

No. 137, Original

In The
Supreme Court Of The United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

Before the Honorable Barton H. Thompson, Jr.
Special Master

**Montana's Supplemental Evidence Pursuant to
Memorandum Opinion of the Special Master on Wyoming's
Renewed Motion for Summary Judgment**

STEVE BULLOCK
Attorney General of Montana

JENNIFER ANDERS
Assistant Attorneys General
ANNE YATES
Special Assistant Attorney General
215 North Sanders
Helena, Montana 59620-1401

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
LARA KATZ
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jdraper@montand.com
*Counsel of Record

December 7, 2012

The State of Montana hereby submits supplemental evidence as required by the Special Master in the Memorandum Opinion on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirement for Damages) ("Second Memorandum Opinion"), issued on September 28, 2012.

BACKGROUND

1. The Special Master's Case Management Order No. 8 ("CMO No. 8"), issued August 19, 2011, directed the State of Wyoming to file a motion for partial summary judgment to preclude the State of Montana from claiming damages for any years in which Montana did not notify the State of Wyoming that its pre-1950 appropriators were not receiving adequate water. *Id.*, ¶ 2.

2. Wyoming filed its Motion for Partial Summary Judgment and Brief in Support ("First Motion") on September 12, 2011. Montana filed its Brief in Opposition to Wyoming's Motion for Partial Summary Judgment ("First Opposition Brief") on September 23, 2011.

3. On December 20, 2011, the Special Master issued his Memorandum of the Special Master Opinion on Wyoming's Motion for Partial Summary Judgment (Notice Requirements for Damages) ("First Memorandum Opinion"), in which he reserved final ruling on Wyoming's Motion to allow further discovery. *Id.*, at 11. Wyoming was instructed to file a renewed Motion for Partial Summary Judgment on or before June 15, 2012. *Id.*, at 12; see also Case Management Order No. 10, ¶ 1.

4. On June 15, 2012, Wyoming filed its Renewed Motion for Partial Summary Judgment and Brief in Support of its Renewed Motion for Partial Summary Judgment ("Renewed Motion"). Montana submitted its Brief in Opposition to Wyoming's Renewed Motion for Partial Summary Judgment ("Renewed Opposition Brief") on July 13, 2012.

5. On September 28, 2012, the Special Master issued the Second Memorandum Opinion.

6. In the Second Memorandum Opinion, the Special Master found that Wyoming was entitled to summary judgment for all years except 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. For the years 1987, 1988, 1989, 2000, 2001, 2002, and 2003, the Special Master ordered Montana to provide additional specific information regarding the notice provided to Wyoming in those years. Second Memorandum Opinion, 33-35, 44.

APPLICABLE STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, “[s]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). In ruling on a motion for summary judgment, the Court must view the evidence “in the light most favorable to the party opposing the motion,” and draw all inferences in that party’s favor. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). “[T]he issue of material fact required . . . to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Thus, at the summary judgment stage, the Court “does not weigh conflicting evidence with respect to a material fact” or “make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir 1987).

In this case, Federal Rule of Civil Procedure 56 and the Supreme Court's precedents construing that Rule must be viewed within the unique context of the Court's original jurisdiction. Given the great public importance of cases in the original jurisdiction, the Court has eschewed reliance on restrictive procedures, and has repeatedly emphasized the need for full development of the record. See *United States v. Texas* 339 U.S. 707 (1950) ("The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts") (citing *United States vs. Texas*, 162 U.S. 1 (1896); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Oklahoma v. Texas*, 253 U.S. 465 (1920)). For example, in *Rhode Island v. Massachusetts*, 39 U.S. 210 (1840), the Court explained that in original actions "the most liberal principles of practice and pleading ought unquestionably to be adopted in order to enable both parties to present their respective claims in full strength." *Id.*, at 257. Similarly, in *Virginia v. West Virginia*, 234 U.S. 117 (1914), the Court allowed West Virginia to file a pleading which would have been denied between ordinary litigants:

"As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy." *Id.* at 121.

See also *Iowa v. Illinois*, 151 U.S. 238, 242 (1894); *United States v. Texas*, 143 U.S. 216 (1891); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Wyoming*, 331 U.S. 440 (1947).

Further, in line with these policies favoring full development of the record in original actions, the Supreme Court has expressly cautioned Special Masters that, since they “are neither ultimate factfinders nor ultimate decisionmakers, they should err on the side of overinclusiveness in the record.” Guide for Special Masters 9.

REQUIREMENTS FOR NOTICE

As in his First Memorandum Opinion, the Special Master in the Second Memorandum Opinion stated that, while the Compact requires Montana to give notice to Wyoming that it was not receiving adequate water to meet its pre-1950 uses, such notice need not take any particular form. See First Memorandum Opinion 7; Second Memorandum Opinion 13-14. Thus, in evaluating whether there was adequate notice in any given year, “the focus should be on whether the notice serves the core function of a call – *placing an upstream holder of water rights on notice that a downstream senior is not receiving adequate water under its right and that the upstream user must therefore reduce its diversions in order to allow additional water to flow downstream for the senior’s use.*” Second Memorandum Opinion 13. The Special Master further held that “there is no need for the notice to contain any specific information beyond that needed to meet this core function.” *Id.*, at 14. Nor does such notice need to come from any particular Montana official, so long as it was provided by an official acting within his authority. *Ibid.* Finally, notice does not need to be instantaneous; thus, “[s]o long as Montana acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies, the notice should typically permit Montana to seek damages for the entire year.” *Id.*, at 16. Applying the

standards discussed above, if the evidence supports an inference that, in any given year, a Montana official with authority to do so notified Wyoming of pre-1950 deficiencies, then summary judgment is not appropriate.

MONTANA'S EVIDENCE

Montana maintains that the existing evidence already submitted by Montana in response to Wyoming's First Motion and Renewed Motion is sufficient to preclude summary judgment for 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. That evidence is specifically incorporated herein by reference. However, in compliance with the Special Master's directive in the Second Memorandum Opinion, Montana submits the attached documents, which are summarized as follows:

Exhibit 1: Second Declaration of Rich Moy. Mr. Moy was the Montana Department of Natural Resources and Conservation ("DNRC") Water Resources Management Bureau Chief from 1981 to December 2008. Mr. Moy's Declaration establishes that, in his communications with Wyoming officials, Mr. Moy informed Wyoming that there were water shortages in Montana and requested water to satisfy Montana's Compact rights. These communications occurred during the irrigation season in a number of years in the 1980's and 2000's, including 1987, 1988, 1989, 2001, and 2002.

Exhibit 2: Declaration of Jack Stults. Mr. Stults was the Administrator of the Water Resources Division of DNRC from 1997 until July 2006, and was also Montana's Commissioner on the Yellowstone River Compact Commission. Mr. Stults' Declaration establishes that Montana informed Wyoming that Montana was not receiving sufficient water to satisfy its pre-1950 water rights in the Tongue and Powder River basins in 2000, 2001, 2002, 2003, 2004, and 2006.

Exhibit 3: Selected deposition testimony of Jeff Fassett. Mr. Fassett was the State Engineer of Wyoming from 1987 to 2000. Mr. Fassett acknowledges that meetings of Montana and Wyoming water officials occurred outside of formal meetings of the Compact Commission. While Mr. Fassett indicates that the discussions during these meetings were general in nature, they included water management issues, water conditions and water availability in both States. Mr. Fassett further states that he would have expected other Wyoming officials to be communicating with Montana officials regarding water issues.

Exhibit 4: Selected deposition testimony of Sue Lowry. Ms. Lowry was an official in the Wyoming State Engineer's Office during the relevant years. Her testimony indicates that meetings of Montana and Wyoming water officials occurred outside of formal Compact Commission meetings, during which issues regarding water shortages and Compact compliance were discussed.

Exhibit 5: Montana's First Supplemental Responses to Wyoming's First Set of Interrogatories, Interrogatory No. 58. This supplemental answer describes the Montana officials other than the Montana Compact Commissioner who have or had authority to act on behalf of Montana to make a call, demand or other notification requesting water from Wyoming under the Compact.

Exhibit 6: Selected deposition testimony of Keith Kerbel. Mr. Kerbel's testimony establishes that Montana communicated to Wyoming that it was not receiving water sufficient to satisfy pre-1950 uses in Montana in the relevant years. See Kerbel Depo. at 102:16-21, 107:19 – 108:22, 120:13 – 121:6, 141:13 – 142:13, 142:14, 144:24 - 145:16, 146:2-11, 146:22 – 147:14, 270:19 – 271:9, 272:9 – 273:9, 273:15-25, 274:1-8, 274:1-15, 278:17-25, 279:1-12, 281:19-21, 283:9 – 284:19, 285:8-16, 286:4-16, 286:22-25.

As indicated previously, in addition to the attached documents, the State of Montana incorporates by reference all evidence previously submitted in its Renewed Opposition Brief.

Taken together, the evidence submitted by Montana establishes the following information as requested by the Special Master for the years at issue:

1. The names and positions of Montana officials who provided notice to Wyoming officials:
 - a. For the years 1987, 1988, and 1989: Rich Moy and Keith Kerbel.
 - b. For the years 2000, 2001, 2002, and 2003: Jack Stults, Rich Moy and Keith Kerbel.
2. The names and positions of the Wyoming officials to whom the notice was provided:
 - a. For the years 1987, 1988, and 1989: Jeff Fassett, Mike Whitaker, Carmine LoGoduice, Bill Knapp, Lou Allen, John Shields, and Sue Lowry.
 - b. For the years 2000, 2001, 2002, and 2003: Pat Tyrrell, Mike Whitaker, Carmine LoGoduice, Bill Knapp and Sue Lowry.
3. The substance of the notice(s), including the specific tributary or tributaries to which the notification(s) applied: The communications in each of the relevant years indicated that Montana was suffering shortages to its pre-1950 rights on both the Tongue and Powder Rivers.
4. The date(s) of when the notice(s) was or were provided: The communications occurred during the irrigation seasons in each of the relevant years.
5. The authority of the Montana official(s) to provide the notice: Each of the Montana DNRC officials identified above had authority to provide notice to Wyoming by virtue of their official positions.

CONCLUSION

Montana's evidence is thus amply sufficient to preclude summary judgment in favor of Wyoming regarding notice that Montana's pre-1950 water rights were not being satisfied in 1987, 1988, 1989, 2000, 2001, 2002, and 2003.

Respectfully submitted,

STEVE BULLOCK
Attorney General of Montana

JENNIFER ANDERS
Assistant Attorney General
ANNE YATES
Special Assistant Attorney General
215 North Sanders
Helena, Montana 59620-1401



JOHN B. DRAPER
JEFFREY J. WECHSLER
Special Assistant Attorneys General
LARA KATZ
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
*Counsel of Record

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Montana's Supplemental Evidence Pursuant to Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Summary Judgment was served by electronic mail on this 7th day of December, 2012, and by placing the same in the U.S. mail on December 7, 2012, to the following:

Peter K. Michael
Chief Deputy Attorney General
Jay Jerde
Christopher M. Brown
David Willms
Matthias Sayer
Andrew Kuhlmann
James C. Kaste
The State of Wyoming
123 Capitol Building
Cheyenne, WY 82002

James Joseph Dragna
Bingham, McCutchen LLP
355 South Grand Avenue Suite 4400
Los Angeles, CA 90071
jim.dragna@bingham.com

Michael Wigmore
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006-1806
michael.wigmore@bingham.com

peter.michael@wyo.gov
jjerde@wyo.gov
chris.brown@wyo.gov
matthias.sayer.wyo.gov
david.willms@wyo.gov
andrew.kuhlmann@wyo.gov
james.kaste@wyo.gov

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

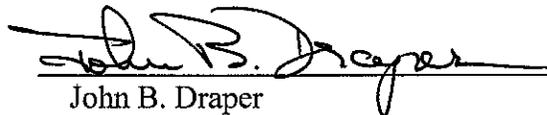
Solicitor General of the United States
U. S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov

Barton H. Thompson, Jr., Special Master
Susan Carter, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 Via Ortega
Stanford, CA 94305-4205
(Original and 3 copies of Certificate of Service
only by Email and U.S. Mail)
susan.carter@stanford.edu

Jennifer L. Verleger
Assistant Attorney General
North Dakota Attorney General's
Office
500 North 9th Street
Bismarck, ND 58501-4509
jverleger@nd.gov

James DuBois
United States Department of Justice
Environmental and Natural Resources
Division of Natural Resources Section
999 18th St. #370 South Terrace
Denver, CO 80202
james.dubois@usdoj.gov

I further certify that all parties required to be served have been served.


John B. Draper

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SECOND DECLARATION OF RICHARD M. MOY

COMES NOW Richard M. Moy, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am over 18 years of age. Currently, I am a Commissioner, appointed by the President of the United States, of the International Joint Commission, U.S. Department of State. The International Joint Commission oversees administration of the Boundary Waters Treaty (1909) with Canada, arbitrates transboundary water disputes and issues orders with regard to transboundary reservoirs.

DECLARATION OF RICHARD MOY
PAGE 1

Exhibit 1

2. I am a former water resources manager for the State of Montana, Department of Natural Resources and Conservation ("DNRC"). I was the DNRC Water Resources Management Bureau Chief from 1981 to December 2008.

3. During my tenure as DNRC Water Management Bureau Chief, I had responsibility for oversight of the Yellowstone River Compact ("Compact") for Montana and attended meetings of the Yellowstone River Compact Commission ("Commission" or "YRCC"). As part of my responsibilities, I was authorized to communicate directly with Wyoming water officials regarding matters related to the Compact, including water shortages in Montana, administration of the Compact, and Wyoming's obligations under the Compact.

4. Over the years, the individuals who attended Commission meetings and worked on issues related to the Compact included Dan Ashenberg, Chuck Dalby, Jim Robinson, and Keith Kerbel. Each of these individuals was also authorized to communicate directly with Wyoming water officials regarding matters related to the Compact, including water shortages in Montana, administration of the Compact, and Wyoming's obligations under the Compact.

