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December 13, 2012

By U.S. Mail and Email

Barton H. Thompson, Jr., Special Master  
Jerry Yang and Akiko Yamazaki  
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**Re: Montana v. Wyoming & North Dakota,  
No. 137, Orig., U.S. Supreme Court**

Dear Special Master Thompson:

I am writing in response to your inquiry during the telephonic status conference earlier today regarding a paragraph in the Second Declaration of Richard M. Moy, which was attached to Montana's Supplemental Evidence Pursuant to Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Summary Judgment ("Supplemental Evidence").

It turns out that there is no typographical error. We have spoken with Mr. Moy, and he has clarified that the statement in the part of ¶ 35 on page 8 of his Second Declaration that reads, "I believe I informed Wyoming that Montana was not receiving sufficient water to satisfy its pre-1950 water rights in the following years: 1988, 1989, 2001, and 2002, when Montana was unable to fill the Tongue River Reservoir," was intended to refer to that subset of years in which Tongue River Reservoir clearly did not fill. This is consistent with the more general statement on page 6, ¶ 24 that during "informal meetings from 1987 to 1989, I personally informed Wyoming water officials that Montana was not receiving sufficient water to satisfy its pre-1950 water rights." In 1987, Montana was not receiving sufficient water to satisfy its pre-1950 water rights because its direct flow rights were not being satisfied, not because Tongue River

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**REPLY TO:**

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Reservoir was not filling. Therefore, it was appropriate to exclude 1987 from the reference in ¶ 35, which only included years in which Tongue River Reservoir clearly did not fill.

In addition, during the status conference, the issue whether Mr. Moy's communications in 1987, 1988, and 1989 constituted calls or demands for water was discussed. In line with your ruling that notice need not take any particular form, I call your attention to the deposition testimony of Mr. Moy, which was incorporated by reference into Montana's Supplemental Evidence, and which is attached hereto for convenience. In his deposition, Mr. Moy testified that he considered his communications to be a verbal call or demand to curtail water use in Wyoming. Moy Depo. 102:7 – 103:15, 105:11-25, 230:7-19. For example, Mr. Moy testified as follows:

Q. But would you agree with me, when you describe the kind of complaints and the process in the '80s versus what happened in 2004, where you got together, you wrote a letter, you got the governor's approval and sent a letter mentioning the governor's name and so forth, that was a different kind of request?

A. No. It was actually, from my perspective, it was the same.

Q. But did you make the same kind of demand?

A. Verbally, yes.

Moy Depo. 102:7 – 103:15

Q. It's a call. What was the meaning, definition of that word? Do you know what that meant in that letter, what it was intended to mean, the word call?

A. The word call is we think Wyoming should shut off and make sure they're not developing or using post-50 water to the detriment of our pre-'50 water. And the call was to ensure water was to cross the border to satisfy our pre-'50 water rights.

Q. Was there a contact previously in the '80s, because we've eliminated 1990s –

A. Okay.

Q. – where the call was made on Wyoming in that sense of the word?

A. Yes.

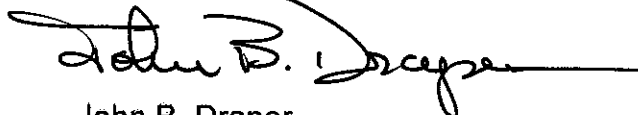
Moy Depo. 105:11-24.

We were able to confirm with Mr. Moy that this testimony applies to his communications to Wyoming water officials in 1987, 1988 and 1989.

Barton H. Thompson, Jr., Special Master  
December 13, 2012  
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Mr. Moy is traveling today but has expressed a willingness to confirm the foregoing in a further filing, if that would be helpful.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John B. Draper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John B. Draper

JBD:dlo  
enclosure

cc: w/enclosure  
Richard M. Moy  
Peter K. Michael, Esq.  
Jennifer Verleger, Esq.  
Jeanne S. Whiteing, Esq.  
Solicitor General of the United States  
James DuBois, Esq.  
James Dragna, Esq.  
Michael Wigmore, Esq.  
Jennifer Anders, Esq.

No. 137, Original

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THE SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA,

Plaintiff,

-vs-

STATE OF WYOMING and STATE OF NORTH DAKOTA,

Defendant.

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BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

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DEPOSITION OF RICHARD MOY

Helena, Montana

Wednesday, April 18th, 2012

9:00 - 11:57 A.M.

Exhibit X

1:00 - 4:14 P.M.

APPEARANCES:  
 MONTGOMERY & ANDREWS  
 Attorneys at Law  
 325 Paseco de Peralta  
 Santa Fe, New Mexico 87501  
 By: JEFFREY WECHSLER (Videoconference)

and

JENNIFER M. ANDERS  
 State of Montana  
 Assistant Attorney General  
 Appellate Legal Services Bureau  
 215 North Sanders  
 Helena, Montana 59620-1401  
 Attorneys for the Plaintiff, State of Montana.

PETER K. MICHAEL  
 State of Wyoming  
 Chief Deputy Attorney General  
 123 State Capitol  
 Cheyenne, Wyoming 82002  
 Attorney for the Defendant, State of Wyoming.

ALSO PRESENT: Bern Hinckley, Consultant  
 David Willms, State of Wyoming (Videoconference)  
 Andrew Kuhlmann, State of Wyoming (Videoconference)

1 BE IT REMEMBERED that on Wednesday, April 18th,  
 2 2012, at the hour of 9:00 A.M. of said day, at 215 North  
 3 Sanders, Helena, Montana, and before Joan P. Agamenoni, a  
 4 Notary Public for the State of Montana, pursuant to Notice,  
 5 the deposition of RICHARD MOY was taken on oral  
 6 interrogatories.

7  
8 Thereupon,

9 RICHARD MOY,  
 10 having been first duly sworn to tell the truth, the whole  
 11 truth and nothing but the truth, testified upon his oath as  
 12 follows:

13  
14 EXAMINATION BY MR. MICHAEL:

15 Q Mr. Moy, state your full name, please.

16 A Richard Marshal Moy.

17 Q I'm going to jump in to questions in a minute,  
 18 but I wanted to make sure that everybody was cleared up on  
 19 a few housekeeping things, what we've done. I think we're  
 20 in pretty good shape on exhibits. What I'm planning to do  
 21 is I have paper copies for you, which may be a little  
 22 easier to read than staring at the screen. So if I talk  
 23 about exhibits, I think I'll be giving you a paper copy,  
 24 and probably leave them with the court reporter, at least  
 25 for this deposition. And we can work out how we may do

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1 that in the future.

2 A Okay.

3 MR. MICHAEL: The other thing I want to mention  
 4 to Jeff Wechsler. I may have some questions about some  
 5 Montana statutes, and we have a statute book here. I'll  
 6 have a copy for you to take a look at. I want to mention  
 7 it to Jeff, if you need to follow along at some point, if  
 8 you have a book, you're in great shape. So let me know if  
 9 there is a problem there.

10 MR. WECHSLER: I have access to West Law, so I  
 11 should be able to access it. Thanks.

12 MR. MICHAEL: Then the other thing we have, we  
 13 have a map. At the compact meeting last week, our folks  
 14 had a map to be produced, it was a large map, that Montana  
 15 had generated, we think. And we'll talk about it in a  
 16 little bit, but we have a large copy of it here, Jeff. And  
 17 I'm not sure that we've actually sent that to you. So that  
 18 may be one that is missing out of the stack.

19 MR. WECHSLER: Yeah, that's fine. I'll be able  
 20 to follow along as necessary.

21 MR. MICHAEL: I think with that, the other thing  
 22 that we've gotten, we did receive Mr. Moy's resumé, and I  
 23 have a copy of that. And so I don't think I'm really going  
 24 to do -- it was great to get it, because it helps and saves  
 25 a lot of time. I don't know that I'll make it an exhibit.

1 A My understanding of the compact was one of the  
2 key provisions was to make sure both states provided a  
3 foundation for the existing water rights pre-'50 and  
4 post-'50.

5 Q Foundation, what do you mean a foundation?

6 A A documentation of the water rights.

7 Q Go ahead and set that aside.

8 A Okay.

9 Q You can certainly pass it to Jennifer.

10 A Thanks.

11 Q Let's start talking about this declaration, and  
12 we'll start at the very beginning. And I think we've  
13 already established this was your declaration, and you  
14 affirmed that this was true and correct when it was signed  
15 by you?

16 A That is correct.

17 Q And I think we don't need to talk about the first  
18 paragraph. The second paragraph we've already talked about  
19 I think. Let's talk about the third paragraph a little  
20 bit. Are you with me?

21 A Yeah.

22 Q It says, "During my 1981 to 2008 tenure as DNRC  
23 water management bureau chief, I had the responsibility for  
24 oversight of the Yellowstone River Compact for Montana and  
25 attending meetings of the Yellowstone River Compact

1 states on an equitable basis based on the actual language  
2 of Article 5. And so we presented a lot of ideas to  
3 Wyoming and tried to work with Wyoming on them. And one of  
4 the things was, when we put a prototype together, and I  
5 worked with David, Dan Ashenberg joined us. And when we  
6 put that prototype together, they said it looks good,  
7 develop it for the Tongue River. We did that. And we  
8 couldn't get Wyoming to move forward at all on accepting  
9 anything or accepting any assumptions, period. They had no  
10 desire to do anything.

11 Q And on Wyoming's side was Lou Allen and Jeff  
12 Fassett at that time?

13 A Lou Allen, Jeff Fassett, George Christopoulos. I  
14 think there was somebody else too. Was there a Clem Lord?

15 Q Clem Lord. How about John Bullock?

16 A Yeah, and John too. Haven't heard that name in  
17 about 30 years.

18 Q So just generally, because we can go back and  
19 look at a lot of records and a lot of things that were sent  
20 back and forth. Generally what was Montana's position on  
21 5A back in the '80s of how 5A should be administered  
22 between the states?

