.

6 A. I was primarily the author of this particular  
7 water code, and including our tribal water rights  
8 attorneys that developed this water code.

9 Q. And has the tribe -- has the Northern  
10 Cheyenne Tribe adopted this code?

11 A. Yes.

12 MR. SWANSON: Your Honor, I would move  
13 admission of Exhibit Montana 365.

14 SPECIAL MASTER: Any objection?

15 MR. KUHLMANN: No objection.

16 SPECIAL MASTER: Okay. Exhibit M365 is  
17 admitted.

18 (Exhibit M365 admitted.)

19 MR. SWANSON: I'm not sure if I heard that  
20 number right. I think I said 365. But it may have  
21 slurred.

22 SPECIAL MASTER: That's what you said, and I  
23 think that's what I said.

24 MR. SWANSON: Okay. I wasn't sure if I heard  
25 M365.

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1           SPECIAL MASTER: It is M365, just to be  
2 clear.

3 BY MR. SWANSON:

4           Q. So, Mr. Whiteman, without going into great  
5 detail here, can you just explain how a tribal member  
6 on the reservation can use water by -- through this  
7 code?

8           A. Pursuant to this code here, the tribe  
9 would -- I want to say have tribal members apply for a  
10 water right through this process, the application  
11 process. But this also included Tongue River Reservoir  
12 Water Users' Association members to also apply for  
13 leasing water from the Northern Cheyenne Tribe.

14          Q. And those would be leases off the  
15 reservation; is that correct?

16          A. Yes.

17          Q. So before we get to that, in terms of  
18 on-reservation use, a tribal member can apply through  
19 this code to use water on the reservation?

20          A. Yes.

21          Q. And what do you -- do you give them a permit  
22 or a water rights certificate of some kind?

23          A. First step is to let the tribe member would  
24 apply for a permit with required documentation. Then  
25 the tribe, in this case the Tribal Water Resources

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1 administrator, would issue a permit to the individual.

2 Q. Do you know -- and I know you've been away  
3 from this for several years. But do you know of any  
4 tribal members that are using water on the reservation  
5 right now?

6 A. Yes.

7 Q. Can you tell us who they are?

8 A. The ones I recall is -- on surface water is  
9 Clinton Small and Ann Messer, M-e-s-s-e-r.

10 Q. Do you know what they use the water for?

11 A. Primarily use it for agriculture purposes.

12 Q. Do you mean livestock?

13 A. Okay. That's -- the ones I mentioned were  
14 for irrigation purposes. Annie Messer uses a canal  
15 referred to as the Birney Canal. And they divert it to  
16 a single pivot irrigation system. And Clinton Small  
17 uses water for a spreader dike that pumps the water  
18 from Tongue River out.

19 But also during nonirrigation season, as I  
20 mentioned, is that they use the water for fishery  
21 purposes, but also livestock. I recall when the --  
22 when I first started working in '76, more of a  
23 historical, that tribal members use their -- I would  
24 say, use their lands or leased land as a winter feeding  
25 area along the Tongue River. So their livestock were

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1 actually utilizing the water out of Tongue River.

2 Q. And do you know where that is along the  
3 river? There is a map here if you want to point to it.  
4 But just kind of a general area where that is.

5 A. The general area that I recall seeing was --  
6 again, from '96 -- '76 back when I was hydrologist  
7 technician, I was north of Ashland, about three, four  
8 miles north of Ashland, and south of Ashland would have  
9 been the mouth of Logging Creek as a tributary to  
10 Tongue River. And there was a -- oh, also, in addition  
11 to that, a little further south of Ashland was another  
12 family that had livestock winter feeding grounds  
13 adjacent to Tongue River.

14 Q. So these livestock were watering out of  
15 Tongue River during the winter?

16 A. That's correct.

17 Q. And do you know how many livestock we were,  
18 in total, talking about?

19 A. As -- when I was out in the field collecting  
20 groundwater data or surface water data, I'd say between  
21 500 to a thousand livestock, primarily cattle.

22 Q. Were there any horses?

23 A. There were some horses, yes.

24 Q. Do you recall how many?

25 A. I don't recall how many. But there were some

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1 horses that were utilizing the Tongue River.

2 Q. Were there --

3 A. For drinking.

4 Q. Were there any sheep?

5 A. No sheep, no.

6 Q. Any other animals?

7 A. The only two that I recall is cattle and  
8 horses. Livestock.

9 Q. Does anybody in the tribe have domestic bison  
10 herd?

11 A. No, I don't recall that.

12 Q. Okay. But you -- in the past, had there been  
13 a bison herd?

14 A. Excuse me. The last question you asked is  
15 tribal members did use both during irrigation -- even  
16 before irrigation season, they did fish out of Tongue  
17 River. That was one of the most important issues to  
18 our tribal members.

19 Q. Was that winter fishing or summer?

20 A. Both. Both during winter season and also  
21 nonirrigation -- including irrigation season too.

22 Q. Did you consider the livestock watering and  
23 the fishing, did you consider them rights that were  
24 protected under the compact?

25 A. Yes.

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1 Q. Was that -- were they under that existing  
2 stock water and domestic use clause?

3 A. Yes.

4 Q. I think we'll talk a little bit more -- well,  
5 let me go back to the irrigation. We talked briefly --  
6 you discussed Ms. Messer and Mr. Small. And you  
7 mentioned irrigation. Do you know, like, how long in  
8 the summer they irrigate, when they begin and when they  
9 end?

10 A. I -- primarily during irrigation season, that  
11 they used it both when there was water direct flow  
12 right as well as the tribe's storage water.

13 Q. So -- go ahead.

14 A. I'm sorry. That's during normal and during  
15 when we had to experience some water shortages.

16 Q. Are they using the tribe's compact water  
17 right for their practices?

18 A. Yes.

19 Q. Do you know if they are using the direct flow  
20 or the storage or perhaps both?

21 A. Both.

22 Q. Did you know how much acreage they are  
23 irrigating?

24 A. I -- it would be Mr. Allen Clubfoot, the  
25 Water Resources administrator, actually has the

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1 information. I was not the appropriate staff person  
2 that recorded that.

3 Q. Do they irrigate and raise hay every year?

4 A. Yes.

5 Q. And then you mentioned surface water. When I  
6 asked earlier about a permit, you specifically said  
7 surface water referring to Ms. Messer and Mr. Small.  
8 So are there any -- is there anybody that's using  
9 groundwater through a permit as well?

10 A. Just from my -- I want to say my tour along  
11 the Tongue River, I did observe where tribal members  
12 use subirrigation water that just relied on the  
13 alluvial groundwater, again for agriculture purposes.

14 Q. And are they required to get a permit for  
15 that?

16 A. No.

17 Q. Are they -- are the tribal members required  
18 to get a permit for the stock water use that you  
19 mentioned earlier?

20 A. Yes, after the code was implemented.

21 Q. Afterwards? Okay.

22 A. Yes.

23 Q. But would they -- was there any exemption if  
24 they could provide it was historic existing stock water  
25 use?

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1 A. There was some historical use of stock water.

2 Q. So I wonder if we could turn to the reservoir  
3 issue. I know you've mentioned that you were at  
4 multiple meetings dealing with the Tongue River Water  
5 Users' Association. I asked you at the beginning if  
6 you agreed with Mr. Tweeten that the reservoir was  
7 expanded in part to support the tribe's storage right.

8 Are you aware of a Reservoir Advisory  
9 Committee that's in the compact?

10 A. Yes.

11 Q. And can you just tell us what the tribe's  
12 involvement is on that Reservoir Advisory Committee?

13 A. The tribe's role was an official committee  
14 member. And also through that process, we were  
15 informed in this case by Montana DNRC about the water  
16 availability in Tongue River.

17 Q. Did -- what do you mean by that? Is that an  
18 ongoing conversation?

19 A. That's the annual -- an annual operating plan  
20 that we relied on.

21 Q. I wonder if you could look at Montana  
22 Exhibit 316. And we're just going to briefly look at  
23 this. It may not be in your list of exhibits 'cause I  
24 don't intend to spend much time on it.

25 SPECIAL MASTER: This has been introduced?



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1 MR. SWANSON: Yes, it has. It's the  
2 Operating Plan for the Tongue River Reservoir, Your  
3 Honor.

4 THE WITNESS: Are you referring to the  
5 operating plan?

6 BY MR. SWANSON:

7 Q. Yes, Montana Exhibit 316.

8 MR. SWANSON: Your Honor, may I approach and  
9 hand a copy to the witness?

10 SPECIAL MASTER: Yes, you may.

11 THE WITNESS: Thank you.

12 BY MR. SWANSON:

13 Q. If you look at the last page of that  
14 document.

15 A. Okay.

16 Q. There's a group of signatures there. Can you  
17 identify any tribal members there?

18 A. Yes. It's the third one down is Geri Small  
19 was the president at that time for Northern Cheyenne  
20 Tribe. And she signed off on 5/2/02.

21 Q. And are there still -- is there still a  
22 tribal member that's on this committee?

23 A. Yes.

24 Q. Did this tribal member or any other tribal  
25 officials, perhaps yourself, have any role in

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1 developing this operating plan?

2 A. The -- at that time, I recall was Glen  
3 McDonald, Calvin Wilson was a tribal member, which was  
4 also our tribal attorney that was -- played an active  
5 role in developing the plan. And United States,  
6 because of the trust assets involved, was John White,  
7 he's the agency superintendent that also was involved  
8 with development of the plan, the Tongue River  
9 Reservoir Advisory Committee plan, the bylaws and  
10 policies. But in addition to that, myself -- I and a  
11 college intern with a juris doctorate reviewed and made  
12 comments on this particular plan, including our tribal  
13 attorney, Jeanne Whiteing. And I specifically  
14 requested for United States to also provide review and  
15 comments on this plan.

16 Q. And did you ultimately support or recommend  
17 support of this operating plan?

18 A. Yes.

19 Q. If you could look at page 5 of this document,  
20 the paragraph that's numbered 11.

21 SPECIAL MASTER: Sorry. This is page 5 or 6?

22 MR. SWANSON: I believe it's Montana 15109 at  
23 the bottom. I can't tell if that says A5 or A6.

24 SPECIAL MASTER: A6, I think. Yep. There  
25 doesn't appear to be an A1.

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1 MR. SWANSON: Okay. It does say A6.

2 BY MR. SWANSON:

3 Q. Looking at paragraph 11, Mr. Whiteman, did  
4 you review and agree with these winter flow numbers  
5 coming through the reservoir?

6 A. Yes.

7 Q. And can you tell us why you supported those  
8 flow levels?

9 A. Primarily, what we were concerned about was  
10 ice jam -- well, first of all, during this time, the --  
11 at winter flow month, our concern was that the tribe  
12 used water during nonirrigation season with livestock  
13 purposes, fishery. And in addition to that, as it's  
14 quoted in here in the operating plan, the operating  
15 plan is preventing ice jams which creates flooding.  
16 And one of the areas that was always a big concern was  
17 St. Labre property. That is a facility that provides  
18 an educational facility, a private educational  
19 facility. And that's St. Labre.

20 Q. Have you ever seen ice jam problems around  
21 St. Labre?

22 A. Yes, I recall. Not the specific year, but I  
23 do recall there was some ice jams that created flooding  
24 and St. Labre was affected by that.

25 Q. Was that before or after the compact?

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1 A. Before the compact.

2 Q. And could you tell us how the ice jams  
3 created the flooding, if you recall?

4 A. It was not actually involved with the  
5 actual -- this, to me, would be the -- that regulating  
6 the outflow of the Tongue River Reservoir at that time  
7 wasn't really seriously taken a look at until that  
8 actually happened. And when ice jams had happened  
9 around St. Labre property, that's why that particular  
10 provision is included in there, to address preventing  
11 ice jams during nonirrigation season.

12 Q. So how do you understand that the winter flow  
13 levels, I guess, mitigate the ice jam problem?

14 A. Well, really it's a hydrologic flow on Tongue  
15 River that needs to be managed in order to prevent ice  
16 jams. And if it wasn't managed, then it does create  
17 ice jams and also, as I mentioned earlier, creates  
18 damages to property.

19 Q. Thank you. So turning to summer. We've  
20 talked a lot about winter. Let's talk about summer  
21 water levels on the Tongue River Reservoir and -- in  
22 the river and on the reservoir, I should say. You  
23 testified earlier that you understand that if the  
24 reservoir doesn't fill all the way, that the tribe's  
25 rights can actually, I guess, be shorted?

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1           A.    Yes.  Again, pursuant to the compact that we  
2 agreed to share shortages in the reservoir.

3           Q.    And do you remember any years when, I guess,  
4 they became a problem when the shortages reduced the  
5 amount of water that was available to the tribe and the  
6 water users?

7           A.    Yes.  It was in the 2000s.

8           Q.    And do you recall if anybody tried to lease  
9 or did successfully lease water from the tribe in those  
10 years?

11          A.    Yes.  There was victims from the Tongue River  
12 Water Users' Association -- again, let me back up.  
13 That first we were notified either through the Tongue  
14 River Advisory Committee or the Tongue River Water  
15 Users' Association that the Northern Cheyenne Tribe was  
16 informed that there was a water shortage in the  
17 reservoir.  And we were both with the contract water  
18 and storage water 20,000, what was available to the  
19 Northern Cheyenne Tribe and the individuals that mostly  
20 uses -- Water Users' Association members, requested to  
21 lease water for irrigation purposes.  And there's  
22 where -- there were starting and ending dates for this  
23 irrigation, generally around two weeks, that they both  
24 upstream -- this is off the reservation, that requested  
25 to lease water from the tribe.  And the tribe, again,

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1 that was under Water Resources, issued permits to Water  
2 Users' Association, which are generally upstream and  
3 downstream, for the irrigation -- that lease water  
4 during irrigation, water shortages years.

5 Q. I'm going to ask you to look at a document  
6 that's Montana Exhibit 344. And this is a very --  
7 fairly long document. I'm just going to look at two  
8 pages that are in the middle of that beginning on page  
9 MT09161. There are a total of pages beginning at  
10 01961. Have you been able to find that page,  
11 Mr. Whiteman?

12 SPECIAL MASTER: What is that?

13 MR. SWANSON: The specific page isn't on the  
14 screen. I think it will pop up in a second. And this  
15 has already been admitted.

16 BY MR. SWANSON:

17 Q. I just want to ask you: Do you understand  
18 what the purpose of this document is? And can you  
19 begin by identifying who wrote it?

20 A. Pursuant to the compact, the tribe is -- one  
21 of the requirements of the tribe is to provide 180-day  
22 notice to the Montana DNRC office.

23 Q. And who wrote that document?

24 A. This particular document was issued by our  
25 tribal water attorney, Jeanne Whiteing. And there's

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1 also additional information that -- where Mr. Allen  
2 Clubfoot was the Water Resources administrator.

3 Q. Let's look at that document next. That  
4 document should be Wyoming Exhibit 73.

5 SPECIAL MASTER: Has this been introduced  
6 into evidence yet?

7 MR. SWANSON: This one has not, Your Honor.

8 SPECIAL MASTER: Okay.

9 BY MR. SWANSON:

10 Q. So, Mr. Whiteman, can you identify this  
11 document, please?

12 A. This particular document is, again, a notice  
13 of off-reservation use to the Montana DNRC office.

14 Q. Is that the Northern Cheyenne Tribe  
15 letterhead at the top?

16 A. Yes.

17 Q. And turning to the next page, can you tell us  
18 who wrote that document?

19 A. Okay. This particular document is signed by  
20 Mr. Allen Clubfoot.

21 Q. This is in 2004. What was your position in  
22 2004?

23 A. I was director for the Natural Resource  
24 Department.

25 Q. Were you Mr. Clubfoot's supervisor at this

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1 time?

2 A. Yes.

3 Q. Did you supervise him in writing this  
4 particular letter of notice to DNRC?

5 A. Yes.

6 MR. SWANSON: Your Honor, I move admission of  
7 Exhibit Wyoming 73.

8 SPECIAL MASTER: Any objection?

9 MR. KUHLMANN: No objection.

10 SPECIAL MASTER: Okay. Exhibit W73 is  
11 admitted into evidence.

12 (Exhibit W073 admitted.)

13 BY MR. SWANSON:

14 Q. And just want to -- if you could just tell us  
15 briefly what this document is going to do? We'll end  
16 up looking at a couple more similar documents, and then  
17 at the end, we'll talk a little bit more about them.  
18 But this particular document, can you just tell us what  
19 the tribe was trying to accomplish here?

20 A. The particular document, again, it's a notice  
21 to the Montana DNRC office that we are in the process  
22 of leasing water to Tongue River Water Users'  
23 Association members for off-reservation use and  
24 primarily for irrigation agriculture use.

25 Q. And then if you could look at document



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1 Montana 387. That should be a one-page document. You  
2 there? Can you identify this, please?

3 A. Yes. Again, this is a notification by the  
4 Northern Cheyenne Tribe that provides a list of the  
5 individuals that are leasing storage water, tribe  
6 storage water.

7 Q. I'm looking at the line across the top that  
8 looks like a fax machine receipt. Can you tell us what  
9 PM Environmental Protection refers to?

10 A. Again, this is where we utilize the -- when I  
11 was director for Northern Cheyenne Tribe for Natural  
12 Resources and I provided oversight, what I'm getting to  
13 is providing oversight for the Environmental  
14 Departmental Natural Resources and Fish and Wildlife.  
15 And we use the Tribal Environmental Protection  
16 Department's fax.

17 Q. This was sent on your business fax machine?

18 A. That's correct.

19 MR. SWANSON: Your Honor, I move admission of  
20 Exhibit M387.

21 SPECIAL MASTER: Any objection?

22 MR. KUHLMANN: No objection.

23 SPECIAL MASTER: Okay. Exhibit M387 is  
24 admitted into evidence.

25 (Exhibit M387 admitted.)

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1 BY MR. SWANSON:

2 Q. Mr. Whiteman, looking at these names here,  
3 can you tell us, are any of these -- are any of these  
4 names, are these off-reservation water users?

5 A. Yes.

6 Q. Can you tell us which ones are?

7 A. One would be Ann Messer, which is a tribal  
8 member. And Clinton Small is also a tribal member that  
9 was using water on the Northern Cheyenne reservation.

10 Q. So those two were using on reservation?

11 A. That's correct.

12 Q. That's why there's no amounts or payments  
13 listed next to their names?

14 A. Yes. They -- they didn't quantify their  
15 water. But there was no issue about the amount of  
16 quantified water they were using.

17 Q. So the rest of the names on this list, are  
18 these off-reservation water users?

19 A. Yes, that's correct.

20 Q. And then we have one final document related  
21 to this, and that's Exhibit Montana 350.

22 MR. SWANSON: And this particular document,  
23 Your Honor, is another where there's multiple different  
24 documents put together as one exhibit. What I would  
25 like to do is just pull two pages out of this

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1 collection and admit them as 350A. The two pages in  
2 particular are MT09281 and MT09282.

3 BY MR. SWANSON:

4 Q. Mr. Whiteman, do you have those pages?

5 A. Yes.

6 Q. Can you identify those -- that document for  
7 us?

8 A. First page is just agenda for the Tongue  
9 River Reservoir Advisory Committee meetings.

10 Q. And then can you refer to the page that I  
11 mentioned, the MT09281? It's actually the 14th page in  
12 that packet. So you may have to flip through that. I  
13 apologize.

14 A. Okay.

15 Q. Can you identify this document?

16 A. Yes. What number was it, again?

17 Q. The bottom should say MT09281.

18 SPECIAL MASTER: You want to approach the  
19 witness and --

20 MR. SWANSON: Yes. May I, please?

21 SPECIAL MASTER: -- and help him.

22 THE WITNESS: Okay. I found it. Okay.

23 BY MR. SWANSON:

24 Q. Sorry about that.

25 A. Okay.

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Direct Examination by Mr. Swanson

1 Q. So can you go ahead and identify this  
2 document, please.

3 A. Okay. This particular document, again, is a  
4 notice to the Montana DNRC of off-reservation use on  
5 Tongue River Basin.

6 Q. Is that the Northern Cheyenne Tribe's  
7 letterhead at the top?

8 A. Yes.

9 Q. And who is the author of this document?

10 A. Would be Allen Clubfoot, Water Resources  
11 administrator.

12 Q. You testified a moment ago that you were his  
13 supervisor in 2004. Is that still the case regarding  
14 this letter?

15 A. Yes, that's correct.

16 MR. SWANSON: Your Honor, I move admission of  
17 Exhibit Montana 250A [sic] and, again, that would be  
18 pages MT09281 and 09282.

19 SPECIAL MASTER: Any objection?

20 MR. KUHLMANN: No objection.

21 SPECIAL MASTER: Okay. Then Montana  
22 Exhibit 350A is admitted into evidence.

23 MR. SWANSON: With or without the dash.

24 (Exhibit M350A admitted.)

25

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1 BY MR. SWANSON:

2 Q. Mr. Whiteman, I wonder if you could just read  
3 the first sentence of the second paragraph on page 1.

4 A. "This notice is provided in anticipation that  
5 drought conditions may exist during the 2005 irrigation  
6 season."

7 Q. So this letter is written in October 2004.  
8 But is it safe to say this is the tribe looking forward  
9 to possibly needing to lease water in 2005?

10 A. Yes.

11 Q. And do you know whether the tribe did lease  
12 water off reservation in --

13 A. I don't recall.

14 Q. Why did you understand that water users off  
15 the reservation were asking to lease water from the  
16 tribe?

17 A. Primarily water shortage in Tongue River  
18 Basin.

19 Q. Is it safe to say they had run out of their  
20 storage shares?

21 A. Yes, both the direct flow right and also the  
22 contract water.

23 Q. So once the lease had been agreed upon, who  
24 was responsible for releasing that water from the  
25 reservoir? Was that the tribe?

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1           A.    No.    The Tongue River Water Users'  
2 Association and Tongue River dam keeper.

3           Q.    Did the Water Users' Association notify you  
4 how much water had been used?

5           A.    Yes.    Again, they were what -- the simple  
6 process was that the Northern Cheyenne Tribe, in this  
7 case Mr. Allen Clubfoot, issued a permit.  The Tongue  
8 River Water Users' Association was notified of the  
9 amount of water that needed to be released for that  
10 particular individual.

11          Q.    So do you consider it important that each  
12 year the tribe receives its full share of stored water  
13 in the reservoir?

14          A.    Yes.

15          Q.    And do you expect DNRC to fill the reservoir  
16 and use its best efforts to fill the reservoir every  
17 year?

18          A.    Yes.

19          Q.    In addition to the 20,000 acre-feet we talked  
20 about, does the tribe still have its contract right for  
21 additional stored water?

22          A.    Yes.

23          Q.    Is that the 7500 acre-feet?

24          A.    That's correct.

25               MR. SWANSON:  Your Honor, could I have a

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1 moment with my co-counsel?

2 SPECIAL MASTER: You certainly may.

3 MR. SWANSON: Your Honor, I have no further  
4 questions. I just may have a need to do redirect after  
5 yourself and Mr. Kaste.