5. During my tenure, I generally kept the Director of the Montana DNRC and Montana Compact Commissioner informed of my activities and the activities of my staff.

6. I am familiar with the history of the Compact and its key provisions. In the early 1980s, I undertook an extensive review of the history of Compact negotiations and post-Compact interactions. I have always understood Article V(A) of the Compact to provide protection for water that was necessary to satisfy pre-1950 water rights in Montana. In my view, all pre-1950 rights, including pre-1950 rights in Montana, had to be satisfied before water could be used for post-1950 uses. This meant that Wyoming had obligations to regulate its post-1950 water use to ensure that enough water entered Montana to satisfy Montana's pre-1950 uses. I personally communicated this understanding of the Compact to Wyoming on multiple occasions.

7. During the time that I worked for the State of Montana, Wyoming and Montana had repeated disagreements over the proper interpretation of the Compact. Wyoming water officials took the position that the Compact only divided the available post-1950 water, but Article V(A) did not place any obligation on the State of Wyoming vis-à-vis Montana. In other words, disagreements arose between the two States because

Wyoming officials stated to me and others that Wyoming had no Compact obligation to take any action to regulate or control water use in Wyoming to ensure that enough water was available in Montana to satisfy pre-1950 uses in Montana.

8. Throughout this time, I was acutely aware that Wyoming controlled the amount of water that was available in the interstate tributaries for Montana water users. For that reason, my staff and I made every effort to work with Wyoming to ensure that Montana received its share of water under the Compact.

9. As part of Montana's efforts to ensure that enough water crossed into Montana to satisfy Montana's pre-1950 rights, I made multiple efforts to develop a methodology for administering the Compact that would have required Wyoming to provide sufficient water to Montana to satisfy Montana's pre-1950 rights before Wyoming used water for post-1950 uses.

10. For example, in the early 1980's I helped initiate discussions regarding Article V(A) at meetings of the Commission. My objective was to reach a workable understanding of the Compact that would allow for its administration and protect Montana's interests.

11. In April of 1984, the Yellowstone River Compact Commission held a two-day session to discuss water rights in both States, the adjudication of the interstate ditches, and Compact administration. At that meeting, Dan Ashenberg presented a proposal for Compact administration that had been developed under my direction. That proposal would have allowed Montana to receive the water necessary to satisfy its pre-1950 uses before either state could use water for post-1950 uses.

12. Discussions regarding the administration of water under the Compact continued throughout the 1980s, both during Commission meetings, and during other discussions between officials from both states. I was the point person for this effort from the State of Montana. From Wyoming, I recall that George Christopulos, Jeff Fassett, Lou Allen, John Shields, and Sue Lowry, all individuals who attended Commission meetings on behalf of Wyoming, were involved.

13. My efforts to develop a Compact administration methodology were not supported by Wyoming's representatives who communicated that the Compact did not

require Wyoming to ensure that water was available in Montana to satisfy Montana's pre-1950 uses.

14. Despite Wyoming's stated position that it had no obligation under Article V(A) of the Compact, Montana representatives, including me, continued to press Wyoming to provide water to Montana so that Montana could satisfy its pre-1950 rights.

15. An example of an impasse over Compact interpretation occurred in 1985, when Wyoming proposed the construction of a reservoir in the Powder River drainage, known as the "Middle Fork Project." Wyoming claimed that the reservoir was "exempt" from compact administration because it was permitted prior to January 1, 1950. On behalf of Montana we disagreed with that view and stated that any reservoir constructed after 1950 was subject to Article V(C) even though it was permitted prior to 1950.

16. Montana actively opposed the Middle Fork project because of its potential impact on water availability in Montana. Our purpose in opposing the Middle Fork project was to protect Montana's rights under the Compact. The message we delivered to Wyoming was very clear: We recognized our entitlement to water under the Compact, and we would not allow any activity in Wyoming that would jeopardize that entitlement. Based on our communications, Wyoming knew or should have known Montana's position on Article V of the Compact.

17. In 1987, both states experienced low streamflow conditions in the Tongue and Power rivers. I attended the Compact Commission meeting that year and, after reviewing the minutes, recall that we were very concerned about the lack of water and the inability to convince Wyoming officials of the need to administer the compact to protect pre-1950 uses in Montana. Even though by that time, the Middle Fork project was no longer a priority for Wyoming, on behalf of Montana we continued to express concerns about water shortages, particularly in dry years. In my view, Wyoming was well aware of Montana's concern and understood that Montana was attempting to invoke protections under the Compact.

18. During the 1980s I was involved with discussions with Wyoming over water supply issues in Montana and water use in Wyoming. During the period of 1985 through 1989 I was involved in these discussions with Wyoming both during Compact Commission meetings, and during more informal discussions that were held throughout the year. As part of these discussions, my staff and I investigated the records of

adjudicated rights in Wyoming and compared the records with the actual use on the ground. We found a series of discrepancies, and raised the issue with Wyoming officials.

19. As part of these ongoing discussions, my staff and I investigated the records of particular water rights in Wyoming. One example is indicated in a series of letters, attached hereto, relating to unpermitted stock reservoirs in Wyoming. As can be seen from the attachments, the original letter was written in April of 1988, and it was followed up by a phone call in June of that same year.

20. In 1988, both states experienced extreme drought conditions. At the 1988 Compact Commission meeting, I made it a point to discuss the need for Compact administration and Montana's Compact Commissioner, Gary Fritz, also stressed "that a sincere effort must be made to develop an acceptable procedure to administer water rights." 1988 Compact Commission Minutes, p. IV. As we explained to Wyoming officials, these points were made precisely because Montana was not getting sufficient water to satisfy pre-1950 rights. I recall that Montana even offered to initiate this process, but Wyoming's commissioner, SEO Jeff Fassett, was reluctant because Wyoming did not believe the Commission had authority to address water shortages. 1988 Minutes, p. V.

21. As reflected in the Compact minutes for 1988, Montana continued to attempt to work with Wyoming on the administration of the Compact. Attached hereto is a copy of a draft "Status Report and Work Plan" that I drafted that was intended to spark discussions between the two States. We communicated with Wyoming officials, including Jeff Fassett, Sue Lowry, and John Shields, regarding this project in the spring and summer of 1989. As I previously discussed, it is my opinion that these efforts ultimately failed because Wyoming officials would not consider an administration scheme that included pre-1950 water rights.

22. By 1989, conditions had not improved even though precipitation was near normal. The 1989 Compact Commission Minutes state that by the end of water year 1988, "most reservoirs were extremely overdrafted." 1989 Min., p. III. The Powder River completely dried up in both 1988 and 1989. These conditions made it even more urgent for Montana to administer the Compact. To that end, I prepared a report that outlined the history of the compact, the positions of both states, and the Commission activities since the Compact was adopted. The purpose of the report was to educate Montana folks so that we could start a meaningful dialogue with Wyoming.

23. The Compact Commission meetings involved formal discussions. I was also involved in informal discussions that took place between Montana officials and Wyoming officials, during the drought years of 1987, 1988, and 1989. These communications centered around Wyoming's water planning efforts and the joint effort to adjudicate the interstate ditches, among other issues.

24. During these 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.

25. I am also generally aware that other Montana officials, including Keith Kerbel, the Regional Manager for the Water Resources Division Regional Office was in regular communication with Wyoming officials about water supply conditions.

26. There are substantial senior water rights (dating back 100 years or more) on the Tongue and Powder Rivers that Montana was interested in protecting. Two of those senior rights holders were in regular communication with my staff and the regional office whenever there was insufficient water to satisfy their rights. I know that it was common for the regional manager to discuss this situation not only with my staff in Helena, but also with Wyoming officials.

27. While I do not recall exact dates or times, I know that my staff and I had discussions with Wyoming about the fact that Montana was water short and that we needed to administer the Compact to remedy that problem. These discussions would have occurred during the irrigation season, when Wyoming was in a position to take some action to protect Montana.

28. I did not work on Yellowstone Compact issues during the 1990's, although I resumed that work again in approximately 1999. That was also a time when Montana experienced very dry conditions. I have reviewed the USGS records for those years and they reflect that 2000, 2001, 2002, and 2003 were particularly dry years. At the time, we would have been using the surface water supply index and the Palmer drought index to monitor conditions.

29. During those years of drought, my Staff and I were aware that pre-1950 appropriative rights in Montana were not receiving sufficient water. I recall speaking

directly to irrigators, including Art Hayes and Roger Muggli, and I was also in communication with our regional manager in Billings, who would have been in regular contact with irrigators on both the Tongue and Powder Rivers.

30. It was my belief that shortages in Montana were caused by overuse in Wyoming. Wyoming was actively developing new storage and irrigation projects in the basin, and I was concerned that Wyoming was diverting or storing water for post-1950 uses when it should have been allowing that water to reach Montana. When the opportunity arose, I communicated my concerns to Wyoming in water short years.

31. In January 2002, I attended a meeting with other Montana and Wyoming water officials in Sheridan, Wyoming. The purpose of the meeting was to discuss water supply conditions given the extreme drought conditions in both States. The minutes of the meeting are attached.

32. Specifically, we were concerned that Wyoming was storing water in reservoirs that were built after 1950. I explicitly voiced my concern that Wyoming was using water that should have been coming to Montana under the Compact. My purpose in attending the meeting was to understand hydrology and forecasting in the basin, and to try to avoid the problems we experienced in 2001. My discussions with Wyoming officials related to this subject continued past the 2002 meeting into the 2002 irrigation season.

33. After 20 years it was clear to me that Wyoming was not going to comply with our verbal requests. In 2004 and 2006, when we experienced similar shortages, we communicated with Wyoming in writing.

34. It was my opinion that Wyoming did not want the Compact to be administered and never did regulate its uses for purposes of Compact compliance. Eventually, the present litigation was filed because of Wyoming's intransigence.

35. In my first Declaration in this case, I stated as follows:

During the period 1981-2008, pre-1950 water rights in Montana experienced shortages, not only in 2004 and 2006 but also in other years that Montana believed were caused by Wyoming's overuse under the Compact. Montana's representatives complained to the Wyoming representatives about this, not only in 2004 and 2006 but

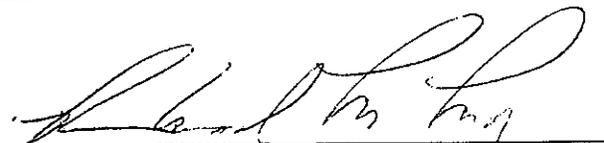
also in other years, but Wyoming refused to admit that Wyoming had any obligation under the Compact to protect Montana's pre-1950 uses. Therefore, Wyoming continually rebuffed Montana's complaints and refused to provide any additional water in response to those complaints.

I still consider this to be an accurate statement. Since writing my declaration and having my deposition taken, I have had the opportunity to review my records, review data related to water supply, and to review historical documents. 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.

36. My communications to Wyoming were during spring meetings, the irrigation season, or other times when it was apparent that the Reservoir was having trouble filling, most likely in May or June. I recall speaking with Wyoming officials about this issue, all individuals who I understand represented Wyoming's Compact interests.

I state under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2012.


Richard M. Moy

THE STATE



OF WYOMING

RECEIVED

SEP 21 1988

MIKE SULLIVAN
GOVERNOR

WYOM. DEPT. OF NATURAL
RESOURCES & CONSERVATION

GORDON W. FASSETT
STATE ENGINEER

State Engineer's Office

HERSCHLER BUILDING

CHEYENNE, WYOMING 82002

September 19, 1988

Mr. Gary Fritz
Administrator, Water Resources Division
Dept. of Natural Resources and Conservation
1520 East Sixth Ave.
Helena, MT 59620-2301

Dear Gary:

In your April 6, 1988, letter concerning the adjudication process of the Interstate Ditches, you brought to our attention that there may be a number of stock reservoirs in the Hanging Woman drainage for which no valid Wyoming water rights exist. My office has researched the permit status of these reservoirs based on the information you sent us, as well as our own records and field work.

Letters explaining the process to acquire stock reservoir permits are being sent by our Surface Water Division to those reservoir owners lacking valid permits. The necessary forms accompany the letter and the reservoir owners were given a deadline for submitting the application forms. We expect to have the stock reservoir permits issued for the currently unpermitted reservoirs within the next six to nine months. As Article V, E, exempts stock reservoirs under 20 acre feet in capacity, the permit status of these reservoirs is not a Yellowstone River Compact concern, but I do appreciate your bringing the status of these reservoirs to my attention.

If you have any further questions concerning our process of granting permits to these reservoirs, please don't hesitate to contact me.

With Best Regards,

JFF

Gordon W. Fassett
Wyoming State Engineer

GWF/SL

cc: Frank J. Trelease, Administrator, Surface Water Division
Michael B. Whitaker, Division No. 2 Superintendent

Moy Declaration Attachment 1

MIKE SULLIVAN
GOVERNORGORDON W. FASSETT
STATE ENGINEER*State Engineer's Office*

HERSCHLER BUILDING July 11, 1988 CHEYENNE, WYOMING 82002

Mike Whitaker
Water Division II
P. O. Box 6103
Sheridan, Wyoming 82801

COPY

Re: Unpermitted Stock
Reservoirs in Hanging
Woman Creek Drainage

Dear Mike:

The State of Montana recently alerted us about a number of unpermitted stock reservoirs in the Hanging Woman Creek drainage. (See attached April 6, 1988, letter from Gary Fritz to Jeff, last paragraph on page 1.)

Also attached are 2 copies of the list referenced in the letter from Fritz. One copy is fairly clean and the other has scribbled notes that Sue Lowry made when reviewing the quads and infra-red photos at the Wyoming Water Development Commission (WWDC). These may or may not be of any use to you. Our review of this list so far has included:

- 1) Surface water folks checking the linen and paper maps, township cards and stream cards to try to locate permits. The few that were found are shown in the margin beside the legal description.
- 2) Reviewing the quad maps to check for legal description accuracy. Where the reservoir was located in more than one (1) quarter - quarter, I listed the ones it might possibly show up in.
- 3) Checked the quads against the WWDC's infra-red photos (taken in 1983) to see if the reservoirs really exist on the ground.
- 4) Reviewed BLM ownership maps. Almost all are located on private lands with one on BLM and one on State of Wyoming lands.