23 A We felt pretty strongly back in 1981, at least I  
24 did, that Wyoming should not be able to develop any  
25 post-'50 water until pre-'50 water was satisfied in

Commission."

2 Let's start with the first part of that sentence.  
3 Describe for me your responsibility for the oversight of  
4 that compact.

5 A Most technical analysis dealing with the  
6 Yellowstone River Compact were within my jurisdiction.

7 Q And what do you mean by technical analysis? Can  
8 you give me examples of what that means?

9 A An assessment of how to make Article 5 work, for  
10 example.

11 Q So discussions in the '80s about say between Gary  
12 Fritz and George Christopoulos of Wyoming or Gary Fritz and  
13 Jeff Fassett of Wyoming, involving how you would allocate  
14 5B, what we could call 5B water, water that was being used  
15 for post-'50 rights, that was a major area of discussion in  
16 the '80s that required technical analysis?

17 A It was both pre-'50 and post-'50.

18 Q And what kind of technical analysis then did you  
19 engage in? Let's talk about the '80s just now. I know  
20 it's a long time ago. What kind of technical analysis did  
21 you work on to try to get that going?

22 A We tried to figure out how to make the  
23 apportionment work, Article 5, and what type of assumptions  
2 we would have to make in order to see how to make that  
2 thing actually be able to apportion water between the two

1 Montana.

2 Q What do you mean by the --

3 A Not developed, to use post-'50 water.

4 Q That was going to be my question. So in a  
5 particular water year, how would that actually play out?  
6 How would you administer?

7 A We felt that Wyoming should not be diverting  
8 post-'50 water to the detriment of pre-'50 water rights in  
9 Montana.

10 Q So in a particular date, if there were pre-'50  
11 water rights on the Tongue River that weren't being  
12 satisfied in Montana, those uses should be curtailed in  
13 Wyoming to make that whole?

14 A That's correct.

15 Q While we're on that topic, I'll find a number for  
16 you. By the way, anytime you need to take a break, we'll  
17 be taking plenty of breaks. We're not going to carry this  
18 on to that degree.

19 A Okay.

20 Q I have in my notes. I'll find a number and give  
21 it to you. Okay. 13736, can you find that? It's Montana  
22 13736.

23 Jeff, we'll be looking in the Montana  
24 subdirectory of 13736.

25 MR. WECHSLER: Thank you.

1 have minutes that were more carefully, that would say what  
 2 happened better. Did that kind of get wrote into the  
 3 annual reports to where the annual reports got better  
 4 because of the minute process?  
 5 A That is right.  
 6 Q Because I did notice that much, I noticed the ten  
 7 years with Floyd Bishop in the '70s, the annual reports  
 8 were pretty truncated not much; is that accurate?  
 9 A That's accurate.  
 10 Q But then in the '80s, things became longer, and  
 11 the governor letter became more beefy.  
 12 A Because it's important to know what happened  
 13 historically, and I wanted to make sure that that record  
 14 was out there.  
 15 Q And so when you were going to -- there would be  
 16 an agenda for one of these meetings; right?  
 17 A Uh-huh.  
 18 Q Typically. Was that true in the '80s and '90s?  
 19 A Uh-huh, yes.  
 20 Q And 2000s, of course, there were agendas; right?  
 21 A Yes.  
 22 Q And after the meeting, at these meetings, did you  
 23 personally take notes?  
 24 A In the '80s I think, when I attended, I did.  
 25 Q And do you have any idea what became of them?

1 A Grady Moore.  
 2 Q Let's take a quick look, you say '79 was your  
 3 first year or --  
 4 A That is correct.  
 5 Q And that was Christopulos for Wyoming, Gary Fritz  
 6 for Montana and Grady Moore --  
 7 A Right. Okay.  
 8 Q -- from the U.S. would be those years. And then  
 9 Moore was actually the commissioner for a long time until  
 10 Bill Horak. Do you recall that?  
 11 A I wasn't there too often with Bill Horak. I was  
 12 there when Grady Moore was there.  
 13 Q My notes show that Horak was 1990 through 1997?  
 14 A Okay.  
 15 Q And, then, so it's '97 was Jack Stults' first  
 16 year --  
 17 A Okay.  
 18 Q -- after Gary Fritz.  
 19 A That was '97. No, I have couldn't remember. You  
 20 tell me 1997?  
 21 Q Yes.  
 22 A Okay.  
 23 Q Still Fasset for Wyoming, but Stults came on to  
 24 replace Gary Fritz.  
 25 MS. ANDERS: Pete, Can you identify what you're

1 A Absolutely not. Like everything else, when I  
 2 retired, I think I cleaned out everything. No.  
 3 Q When you say cleaned out, that would have been  
 4 something in your office, I take it? You wouldn't take it  
 5 home, would you?  
 6 A I don't think, when they became minutes, I don't  
 7 think I kept anything at the time. I never kept anything.  
 8 Q So you were pretty confident in the minutes and  
 9 the annual reports then, that they covered what they needed  
 10 to cover, and didn't need to save the notes?  
 11 A I think they were reasonably accurate, to the  
 12 point where both commissioners could sign them. But I  
 13 didn't finalize them. The USGS chair had the  
 14 responsibility for finalizing those minutes.  
 15 Q Who would do that? The secretary generally or  
 16 also the U.S. commissioner?  
 17 A I would have to go back and think. At the times,  
 18 the USGS chair had somebody sitting in the meeting taking  
 19 down notes. And you would have to just go back and check  
 20 the reports and see actually who was involved.  
 21 Q I was just looking, because I think I have a list  
 22 her somewhere of different commissioners, and it might be  
 23 helpful. Sorry, I'm a little disorganized here.  
 24 A What is Grady's last name?  
 25 Q Grady Moore?

1 looking at?  
 2 MR. MICHAEL: Just notes, personal notes of the  
 3 commission. We can double check.  
 4 Q (BY MR. MICHAEL) I don't want you to agree with  
 5 stuff. If I'm in the ballpark. I'm just trying to help us  
 6 put the conversation a little bit --  
 7 A Well, I'm learning something here, because I  
 8 couldn't recall.  
 9 Q How about James Kircher, he became the U.S.  
 10 representative of '99, and my notes show that he was  
 11 through 2004, and then Horak came back.  
 12 A Okay.  
 13 Q Does that ring a bell? Do you remember Kircher?  
 14 A You know, I can't recall. I wasn't -- probably.  
 15 Q Well, 2004 would have been important meeting,  
 16 that was a drought year.  
 17 A Yeah, he was probably there. I wasn't paying too  
 18 much attention to who the USGS person was at those  
 19 meetings.  
 20 Q All right. Let's go to Paragraph 4 of your  
 21 declaration. I'm going to break this sentence up, as I ask  
 22 the questions. "During the period 1981 to 2008, pre-1950  
 23 water rights in Montana experienced shortages." Let's stop  
 24 right there. Well, let's go on, just a little bit. "Not  
 25 only in 2004 and 2006, but also in other years." And I

1 wanted to ask you, you wrote this in 2011. What other  
2 years did Montana pre-'50 experience shortages?

3 A If I recall, I thought like 1981, '82, '85. I  
4 just remember that we were going through drought cycles,  
5 and my staff was responsible for dealing with doubt issues  
6 in the state. And so I'm thinking '81, '82, '84, '85  
7 were doubt years, for example.

8 Q Well, you've said, so far you said '81, '82, '84,  
9 '85?

10 A I didn't say '84.

11 Q Oh, you didn't?

12 A No, I did not. '81, and I have to go back and  
13 check, and '85 clearly were two drought years.

14 Q Any others that come to mind?

15 A You know, there's so many drought years in there,  
16 that we were working on drought issues in the state. But I  
17 would have to go back and check the USGS record and tell  
18 you specifically what years they were.

19 Q Well, when you have drafted this or signed this  
20 declaration last fall, did you check at that time?

21 A You know, I just know we were working on  
22 significant drought issues for so many years, that it  
23 become almost common to have these droughts. So I  
24 was running between two meetings at the time when we were  
25 putting this together, and just acknowledged that we were

1 experiencing severe drought and were implementing our  
2 drought statute almost consistently because of concerns.  
3 So what I would do right now, I would go back to the USGS  
4 records and tell you specifically exactly what years. It  
5 would be easy to check.

6 Q But that wasn't my question. My question was,  
7 when you drafted this, signed this declaration, on  
8 September 22nd of 2011, had you checked recently before  
9 that --

10 A No.

11 Q -- to see the years?

12 A No. I remember '81, '85, and I just knew, I did  
13 not check the records, but I knew we were in significant  
14 droughts during that period.

15 Q And those were the years that you had in mind  
16 when you said other years, the ones that you just said?

17 A And the fact that we were in significant drought  
18 during that period in this state, dealing with the drought  
19 statute, that I know.

20 Q And what period, when you say that period?

21 A Well, okay, and again --

22 Q That was a long period, '81 to --

23 A I understand that. What I would do is go back to  
24 see the USGS records and tell you very specifically which  
25 years those were.

1 Q I guess what my question is, I just want to be  
2 clear on this, when you signed this declaration, you must  
3 have had some other years, you may have had other years in  
4 mind, maybe you didn't. I want to know what you had in  
5 mind.

6 A I just recalled there was a lot of years, as I  
7 just said, we experienced severe drought in the state of  
8 Montana and on the Tongue, Powder and Yellowstone. Could I  
9 tell you specifically each and every year what they were,  
10 no. Would I have to go back and recheck them, yes. I  
11 did not do that.

12 Q Now, you say there was drought in some of those  
13 years, and we all know that. This isn't a debatable point.  
14 There were droughts. My question is your declaration says  
15 pre-'50 water rights in Montana experienced shortages in  
16 those other years. So I guess my question is what were you  
17 basing that on that they had experienced shortages, pre-'50  
18 rights had experienced shortages?

19 A What I recall is discussions with Art Hayes and  
20 Roger Muggli and others. Could I tell you specifically  
21 which years, no. Did I have a lot of discussions with  
22 them, yes.