6 SPECIAL MASTER: Okay. So who's doing the --

7 MR. KASTE: I'm sorry. Mr. Kuhlmann.

8 SPECIAL MASTER: So, Mr. Kuhlmann.

9 Actually, while you're getting ready, I can  
10 ask one or two just quick clarifying questions.

11 EXAMINATION

12 BY SPECIAL MASTER:

13 Q. So on Exhibit 226, which was the list of  
14 water lease applicants.

15 A. That's correct. It's --

16 Q. Do you have that in front of you?

17 A. Okay. Okay.

18 Q. So in this particular year, 2004 -- first of  
19 all, is this with respect to the 2004 water year?

20 A. Yes.

21 Q. And so are -- these are applicants for a  
22 lease of the tribe's storage water rights?

23 A. That's correct.

24 Q. Okay. And you had mentioned earlier water  
25 used by Ms. Messer and Mr. Small. Did they use their

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Examination by the Special Master

1 water from the storage water?

2 A. The tribe's water. Excuse me, let me just --  
3 first they used their direct flow right. Then we were  
4 notified by the Montana DNRC of water shortage that the  
5 direct flow -- all in Tongue River Basin were notified  
6 that the direct flow right was not available. Then we  
7 relied on the contract water. That included Tongue  
8 River Water Users' Association and then also the  
9 tribe's storage water and contract water, 7500 and the  
10 20,000. And there were really no issues with our  
11 tribal members about the amount of water they used.

12 Q. Okay. And so, again, just to clarify. So in  
13 the years when you -- during the 2000s before you  
14 actually left your position in 2006, the tribal members  
15 were taking water -- would initially take water from  
16 their direct rights?

17 A. That's correct.

18 Q. And then after that, would you draw from the  
19 storage rights that you had through the Tongue River  
20 Water Users' Association?

21 A. Just would be -- well, there's two areas:  
22 the contract water and the 20,000 of reserved storage  
23 water.

24 Q. Right. And did you take them in any  
25 particular order?



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1           A.    Mainly by -- with the individuals that were  
2 on this list, it was different dates that they  
3 approached the tribe -- submitted their application.  
4 And we issued a permit to them. So they were not  
5 issued all at the same time. They were different dates  
6 on there.

7           Q.    I guess my question, and feel free to tell me  
8 if you don't recall, but when tribal members would need  
9 to go to storage water versus direct flow waters --  
10 first of all, do I understand that the tribe basically  
11 has two rights on the reservoir? One is their contract  
12 right, and then the second is the federal reserved  
13 water right?

14          A.    Okay. The individuals, these particular  
15 individuals did not have a contract storage with the  
16 tribe's water right and storage water right.

17          Q.    Okay. So would they use --

18          A.    The tribe's storage water.

19          Q.    Okay. And so the tribe would provide water  
20 to these two users?

21          A.    That's correct.

22          Q.    Okay. And if you asked for some water from  
23 the reservoir for these users --

24          A.    There really wasn't an issue, but they were  
25 utilizing it when it was released. But we -- I mean, I

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1 was not involved with the notification process. But  
2 Mr. Allen Clubfoot is the one that notified the Tongue  
3 River Water Users on this list here that they were  
4 using storage water.

5 Q. Okay. But do you know, again, are there two  
6 different types of storage rights that the tribe had?  
7 The contract under the Water Users' Association, and  
8 the second were reserved rights?

9 A. Yes.

10 Q. And so to the degree that the tribe -- first  
11 of all, did the tribe pull in any of these years for  
12 its own water use any of its storage rights?

13 A. You mean, regarding the two tribal members  
14 when they used it?

15 Q. Okay. Let's go back to the first. I should  
16 probably understand this to make sure. So, again,  
17 the -- so first of all, do you know whether or not  
18 during the 2000s, whether the tribe asked for any of  
19 its storage water, either contract water or reserved  
20 storage water?

21 A. I don't recall that specifically.

22 Q. Okay. Thanks.

23 SPECIAL MASTER: Sorry. Mr. Kuhlmann.

24

25

JASON WHITEMAN - October 28, 2013  
Cross-Examination by Mr. Kuhlmann

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CROSS-EXAMINATION

BY MR. KUHLMANN:

Q. I just have a couple questions for you, Mr. Whiteman. Looking at Exhibit M385, which was the table that you were just speaking with the Special Master about, there are -- don't appear to be any measurements next to Ms. Messer or Mr. Small's name; correct?

A. Yes.

Q. Do you know if Ms. Messer or Mr. Small's use of the tribe's water is measured each year?

A. I don't recall if it was measured. It was Mr. Allen Clubfoot was the Water Resources administrator at the time.

Q. And talking about the leasing of water to the Tongue River Water Users' members for off-reservation use, do you know how much was charged to those members?

A. I recall it was either 7 or \$9 per acre-foot.

MR. KUHLMANN: I don't believe I have any other questions.

THE WITNESS: Thank you.

SPECIAL MASTER: Thank you.

Mr. Swanson?

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Redirect Examination by Mr. Swanson

1 REDIRECT EXAMINATION

2 BY MR. SWANSON:

3 Q. Mr. Whiteman, I think we just wanted to  
4 clarify some numbers here.

5 MR. SWANSON: Your Honor, when we looked at  
6 Montana 387, which is this chart we've been looking at,  
7 you referred to it as Exhibit 226 at one point. So I  
8 just wanted the record to be clear on that. That 226  
9 is actually the exhibit number it had when it was used  
10 in a deposition.

11 SPECIAL MASTER: Thank you.

12 MR. SWANSON: So Deposition Exhibit 226 but  
13 Trial Exhibit Montana 387.

14 BY MR. SWANSON:

15 Q. And, Mr. Whiteman, I wonder if you could look  
16 at the very top of that table, Northern Cheyenne Water  
17 and then in parentheses it says (20,000 acre-feet),  
18 lease applicants. Do you know if that indicates  
19 whether these water users were using water that was  
20 from the contract water right of 20,000 acre-feet --  
21 I'm sorry. I misspoke. And the compact water right of  
22 20,000 acre-feet?

23 A. Yes. It was from the 20,000 acre-feet of the  
24 compact.

25 Q. And when we talked about Ms. Messer and

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Further Examination by the Special Master

1 Mr. Small and the amount of water that they were using,  
2 did you recall if -- I guess, how big are their  
3 operations? You talked about that they have livestock  
4 and that they irrigate. Do they irrigate around  
5 100 acres or 500 acres? Do you know?

6 A. Maybe Messer's was, say, hundred acres or  
7 less.

8 Q. And Mr. Small?

9 A. Mr. Small is less than a hundred acres.

10 Q. So did you have any concern that they were  
11 going -- that their use was going beyond the tribe's  
12 total direct flow and storage water rights of 32,000  
13 acre-feet?

14 A. There was no issue with Mr. Small or  
15 Ms. Messer.

16 MR. SWANSON: Thank you, Your Honor. No  
17 further questions.

18 FURTHER EXAMINATION

19 BY SPECIAL MASTER:

20 Q. I hate to wade into this. But let me just  
21 ask quickly. Because, again, I just want to clarify on  
22 this. So the Northern Cheyenne Tribe, in addition to  
23 its 20,000 acre-feet of storage rights under the  
24 compact, also holds contract rights through the Tongue  
25 River Water Users' Association; is that correct?

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Further Examination by the Special Master

1 A. That's correct.

2 Q. And earlier there was an exhibit that shows  
3 the Department of the Interior Indian services with  
4 rights to 7500 acre-feet of water. Is that the  
5 quantity of water that the tribe has through its  
6 contract right?

7 A. Yes.

8 Q. Okay. And do you know what the tribe uses  
9 that 7500 for?

10 A. Primarily irrigation purposes. But also  
11 maybe just add a little more information is that the  
12 contract -- well, when there's a water shortage,  
13 usually released water either 7500 acre-feet, or in  
14 this case 20,000 acre-feet.

15 Q. Okay. Thank you.

16 MR. SWANSON: Thank you, Your Honor.

17 SPECIAL MASTER: So thank you very much.

18 Very much appreciate your testimony, Mr. Whiteman.

19 Mr. Draper.

20 MR. DRAPER: Your Honor, I believe we're  
21 ready to call our next witness.

22 SPECIAL MASTER: Okay. You may proceed.

23 MR. DRAPER: We will now call Michael  
24 Whitaker to the stand. Examination by Mr. Wechsler.

25 (Michael Whitaker sworn.)

Direct Examination by Mr. Wechsler  
MICHAEL WHITAKER - October 28, 2013

1 THE CLERK: Have a seat, please. State your  
2 name and spell it.

3 THE WITNESS: My name is Michael B. Whitaker.  
4 Michael Bradley Whitaker. M-i-c-h-a-e-l. Bradley,  
5 B-r-a-d-l-e-y. Whitaker, W-h-i-t-a-k-e-r.

6 SPECIAL MASTER: And can we just go off the  
7 record for one second?

8 (Discussion held off the  
9 record.)

10 (Recess taken 11:40 to 11:45  
11 a.m., October 28, 2013)

12 SPECIAL MASTER: Let's go back on the record.  
13 So, Mr. Wechsler.

14 MR. WECHSLER: Thank you, Your Honor. And  
15 Mr. Whitaker will begin the conversation of regulation  
16 that occurs in Wyoming and Montana. I believe that it  
17 will show that Wyoming was using post-1950 water during  
18 the years at issue.

19 MICHAEL WHITAKER,  
20 having been first duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. WECHSLER:

23 Q. Good morning, Mr. Whitaker.

24 A. Good morning.

25 Q. And I plan to ask you this morning really

Direct Examination by Mr. Wechsler  
MICHAEL WHITAKER - October 28, 2013

1 about five topics. I'll ask you a little bit about  
2 your background. I'm going to ask you to describe the  
3 hydrographer reports a little bit to help familiarize  
4 all of us here today. I'm going to ask you generally  
5 how regulation in Wyoming works. I'm going to ask you  
6 about some regulation that specifically occurred in  
7 Wyoming during the years that you were with the state  
8 engineer's office. And finally I'm going to ask you a  
9 little bit about reservoirs.

10 A. Okay.

11 Q. So starting out with your background; by whom  
12 are you currently employed?

13 A. I retired from the State of Wyoming a number  
14 of years ago. And my wife is my current boss.

15 Q. I have two jobs. And my wife is also the  
16 boss of one of those jobs.

17 I understand that you're originally from  
18 Kansas; is that right?

19 A. That's correct. I grew up in northwest  
20 Kansas, Atwood.

21 Q. When did you move to Wyoming?

22 A. I started with the state engineer's office in  
23 Cheyenne in 1973.

24 Q. You received a BS in biology, I believe;  
25 correct?



Direct Examination by Mr. Wechsler  
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1           A.    I did, from Fort Hays, Kansas State College  
2 in Hays, Kansas.

3           Q.    You just indicated that you began for the  
4 state engineer's office in 1973. And I believe that  
5 was originally in Cheyenne; right?

6           A.    That's correct.

7           Q.    Shortly thereafter, you moved up to Sheridan,  
8 Wyoming?

9           A.    May of 1975, I moved to Sheridan as the  
10 hydrographer commissioner for the Powder River  
11 drainage.

12          Q.    At that time, your responsibilities were to  
13 oversee the water rights in the Powder River drainage?

14          A.    That's correct.

15          Q.    And today, the Division II, and that area of  
16 Wyoming is referred to as Division II; is that right?

17          A.    Division II, yes, encompasses both Powder,  
18 Tongue, Little Missouri, Belle Fourche, and the  
19 Cheyenne River drainages.

20          Q.    Today, Division II has a full-time  
21 hydrographer commissioner; right?

22          A.    Today they have several full-time  
23 hydrographer commissioners. When I first started back  
24 in '75, we had one commissioner on the Powder River  
25 drainage -- one full-time hydrographer commissioner.

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1 That was myself. We had another hydrographer  
2 commissioner on the Tongue River drainage. Then we had  
3 several part-time, seasonal county paid employees  
4 throughout the division.

5 Q. And so it was a different arrangement than it  
6 is today?

7 A. Yes, it was.

8 Q. When you were first the hydrographer  
9 commissioner, were those county employees who were  
10 responsible for the actual distribution of water?

11 A. They were for an appointed area. Usually  
12 they were on one drainage or maybe two drainages. But  
13 it was my job to oversee them and assist them. If  
14 there were any stream gauges or any reservoir water  
15 that was released into those drainages, I was to make  
16 sure they had the information they needed to distribute  
17 the water.

18 Q. When did that change?

19 A. That change occurred, I would say, sometime  
20 about 1990.

21 Q. You were a hydrographer commissioner until  
22 1987; do I have that right?

23 A. That's correct.

24 Q. At that time, you became the superintendent  
25 of Division II; correct?

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1 A. Yes, I did.

2 Q. And who was the superintendent before you, of  
3 Division II?

4 A. Paul Kawulok, K-a-w-u-l-o-k.

5 Q. In one of those great stacks of documents, I  
6 believe you have Exhibit M458.

7 A. Right on top.

8 Q. I don't intend to look at all of these  
9 hydrographer's annual reports, but I do want to get you  
10 to confirm some things about them. And I think we'll  
11 only look at 458 and then the one from 2004 to get a  
12 feel for the anatomy of the document.

13 First I want to start with document M458.  
14 Can you describe what this document is?

15 A. It's the hydrographer's annual report for  
16 1980, Water Division II.

17 Q. That's the division where you worked; is that  
18 right?

19 A. That's correct.

20 Q. And this is put out every year by Division  
21 II; is that correct?

22 A. That's correct.

23 Q. And it shows the measurement and distribution  
24 of water that was recorded by the hydrographer  
25 commissioners?

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1 A. It does.

2 Q. Can you turn with me, please, to what is the  
3 fourth page of the document? At the bottom, you will  
4 have a little number WY110586. And at the top, it  
5 indicates "Recorded diversion and reservoir releases";  
6 do you see that?

7 A. Yes.

8 Q. At the top, there's a list of names there.  
9 And it indicates, I believe, Mr. Kawulok. Did I  
10 pronounce that correctly?

11 A. That's correct.

12 Q. And that's who you just referred to as being  
13 the superintendent.

14 A. I did.

15 Q. Next is your name, Mr. Whitaker, hydrographer  
16 commissioner; do you see that?

17 A. Yes.

18 Q. At some time you became, is it called the  
19 assistant superintendent?

20 A. No, I didn't. At that time, we did not have  
21 the assistant superintendent position. I went directly  
22 from the hydrographer commissioner to superintendent in  
23 '87.

24 Q. If you turn the page, and this time I'm  
25 looking at something that has the No. 110588. And it

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1 indicates in the center, "Annual report of recorded  
2 diversions and reservoir releases in the Powder River  
3 drainage, 1980." Do you see that?

4 A. Yes, I do.

5 Q. At the bottom here, it indicates "Compiled  
6 by," and it indicates it was compiled by you; correct?

7 A. That's correct.

8 Q. And then if you turn to page what has been  
9 handwritten on the bottom with the page 9 of this  
10 document. And at the top, it indicates "1980 water  
11 year summary."

12 A. Yes.

13 Q. And, again, this appears to be a summary  
14 written by you for the Powder River drainage?

15 A. Yes, it is.

16 Q. And then there's also a similar report that's  
17 given for the Tongue River drainage in this document;  
18 right?

19 A. There should be, yes. This may be only a --  
20 no, it's in the back, yes.

21 Q. And does this document look relatively  
22 complete to you? You probably don't remember.

23 A. It does, as far as I've seen it, yes.

24 Q. What year did they first start doing  
25 hydrographer reports in Wyoming?

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1           A.    In Water Division II, we started, I believe,  
2 about the time I arrived there.

3           Q.    You arrived there roughly '78?

4           A.    '75.

5           Q.    So this document here is 1980.  So you think  
6 there might be some earlier ones other than or prior to  
7 1980?

8           A.    Potentially.  The documents grew each year as  
9 we got a little more sophisticated and got more  
10 information.

11          Q.    For this case, we have only the years -- we  
12 have records of the years starting in 1980.  And so  
13 beginning in 1980, did you have similar  
14 responsibilities for creating the hydrographer's annual  
15 reports for Division II?

16          A.    Up to 1987, yes.

17          Q.    So between 1980 and 1987, you were  
18 responsible, generally, for compiling the information  
19 for the Powder River Basin and writing the summary; is  
20 that accurate?

21          A.    That's accurate, yes.

22          Q.    And then one of the hydrographer  
23 commissioners was responsible for the Tongue; is that  
24 right?

25          A.    That's correct.

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1 Q. Which one of those -- looking at the third  
2 page of the document again, which one of these  
3 hydrographer commissioners was responsible for the  
4 Tongue?

5 A. The only other hydrographer that's listed on  
6 that page, Richard Oliver.

7 Q. In 1987, you became the superintendent;  
8 correct?

9 A. Correct.

10 Q. And at that time, did you have responsibility  
11 for supervising and overseeing the creation of these  
12 documents?

13 A. In general, yes.

14 Q. Are those documents kept at the state  
15 engineer's office at Division II in the Sheridan  
16 location?

17 A. In both.

18 MR. WECHSLER: Your Honor, at this point,  
19 rather than going through each one of the years, I  
20 would move the admission of 458 through 480. My  
21 recollection is that these were admitted for the  
22 limited purpose of showing what Mr. Book relied on in  
23 his report. Those documents cover all the years except  
24 for 2001, 2002, 2004, and 2006, which are joint  
25 exhibits.

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1 SPECIAL MASTER: Mr. Kaste?

2 MR. KASTE: I object to the admission of  
3 hydrographer reports that don't relate to years in  
4 issue. So '87, '88, '89, 2004, and 2006, I believe,  
5 ought to be part of this litigation. All of the  
6 remaining should not.

7 SPECIAL MASTER: Okay. So, sorry to  
8 disappoint you on this. But I'm going to admit all of  
9 them, recognizing that for many of the years, the  
10 question of whether or not Wyoming is liable in those  
11 years is not at issue. And, therefore, the only reason  
12 why those particular reports would be relevant would be  
13 to the degree they shed any light on other years that  
14 actually are at issue. And I trust no one will make  
15 any other arguments based on them.

16 So do you need those recited again? Or is it  
17 clear enough on the record?

18 THE CLERK: So you're admitting 458 through  
19 480?

20 SPECIAL MASTER: That's right. 458 through  
21 480 with the, I guess, notation that for the years  
22 where Wyoming's obligations under the compact are no  
23 longer an issue, that those are admitted for the  
24 purpose of providing any light that they do on the  
25 other years at issue.



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1 (Exhibits M458 through M480  
2 admitted.)

3 BY MR. WECHSLER:

4 Q. Mr. Whitaker, could you turn, please, to  
5 Exhibit J61. And I'll -- I know you have a lot of  
6 documents there with you. I believe all the ones to  
7 your left are now going to be documents that we no  
8 longer refer to. And I hope all the other documents  
9 will be in the smaller stack.

10 So J61 should be the 2004 hydrographers'  
11 annual report.

12 A. Yes, sir.

13 Q. And using this document, I would like to just  
14 talk generally about the anatomy of one of these  
15 documents. So looking first at Exhibit J61 on the very  
16 first page, we see the cover page; right?

17 A. Yes.

18 Q. And there's a map here. And up in the  
19 right-hand corner of the map -- and I understand this  
20 to be a map of the state of Wyoming. Do you understand  
21 that the same way?

22 A. Yes, I do.

23 Q. And up in the right-hand corner is shown  
24 Division II. And is that a fairly accurate depiction  
25 of what you understand to be Division II?

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1 A. It is.

2 Q. If you turn with me, please, one page over,  
3 and then on the page labeled WY040702, we see a  
4 description of the water districts. Do you see that?

5 A. I do.

6 Q. And here it indicates Water Division II,  
7 which we've been talking about. Can you highlight --  
8 using this document, can you highlight the districts  
9 within Water Division II that are relevant to the  
10 Tongue River Basin?

11 A. Four, five, and eleven.

12 Q. When you were superintendent of Division II,  
13 did you have particular water commissioners assigned to  
14 those districts?

15 A. We did, yes.

16 Q. Starting in 1987, do you recall what water  
17 commissioners were assigned to District 4?

18 A. John Gootz was working for us at that time.  
19 And his primary area was Districts 4 and 5.

20 Q. And when did he complete his work?

21 A. He was there a couple years until he retired.  
22 And then Mr. Bill Knapp took his place.

23 Q. And that covers District 4 and 5; is that  
24 right?

25 A. Right.

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1 Q. How about District 11?

2 A. District 11 was picked up by Carmine  
3 LoGuidice.

4 SPECIAL MASTER: Mr. Wechsler, can I just  
5 interrupt you for one second? When you originally had  
6 Mr. Whitaker go through his background, I don't  
7 remember you actually asking him when he left the  
8 employment of the State of Wyoming. And it would be  
9 useful for me, just as you go through various  
10 questions, to have a sense of whether he held any other  
11 positions in Wyoming after he was superintendent and  
12 when he finished with various responsibilities.

13 BY MR. WECHSLER:

14 Q. Mr. Whitaker, when did you retire from the  
15 Wyoming State Engineer's Office?

16 A. In February 2009.

17 Q. What position were you in at that time?

18 A. Still superintendent of Water Division II.

19 Q. You held that position from 1987 until 2009  
20 when you retired?

21 A. Correct.

22 Q. Did you have any other positions?

23 A. No, I did not.

24 Q. But you did serve on what I understand to be  
25 the Board of Control; is that right?

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1           A.    The State Board of Control is comprised of  
2 the four division superintendents and the state  
3 engineer.

4           Q.    That was one of your responsibilities as  
5 superintendent of Division II?

6           A.    Yes, it was.

7           SPECIAL MASTER:   Okay.   Thank you.

8 BY MR. WECHSLER:

9           Q.    You were talking about Mr. LoGuidice, is how  
10 I understand his name is pronounced.   And I'll have to  
11 ask him at a break to see if I've got that right.

12                   Do you know when he began as a water  
13 commissioner?

14           A.    He began in 1988.   I think we sent him to  
15 snow survey school about the first day he got on the  
16 job, and that was in January.

17           Q.    He replaced you?

18           A.    He did, in 2009, yes.

19           Q.    Are you familiar with Mr. Pat Boyd?

20           A.    Yes, I am.

21           Q.    And when did Mr. Boyd become a commissioner?

22           A.    I don't recall exactly.   Pat, up to 2006, I  
23 think Pat worked for us probably about eight to ten  
24 years.

25           Q.    Looking back at Exhibit J61, we have a table

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1 of contents. And then I'd like to turn to the part of  
2 the hydrographer's report having to do with the Tongue  
3 River Basin.

4 It looks to me like the Powder is first; is  
5 that how you understand it?

6 A. I believe so, yes.

7 Q. And then as I see it, starting on page 89 is  
8 where the Tongue River Basin information begins. Can  
9 you look to that page, please?

10 A. Yes.

11 Q. On page 89, it shows a map of the Tongue  
12 River drainage; right?

13 A. The Tongue River drainage and the Little Horn  
14 drainage.

15 Q. And the Little Horn is shown as District 6;  
16 do I have that correct?

17 A. That's correct.

18 Q. The 4 and 5 shown on this map, the Tongue  
19 River drainage, that's the Tongue River drainage, as it  
20 says; right?

21 A. Correct.

22 Q. There's a number of numbers there on the map.  
23 And I understand those to correspond to the next page,  
24 which indicates a map index; is that your  
25 understanding?