Gary Fritz asked about these reservoirs during a conference call on another matter on June 22, 1988, so apparently Montana is still thinking about this. We will

WY018695

Mike Whitaker
July 11, 1988
Page 2

eventually need to alert the various landowners that they need to file permits in order to have valid rights, after carefully evaluating this situation. Would you please investigate and report back to me on this matter with a description of how long the reservoir has been in place (if one actually exists at this time), information as to who built the facility and under what circumstances, if they can be determined (was it part of a multi-facility project, was it designed by the SCS, etc.) and other information which you might be able to obtain and feel would be useful to this office in sorting out how this situation has come about.

If we can help you out with this here in the Cheyenne office in any way, as to notations, please give Sue Lowry a call.

With best regards,

Jeff

GORDON W. FASSETT
State Engineer

GF/SL/dll

Encls.

cc: Sue Lowry
Interstate Streams Engineer

Becky Mathisen
Administator, Technical Services Division

John Shields
Interstate Streams Engineer

Francis A. Carr
Administrator, State Board of Control

WY018696

Chuck W.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



TED SCHWINDEN, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699

HELENA, MONTANA 59620-2301

April 6, 1988

Mr. Gordon W. Fassett
Wyoming State Engineer
Herschler Bldg.
Cheyenne WY 82602

Dear Jeff:

We have received copies of documents describing the Wyoming Board of Control's adjudication of the Doctor Ditch, Interstate Irrigation and Mining Ditch Company Ditch and the Serrine Ditch. These will be incorporated into Montana's water rights data base as an informational note with a reference to the Wyoming Board of Control for specific information on the water rights. We hope this will inform interested parties of the existence of these Wyoming water rights in the Clark Fork Yellowstone basin and make it clear that these rights are administered by Wyoming. Our thanks to Francis Carr, John Shields and Craig Cooper for their efforts in processing these rights.

We would like to proceed with your recommendation for amending the Yellowstone River Compact Administrative Rules to allow a continuing process for review of interstate uses of water. Six additional interstate uses of water in the Clark Fork's drainage, which involve versions in Montana and uses in Wyoming, have been recently identified; these could be introduced into the compact process under the new rules and field-inspected this summer. With respect to the existing Britton ditch claim, Chuck Dalby will be contacting Craig Cooper and John Shields this month to coordinate field review and verification.

Recently, Montana water users in the Hanging Woman drainage have brought to our attention the existence of a large (~80) number of apparently unpermitted stock ponds in the Wyoming portion of the basin. A list of these stock ponds along with their location and expected ownership is enclosed. I would appreciate your providing us with permit information on these ponds. A tabulation showing permit numbers, pond capacities, and priority dates for these stock ponds would be most useful.

Mr. Gordon W. Fassett

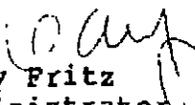
Page two

April 6, 1988

I apologize for my absence at the March 18 meeting in Sheridan. I have reviewed the joint Montana-Wyoming Powder River water quality proposal (March 18 version) and feel that it represents a positive step toward responsible management of Powder River water resources.

I will call within the next few weeks, and we can visit on these issues and set up a conference call with Grady to amend the Compact rules.

Sincerely,


Gary Fritz
Administrator
Water Resources Division

GF:CD:lrc

cc: Grady Moore
Joe Moreland
Keith Kerbel

Wyoming Water

Hanging Woman Drainage

Quadrangle Names:

OTO Ranch Quadrangle

- | | |
|---|----------------------------|
| 1. NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 18, T58N R80W
Un-named tributary of North Fork Waddle | Kendrick Cattle
Company |
| 2. S $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 24 T58N R81W
Un-named tributary of North Fork Waddle | Muller |
| 3. SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 20 T58N R80W
Un-named tributary of Letspeich Prong of
Waddle | Kendrick Cattle
Company |
| 4. SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 30 T58N R80W
Un-named tributary of Letspeich Prong of
Waddle | Kendrick Cattle
Company |
| 5. SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 30 T58N R80W
Un-named tributary of Letspeich Prong of
Waddle | Kendrick Cattle
Company |
| 6. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 29 T58N R80W
Randall Prong of Waddle | Kendrick Cattle
Company |
| 7. NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 6 T57N R80W
Randall Prong of Waddle | NX Bar |
| 8. SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 6 T57N R80W
Un-named tributary of Randall Prong Waddle | NX Bar |
| 9. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 8 T57N R80W
Un-named Tributary of Randall Prong Waddle | NX Bar |
| 10. SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 28 T58N R80W
Un-named tributary of Randall Prong of
Waddle | Kendrick Cattle
Company |
| 11. NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 9 T57N R80W
Un-named tributary of Welter Prong of
Waddle | NX Bar |
| 12. NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 17 T57N R80W
Un-named tributary of Welter Prong of
Waddle | NX Bar |

Round-up Quadrangle

- | | |
|---|-----------------|
| 13. NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 22 T58N R80W
Un-named tributary of Welter Prong Waddle | |
| 14. Center of SW and NE Sec. 27 T58N R80W
Un-named tributary of Welter Prong Waddle | Kendrick Cattle |

Round-up Quadrangle (continued)

- | | |
|--|----------------------------|
| 15. E $\frac{1}{4}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 27 T58N R80W
Un-named tributary of Welter Prong
of Waddle | Kendrick Cattle
Company |
| 16. NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 10 T57N R80W
Un-named tributary of Welter Prong
of Waddle | Kendrick Cattle
Company |
| 17. SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 23 T58N R80W
Road Draw tributary of West Prong Hanging
Woman | Kendrick Cattle
Company |
| 18. NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 24 T58N R80W
Un-named tributary of Road Draw | Kendrick Cattle
Company |
| 19. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 35 T58N R80W
Antelope Draw, tributary of West Prong of
Hanging Woman | Kendrick Cattle
Company |
| 20. S $\frac{1}{4}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 30 T58N R79W
Antelope Reservoir - Antelope Draw | Kendrick Cattle
Company |
| 21. SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 30 T58N R79W
Un-named tributary of West Prong of Hanging
Woman | Kendrick Cattle
Company |
| 22. N $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 31 T58N R79W
West Prong of Hanging Woman | Kendrick Cattle
Company |
| 23. NW $\frac{1}{4}$, SE $\frac{1}{4}$, NE $\frac{1}{4}$ of Sec. 1 T57N R80W
Un-named tributary of Round-Up Draw,
tributary of West Prong Hanging Woman | Kendrick Cattle
Company |
| 24. E $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 11 T57N R80W
Round-Up Draw | Kendrick Cattle
Company |
| 25. S $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 13 T57N R80W
Tiner David Draw, tributary of West Prong
of Hanging Woman | Kendrick Cattle
Company |
| 26. NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 26 T57N R80W
Horsley Draw tributary of West Prong of
Hanging Woman | Kendrick Cattle
Company |
| 27. SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 25 T57N R80W
Tributary of Horsley Draw - West Prong of
Hanging Woman | Kendrick Cattle
Company |
| 28. E $\frac{1}{4}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 25 T57N R80W
Un-named tributary of West Prong of
Hanging Woman | Kendrick Cattle
Company |
| 29. NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 7 T57N R79W
West Prong of Hanging Woman | Kendrick Cattle
Company |
| 30. SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 18 T57N R79W
Un-named tributary of Early Prong,
tributary of West Prong of Hanging Woman | Kendrick Cattle
Company |

Round-Up Quadrangle (continued)

- | | |
|--|----------------------------|
| 31. NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 29 T57N R79W
Un-named tributary of Early Prong -
West Prong of Hanging Woman | Kendrick Cattle
Company |
| 32. SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 29 T57N R79W
Early Prong tributary of West Prong of
Hanging Woman | Ralph R. Westfall |
| 33. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 17 T57N R79W
Un-named tributary of Middle Prong -
tributary of West Prong of Hanging Woman | Kendrick Cattle
Company |
| 34. N $\frac{1}{4}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 28 T57N R79W
Tributary of Middle Prong, tributary of
West Prong Hanging Woman | Kendrick Cattle
Company |
| 35. SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 21 T57N R79W
Middle Prong tributary of West Prong
Hanging Woman | Kendrick Cattle
Company |
| 36. N $\frac{1}{4}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 20 T58N R79W
Flat Bottom Draw tributary of Hanging
Woman | Kendrick Cattle
Company |

Shuler Draw Quadrangle

- | | |
|---|----------------------------|
| 37. W $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 2 T56N R80W
Horsley Draw Tributary of West Prong of
Hanging Woman | Jock Hutton |
| 38. SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 31 T57N R79W
Un-named tributary of West Prong of
Hanging Woman | Kendrick Cattle
Company |
| 39. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 6 T56N R79W
Un-named tributary of West Prong Hanging
Woman | Don Roberts |
| 40. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 6 T56N R79W
West Prong of Hanging Woman | Pete Nussbacher |
| 41. SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 8 T56N R79W
Un-named tributary West Prong of Hanging
Woman | Don Roberts |
| 42. N $\frac{1}{4}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 33 T57N R79W
Un-named tributary of Early Prong of West
Prong Hanging Woman | Kendrick Cattle
Company |
| 43. N $\frac{1}{4}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 34 T57N R79W
tributary of Middle Prong of Hanging
Woman | Kendrick Cattle
Company |

Box Elder Quadrangle

- | | |
|---|-----------------------------------|
| 44. NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 10 T57N R79W
Un-named tributary of Hanging Woman | Kendrick
Cattle Company |
| 45. SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 22 T57N R79W
Un-named tributary of Hanging Woman | Kendrick
Cattle Company |
| 46. SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 26 T58N R79W
Un-named tributary of Box Elder Draw,
tributary of Hanging Woman | Kendrick
Cattle Company |
| 47. SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 12 T57N R79W
and NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 13 T57N R79W
North Fork Cottonwood Draw, tributary of
Hanging Woman | Dooley
Dooley |
| 48. S $\frac{1}{2}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 13 T57N R79W
N $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 13 T57N R79W | Dooley
Dooley |
| 49. N $\frac{1}{2}$ of SW $\frac{1}{4}$ Sec. 24 T57N R79W
Un-named tributary of Hanging Woman | Kendrick
Cattle Company |
| 50. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 25 T57N R79W
tributary of Hanging Woman | Kendrick
Cattle Company |
| 51. N $\frac{1}{2}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 31 T57N R78W
Tributary of Hanging Woman | Kendrick
Cattle Company |
| 52. N $\frac{1}{2}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 31 T57N R78W
Hanging Woman Creek | Kendrick
Cattle Company |
| 53. SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 30 T57N R78W
tributary of Hanging Woman | Dooley and
State of
Wyoming |
| 54. SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 19 T57N R78W
Tributary of Dooley Draw, tributary of North
Cottonwood, tributary of Hanging Woman | State of
Wyoming |
| 55. NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 20 T. 57N R78W
Tributary of North Fork Cottonwood, tributary
of Hanging Woman | Sylvia
Rosenthal |
| 56. SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 18 T57N R78W
Tributary of North Fork Cottonwood | Kendrick
Cattle Company |
| 57. SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 18 T57N R78W
Tributary of North Fork Cottonwood Draw | Kendrick
Cattle Company |
| 58. SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 17 T57N R78W
North Fork Cottonwood | Kendrick
Cattle Company |

Box Elder Quadrangle (continued)

- | | | |
|-----|--|--|
| 59. | NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 17 T57N R78W
North Fork Cottonwood Draw | State of Wyoming |
| 60. | NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 16 T57N R78W
Tributary of 76 Creek, Tributary of Hanging
Woman | |
| 61. | NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 15 T57N R78W
Tributary of 76 Creek | Kendrick Cattle
Company |
| 62. | S $\frac{1}{4}$ of N $\frac{1}{4}$ Sec. 7 T57N R78W
Box Elder Draw | Kendrick Cattle
Company and State of
Wyoming |
| 63. | E $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 8 T57N R78W
Tributary of Grenell Prong, tributary of
76 Creek | Kendrick Cattle
Company |
| 64. | NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 32 T58N R78W
Un-named Tributary of 76 Creek | Kendrick Cattle
Company |
| 65. | SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 30 T58N R78W
Un-named Tributary of 76 Creek | Kendrick Cattle
Company |

Cabin Creek Quadrangle

- | | | |
|-----|---|--|
| 66. | E $\frac{1}{4}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 14 T57N R78W
76 Creek
W $\frac{1}{4}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 14 T57N R78W
76 Creek | Kendrick Cattle
Company
Kendrick Cattle
Company |
| 67. | NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 14 T57N R78W
76 Creek | Kendrick Cattle
Company |
| 68. | W $\frac{1}{4}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 11 T57N R78W
76 Creek | |
| 69. | NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 11 T57N R78W
76 Creek | |
| 70. | E $\frac{1}{4}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 11 T57N R78W
76 Creek | |
| 71. | NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 3 T57N R78W
School House Prong tributary of 76 Creek | Kendrick Cattle
Company |
| 72. | NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 27 T58N R78W
Tributary of Iron Springs Creek, tributary
of Trail

E $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 27 R58N R78W
Tributary of Iron Springs Creek, tributary
of Trail | Kendrick Cattle
Company

Kendrick Cattle
Company |
| 73. | NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 24 T58N R78W
Tributary of Trail Creek | Kendrick Cattle
Company |
| 74. | SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 20 T57N R78W
Dooley Draw, Tributary of North Fork
Cottonwood Creek | Sylvia Rosenthal |

75. T57N, R79W Sec. 35 (Box elder Quad)

76. T58N, R79W Sec. 22

77. T57N, R78W Sec. 18

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

JK: Copy to ^{pickme} _{PA. 11. 88}
forcast RLM
Comment JWS
SL
Start New Yr file for me.