23 Q And just for our purposes, when we talk today,  
24 the distinction, to me there's a distinction, you can tell  
25 me about if I'm right or wrong, if you just say there's a

1 drought, that doesn't necessarily tell me which water  
2 rights we're getting water out of. I mean some person's  
3 definition of drought may be post-'50 water rights are  
4 getting nothing, but pre-'50s are satisfied.

5 A You're absolutely correct. That's very easy to  
6 check by looking at the flow data at the border.

7 Q When you use the term drought, does that mean  
8 that --

9 A Surface water supply index -- excuse me, I'm  
10 sorry.

11 Q No. Go ahead.

12 A Use the surface water supply index and the Palmer  
13 drought index, which we have used quite extensively in this  
14 state.

15 Q Is the Palmer drought index based on soil  
16 moisture? Is that the factor for the entire basis?

17 A Yes.

18 Q And what was the other one?

19 A Surface water supply index actually relates to  
20 water supply within its drainage basin classified as  
21 irrigated water within that drainage basin.

22 Q What is the control or base line that that is run  
23 off of?

24 A Excuse me.

25 Q Is it run off of average years? Is it run off of



1 Q So I guess my next question is going to be,  
2 during the period of '81 to 2008, Montana, according to  
3 this, your declaration, Montana believed that pre-'50 water  
4 rights in Montana were experiencing shortage, and they were  
5 caused by Wyoming's overuse under the compact. Have I  
6 paraphrased that correctly?

7 A I think so. That's correct.

8 Q So my first question is who in Montana believed  
9 that? And I'm not talking about individual. I'm talking  
10 about in state government, who believed that?

11 A I think I did. And I think there was a general  
12 perception by us who had been involved trying to get to  
13 administer the compact, in any given way, we were unable  
14 to -- we were not successful even to get Wyoming to agree  
15 to basic assumptions. There was absolutely zero desire by  
16 Wyoming to actually administer the contract. Wyoming was  
17 very polite. They were very nice, very courteous to us.  
18 But when it came to actually administering the compact,  
19 they were not willing to do so. The second thing is, just  
20 for example, in 2006 it was hardly any flows crossing the  
21 border. And I remember flying into Sheridan, and on our  
22 side of the border, it was nothing, there was no  
23 irrigation. Going across the border, it was almost like an  
24 oasis, everything was green. And I heard from Wyoming,  
25 well, we're cutting down -- we're administering water

1 have to talk to the witnesses, other witnesses.

2 A Sure.

3 Q Who, besides yourself, believed what you said you  
4 believed in Paragraph 4?

5 A You know, I don't want to say. You need to talk  
6 to them and ask them.

7 Q Well, let me ask you this: You were in the  
8 middle of these discussions --

9 A I was.

10 Q -- over this whole time period. Who do you  
11 recall that echoed that belief in discussions that you had?

12 A Well, you know, I prefer you talk to them.

13 Q I don't know who they are, until you tell me.

14 A Well, you ask them.

15 Q I don't know who they are.

16 A You have them. You have most of them that you  
17 identified that you're going to do depositions from.

18 Q Well, okay, let's go through the ones I'm going  
19 to take depositions of. I may talk to Gary Fritz about  
20 this.

21 A Talk to Jack Stults.

22 Q Okay, Jack Stults. Is there anybody else that  
23 shares --

24 A Talk to Mary Sexton about it.

25 Q Who else? Anybody else?

1 rights down to 1860s and 1870s. They weren't administering  
2 any water rights in the main stream of the Tongue River.  
3 And they finally admitted it. The Tongue River, they were  
4 not administering the main stream of the Tongue River.

5 Q Let me ask you this: On the date that you signed  
6 this declaration, what years do you believe that Wyoming's  
7 overuse caused Montana to experience shortages?

8 A Did I go back, after I retired, and recheck those  
9 years, no. Would I, could I do that, yes.

10 Q But I'm asking you as of this, well, today, you  
11 would have to check records to be able to say so today; is  
12 that correct? You're not prepared today to supplement  
13 this?

14 A No. But I would have to go back and check the  
15 flow data. I do know '85 was a good example.

16 Q So '85, it's your belief that in 1985,  
17 Montana experienced shortages of pre-'50 rights because of  
18 Wyoming's overuse, did that happen in 1985?

19 A That's one specific date that I can remember.  
20 But I -- perception being away from this 25 years, yeah,  
21 there were a lot of other years.

22 Q And what do you -- well, we haven't finished the  
23 question. You told me what you mean believe. I was asking  
24 who believed this. And once you got on to yourself, you  
25 said why. But I want to go back to who, because we always

1 A Talk to Chuck Dalby in my old staff.

2 Q Are you saying that Chuck Dalby shared that  
3 belief?

4 A I believe he did.

5 Q Who else?

6 A He was actually hired to work on the Yellowstone  
7 River Compact. He was doing most of the work under the  
8 compact. So he would be the key staff person.

9 Q When was he hired to work on the Yellowstone, do  
10 you recall?

11 A '85. And before that was Dan Ashenberg, now  
12 called Dan Buffalo.

13 Q I saw that. I wondered. It had to be the same  
14 person.

15 A It was.

16 Q Good for him. What was Dalby's, what was he --  
17 you say he worked on the Yellowstone River Compact. What  
18 is his area of expertise? Is he a hydrologist?

19 A He's a hydrologist.

20 Q We talked a little bit by looking at that first  
21 exhibit about how you interpreted the compact, the pre-'50,  
22 post-'50 thing and so forth. So I'm wondering you use the  
23 phrase Wyoming's overuse in your declaration here in  
24 Paragraph 4. How did you use that phrase? What did you  
25 intend that to mean in the declaration?

1 A Well, since 1950, Wyoming has developed  
2 additional waters and storage and converted from flood to  
3 sprinkler irrigation and expanded irrigation. And nothing  
4 has changed in the compact since it was signed. It has  
5 never been administered. Nothing had ever been done to  
6 protect pre-'50 rights in Montana under the compact. There  
7 was actually zero desire by Wyoming to do so.

8 Q When you say nothing had been done to administer,  
9 you put that in the past sense. Did you mean up until  
10 2004, until the letter to 2004?

11 A To my knowledge, no, nothing has ever been done.

12 Q As of when? As of 2005?

13 A. 2004 was the first time. And I don't think they  
14 did anything in 2004. Did they do anything in 2004?

15 Q I don't know, you're saying they.

16 A Wyoming.

17 Q We'll get to that. Obviously you know there was  
18 a lot of discussions in 2004, you were involved in those;  
19 correct?

20 A There were a lot of letters sent back and forth,  
21 but I doubt any action on the ground.

22 Q So I guess, again, my question, though, is I'm  
23 trying to make sure I have a full understanding of what you  
24 meant in this declaration by Wyoming's overuse. You said  
25 that Wyoming, for example, changed from some flood to

1 action, into beneficial use. For example, let's say in  
2 Custer County, Montana, on the Powder River, somebody went  
3 to the courthouse in 1937 and filed for a water right in  
4 Montana. They could do that; right?

5 A Sure.

6 Q But they didn't actually develop their water at  
7 all. They said I have the water right, and then waited  
8 until 1970 and put in their headgate and irrigated what  
9 they said they were going to do. Did Montana have a  
10 position on whether that was a pre-'50 or post-'50?

11 A Well, the issue is due diligence and a  
12 presumption of abandonment or not. And you would have to  
13 talk to the legal staff on that one.

14 Q Well, I'm just asking you did Montana have a  
15 position on that? Is that something that Montana took a  
16 position on throughout your tenure?

17 A I felt if Wyoming's 1940, they filed all these  
18 permits in 1940 with a clear understanding that they were  
19 trying to get around a pre-'50 water right issue, yeah, I  
20 was concerned.

21 Q But just on that general issue, though, whether a  
22 water right that was not put into beneficial use until  
23 after 1950, but was established on paper, whether in  
24 Montana or Wyoming before 1950, did Montana take a position  
25 on that, when you were involved in the commission?

1 sprinkler irrigation. Did Montana do that as well?

2 A Yes.

3 Q If a pre-'50 water right changes from flood to  
4 sprinkler irrigation, was it your concept then, at least in  
5 the 2000s, that that was an overuse, necessarily created an  
6 overuse?

7 A No, not necessarily. In Montana specifically you  
8 look at that as potential overuse, but not under the  
9 compact, no.

10 Q What about expanding, adding new acreage to  
11 post-'50 water rights; is that overuse?

12 A Putting in new irrigation with 1940 permits --

13 Q Well --

14 A -- in 2000, probably that might be considered  
15 overuse, yes.

16 Q Well, let me ask that question, because you raise  
17 an issue. During the 2000s, what was your view as --  
18 you've written a lot about this compact, and you were kind  
19 of in charge of this compact for Montana in a sense, it's  
20 fair to say that, isn't it?

21 A Well, up to a point. Not too much in the 1990s,  
22 no.

23 Q You've done a lot of research about this compact.  
24 What has Montana's position been with respect to a water  
25 right that's permitted, but not necessarily put into

1 MS. ANDERS: I'm going to object. I think it's  
2 been asked and answered. Go ahead and answer it.

3 THE WITNESS: Excuse me, go ahead, Jennifer.

4 MS. ANDERS: I just objected. I think he stated  
5 that you should talk to the legal staff.

6 Q (BY MR. MICHAEL) Let me say this for this  
7 deposition. Maybe we need to take a break about now. An  
8 answer that says talk to somebody else is actually not an  
9 answer. An answer is, if you know, you answer the  
10 question. And if you don't know, you don't answer the

11 question. And I'm going to insist on answers. If he says  
12 he doesn't know, we move on. But he doesn't get to dictate  
13 who I get to ask the question to. And I probably will talk  
14 to the other people, and I do want to know who they are.  
15 But if you know the answer, I need to know the answer, if  
16 you have it, your best answer for each question.