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1 A. Yes.

2 Q. So if we're looking for particular reservoirs  
3 and recording stations operated by the Wyoming State  
4 Engineer, they are shown on that map index; right?

5 A. Yes.

6 Q. Does this only show those reservoirs and  
7 recording stations operated by the state engineer?

8 A. It -- as far as reservoirs go, these are the  
9 reservoirs that we routinely deliver water that's  
10 released from those reservoirs. But they have their  
11 own company and their own managers.

12 Q. Part of my question was -- what I intended to  
13 be asking was, does it also show USGS gauges?

14 A. Yes, it does.

15 Q. If you'd turn, please, to page 92 of Exhibit  
16 J61.

17 A. Yes.

18 Q. This appears to be a report from Mr. Knapp  
19 about the Tongue River drainage; is that right?

20 A. That's correct.

21 Q. And all of these -- we looked earlier at your  
22 summary for the Powder River Basin. Here's one for the  
23 Tongue River drainage. It looked to me like all of  
24 these hydrographer reports have a summary much like  
25 this one; is that correct?

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1 A. Through my tenure, yes, that's correct.

2 Q. And, generally, what goes into these  
3 summaries?

4 A. Just a basic breakdown of what happened  
5 throughout the year, what kind of water was available.

6 Q. Shows times when water was released from the  
7 reservoir; right?

8 A. Generally, yes. Gives a breakdown on the  
9 reservoir operation, yes.

10 Q. I apologize for speaking over you. In fact,  
11 if you look at the third paragraph here, there is an  
12 indication here that there were reservoir releases that  
13 began as early as June 9th; you see that?

14 A. Yes, I do.

15 Q. Water users tend to call for water to be  
16 released from reservoirs when there's insufficient  
17 direct flow; would you agree with that?

18 A. That's correct.

19 Q. And so, in a sense, it's a good indicator of  
20 when water is going under regulation in Wyoming; right?

21 A. That's correct.

22 Q. Turn, please, with me to page 96. You have  
23 that?

24 A. Yes, I do.

25 Q. And here this is a reservoir summary of

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1 reservoirs in the Tongue River drainage; right?

2 A. Correct.

3 Q. If you'd turn with me to the next several  
4 pages, we can see that there is pages indicating the  
5 water distribution for some of the reservoirs in the  
6 Tongue River Basin and Wyoming; right?

7 A. Correct.

8 Q. And so just taking one that we visited on the  
9 basin tour as an example, and that's Park Reservoir,  
10 that shows up on page 110.

11 A. Yes.

12 Q. Here, again we see some indication of when  
13 calls began, and it indicates water was first released  
14 on July 16th. Do you see that?

15 A. I do.

16 Q. Is that relatively common for these  
17 hydrographer reports to be indicating when water was  
18 released from storage?

19 A. Yes.

20 Q. It then has a table of the shareholders;  
21 right?

22 A. Correct.

23 Q. And this shows who owned water in this  
24 reservoir and how much was used?

25 A. That's correct.



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1 Q. And then if you turn to the next page, then  
2 it has more detailed pages showing the actual water  
3 distribution from this particular reservoir; right?

4 A. Right. Through the months, yes.

5 Q. And it seems to have something relatively  
6 similar for each of the reservoirs. Do you agree?

7 A. Yes.

8 Q. The hydrographer report then goes on to show  
9 measured diversions from ditches; right?

10 A. Recorded diversions, yes.

11 Q. Recorded diversions. And I'll look at page  
12 129 as the Alliance Ditch as an example of this.

13 A. Okay.

14 Q. And here we can see it shows the ditch, shows  
15 it's from the Alliance Ditch; right?

16 A. Shows the Alliance Ditch water diversion for  
17 that year, yes.

18 Q. And then it shows the source. And in this  
19 particular case, it's Big Goose Creek?

20 A. Yes.

21 Q. Then it shows the diversions -- I'm sorry.  
22 Did you call them recorded diversions?

23 A. In the Alliance Ditch, yes. It's a six-foot  
24 hard shell with an FM recorder.

25 Q. And it shows the actual measurements that one

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1 of the hydrographer commissioners made in each day of  
2 the month; right?

3 A. These are continuous recorders. And these  
4 records are compiled off of the charts that come -- are  
5 pulled from the recorders. The FMs run for 30 days and  
6 then have to be reset. On most of them, there's a  
7 weekly variety. We had some of those too. But as I  
8 recall, most of the weeklies were in the Tongue River  
9 drainage and the 30 days were in the Powder River  
10 drainage.

11 Q. We know it has an FM recorder because at the  
12 top it actually indicates the type of measuring device;  
13 right?

14 A. Right.

15 Q. It shows here that the recorded diversions  
16 began on April 18th. Do you see that?

17 A. Yes.

18 Q. Does that mean that there were no recorded  
19 diversions prior to April 18th?

20 A. No, it doesn't mean that. There could have  
21 been some diversions prior to that. This is when we  
22 got things going. It's possible that that's the date  
23 they turned the ditch on.

24 But we like to start recorders when there's a  
25 little water in the pipe. If you start it too soon,

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1 the float tends to stick into the mud. And then when  
2 the water comes, in it will overtop and sink the float,  
3 and there goes your record for a number of days.

4 Q. If I understand you correctly, where it  
5 indicates in October, November, December, January,  
6 February, 0 CFS during those days, that might not  
7 necessarily mean that there was no water flowing in the  
8 ditch in those months?

9 A. There was no water in those -- in the ditches  
10 during the winter period.

11 Q. But you indicated to me that we don't know --  
12 just because there's no recording there, we don't know  
13 that that means that there's no water in the ditch;  
14 right?

15 A. Right. It's possible. We like to start that  
16 recorder as soon as we see some water in the ditch.  
17 Typically, a seasonal stream gauge would be started up  
18 prior to the 1st of April. But the ditch recorders,  
19 like I say, we tend to want to see water in those  
20 before we turn the recorder on.

21 Q. And at page 145, turn there, please.

22 A. Okay.

23 Q. There it has a different type of measuring  
24 device; right?

25 A. Yes, it is.

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1 Q. And could you please describe that type of  
2 recording -- or measuring device?

3 A. The A-35 recorder is a continuous recorder  
4 that has a chart that will last about a year. And  
5 typically they're reserved for stream gauges. But this  
6 was put in a number of years ago. And that was the  
7 recorder that was brought up to us to install.

8 Q. In this hydrographer report from 2004,  
9 beginning on page 120 and ending on page 145, it has a  
10 number of ditches where the diversions are recorded on  
11 a daily basis; right?

12 A. Yes. Where there's a continuous recorder,  
13 yes.

14 Q. It doesn't include all of the ditches in the  
15 Tongue River Basin; right?

16 A. No.

17 Q. So if we turn, then, to page 146, this at the  
18 top indicates a spot discharges only. You see that?

19 A. That's correct.

20 Q. What does spot discharges mean?

21 A. That's an instantaneous reading for that day  
22 when the water commissioner or hydrographer would  
23 happen to go by that ditch and take a reading on the  
24 measuring device.

25 Q. Some of these, like the first one shown here

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1 for Red Hill, have a number of readings; right?

2 A. Right.

3 Q. But if you turn with me to page 149, here's a  
4 diversion that comes from Jackson Creek. And it  
5 appears that they visited only one day that year; is  
6 that right?

7 A. It appears that that's correct, yes.

8 Q. Turn with me, please, to page 167.

9 A. Okay.

10 Q. I'm looking at the last ditch there entitled  
11 the South Side Tongue River and Dayton. You see that?

12 A. Yes.

13 Q. Are you familiar with that ditch?

14 A. Yes.

15 Q. And where is that ditch located?

16 A. Just above Dayton.

17 Q. Here it indicates that -- is it off of the  
18 main stem of the Tongue River?

19 A. It is.

20 Q. Here it indicates that it was measured twice,  
21 on 4/7 and 4/16; right?

22 A. It's on. There was no measuring device in  
23 that.

24 Q. And some of these simply stay on; is that  
25 correct?

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1           A.     Correct.  If there's no measuring device in  
2 the ditch to be able to determine the amount of flow in  
3 the ditch at that day, then it's just designated on or  
4 off.

5           Q.     One of the ditches at issue in this case is  
6 the Interstate or Pennoyer ditch; are you familiar with  
7 that ditch?

8           A.     Yes.

9           Q.     Where is that located?

10          A.     That's located down close to the state line  
11 on the west side of the Tongue River.

12          Q.     I looked through the spot discharges in this  
13 hydrographer's report from 2004, and I didn't find the  
14 Pennoyer or Interstate ditch.

15                   Can you, please, review the pages here and  
16 confirm that it's not shown?

17                   SPECIAL MASTER:  Can I just suggest this  
18 might be a good time for the lunch break?  Since you're  
19 asking the witness to review something, he might have a  
20 little bit more time to actually take a look at the  
21 exhibit.

22                   But let me just clarify.  A moment ago when  
23 you were talking about page 167, the bottom of the  
24 page, the South Side Tongue River and Dayton diversion,  
25 when you said that it indicates it's on, what is on is

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1 the diversion ditch?

2 THE WITNESS: The ditch is flowing water,  
3 yes, sir.

4 SPECIAL MASTER: Okay. Thank you.

5 Okay. We'll break to the lunch hour. It is  
6 about 17 after the hour. Why don't we come back at,  
7 say, 20 after 1:00 this afternoon.

8 (Recess taken 12:17 to 1:23  
9 p.m., October 28, 2013)

10 SPECIAL MASTER: Okay. Thank you very much.  
11 You can all be seated.

12 So welcome back, Mr. Whitaker. And it's one  
13 of my responsibilities to remind you you're still under  
14 oath.

15 BY MR. WECHSLER:

16 Q. Good afternoon, Mr. Whitaker.

17 A. Good afternoon.

18 Q. Before the break, I asked you whether you  
19 could confirm that there was no insert here or table  
20 for the Interstate or Pennoyer Ditch; were you able to  
21 confirm that?

22 A. I didn't find any record for the Pennoyer  
23 Ditch, no.

24 Q. Before we leave this exhibit, it was pointed  
25 out to me that there's something a little bit that I

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1 think I inaccurately characterized. So if you look  
2 back at page 120, and this is just after the -- there's  
3 several tables which cover reservoirs. And then this  
4 is where there begins to be measuring devices or  
5 records for flows in places other than the reservoirs.  
6 Do you see page 120?

7 A. Yes, sir.

8 Q. And then I think I characterized this as  
9 having records of ditches. But, in fact, if you look  
10 at the very first one, that's not a ditch; right?

11 A. No, it is not.

12 Q. That's actually on a creek?

13 A. Yes. That's just upstream of Park Reservoir.

14 Q. And there's several here that are -- actually  
15 look to be creeks and not recording devices on ditches;  
16 right?

17 A. It appears it goes over to page 128, which is  
18 the Sheridan intakes.

19 SPECIAL MASTER: And I know I've been focused  
20 on trying to speed up the time that we're taking. But  
21 I have to ask, what's an AccuBubbler?

22 THE WITNESS: An AccuBubbler, it uses air  
23 pressure. It actually has a little compressor unit and  
24 blows air pressure through the line. The elevation of  
25 the water in the stream puts so much pressure back on



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1 that that it gives you a reading.

2 SPECIAL MASTER: Thank you.

3 BY MR. WECHSLER:

4 Q. Are any of these listings here records of  
5 measurements directly from the Tongue River main stem?

6 A. The ditch records, you mean?

7 Q. Either the ditch or measurements from  
8 measuring devices located on the Tongue River main  
9 stem.

10 A. The south side, on page 167.

11 Q. That was the spot discharge that we looked  
12 at?

13 A. Right.

14 Q. Any others?

15 A. I believe that's all I saw in here.

16 Q. Okay. Moving on from Exhibit J61, and we  
17 might refer back to it from time to time if necessary.  
18 But I want to talk generally regulation that occurs in  
19 Division II in Wyoming. And so how do you understand  
20 the term "regulation"?

21 A. Regulation is when somebody who is short of  
22 their appropriation places a call. And when we receive  
23 that call, then the first thing we do is to verify that  
24 they are indeed short of water, number one; and number  
25 two, that they are taking all the water that's

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1 available to that diversion. If those two things are  
2 met, then we proceed to regulate the stream.

3 Q. By regulate, you mean actually the curtailing  
4 of the water?

5 A. We would turn off the most junior water that  
6 we find on until we can satisfy that calling right.

7 Q. And the water commissioner will take physical  
8 control of the headgate; is that right?

9 A. That's right.

10 Q. In general, in Wyoming, when you don't use  
11 your water rights, they are abandoned; right?

12 A. No. Somebody will bring an action.

13 Q. If you don't use your water rights and  
14 somebody brings an action, then you can lose your water  
15 right?

16 A. Potentially you could lose it, yes.

17 Q. Are you familiar with the term "forfeiture"?

18 A. Yes.

19 Q. And what does that mean?

20 A. Basically, you would forfeit your right. But  
21 that's not a term that Wyoming uses. It uses  
22 abandoned.

23 Q. There's two different kinds of abandonment,  
24 if I understand it correctly; is that right? Voluntary  
25 and involuntary?

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1 A. Correct.

2 Q. So involuntary abandonment is akin to  
3 forfeiture, would you agree with me?

4 A. Involuntary abandonment requires a board  
5 action.

6 Q. For nonuse?

7 A. For nonuse.

8 Q. So would you agree that the term "use it or  
9 lose it" applies to Wyoming water rights?

10 A. That's probably where it originated, yes.

11 Q. And so I think you said in your deposition  
12 that during your time at Division II, you only recall  
13 three abandonments that occurred during that time; is  
14 that right?

15 A. If I said that, yes. The board actually had  
16 several. But I think we were referring to abandonment  
17 actions in Water Division II.

18 Q. I intended to limited that to Division II.  
19 So to the extent I didn't, yes. You recall three that  
20 occurred in Division II; is that right?

21 A. I believe that's what I said.

22 Q. Do you have any additional information today?

23 A. No.

24 Q. So between the years that you were at  
25 Division II, would you characterize the remainder of

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1 the water rights as active water rights?

2 A. Yes.

3 Q. And so those water rights, essentially when  
4 there's water available to them, they might be taking  
5 water until they are put into regulation?

6 A. Generally, what we do, the individuals on the  
7 streams turn on when they're ready to in the spring,  
8 when water is available. And they can go ahead and run  
9 without anything from us. We don't touch a ditch when  
10 they turn on. When we get a call for administration or  
11 regulation, that's when we take control of the stream  
12 and control of the headgates.

13 Q. Typically, the most water is available during  
14 the spring runoff; right?

15 A. Correct.

16 Q. Let me get you to look at Exhibit M481, which  
17 is titled "Handbook for Field Water Administrators."

18 A. Would that be in this?

19 Q. I don't believe so. It's a document, as I  
20 said, which seems to be Handbook for Field Water  
21 Administrators with the Bates No. WY037170. It's about  
22 a 14-, 13-page document.

23 A. I don't see it here.

24 MR. WECHSLER: Your Honor, may I approach?

25 SPECIAL MASTER: You certainly may.

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1 BY MR. WECHSLER:

2 Q. Do you have that now, Mr. Whitaker?

3 A. I do.

4 Q. I'm looking at page 8 -- first, let me ask  
5 you, do you know what this document is?

6 A. It says it's a Handbook for Field Water  
7 Administrators.

8 Q. Is this a document that you had when you were  
9 the supervisor for Division II?

10 A. This, I believe, yes, is an old one that's  
11 been around for some time, yeah.

12 Q. And this was created by the Wyoming State  
13 Engineer's Office?

14 A. Yes, it was.

15 Q. And is this a document that was used in  
16 Division II?

17 A. It was used by all the water commissioners.  
18 It was referenced a lot of times as a guide.

19 MR. WECHSLER: Your Honor, I'd offer Exhibit  
20 M481.

21 SPECIAL MASTER: Any objection?

22 MR. KASTE: No objection.

23 SPECIAL MASTER: Okay. Without any  
24 objection, then, Exhibit M481 is admitted into  
25 evidence.

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1 (Exhibit M481 admitted.)

2 SPECIAL MASTER: And, Mr. Wechsler, for my  
3 purposes, it would also be useful if you're going to be  
4 asking questions about this, if you could provide some  
5 sense as to when this particular handbook was utilized.

6 MR. WECHSLER: Sure.

7 SPECIAL MASTER: So, Mr. Draper.

8 MR. DRAPER: Yes, Your Honor. I wonder if I  
9 could just interrupt and ask that the monitors in the  
10 back of the courtroom be turned on. I think that's  
11 something that the controls are -- exist up near you  
12 there. That would help people following the  
13 discussion. Thank you.

14 SPECIAL MASTER: So let's go off the record  
15 for a moment.

16 (Discussion held off the  
17 record.)

18 SPECIAL MASTER: Okay. Back on the record.

19 BY MR. WECHSLER:

20 Q. Mr. Whitaker, you were a water commissioner  
21 beginning in, I believe you said, 1979?

22 A. Correct.

23 Q. Did they have a Handbook for Field Water  
24 Administrators at that time?

25 A. Yes, they did.

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1 Q. Was it in the substantial form as this one  
2 that you see before you?

3 A. Yes.

4 Q. And what was that document used for?

5 A. It was just a guide to all the water  
6 commissioners that were spread around Wyoming.

7 Q. And it's been used essentially since that  
8 time for water commissioners; is that right?

9 A. Yes.

10 Q. When you left in 2009, were you using a  
11 Handbook for Field Water Administrators that was  
12 substantially similar to Exhibit M481?

13 A. I believe there was one at the office or  
14 multiple copies in the office, yes.

15 Q. If you'd turn with me, please, to page 8.

16 A. Yes.

17 Q. And I'm looking under the heading "surplus  
18 water." Do you see that?

19 A. Yes.

20 Q. Do you know what surplus -- what that heading  
21 "surplus water" refers to?

22 A. Surplus water, to us, meant that anyone with  
23 a pre-1945 right could take double appropriation before  
24 any rights after that time received water.

25 Q. That period was during the spring runoff

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1 period?

2 A. That would be any time.

3 Q. Any time there was --

4 A. Water available.

5 Q. "Excess water" is the next heading on page 8  
6 of that document. Do you know what excess water refers  
7 to?

8 A. Excess water was the next step. And that was  
9 March 1 of '85, which meant that once the post-rights  
10 to 1945, that was the double appropriation for the  
11 period between 1945 and 1985, before anything after  
12 '85 would get water.

13 Q. When is the time of the year when typically  
14 there is the most water available?

15 A. During the spring runoff period.

16 Q. During the time that you were superintendent  
17 of Division II, were there times there was surplus  
18 water?

19 A. Sure. When the streams were flooding. What  
20 we found was very few ditches would -- had the ability  
21 to take double appropriation, number one. Number two,  
22 they were reluctant to open their ditches very much  
23 during the high water period for fear they may --  
24 something might happen. They might overtop and flood  
25 the ditch out.



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1 Q. Many of the ditches were limited by their  
2 physical capacity?

3 A. That's true.

4 Q. Sometime during the typical water year, the  
5 water levels would drop and a creek would go into  
6 regulation; right?

7 A. Yes.

8 Q. And at the time where a creek in Wyoming  
9 typically went into regulation was in midsummer, I  
10 believe?

11 A. Yes. Most of the streams in the Big  
12 Goose-Little Goose drainage went into regulation  
13 shortly -- oh, the 10th of July to 15th, something like  
14 that.

15 Q. Depends on every year, of course?

16 A. Yes. It would vary a little bit. But that  
17 was the general time frame.

18 Q. And I think you just said that at some point,  
19 then, you would get a call for regulation; is that  
20 right?

21 A. Yes.

22 Q. That call can be in writing?

23 A. We had the ability to do that, yes. And  
24 there's a form for it. And I understand that the  
25 current policy is to get those forms signed if you're

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1 requesting regulation.

2           Early in my tenure, we took the call over the  
3 phone if we knew the party. If it was a routine call  
4 that happened every year and we were very familiar with  
5 that particular ditch and the people on it, we'd go out  
6 and verify they were short in taking everything. But  
7 we wouldn't for the writing, the written receipt.

8           Q.    Ever have a call that occurred in person,  
9 meaning the water user told you in person where it's  
10 time to regulate?

11          A.    Yes.

12          Q.    And of those ones that were done in person,  
13 did you require -- every time, did you require them to  
14 submit a written request?

15          A.    Not every time, no. Like I said, if we knew  
16 the calling party and it was somebody that routinely  
17 called every year on a particular ditch and we knew the  
18 situation on the stream, something that we were on  
19 almost daily, we didn't necessarily need anything in  
20 writing to instigate that. We knew it happened, and we  
21 could see it coming. And we would respond to the call.

22          Q.    Are you familiar with the term "calling  
23 right"?

24          A.    Calling right would be the -- I suppose,  
25 would be the calling appropriation, yes.

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1 Q. When you have a calling right, you  
2 essentially place the ditches above it that are  
3 necessary into regulation; right?

4 A. Yes.

5 Q. But you wouldn't necessarily be regulating  
6 the ditches below the calling right; is that right?

7 A. No, you don't.

8 Q. Because the objective is to get the water  
9 down to the calling right?

10 A. That's correct.

11 Q. And so the only reason to have regulation  
12 below the calling right is if you have another calling  
13 right; right?

14 A. That's true.

15 Q. Now, when you place a stream or creek into  
16 regulation, you would then go upstream and physically  
17 control the headgates that were necessary to make sure  
18 water got down to the calling right; is that correct?

19 A. Yes. We would go up and verify that all the  
20 ditches above there were in priority. And we would  
21 only turn off the amount that was junior to the calling  
22 appropriation that we needed to satisfy them.

23 Q. Once they're satisfied, then you've met your  
24 objective?

25 A. For that day. But what happens on a stream

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1 is the flow continues to diminish. And that call stays  
2 active. So we would continue to have to shuffle more  
3 water down to that particular diversion.

4 Q. And if it stays active, in fact, you may have  
5 to cut back to an even earlier date; right?

6 A. Yes. We'd have to continue to regulate other  
7 rights off to accomplish that.

8 When they have -- if they're going to shut  
9 off for a period of time to hay or they are just  
10 finished for the season, then we relinquish the call on  
11 the stream.

12 Q. You typically put a tag on a ditch; right?

13 A. We tag some. Some of them that the guys talk  
14 to all the time, they just tell them, hey, we're in  
15 regulation. Everybody knows what's going on. It just  
16 depended on the situation on the stream. If you had  
17 somebody that wasn't familiar with regulation, we  
18 obviously would put a tag on. Usually that would  
19 prompt a phone call, what's going on?

20 Q. If you could look back, please, to page M481.  
21 That was the document we just looked at, the handbook.

22 A. Okay. What page?

23 Q. Page 7, please.

24 A. Seven? Yes, sir.

25 Q. I'm looking above the heading "headgate."

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1 And then there's one paragraph there. And then the  
2 second to last sentence of the paragraph above that,  
3 this is the paragraph starting "prior to regulating";  
4 you see that?

5 A. Prior to regulating? Yes.

6 Q. And the sentence I'm reading here, second to  
7 last sentence in that paragraph says, "When regulating  
8 any diversion, it is required to attach a notice (or  
9 tag) to the control device advising appropriators that  
10 the diversion is under regulation"; you see that?