TED SCHWINDEN, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699

HELENA, MONTANA 59620-2301

December 9, 1988

Mr. Gordon W. Fassett
State Engineer
Herschler Building, 4E
Cheyenne, WY 82002

Dear Jeff:

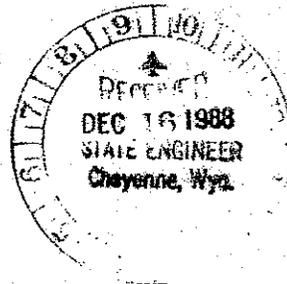
I am enclosing the draft of the outline for the Yellowstone River Compact Commission's "Status Report and Work Plan."

I suggest that once we agree upon the final outline for this document, we either meet or set up a conference call to talk about how we want to proceed in drafting the thing.

Sincerely,

Gary
Gary Fritz
Administrator
Water Resources Division

GF:rmb
enclosure



CENTRALIZED SERVICES
DIVISION
(406) 444-6700

CONSERVATION DISTRICTS
DIVISION
(406) 444-6667

ENERGY
DIVISION
(406) 444-6897

OIL AND GAS
DIVISION
(406) 444-6675

WATER RESOURCES
DIVISION
(406) 444-6601

WY018716

Moy Declaration Attachment 2

YELLOWSTONE RIVER COMPACT
WORK PLAN
DRAFT

The purpose of this outline is to frame a report to be prepared by the Yellowstone River Compact Commission during the current water year. The report would become the work plan for the YRCC and describe the objectives of the commission as well as its relative priority.

Montana agreed to draft this outline and send it to Wyoming and the Chairman by December 1. Subsequently, those parties would review the outline and submit comments to Montana by January 1 (or a reasonable date soon after). The outline should be finalized by early spring so that a draft report could be printed by summer and a final report adopted by the annual meeting.

COMPACT HISTORY

This section of the report would not be an exhaustive study of the history of the compact but would describe the versions of previous unsuccessful compacts, the issues that the negotiators were struggling with, and the general means by which these issues were handled. The length of this section should not exceed ten pages.

Montana author: Rich Moy

WATER USE IN THE YELLOWSTONE RIVER BASIN

This section would serve to provide the commissioners with a common understanding of the types and amounts of water uses throughout the basin. The water rights associated with these water uses would be portrayed by both states. While a complete listing of these rights would be beyond the purpose of this report, these rights should be summarized to characterize the pre- and post-1950 uses. In addition, each state would provide a description of how its respective water right laws operate on these rights.

This section should be partitioned by major river basin.

Montana author: Chuck Dalby

HYDROLOGY OF THE YELLOWSTONE RIVER BASIN

This section would describe the hydrology of the basin, again categorized by river basin. The water right description would mean little without an understanding of basin hydrology. Sophisticated analysis would not be needed; hydrographs, percentile flows, and storage characteristics would be sufficient.

Montana authors: Chuck Dalby
Joe Moreland

COMPACT ISSUES

A. Indian and Federal Reserved Rights

The relationship of Indian and federal reserved water rights and the rights of Wyoming and Montana have been a source of dispute between the two states. The positions of both states would be presented in this section.

Montana author: Rich Moy

B. YRCC Jurisdiction

Montana has recently raised questions about the interpretation of compact provisions that resulted in a Mexican standoff between the two states. Montana felt that these issues could be decided by a tie-breaking vote from the chairman. Wyoming disagreed. This section will discuss the positions of the two states in regard to this question of Compact Commission jurisdiction.

Montana author: Gary Fritz

C. Little Bighorn River

The compact excludes the Little Bighorn River from Article V. Wyoming has taken the position that this means the river is excluded from the entire compact, most notably Article X. Montana disagrees. This section would describe this difference in opinion.

Montana author: Rich Moy

D. Water Storage Priority Dates

This section would describe the two states' positions regarding the priority dates of unconstructed Wyoming storage projects as they relate to use in Montana.

Montana author: Chuck Dalby

E. Powder River

Much controversy has surrounded the Powder River Basin in terms of how the compact protects or does not protect the rights of Montana to utilize water under the compact. Fortunately, both states have agreed to carefully study the question of water quality in the Powder. This issue and the

status of the Powder River studies will be reported in this section.

F. Interstate Ditches

The YRCC has resolved a sticky problem of water rights for ditches that divert water in one state and use it in another. The rules of this resolution process would be described in this section.

Author: Chuck Dalby

G. Article X

The question of whether Article X is constitutional has been answered by the U.S. Supreme Court. This issue and its resolution would be briefly documented in this section.

WATER ALLOCATION AND COMPACT ADMINISTRATION

To be useful, the compact must be able to serve at least two purposes: (1) Provide a method to administer water rights between states, and (2) Provide a basis for each state to estimate what its rights are for planning purposes.

A. Water Allocation

The compact was intended to remove the uncertainty each state felt about the water it was entitled to in the future. To date, the YRCC has not estimated how much water the compact allows each state to use.

B. Compact Administration

Both Montana and Wyoming have proposed methods for administering the compact. This section would summarize those methods and demonstrate their use through a common example.

WORK PLAN

This section of the report would show the commission's method of addressing each of the issues presented in this report, including the administration and allocation questions. The work plan would present, by objective, its relative priorities, schedule of activities, cost, and milestones.

Summary of Meeting between Montana and Wyoming
To discuss Water Supply Issues in the Tongue River Basin
January 16, 2002
Water Division Office
Sheridan, WY

The following attended the meeting:

<u>Name</u>	<u>Agency</u>	<u>Location</u>
Mike Whitaker	Division 2 Superintendent	Sheridan
Carmine LoGuidice	Div. 2 Asst. Superintendent	Sheridan
Bill Knapp	Hydrographer-Commissioner	Sheridan
David Pelloux	Hydrographer-Commissioner	Sheridan
Sue Lowry	Wyo. State Engineer's Office	Cheyenne
Rich Moy	MT DNRC	Helena
Jim Robinson	MT DNRC	Helena
Keith Kerbel	MT DNRC	Billings

Montana started the discussion stating that they were interested in learning more about the hydrology and forecasting abilities in the Tongue River drainage for a couple of reasons. First, they are receiving inquiries from irrigators and other water users along the Tongue River about Wyoming's water use and Montana is interested in understanding more about the upper system in order to answer these inquiries. Secondly, the reservoir operations branch of the DNRC has completed some analyses and is concerned about the low inflow to Tongue River reservoir during the drought conditions last year. As the enlargement to that reservoir has not been in place for that many years, it's difficult to assess the impact of these drought years to the inflow. MT would also be interested in having better forecasting abilities in order to predict earlier in the year what type of inflows Tongue River Reservoir might receive. Inflows to the reservoir last year were around 13,000 af and the downstream irrigators negotiated a deal with the Northern Cheyenne for storage water from the tribe's storage space in the reservoir.

The Sheridan office personnel described the location of the various SNOTEL sites in the Big Horn mountains that can be useful predictors of runoff for the Tongue River basin. Carmine pointed out that while snowpack is one important component in predicting runoff, many other factors also play a role. He stated that with an average of about 65% snowpack last year, that amount of snowpack only resulted in streamflows of 25-35% of average. Due to the low antecedent soil moisture this past fall, similar conditions would be expected for this coming runoff season.

Rich asked about the general irrigation practices in the basin and whether the Wyoming irrigators tend to turn on their water supplies earlier when a drought appears imminent. Mike responded that he didn't think the operations were much different in 2001, but it's

possible that irrigators might start earlier this coming summer if conditions don't improve. It was pointed out that 2001 was an extremely dry year and that several new daily low readings were experienced at long-term USGS gages in the basin. Bill noted that the town of Dayton has a 1907 water right that was in danger of being shut off and the town negotiated a deal with an 1887 water right holder for an additional cfs for municipal use.

Montana then asked about the various storage facilities in the tributaries to the Tongue River. Mike gave Rich a copy of the Hydrographers Report for last year. A complete listing of the reservoirs, their location and their capacities is included in the report. The Hydrographers Report also includes the individual diversion readings for each of the ditches regulated during the season, as well as additional streamflow measurements.

Montana described the various citizen initiatives and resource groups that are meeting in the Yellowstone basin in Montana. These groups are interested in the variability of water supplies and will be analyzing the tributary inflows, including the flows originating in Wyoming. Discussion was held concerning the types of older aerial photography that might be available and how to locate such photography.

Wyoming's water planning efforts in the Powder-Tongue are nearing completion. HKM consultants should have the final spreadsheet model completed by the end of March or so. Wyoming agreed to furnish Montana with a copy of the model and other products from the water-planning program. These data should be helpful in looking at "what-if" scenarios for the basin. Wyoming also agreed to get a copy of the 1973 water-planning document for the northeast portion of Wyoming to Montana.

After Montana has had a chance to review the water planning information and the information from the SNOTEL sites and streamgages, this group may want to discuss any remaining questions, but we did not feel there was a need for an on-going Technical Committee of the Yellowstone Compact Commission.

Sue Lowry
1/29/02

No. 137, Original

In The
Supreme Court Of The United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

Before the Honorable Barton H. Thompson, Jr.
Special Master

DECLARATION OF JACK STULTS

COMES NOW Jack Stults, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am over 18 years of age.
2. I was the Administrator of the Water Resources Division for State of Montana, Department of Natural Resources and Conservation (DNRC) from 1997 until July 2006. I was also Montana's representative on the Yellowstone River Compact Commission ("Commission").
3. As DNRC Administrator and Compact Commissioner, I had the authority to communicate directly with Wyoming water officials regarding matters related to the Compact, including water shortages in Montana, administration of the Compact, and

DECLARATION OF JACK STULTS
PAGE 1

Wyoming's obligations under the Compact. Other individuals that had responsibilities relating to the Compact or relating to the Tongue and Powder Rivers also were authorized to communicate directly with Wyoming water officials on these same matters. At a minimum, that would have included Rich Moy, Chuck Dalby, Jim Robinson, and Keith Kerbel.

4. When I started my position as Administrator, I was aware of the States' long history of an inability to agree on an interpretation of the Yellowstone River Compact ("Compact") that would allow for its administration to protect Montana water users. My goal was to work collaboratively and cooperatively with Wyoming in order to ensure that Montana received its share of water under the Compact.

5. By avoiding conflict and working cooperatively with Wyoming, Montana was by no means foregoing Compact enforcement. To the contrary – Montana well understood its rights under the Compact and was using all available means to protect those rights. Our approach in the drought years of 2000, 2001, 2002, and 2003 involved gathering facts about water uses and regulation, and understanding basin hydrology, so that the Compact could work from a "scientific" standpoint.

6. During my tenure as Administrator, I recall that 2000, 2001, 2002, 2003, 2004, and 2006 were dry years, and that Montana irrigators in the Tongue and Powder River basins were having a difficult time getting enough water. At the same time, it appeared that Wyoming users were not experiencing similar dire conditions.

7. Part of our effort at sharing information with Wyoming involved providing information to Wyoming about water availability and uses in Montana. Under my direction, Montana officials, including Mr. Moy, Mr. Kerbel, Mr. Dalby, and Mr. Robinson, communicated directly to the Wyoming officials that were involved in Compact matters on behalf of Wyoming about water use and availability in Montana. That included informing Wyoming officials in 2000, 2001, 2002, and 2003 that Montana was not receiving sufficient water to satisfy its pre-Compact water rights.

8. In an effort to understand how Wyoming was using water, and how Montana might secure more water for its users, the Compact Commission established a technical committee consisting of representatives from each State. A reference to the technical committee can be seen in the 2000 Annual Report which indicates that the committee would be discussing "the need for quantifying diversions and other hydrologic

factors in order to administer the Compact.” This was part of Montana’s on-going discussions on this subject with Wyoming.

9. The Compact Commission directed the technical committee to address certain objectives, one of which included exploring the “timing” and “efficiency” among storage and direct flow uses in the basin. These objectives are reflected in the March 25, 2003, Minutes of the Yellowstone River Compact Commission Technical Working Group, attached to the 2003 Annual Report of the Commission. I recall that Montana was driving this particular objective for the specific purpose of obtaining more water at the border, which would have been the only reason to address “timing” and “efficiency” issues.

10. The technical committee met several times during the years 2000, 2001, 2002, 2003, and 2004. Members of my staff including Rich Moy, Jim Robinson, and Keith Kerbel were Montana representatives on the technical committee. I was in frequent communication with Rich, Jim, and Keith about technical issues relating to the Compact.

11. I had regular discussions with my staff about irrigated acreage, water rights, and water uses in the Tongue and Powder River basins in both Montana and Wyoming. I also had discussions with Wyoming on these issues in the drought years of 2000, 2001, 2002, and 2003, and I am aware that my staff had discussions with Wyoming regarding these matters as well. I specifically instructed my staff to have these discussions so we remained in communication with Wyoming and could understand how water was being used in their state.

12. In addition to annual Commission meetings, I had regular communication with Wyoming water officials such as Jeff Fassett, Pat Tyrrell, and Sue Lowry throughout the year. Some of these communications would be at conferences or meetings such as the Western States Water Council or Western Governors' Association meetings. Others would be by letter, email, or telephone.

13. In 1998 or 1999, the Wyoming State Engineer Jeff Fassett initiated regular field trips to promote mutual communication between the States. I regularly participated in those field trips, which generally occurred in June. Members of my staff would also participate in these field trips. We focused on certain topics for the tour, for example, I recall that in 2002 the topic was coal bed methane (CBM) production and wells. We would discuss other topics as well, including the issues of water availability, water

management, and water uses. These tours would typically last two days and we would do several site visits during the trip, with all of us traveling in the same van. There was ample time for discussion, and I used that time to discuss what I viewed as concerns with regard to compact administration, including water management, water availability and shortages, reservoir operations, Wyoming regulation of water rights, and other pertinent matters.