17 A I'm going to say I don't know the answer. You  
18 need to talk to the legal staff.

19 Q (BY MR. MICHAEL) So you don't recall Montana  
20 taking a position on that issue?

21 A Was there a specific position taken on the issue,  
22 no.

23 Q Did you discuss that issue with other people for  
24 compact purposes within the DNRC?

25 A Yes.

1 River is not gaining a lot of water, no.

2 Q But did you make that assumption, I guess is my

3 question? You say it's a fair assumption. Did you make

4 that assumption?

5 A I look at the gauge at the border and what is

6 flowing into the Tongue River dam. And I've actually been

7 on the Tongue River in drought years when the flow

8 downstream to the confluence is dry, almost dry, completely

9 drive, hardly any water at all. And so based on seeing the

10 river system, I assume there's not a lot of gains in that

11 river system.

12 Q Is there a separate gauge for inflow at the

13 reservoir versus the state line gauge on the Tongue?

14 A There is, I think so.

15 Q What is the distance between them, do you know?

16 A You know, I cannot tell you specifically. I

17 think it's pretty close, but not that far apart.

18 Q Are there any water rights, Montana water rights

19 between those two points?

20 A I can't tell you. I would have to go back and

21 check the map, and I haven't looked in many years.

22 Q So purposes of this declaration, you didn't check

23 on those issues we just talked about really?

24 A That's right. One of the assumptions that I did

25 make is that, based on historical usage in the state of

1 A I did.

2 Q -- Wyoming overuse affecting pre-'50s in Montana?

3 A I did.

4 Q So when you say started looking at the issue, can

5 you kind of tell me what kind of things you did to look at

6 the issue and maybe when those things occurred?

7 A For example, Wyoming's water development program

8 was very intimately involved in development of storage and

9 new irrigation projects in Wyoming. They were very

10 interested in building the storage project on the Powder

11 River system. The heritage report identified what they

12 wanted to develop as far as new irrigation development,

13 what they felt they could develop under the compact. What

14 I saw occurring in the state of Montana on many river

15 systems on new irrigation development and EQUIP and other

16 federal programs, I assumed also was occurring in the state

17 of Wyoming. And the basic fact that the compact had never

18 once been able to get to first base to figure out how to

19 even administer that compact. We couldn't even

20 get agreement on basic assumptions with Wyoming.

21 Q Well, you agreed on administering the state line

22 ditches; correct?

23 A That's a nonissue, for all practical purposes.

24 Q Why is that?

25 A Well, because it didn't really affect water

1 Montana from 1950 to 2006, we have seen extensive

2 irrigation development. And after we did a heritage report

3 and other reports from Wyoming and water development

4 commission, I made an assumption that you had also

5 increased irrigation development in the state of Wyoming.

6 Q If you wanted to confirm that assumption, what

7 would you do?

8 A I would do some GIS mapping.

9 Q Would you look at water rights filed in Wyoming

10 as well?

11 A No, I would actually use GIS data and look at

12 actually what is occurring on the ground.

13 Q Did Montana do that when you were working

14 for Montana during the 2000s, do that GIS mapping of

15 Wyoming?

16 A We started it. We did not complete it.

17 Q When did you start that, Montana start that?

18 A I don't know. I think 2008, 2007.

19 Q After the letter of 2006, for example, the call

20 letter?

21 A You know, I cannot recall specifically. I mean I

22 truly can't recall when we started looking at this issue.

23 Q When you say you start looking at the issue, I

24 mean you've said in your declaration, I think here today,

25 between 1981 and 2008 you felt there was an issue of --

1 supplies. It was a procedural issue to ensure that those

2 water rights are taken into account. But it didn't really

3 affect the volume of water to any significant degree as far

4 crossing and affecting the pre and post-rights, no.

5 Q But on, at least on one of those state line

6 ditches, there are Montana pre-'50 rights on those ditches;

7 right?

8 A You know, I looked at those cases 20 years ago.

9 I haven't checked on any of them. I can't tell you

10 specifically what they even involve at this stage in the

11 game.

12 Q But if there was a large pre-1950 water right or

13 even a small one on an interstate ditch, it would be very

14 high up on the system in Montana, would it not, because it

15 takes off in Wyoming, it's probably not going to go very

16 far; correct? Is that your understanding?

17 A I don't understand that question.

18 Q All right. I'm just talking about water, okay.

19 A Okay.

20 Q Does the interstate ditch say the water takes out

21 at a headgate in Wyoming, just south of the Montana border

22 off the Tongue River and that ditch goes downstream, and it

23 supplies different lands?

24 A In Montana?

25 Q Well, some of them supply lands in Wyoming and

1 that particular year?

2 A I would be concerned if it's a valid water right.

3 Q And would it be an invalid water right if --  
4 well, even if it's a valid water right and the rancher went  
5 on vacation that year and did not want the water.

6 A That one year?

7 Q Yeah.

8 A I don't know why.

9 Q Well, I don't know why either, but let's say he  
10 did. He wanted to leave his land fallow for whatever  
11 reason, he had a family emergency, I don't want to ranch, I  
12 don't want to irrigate this year.

13 A I'm not going to superimpose -- I'm not going to  
14 guess on an issue when I don't know if it's a reality or  
15 not.

16 Q Well, what I wanted to ask, though, when  
17 these kind of issues, I assume a lot of hypotheticals come  
18 up when you're talking about making a call on Wyoming.

19 A There's a lot of hypotheticals, but the basic  
20 assumption on how to develop a framework on looking at  
21 pre-'50 and post-'50 rights, we couldn't even agree to the  
22 basic assumption. What is actually truly pre-'50, what is  
23 actually being irrigated, and what is actually post-'50 we  
24 could not even agree on.

25 Q What I'm asking you --

1 A So why would I take that second step and look at  
2 administration, when we couldn't even get through the first  
3 step.

4 Q Well, my question does go to the first step,  
5 because what I'm trying to understand is what was Montana's  
6 position and over your long tenure with respect to how it  
7 would want to be administered, what was it proposing to  
8 Wyoming? Was it saying, look, we have a pre-'50 right, in  
9 a particular year, if a rancher in Montana doesn't use that  
10 pre-'50 right, we will not call based on that right for  
11 water, because it's not going to be used, was  
12 that something that was proposed by Montana?

13 A No, because it hadn't even gotten to that point.  
14 But I can tell you right now, if it had gotten to that  
15 point, every single pre-'50 right in Wyoming and Montana  
16 was actually being used, then we would include those. Any  
17 post-'50 rights, we would identify very specifically what  
18 those post-'50 rights were. But we would ensure pre-'50  
19 rights were satisfied first, bona fide pre-'50 rights that  
20 were actually beneficial use versus post-'50 rights that  
21 were not -- versus post-'50 rights that were being  
22 satisfied, to my knowledge, in Wyoming.

23 Q So you didn't send this affidavit, but Art Hayes'  
24 affidavit went with -- well, you kind of did in a sense, it  
25 went with the letter in 2004, and you were heavily involved

1 in that letter, correct, the call letter?

2 A Right.

3 Q And Art Hayes' affidavit went along with it. His  
4 affidavit attaches a degree from 1914.

5 A Right.

6 Q That wasn't presented to Wyoming, was it -- or I  
7 should ask this in a better way. Was that presented to  
8 Wyoming as this is the water rights that are actually being  
9 used on the ground in Montana and are unsatisfied this  
10 year? Is that what that was intended, do you know?

11 A I think the intent was to show most of those  
12 rights, those decreed rights, I assume, yes. That those  
13 are decreed rights. Those rights, that they were bona fide  
14 rights to beneficial use of the water that were pre-'50  
15 prior to Wyoming using post-'50 rights. Now, if there was  
16 -- and the Tongue River was going through the adjudication  
17 process. If there was one of those rights that determined  
18 it was abandoned, I think the Court would address that.

19 Q Was there an available list of rights between '14  
20 and '50, at that time, to send to Wyoming, do you know?

21 A I think -- I don't think those rights were sent.  
22 I think -- well, well, maybe they were. I can't recall,  
23 but obviously there's a listing of those rights.

24 Q Well, that's my question. Was there a listing of  
25 the rights as of May 18th, 2004?

1 A Yeah, there's a listing of those rights.

2 Q Where would the listing be?

3 A That would be part of the statewide adjudication  
4 program. They would have a listing of those rights. They  
5 were turned in with prime fascia evidence as a right. So I  
6 assume that they're there.

7 Q So that would be one to pose to who in the  
8 adjudication, Kerbel?

9 A No. It would be the person that actually  
10 controls the database and all those water rights. We were

11 actually getting -- I remember we were getting lists of  
12 water rights, pre-'50 rights, post-'50 rights, and that  
13 were tied to the adjudication, and those are available.

14 Q Did Montana actually send somebody out in the  
15 field, for example, shortly before May 18th, 2004, to go up  
16 and down the river and check which water rights were valid  
17 and existing?