11 A. Yes.

12 Q. And that's something you did when you were  
13 commissioner; right?

14 A. Not every time. I understand that that's the  
15 policy now.

16 Q. If I could get you to look at Exhibit M499.  
17 This is a single page -- it's actually a statute. At  
18 the top, it's labeled "Section 41-3-604.  
19 Commissioners."

20 A. I don't believe I have that one either.

21 MR. WECHSLER: May I approach?

22 SPECIAL MASTER: You may.

23 THE WITNESS: Are we up to 40 yet?

24 BY MR. WECHSLER:

25 Q. I'll give you a second to look that over.

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1 A. Yes.

2 Q. When you were a commissioner and then  
3 superintendent, was it necessary for you to be familiar  
4 with the Wyoming Statutes related to administration and  
5 control of water rights?

6 A. Yes.

7 Q. And at that time, was there a statute  
8 concerning water districts and commissioners and  
9 specifically the powers of water commissioners?

10 A. Yes.

11 Q. Is this that statute?

12 A. It appears to be.

13 Q. Is there anything about this statute that you  
14 recognize to be different from when you were a water  
15 commissioner or a superintendent?

16 A. No.

17 MR. WECHSLER: Your Honor, at this point,  
18 we'd move the admission of Exhibit M499.

19 MR. KASTE: It's a statute. I don't know  
20 that it's properly made an exhibit, but I don't object.

21 SPECIAL MASTER: We all seem to have made  
22 that a common policy so far. I think we've actually  
23 permitted several statutes to be exhibits. To the  
24 degree we don't need to, that's fine. But in terms of  
25 being able to make clear what particular statutory

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1 provisions we're referring to, I don't have any problem  
2 with this.

3           So we will admit into evidence Exhibit M499.  
4 And just to clarify, it's M499. Because earlier I  
5 thought you said Exhibit M4.

6           MR. WECHSLER: It's M499. So to the extent I  
7 said 4, I misspoke.

8           SPECIAL MASTER: Okay. Thank you.

9                           (Exhibit M499 admitted.)

10 BY MR. WECHSLER:

11           Q. Mr. Whitaker, looking at the statute, the  
12 second to last sentence, and you're welcome to look at  
13 any other parts, but I wanted to draw your attention to  
14 the sentence that says, "Whenever, in the pursuance of  
15 his duties, the water commissioner regulates a headgate  
16 to a ditch or the controlling works of reservoirs, it  
17 shall be his duty to attach to such headgate or  
18 controlling works a written notice, properly dated and  
19 signed, setting forth the fact that such headgate or  
20 controlling works has been properly regulated and is  
21 wholly under his control, and such notice shall be  
22 legal notice to all parties interested in the division  
23 and distribution of the water of such ditch or  
24 reservoir." You see that?

25           A. Yes, I do.

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1 Q. This was the law at the time you were a  
2 commissioner; right?

3 A. Yes, it was.

4 Q. Also when you were the superintendent of  
5 Division II?

6 A. Yes.

7 Q. There were times -- you indicated there were  
8 times when you didn't place a tag on the headgate;  
9 right?

10 A. That's correct. If -- we would go up the  
11 stream and set the different diversions to their  
12 appropriation if they were above and if we had a call  
13 on them. Or if they were all right, if they were at or  
14 below their appropriation, we would leave them alone.

15 We would -- a lot of times, we would talk to  
16 the party that we knew to control that ditch. If it's  
17 somebody that we were very familiar with, and it  
18 happened every year, we'd just advise them there had  
19 been a call. The stream is under regulation now. So  
20 leave your ditch alone.

21 If we didn't know the parties or if once we  
22 had done that, if we go back the next day and some  
23 ditch is changed, then the tag would have been applied.  
24 But initially, no.

25 The thought I always had was we work with



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1 these people. And we give them a chance. And if  
2 they're honest and work with us, we don't have to take  
3 this step.

4 Q. You understand that a tag was required by the  
5 statutes; right?

6 A. Right.

7 Q. Did you understand that at the time you were  
8 a commissioner?

9 A. We understood it was a tool that we could use  
10 to control the stream if we needed to apply it. As I  
11 stated, we didn't always feel that it was necessary.  
12 But it's in the statute, yes. And I can't argue with  
13 that.

14 Q. Are you saying there are times where you felt  
15 like the water users voluntarily complied?

16 A. Yes. When we told them the stream was in  
17 regulation, most of them would work with us and leave  
18 their ditch where it was. And that was it.

19 Q. You generally found that the water users were  
20 willing to accept your direction?

21 A. Yes.

22 Q. If I understand it -- if I understand your  
23 testimony, there were times that you did place a tag on  
24 the headgates; right?

25 A. That's correct.

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1 Q. And if I understand, the tag itself has two  
2 parts; is that right? It has a part you leave on the  
3 ditch, and then you also take the part -- half of it  
4 back with you to the office; is that correct?

5 A. Well, the tag itself is a book. And a  
6 portion of the tag remains in the book when you tear  
7 the notice out.

8 Q. And then --

9 A. The notice is what you attach to the headgate  
10 or diversion works.

11 Q. And that notice allows water users to know,  
12 hey, this is under regulation?

13 A. That's right.

14 Q. The remainder of that tag you indicate --  
15 there's a place where you indicate that the ditch was  
16 placed under regulation; right?

17 A. There's a place at the bottom. There's a  
18 tabulation at the bottom. You put on it what you've  
19 set the ditch to. And you can note that in the receipt  
20 portion that stays in the book with you.

21 Q. Those records are kept back at the Division  
22 II office?

23 A. They most likely would be part of the weekly  
24 administrative report of the commissioner. Or if they  
25 kept the books after all the tags were ripped out,

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1 there would be a record there.

2 Q. Typically, after you placed the tag on a  
3 ditch, you wouldn't remove that tag until the fall;  
4 right?

5 A. Not typically. But in some cases, the  
6 calling party would relinquish the stream back. He was  
7 through for the season for one reason or another. And  
8 then we could go through and take the tags off, yes.

9 Q. If they didn't relinquish the stream, the tag  
10 would stay on so that those water rights still couldn't  
11 be used; right?

12 A. It would stay on until we made a change.

13 Q. Which was typically the fall?

14 A. We might have to regulate that particular  
15 ditch a little more. So there would be a different  
16 reading on the tabulation on the bottom of the tag.  
17 But, yes, the tag would most likely remain until the  
18 call was off, yes.

19 Q. By regulated a little more, do you mean crank  
20 it down so that more water could get downstream?

21 A. Right.

22 Q. We talked about there being a calling right  
23 and the fact that you regulate the water rights above  
24 the calling right but not necessarily below; right?

25 A. Correct.

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1 Q. And so when you say that a water -- when you  
2 say that a stream is under regulation to a particular  
3 date, would you agree with me that it's also relevant  
4 to be looking at where the calling right is? Do you  
5 understand my question?

6 A. You might rephrase, please.

7 Q. Sure. So when you have a calling right, it's  
8 at a particular location in the stream; right?

9 A. They designate, yes, that point. And as I  
10 previously stated, the first thing we do when we  
11 receive that call is to go out and verify that they are  
12 taking all the water that's available and that indeed  
13 they're short of this -- their supply for their  
14 original appropriation.

15 Q. That calling right typically has a priority  
16 date?

17 A. Oh, it does, yes.

18 Q. Like, I'll use just an example of 1887. So  
19 you might -- in Wyoming, I've seen the terminology you  
20 might say, the creek was on regulation to 1887. Are  
21 you familiar with that kind of terminology?

22 A. Yes.

23 Q. And so that means that you're regulating to  
24 that particular calling right; right?

25 A. Yes. You sometimes even have to include the

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1 day and -- month and day on that.

2 Q. And that's because there might be multiple  
3 rights with the same year?

4 A. Right.

5 Q. So what that tells you is that there are  
6 rights above that calling right that are in regulation.  
7 But I think you agreed with me that it doesn't  
8 necessarily mean that the rights below it are in  
9 regulation; right?

10 A. No. They wouldn't be.

11 Q. And the calling right is not always the  
12 lowest on the stream; correct?

13 A. Not always. But the best water rights are  
14 generally located at the lower end of the stream.

15 Q. Sometimes they are at the low point of the  
16 stream; sometimes they could be higher; right?

17 A. They could be, yes.

18 Q. So that's why you have to look at where that  
19 calling right is located on the stream; right?

20 A. We always go and look at the calling right --  
21 or the calling location and see what that ditch is,  
22 what its right is, verify that they're taking all the  
23 water available. Essentially, if somebody places a  
24 call, they have to dry the stream up.

25 Q. Now, moving to the regulation of specific

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1 rights. We're talking about calling rights. I just  
2 want to identify a few calling rights on some of the  
3 creeks. And I want to start with Little Goose Creek.

4 We looked at Exhibit J61, and I believe there  
5 was -- we looked at a map that's on page 89.

6 A. Okay.

7 Q. And is there a number associated with Little  
8 Goose Creek there? Do you see it on the map?

9 A. Yeah, there's several numbers.

10 Q. And it's -- those numbers are 2, 3, 4, 5,  
11 looks like maybe 37; is that right?

12 A. Yes.

13 Q. And that's -- so that's the location of  
14 Little Goose Creek; is that right?

15 A. Yeah, it says Little Goose Creek right on it.

16 Q. Do I understand correctly that typically the  
17 calling right on Little Goose Creek is what's called  
18 the Burn-Cleuch Ditch?

19 A. Yes.

20 Q. It's spelled B-u-r-n, C-l-e-u -- does it have  
21 a c-h?

22 A. Yes.

23 Q. I knew I was going to mispronounce it. I  
24 should have asked you how to pronounce it.

25 We can see the Big Goose Creek on this map as

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1 well. And it's labeled Big Goose Creek. So that's  
2 helpful.

3 And then on the Big Goose Creek, if I  
4 understand it correctly, the Alliance Ditch is  
5 typically a calling right; is that right?

6 A. Correct.

7 Q. The Alliance Ditch is actually located at the  
8 base of the mountain; right?

9 A. Correct.

10 Q. And if I understand you correctly, the  
11 Alliance Ditch typically takes all of the water into  
12 the ditch there at the base of the mountain; right?

13 A. It does.

14 Q. And the Alliance Ditch, there are rights  
15 below the Alliance Ditch; right?

16 A. Correct.

17 Q. Those rights, typically they're relying on  
18 return flows?

19 A. Yes. Return flows and other sources.

20 Q. Other sources meaning there might be some  
21 small draws or something?

22 A. Right. Beaver Creek and Rapid Creek  
23 contribute quite a little bit of water.

24 Q. And in a typical year, if it's the Alliance  
25 Ditch that's placed under regulation, there's no

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1 regulation below Alliance Ditch; right?

2 A. Generally, no, there's not. Not -- there's  
3 been a couple of times I think we've had calls from  
4 ditches down lower. But in a normal year, there  
5 wouldn't be.

6 Q. Do you know the years that there were calls  
7 below Alliance Ditch?

8 A. Not offhand. Potentially it could have been  
9 these dry years in 2004, 2006. I don't know.

10 Q. Yeah. You say potentially, but sitting here  
11 today, you don't actually know?

12 A. I don't know.

13 Q. Do you know if there were any post-1950  
14 rights below Alliance Ditch on Big Goose Creek?

15 A. Not that I'm aware of.

16 Q. Do you have Exhibit M5 there before you?

17 A. I don't believe so.

18 Q. It should be a big --

19 A. Yes, I do. I do. Sorry.

20 Q. This is a document that I'll represent to you  
21 has been admitted earlier in this proceeding. It's an  
22 expert report from one of the experts from the State of  
23 Montana named Dale Book. If I could get you to turn,  
24 please, in that exhibit to page 321.

25 A. Okay.



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1 Q. And I'll represent to you again, this is an  
2 appendix that was compiled by Mr. Book showing  
3 post-1950 permit lists. And I'm not going to ask you  
4 to verify that these rights are correct, unless you  
5 know.

6 If you'll turn, please, to page 326 of that  
7 document. Do you have that?

8 A. Yes.

9 Q. And this is under the heading "Appendix G3,  
10 Big Goose Creek post-1950 irrigation water rights." Do  
11 you see that?

12 A. Yes.

13 Q. There's some water rights here. Let's see.  
14 Are you familiar with the Kuzara Sprinkler rights?

15 A. I know about where they are. I'm not  
16 familiar with them offhand, no.

17 Q. You don't know the priority date?

18 A. No. From reading this, I do.

19 Q. You don't independently know without looking  
20 at that document?

21 A. No.

22 Q. Turning to the main stem of the Tongue. We  
23 talked about Little Goose Creek and Big Goose Creek and  
24 now the main stem of the Tongue. If I understand you  
25 correctly, there were no calls on Wyoming for

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1 regulation of the main stem of the Tongue River; is  
2 that correct?

3 A. That's correct.

4 Q. And you did not regulate the main stem of the  
5 Tongue River when you were -- well, you worked on the  
6 Powder; right?

7 A. When I was a hydrographer, yes, I was on the  
8 Powder.

9 Q. At that time from 1975 to 1987, were you  
10 aware of any calls or regulation being done on the main  
11 stem of the Tongue River in Wyoming?

12 A. No, I wasn't aware of any.

13 Q. When you were superintendent from the years  
14 1987 through 2009, were you aware of any regulation  
15 that occurred on the main stem of the Tongue in  
16 Wyoming?

17 A. No. No calls were placed, no.

18 Q. And no regulation?

19 A. The only thing I did at one point, and I  
20 believe it was in 2004, Mr. Boyd reported one day that  
21 the stream was getting low at Ranchester. And a couple  
22 of the ditches up by Dayton were taking a little over  
23 their appropriation trying to run some surplus water.  
24 And I advised him to go shut them back to their  
25 original appropriation.

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1 Q. Is that the only example you can think of  
2 during those years?

3 A. Yeah. And that was just an internal thing  
4 that I chose to do because Ranchester had a water  
5 right, and their water wasn't all that great anyway.  
6 So I had to keep some water down there for them.  
7 Didn't want them to dry the river up there.

8 Q. If I understand you correctly, they were  
9 actually trying to take more water than their right  
10 entitled them to?

11 A. The ditches up by Dayton that I referenced?  
12 Is that correct?

13 Q. Yes. That's what I'm asking about.

14 A. They were into their surplus water, yes.  
15 They were a little over their appropriation.

16 Q. Do you know if there are post-1950 water  
17 rights on the main stem of the Tongue River in Wyoming?

18 A. Yes, there are.

19 Q. And can you identify those?

20 A. There's one on Buyok's, and I think there's  
21 one on Padlock. There might be one further down, yeah.

22 Q. How about the Interstate or Pennoyer Ditch  
23 that we looked at before? And maybe it will refresh  
24 your memory to look at Exhibit M5 again.

25 A. Okay.

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1 Q. And I'm going to take you to that same  
2 appendix. It's G. But this time it's the Appendix G1,  
3 which is entitled "Tongue River post-1950 irrigation  
4 water right."

5 SPECIAL MASTER: Do you have a specific page  
6 for him?

7 BY MR. WECHSLER:

8 Q. Yes, page 322. Do you have that before you?

9 A. Yes.

10 Q. And here I'm looking at the first two of  
11 your -- appear to be the enlarged Interstate Ditch with  
12 a priority date of 1951 and 1954. And if you skip five  
13 rights, the sixth and seventh one also appear to be  
14 associated with the Interstate Ditch. Do you see that?

15 A. Yes.

16 Q. Does that refresh your recollection that  
17 there are, in fact, post-1950 water rights on the  
18 Interstate Ditch?

19 A. Yes.

20 Q. And then I think you mentioned the Buyok one,  
21 and that seems to be here four from the top -- I'm  
22 sorry. Four from the bottom, it indicates Buyok  
23 irrigation system. Do you see that?

24 A. Yes.

25 Q. And we also looked in the hydrographers'

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1 report from 2004, we looked at the south side right.

2 Do you recall that?

3 A. Yes.

4 Q. And there appear to be two post-1950 south  
5 side rights as well; correct? Is that right?

6 A. I don't recall that offhand.

7 Q. We can check the records as to what those  
8 were.

9 A. Right.

10 Q. And then if you turn to the next page, I  
11 think you mentioned the Padlock Ranch, that there were  
12 some post-'50 rights there? And I'll just point those  
13 out to you. This is on page 323.

14 A. Right.

15 Q. The sixth right down is called the enlarged  
16 Wagner Reservoir. And that belongs to the Padlock  
17 Ranch. Do you see that?

18 SPECIAL MASTER: So this is on page 323?

19 MR. WECHSLER: Correct.

20 THE WITNESS: I haven't found Enlarged  
21 Wagner. Can you enlighten me?

22 BY MR. WECHSLER:

23 Q. Sure. If you start at the top of that  
24 appendix, which is labeled Appendix G2, and the first  
25 right, I'm looking under name of ditch, which is the --

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1 looks like the seventh column. Do you see that? Where  
2 it says name of ditch?

3 A. Yes.

4 Q. And then the first one under that column is  
5 Watson, Watson Reservoir is the next one, followed by  
6 the Morgan Reservoir, the Belish Reservoir, and Mock  
7 Supply, and the next one is the Enlarged Wagner.

8 A. Yes.

9 Q. Is that one of the rights that you were  
10 referring to on the Padlock?

11 A. No. They had some others.

12 Q. Are you talking about reservoir rights or  
13 direct flow rights?

14 A. Direct flow.

15 Q. So the ones you see that are listed here are  
16 actually reservoir rights; is that right?

17 A. The Enlarged Wagner is, yes.

18 Q. Are you also familiar with the Fivemile  
19 Reservoir?

20 A. Yes.

21 Q. Does that also have primarily post-1950  
22 storage?

23 A. Probably. I don't see it on here.

24 Q. You say "probably." Why do you say probably?

25 A. It's seems to me that that was a later

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1 reservoir development. I'd like to verify it in this  
2 tabulation.

3 Q. Fair enough. In order to verify that, would  
4 the best place be to look at the Division II tabulation  
5 book?

6 A. Yes.

7 Q. And --

8 A. That's essentially what this is, except for  
9 the land tabulation.

10 Q. And you'd be able to see on that tabulation  
11 book the name of the right as well as the priority  
12 date; correct?

13 A. Yes.

14 Q. And that's a joint exhibit in this case. So  
15 we can do that at some other time.

16 When you were the superintendent of Division  
17 II, did you ever regulate any rights for the purposes  
18 of the Yellowstone River Compact?

19 A. No.

20 Q. If I could get you to turn, please, do you  
21 have Exhibit J54? I hesitate to ask. And I'm going to  
22 be looking at page, the numerettes, the small Roman  
23 Numerals at the bottom, page Roman viii?

24 A. J64, you said?

25 Q. Fifty-four. Five, four.

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1 A. Yes. I have that. Which page?

2 Q. Page 8, viii. It also has the Bates number  
3 at the bottom WY016207. Do you have that?

4 A. Yes, I do.

5 Q. At times where you were superintendent of the  
6 Division II, you attended Yellowstone River Compact  
7 Commission meetings; is that right?

8 A. Yes.

9 Q. And I believe -- you can check if you want on  
10 this document. But I believe you attended the  
11 commission meeting in 2004; is that right?

12 A. I'm sure I did. I don't think I missed any.

13 Q. Do you recall that that was one of the years  
14 that Montana sent a written call letter to Wyoming?

15 A. Yes.

16 Q. If you look with me down to the second --  
17 it's the first full paragraph from the bottom. It  
18 indicates -- it starts with "Montana asked if Wyoming."  
19 Do you see that?

20 SPECIAL MASTER: Which page are you on?

21 MR. WECHSLER: WY016207. The Roman viii.

22 SPECIAL MASTER: So page 8 in lower Roman  
23 numerals?

24 MR. WECHSLER: Correct.

25 SPECIAL MASTER: And, again, which paragraph?



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1 MR. WECHSLER: I'm looking at the first --  
2 the last full paragraph beginning with the words  
3 "Montana asked if Wyoming had appointed a water  
4 commissioner."

5 BY MR. WECHSLER:

6 Q. Do you see that, Mr. Whitaker?

7 A. Yes, I do.

8 Q. And there you responded by saying that  
9 Wyoming does have two commissioners appointed to the  
10 Tongue River. "However, Wyoming did receive a -- did  
11 not receive a valid call for regulation from a Wyoming  
12 appropriator on the main stem Tongue"; right?

13 A. That's correct.

14 Q. So for that reason, there was no  
15 administration in 2004; correct?

16 A. Correct.

17 Q. Mr. Whitaker, could you turn, please, now, to  
18 Exhibit M493?

19 As you're looking for that, Mr. Whitaker,  
20 I'll explain to the Special Master that while he has  
21 asked us to divide Exhibits into A, B, and C, this one  
22 is intentionally kept as a single exhibit because I  
23 believe they are all almost identical letters.

24 This is a letter, Mr. Whitaker, in helping  
25 you look for it, dated May 3rd, 2006, signed by you, it

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1 looks like, on Board of Control letterhead. Do you  
2 have that?

3 A. I don't believe I do. I'm looking.

4 Q. If it helps, it looks like this.

5 A. I don't --

6 Q. We will get another one for you.

7 Sorry for the confusion with exhibits. We're  
8 doing our best. But I know there's a very large stack  
9 of paper there, so sometimes they are hard to locate.

10 So you now have Exhibit M493; right?

11 A. Yes, I do.

12 Q. Do you recall this letter -- or this series  
13 of letters, I should say?

14 A. Yeah, I think it was a series of letters that  
15 went out to water users along the main stem of the  
16 Tongue.

17 Q. Each of the letters is dated May 3rd, 2006;  
18 right?

19 A. Yes.

20 Q. They appear to have identical language except  
21 for the addressee?

22 A. Yes.

23 Q. And then they're signed by you?

24 A. Yes.

25 MR. WECHSLER: Your Honor, I'd move for the

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1 admission of Exhibit M493.

2 SPECIAL MASTER: Any objection?

3 MR. KASTE: No objection.

4 SPECIAL MASTER: Then Exhibit 493 is  
5 admitted.

6 (Exhibit M493 admitted.)

7 BY MR. WECHSLER:

8 Q. As of this date, May 3rd, 2006, you didn't  
9 have measurement devices on all of the diversions on  
10 the main stem of Tongue River; correct?

11 A. No, we did not. Since we'd never had a call  
12 or had to regulate Tongue River, we had no reason to  
13 order in measuring devices.

14 Q. And, in fact, the purpose of this letter was  
15 to inform people that you were ordering -- is it fair  
16 to say ordering them?

17 A. What we had done was tried to put the word  
18 out to all the water users. A year or two ahead of  
19 that, it was in anticipation of maybe being in this  
20 litigation that we're here for today, that we would  
21 need some type of measuring device. So we started  
22 talking to the ditch companies early on about it. A  
23 few complied, and you always get some that draw -- drag  
24 their heels until you give them a drop-dead date. So  
25 that was the purpose of this letter, was to get

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1 everybody advised with an order date they needed to do  
2 something.

3 Q. And the drop-dead date that you gave them was  
4 May 1st, 2007; right?

5 A. That's correct.

6 Q. Since you didn't have any measuring devices  
7 before that on the main stem of the Tongue, were you  
8 able to determine how much water was being taken by the  
9 diversions?