14. I recall that specific areas that my staff and I emphasized with Wyoming included post-1950 storage in reservoirs in Wyoming in the Tongue and Powder Basins, irrigation of post-1950 acreage in the Tongue and Powder River Basins in Wyoming, CBM development, and regulation of post-1950 water users in both Basins, with a particular emphasis on regulation of the mainstem of the Tongue River below Dayton.

15. An example of one of these issues being raised can be seen in the 2001 Annual Report which indicates that "Mr. Moy asked if any irrigation or changes in irrigation methods have occurred in the Tongue River basins in Wyoming since 1950." As I indicated above, while we certainly raised these issues at the annual Commission meetings, my staff and I also expressed our concern on these same issues throughout the irrigation season, especially during the drought years of 2000, 2001, 2002, and 2003.

16. Montana also conducted its own investigations on several of these issues. An example of one such investigation is the "Reconnaissance Study of Expanded Irrigation Water Use: Tongue River Drainage - Wyoming" which we had conducted in 2002. A copy of that report is attached hereto. These investigations helped inform our discussions with Wyoming during this period.

17. During the years 2000, 2001, 2002, 2003, 2004, and 2006, my staff and I monitored water availability in Montana in the Tongue and Powder River Basins. Water was short in Montana in those years, and my staff frequently received complaints or input from irrigators. For example, attached hereto are two sample letters from 2002, as well as my responses. I recall that similar letters were also sent during these years to the Attorney General for the State of Montana. When I received these letters and complaints, I would raise the issue of water shortage in Montana with Wyoming water officials, including Pat Tyrrell and Sue Lowry.

18. Without intending to trigger any legal action or litigation, I made it clear to Wyoming officials, including Pat Tyrrell and Sue Lowry that Wyoming needed to

regulate their water uses to ensure that more water would cross the state line into Montana. These communications occurred during the irrigation season, when it was apparent that Wyoming was using water and Montana irrigators were suffering. Wyoming was cordial and responsive, but never did regulate their uses for the benefit of Montana. For example, I understood that Wyoming did not regulate the mainstem Tongue River below Dayton, Wyoming, and that there were post-1950 uses occurring in that part of the basin that were unregulated. When I asked Wyoming about this, they responded that they were regulating "back to 1880 water rights," but they did not acknowledge the need to regulate for the benefit of Montana by shutting down post-1950 users below Dayton.

19. The issue of reservoirs was also a main topic for discussion in the early 2000s. Montana was concerned that Wyoming was storing water in post-1950 high mountain reservoirs at a time when Montana was not receiving adequate water in its own reservoir or for its pre-1950 users. We had many discussions with Wyoming about reservoir operations, hoping to better understand how and when they stored water which might adversely affect Montana. The purpose of these discussions was to encourage regulation for the benefit of Montana. As DNRC Administrator, I understood the benefit of having storage high in the basin, but I also understood that Wyoming's operation of those reservoirs was critical to Montana's water supply.

20. I personally notified Wyoming officials including Pat Tyrrell and Sue Lowry of water shortages in the Tongue and Powder River basins in Montana in May and June of 2002 and 2003. My intent was to make a verbal request for water under the Compact, and I believe that I communicated that intent.

21. I also instructed my staff to have similar communications with Wyoming water officials. Under my supervision, Mr. Kerbel had similar discussions with Mike Whitaker, the Wyoming Division II Supervisor. I am aware that these discussions occurred in the spring and summer of the drought years of 2000, 2001, 2002, and 2003. I also personally observed Mr. Kerbel request action from Wyoming officials to get water to Montana on more than one occasion. Although I do not specifically recall the dates, I believe these occurred during the irrigation season in 2001 and 2002.

22. Under my supervision, Mr. Moy also had discussions during the period of 2000, 2001, 2002, and 2003 with Wyoming officials regarding water shortages in Montana and the need for action by Wyoming.

23. By 2004, it was clear that our communications were unproductive and that our cooperative efforts had failed. At that point, I authored the call letter of May 2004 intending to trigger formal action under the Compact.

I state under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2012.



Jack Stults

RECONNAISSANCE STUDY OF EXPANDED IRRIGATION WATER USE
TONGUE RIVER DRAINAGE - WYOMING

SUMMARY REPORT

HKM Engineering Inc.
October 2002

INTRODUCTION

HKM Engineering Inc. entered into an agreement with the Montana DNRC in June 2002 to perform a reconnaissance level evaluation of changes in the extent of irrigated lands in Wyoming's Tongue River drainage from the 1940's and 1950s time period to recent.

The objective of the study is to determine if there have been significant changes in the extent of irrigation from the time the Yellowstone River Compact was signed in 1950 to present. The results of this study will be used to determine if a more detailed mapping effort or other more detailed investigations are warranted.

HKM performed the following tasks in completing this study:

1. Obtain 1940's and 1950's aerial photographs
2. Identify Changes in extent of irrigation from 1940's and 1950's to recent
3. Review the water rights associated with lands only irrigated more recently

AERIAL PHOTOGRAPHS

A detailed mapping effort would require acquisition of high resolution, stereo, 1:20,000 scale, contact print, aerial photographs for the Tongue River basin in Wyoming. This photography would provide a means of developing detailed mapping of the extent and type of irrigation at about the time the Compact was entered into. Such an undertaking would, however, be quite costly. The current evaluation uses lower scale (1 inch per mile) mono photography to evaluate the extent of irrigation at a reconnaissance level. The mono photography is adequate for the purposes of this study.

Aerial photo index maps are typically used as a tool for ordering individual stereo aerial photographs. These index maps are created by fitting individual aerial photos together and then photographing the resulting photo mosaic. HKM acquired the aerial photo index maps at a scale of 1:63,600 (1 inch per mile) for three points in time around 1950 (1946, 1954, and 1958). 1946 precedes the signing of the Compact and provides a good baseline for comparison. The 1946 index maps are however, of lower resolution than the other two years. The 1958 index maps obtained from the USDA, are available for the majority of the area and are of good resolution. The 1958 photo index maps were used as the primary base for mapping the extent of irrigation at about the time the Compact was signed. The 1946 photo index maps were used as a cross-reference for verifying the mapping and the 1954 photo index maps were used to fill in the gaps

where 1958 photography is unavailable. Significant changes in the extent of irrigation were not observed between 1946 and 1958. The quality of irrigation did, however, improve during this time period in some locations. Increased transbasin diversions may be the cause of this improvement in the Upper Prairie Dog Creek watershed; whereas, expansion of the reservoir on Wagner Draw may be the cause for the improved irrigation quality evident for the lands in that vicinity of the Tongue River – Fivemile Creek watershed.

CHANGES IN EXTENT OF IRRIGATION FROM 1940'S AND 1950'S TO RECENT

HKM performed detailed irrigated lands mapping for the State of Wyoming in preparation of the Powder / Tongue River Basin Water Plan. The irrigated lands mapping for the Tongue River basin reflects conditions that existed in 1994 to 1996. This information is available to the public and is currently being posted on the Wyoming State Water Plan website.

HKM projected the irrigated lands shown on the 1954 and 1958 aerial photo indexes onto maps of the 1990's irrigated lands to identify changes in the extent of irrigation that occurred from the 1940's and 1950's time period to recent. Both increases and decreases in irrigated lands were identified and the spatial extent of these changes was digitized into an ArcGIS data coverage. The results of this mapping effort are provided on the enclosed maps (Sheets 1 through 7). Areas shown in red are lands that were not irrigated in the 1940's and 1950's but which have been irrigated recently (during the 1990's). Dark green areas, on the other hand, are lands which were irrigated in the 1940's and 1950's but which are no longer irrigated. A summary comparison of the irrigated acreage is provided on the enclosed index map.

The 1990's irrigated lands mapping was performed at a higher level of detail allowing for delineation of lands that were actively being irrigated (70,442 acres) in contrast to those lands that show evidence of recent irrigation but which were idle at the time of the 1990's aerial photography (2,782 acres). These two categories of irrigation are reflected on the enclosed maps. The delineation of irrigated lands using the 1940's and 1950's photo indexes was performed at a lower level of detail and is most comparable to the total irrigation (active and idle) delineated on the 1990's photography. A comparison of the irrigated acreage during the 1940's and 1950's time period to that of the 1990's is provided on the Table 1 by watershed. As shown in Table 1, there are 3,180 acres that were irrigated in the 1990's that were not irrigated in the 1940's and 1950's. This was most prevalent in the Tongue River – Fivemile Creek watershed where a number of center pivot sprinkler systems have been developed and also in the Middle Prairie Dog Creek watershed. Conversely, there were 1,785 acres irrigated in the 1940's and 1950's that were no longer irrigated in the 1990's. This was most prevalent in the Big Goose Creek watershed and in the expanding area of development around Sheridan, in particular. HKM has made no attempt in this study to review water right transfers associated with these lands.

The total extent of irrigation in the 1990's was 73,224 acres in comparison to 71,829 acres during the earlier time period. This amounts to a total increase of 1,395 acres or approximately 2 percent.

5th Level Watershed	6th Level Watershed	Irrigation Era					Reported Values	
		Irrigated Only in 1940s & 50s	Irrigated in 1940s, 50s & 90s	Irrigated Only in 1990s	Total 1940s & 50s Irrigation	Total 1990s Irrigation	USBR 1939-42	WY SEO 1968-70
Big Goose Creek	Goose Creek-Soldier Creek	366	6,902	0	7,268	6,902		
	Lower Big Goose Creek	176	7,375	77	7,551	7,452		
	Lower Little Goose Creek	469	8,860	103	9,329	8,963		
	Middle Little Goose Creek	243	9,740	147	9,983	9,887		
	Upper Big Goose Creek	36	4,045	18	4,081	4,064		
	Total	1,291	36,922	346	38,213	37,268	37,446 ¹	33,397 ¹
Prairie Dog Creek	Lower Dutch Creek	0	80	25	80	104		
	Lower Prairie Dog Creek	0	1,128	84	1,212	1,213		
	Middle Prairie Dog Creek	7	3,554	790	3,561	4,344		
	Upper Prairie Dog Creek	92	7,890	59	7,949	7,949		
	Wagner Prong Dutch Creek	0	36	0	36	36	0	316 ²
	Total	99	12,688	958	12,787	13,645	6,803 ³	13,555 ³
Tongue River-Badger Creek	Ash Creek	0	336	0	336	336		
	Lower Badger Creek	0	224	0	224	224		
	Middle Badger Creek	0	40	0	40	40		
	Tongue River-Beauy Gulch	0	2,056	0	2,056	2,056		
	Upper Badger Creek	0	24	0	24	24		
	Youngs Creek	0	462	0	462	462		
	Total	0	3,141	0	3,141	3,141		
Tongue River-Little Tongue River	Little Tongue River	34	1,806	21	1,810	1,825	1,088 ⁴	819 ²
	Lower Wolf Creek	78	4,188	0	4,267	4,188	4,378 ⁵	3,095 ⁵
	Tongue River-Columbus Creek	29	3,951	126	3,981	4,078		
	Tongue River-Fivemile Creek	271	6,476	1,712	6,747	8,168		
	Tongue River-Slater Creek	13	1,055	16	1,068	1,071		
	Total	395	16,676	1,876	17,071	18,553		
Tongue R. - Little Tongue R. - Badger Cr. Total		395	19,818	1,876	20,213	21,694	20,718 ⁶	17,333 ⁴
Upper Hanging Women Creek	Upper Hanging Women Creek	0	66	0	66	66		
	Waddle Creek	0	372	0	372	372	0	36 ⁷
	West Prong Hanging Women Creek	0	180	0	180	180		
	Total	0	617	0	617	617	0 ⁷	36 ⁷
Total Acres		1,785	70,044	3,180	71,829	73,224	64,967 ⁸	64,321 ⁸

- Notes: ¹ Little Goose Creek, Goose Creek, and Soldier Creek reported values.
² Wagner Prong Creek reported values.
³ Prairie Dog Creek (mainstem), Wagner Prong Creek, Dow Prong Creek, and Jim Creek reported values.
⁴ Little Tongue River reported values.
⁵ Wolf Creek reported values.
⁶ Tongue River (mainstem), Youngs, Ash & Slater Creeks; Five Mile & Bonanza Creeks; Wolf Creek; Columbus Creek; Little Tongue River; Amuden Creek; Smith Creek; Sheep Creek; and Six-Mile Creek reported values.
⁷ West Waddle Creek reported values.
⁸ Total reported values.

The DNRC provided a summary of the irrigated lands inventoried during previous investigations by the USBR and the Wyoming State Engineers Office (see attached). The USBR work represents the time period 1939 to 1942 while the Wyoming SEO inventory was completed between 1968 and 1970. This information is also provided in Table 1 for comparison. The USBR and SEO inventories resulted in total irrigated acreage of 64,967 and 64,321 respectively. Although the total acreage for the Tongue River drainage is quite close between these two previous studies, there are large differences between the two inventories when individual watersheds are compared. By way of example, the USBR reported 6,803 acres of irrigation in the Prairie Dog Creek watershed, whereas, the Wyoming SEO reported 13,555 acres for the same basin. HKM's mapping compares more closely with the USBR work for some watersheds and more closely with the SEO work in other watersheds. HKM mapped all types of irrigation

from Type A ("full-supply") irrigation easily identifiable to the more marginal "partial service" irrigation receiving a more limited water supply (Type B), the lands with only minor beneficial use served from ephemeral streams (Type H), and "spreader dike irrigation" (Type S). Although a direct comparison of HKM's 1990's mapping to the previous mapping has not been performed, based on our past experience where such comparisons have been made, it is likely that portions of the more marginal irrigation were missed during the previous inventories.