18 A Where?

19 Q On the Tongue River.

20 A In Montana?

21 Q In Montana only, of course.

22 A In Montana, I think the water commissioner did.  
23 That was his job.

24 Q In 2004?

25 A Well, I would have to go back and check.

1 Q Well, you have his affidavit from 2006. Do you  
 2 know whether there was a commissioner --  
 3 A You know, back in 2004, I would have to read. I  
 4 mean I have to go back and read Art Hayes's.  
 5 Q Well, we can read that. We have limited time  
 6 here, so I'm not going to ask you to read it on your own  
 7 motion, if there was something in there. I was wondering  
 8 if you knew. If you don't know, tell me and we'll probably  
 9 find it from somebody else.  
 10 A You want me to talk to that, okay. It just says,  
 11 enclosed is May 15th, 2005, which is 10 to 20 percent of  
 12 average.  
 13 Q Art Hayes, I assume, was not -- do you know  
 14 whether -- he wasn't a commissioner out there, was he --  
 15 A No.  
 16 Q -- ever. Okay. So he wouldn't have been a  
 17 commissioner?  
 18 A No. He would be more interested in filling the  
 19 Tongue River Reservoir and meeting the rights downstream  
 20 from the reservoir.  
 21 Q Let's do this, let's go back to the second page  
 22 of the declaration, because I don't want to -- we have to  
 23 get a feel for the times, but I want to go back a little  
 24 bit. I'm looking at the second sentence of Paragraph 4.  
 25 You say, "Montana's representatives complained to Wyoming's

1 Q Can you give me an idea which ones may have  
 2 happened that never showed up in a report?  
 3 A If I pushed it, they probably showed it. If I  
 4 didn't push it, they probably did not show up.  
 5 Q Why didn't you push it?  
 6 A Huh?  
 7 Q If you thought it was important, why wouldn't you  
 8 push it.  
 9 A I said if I was there, I would try to push it. I  
 10 don't sign those documents.  
 11 Q Well, if you pushed that issue with Gary Fritz,  
 12 would he have added it to the annual report or try to push  
 13 it?  
 14 A You would have to ask him. I'm not going to  
 15 speak for Gary Fritz.  
 16 Q Well, you worked with him for many, many years.  
 17 A Yeah, but I won't speak for Gary Fritz.  
 18 Q Let me ask you this about your relationship: Did  
 19 you have a good working relationship with Gary?  
 20 A During the early years, we had a very good  
 21 working relationship, yes.  
 22 Q If you felt strongly about something from  
 23 Montana, did he generally, in most cases, take that into  
 24 strong consideration?  
 25 A I think you ask him, because I would hate to

1 representatives about this." And I assume what you meant  
 2 in your declaration about this was Wyoming's overuse over  
 3 various years causing shortages in pre-'50s in Montana.  
 4 A That is correct.  
 5 Q And so in this sentence you say, "They complained  
 6 about this not only in '04 and '06, but also in other  
 7 years." Can you tell me about those other complaints in  
 8 other years?  
 9 A Well, there was discussions and comments that the  
 10 technical committee has been trying to address the issue of  
 11 how to apportion the flows in the drought years, when we  
 12 drive into Wyoming and see everything is lush and green,  
 13 and on our side of the border it is not. So we have had a  
 14 lot of discussions over this over the years in the '80s.  
 15 Q Where were the discussions? You were privy to  
 16 some of those, I take it, because you just described them.  
 17 A Yeah, I'm trying to figure out who we had all  
 18 those discussions with. I don't think it's new that we had  
 19 those discussions with folks in Wyoming, yes.  
 20 Q Did you have them at compact commission meetings?  
 21 A I think in some compact commission meetings we  
 22 had those discussions in really low flow years.  
 23 Q Would they be important enough to probably show  
 24 up in the compact commission reports?  
 25 A Some of them yes. Some of them probably not.

1 speak for him. But my impression is I think he was  
 2 concerned.  
 3 Q Do you remember particular instances where you  
 4 pushed this issue, but didn't show up in the annual report?  
 5 A You know, I had to, just right now, refresh my  
 6 memory on the annual reports, and I was just doing it  
 7 before this meeting started, because I hadn't checked on  
 8 them, well, some are 1980s, so that's 32 years. Can I  
 9 recall, no.  
 10 Q But I mean this declaration, so you understand,  
 11 this declaration is important. It was filed in Montana.  
 12 So what is said in here is important.  
 13 A It is very important.  
 14 Q So for us we want to use this the best we can --  
 15 A But you want a very specific fact, on this year,  
 16 on this year, on what I said on that point and that point.  
 17 I cannot tell you. If perception of what is in here is  
 18 absolutely correct, yes.  
 19 Q But just to give you context, the reason I asked  
 20 for specific facts are, this is important in terms of what  
 21 years we will be litigating in this case. The special  
 22 master has held that. So I want to try to isolate the  
 23 years as much as I can.  
 24 A I would tell you what I would do, I would go back  
 25 and check the flow records at the international border -- I

1 that might have been?  
 2 A I don't, I can't.  
 3 Q George Pike?  
 4 A Who?  
 5 Q George Pike?  
 6 A George Pike was the U.S. district chief.  
 7 Q He was in that group?  
 8 A Yeah, he was probably in the group too.  
 9 Q This article, correct me if I'm wrong, but it  
 10 looks to me a summary of what happened with regard to  
 11 Article 5 in '85 was a discussion of coming up with an  
 12 administrative procedure for the compact between the  
 13 states, right, some kind of model?  
 14 A Yeah.  
 15 Q Is there -- I don't see anything here. If you  
 16 can find it, I mean I don't see anything in '85 that says,  
 17 Wyoming, we've got a problem, you're stealing our water  
 18 kind of thing or anything even remotely approaching that.  
 19 A Approaching what now?  
 20 Q Approaching that, Wyoming, we want you to cut  
 21 back on your water use, so we can get some water, or that  
 22 that happened during the year. This is in November, of  
 23 course, but that had happened that year. I don't see  
 24 anything that indicates that.  
 25 A You know, one of the things we try to do is keep

1 compact. You just said that, and you were frustrated about  
 2 that.  
 3 A Absolutely.  
 4 Q But my question is about complaints about  
 5 particular years when Montana felt it wasn't getting  
 6 sufficient water and Wyoming caused that by violating the  
 7 compact. That's a different complaint. Do you understand  
 8 the distinction?  
 9 A I understand the distinction.  
 10 Q So all I'm trying to get to is, when were those  
 11 complaints made by Montana other than '04 and '06, because  
 12 you've said it happened in other years.  
 13 A Okay. It happened, every time there was a  
 14 drought year or the flows were very low on the Tongue and  
 15 the Powder Rivers, there were complaints. And, for  
 16 example, we worked with the Powder River folks on our side  
 17 of the border. And if they could get one supply of  
 18 irrigation water, they felt really lucky, only one supply,  
 19 because of water quality. And all we were getting was all  
 20 this high salt water coming out of Salt Creek, Powder  
 21 River. And all of the good quality water Wyoming was using  
 22 on Clear Creek and the good tributaries. And the  
 23 interesting thing is that water quality problems, one,  
 24 there was a lack of water. And the second thing the water  
 25 was very high in chloride. The only two sources of

1 a positive frame, if we figured that, if we could actually  
 2 get Wyoming to move forward in an administrative process,  
 3 that we would do whatever we could do to move through it.  
 4 And sometimes we were nice.  
 5 Q So it might happen in '85. It might not happen.  
 6 You don't have documentation that it happened on the  
 7 report?  
 8 A All I remember is I became extremely frustrated  
 9 over the years, not being able to move forward with Wyoming  
 10 at all on developing administrative procedures for Article  
 11 5. And is that all going to be recorded in the minutes of  
 12 these meetings, of course not. Is that based on verbal  
 13 conversations with everybody involved in this issue over  
 14 years, yes.  
 15 Q Let's go back to your declaration.  
 16 A Okay.  
 17 Q If you move back, let's go back to the  
 18 declaration part. I think you're stuck on Art Hayes there.  
 19 Go ahead and go back to the second page.  
 20 A I'm on the second page.  
 21 Q You're in the right place. What I was trying to  
 22 focus on, though, was the substance of Montana's  
 23 complaints. And I guess I'm just, here's the question I  
 24 guess, you say that Montana complained about Wyoming not  
 25 participating in discussions about how to administer the

1 chloride was secondary oil recovery, which was discharging  
 2 all of that water into the Powder River that crosses the  
 3 border on our side. And that is according to the USGS. So  
 4 in many years when we were working with those folks, they  
 5 were not getting even one full supply of water during  
 6 irrigation system.  
 7 Q Working with your Montana --  
 8 A The Powder River irrigators.  
 9 Q When you say folks, that's who you mean?  
 10 A Actually meeting with those folks. And then the  
 11 other issue is not being able to fill the Tongue River dam  
 12 just once.  
 13 Q So I understand the concerns in Montana. My  
 14 question, though, again was about, you said there  
 15 were complaints made. I'm just trying to figure out who  
 16 they were made to and who made them on behalf of Montana?  
 17 A To the state engineer, we made that verbally to  
 18 the state engineer.  
 19 Q Who made them? You say we. Who is we?  
 20 A I made complaints. I would assume, and you need  
 21 to ask Gary Fritz and Jack Stults, I assume they did, but I  
 22 did. And then the thing is you need to quantify what is  
 23 pre-'50 and what is post-'50 and get that information. We  
 24 couldn't even go more than that far back then.  
 25 Q And on the Montana side, you quantified who was

1 pre-'50 and who was post-'50 on the Powder?  
 2 A We were in the process of trying to get through  
 3 the adjudication program. And I wasn't in charge of the  
 4 adjudication. If I were, I would have expedited it even  
 5 faster. I mean the Powder River was the first basin, and  
 6 the Tongue River was set as a priority basin, even though  
 7 it was still ongoing. But the prima facie evidence was  
 8 there and submitted by the claims.

9 Q Let me ask, you said that, though. The prima  
 10 facie evidence submitted oh, by the Powder River folks to  
 11 make their claims for water rights?

12 A And also on the Tongue River.

13 Q I understand. So you say that complaints were  
 14 made orally, these complaints that we're talking about in  
 15 Paragraph 4, were made orally to the state engineer of  
 16 Wyoming?

17 A Well, and the bottom line was what did we  
 18 actually accomplish on developing administrative  
 19 procedures, nothing.

20 Q But my question is, I'm talking about  
 21 the complaints now. I understand your administrative  
 22 procedure concerns. We've talked about that quite a bit.  
 23 But these complaints to the Wyoming state engineer, which  
 24 state engineers of Wyoming were the complaints made to?