10 A. If we had reason to check one, we all carried  
11 measuring equipment and would occasionally jump in a  
12 ditch and measure it, yes.

13 Q. If you had measured that ditch, would it show  
14 up in a hydrographer's report?

15 A. If the guys had it, yeah, it should have  
16 shown up in either their administrative report or the  
17 weekly diversion report, yeah.

18 Q. Turn, please, to Exhibit M520.

19 A. 520.

20 Q. And this time, again, it's a letter with --  
21 on Board of Control letterhead dated December 3rd,  
22 2003, to Mr. John Cummings. Should be a single-page  
23 document.

24 A. Do I get to yell bingo if we find one in my  
25 pile?

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1           SPECIAL MASTER: Yeah, you can. But you  
2 don't win anything.

3 BY MR. WECHSLER:

4           Q. I'll give you a chance to look that over.  
5 Let me know when you're ready.

6           A. Yes.

7           Q. Do you recall this letter?

8           A. I recall what this was about, yes.

9           Q. Do you know Mr. Cummings?

10          A. I can't say that I do, no.

11          Q. Do you recall writing a letter to someone  
12 from his company?

13          A. Yes. There was meetings concerning a number  
14 of folks in the Beatty Spur area and the fact that  
15 Huber was going to try to develop a well in the --  
16 adjacent to Tongue River.

17          Q. And then it indicates here that the date is  
18 December 3rd, 2003; does that seem the right time  
19 frame?

20          A. Yes.

21          Q. On the back, it has your name, Michael B.  
22 Whitaker. Do you see that?

23          A. Okay.

24          Q. It's not signed. Do you keep copies of  
25 documents that are not signed in Division II?

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1 A. Not routinely. I think I signed most of  
2 them. But evidently this one got overlooked, yes.

3 Q. Do you recall actually signing this letter?

4 A. No, but I recall going to the meetings and  
5 discussing this project with the people. I can't say  
6 whether Mr. Cummings was at those meetings or not.

7 Q. Rather than asking to admit this, since it's  
8 not signed, why don't we just talk generally about the  
9 project.

10 Do you recall what this project was about?

11 A. Yes. As I said, the -- there was a number of  
12 folks in the Beatty Spur area having problems with  
13 their wells, and they attributed those problems to  
14 Huber CD, a developer. Huber was looking for a  
15 solution to the problem and was considering putting a  
16 well in down close to Tongue River and supplying all  
17 his houses with that water.

18 Q. Do you typically call wells diversions?

19 A. Diversions are something that I always liked  
20 to feel that they are off of a stream. A well was a  
21 well.

22 Q. And do you regulate wells in the Tongue River  
23 Basin?

24 A. We have the authority and the ability if  
25 there's a call for regulation, yes.

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1 Q. Have you ever done it?

2 A. No.

3 Q. In 2003, in relation to that Beatty Spur  
4 project, were you of the opinion that if they put that  
5 project in, that there would be water available for  
6 them?

7 A. Potentially, yes.

8 Q. And would that water have been available for  
9 them all the time?

10 A. Potentially. I don't know what they were  
11 going to do exactly. It would have been up to the way  
12 they developed a well in the area.

13 Q. We've been talking about the main stem of the  
14 Tongue River. Let's turn to Prairie Dog Creek.

15 A. Okay.

16 Q. You're familiar with the Prairie Dog  
17 drainage; right?

18 A. Yes.

19 Q. And that's partly because when you were a  
20 water commissioner, you had responsibility over that  
21 drainage; is that correct?

22 A. Yes.

23 Q. Could you turn, please, to Exhibit M494?  
24 This one is entitled "Memorandum," again, on Board of  
25 Control letterhead.

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1 MR. WECHSLER: May I approach?

2 SPECIAL MASTER: You may.

3 BY MR. WECHSLER:

4 Q. Let me know when you've had a chance to look  
5 at it.

6 A. I'm ready.

7 Q. So this memorandum is dated August 7th, 2001.  
8 At that time, you were the superintendent of Division  
9 II; correct?

10 A. Correct.

11 Q. It indicates it's a memorandum from you to a  
12 Mr. Jim Wagner; right?

13 A. To Jim Wagner, yes, correct. President.

14 Q. Who was Mr. Wagner?

15 A. He was the president of Prairie Dog Water  
16 Supply Company at the time.

17 Q. Do you recall writing this memorandum?

18 A. Yes.

19 MR. WECHSLER: Your Honor, at this point, I  
20 would move the admission of Exhibit M494.

21 MR. KASTE: No objection.

22 SPECIAL MASTER: Exhibit M494 is admitted  
23 into evidence.

24 (Exhibit M494 admitted.)

25



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1 BY MR. WECHSLER:

2 Q. The heading here is "administration of  
3 water." And it does indicate in the first paragraph  
4 that questions had recently arisen. Do you see that?

5 A. Yes.

6 Q. And then looking at the bold in the middle of  
7 the first page, it indicates "Policy regarding the  
8 obligation of State Water Administration personnel to  
9 address problem calls within the boundaries of  
10 irrigation districts, organized companies,  
11 associations, or other entities." Do you see that?

12 A. Yes.

13 Q. Do you recall that policy?

14 A. Yes.

15 Q. What is that policy?

16 A. Basically that within the boundaries of  
17 irrigation district or organized company or association  
18 or other entity, they were to provide for the  
19 administration of the water within those boundaries.  
20 The state water people would ensure that the proper  
21 amount of water was going into their diversion. But  
22 beyond that point, they would have to take care of  
23 their internal problems.

24 Q. The state water commissions did not regulate  
25 within those entities?

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1 A. Essentially they don't go down ditch.

2 Q. So you -- am I correct that in Division II,  
3 when you were there, you treated Prairie Dog Creek  
4 essentially as a ditch; is that right?

5 A. That's -- yes. That's what we did. We put  
6 their appropriation in, their diversion in at Story.  
7 And they have 15-odd different ditches that come off of  
8 Prairie Dog Creek. And they have little companies on  
9 each one.

10 When I first started, they had a ditch rider  
11 that would take care of the whole system. And they  
12 lost that over time. The gentleman passed away. And  
13 they chose just to have the members on the individual  
14 ditches take care of their laterals.

15 Q. I believe there's -- do I have the number  
16 correct? Sixteen laterals on Prairie Dog Creek?

17 A. Well, 15 or 16, yeah. I believe that's  
18 correct.

19 Q. And none of those are regulated by the water  
20 commissioners from Division II?

21 A. No. We turn their appropriation in up at  
22 Story. Prairie Dog Creek itself generates very little  
23 water. It doesn't come off the mountain. And it's  
24 essentially always been handled as a one-ditch system.

25 Q. Let's talk about reservoirs. Do you still

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1 have Exhibit M5? That was the big one, I think.

2 A. M5?

3 Q. M5.

4 SPECIAL MASTER: The very thick one.

5 THE WITNESS: Yes.

6 BY MR. WECHSLER:

7 Q. Great. Can you turn, please, to page 46?

8 A. Forty-six?

9 Q. Forty-six. Four, six. Just to orient us,  
10 I'd like to take a look at the -- at a figure that's  
11 shown in that document.

12 A. Yes.

13 Q. And towards the bottom of the green area, it  
14 shows a number of reservoirs. Do you see that?

15 A. Yes.

16 Q. And is that roughly consistent with your  
17 understanding of the location of those reservoirs?

18 A. Yes.

19 Q. In your deposition, you used a term  
20 "highority"; are you familiar with that term?

21 A. Highority versus priority, yes.

22 Q. Can you explain what highority is and what  
23 the distinction is?

24 A. Sometimes it's better to be up high on a  
25 system and take the water first.

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1 Q. As opposed to having the older right?

2 A. Yes.

3 Q. And you administer the mountain reservoirs  
4 according to the principle of highority; right?

5 A. These reservoirs that you're referring to are  
6 all located up on the mountain. And there's a series  
7 of these that are sort of connected. And what -- in  
8 the early part of the season, there's too much snow to  
9 get up to the reservoirs. They essentially fill the  
10 top one first, and then it spills and comes down to the  
11 second one, et cetera. That's the highority. And it's  
12 a pretty good way to manage these reservoirs. Because  
13 once you capture that water in a reservoir, you can  
14 always move it down to a senior reservoir. But you  
15 can't move it back up for any reason. So, yes, that's  
16 kind of where we coined the term highority on the  
17 system.

18 Q. So sometimes at the end of a season, were  
19 there years -- end of a storing season, were there  
20 years in which you had water in the upper reservoir but  
21 not in the lower reservoir, but the lower one, in fact,  
22 had a senior priority? Did that occur?

23 A. Yes, it did.

24 Q. How would you address that?

25 A. We can do it two ways: One, we can leave the

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1 water where it was at, and it could be released to the  
2 people in the lower reservoirs that didn't have any  
3 water to satisfy them. Or, two, we could physically  
4 move it down into those reservoirs.

5 Q. So in other words, when you could actually  
6 access the reservoirs. And when was that typically?

7 A. It was late, usually later in the month of  
8 May, maybe early June.

9 Q. Am I correct that these reservoirs tend to  
10 spill during the spring runoff?

11 A. They do, yeah. And that's part of the  
12 problem in Mr. Kaiser's runoff predictions. Because  
13 there was a period when he didn't account for these  
14 reservoirs spilling. And they had to fill from what  
15 they had carried over the fall before. They had to  
16 fill and physically spill before runoff would actually  
17 start down the stream. There was snow below these  
18 reservoirs that would give you some early runoff. But  
19 these were high enough that they would catch that  
20 really high stuff.

21 Q. When you say Mr. Kaiser, are you referring to  
22 Roy Kaiser, who I believe worked for NRCS?

23 A. I am. Yes. And he always attended the  
24 compact commission meetings and would give a report on  
25 the snowpack and his predictions.

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1 Q. People were looking at snowpack in order to  
2 estimate how much water would be available for both  
3 Wyoming and Montana?

4 A. Correct.

5 Q. Going back to the discussion about the  
6 reservoirs. So they are filling in the spring period.  
7 And you said that typically you can access them around  
8 May 1st, did you say?

9 A. No. Not May 1st. Sometime toward the latter  
10 part of May. There was a number of years when actually  
11 Park Reservoir was the one that would do it, would  
12 actually hire somebody to plow the road to get the  
13 caretaker up there before the reservoir would spill so  
14 they could open the gate and, in that way, not have the  
15 entire flow going out through the spillway and  
16 potentially having a problem there.

17 Q. For these reservoirs that have this highority  
18 issue, at that time you could access those reservoirs,  
19 were times where you simply allowed water to go from  
20 the upper reservoir into the lower one to address the  
21 priorities of the water rights?

22 A. When that was occurring, most of the time it  
23 was early in May when the runoff would first start.  
24 And until we could get up there, they filled by the  
25 highority system. The top one would catch water and

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1 fill and spill to the next one down.

2 Q. Then you'd adjust it once you could access  
3 the reservoirs?

4 A. Yeah.

5 Q. Do you still have Exhibit 5 before you?

6 A. Yes.

7 Q. Let's look this time at page 36, which is a  
8 listing of some reservoirs.

9 A. Yes.

10 Q. Who reports the amount of water that is  
11 stored in the reservoirs?

12 A. The ones that are on this list are in the  
13 Little Goose-Big Goose drainage. And Mr. Knapp would  
14 take that final elevation right around the 1st of  
15 October.

16 Q. And would he also be responsible for  
17 recording the amount of carryover storage?

18 A. Yes.

19 Q. Some of these reservoirs have multiple  
20 priorities; is that consistent with your recollection?

21 A. Yes.

22 Q. When doing accounting on reservoirs in  
23 Wyoming, you essentially fill the senior most right  
24 first; is that correct?

25 A. Yes.

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1 Q. During the irrigation season, users rely  
2 first on direct flow water; right?

3 A. Say again.

4 Q. During the irrigation season, the water  
5 users, the irrigators are relying initially on direct  
6 flow water; is that right?

7 A. If there's enough available, yes.

8 Q. And then when it runs out or if there's not  
9 enough, that's when they might switch to stored water;  
10 correct?

11 A. Right.

12 Q. And that's the reason that we talked about  
13 the date of releases from the reservoir is a good  
14 indicator of whether the users are running out of  
15 direct flow water; right?

16 A. That's an indication of when the supplies are  
17 diminishing, yes.

18 Q. When you have releases of the reservoir, was  
19 it necessary for water commissioners to regulate that  
20 water to make sure it gets down to where it belongs?

21 A. That's correct. There were different release  
22 days of the week for different reservoirs. And they  
23 had -- the companies had an obligation to advise us of  
24 who ordered the water and how much was released and  
25 where it was to be delivered. And we would take care



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1 of that.

2 Q. You essentially shepherd it down to the right  
3 place?

4 A. Yes.

5 Q. And you do that by making sure someone else  
6 isn't taking it?

7 A. Right.

8 Q. Now, do you also have reservoirs in the  
9 Tongue River Basin that are essentially single-owner  
10 reservoirs?

11 A. Correct.

12 Q. And those single-owner reservoirs are not  
13 regulated by the state; correct?

14 A. No. We only delivered the water from the  
15 owner reservoirs to the ditches on the stream where it  
16 was a complicated system. That's where we took over.

17 Q. Turn, please, to page 39 of the same  
18 document.

19 A. Okay.

20 Q. This is entitled "Table 9, Tongue River  
21 post-1950 storage capacity water rights greater than 20  
22 acre-feet." Looking over the list here, do you  
23 recognize some of those reservoirs as single-owner  
24 reservoirs in the Tongue River Basin?

25 A. Yes.

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1 Q. And these reservoirs are privately owned;  
2 right?

3 A. Yes. There may be one -- more than one  
4 owner. But essentially it's a one- or two-party  
5 operation, yeah.

6 Q. The state does not distribute water from  
7 these reservoirs?

8 A. No, we didn't.

9 Q. Taking a look at some of the bigger ones  
10 here. We see the Windy Draw Reservoir at 533  
11 acre-feet. And then can you see we talked earlier  
12 about the Fivemile and Wagner Reservoir. Do you see  
13 those?

14 A. Yes.

15 Q. Do you know if those take water every year?

16 A. I believe they do.

17 Q. And then the priority date of these  
18 reservoirs are listed. Does that look relatively  
19 consistent with your understanding?

20 A. As far as I can recall, yes.

21 Q. Do you have -- and I hesitate to ask -- do  
22 you have before you Exhibit W63? This --

23 A. I think you're going to get a bingo on that  
24 one.

25 SPECIAL MASTER: Which one are we talking

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1 about?

2 MR. WECHSLER: W63 is a September 4th, 2001,  
3 letter to a Jim Wagner. It's multi pages, but it's  
4 only the first page I'm interested in. I believe that  
5 there's multiple pages that were listed here as part of  
6 a deposition exhibit. But I think that was probably  
7 accidental.

8 BY MR. WECHSLER:

9 Q. Do you have that, Mr. Whitaker?

10 A. Not yet. I've got one. Exhibit 63, yes.

11 Q. Great. This is dated at the top  
12 September 4th, 2001. You see that?

13 A. Yes.

14 Q. To a Mr. Jim Wagner. Do you see that?

15 A. Yes, I do.

16 Q. Appears to be from you?

17 A. Yes.

18 Q. Do you recall writing this letter?

19 A. I do now, yes.

20 Q. Did you before we looked at it together?

21 A. Sure.

22 MR. WECHSLER: Your Honor, at this point, I'd  
23 move the admission of Exhibit -- the first page of  
24 Exhibit W63.

25 SPECIAL MASTER: Are you planning to -- let

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1 me just quickly ask: Are you planning on introducing  
2 the rest of the W63 ever?

3 MR. WECHSLER: No.

4 SPECIAL MASTER: Okay. Then W63 will now be  
5 reduced to just that first page.

6 MR. KASTE: I have no objection to that.

7 SPECIAL MASTER: Then Exhibit W63, which is  
8 one page, Bates-stamped Wyoming 030351, is admitted  
9 into evidence.

10 (Exhibit W063 admitted.)

11 BY MR. WECHSLER:

12 Q. Mr. Whitaker, the first sentence indicates,  
13 "As a follow-up to our telephone conversation this day,  
14 it is my understanding that the PDWSC wishes to set the  
15 headgate on Kearney Lake for the winter flow release on  
16 September 12th, 2001"; you see that?

17 A. I do.

18 Q. First, what is PDWSC?

19 A. That is Prairie Dog Water Supply Company.

20 Q. Are they responsible for Kearney Lake?

21 A. They are the principals on Kearney Lake, yes.

22 Q. It continues, "wants to set the winter flow  
23 releases." Do you recall setting the winter flow  
24 releases in 2001?

25 A. No, I remember this letter because they were

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1 trying to do some work on the outlet structure at  
2 Kearney Lake. And they wanted to get started about the  
3 middle of September so they could accomplish that  
4 before the weather turned and caught them. And Prairie  
5 Dog asked if that would be acceptable.

6 Q. If I understand correctly, Kearney Lake is  
7 not accessible typically during the winter; is that  
8 right?

9 A. That's correct.

10 Q. You have to get there by snowmobile?

11 A. Even in the summer, you pretty much have to  
12 get there by motorcycle or four wheeler or horseback or  
13 a long hike.

14 Q. I also understand it's very beautiful.

15 Now, are there -- is there water flowing  
16 through Kearney Lake during a typical year?

17 A. Normally we would set the outlet gate on  
18 Kearney to release about 3 to 4 CFS through the winter  
19 period.

20 Q. That flows all winter long?

21 A. Yes.

22 Q. How big is Kearney Lake?

23 A. Trying to remember. I think it's about  
24 6100 acres.

25 Q. Kearney Lake fills most every year?

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1           A.    Most years.  There's been about two or three  
2 that it hasn't.

3           Q.    So even though you have some flow through the  
4 reservoir in a typical year, it will still fill?

5           A.    Well, normally, these wintertime flow  
6 releases, the one on Kearney, Willow Park has one for  
7 maybe 7 CFS; Park Reservoir has one for, I think, 4 and  
8 a half.  These are not -- these, just to maintain the  
9 elevation in the wintertime rather than fill the  
10 reservoir, they don't want anything getting up on the  
11 concrete structures.  And they need to be there in the  
12 spring so they can open the gate before it all runs out  
13 the spillway.

14          Q.    These reservoirs are interested in filling in  
15 the spring runoff; is that right?

16          A.    All the reservoirs essentially do.  There's  
17 minimum flow in the wintertime that high.

18          Q.    I want to ask you last -- just about your  
19 understanding, if you had any, of water rights that  
20 occurred in Montana.  And so you didn't work in  
21 Montana; right?

22          A.    No.

23          Q.    You were -- but you were aware that there  
24 were water rights on the Tongue River in Montana; is  
25 that right?

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1           A.    I was aware that there is lands under the  
2 Interstate Ditch in Montana.

3           Q.    How about on the main stem of --

4           A.    Yeah.  We always -- we became aware of  
5 various diversions along the main stem of Tongue River  
6 in Montana through the compact commission meetings.

7           Q.    In fact, during those compact commission  
8 meetings, there were occasionally reports about, say,  
9 the adjudication process or various rights in Montana;  
10 is that right?

11          A.    One of the things we got at all the meetings  
12 routinely was a report from Mr. Kerbel on what had been  
13 done as far as their adjudication process in the  
14 previous year.

15          Q.    Were you finished?

16          A.    Mr. Hayes would sometimes offer comments  
17 about the Tongue River.

18          Q.    Mr. Hayes' comments related to the Tongue  
19 River Reservoir?

20          A.    Sometimes the reservoir; sometimes the  
21 various diversions.

22          Q.    You were generally aware of the existence of  
23 the Tongue River Reservoir?

24          A.    Yes.  Being from Sheridan, I was well aware  
25 of the Tongue River Reservoir.

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1 Q. Did you know the priority date of the Tongue  
2 River Reservoir?

3 A. I knew it was somewhere in the '30s. I think  
4 I picked up earlier today it's 1937.

5 MR. WECHSLER: May I have a moment, Your  
6 Honor?

7 SPECIAL MASTER: That would be fine. You  
8 think you're --

9 MR. WECHSLER: I think I'm done unless I'm --

10 MR. BROWN: Not?

11 MR. WECHSLER: Yeah. Unless I'm not.

12 SPECIAL MASTER: Why don't we take the  
13 afternoon break at this point in time. So I have close  
14 to quarter to 3:00. So why don't we break now. We'll  
15 come back at 3:00. And, Mr. Whitaker, I think you'll  
16 be lucky enough to be off the stand this afternoon. So  
17 we'll come back at 3:00 then.

18 (Recess taken 2:43 to 3:01

19 p.m., October 28, 2013)

20 SPECIAL MASTER: Please be seated.

21 MR. WECHSLER: No further questions, Your  
22 Honor.

23 SPECIAL MASTER: Thank you, Mr. Wechsler.  
24 Mr. Kaste.

25



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1 CROSS-EXAMINATION

2 BY MR. KASTE:

3 Q. Good afternoon, Mr. Whitaker.

4 A. Good afternoon.

5 Q. I'm going to try and go through in  
6 essentially the same order the subjects that you  
7 discussed with Mr. Wechsler. And then I'm going to ask  
8 you something that's outside the scope of what he asked  
9 you, but I'll save that until the end.

10 At some point in your testimony early on, you  
11 were looking at the hydrographers' annual report, and  
12 you saw a release date for one of the reservoirs. I  
13 think it was June 9th. And you indicated to  
14 Mr. Wechsler that dates on which releases occur from  
15 reservoirs might be a good indication of when  
16 regulation began on that particular stream. Do you  
17 remember that?

18 A. Yes.

19 Q. Can streams go into regulation before  
20 reservoir releases?

21 A. Yes.

22 Q. And does that occur?

23 A. Yes.

24 Q. All right. I believe you talked to  
25 Mr. Wechsler about the process of abandonment of water

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1 rights in Wyoming. Do you remember that?

2 A. Yes.

3 Q. Typically, how is an abandonment action  
4 initiated in Wyoming?

5 A. Another party equal or junior in priority to  
6 the one they're claiming to seek abandonment on has to  
7 file a petition with the Board of Control, a  
8 declaration of abandonment.

9 Q. All right. So typically those actions are  
10 initiated by private parties?

11 A. They're initiated by another water right  
12 holder on the same system that would be benefited by  
13 the abandonment or injured by the reactivation.

14 Q. All right. After talking abandonment with  
15 Mr. Wechsler and discussing that there had only been  
16 three such actions during your time as the  
17 superintendent of Division II, I think you talked about  
18 the remaining water rights in Division II. And one of  
19 the two of you just characterized those as active water  
20 rights. Do you remember that?

21 A. Yes.

22 Q. Okay. Because a water right is active and  
23 still valid under Wyoming law, does that mean it's  
24 actually using water at any given point in time?

25 A. No. It's simply a water right that's in good

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1 standing as far as we're concerned.

2 Q. And they may or may not irrigate at that  
3 particular year or any given time of year; correct?

4 A. Right. We don't keep a clock on a five-year  
5 period or anything. If no action is brought against  
6 it, we assume that it's valid and okay.

7 Q. All right. Then you started talking with  
8 Mr. Wechsler a little bit about the process of  
9 regulation by the hydrographer commissioners in  
10 Wyoming. Do you remember that?