WATER RIGHTS OF RECENTLY DEVELOPED IRRIGATION

HKM also inventoried the water rights associated with the lands irrigated only in the 1990's as part of the Powder / Tongue River Basin Water Plan. Although a detailed water rights review is beyond the scope of this study, this information can be used to determine the extent of irrigated lands that only have water rights that postdate the Yellowstone River Compact. The results of this inventory are presented in Table 2. Of the 3,180 acres of irrigated lands developed after the signing of the Compact, 241 acres only had water rights with priorities junior to the Compact date (January 1, 1950). There were an additional 232 acres for which water rights could not be found. Many of the parcels of irrigation have multiple water rights, some junior and some senior to the Compact. It is beyond the scope of the current evaluation to determine if there are adequate senior (pre-Compact) water rights to serve the full acreage of each individual parcel.

Table 2 Irrigated Acreage by Priority Date Lands Irrigated only in the 1990's				
Water Right Priority				Total
No Permit	Pre Compact Priority Date	Mix of Pre & Post Compact Priority Dates	Post Compact Priority Date	
232	1,177	1,530	241	3,180

CONCLUSIONS AND OTHER OBSERVATIONS

HKM performed a reconnaissance level evaluation of changes in the extent of irrigated lands in Wyoming's Tongue River drainage from the 1940's and 1950s time period to recent. It is estimated that there have been approximately 3,200 acres of land brought under irrigation since the Compact was signed. On the other hand, approximately 1,800 acres of irrigation have been retired during the same time period for a net increase of roughly 1,400 acres. The total extent of irrigation identified by HKM is higher than that identified during previous investigations. This is likely because HKM has mapped all categories of irrigation including the marginal irrigation more difficult to identify; some of which was likely missed in the previous mapping efforts.

Of the approximately 3,200 acres of land brought under irrigation since the Compact was signed, approximately 240 acres only have water rights that postdate the Compact. Water rights could not be found for an additional 230 acres.

Although the total extent of irrigation has not changed markedly over the years, two other changes were observed through the course of this study. There has been a significant shift in the type of irrigation from gravity irrigation to sprinkler irrigation. Based on a conversation with a representative from the NRCS field office in Sheridan, crop yields have increased somewhat with this shift to sprinkler irrigation. The total amounts of diversion, crop depletion, and return flow have therefore likely changed over time. With a progression to more sprinkler irrigation, it would be expected that, from a basin-wide perspective, there would be less diversion from the streams but also with the higher efficiencies, there would be an even greater reduction in return flow, and with higher crop yields there would be higher crop water consumption. The timing of return flow reemerging to the downstream system would also be expected to have changed with a reduction of return flows reemerging in the later months.

HKM also observed that additional small reservoirs were constructed in the intervening years following the signing of the Compact. Three facilities in particular are noted. These three reservoirs are in the Tongue River - Five Mile Creek watershed shown on Sheet 1 of 7. Wagner Reservoir located in Sec 7, T57N, R86W, was significantly enlarged between the time of the 1954 photography and 1958. According to the Tabulation of Water Rights for Wyoming's Water Division 2, this facility has a 04-29-1903 storage right for 65 acre-feet and a 10-31-1955 enlargement right for 274.85 acre-feet. Five Mile Reservoir located in Sec 4, T57N, R86W, is not shown on either the 1954 or 1958 photography. This facility has a 05-26-1960 storage right for 535.5 acre-feet. The third new reservoir observed is located in Sec 2, T57N, R86W. This facility recorded in the Tabulation of Water Rights as Dzendolet Reservoir is not shown on either the 1954 or 1958 photography. Dzendolet Reservoir has a 05-27-1896 storage right for 94 acre-feet and a 09-08-1967 enlargement right for 68.59 acre-feet. Although an exhaustive search for new reservoirs was not performed, these three facilities appear to represent the most significant changes in reservoir storage in the Tongue River basin.

Wyoming

Tongue River Basin	1939-42(1)	1968-70(2)	2001
West Waddle Creek	0 (3)	36	
Wagner Prong Creek	0	316	
Dow Prong Creek	0	211	
Jim Creek	0	776	
Prairie Dog Creek (mainstem)	6,803	12,252	
Youngs, Ash & Slater Creeks	610	753	
Five Mile & Bonanza Creek	483	2,217	
Wolf Creek	4,378	3,095	
Columbus Creek	3,662	950	
Little Tongue River	1,080	819	
Tongue River Mainstem	8,800	9,499	
Little Goose Creek	17,388	16,625	
Goose Creek	17,558	12,766	
Soldier Creek	2,500	4,006	
Amsden Creek	436	0	
Smith Creek	1,038	0	
Sheep Creek	127	0	
Six-Mile Creek	104	0	
Total	64,964	64,321	73,000

Montana

Tongue River Basin	1932-41 (1)	1968-70(2)
Mainstem State Line to Yell. Div.	10,253	
Tongue-Yellowstone Ditch	10,269	
Tributaries in Montana		
Youngs Creek	247	
Badger Creek	105	
Otter Creek	5,168	
Pumpkin Creek	4,276	
Total (4)	30,318	

- (1) USBR Inventory of irrigated lands in Wyoming between 1939 and 1942 that was submitted by the Engineering Committee on Dec 16, 1949 to the State Engineers of MT, WO, and ND.
- (2) The Wyoming State Engineers Office, through its Water Panning Program Report No.7, *Irrigated lands Inventory for Wyoming*. January 1971.
- (3) (0) Does not mean no irrigated acres, it shows how the acres were reported.
- (4) Includes 2,500 acres irrigated by the BIA Projects

Tongue River Water Users Association

May 3, 2002

Art Hayes Jr.
PO Box 578
Birney, Montana 59012

Jack Stults
48 North Last Chance Gulch
PO Box 201601
Helena, Montana 59620-1601

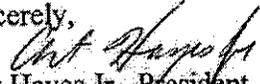
Dear Jack:

I was highly disappointed to hear that funds have been dropped for the Yellowstone Compact engineering study regarding post 1950 Wyoming irrigation on Tongue River. Wyoming is expanding its irrigation on Tongue River yearly—mostly with new sprinklers systems. These new sprinklers are not giving Montana the return flows in the late summer that we have had in the past. Also I have observed Wyoming ranchers irrigating earlier every spring and later in the fall. This practice is taking from Montana's share of the Yellowstone Compact.

During the last few months the Tongue River Water Users have held several public meetings regarding the expected water shortages for this year. The main topics of interest were the enforcement of the Yellowstone Compact and the water quality from coal bed methane discharge. The board members of the Tongue River Water Users Association believe that it is in Montana's best interest to continue gathering the information needed in order to insure that Montana gets its fair share of water from the Yellowstone Compact.

If the Water Users Assoc. can be of any help in restoring funding for the post 1950 irrigation engineering study please let me know. It is vital to the future of all Tongue River water users that we receive an adequate supply of water.

Sincerely,


Art Hayes Jr., President
Tongue River Water Users

C.C. Arthur Clinch, Director, DNRC
Senator Tom Zook
Representative Norma Bixby
Representative Ron Devlin
Representative Gary Matthews
Senator Gerald Pease

Stults Declaration Attachment 2

MT-12970



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

RECEIVED

MAY 07 2002

D.N.R.C.

REPRESENTATIVE NORMA BIXBY
HOUSE DISTRICT 5

HELENA ADDRESS:
PO BOX 200400
HELENA, MONTANA 59620-0400
PHONE: (406) 444-4800

HOME ADDRESS:
BOX 1165
LAME DEER, MONTANA 59043
PHONE: (406) 757-2433

COMMITTEES:
AGRICULTURE
EDUCATION
LEGISLATIVE ADMINISTRATION
STATE ADMINISTRATION

May 6, 2002

Mr. Jack Stults
48 North Last Chance Gulch
PO Box 201601
Helena, Mt. 59620-1601

Dear Mr. Stults:

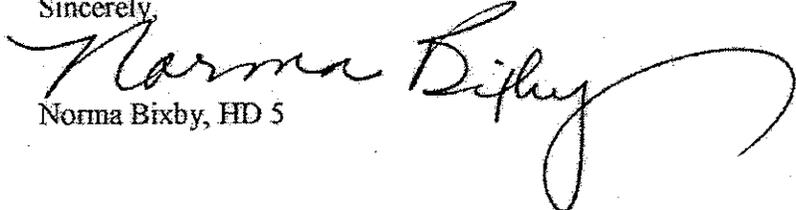
I strongly recommend funds not be eliminated for any type of study pertaining to water and especially for the Yellowstone Compact Engineering Study regarding post 1950 Wyoming irrigation on the Tongue River. This study is critical to the Tongue River Water Users and the funding of \$8,000.00 is needed to assure Montana is getting its fair share of the water from the Yellowstone Compact.

The DNRC should be protecting and assuring Montana's water is not being overused by the Wyoming ranchers and definitely not being contaminated by the coal bed methane development. This assurance can only be documented by good base line data. The data cannot be compiled without proper funding for the on going study and in my opinion more than \$8,000.00 is needed to track the data over a longer period of time.

Funding must be reinstated. Montana water is too important to the farmers and ranchers especially in this time of drought. I'm sure DNRC is aware of how critical the situation is concerning the drought and its impacts. Your attention, support and assistance is needed now and would be greatly appreciated.

Thank you.

Sincerely,


Norma Bixby, HD 5

MT-12972

cc. Governor Judy Martz
Senator Max Baucus
Senator Conrad Burns
Representative Rehberg
Art Hayes, Jr. Tongue River Water Users
Senator Gerald Pease
Senator Tom Zook
Representative Ron Devlin
Representative Gary Matthews
Geri Small, Northern Cheyenne Tribal President

DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

*Jack
copy*



JUDY MARTZ
GOVERNOR

DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684

STATE OF MONTANA

WATER RESOURCES DIVISION (406) 444-6601
TELEFAX NUMBERS (406) 444-0533 / (406) 444-5918

48 NORTH LAST CHANCE GULCH
PO BOX 201601
HELENA, MONTANA 59620-1601

May 23, 2002

Rep. Norma Bixby
Box 1165
Lame Deer, MT 59043

Dear Rep. Bixby:

Thank you for your May 6 letter. We at the DNRC Water Resources Division are concerned about the post-1950 development in Wyoming. This is an important issue.

The Water Resources Division has been pursuing funds to do an initial assessment of the amount of development so we can clearly describe our concerns in our next interactions with representatives of the State of Wyoming. I believe that is the funding you refer to in your letter. We expect an initial assessment to cost about eight to ten thousand dollars. We are hopeful the funds will be made available to us for this purpose in the next few weeks. We have never eliminated or redirected these funds, because we have not yet received them. I am sorry that you were given that impression.

There may be an explanation to this misinformation you received. A very preliminary proposal was drafted to seek funds from the 58th Legislature to prepare a comprehensive technical and legal justification for administering, enforcing, and/or amending the Montana/Wyoming Compact of 1950 (§85-20-101, MCA). As I am sure you can understand, given the tightening constraints on available funds and declining revenues, the decision was made not to move the proposal forward. I believe you were sent a copy of Bud Clinch's response to Art Hayes on these circumstances. This action may have been confused with our continuing efforts to fund and complete the initial assessment. I hope this clears up any misconceptions.

We appreciate your interest and concern about this important issue. It is not an easy one or a simple one since it is between two sovereigns. I am sure it will take the efforts of many to resolve it. We will keep you informed as things proceed.

Sincerely,

A handwritten signature in black ink, appearing to read "Jack Stults".

Jack Stults
Administrator
Water Resources Division

cc: Governor Judy Martz
Senator Max Baucus
Senator Conrad Burns
Representative Rehberg
Art Hayes, Jr., Tongue River Water Users
Senator Gerald Pease
Senator Tom Zook
Representative Ron Devlin
Representative Gary Matthews
Geri Small, Northern Cheyenne Tribal President,

DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION



JUDY MARTZ
GOVERNOR

DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684

STATE OF MONTANA

WATER RESOURCES DIVISION (406) 444-6601
TELEFAX NUMBERS (406) 444-0533 / (406) 444-5918

48 NORTH LAST CHANCE GULCH
PO BOX 203601
HELENA, MONTANA 59620-1601

May 29, 2002

Tongue River Water Users Association
Attn: Art Hayes, Jr., President
P. O. Box 578
Birney, MT 59012

Re: Wyoming water developments

Dear Art:

Thank you for your May 3 letter. Post-1950 development in Wyoming is an important issue. It was good to have the issue brought out at the last Yellowstone Compact Commission meeting. I understand that the Tongue River Dam Advisory Committee also requested information on how the State would be looking into Wyoming's future development as it affects the Tongue River Water Users Association and the Northern Cheyenne Tribe.

As you know we met with Wyoming in an attempt to informally manage water supply in this year of continuing drought. That meeting did not result in a plan to manage this year's short supply to maximum advantage to all users in the Tongue River basin, regardless of the political boundary at the state line.

The DNRC Water Resources Division drafted a very preliminary proposal to seek funds from the 58th Legislature to prepare a comprehensive technical and legal justification for administering, enforcing, and/or amending the Montana/Wyoming Compact of 1950 (§85-20-101, MCA). As you know from Bud Clinch's May 7 letter to you, given the tightening constraints on available funds and declining revenues, the decision was made not to move the proposal forward.

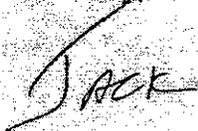
The Water Resources Division has been pursuing funds to do an initial assessment of the amount of post-1950 development in Wyoming so we can clearly describe our concerns in our next interactions with representatives of the State of Wyoming. We expect an initial assessment to cost about eight to ten thousand dollars. We are hopeful the funds will be made available to us for this purpose in the next few weeks. We have never eliminated or redirected these funds, because we have not yet received them. As soon as we receive the funds we will have the assessment done, which should not take long. So to that extent we are moving forward on this issue. As soon as the initial assessment has been completed we need to work together on our next steps.

Once the initial assessment has been completed and we have discussed our concerns with Wyoming there are two potential outcomes. We will enter into a process with Wyoming of ensuring that future allocation of water is in conformance with the Compact with respect to pre- and post-1950 developments; or, we will be in disagreement over the nature of post-

1950 development in Wyoming and faced with the need for third party determination, such as through the courts. These circumstances have very serious implications. It is not an easy issue or a simple one since it is between two sovereigns.