25 A George Christopoulos first.

1 Q And that would have been in the early '80s?

2 A Early '80s.

3 Q Late 70's? What about Jeff Fassett?

4 A I think we probably sent them also to Jeff  
 5 Fassett.

6 Q Sent them in writing?

7 A No, no, told verbally.

8 Q You say we again. You or somebody else?

9 A I guess I did, and I would assume, I'm pretty  
 10 sure, you need to ask them whether they said anything, but

11 Gary Fritz and Jack Stults.

12 Q You recall them specifically saying something?

13 A I can't recall specifically, because I can't  
 14 recall what happened one meeting to the next meeting at  
 15 this stage in the game, no I can't.

16 Q How about Stults to Tyrrell, that's more recent,  
 17 in the 2000s, were there oral complaints, other than '04  
 18 and '06? I know there were lots that went on in those  
 19 years. I've got documentation.

20 A You know, if you read the report that we put  
 21 together way back in '89, it's pretty clear there's a lot  
 22 of frustration, based on that point in time, that we  
 23 weren't able to get anywhere with Wyoming.

24 Q And that was your frustration?

25 A That was my frustration.

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 5 Fassett.

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 18 and '06? I know there were lots that went on in those  
 19 years. I've got documentation.

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 21 together way back in '89, it's pretty clear there's a lot  
 22 of frustration, based on that point in time, that we  
 23 weren't able to get anywhere with Wyoming.

24 Q And that was your frustration?

25 A That was my frustration.

1 Q But, again, I'm trying to get as much  
 2 information, so I can follow up with others as necessary --

3 A Okay.

4 Q -- as to what complaints were made to Wyoming by  
 5 who in Montana and who received them, and a best guess  
 6 estimate of when they may have been made and what context.

7 A Most of them were verbally. And I'm not going to  
 8 say -- could I remember the person next to me, whether he  
 9 was part of the discussion with them, I can't even remember  
 10 who was even at the meetings, how could I recall what was  
 11 said at those meetings. But I know what I said and what I  
 12 was concerned about, and in all of these discussions about  
 13 why do you think we wanted to set up administrative  
 14 procedures in the first place. For our health, no. We  
 15 wanted to protect pre-'50 rights. We wanted to make sure  
 16 we could protect some rights in Montana to actually get  
 17 this compact to do something besides Article 10. The  
 18 compact does nothing.

19 Q So the meetings that these complaints would be  
 20 made, would that include the annual meetings; or if we  
 21 don't find an annual meeting report, would you say it  
 22 didn't happen and it happened some other time?

23 A Because a lot of times there was a perception by  
 24 the USGS. The USGS, who will not break tie votes between  
 25 the two commissioners, likes everything to be so nice. And

1 so they are the authority responsible for the final report  
 2 that they put out. So what is in the final report is a  
 3 very nice document that says everything works very nice,  
 4 regardless of what happens and the perception on either  
 5 side of the border between the two states.

6 Q Again, I just want to take this one little bit at  
 7 a time. Focusing on what happened in the annual meeting,  
 8 do you recall the kind of complaint that you just talked  
 9 about from some representative in Montana to the Wyoming  
 10 state engineer? I want to just focus on the --

11 A Of course.

12 Q Do you recall that happening at an annual meeting  
 13 or at annual meetings, or was it in some other venue?

14 A It was either in the annual meetings or the  
 15 technical meetings tied to the annual meetings. Sometime  
 16 we had two or three, sometimes a couple of meetings  
 17 associated with the annual meeting where we had those  
 18 discussions, yes.

19 Q And that was in -- '90s is kind of out, because  
 20 you weren't attending those?

21 A I wasn't attending the '90s, I don't believe.

22 Q So this would have been '80s or 2000s?

23 A '80s.

24 Q '80s, okay. And technical, so in the '80s they  
 25 were having the two-day affair where they had the technical

1 meeting and followed by the annual meeting. Did that  
2 happen in the '80s, as far back as the '80s?

3 A Sometimes they were combined. Sometimes I do not  
4 believe they were combined.

5 Q Would they sometimes have technical meetings in  
6 the spring and the annual meeting in November when it's  
7 required by the compact?

8 A I think so.

9 Q So these complaints that we're talking about  
10 happened, may have happened at a technical meeting, do you  
11 think?

12 A I think they probably happened in both meetings.

13 Q How about outside of meetings? I mean were you  
14 present face to face with the Wyoming state engineer at  
15 other kinds of meetings? Did that happen very often in the  
16 '80s?

17 A No.

18 Q So it would have been one of these meetings?

19 A Generally speaking, yes.

20 Q Are you aware of Jack Stults -- well, I shouldn't  
21 say Stults, because he was later. But Gary Fritz or you  
22 picking up the phone with Wyoming and complaining over the  
23 phone that our irrigators aren't getting water, you guys  
24 are at fault?

25 A Generally Gary. If he did it, he did it by

1 in on very discrete facts here, if I can, which is in the  
2 year in the '80s when one of these complaints was made  
3 orally by you or by Gary Fritz to George Christopoulos, for  
4 example, or Jeff Fassett is the Wyoming commissioner, at a  
5 meeting, either the annual meeting or a technical meeting,  
6 would that technical meeting be, in those years, generally  
7 be attached to the annual meeting in November?

8 A I would have to go back. Sometimes they were and  
9 sometimes weren't. Sometimes there was a spring meeting.  
10 I would have to go back and check the records to see back  
11 then when they had them. I cannot tell you.

12 Q But if the spring meeting was in -- were there  
13 spring meetings when irrigation had already started, or did  
14 they tend to have those meeting before the spring --

15 A Again, I can't tell you. I would have to go back  
16 and check the dates on those things. Again, as I just said  
17 to you, we were more interested in figuring out a way to  
18 actually protect those rights than -- again, why would I  
19 look at the flow data, knowing it's an extreme drought,  
20 when we have no ability to protect those pre-'50 rights in  
21 our state.

22 Q So I guess what you're telling me, and tell me if  
23 I'm wrong about this, but what I'm hearing from you is that  
24 generally the complaints that were made in the '80s, and  
25 that sounds to me like what you're referring to in

1 himself. I was not there.

2 Q Do you know whether these complaints occurred,  
3 for example, in the irrigation season where the statement  
4 is made this year this is happening, you've got to do  
5 something about it, Wyoming?

6 A Yes.

7 Q When did that happen do you recall?

8 A Generally when the flows are to the point where  
9 people are not getting their irrigated water at the border.  
10 Can I tell you, no, I can't tell you specifically, but yes.

11 Q Let me throw this out. Let's say in a particular  
12 year there is a technical meeting in April. That wouldn't  
13 necessarily tell you how the water is going to be. It  
14 might, it might not; correct?

15 A Back then we didn't do that.

16 Q Oh, you didn't do that?

17 A No, not really, because we didn't have the  
18 surface water supply index. I don't know if we had the  
19 capability. We were trying to move toward that direction,  
20 but what good is it, if you don't have administrative  
21 procedure developed that actually protects pre-'50 rights  
22 in Montana? Why would you go to take the next step, when  
23 you can't get to cross the first step, which is develop the  
24 procedures.

25 Q My question to you, though, is I'm trying to hone

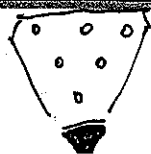
1 Paragraph 4, now we've kind of talked about dates, that in  
2 the 1980s, when this discussion, when the administrative  
3 process was going on, that Montana, you were frustrated and  
4 you were complaining to Wyoming that we need to get this  
5 system done, because we believe that in some of these low  
6 years, Wyoming is overusing and affecting our people.

7 A And I would ask, make one other clear point is  
8 that we heard it from the irrigators from the Tongue and  
9 Powder Rivers, who were continually complaining to us that  
10 they were not getting any water across the border. They

11 were the ones that continually pushed us to get something  
12 from Wyoming, because they were not getting water.

13 Q So you would make that complaint, but it wasn't  
14 really equivalent of the two letters that went out in '04  
15 and '06 that said, Wyoming, you need to change your act  
16 right now to put more water across the border?

17 A You know what we felt we did in 2004, but in  
18 2004, working with the legal staff, we want to make it  
19 really clear the frustration is to the point we're going to  
20 start documenting it. During the '80s, we tried to work  
21 with them. We heard from our water users and irrigators  
22 that they were getting no water in these drought years. So  
23 our first effort is let's see if we can work with Wyoming  
24 to develop the procedures to actually ensure that we can  
25 get that water. We couldn't. They were not willing to do





1 any work with us. They were very nice and very polite and  
2 gave us big cinnamon rolls and everything else. But  
3 actually getting water, no. So I think then in 2004 we  
4 said let's start documenting this. Let's start the  
5 process. We were actually thinking of litigation back  
6 then. We were actually starting the process.

7 Q But would you agree with me, when you describe  
8 the kind of complaints and the process in the '80s versus  
9 what happened in 2004, where you got together, you wrote a  
10 letter, you got the governor's approval, and sent a letter  
11 mentioning the governor's name and so forth, that was a  
12 different kind of request?

13 A No. It was actually, from my perspective, it was  
14 the same. And the reason the difference is is that I could  
15 get Jack Stults to send that letter and move that thing  
16 forward.

17 Q But in the prior years, there wasn't a letter.

18 A No.

19 Q Was there ever a demand that on this water year,  
20 Wyoming, we need you to take action now, in this water  
21 year, so we get water next week or two weeks from now? Did  
22 that demand ever happen in some other type?

23 A I'm trying to think. There was one time where we  
24 actually asked the chair of the commission, and I would  
25 have to go back and reread the minutes, the chair of the

1 commission to actually break a tie vote between Montana and  
2 Wyoming and go back and see whether specifically it was on  
3 this issue or not, because the two chairs, excuse me, the  
4 two commissioners were in disagreement a lot. And no one  
5 was there to actually break that in order to move forward  
6 with implementing the compact. So the only difference is  
7 that we wanted to built a legal foundation for litigation  
8 in 2004 and 2006. Before that, we felt the same way. The  
9 issues were the same. The complaints by the Montana  
10 irrigators were the same. We just didn't do it.