11 A. Yes.

12 Q. And you said a couple of different times that  
13 when you go -- or when you initiate the process in  
14 response to a call, you go to the calling right. And I  
15 think you said you make sure they are drying the stream  
16 up. What does that mean?

17 A. That means they're taking all the water in  
18 the stream that's available to them.

19 Q. If, for example, a headgate -- or what's the  
20 right term for the dam that creates --

21 A. Diversion.

22 Q. A diversion is allowing water to go past and  
23 is unable to catch that water or unwilling to catch  
24 that water. Do you honor the call?

25 A. No. We would tell them to pick that water up

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1 and put it into their ditch. Once they had done that,  
2 if they were still short, call us back.

3 Q. All right. And when you talk about  
4 regulating up the stream after you verified that they  
5 are short of water and that their diversion is able to  
6 dry up the stream, are you and your staff physically  
7 turning the headgates down?

8 A. If they're -- if anybody is over their  
9 appropriation and they don't have a right to that  
10 additional amount ahead of the calling party, if that's  
11 the right we have to turn down and get them to their  
12 original appropriation, we do. We adjust all the  
13 headgates if necessary.

14 Typically, what we find is most of the guys  
15 pretty well know what they're entitled to. And that's  
16 what they like to set their ditch to. It handles that  
17 amount of water. They can deal with it. They're in  
18 priority. We'll look for the most junior right.

19 Q. And is that process one that continues every  
20 day throughout the irrigation season, that there's a  
21 constant adjustment of the various rights in response  
22 to the changing conditions?

23 A. Well, maybe not every day. But probably  
24 every other day. The stream continues to diminish as  
25 the summer goes on. So you have to readjust and maybe

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1 go find another -- the next junior in priority.

2 Q. And do you utilize both the USGS and the  
3 State-owned stream gauges in the course of the work you  
4 do to regulate the streams?

5 A. The stream gauges that are located in this  
6 particular instance on Little Goose and Big Goose, we  
7 operate even though they are USGS gauges.

8 Q. And do you utilize the information from those  
9 gauges in conducting the regulation that you're engaged  
10 in?

11 A. Yes, we do.

12 Q. If I understand right, during the process of  
13 regulating, you have on occasion, and have not on  
14 occasion, placed tags on headgates; correct?

15 A. That's correct.

16 Q. Now, you were provided with a statute from  
17 Mr. Wechsler --

18 A. Yes.

19 Q. -- that said you're supposed to put tags on  
20 all the time -- yeah, tags on all the time; right?

21 A. Yes.

22 Q. If you don't put a tag on, does that mean the  
23 stream isn't in regulation?

24 A. No. If we don't apply the tag and we are in  
25 the process of regulating, that is probably somebody we

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1 have contacted and advised them that it's in  
2 regulation. Like I said, we have to go through the  
3 system. The next two days, we'll go back through the  
4 system. If somebody has changed the setting on one of  
5 those ditches and taken more water after we had advised  
6 them, they will get a tag on that ditch then.

7 Q. Will they also on occasion get a lock?

8 A. Occasionally we'll put a lock. We used to  
9 like to use the railroad seals, but we can't get those  
10 anymore. The locks are expensive.

11 Q. So it sounds like you give people the benefit  
12 of the doubt, and if they prove themselves not to be  
13 trustworthy, you start elevating the systems you take  
14 to ensure their compliance?

15 A. Exactly.

16 Q. And ultimately, people can be prosecuted  
17 criminally in Wyoming if they mess around with the  
18 headgate when it's under regulation; right?

19 A. They can.

20 Q. But in order to prosecute -- if I understand  
21 right, in order to prosecute them criminally, first the  
22 tag has to be applied; right?

23 A. Right.

24 Q. Now, in addition to the fact that there may  
25 not be tags demonstrating specific regulation on any

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1 given day, the hydrographer commissioners, if I  
2 understand it, keep diaries; right?

3 A. They do.

4 Q. Now, assuming that a tag wasn't applied to a  
5 particular headgate on a particular day, could we look  
6 to the hydrographer diaries to show what action may  
7 have been taken with regard to that headgate on that  
8 day?

9 A. Either the diary or the administrative report  
10 should reflect an action.

11 Q. All right. Now, if I understand right,  
12 sometimes in some streams there is a direct flow.  
13 There's an amount of water for direct flow, and then  
14 there's also reservoir water in the same stream; is  
15 that true?

16 A. That's true.

17 Q. And are you able to keep track in your  
18 position -- is Division II able to keep track of what's  
19 reservoir water and what's the natural flow?

20 A. Any time there's a release on one of the  
21 reservoirs that we work with the companies to convey  
22 the water down to that particular owner of the water,  
23 we keep an accounting on that, yes.

24 Q. And if I understand right, do you see orders  
25 from the reservoir operators?

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1 A. Yes. The reservoir company.

2 Q. They will call you up and say, we want to  
3 release a certain amount of water; correct?

4 A. They send them in in writing or bring them  
5 in.

6 Q. And then you're able to keep track of that  
7 reservoir water as it makes its way down to  
8 particularized diversions?

9 A. We keep track of it, shuffle it into the  
10 proper ditch that it's supposed to go into. We also  
11 keep a running total. And when that individual's water  
12 is used up in the reservoir, we shut them off. A lot  
13 of times, the companies are pretty good about keeping  
14 the books. And they'll catch it. If they don't, we  
15 usually do and remind them, hey, so and so ran out.

16 Q. And at the same time that you're shepherding  
17 the reservoir water down the stream, are you also able  
18 to regulate the natural or direct flow in the stream by  
19 priority?

20 A. Yes.

21 Q. You were asked, I think after that, about  
22 calls within Wyoming on the main stem of the Tongue.  
23 Do you remember that?

24 A. Yes.

25 Q. And I think you said that there had not been



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1 calls on the main stem of the Tongue in 2004 and 2006  
2 in Wyoming; is that right?

3 A. Correct.

4 Q. Now, was there a hydrographer commissioner  
5 employed by the Division in 2004 and 2006 with  
6 responsibility for the main stem of the Tongue River?

7 A. Mr. Knapp and Mr. Boyd would have been those  
8 parties, yes.

9 Q. And it's your understanding that no Wyoming  
10 appropriator made a call on the river during those two  
11 years?

12 A. Correct.

13 Q. And are you familiar with Wyoming Statute --  
14 I know the number might not mean much, but it's  
15 41-3-606 -- entitled "Commissioners performance of  
16 duties request for regulation"? Do you recall that  
17 statute from your time as superintendent?

18 A. Vaguely, yes.

19 Q. Vaguely. I'm going to read just the second  
20 sentence of it. Maybe I'll read the first in case the  
21 Court's not familiar. It says --

22 MR. WECHSLER: Your Honor, if we're going to  
23 testify to this, could I ask for a copy of the statute?

24 MR. KASTE: Can you turn that on?

25 MR. WECHSLER: Thank you.

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1 SPECIAL MASTER: Thank you.

2 MR. KASTE: I'm shocked and dismayed that  
3 Mr. Wechsler has not memorized the Wyoming Statutes.

4 SPECIAL MASTER: You don't have a code book  
5 like Montana?

6 MR. KASTE: We do have a code titled 41 of  
7 the Wyoming Statutes. It's all about water. And I  
8 don't have a copy in hand.

9 SPECIAL MASTER: Okay.

10 MR. KASTE: Is there a way we can -- that's  
11 better. Very good.

12 BY MR. KASTE:

13 Q. So it's actually on the monitor beside you.  
14 Are you able to read that, Mr. Whitaker?

15 A. Yes, I am.

16 Q. Please take a moment to read through the  
17 substance of the statute, and then I'll ask you a  
18 couple questions.

19 A. Okay.

20 Q. I think you established that no -- is this  
21 fair? No holder of a Wyoming water right made a call  
22 on the main stem of the Tongue in 2004 and 2006?

23 A. Correct.

24 Q. Is that, then, the limit of your hydrographer  
25 commissioners' authority to regulate?

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1 A. Correct.

2 Q. Would you or your hydrographer commissioners,  
3 when you were superintendent, have the authority to  
4 regulate diversions in Wyoming based on a call from  
5 Montana? All on your own? Would you have that  
6 authority?

7 A. Not on our own. I believe we would want to  
8 have the state engineer order us to do so.

9 Q. Fair enough. Did the state engineer order  
10 you or any member of your staff to regulate any  
11 diversions in Wyoming in 2004 or 2006 for the benefit  
12 of the State of Montana?

13 A. No.

14 Q. So we can all agree that whatever fault there  
15 is in this case, it belongs to Mr. Tyrrell?

16 A. Yes.

17 Q. Very good.

18 MR. WECHSLER: I'll just stand up now.

19 MR. KASTE: He rests. No.

20 MR. WECHSLER: Well, I --

21 SPECIAL MASTER: Are you anticipating?

22 MR. WECHSLER: I'm anticipating he's going to  
23 go outside the scope.

24 MR. KASTE: Not yet. I will save it for  
25 last.

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1           SPECIAL MASTER: But you can still jump up if  
2 you think he's not staying within that promise.

3           MR. KASTE: I will build to the exciting  
4 part. I hope.

5 BY MR. KASTE:

6           Q. With regard to the main stem of the Tongue  
7 River and its tributaries, do I understand right that  
8 regulation occurs on the tributaries of the Tongue  
9 River routinely?

10          A. It does.

11          Q. Can you tell us what tributaries of the  
12 Tongue River get regulated typically in a regular year?

13          A. Big Goose, Little Goose, Wolf Creek, Soldier  
14 Creek, Little Tongue.

15          Q. Now, we have a map on your screen of the  
16 Tongue River Basin in Montana. And if you see where  
17 I'm drawing, if that's the main stem of the Tongue  
18 River.

19          A. I lost it. There it is.

20          Q. See the line that I drew? That's what I'm  
21 doing is the main stem of the Tongue River. Have you  
22 identified most or all of the tributaries to the Tongue  
23 River that are regulated routinely?

24          A. Yes.

25          Q. So, for example, Wolf Creek is typically a

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1 tributary that gets regulated?

2 A. It is.

3 Q. In most years or all years?

4 A. Most years. Virtually every year.

5 Q. All right. And then if I understand right,  
6 it's this piece below Rancheater that you were  
7 discussing with Mr. Wechsler when you said there wasn't  
8 regulation of the main stem of the Tongue; is that  
9 right?

10 A. Are you referring to when the two ditches up  
11 by Dayton were running some surplus water?

12 Q. No. I'm just talking in general. I think  
13 Mr. Wechsler asked you a couple times about there not  
14 being regulation of the main stem of the Tongue. And I  
15 just want to figure out if it's limited pretty much to  
16 this area below Rancheater and to the state line.

17 A. There was virtually nothing on the main stem.

18 Q. All right. So it could go farther upstream  
19 than Rancheater?

20 A. Yeah.

21 Q. Fair enough. All right. You were asked  
22 about a letter talking about the Beatty Spur project.  
23 Do you recall that?

24 A. Yes.

25 Q. Do you recall whether or not that project

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1 ever was completed?

2 A. No, I don't. I don't believe it was.

3 Q. Fair enough. All right. You were asked a  
4 little bit about irrigation along Prairie Dog Creek.  
5 Do you recall that?

6 A. Yes.

7 Q. Where does most of the water that's used for  
8 irrigation in Prairie Dog Creek come from?

9 A. It comes from North and South Piney Creek and  
10 Kearney Lake Reservoir.

11 Q. If I understand right, that's water from the  
12 Tongue River Basin?

13 A. Yes.

14 Q. And I think we went on the tour and you  
15 showed the Special Master the crossover ditches. Is  
16 that where that Powder River water makes its way into  
17 the Tongue River drainage?

18 A. No. The crossover ditches are three big  
19 ditches in Story, and they water from South Piney over  
20 to North Piney. The actual ditch diversions are out of  
21 North Piney. Uppermost is the Mead and Coffeen, which  
22 can -- the return flows off of part of it go into the  
23 Little Goose drainage. The middle ditch is  
24 Piney/Cruse. Some of that is conveyed down into the  
25 Little Goose drainage. Part of it's conveyed -- the

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1 return flow's conveyed back into Prairie Dog. And then  
2 the lower ditch is Prairie Dog Water Supply.

3 Q. Okay. Now, Figure 2 from Mr. Book's report  
4 that you talked about with Mr. Wechsler, and it shows  
5 at the bottom the reservoirs in the Big Horn Mountains.  
6 You see those?

7 A. Yes.

8 Q. And I think as you were talking with him  
9 about this highority system, I think it's important we  
10 try and figure out which of the reservoirs that applies  
11 to.

12 Can you identify which of the reservoirs that  
13 process involves?

14 A. It's mainly Cross Creek, Big Horn, Last  
15 Chance, Martin, Willlitts, Granger. Those.

16 Q. Park?

17 A. Not so much Park. Partially Park gets some  
18 water when the Big Horn fills and spills.

19 Q. Okay.

20 A. It gets a portion of its supply.

21 Q. All right. If I understand right, these  
22 things fill in the order of their elevation because  
23 they must?

24 A. Well, they must. But also the fact that  
25 there's still snow and nobody can get up there to make

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1 any adjustments on anything.

2 Q. All right. But if I understand right, do the  
3 folks in Division II keep track of whose water actually  
4 belongs to who?

5 A. Yes, we do. As soon as we get there, we can  
6 sort it out.

7 Q. All right. And do the people in Division  
8 II -- or does the system take place with the intent of  
9 the owners of all the reservoirs?

10 A. Definitely. Most of the time, if there's  
11 storage in one reservoir that needs to be transferred  
12 to another reservoir because of priority and somebody  
13 didn't fill, most of the time those owners work it out  
14 and talk to us about it. They have done it for a  
15 number of years. And they are a very cohesive group  
16 and very easy to get along with each other.

17 Q. All right. Now, after talking about sort of  
18 our version of big reservoirs in the Tongue River, you  
19 talked about the single-owner reservoirs with  
20 Mr. Wechsler. And I think he indicated that you don't  
21 regulate those reservoirs. So I want to talk about  
22 those for a second.

23 If I understand right, the folks that own  
24 these reservoirs, these single-owner reservoirs, where  
25 is the place where they use the water in relation to



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1 their reservoir, typically?

2 A. It's either immediately adjacent to the  
3 reservoir or just a little ways downstream. In these  
4 type of situations, what we look for is there's no  
5 interveners that can be injured; and, therefore, we  
6 don't get a request to come in and actually administer  
7 any water that's released from those.

8 Q. Do they have -- do the reservoir operators  
9 have the right to use the water that they have stored  
10 when they would like to?

11 A. Yes.

12 Q. All right. Now, it sounds to me like this  
13 probably doesn't occur, but I'll ask. In the event  
14 that one of these reservoirs is on a stream that goes  
15 into regulation, would they be required to stop storing  
16 when regulation begins?

17 A. It depends on their priority.

18 Q. If they were out of priority, they would be  
19 required to stop storing?

20 A. Correct.

21 Q. They would be regulated like anybody else?

22 A. Right.

23 Q. You talked with Mr. Wechsler about a letter  
24 that talked about winter releases from Kearney Lake.  
25 Do you recall that?

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1 A. Yes.

2 Q. All right. There are a couple reservoirs in  
3 the Big Horns that release a little bit of water over  
4 the winter; isn't that true?

5 A. Yes.

6 Q. Do you count the water that they release as  
7 part of Division II's work?

8 A. We know the amount that they're set for.  
9 Like I said previously, Park, I believe, is 4 and a  
10 half. Kearney Lake is 3 to 4 roughly. It's kind of  
11 hard to gauge. And Willow Park is something like 7, I  
12 believe. Of -- we're -- we usually check those  
13 releases after they shut down for the winter period.  
14 And that's the setting it will stay through the winter  
15 period. That can be accounted, yes.

16 Q. Okay. And if I understand right, you know  
17 how much generally has been released over the course of  
18 the winter. Can you count that against that  
19 reservoir's fill?

20 A. There is a provision in the statutes that any  
21 time there's excess water released and then the  
22 reservoir doesn't fill in the spring, that that amount  
23 could be accounted against their storage, yes.

24 Q. Have you had to do that with the high  
25 mountain reservoirs in the Big Horns ever?

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1 A. No.

2 Q. Why not?

3 A. Generally, it doesn't come into play. What  
4 happens a lot of times, the bigger ditches down on  
5 Little Goose, for example, they -- they might be short  
6 of water early in the year. But they will not call for  
7 regulation because they want to continue to store as  
8 long as possible in the hopes that they will fill. But  
9 there's no guarantee. There's other earlier rights  
10 that don't have any reservoir water, so they may call  
11 them out anyway. But the guys will keep shuffling  
12 water down the stream to keep that lower guy happy and  
13 keep the call off as long as they can.

14 Q. Are there any upstream junior water  
15 appropriations above these reservoirs?

16 A. No.

17 Q. Okay. If there was one, if there was an  
18 irrigator on Cloud Peak --

19 A. Good luck.

20 Q. -- I don't know what he would be growing, but  
21 let's say there was a guy up there. And this water was  
22 allowed to pass through one of the reservoirs during  
23 the course of the winter. And then that reservoir  
24 attempted to make a call on the upstream junior. Would  
25 you allow that call?

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1 A. No.

2 Q. I think there's been some talk a little bit  
3 about the one-fill rule in Wyoming. And I do hope to  
4 clear up a misconception I think that's gone on, if  
5 you'll help me.

6 The one-fill rule in Wyoming, if I understand  
7 it, entitles you to fill your reservoir one time;  
8 correct?

9 A. Correct.

10 Q. Okay. Now, if there's extra water available  
11 in the system and nobody is calling for water, can you  
12 put more water in your reservoir than your one fill?

13 A. If they have space available and you get into  
14 a situation, say you had a significant rainstorm in the  
15 middle of the summer and there was a free river  
16 situation at the time, the reservoir would then be in  
17 priority to store a portion of that water, yes.

18 MR. KASTE: Now, Mr. Wechsler, you can stand  
19 up.

20 BY MR. KASTE:

21 Q. Now I'm going to go outside the scope of your  
22 direct examination because I'm a little bit befuddled  
23 why we didn't just ask you about it then. And I'm  
24 going to ask you about calls that may or may not have  
25 been made by folks in Montana. And now he's going to

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1 object.

2 MR. WECHSLER: Your Honor, I mean, it wasn't  
3 within the scope of direct. We did allow Wyoming --  
4 we -- Montana and Wyoming had discussions over whether  
5 or not the Wyoming witnesses ought to -- they ought to  
6 put them on first. And my understanding is they will  
7 be putting on each of the other Wyoming witnesses  
8 first. They chose not to with Mr. Whitaker. I don't  
9 see why we ought to be able to go beyond the scope of  
10 direct.

11 MR. KASTE: Well, we would have to recall him  
12 again in our case in chief. And, frankly, I cannot  
13 understand why you wouldn't want to hear what his  
14 recollection is about calls.

15 SPECIAL MASTER: So at some point, I would  
16 actually love to hear it. Is there a reason why, at  
17 this stage, we should have your direct?

18 MR. KASTE: So that Mr. Whitaker, who doesn't  
19 work for us, doesn't have to come back here in two  
20 weeks.

21 SPECIAL MASTER: Okay. And is it my  
22 understanding, then, that you do not plan to call  
23 Mr. Whitaker for another purpose?

24 MR. KASTE: No. I want to ask him about one  
25 particular subject matter that I would have reasonably

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1 anticipated them bringing up during their direct. And  
2 then I wanted to ask him -- I'm going to be done.

3 SPECIAL MASTER: So, Mr. Wechsler, other than  
4 the fact that Mr. Whitaker will now be testifying out  
5 of order in the middle of your case, and I realize  
6 you'd prefer that not to happen, but at the same time,  
7 on the assumption that Mr. Whitaker does not live a  
8 block or two from here, I'd prefer not to force him to  
9 come back. Do you have any problem?

10 MR. WECHSLER: No, I will withdraw my  
11 objection.

12 SPECIAL MASTER: Okay. Thank you.

13 BY MR. KASTE:

14 Q. All right, Mr. Whitaker. This won't take  
15 very long. But we have to go through that process, and  
16 I apologize for the delay.

17 There has been testimony in this case about  
18 communications between folks in Montana and folks in  
19 Wyoming over the years. Did you ever see a  
20 communication from anyone in Montana prior to 2004 that  
21 you would construe as a call on you or the State of  
22 Wyoming to regulate or deliver water to Montana?

23 A. No.

24 MR. KASTE: No further questions.

25 SPECIAL MASTER: Okay.

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EXAMINATION

BY SPECIAL MASTER:

Q. First of all, I just have one or two. And I think these are relatively quick questions. But I'm just trying to sort things out myself.

So the first question goes to Exhibit W63, which is the letter to Jim Wagner regarding Kearney Lake winter flow release. And I don't know whether you need this particular letter to answer this question.

But the second sentence of it says, "Accordingly we will set the Prairie Dog Ditch for stock water at that time." Can you explain what that has to do with Kearney Lake?

A. Yes, sir. Prairie Dog Water Supply Company has the most senior right on that stream in that area, Piney creek. And the two ditches I mentioned previously, Piney-Cruse and Mead and Coffeen, also have some Kearney Lake water that is owned by some of their members. I felt like if we allowed Prairie Dog to shut down Kearney Lake, they could then turn around and call for regulation and take out all the water out of those other two ditches. And since they were the ones requesting to shut down early to make the repairs on Kearney Lake, then they are the ones that should suffer. So we set their ditch at stock water and let

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1 the other two ditches take direct flow that they were  
2 entitled to.

3 Q. So what was -- to your knowledge, what was  
4 the purpose, then, of the winter flow release from  
5 Kearney Lake at this time?

6 A. I believe the winter flow release from  
7 Kearney Lake and also the one in Willow Park are part  
8 of their Forest Service permit that allowed them to  
9 construct the reservoirs. Secondly, they don't want  
10 the reservoirs to fill in the wintertime; Willow Park  
11 especially, because it has a big concrete chute for a  
12 spillway, and the ice will just break that up.

13 Q. And so then the purposes of releasing water  
14 from these -- from Kearney Lake during the winter is  
15 both in order to comply -- to your understanding,  
16 comply with Forest Service requirements that were part  
17 of being able to construct the lake, as well as  
18 avoiding damage to the lake?

19 A. Exactly.

20 Q. And then going back to Mr. Kaste's question a  
21 moment ago. If there were somebody upstream from  
22 Kearney Lake, and I realize that that's not the case,  
23 but if there were somebody upstream and later in the  
24 year Kearney Lake needed some additional water to fill  
25 up their lake because they had to let this other water



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1 go down in the meantime and the people upstream  
2 objected to that, you would have told Kearney Lake, no,  
3 you can't?

4 A. That would have been counted against their  
5 storage amount. Yes, sir.

6 Q. Okay. Thanks. And then I also wanted to  
7 make sure I understood the highority. So under the  
8 highority, what you're doing is filling up the  
9 reservoirs at the very top of the system. And then  
10 when you actually can get up there and begin to  
11 actually regulate those various reservoirs, at that  
12 point, you then have to sort out whose water is whose  
13 within that reservoir?