We appreciate what is at risk for the Tongue River Reservoir, the Water Users Association, and the Northern Cheyenne Tribe in this issue. As Bud Clinch directed, we are analyzing our ability to take on this effort relative to the obligations we currently have and the reductions ahead. Changing priorities and redirecting currently obligated resources cannot be taken lightly or hastily. The division is engaged in many large, complex, and pressing water management and allocation issues in this day and age. The partnership between DNRC and the Association through the years has been very productive. Your offer of help is appreciated.

Sincerely,



Jack Stults
Administrator
Water Resources Division

cc: Bud Clinch
Senator Tom Zook
Senator Gerald Pease
Representative Norma Bixby
Representative Ron Devlin
Representative Gary Matthews
Representative Keith Bales
Geri Small, Northern Cheyenne Tribal President

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No. 137, Original

In The
Supreme Court Of The United States

STATE OF MONTANA

Plaintiff,

v.

STATE OF WYOMING
and
STATE OF NORTH DAKOTA

Defendants.

Before the Honorable Barton H. Thompson, Jr.
Special Master

DEPOSITION OF GORDON W. "JEFF" FASSETT
Taken in behalf of Plaintiff

12:57 p.m., Tuesday
November 27, 2012

PURSUANT TO NOTICE, the deposition of GORDON W.
"JEFF" FASSETT was taken in accordance with the applicable
Federal Rules of Civil Procedure at the Attorney General's
Office, 2424 Pioneer Avenue, Cheyenne, Wyoming, before
Kathy J. Kendrick, a Registered Professional Reporter and
a Notary Public in and for the State of Wyoming.

1 over in the Big Horn River Drainage. And so those folks
2 in particular come to mind that I would see outside of
3 just the forum of the Yellowstone River Compact meetings.

4 Q. What about Rich Moy?

5 A. I think Rich may have attended some of these
6 other meetings, but I'm recalling that he primarily was a
7 participant in the commission meetings or -- or committee
8 meetings or meetings associated with the commission, even
9 if it wasn't a formal meeting. He was involved.

10 I met the gentleman from the field -- from the
11 field office on the Montana side.

12 Q. Keith Kerbel?

13 A. Keith Kerbel. Thank you. I met him at Compact
14 Commission meetings as well. He would sometimes interact
15 with similarly positioned people on the Wyoming side.

16 Q. So who would those people be? Are we talking
17 like Mike Whitaker?

18 A. Mike Whitaker was the superintendent during
19 almost my entire tenure as state engineer, and the Compact
20 Commissioner. His predecessor was a gentleman named
21 Paul Kawulok was there first -- when I was deputy, as I
22 was becoming state engineer, he was the division
23 superintendent for Water Division II on the Wyoming side.

24 Q. Was it expected for Mr. Whitaker, as part of his
25 job, to have those kinds of conversations with someone

1 like Keith Kerbel or someone in Keith's position?

2 MR. KASTE: Vague.

3 A. Certainly my recollection is -- my -- I believe
4 most of their conversations were related to being at the
5 Compact Commission meetings themselves. But to the extent
6 there was some other issue where they may have had their
7 own conversations, that could have occurred, but I don't
8 have any real direct knowledge of that.

9 Q. (BY MR. WECHSLER) Did you discourage those
10 conversations?

11 A. Did I discourage them from talking to
12 Mr. Kerbel.

13 Q. Yes.

14 A. I wouldn't have.

15 Q. About water-related issues between Montana and
16 Wyoming?

17 A. Yeah, a lot of it, as I recall, was like --
18 well, for instance, our adjudication procedures. During
19 my tenure on the Commission was we worked a number of
20 years with the State of Montana in adopting the Interstate
21 Ditch Adjudication Rules and Regulations. That was one
22 topic that we worked together on for a number of years.
23 And certainly it's separate from the formal Commission
24 meetings. I can only imagine that there would have been
25 discussion among people like Mr. Kerbel and Mr. Whitaker

1 how's the budget in your state government versus the other
2 state. Those were sort of regular topics that counter
3 agency heads in counter states often visited about.

4 Q. So the water condition in both states was a
5 regular topic of discussion?

6 A. It would have been.

7 Q. And did both states talk about -- say it was a
8 drought year, did both states discuss drought conditions?

9 A. If it was of some note -- if it was noteworthy,
10 I'm confident that would have been talked about. Same
11 as -- same as being very wet.

12 Q. Do you recall any years where there were
13 discussions -- where there were discussions at one of
14 these meetings about drought conditions?

15 A. I mean, really not recalling a specific
16 conversation. There certainly -- there were certainly dry
17 years during my tenure.

18 Q. During those dry years, did you explain to the
19 folks from Montana that it was dry in Wyoming?

20 A. If it was, I would report to them on it.

21 Q. Did the people from Montana also inform you when
22 it was dry in Montana?

23 A. Yeah, in a general sense. It was just sort of
24 how the snowpack conditions are in your state. It was
25 never with much detail.

1 A. When you say is it possible, it is possible.
2 But that was not a routine of mine to log phone calls.
3 There was too many. This was -- these are much more
4 general sense. I noticed it was a place I could keep
5 track of business expenses, things of that nature as well.

6 Q. I think one of the pages I noticed you were at a
7 conference and you indicated that you were at a
8 conference?

9 A. Uh-huh.

10 MR. KASTE: You have to say out loud.

11 A. Yes, that's correct.

12 Q. (BY MR. WECHSLER) We were talking before the
13 break about communications, and I think earlier in your
14 deposition you mentioned that there were others in your
15 office who you were aware had communications with people
16 in Montana; is that correct?

17 A. Yes.

18 Q. And so what positions would you -- what
19 positions in the Wyoming State Engineer's Office would you
20 have expected to have had communications with people from
21 the State of Montana?

22 A. Well, other than me as State Engineer, there
23 could have been staff -- the staff -- the technical staff
24 people on each -- in each state. In our case, in
25 Wyoming's case, they were -- they were often positions

1 that were titled Interstate Streams Engineer, and there
2 were a number of people that had that position in state
3 government. They would have talked to technical people --
4 they could have talked, I should say, with technical
5 people from Gary Fritz's staff, for example. And then
6 really the only other ones is the ones we talked about
7 previously. The superintendents, people like
8 Mr. Whitaker, would have had the opportunity to have
9 dialog with his counter -- people of similar position
10 on -- in the other state.

11 Q. The interstate stream engineer, is that a
12 position that's currently held by Miss Sue Lowry?

13 A. That's correct.

14 Q. And so there were a number of interstate stream
15 engineers during your tenure as state engineer?

16 A. Well, there's more than one. And when I first
17 came to work there, there was only a single person.
18 That's now a group of people that Sue Lowry is the head of
19 in the organization today.

20 Q. When you first got there, there was one
21 individual?

22 A. Yeah.

23 Q. Do you recall who that was?

24 A. I believe it was -- actually, there were two. I
25 think Lou Allen was a staff member, and then Mr. Shields,

1 garbled comments. There's a couple of statements in here
2 I wanted to ask you about. Turning to page 2. In the
3 middle there's handwritten numbers, and there's a 2 right
4 in the middle. Do you see that?

5 A. On page 2?

6 Q. Yes. I just -- I'm referring just to the page
7 numbers themselves are handwritten. And then the bottom
8 right-hand corner is number 187700?

9 A. Okay.

10 Q. Again, under water --

11 A. I don't see handwritten notes, though.

12 Q. I don't mean notes. Just the number 2.

13 A. Oh, the number 2 handwritten. Okay. I'm sorry.
14 Yes.

15 Q. There's a heading at the bottom of the page
16 Wyoming Water Management, and there it indicates Mike. Do
17 you understand that to be Mike Whitaker?

18 A. Yes.

19 Q. And here it's talking about water use in
20 Wyoming. And it talks about regulations down to early
21 1980. I think looking at the previous document it's
22 probably 1880. Would you agree with that?

23 A. Yes, I would.

24 Q. And then it indicates smaller irrigation
25 reservoirs utilized in 90 to a hundred percent of their

1 storage. Do you see that?

2 A. Yes.

3 Q. What do you understand that to mean?

4 A. Well, I think what he's talking about is that
5 that's a fear of regulation. In other words, a far
6 majority of the water rights in Wyoming were turned off
7 under priority appropriation enforcement on our side. And
8 then I think he's reporting that those water rights who
9 had irrigation reservoirs most likely drew that water out
10 to help supplement their natural flow water rights. And
11 so I assume he was reporting to the group that a lot of
12 the smaller reservoirs were used up that year.

13 Q. Was it common at the Compact Commission meetings
14 to discuss water administration in Wyoming?

15 A. Yes.

16 Q. Why?

17 A. It was of interest.

18 Q. Why was it of interest?

19 A. You'd have to ask Montana. I mean, we always
20 brought -- I think you'll look at all of the annual
21 reports, I think either Mr. Whitaker or Mr. Cooper, his
22 counterpart on the Big Horn/Clarks Fork side, those are
23 the two people who worked for me who had the
24 responsibility of water rights administration, always
25 attended almost all of these meetings and were prepared to

1 report on activities if of interest to the Commission.

2 Q. So you said it was of interest to Montana. What
3 do you mean by that? Did they ask about regulation that
4 occurred in Wyoming?

5 A. Well, they asked about water conditions. I
6 don't -- you haven't handed me an agenda. I'm recalling
7 that the agendas for these meetings may have had this
8 water management line item, so it was a -- that's why I
9 was recalling that. It was a -- kind of a routine
10 activity that we would report to the Commission, which, in
11 essence, is talking to Montana about what's going on in
12 Wyoming.

13 Q. Water management in Wyoming was an issue that
14 was raised by Montana?

15 A. It was of interest to Montana.

16 Q. Outside of the Compact Commission meetings did
17 you ever have contacts with people from Montana about
18 water management in Wyoming?

19 A. Not other than what we'd already talked about.
20 Just in a general sense there was -- we would have been
21 at conferences or other meetings where there may have been
22 discussions about, for instance, reserved water rights and
23 stuff like that. Not to the detail of -- of what we're
24 reading in Exhibit 110, where there's a -- a much more
25 detailed report by the people who have responsibility for

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No. 137, Original

In The
Supreme Court Of The United States

STATE OF MONTANA

Plaintiff,

v.

STATE OF WYOMING
and
STATE OF NORTH DAKOTA

Defendants.

Before the Honorable Barton H. Thompson, Jr.
Special Master

DEPOSITION OF SUE LOWRY
Taken in behalf of Plaintiff

8:05 a.m., Friday
November 30, 2012

PURSUANT TO NOTICE AND SUBPOENA, the deposition
of SUE LOWRY was taken in accordance with the applicable
Federal Rules of Civil Procedure at the Attorney General's
Office, 2424 Pioneer Avenue, Cheyenne, Wyoming, before
Kathy J. Kendrick, a Registered Professional Reporter and
a Notary Public in and for the State of Wyoming.

1 A. Well, we relied a lot on Mr. Kaiser. He was a
2 very capable modeler. And so I think when it was
3 appearing that it was going to be a dry year, we didn't
4 get into specifics as to individual water rights, but I
5 think we did discuss just anticipating that generally in
6 dry years your runoff peak occurs earlier in the season.
7 Our field staff would relate in their experience, given
8 the kind of water year we were looking at, when they felt
9 they might be regulating the tributaries in Wyoming.

10 Q. So during periods when there was going to be an
11 anticipated shortage, there were discussions that both
12 states were going to be suffering shortages that year?

13 A. Yes.

14 Q. Did the discussions go further than that in
15 terms of at least major reservoirs or water rights in the
16 two states?

17 A. Well, Tongue River Reservoir is such a prominent
18 storage facility in the Basin. Mr. Art Hayes would many
19 times attend these technical meetings. So we would ask
20 either Mr. Hayes or a gentleman named Kevin Smith, who is
21 the Montana DNRC manager of the reservoir program, I think
22 we'd ask them what the carryover storage was looking like,
23 how much Tongue River Reservoir had filled since the start
24 of the water year until we generally met in April. Our
25 field staff generally had a feel for how much capacity was

1 correct?

2 A. Yes, that's correct.

3 Q. Uh-huh. So already at the time of this meeting,
4 the two states mutually recognized that there was a likely
5 drought in progress for that irrigation season?

6 MR. BROWN: Object. I think it misstates
7 the statement in the exhibit.

8 Q. (BY MR. DRAPER) The statement that I referred
9 to earlier referred to these drought years. Do you agree
10 that those were drought years --

11 A. I believe --

12 Q. -- at that time?

13 A. I agree that in the early 2000s this basin did
14 suffer serious drought.

15 Q. And that meant there were shortages to water
16 users in both states, right?

17 A. I can really only speak to Wyoming, but
18 certainly we were regulating back very early water rights
19 in several of the years of the 2000s, yes.

20 Q. And didn't you confirm, through meetings like
21 this, that there were also water shortages in Montana?

22 A. I was told anecdotally that there were water
23 rights not being fulfilled in Montana.

24 Q. Okay. Thank you.

25 Look at Exhibit 96. Do you recognize this

No. 137, Original

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.
SPECIAL MASTER

MONTANA'S FIRST SUPPLEMENTAL RESPONSES TO
WYOMING'S FIRST SET OF INTERROGATORIES

STEVE BULLOCK
Attorney General of Montana

JENNIFER ANDERS
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
** Counsel of Record*

May 4, 2012

Exhibit 5

with respect to each such regulation.

d. A description of actions taken by the employees, agents or representatives of the State of Montana.

SUPPLEMENTAL ANSWER TO INTERROGATORY 43: Regulation that took place in Montana in 2004, 2005 and 2006 is reflected in water commissioner documents identified as MT 9919 through 10049 that have already been provided to Wyoming.