11 Q You didn't do it, do what?

12 A We did not send the letter.

13 Q But did you make the same kind of a demand on  
14 Wyoming?

15 A Verbally, yes.

16 Q And what year did you make that demand?

17 A You know, again, as I said to you, they're all,  
18 all these years are --

19 Q Let me go back a quick second, because I want to  
20 make sure you understand my question.

21 A I understand, okay.

22 Q I'm not talking about whether there was a  
23 commissioner involved or anything. I'm talking about a  
24 communication from a Montana State employee that has  
25 authority to do something about this -- and I think you're

1 one of them maybe. I don't know that -- but you or  
2 Montana's commissioner, where a demand was made on Wyoming  
3 this water year, our pre-'50 water users will not be  
4 getting water in the near future, and we want you to shut  
5 off irrigation in Montana to make this compact work, not  
6 what we want to do administratively, we want to work out  
7 with you. It's we want this done, a demand on Wyoming for  
8 water to cross the border. Do you see what I'm saying?

9 A You're making a clear distinction here, and it's  
10 a good distinction. You're saying did you make that clear  
11 call on Wyoming in the '80s like we made in 2004 and 2006.

12 Q For real time --

13 A Real time.

14 Q -- administration, right now do something, that's  
15 my question.

16 A What we did, there's a slight difference. And  
17 the call was made verbally. It was not in writing, but we  
18 were young. We had just started working for the DNRC. We  
19 were optimistic we could move through administrative  
20 procedures with Wyoming and then have that framework in  
21 place that we could do this every year. Okay. And so the  
22 calls were not the same. The call was we said, yes, our  
23 irrigators are not getting water; yes, we need to make our  
24 pre-'50 rights are being satisfied. Based on 1981 we knew  
25 that was the case. Did we push it like we did in 2004

1 legally, no, because we were still hoping to be able to  
2 develop administrative procedures with Wyoming to allow us  
3 to do that in the upcoming years. And what it turned out  
4 to be, no, we weren't able to get anywhere with Wyoming.

5 Q You used the word call. So I guess we need to  
6 define some terms here, because I don't want there to be  
7 confusion on the record. Do you use the term call in  
8 Montana? Well, in the letter in '04 and '06, it says this  
9 is a call.

10 A The letter says it's a call.

11 Q It's a call. What was the meaning, definition of  
12 that word? Do you know what that meant in that letter,  
13 what it was intended to mean, the word call?

14 A The word call is we think Wyoming should shut off  
15 and make sure they're not developing or using post-'50  
16 water to the detriment of our pre-'50 water. And the call  
17 was to ensure water was to cross the border to satisfy our  
18 pre-'50 water rights.

19 Q Was there a contact previously in the '80s,  
20 because we've eliminated 1990s --

21 A Okay.

22 Q -- where the call was made on Wyoming in that  
23 sense of the word?

24 A Yes.

25 Q Orally on in writing?

1 part of it?

2 A Of course.

3 Q Why don't you get me 12926, Montana 12926. I  
4 think this will follow up on a point that you made a bit  
5 ago, but there's some documentation for it. What  
6 I've handed you is a single page Montana 12926. And it  
7 says it's an e-mail from you to Jack Stults dated  
8 November 30th, 2001 and relating to a Yellowstone compact  
9 commission meeting; is that correct.

10 A Uh-huh.

11 Q Take a second to read that first entry at the  
12 top.

13 A (Witness complies.)

14 Q That message at the top of the page, the first  
15 paragraph from you to Jack Stults, was that what you wrote  
16 on November 30th, 2001?

17 A I assume so.

18 Q Well, is there anything in there that you think  
19 you wouldn't have written?

20 A No. I mean I'm surprised that somebody found a  
21 memo that I actually wrote way back when like this and has  
22 it here.

23 Q There's a lot of documents, believe me. Needles  
24 in haystacks. Is there anything there that you think you  
25 were wrong about, or do you think that was all accurate?

A I think probably if I wrote it, I think probably  
2 it was accurate at the time.

3 Q The reason I ask that, I should rephrase the  
4 question a little. To me it's not all just facts here.  
5 You also have some ideas about what the compact was  
6 intended to do. So there's some opinion?

7 A It's an opinion, right.

8 Q Do you think that opinion is valid and still is?

9 A Be more specific.

10 Q Well, is there anything in here that you think  
11 you would say you disagree with now, maybe you overspoke or  
12 you didn't say it right or you disagree with now or changed  
13 your mind?

14 A I think it's accurate, when I wrote it.

15 Q In your working on this compact over all these  
16 years, I get the impression, correct me if I'm wrong, that  
17 at some point you developed an opinion that this was not a  
18 well crafted compact for Montana's interests?

19 A I don't think it was a well crafted compact,  
20 period.

21 Q And do you think that it also wasn't crafted in  
22 Montana's best interest?

23 A I think it was crafted with the idea of  
24 encouraging water storage projects to be developed at the  
25 interstate border.

1 Q And to date the only one that was developed by  
2 the federal government was the Big Horn Lake; correct?

3 A That is correct.

4 Q That being the case, did that solve the problems  
5 on the Big Horn, as far as you know, do you think it did?

6 A No, not in all years, no. There's still some  
7 problems in the Big Horn, in fact, significant problems in  
8 the Big Horn, yes.

9 Q As far as actually adequate water on the Montana  
10 side for irrigation?

11 A Not completely, no. There's some drought years  
12 and some problems with the Montana side, especially now  
13 with the tribal rights.

14 Q Under the Crow compact --

15 A Right.

16 Q -- recently ratified?

17 A Yes. But can I add one comment? I don't know if  
18 I should or not. But even though I said this, and this, I  
19 think, is true, I thought for a long time we could actually  
20 get the compact to work, if we made some assumptions on how  
21 to take Article 5 to make it work. And there was a way  
22 that we could probably do that. And that was the Dan  
23 Ashenberg protocol.

24 Q I would like you to explain that to me, because  
25 that is -- we can't spend all day on that, but I guess I am

1 interested in what -- well, let me tell you this, and you  
2 can correct me what I think. I've looked at a lot of  
3 documents on what happened in the '80s. And I see, at the  
4 end of the day, Wyoming, at least as far as 5B, Wyoming  
5 took the position, maybe Lou Allen and George Christopolos,  
6 that for 5B purposes we should just apply the formula that  
7 is in 5B, and we have to keep track of these diversions and  
8 count, do the count. And maybe we can't count every  
9 headgate every day, but we count it on a basis and  
10 interpolate how much water was being withdrawn and keep the  
11 count, try to keep the percentages right to any given date.  
12 I understood that to be Wyoming's position.

13 A And that would not work, because it was really  
14 contingent upon building storage and to have that huge  
15 storage reservoir there to satisfy downstream demand.  
16 That's why the point of measurement was at the confluence.  
17 And back then all diversions were flood irrigation. Now,  
18 you have sprinklers with high depletions and no return  
19 flows. And then the issue of industrial development where  
20 there's no return flows. So you're mixing apples with  
21 oranges. Depletions and diversions, they're not the same.  
22 They're different. So in order to put them on both sides  
23 of the border equally and talking the same language is what  
24 we wanted to do. So we wanted to treat Wyoming like we  
25 treated Montana, no differently. They're one in the same.

1 right can use the water later, and that water can't be  
2 called out by somebody that was junior, as long as it was  
3 stored in priority?

4 A What does in priority mean?

5 Q It was stored when no senior on the river, at the  
6 time that no senior on the river was calling for water.

7 A And that river is the entire river system?

8 Q Well, that's the question I have. In Wyoming  
9 that's the law, and that's also the law in Montana.

10 MS. ANDERS: I'll object on the basis that it  
11 calls for a legal conclusion.

12 Q (BY MR. MICHAEL) What I'm wondering is was that  
13 something that was discussed in the evolution of this  
14 letter, what kind of reservoir storage in Wyoming could be  
15 properly called for delivery by Montana?

16 A You know, I can't recall specifically at the  
17 time.

18 Q It says in that paragraph that those waters from  
19 the reservoirs, Wyoming should immediately release them.  
20 But then further down it says, Montana requested immediate  
21 meeting of the technical committee to supervise the release  
22 of the delivery of the water.

23 A Okay.

24 Q And what did Montana have in mind with how that  
25 could be accomplished?

1 congenial. Did we get anything done regarding the  
2 improvement of the administration of the compact, no.

3 MR. MICHAEL: Note to David, when we have  
4 depositions in Wyoming, we're going to have to make sure we  
5 have cinnamon rolls, when we host the depositions.

6 MR. WILLMS: We'll get the biggest ones we can  
7 find.

8 MS. ANDERS: And a nice glass of water to go with  
9 it.

10 THE WITNESS: They're in Sheridan.

11 Q (BY MR. MICHAEL) I've got just an overall  
12 question about the call in 2004. You have told us a number  
13 of times in the deposition you were frustrated, Montana was  
14 frustrated, Montana thought it was time to make a call, and  
15 submit something like this letter, an official letter. At  
16 that point in time was, at least from your standpoint, did  
17 you feel personally that you had a solid grasp that Wyoming  
18 was in violation at the time that this letter went out, or  
19 was the object of this letter really to get Wyoming more  
20 serious to come back to the table and talk about the  
21 compact 5A and even 5B.

22 MS. ANDERS: I'll object to the extent it's been  
23 asked and answered. Go ahead.

24 A No comment then.

25 MS. ANDERS: No, you can answer the question.

1 A Do you know there were some others that were  
2 working on that part as far as releasing the storage out of  
3 the Wyoming reservoirs, and I would suggest you talk to  
4 them, because I was not involved in those discussions, nor  
5 could I recall.

6 Q And who were they?

7 A I would talk to Jack Stults, and I would talk to  
8 Kevin Smith, and I would talk to Chuck Dalby. These notes  
9 always scare me.