14 A. Not only whose water is whose in that  
15 particular reservoir but we look at all the reservoir  
16 storage in a particular elevation, and we figure out  
17 who owes who water, which reservoir owns the other  
18 reservoir water because of the difference in priority  
19 dates and amounts.

20 Q. So even though you have the reservoir at the  
21 highest filling up, you can later actually determine,  
22 as a matter of priority, how much water belonged to  
23 that reservoir that's filled up first and how much  
24 belonged to various reservoirs that are further down  
25 the mountain?

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1           A.     Exactly.  And I -- and one year, I think it  
2 was 2004, all of the storage in Cross Creek, which is  
3 the upper reservoir, actually belonged to three senior  
4 reservoirs down below Big Horn.

5           Q.     And did I also understand that when you're  
6 actually able to regulate the reservoirs, there are two  
7 different ways that you can treat the water which has  
8 been stored by highority but not according to priority?  
9 One of those is you can let that water go down to the  
10 other reservoir to be stored there.  Or a second  
11 possibility is that you can keep the water where it is  
12 but release it to the correct individuals?

13          A.     That's exactly right.  And that's usually  
14 something those individual owners already worked out  
15 before we got into it.

16          Q.     Okay.

17          A.     They'll concur -- or we concurred with  
18 whichever method they wanted to use.

19          Q.     And to the degree that you say filled a  
20 reservoir by highority and a portion of that by  
21 priority belongs to another reservoir and you let that  
22 water, say, flow down to that other reservoir, can the  
23 first reservoir, the one that was highest in terms of  
24 highority, then fill up to its capacity?

25          A.     Only if he's in priority.

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1 Q. Okay. But to the degree he's in priority, he  
2 can do that?

3 A. That's right. And really the reason we use  
4 highority is because we cannot physically get there at  
5 that time of the year.

6 Q. Right. But to the degree that somebody has  
7 filled up by highority and has to release that water,  
8 that doesn't count against them so long as there's  
9 water that they can take under their priority right  
10 of --

11 A. Correct. If they had space and they were in  
12 priority, they could fill at that time.

13 Q. Okay. Thank you.

14 SPECIAL MASTER: So, Mr. Kaste, did you have  
15 any additional cross-examination questions?

16 RECROSS-EXAMINATION

17 BY MR. KASTE:

18 Q. Maybe this isn't clear, but I probably  
19 should -- when you're able to get to the high mountain  
20 reservoirs and take -- and assess what's gone on -- the  
21 Special Master just asked you if water has to be passed  
22 from one of the higher reservoirs to the lower, can  
23 they take more water at the higher reservoir. Do you  
24 remember that? And you said only if they are in  
25 priority. And, typically, once you're able to get up

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1 into the mountains in, sounded like, late May, maybe  
2 early June; is that fair?

3 A. That's fair. I'm sorry.

4 Q. Okay. Within a very short period of time, if  
5 I understand right, the streams typically go on  
6 regulation; is that fair?

7 A. That's correct.

8 Q. Are the reservoirs allowed to continue  
9 storing once the stream goes on regulation?

10 A. No. Because generally they're the most  
11 junior in priority.

12 Q. And I just want to make it clear. When you  
13 say only if they are in priority once the stream goes  
14 on regulation, they are typically not in priority --

15 A. Right.

16 Q. -- not able to fill again; is that fair?

17 A. Right.

18 Q. All right. And I guess that leads me to  
19 another question. Once reservoir releases begin, does  
20 the stream automatically go into regulation?

21 A. No.

22 Q. No?

23 A. No, we can shepherd reservoir water without a  
24 call for regulation.

25 Q. Typically, they tend to coincide, but not --

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1           A.   Typically, it's in conjunction because the  
2 ditch you're taking water out of is also an owner in a  
3 reservoir. So they replace what we took out. But it  
4 doesn't have to occur that way.

5           Q.   And I think I understood. At times, the same  
6 folks that own irrigation rights down at the bottom of  
7 the base of the mountain own reservoir storage up at  
8 the top and have -- if I understood right, at times  
9 they have foregone making a call in order to attempt to  
10 store water; is that true?

11          A.   They will forego making the call. And in  
12 addition, they will not take their full appropriation,  
13 allowing the senior rights down below to have that  
14 water so they will not place a call in the system,  
15 which allows the reservoirs to continue to store.

16          Q.   Okay. If they did make -- or if that water  
17 had to be passed through, is there sufficient early  
18 water rights on these streams to gobble it all up?

19          A.   Most likely, if we're in that kind of a  
20 situation, yes. The stream's flow going into the  
21 reservoirs would be low enough that everything they  
22 would pass then would be diverted down below.

23          Q.   Thank you.

24                SPECIAL MASTER: Okay. Actually, just one  
25 other quick question.

Further Examination by the Special Master  
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1 FURTHER EXAMINATION

2 BY SPECIAL MASTER:

3 Q. When you were talking at the very outset  
4 about the Wyoming commissioner system, I believe you  
5 said that when you first went to work for the state  
6 engineer's office, were the water commissioners  
7 themselves employed by the county rather than the state  
8 engineer?

9 A. The seasonal water commissioners were  
10 employed by the various counties.

11 Q. At that point in time, did the commissioners  
12 who were employed by the county carry out the same  
13 responsibilities as water commissioners do today?

14 A. They did. In fact, we had to budget with  
15 each county for those people. And we were in control  
16 of them. And they worked for us, not for the county  
17 commissioners. They worked for us because county  
18 commissioners simply approved the budget we submitted.

19 Q. So it was really a funding difference more  
20 than anything else?

21 A. Right. Right. And there were inequities  
22 throughout the different counties. Some counties were  
23 richer; some counties were poorer. And that's what  
24 essentially drove us to make it the system that we have  
25 today, where everything is funded by the state.

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1 Q. Okay. And do you have any knowledge as to  
2 how far back the commissioner system goes?

3 A. Prior to statehood.

4 Q. Okay. Thank you.

5 SPECIAL MASTER: So, Mr. Wechsler, both  
6 redirect on the first set of questions, and then you're  
7 welcome to cross-examine the witness on the one new  
8 question that was asked.

9 REDIRECT EXAMINATION

10 BY MR. WECHSLER:

11 Q. Mr. Whitaker, one of the early questions that  
12 Mr. Kaste asked you was about the active water rights.  
13 Do you recall that discussion?

14 A. Yes.

15 Q. And those water rights are all capable of  
16 taking water; correct?

17 A. To my knowledge, they are, yes.

18 Q. Legally able to take water?

19 A. Anything that we consider active would be a  
20 valid water right that would be able to take water.

21 Q. Can you think -- can you identify any active  
22 water rights during the years 2001, 2002, 2004, and  
23 2006 that were active water rights but chose  
24 voluntarily not to take their water?

25 A. No.

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1 Q. Lets's talk a little bit about regulation in  
2 connection with those active water rights. When a  
3 stream goes into regulation, it's because too much  
4 water is being taken upstream to satisfy the calling  
5 right; correct?

6 A. Yes.

7 Q. And that's why you go into regulations, so  
8 that enough water can get down to the calling right?

9 A. Yes.

10 Q. So you're shutting down some of those active  
11 water rights that are taking their water?

12 A. Yes.

13 Q. When you were talking with Mr. Kaste about  
14 whether or not you tagged -- and it sounded like  
15 sometimes you did tag and sometimes you didn't; right?  
16 Do you remember that discussion?

17 A. Yes.

18 Q. And what I understood you to be saying is  
19 that sometimes the water users would cooperate with  
20 you; right?

21 A. Most of the time they did.

22 Q. And when they did, there was no reason to  
23 place a tag?

24 A. Right.

25 Q. Because they were complying your



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1 instructions?

2 A. That's right.

3 Q. You talked with Mr. Kaste about ditches that  
4 take all the water. Do you recall that conversation?

5 A. Was that in regard to making a call for  
6 regulation?

7 Q. Yes, that you would check and see that a  
8 right was, in fact, drying up the river. Do you  
9 remember that?

10 A. Yes. That's the first thing we do is make  
11 sure they're taking everything that's available to  
12 them.

13 Q. Are there some ditches that aren't capable of  
14 taking the entire river?

15 A. It's not that they can take the entire river;  
16 it's whether or not they're taking their appropriation.

17 Q. Are there some that can't dry up the river?

18 A. Not if they're placing the call.

19 Q. And are there some that have physical  
20 limitations?

21 A. Every ditch has physical limitations --

22 Q. And are --

23 A. -- as to size. But the key to regulation is  
24 they have to dry up the stream taking all the water  
25 that's available to them at that point and prove to us

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1 that they are, indeed, short of their original  
2 appropriation.

3 Q. Are there any that have physical limitations  
4 that prevent them from drying up the stream?

5 A. No. If they do we tell them before we  
6 regulate they need fix it.

7 Q. When you're -- you talked with Mr. Kaste  
8 about regulating reservoir water. Do you recall that  
9 conversation?

10 A. Yes.

11 Q. So I think I understood you to be saying you  
12 basically shepherd the water down to the place where  
13 the storage water is required; right?

14 A. To the party that ordered it, yes.

15 Q. And so along the way you're making sure that  
16 people aren't taking that stored water?

17 A. Right.

18 Q. And you do that in part by making sure that  
19 if there's direct flow available to them, that they're  
20 only taking that direct flow that they're entitled to;  
21 right?

22 A. That's correct.

23 Q. Below the right that's calling for storage,  
24 you're not doing any regulation; right?

25 A. Right.

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1 Q. You talked with Mr. Kaste about that statute.  
2 I think it was 41-3-306. Do you recall that?

3 A. Yes.

4 Q. And I think the gist of that conversation  
5 that I understood was that you were only allowed to  
6 honor a call from a Wyoming appropriator; right?

7 A. Correct.

8 Q. So if Montana had made a call for water, you  
9 couldn't have honored it?

10 A. In my tenure, I never received anything I  
11 considered to be a request. I had numerous  
12 conversations with Mr. Kerbel. Keith and I are  
13 friends. How hot it was here. How dry it was. How  
14 hot it was and dry it was in Wyoming. But nothing I  
15 considered to be a request.

16 The only request that I recall are the  
17 written requests that went to the state engineer.

18 Q. Is there certain language that he would have  
19 had to use?

20 A. If somebody would have called and said they  
21 were representing Montana and wanted us to regulate, I  
22 would have told him to put it in writing. If that had  
23 gone to me, I would have passed it to the state  
24 engineer for his comment and instructions.

25 Q. Going back to that statute, and I think what

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1 my original question was is that under 41-3-306 you  
2 said you're only allowed to honor a call for water from  
3 someone from Wyoming; right?

4 A. That's my interpretation, yes.

5 Q. So my question is: Even if Mr. Kerbel had  
6 made a call for water to you, you could not have  
7 honored that; right?

8 A. I would have told him just what I said. I  
9 would have said, Keith, would you please put it in  
10 writing? And I would have passed it on to the state  
11 engineer.

12 Q. So my question is: You could not have  
13 honored that; right?

14 A. Not without the state engineer being  
15 involved, I couldn't.

16 Q. And --

17 A. As I stated, the requirements that we use for  
18 responding to a call is the ability to check on what  
19 the right is, what's being diverted, was there indeed  
20 shortage. And by our statute, were they a Wyoming  
21 appropriator.

22 Q. Did you ever tell Mr. Kerbel that you would  
23 not be able to honor a call from Montana?

24 A. I never had to.

25 Q. Did you ever tell anybody else from Montana?

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1 A. No. Never had any other comments.

2 Q. You spoke with Mr. Kaste about the  
3 single-owner reservoirs. Do you recall that?

4 A. Yes.

5 Q. And I think you said when you -- when you're  
6 evaluating those single-owner reservoirs, you check to  
7 see, hey, is this going to hurt anybody in Wyoming; is  
8 that right?

9 A. No. We don't check to see. If there are  
10 people intervening in the point where the reservoir  
11 water is stored and where it's being used, intervening  
12 people that are injured potentially who call us up, we  
13 would get involved in that. If we had to, then we  
14 would shepherd the reservoir water from those down to  
15 where they're needed.

16 Q. You would check to see if there was injury to  
17 Wyoming water users; right?

18 A. If we received a call from somebody that they  
19 were concerned about this water being transported  
20 through their property or something, they felt like  
21 they were being injured, we would investigate that,  
22 yes.

23 Q. Did that ever occur?

24 A. Is that what?

25 Q. Did that ever occur?

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1 A. No. It hasn't.

2 Q. When you're looking at that injury, would you  
3 have checked to see if there would have been injury to  
4 the State of Montana?

5 A. No.

6 Q. You talked about regulation on the  
7 tributaries to the main stem. Do you recall that  
8 discussion?

9 A. Yes.

10 Q. When you're doing regulation on the main  
11 stem, you're only doing it to that calling right;  
12 correct?

13 A. We're only -- if we were -- if -- when we  
14 regulate a stream, be it Little Goose, Big Goose,  
15 whatever, we go upstream from that right. Now, if  
16 there's a tributary that's coming in that's got  
17 diversions on it that are junior, that's where we'll go  
18 to get the water to satisfy the calling right.

19 Q. And then below the calling right, you're not  
20 doing regulation?

21 A. Right. Correct.

22 Q. You talked with Mr. Kaste and also the  
23 Special Master about the releases from Kearney  
24 Reservoir, and kind of what I understood you to be  
25 saying was sort of the reason that you allow releases

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1 from Kearney Reservoir. Do you recall that discussion?

2 A. Yes.

3 Q. Do you have before you Exhibit Wyoming 290?

4 It begins "Notice to appropriator to begin reservoir  
5 storage" for the same year that we looked at for the  
6 Kearney Lake letter.

7 A. I don't have it. I'm familiar with the  
8 letter for the storage, yes.

9 Q. Unfortunately, I'm told we don't have another  
10 copy. So if you could take a moment to look through  
11 that pile. It's a one-page document. In the lower  
12 right-hand corner, it says Exhibit W290. At the top,  
13 it says, "Notice to appropriator to begin reservoir  
14 storage."

15 A. I'm familiar with the form, yes. I don't  
16 have it yet, but I'm familiar with it.

17 MR. WECHSLER: May I approach, Your Honor?

18 SPECIAL MASTER: Oh, yes, you may. I'm  
19 sorry.

20 BY MR. WECHSLER:

21 Q. Do you recognize this document?

22 A. Yes, I do.

23 Q. What is it?

24 A. It's a notice to appropriator to begin  
25 reservoir storage. And this particular one is for

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1 Kearney Lake Reservoir in the year 2001.

2 Q. And it's signed by Mr. LoGuidice?

3 A. It is.

4 Q. Who was a water commissioner at the time you  
5 were superintendent?

6 A. He was the assistant superintendent, yes.

7 MR. WECHSLER: Your Honor, I'd move the  
8 admission of Exhibit W290.

9 MR. KASTE: No objection.

10 SPECIAL MASTER: Exhibit W290 is admitted  
11 into evidence.

12 (Exhibit W290 admitted.)

13 BY MR. WECHSLER:

14 Q. And here, if you look in the first paragraph,  
15 I think it describes the rule that you were discussing  
16 with Mr. Kaste and the Special Master that all  
17 reservoirs be filled at such times that will not  
18 interfere with the use of water by direct flow  
19 appropriation. Do you see that?

20 A. Yes.

21 Q. The next paragraph says, "The purpose of this  
22 provisional law is for the protection of junior direct  
23 flow rights against depletion of the water supply of  
24 the stream by reservoir storage during the irrigation  
25 season when the reservoir might have been filled at a



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1 time when there was more water available in all direct  
2 flow rights on the stream could use beneficially"; you  
3 see that?

4 A. Yes.

5 Q. When you are storing water in the spring,  
6 that is water that otherwise might be available to  
7 appropriators; right?

8 A. Potentially, yes.

9 Q. We talked earlier about the surplus rule and  
10 there might be surplus water available for the water  
11 users; correct?

12 A. Depends on how much water is in the system,  
13 yes.

14 Q. And that's water that's available for  
15 downstream users; right?

16 A. That's water that's available for everybody  
17 on that stream, yes.

18 Q. We're not talking about the upstream users;  
19 correct?

20 A. We're talking about everybody on that stream,  
21 surplus water, yes.

22 Q. And so if you're allowing winter releases  
23 you're impacting those downstream juniors; right?

24 A. They have the ability to place a call for  
25 regulation.

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1 Q. I think my question was just if you're  
2 impacting them.

3 A. No.

4 Q. You're not impacting them?

5 A. No.

6 Q. You're storing water at a time that it  
7 otherwise might be available?

8 A. Well, they set the release for the winter  
9 period in order not to fill and potentially injure the  
10 reservoir. Or they're required to by either the Forest  
11 Service permit to construct the reservoir or in the  
12 case of the Park Reservoir where there's actually a  
13 requirement for that reservoir on the permit. That's  
14 the purpose of the wintertime release.

15 Q. One of the purposes is to ensure that the  
16 reservoir itself doesn't get damaged?

17 A. Partially.

18 Q. Would you require the owners of the operator  
19 to operate the reservoir in a way that would damage  
20 their facilities?

21 A. No. No. Just the same as we don't require  
22 ditches to take more water than they wish to.

23 Q. You spoke with Mr. Kaste about the one-fill  
24 rule. Do you recall that?

25 A. Yes.

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1 Q. Now, you -- if I recall correctly, Wyoming  
2 has a statute that actually allows potentially up to  
3 another half fill to be taken from a reservoir at  
4 times; is that right?

5 A. You could potentially refill the whole thing  
6 if you had space available and you were in priority and  
7 there was water available to do it.

8 Q. Let's turn to the question of your  
9 communications with Mr. Kerbel. You'll agree with me,  
10 no doubt, that the state of Wyoming is upstream from  
11 the stream -- the state of Montana; right?

12 A. Right.

13 Q. And we talked earlier, you were aware that  
14 they had water rights on the main stem of the Tongue  
15 River?

16 A. Correct.

17 Q. And you knew that some of those were  
18 pre-Compact, pre-1950?

19 A. Correct.

20 Q. And you also knew that they had a reservoir  
21 in Montana; correct?

22 A. Tongue River Reservoir, yes.

23 Q. And you were aware that that had a 1937  
24 priority date?

25 A. I knew it was in the '30s. '37 I learned

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1 today, yes.

2 Q. You also generally understood that when  
3 releases occurred, of a reservoir, that the direct flow  
4 rights were probably short?

5 A. They could be.

6 Q. You spoke with Mr. Kerbel on a regular basis?

7 A. We would talk generally once, twice a summer  
8 and then at the compact meeting each year. And then  
9 when we started the technical meetings, we'd get  
10 together then, yes.

11 Q. And so from what I understood you said to  
12 Mr. Kaste, you never understood that Mr. Kerbel used  
13 whatever the magic words were to request water; right?

14 A. I never heard anything that I considered to  
15 be a request. As I stated, if I had, I would have  
16 asked to have it in writing and conveyed it to the  
17 state engineer.

18 Q. And there you're talking about what you would  
19 have considered to be a request; right?

20 A. Yes.

21 Q. You talked about water supplies in both  
22 states; correct?

23 A. We talked about water supplies in both  
24 states. We talked about a lot of things. Talked about  
25 golf games.

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1 Q. You talked about shortages in both states?

2 A. Sometimes.

3 Q. You were aware that there were times when  
4 Montana was short of water?

5 A. I was aware that sometimes they were short of  
6 water. Sometimes we were short of water.

7 Q. But you were aware that if the water was used  
8 in Wyoming, there's no way it could get to Montana;  
9 right?

10 A. We were within -- we were regulating on the  
11 streams. And a lot of times, Keith would ask, what are  
12 you guys regulated to? I'd tell him, many times we  
13 offered, hey, come down. We'll take you out anywhere  
14 you want to go, show you what's going on, the tab book,  
15 the whole works.

16 Q. In other words, he asked you how far back is  
17 Wyoming regulated; right?

18 A. Yeah. Occasionally he'd say, what are you  
19 guys regulated to?

20 Q. You ever say, are you regulated to below  
21 1950?

22 A. No. He just asked the date. He didn't  
23 mention 1950, that I recall.

24 Q. When he asked you what you were regulated  
25 back to, did you ever tell him, we don't have any

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1 regulation on the main stem of the Tongue?

2 A. I think Keith was aware of that. Basically,  
3 I remember telling him what we were regulated to on  
4 Little Goose, Big Goose, Wolf Creek. Those were the  
5 main ones.

6 Q. You would then be surprised if Mr. Kerbel  
7 testified that he was not aware that there was no  
8 regulation on the main stem?

9 A. I would be surprised at that, yes.

10 Q. Did you understand that Mr. Kerbel was  
11 concerned about shortages in Montana?

12 A. I knew he was concerned about shortages in  
13 Montana. I was concerned about shortages in Wyoming.

14 Q. Would have been logical to understand that  
15 Montana needed more water; right?

16 A. And Wyoming, too, yes.

17 Q. Over the years, beginning in the 1980s,  
18 Montana attempted to develop a system of administration  
19 of the compact; right?

20 A. I believe Gary Fritz was pushing for that,  
21 yes.

22 Q. And that started sometime in the early 1980s?

23 A. Possibly. I recall when I first started  
24 going to the meetings that Mr. Fritz brought that up,  
25 yes.

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1 Q. And it continued throughout the '80s; right?

2 A. It continued for several years, as I recall.

3 Q. And, again --

4 A. I couldn't say just how long.

5 Q. Again, in the 2000s, there was more efforts  
6 to be finding a way to administer the compact; right?

7 A. I don't think there was -- I don't recall the  
8 same level of discussion as earlier with Mr. Fritz. He  
9 brought it up at several meetings that we should work  
10 out some type of system. But that never came to pass.

11 Q. This would have been a methodology to ensure  
12 that both states got their proper share under the  
13 compact; right?

14 A. I think that was his goal, yes.

15 Q. Did you understand his goal to be to make  
16 sure Montana got its share?

17 A. Yeah. I think Mr. Fritz was looking for  
18 dialogue between the two states to come up with a  
19 better way to divide the waters.

20 Q. Mr. Kerbel was involved in some of those  
21 efforts as well; correct?

22 A. He was at those same meetings, yes.

23 Q. Did you understand that the implication from  
24 Montana was that they were not getting their full share  
25 under the compact?

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1           A.    No.  I -- there was -- I think those were  
2 years where we probably had pretty good water supply.  
3 I considered it as something Mr. Fritz looked for in  
4 the future, that there would come a time where we  
5 needed to have something in place.

6           Q.    Did you understand that Montana was bringing  
7 those efforts in order to make sure that it got more  
8 water?

9           A.    It was my understanding that he thought there  
10 was a better way to split the baby.

11          Q.    It had nothing to do with the supplies of  
12 each state, in your view?

13          A.    No, he wanted a policy in place.  I don't  
14 think it had anything to do with the supplies at the  
15 time.  I think he wanted to see something in place.  
16 There was a lot of discussion in those years that  
17 Montana had one vote; Wyoming had one vote.  And  
18 they -- he was always pushing for the federal rep to  
19 have the ability to decide for one state or the other  
20 in the event of a tie.  And the federal rep was always  
21 reluctant to do that and wanted the two states to work  
22 out whatever differences they had.