10 Q Sorry, don't mean to scare you. If I could read  
11 them, they would be more scary.

12 Let's turn to, did we pull out, I think we  
13 already did, 13210. I have one sitting in front of me.  
14 You must have. It's a draft press release. There it is.  
15 We haven't gotten to it. I want to go to the second page  
16 of that, which is Montana 13211. And the very last  
17 bullet point, you've talked a lot about that today, and I  
18 know how politics works, I guess. But I guess that would  
19 be my question. Here's the governor's office, Governor  
20 Martz saying that Montana had a long -- well, Montana  
21 Wyoming had a long history of working together in a very  
22 positive relationship. Is that contradictory to what  
23 you've said before or nuance here or what?

24 A As I've said, Wyoming was very positive, very fun  
25 to work with, great cinnamon rolls, they were very

1 Q (BY MR. MICHAEL) You have to answer it.

2 A State that, do you mind stating it again quickly?

3 MR. MICHAEL: Well, the court reporter can read  
4 it back. She has the real-time thing here.

5 (Whereupon, the court reporter read back the  
6 requested testimony.)

7 A Well, she did a good job. The answer to that is  
8 yes. The compact has never been administered, has never  
9 been enforced, except for Article 10. There were very  
10 severe drought years between the '80s and the '90s up until  
11 2004. The only way we felt we could get Wyoming to sit and  
12 be, sit at the table and be truly honest in trying to  
13 resolve these issues was to take Wyoming to court. Would  
14 we like to see a creative way, an acceptable way for both  
15 states to agree on how to administer this compact that is  
16 fair and equitable under the terms of Article 5 is what we  
17 were after.

18 Q And so you said yes to the second part of my  
19 question. The first part was did the Montana officials  
20 that put this letter together believe that they had solid  
21 evidence that there was a current violation as of that date  
22 by Wyoming?

23 MS. ANDERS: Again, objection to the extent it's  
24 been asked and answered.

25 A Could I pinpoint, yes, yes, because not so much

1 Q Verbal calls, okay. And then in response to a  
2 question from Mr. Michael, you indicated that there were no  
3 calls made during the irrigation seasons. Is that a fact  
4 that you know about?

5 A No. I think there were probably calls made  
6 during the irrigation season. Verbal calls and discussions  
7 at meetings that we had with Wyoming during those times is  
8 what I think, because I'm not a shy person. And if we were  
9 suffering a severe drought and we are in a meeting with  
10 Wyoming, I would probably be pushing for a call verbally.

11 Q And so certainly the opportunity for that  
12 exchange was there for you to make it known to Wyoming that  
13 Montana was not receiving water or had problems in any  
14 given year?

15 MR. MICHAEL: Objection, leading. You can  
16 answer.

17 A I heard enough from the Powder River water users,  
18 the Tongue River water users all the time how severe the  
19 drought was for them. So, yes, when I met with them, I  
20 always strongly indicated that we needed more water, we  
21 needed to protect our pre-'50 rights.

22 MS. ANDERS: Very good. That's all the questions  
23 that I have.

24 MR. MICHAEL: I have a little follow-up here.  
25

1 Q And you said when those occurred, but we can  
2 confirm that with the reports.

3 A Yeah, you can go back and check when they all  
4 were, and there were quite a few of them over the last 25,  
5 30 years. But any time we had -- a lot of times we would  
6 invite to technical meetings and compact commission  
7 meetings participants from the Tongue and the Powder basins  
8 to be at those meetings, because every meeting we had was  
9 open to the public, nothing was closed.

10 Q In any of those meetings that you just described  
11 where you spoke up for Montana, did you ever say to Wyoming  
12 we need you to immediately stop using some of your water  
13 rights so that water will pass the state line to Montana,  
14 more water will pass the state line?

15 A The actual language I cannot tell you  
16 specifically what the wording was. But the general sense  
17 of it was we really need to protect, we need water across  
18 the border to project pre-'50 rights. And if that meant  
19 you need to cut out your post-'50 rights, then yes.

20 Q So which time did that happen and how many times  
21 do you estimate that happened when you said, when it was at  
22 a time when it was in the irrigation season and there would  
23 be something that Wyoming would immediately comply with by  
24 stopping --

25 A Did Wyoming immediately comply with and stop, no.

1 REEXAMINATION BY MR. MICHAEL:

2 Q The word that was just used in those questions  
3 was the word call. And I want to ask you, you say in the  
4 meetings with Wyoming you were not shy and you would have  
5 called. Can you describe for me, first of all, can you  
6 describe for me particularly what you said to Wyoming on a  
7 particular place or date that would meet what you just said  
8 was called?

9 MS. ANDERS: I'll object to the extent it's been  
10 asked and answered on direct examination.

11 MR. MICHAEL: This is redirect.

12 A As I recall, any time I heard complaints from the  
13 water users in the Powder River and Tongue River basin, and  
14 we had meetings with Wyoming, and a lot of times they  
15 attended those meetings, that I would push Wyoming very  
16 hard to make sure that we could protect our pre-'50 rights.  
17 And if that meant cutting out their post-'50 rights, then I  
18 have no problem saying it and did say it.

19 Q And you just said meetings with Wyoming you  
20 attended earlier today, you said the meetings that you  
21 attended with Wyoming would have been compact commission  
22 meetings --

23 A Yes.

24 Q -- or were technical committee meetings?

25 A Yes.

1 Q My question is were any of those statements made  
2 by you to Wyoming at a time when, first of all, you  
3 expected Wyoming within a short period of time, I'll give  
4 you two weeks to cut back the use of water, to allow more  
5 water to cross the state line?

6 MS. ANDERS: Objection to the extent it's been  
7 asked and answered.

8 A I didn't specify. But did I request, yes.

9 Q (BY MR. MICHAEL) Did any of those times -- so  
10 none of those times did you say or did you ever request --

11 A Yes.

12 Q -- that I want this done, so that within a  
13 two-week or one month period water will cross the state  
14 line, more water will cross than otherwise would?

15 A Did I say to Wyoming, yes, I would like, sure  
16 like to see some water crossing the border to satisfy  
17 pre-'50 rights in Montana, because we're not getting any,  
18 yes. Did I demand, no. Did I say within a two-week  
19 period, no. Did I have authority to say anything beyond  
20 that, no.

21 Q Did you say it at a time when it was actually in  
22 a season when there would be -- where immediate action  
23 could even be taken by Wyoming? Do you see what I'm  
24 getting at there?

25 A Was it in July of this year and I said, because

1 the flows were this, all I can recall is that during those  
2 years where I get pressure from the local water users in  
3 the Tongue and Powder River basin, and we had an  
4 opportunity to meet with Wyoming on those issues, I would  
5 push it on their behalf. Can I specify specifically when  
6 that is, no.

7 Q And pushed on their behalf meaning, Wyoming, we  
8 want you to curtail some of your water users?

9 A Post-'50. We actually said, yeah, probably  
10 post-'50 water users.

11 Q Probably?

12 A That's -- if we could have got post-'50, we would  
13 have been very happy.

14 Q But you personally said we want you to curtail  
15 post-'50?

16 MS. ANDERS: Objection to the extent it's been  
17 asked and answered.

18 Q (BY MR. MICHAEL) Did you say that?

19 A Did I say that, yes, I said it.

20 Q And when?

21 A I can't tell you. I just know I said it. But  
22 when I -- I'm not a shy person, and if you read even -- no,  
23 I'm not a shy person.

24 Q So if you said that, I take it there's  
25 no documentation of you having said that; is that correct?

1 A No, not to my knowledge.

2 Q Not in your possession?

3 A Not in my possession.

4 Q Have you seen any documentation?

5 A I have not seen any documentation. No, I have  
6 not seen any documentation.

7 Q And do you know if the fact that you made that  
8 statement to Wyoming, a Wyoming representative, was ever  
9 reflected in an annual report of Yellowstone River Compact?

10 A They would never be reflected in an  
11 annual report.

12 Q Was it ever reflected in the minutes of the  
13 compact commission?

14 A No. As I said generally the final minutes are  
15 put together by the USGS, and they get the final. And  
16 they're generally very positive.

17 Q Was it ever confirmed with any kind of written  
18 communication to Wyoming any of the statements that you  
19 just discussed?

20 A No.

21 MR. MICHAEL: All right. Thank you.

22 THE WITNESS: Okay.

23 MS. ANDERS: Just two follow-up questions.

24 MR. MICHAEL: She gets more.

25 MS. ANDERS: Just two, just to make sure we're

1 clear here.

2 MR. MICHAEL: She can, she can.

3  
4 REEXAMINATION BY MS. ANDERS:

5 Q Because you hadn't seen any documentation of  
6 those communications, does that mean that those documents  
7 don't necessarily exist?

8 A They could, but I have not seen them.

9 Q And communications with Wyoming, they may very  
10 well have occurred, although you may not have done them  
11 personally or do not recall them at this point?

12 A I can guaranty you that they did occur. Can I  
13 identify when they occurred, no. Is that one of the  
14 reasons that I pushed so hard for the 2004 letter, yes.

15 MS. ANDERS: Thank you.

16 MR. MICHAEL: I have one more follow-up.

17 THE WITNESS: Okay.

18  
19 REEXAMINATION BY MR. MICHAEL:

20 Q Should we bother to look for such a document, or  
21 would it be a waste of time that would confirm one of these  
22 conversations?

23 A I have not seen it documented, and I question  
24 whether they would even want to document it.

25 Q They being who?

1 A Wyoming.

2 Q But let's talk about from Montana's standpoint.  
3 We have, I know, both sides have looked through lots of  
4 records, and I have not yet seen such a document, other  
5 than the '04 and '06 letters. Okay. So I'm wondering if  
6 it's worthwhile for Montana to be looking.

7 A No, I would guess that 95 percent of everything  
8 that was discussed, there are no records on.

9 Q Okay.

10 A Okay.

11 MR. MICHAEL: Very good. Thank you.

12 WITNESS EXCUSED

13 \* \* \*