23          Q.    You said that Mr. Kerbel inquired as to when  
24 regulation occurred in Wyoming; right?

25          A.    Not when it occurred so much as what priority



Redirect Examination by Mr. Wechsler  
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1 we were regulated to.

2 Q. You actually made some reports to the YRCC on  
3 that very issue; right?

4 A. I didn't understand the question.

5 Q. You made reports to the Yellowstone River  
6 Compact Commission on that very issue?

7 A. Yes, I think we would tell the commission  
8 each year how regulation occurred through the season.  
9 We'd follow it up with how much carryover we had in the  
10 reservoirs. And sometime, I think it was around 2000,  
11 maybe the late '90s, we even started giving them the  
12 hydrographers' annual report so they could see it. I  
13 gave a copy to Roy Kaiser so he had the information he  
14 needed. We were just trying to provide information for  
15 them.

16 Q. You recall that Montana was asking about  
17 water use in Wyoming?

18 A. They were interested in how our season had  
19 gone and whether or not we'd regulated, yeah.

20 Q. At one point, they asked you about a number  
21 of unpermitted stock reservoirs. Do you recall that?

22 A. I believe that was in the Hanging Woman  
23 drainage.

24 MR. WECHSLER: Excuse me, Your Honor. Can I  
25 have one moment?

Further Examination by the Special Master  
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1 SPECIAL MASTER: You certainly may.

2 MR. WECHSLER: No further questions.

3 SPECIAL MASTER: Okay.

4 FURTHER EXAMINATION

5 BY SPECIAL MASTER:

6 Q. So I actually have one quick question in  
7 follow up to Mr. Wechsler's questions. So do you  
8 remember -- or do you recall at this point any  
9 discussion with Mr. Kerbel in which he expressed  
10 concern that Wyoming users might be getting water who  
11 were junior to Montana users who were not getting  
12 water?

13 A. No. No. He was concerned about the Montana  
14 users as I was with the Wyoming users. We both knew  
15 each other had short supplies, and we were trying to  
16 satisfy a lot of people with the little amounts we had.

17 Q. So he would sometimes ask you about how far  
18 back you were regulating; correct?

19 A. Yes.

20 Q. Did he ever express any -- or did he ever  
21 suggest that you should be regulating even farther  
22 back?

23 A. No. No. Not -- not for any benefit. If he  
24 would have mentioned any type of benefit for Montana,  
25 as I stated, I'd have advised him to put it in writing

Further Recross by Mr. Kaste  
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1 and I'd pass it to the state engineer, who I assume  
2 would have got back in touch with the head of DNRC at  
3 the time, whoever that would have been. And that's the  
4 way it evolved. And that's the way it should evolve.  
5 But not the way you stated it, no, I didn't recall  
6 that.

7 Q. Okay.

8 SPECIAL MASTER: Mr. Wechsler?

9 MR. WECHSLER: Nothing further.

10 SPECIAL MASTER: Okay. Mr. Kaste? Any  
11 redirect specifically on the set of questions regarding  
12 conversations that might have occurred with people from  
13 Montana?

14 MR. KASTE: Just one.

15 FURTHER RECROSS-EXAMINATION

16 BY MR. KASTE:

17 Q. Mr. Whitaker, you've been around a long time  
18 as a hydrographer commissioner and superintendent. Do  
19 you know a call when you hear one?

20 A. I believe I do, yes.

21 Q. Thank you.

22 SPECIAL MASTER: Okay. Thank you. So you're  
23 excused at this point. So thank you very much. And  
24 hopefully we've saved you a second trip back.

25 THE WITNESS: Thank you very much for that.

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Direct Examination (Cont.) by Mr. Draper

1 SPECIAL MASTER: You're welcome.

2 So, Mr. Draper, are there additional  
3 witnesses before you get back to Mr. Aycock?

4 MR. DRAPER: No, we're ready to go back to  
5 Mr. Aycock.

6 SPECIAL MASTER: Great. So what I'd like to  
7 do is get maybe another 20, 30 minutes of testimony in  
8 today, if the court reporter can go that long. So why  
9 don't we have Mr. Aycock come back to the stand.

10 MR. DRAPER: Mr. Aycock, if you would return  
11 to the stand.

12 SPECIAL MASTER: So even though it's been a  
13 while, you're still under oath. Are you aware of that?

14 THE WITNESS: I am aware of that.

15 SPECIAL MASTER: Thank you.

16 Mr. Draper?

17 MR. DRAPER: Thank you, Your Honor.

18 GORDON AYCOCK (CONT.),  
19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION CONTINUED

21 BY MR. DRAPER:

22 Q. Good afternoon, Mr. Aycock.

23 A. Good afternoon.

24 Q. On this snowy afternoon.

25 MR. DRAPER: Your Honor, I'd like to begin by

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Direct Examination (Cont.) by Mr. Draper

1 referring to the exhibit that we discussed when  
2 Mr. Aycock was last on the stand. It has been  
3 designated Exhibit M557. And at your suggestion, we  
4 have divided that into subparts.

5 In addition, we have provided the complete  
6 reports on the earlier reports that were excerpted in  
7 Exhibit M557. We provided those to Wyoming. They have  
8 been looking them over today and have requested that we  
9 copy those other reports, those earlier reports and  
10 make them part of the exhibit. So we will do that.  
11 And we're working on getting those copied right now.

12 SPECIAL MASTER: Okay. That is great. I  
13 assume, Mr. Kaste, though, you don't have any problem  
14 with questions being asked on the direct examination of  
15 Mr. Aycock, so long as it's clearly defined what pages  
16 are being referred to?

17 MR. KASTE: That's correct.

18 SPECIAL MASTER: Okay. Great.

19 Mr. Draper.

20 MR. DRAPER: Good. And my remaining  
21 questions on this exhibit are going to be directed  
22 to -- the specific ones are going to be directed to the  
23 one that is essentially complete. It will be  
24 designated 557E. And we are not supplementing that  
25 because all of the important material is considered to

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Direct Examination (Cont.) by Mr. Draper

1 be there already. And I will refer to those specific  
2 pages by their Bates numbers so there's no confusion.

3 BY MR. DRAPER:

4 Q. Mr. Aycock, as we finish up our discussion on  
5 the reservoir size issues, would you explain the  
6 difference between the total storage capacity and  
7 active or usable capacity?

8 A. The total storage capacity is everything from  
9 the streambed up to the case -- the Tongue River  
10 Reservoir up to the crest of the spillway. So it's the  
11 total water that could be stored in that reservoir  
12 before it begins to spill over the uncontrolled  
13 spillway. The dead pool in the reservoir is the water  
14 below the outlets, at the lowest outlet of the sill  
15 elevation of that outlet.

16 Q. That's s-i-l-l? Sill elevation?

17 A. I'm not sure if it's s-e-a-l or s-i --

18 Q. It's like the sill of a window; right?

19 A. Right. Sometimes if it's a tube, we refer to  
20 the invert elevation of that pipe or tube that goes  
21 through the dam to be the bottom elevation of the  
22 inlet. But it's the point where you can no longer  
23 release water from the reservoir. You could  
24 potentially put a pump in in an emergency and pump  
25 water up into the outlets. But it's the unusable space

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Direct Examination (Cont.) by Mr. Draper

1 in the reservoir.

2 Q. So the dead storage is the unusable storage  
3 in a reservoir?

4 A. It's the unusable space in the reservoir;  
5 right.

6 Q. And, in turn, what is the usable or active  
7 storage space?

8 A. The active storage would be the remaining  
9 storage from the outlet works up to the spillway crest.  
10 There are other allocations. Sometimes in a reservoir  
11 you might have some inactive space. But in the case of  
12 Tongue River, it's just active or usable space. And  
13 then the dead pool.

14 Q. And was there some confusion about that in  
15 the early records regarding Tongue River Reservoir?

16 A. Well, back -- I don't know how far it goes  
17 back. But in the early years, it was quite common for  
18 records to be kept of the usable or active space and  
19 not include the dead. So you see a lot of numbers that  
20 will kind of switch back and forth. They'll  
21 misdescribe what that number is.

22 When I first started work in the reservoir  
23 regulation in 1976, my first assignment was to set up a  
24 database with all of our records for our reservoirs in  
25 the region. And since a lot of those records, since we

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Direct Examination (Cont.) by Mr. Draper

1 kind of had apples and oranges, we had some that were  
2 active and some that were total. I worked with a  
3 technician to go through all of our records and convert  
4 them to total.

5 But you can also see that a lot in the  
6 Yellowstone River Compact Commission reports. You'll  
7 see a mixture of the two numbers in the same table.  
8 They may identify it as active, or they may identify it  
9 as total, but you can -- being familiar with some of  
10 those reservoirs, I can see they had mixed numbers in  
11 the tables. So it's just something you have to be  
12 careful with when you're looking at those values.

13 Q. And sometimes it's not specified at all as to  
14 whether it's active or --

15 A. Sometimes it's not specified, it just says  
16 reservoir storage.

17 Q. Now, you included in the Exhibit 557 these  
18 earlier reports. Why was it important for you to do  
19 that?

20 A. What was that again? I'm sorry.

21 Q. Why was it important for you to include the  
22 earlier reports on the size of Tongue River Reservoir  
23 in this Exhibit --

24 A. The 1941, '42, '43?

25 Q. Yes.



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Direct Examination (Cont.) by Mr. Draper

1           A.    I thought they gave a fair history of what  
2 had gone on there with the capacity, that the early  
3 reports indicated there was some problems with the  
4 survey.  An error has been made in calculating the  
5 capacity.  And they were unsure what that capacity was.

6                   And then by '43, it appeared that they had  
7 corrected that error.  Because that number of 73,900  
8 carried forward from that point up until the time that  
9 the '48 survey was conducted.

10           Q.   How much time was spent in the 1948 survey  
11 and actually making the survey in the field at the  
12 reservoir?

13           A.   They started in late August and went through  
14 early December.  So it was over three months' time that  
15 they were working on that in the field.

16           Q.   Was that a considerable amount, or how did  
17 that compare with typical times to devote to a  
18 sedimentation study?

19           A.   Compared to others that I looked at, it was a  
20 considerable time.  I think they were trying to do more  
21 than they would do in a normal survey.  They were using  
22 this as somewhat of a research project so they could  
23 identify how much sediment entered a reservoir over  
24 time and use that for planning purposes in the future,  
25 as well as determine what the capacity of the reservoir

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Direct Examination (Cont.) by Mr. Draper

1 was in 1948 and also in 1939.

2 Q. Let me turn your attention to page 3 of that  
3 1949 report, which is designated as M557E, and  
4 particularly to the report page No. 3, which has a  
5 Bates number of MT016951.

6 A. Okay.

7 Q. Does this page of the 1949 report show the  
8 conclusions of the sedimentations study that was  
9 achieved by this survey?

10 A. Yes. There under description of the lake, it  
11 basically summarizes a conclusion.

12 Q. And for our purposes here, what were the  
13 important conclusions?

14 A. The second paragraph in that -- second  
15 sentence in that paragraph, it states, "Its present  
16 capacity is 69,439 acre-feet. And its original  
17 capacity was 72,510 acre-feet. The loss of capacity  
18 due to sedimentation is 3071 acre-feet."

19 Q. Is the documentation of that conclusion shown  
20 in Figure 14 beginning in the exhibit at -- this is --  
21 I think it's about three pages before the end of the  
22 exhibit? It has Bates No. MT016981?

23 A. Yes. Figure 14 includes both reservoir  
24 capacity curves for the original capacity as of 1939  
25 and the capacity of as of 1948. And then it includes a

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Direct Examination (Cont.) by Mr. Draper

1 table that shows those capacities from the streambed up  
2 to the spillway crest, both for the '39 survey and the  
3 '48 survey. And it indicates there in the note that in  
4 addition to the work that they did, they also looked at  
5 the data furnished from the original survey or  
6 furnished by the Montana State Water Conservation  
7 Board. So they had that information available as well.

8 Q. Looking at the table on that page, where does  
9 it show the conclusions that were summarized in the --  
10 on page 3 of the report that we looked at just a minute  
11 ago?

12 A. Where they -- the top of that table where it  
13 says "spillway crest elevation 3424.4," they show for  
14 the original survey, they show that capacity of 72,510.  
15 And then over in the 1948 survey, they show the  
16 capacity of 69,039. And also, they show the dead pool  
17 down where they say tunnel inlet sill, show the dead  
18 pool in the original capacity as 1950, and the dead  
19 pool for the '48 survey as 1400 acre-feet.

20 Q. Now, part of this figure is a chart, which in  
21 the exhibit has been split into three. The other parts  
22 are shown on the next two pages. But we have prepared,  
23 and I provided to the Special Master and Wyoming the  
24 other day, a copy of the entire graph.

25 Could you -- and I would like to point out

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1 and have you confirm that the table we were just  
2 looking at is part of this entire graph. It's at the  
3 right-hand side of the graph; is that right?

4 A. Right.

5 Q. Can you describe what is shown by the curves  
6 here and how it relates to the table we just looked at?

7 A. Well, the figures that are on the table are  
8 represented graphically on this graph for both the  
9 capacities and the area. What the graph does is allow  
10 you to look at more precise elevations and get a  
11 capacity for that elevation. So you could -- you would  
12 have to work your scale up -- you know, the scale there  
13 is every ten feet. But you could interpolate between  
14 those elevations and go over to the curve and determine  
15 what the capacity was at that specific elevation.

16 Q. And are the various curves for the original  
17 and current capacities shown there?

18 A. Yes. Both of them are shown on that graph.

19 Q. Those are the solid lines that are designated  
20 either capacity 1948 or capacity original 1939 in  
21 parens?

22 A. Yes. And the '48 has the X marks, and the  
23 '39 has that triangle mark on the graph. And then you  
24 also have the -- for each of those elevations, there's  
25 an area of the lake, and that's the dashed lines below

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1 those solid line curves.

2 Q. And at the far right on those curves, do you  
3 see the maximum figures that you quoted to us out of  
4 the table?

5 A. If I get to the right part. Yes, that goes  
6 up -- see on the left of the table, it is identified  
7 the crest elevation is 3424.4. So you follow that  
8 over. And then they have written in the numbers, the  
9 storage numbers for those -- for that elevation, for  
10 the two curves. 72,510 and the 69,439 acre-feet.

11 Q. Based on your review of this study and your  
12 experience, do you believe that the results of this  
13 survey provide an accurate set of reservoir capacity  
14 figures for Tongue River Reservoir?

15 A. I think for the time it's as accurate as any  
16 I've looked at, broken into five-foot contours, which  
17 was typical for that time. We now do it a lot more  
18 precise. But that was -- with the tools they had, I  
19 think they did a very good job with it.

20 Q. And was the purpose of this study to  
21 determine how the reservoir capacity had changed over  
22 time?

23 A. Yes, that was the primary purpose, was  
24 determine how much sediment had accumulated in the  
25 reservoir which would change the capacity.

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1 Q. And as a result, they determined both the  
2 original capacity and the then current capacity  
3 accurately, in your view?

4 A. In my opinion, yes.

5 Q. Have you seen this study referenced in the  
6 official annual reports of the Yellowstone River  
7 Compact Commission?

8 A. Yes. That was one of the things that raised  
9 my interest in it. In the 1954 report where they  
10 listed the storage capacities, they footnoted Tongue  
11 River. And at the bottom, they said that it was based  
12 on a 1948 survey. So I knew the reservoir had been  
13 resurveyed since it had first been constructed. And I  
14 wanted to see if I could find information about that  
15 survey.

16 Q. Let me ask everyone to look at Exhibit J4, if  
17 you please. That's Joint Exhibit No. 4. The 1954  
18 annual report. If you have a copy, do you see that is  
19 dated December 15, 1954?

20 A. Right.

21 Q. And this is going to be easy. I'd ask you to  
22 look at the very last page of this report. It's  
23 designated Appendix D on the upper right-hand corner.  
24 And it has a Bates number of WY014709.

25 MR. DRAPER: Your Honor, do you have a copy

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1 of that?

2 SPECIAL MASTER: Go ahead.

3 MR. DRAPER: Okay.

4 BY MR. DRAPER:

5 Q. I think it's shown on the screen; is that  
6 right?

7 A. It is.

8 Q. What do you see on this page, Mr. Aycock,  
9 that verifies what you were just referring to?

10 A. On the right of the table is the Tongue River  
11 Reservoir monthly storage values. And there's a  
12 footnote A on the heading. And you go down, footnote A  
13 says, "Contents based upon sedimentation survey of  
14 October 1948."

15 I guess I might add that it was common, at  
16 least on our reservoirs, that when we did a survey,  
17 we'd like to, if possible, start the new year with that  
18 new survey table. So our records would switch from the  
19 old survey to the new survey on October 1st, the water  
20 year, start of water year. And I think that's why they  
21 identified October 1948. That was the date they  
22 applied it.

23 Q. And looking at the beginning of this exhibit,  
24 page 2, this is Bates No. WY014693. This is the  
25 signature page for the transmittal of this report. And

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1 is it signed by the state engineers for Wyoming and  
2 Montana, Mr. Bishop and Mr. Buck?

3 A. Yes. And they were also the commissioners at  
4 that time for the compact committee.

5 Q. Were they also the leaders of the delegation  
6 of their two states in the negotiations that resulted  
7 in the compact?

8 A. Well, it's been a long time since I looked at  
9 that, but that's what I recall from the records we had  
10 in our offices. Those were the two that were involved  
11 in the negotiations.

12 Q. And have you had occasion to review  
13 subsequent annual reports of the Yellowstone River  
14 Compact Commission to determine whether this reference  
15 to the 1948 Bureau of Reclamation sedimentation survey  
16 continued?

17 A. I've looked at most of those reports, you  
18 know, not every one. But I kind of followed it up  
19 through, I believe, 1994, that footnote continued up  
20 until that time. And then they -- it was probably  
21 about the time they started on the modifications. And  
22 so the footnote was dropped after that.

23 Q. So for many years, the 1948 survey by the  
24 Bureau of Reclamation that we've just been looking at  
25 was referred to in the official annual reports?



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1           A.    Well, at least it referred to the 1948  
2 survey, which would seem to be the Reclamation survey.

3           Q.    Is there any other survey, to your knowledge,  
4 it could have been?

5           A.    No.  No, other than the original one back in  
6 1939.

7           Q.    And this was identified as 1948; correct?

8           A.    Right.

9           Q.    From your experience, with respect to  
10 reservoirs and their water right, what is the  
11 importance of the original capacity of a reservoir?

12          A.    Well, my experience with water rights, you  
13 know, when you file a water right, it's based on that  
14 original construction.  So you have a -- you know, your  
15 water right, at least whether the reservoir is full,  
16 that's the point where it's -- it reaches its full  
17 level.  Now, the water right might be a different  
18 number if it's -- you allow a second fill.  But that is  
19 the capacity that is usually accepted as available for  
20 storage.

21          Q.    And is that true of states, including Montana  
22 and Wyoming?  In your experience.

23          A.    Yes.

24                MR. DRAPER:  Your Honor, I'm ready to go on  
25 to the next subject, and I'm perfectly happy to do

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1 that. Just want to have you direct me as to whether  
2 you want me to do that now.

3 SPECIAL MASTER: How long do you think the  
4 next subject is likely to be?

5 MR. DRAPER: It's going to be a major  
6 subject, so it's not something we can finish. But I'd  
7 certainly be glad to start it if that's your pleasure.

8 SPECIAL MASTER: No. Why don't we go ahead  
9 and break for today. And then we'll come back at  
10 9:00 a.m. tomorrow morning. So how much longer do you  
11 think your -- how long do you think your direct  
12 examination will be from this point?

13 MR. DRAPER: I'm estimating an hour and a  
14 half, Your Honor.

15 SPECIAL MASTER: Okay. And then the other  
16 two witnesses? You have two other witnesses tomorrow  
17 that are listed right now. And I can't remember, I  
18 haven't taken a look to see how long you estimated for  
19 these two witnesses. But your best guess is that  
20 tomorrow you'll finish Mr. Aycock, and I keep trying to  
21 avoid pronouncing Carmine's last name.

22 MR. DRAPER: LoGuidice.

23 SPECIAL MASTER: And Mr. Knapp?

24 MR. DRAPER: That's our present expectation,  
25 yes, Your Honor.

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1 SPECIAL MASTER: Okay. Mr. Kaste?

2 MR. KASTE: I'm hopeful we can get through  
3 Mr. LoGuidice and maybe Mr. Knapp.

4 SPECIAL MASTER: It would be great to get  
5 through everybody on that list tomorrow. I think we're  
6 all agreed on that? The only question I have is, is  
7 there any chance we'd be through Mr. Knapp tomorrow?  
8 And no one seems too confident of that.

9 MR. KASTE: I think it would be unlikely that  
10 we would get to our next witness after Mr. Knapp by the  
11 end of the day.

12 SPECIAL MASTER: Okay. Great. Then what we  
13 will do tomorrow, then, is certainly finish Mr. Aycock  
14 and definitely get into Mr. Knapp. And with any luck,  
15 we will finish it.

16 You've sort of moved in this direction,  
17 Mr. Kaste, as if you were either anxious to get out or  
18 you have another matter you want to discuss.

19 MR. KASTE: Both, at the same time, as usual.  
20 I was going to hand John, I have prepared the exhibits  
21 I intend to introduce through Mr. LoGuidice and  
22 Mr. Knapp. I haven't been paying too close attention  
23 about the process of advising you in advance of which  
24 exhibits we're anticipating. I was either going to  
25 give it to Mr. Draper to make sure he's all right with

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1 me giving it to you or the courtroom deputy.

2 SPECIAL MASTER: I would suggest, in addition  
3 to giving it to Mr. Draper, if you can give it to the  
4 courtroom deputy. Then what she will do is pull those  
5 exhibits for me tomorrow. And that way I'll have all  
6 those exhibits up here in front of me.

7 The only other thing that I was thinking  
8 earlier today is particularly when we have a witness  
9 that has a lot of different exhibits, not surprisingly  
10 it seems to take a lot of time to have that witness  
11 sort of look for the particular exhibit. And so I'm  
12 actually wondering whether it makes sense for the  
13 witness -- to actually hand the witness each of the  
14 exhibits in turn. I obviously want a full list so I  
15 have them all up here and I can be shuffling through  
16 sometimes when the witness is answering the question.  
17 But it might actually be easier to give the witness the  
18 exhibits one by one.

19 MR. KASTE: That's my intention.

20 MR. DRAPER: I think you might be right, Your  
21 Honor.

22 SPECIAL MASTER: And, again, it will depend  
23 on the witness. It might be an expert that wants  
24 everything up there at the same time. But I think for  
25 most of the witnesses, it will probably be easier to

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1 give them to them one by one. And I appreciate the  
2 fact that we're really trying hard to keep track of all  
3 these exhibits. I know there are a lot and a lot of  
4 times it's difficult for the witnesses.

5 MR. DRAPER: It may depend if there's just a  
6 few exhibits, it's not a big deal. If there's a whole  
7 stack, then we need to approach it differently.

8 SPECIAL MASTER: Understood. It will depend  
9 on the particular witness. But it was just another  
10 suggestion to move this along.

11 So thank you very much. And I will see you  
12 all tomorrow morning at 9:00 a.m.

13 (Trial Proceedings recessed at  
14 4:38 p.m., October 28, 2013.)

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## REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 261, 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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