INTERROGATORY 58: Does Montana intend to assert that in this litigation that any individual other than its Yellowstone River Compact Commissioner had or has authority to act on behalf of the State of Montana to make a call, demand or other notification requesting that any employee, agent or representative of the State of Wyoming, one or more of Wyoming's water users with water rights within the Tongue River, Powder River, and Little Powder River basins of Wyoming, or any other individual or entity residing or doing business in Wyoming, curtail the use or diversion of surface, groundwater, or stored water within the Tongue River, Powder River, and Little Powder River basins of Wyoming? If your answer is anything other than an unqualified "No," please identify all such individuals who had such authority to act on behalf of the State of Montana between January 1, 1950 and the present, and with respect to each such individual, state:

- a. The dates when each individual held the authority;
- b. The manner in which each individual was authorized to exercise the authority;
- c. The dates when each individual exercised the authority;
- d. A description of how each individual exercised the authority;
- e. The identity of all individuals with personal knowledge relating to any exercise of this authority;

f. The identity of any documents relating to the creation of the authority or the exercise of the authority.

SUPPLEMENTAL ANSWER TO INTERROGATORY 58: To the extent that communications with Wyoming are within the scope of their position, employees of the DNRC are, or were, authorized to act on behalf of Montana to make a call, demand or other notification requesting water from Wyoming under the Compact. At a minimum, this would include the Regional Manager in Billings, the Water Management Bureau Chief, the Water Resources Division Administrator, Surface Water Hydrologists and Hydrogeologists working on the Tongue and Powder Rivers, the State Water Projects Bureau Chief, DNRC Director, and other employees working on issues related to the Compact or the YRCC. Individuals have held, or currently hold, the authority to make a call, demand, or other notification requesting water during the time that they were, or are, employed by DNRC in their respective positions.

INTERROGATORY 61: If your answer to the previous interrogatory is anything but an unqualified "No," please identify all documents relating to any changes in point of diversion, purpose or type of use, and place of use or land application obtained after January 1, 1950 by any holder of a water right within the Tongue River, Powder River, and Little Powder River basins of Montana which right has a priority date earlier than January 1, 1950.

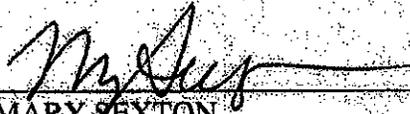
SUPPLEMENTAL ANSWER TO INTERROGATORY 61: Please see the database run attached hereto that identifies the responsive water rights. Information on water rights in Montana is available on Montana's water rights database at http://dnrc.mt.gov/wrd/water_rts/records_unit. Montana has also provided water rights information to Wyoming in documents identified as MT 09095 to 09102.

VERIFICATION

STATE OF MONTANA)
 : ss.
County of Lewis and Clark)

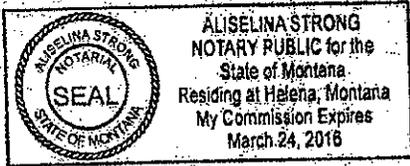
MARY SEXTON, being first duly sworn, deposes and says:

I am the Director of the Montana Department of Natural Resources and Conservation. I have reviewed Montana's First Supplemental Responses to Wyoming's First Set of Interrogatories, and I hereby confirm that they have been prepared under my direction and are true and correct to the best of my knowledge and belief.



MARY SEXTON

Subscribed and sworn to before me this 4th day of May, 2012 by Mary Sexton.





No. 137, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, Plaintiff

V.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, Defendants

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

DEPOSITION OF

KEITH KERBEL

Taken at DNRC Regional Office

1371 Rimtop Drive
Billings, Montana 59105

Monday, April 23, 2012
9:03 a.m. - 5:23 p.m.

GRAF COURT REPORTING
2704 Highland Park Place
Billings, Montana 59102
(406) 254-2576

Exhibit 6

1 APPEARANCES:
 2 MONTGOMERY & ANDREWS LAW FIRM
 3 BY: JEFFREY J. WECHSLER, ESQUIRE
 4 AND
 5 JOHN B. DRAPER, ESQUIRE (by telephone)
 6 325 Pasco de Peralta
 7 Santa Fe, New Mexico 87501
 8
 9 Counsel for Plaintiff
 10
 11 MONTANA ATTORNEY GENERAL'S OFFICE
 12 BY: JENNIFER ANDERS, ESQUIRE
 13 P.O. Box 201401
 14 Helena, Montana 59620
 15
 16 Counsel for Plaintiff
 17
 18 STATE OF WYOMING, OFFICE OF THE ATTORNEY GENERAL
 19 BY: PETER K. MICHAEL, ESQUIRE
 20 AND
 21 ANDREW KUHLMANN, ESQUIRE (by telephone)
 22 AND
 23 DAVID WILMS, ESQUIRE (by telephone)
 24 123 State Capitol Building
 25 Cheyenne, Wyoming 82002
 Counsel for Defendant State of Wyoming

ALSO PRESENT:
 Bern Hinckley
 Reported by John B. Graf

Graf Court Reporting
 (406) 254-2576

1 STIPULATIONS
 2 It is hereby stipulated and agreed by and
 3 among counsel for the respective parties that the
 4 deposition be taken by John B. Graf, Freelance Court
 5 Reporter and Notary Public for the State of Montana,
 6 residing in Billings, Montana.
 7
 8 It was also stipulated by and among counsel
 9 for the respective parties that the deposition be
 10 taken in accordance with the Federal Rules of Civil
 11 Procedure.
 12
 13 It was further stipulated by and among
 14 counsel for the respective parties, and the deponent,
 15 that the reading and signing of the deposition
 16 transcript would be reserved.
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Graf Court Reporting
 (406) 254-2576

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 2
 3 WITNESS: PAGE:
 4 KEITH KERBEL
 5 BY MR. MICHAEL 5, 277
 6 BY MR. WECHSLER 267
 7 Certificate of Witness 290
 8 Certificate of Court Reporter 291
 9
 10 EXHIBITS
 11 NO.: DESCRIPTION:
 12 1 Water Right Dispute Options
 13 2 Final Order
 14
 15
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Graf Court Reporting
 (406) 254-2576

1 Thereupon,
 2 KEITH KERBEL,
 3 having been duly sworn to tell the truth, the whole
 4 truth, and nothing but the truth, testified upon his
 5 oath as follows:
 6 ---
 7 EXAMINATION
 8 ---
 9 BY MR. MICHAEL:
 10 Q. State your name, please.
 11 A. Keith David Kerbel, K-e-r-b-e-l.
 12 Q. Have you ever had your deposition taken
 13 before?
 14 A. Yes.
 15 Q. How many times?
 16 A. Oh, probably -- just a guess, probably
 17 five.
 18 Q. When was the last time?
 19 A. It was for my current job at the Bureau of
 20 Reclamation. And it was in December of last year.
 21 Q. Have you ever been deposed on issues
 22 involving the Yellowstone River Compact?
 23 A. No.
 24 Q. Have you ever testified in court?
 25 A. No.

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1 curtail water use on the Tongue River and the Powder
2 River to allow more water to pass the state line into
3 Montana?

1 A. Well, maybe not in those exact words, but
5 pretty much every doggone annual meeting that I went
6 to -- we basically -- in different words, basically,
7 said -- and tried to work with Wyoming to make sure
8 that we have water coming in from Wyoming into
9 Montana to satisfy our water needs. I mean, those
10 annual meetings, I mean, we basically -- almost
11 every -- I shouldn't say almost every one, except for
12 the wet years, but pretty much we made that point,
13 that all the -- especially the ones that are drier
14 years, that we needed water, and is there anything
15 Wyoming can do to help us out?

16 I mean, that's basically, I think, how it
17 was presented to Wyoming. And a lot of those
18 meetings, is there anything -- and Gary asked Jeff
19 that, and I know they asked Pat that, if there's
20 anything Wyoming could do to get more water down to
21 Montana and work up a system that we could do that.

22 Q. And the annual meetings would generally be
23 in November and December --

24 A. Correct.

25 Q. -- of each year?
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1 letter?

2 A. Yes.

3 Q. And I refer to the May 18, 2004, letter as
4 the call letter.

5 A. Yeah.

6 Q. But, I guess, let me go back to my
7 question, because I want to make sure we're clear.
8 Because I do want to talk about the various things
9 that were said at annual meetings and at various
10 discussions and what Montana was trying to discuss
11 with Wyoming.

12 I want to go get back to that, but first I
13 really want to be clear on this: What I have in mind
14 is a communication from Montana to Wyoming in the
15 water year, and you mentioned a minute ago the
16 discussions at the end of the meeting would be too
17 late to do any good for that water year, correct?

18 A. Yeah, but we always had hope for the next
19 year, you know. That's how western water works. You
20 always have hope and prayer for the next year.

21 Q. But what I'm thinking of is a situation
22 where, for example, like this letter we just talked
23 about, May 18th, 2004, where Montana said we want
24 you, this year, following -- after you receive this
25 letter of May 18 -- and I'm paraphrasing, but we want

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1 A. They were always after the fact, and we
2 were always looking forward to next year. But I
3 mean, that was the reason for the compact meetings,
4 was to negotiate give and take. To try to work out a
5 system between the two states so we're not pissed off
6 at each other all the time, and we can work out an
7 agreement to foster a good relationship between the
8 two states so we didn't have to send letters out like
9 this and may call like this. Because that was one of
10 the reasons that we had to -- we tried to put the
11 tech team together.

12 But that worked for a while and then Pat
13 Tyrrell, at one of the meetings -- and I don't
14 remember exactly which one, but he basically told us
15 that a higher authority is going to have to tell him,
16 to tell a Wyoming water user to shut down to make
17 Montana happy.

18 And he said that basically if he did
19 that -- if he shut off -- in his position, as an
20 appointed position, as a state engineer, the
21 impression I got from Pat -- basically what he said
22 that day of the meeting was that if he shut down a
23 Wyoming user to make sure water was in our reservoir,
24 he would lose his job. And I believe him.

25 Q. Was that something that was after this call
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1 you to curtail pre-'50 water rights that are junior
2 to our pre-'50 water rights so that more water passes
3 the border this year, is the way I interpret this
4 letter. Is that what this letter was intended to do?

5 A. Uh-huh.

6 Q. Yes?

7 A. Well, that's about -- I didn't write the
8 letter or whatever, but that's what -- that was my
9 impression of what they wanted, yeah, that we needed
10 more water this year.

11 Q. This year. And so I guess what I'm saying
12 is we have this one, but I'm asking: Are there other
13 letters or other communications where the request was
14 we are short of water this year in Montana; we want
15 you to curtail your water users so that we get more?

16 A. Well --

17 Q. Was that call -- I call that a call. Do
18 you call that a call?

19 A. Yes.

20 Q. Was that kind of a call ever made before
21 2004, to your knowledge, by Montana?

22 A. Not in that specific words, but the
23 inferences were there. We basically -- I know our
24 water resource administrator a lot of times left a
25 lot of those meetings frustrated because we walked

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1 away accomplishing nothing.
 2 We didn't develop any kind of mechanism
 3 to -- if there was a difference of opinion between
 4 the two states, we always felt frustrated walking
 5 away that Wyoming always had the upper hand because
 6 they're upstream.

7 Now, whether someone sat there at the table
 8 and said Jeff or Pat, we need water; it's December;
 9 the year's gone by. We're meeting after the fact.
 10 It already happened. We talked about what happened
 11 this last summer. The frustration was already there
 12 in a lot of cases in dry years that we experienced.

13 And basically, when you walked out of the
 14 room, there was nothing accomplished other than
 15 trading information. But there was no mechanism in
 16 place to have Wyoming release water to Montana. And
 17 I think that was a frustration with a lot of folks on
 18 the compact on the Montana side.

19 I think it was inferred. I don't know if
 20 it was specifically said, but I know that it was
 21 inferred.

22 Q. But the one you -- you again lapsed back
 23 into telling me about what was inferred in annual
 24 meetings after the water year. And I'm looking for
 25 the communications that say this water year going

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1 water to give to you. I know we talked about trying
 2 to get water in '88 down to Montana. And I was told
 3 that basically it was used up. I mean, Wyoming used
 4 it all.

5 And I know in recent years Carmine, he
 6 always told me that -- he says Kerbel, you've got to
 7 understand something. You fail to understand that
 8 the Bighorns are a sponge. They're not a rock.

9 Q. If you hit the table, I'm not sure about
 10 the people on the phone --

11 A. But I'm just saying that's what I was told.
 12 And that was a frustrating part of my job, because
 13 you would go down and talk to people to try to work
 14 up a way to manage the water in the basin. And
 15 that's the response I met.

16 So how many times am I supposed to ask for
 17 water and when, when I don't get a response better
 18 than that, that this is a sponge and it's not a rock?
 19 You think this is a rock and everything runs off.

20 Q. Well --

21 A. And I'm going okay, then that sends me a
 22 message that this is a futile -- everything's futile.

23 Q. Well, I'm not really interested in how
 24 you're supposed to, because I'm not in your shoes,
 25 okay? But I am interested in --

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1 forward we would like you to curtail.

2 A. You would have to look in the minutes.

3 Q. Well, I'm asking for your memory, though.
 4 We can look through the --

5 A. I can't answer that. I'm just saying it
 6 was --

7 Q. Well, let me say this. My question is: Do
 8 you recall that being said at a time in a water year
 9 where Montana is saying this year we would like you
 10 to curtail water use in Wyoming so more water flows
 11 down the Tongue, Powder, or Little Powder Rivers?

12 A. I don't recall it ever being said, but I
 13 know it was inferred.

14 Q. Well, who inferred it?

15 A. I think Rich did or Gary did.

16 Q. And do you recall what year that --

17 A. No, I don't. No, I don't.

18 Q. Do you know where? What city? What town?

19 A. No, I don't. I know they inferred -- I
 20 know in '88 we had a hell of a time. In '87, '88,
 21 and '9, I know we were short on both sides of the
 22 border. I know it was a frustrating summer.

23 Talking to the Wyoming folks and Montana
 24 folks, when I talked to those guys, they kept saying
 25 well, it's the same thing down here. There's no

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1 A. Well, I wish you were. You would
 2 understand what it's like.

3 Q. But I'm interested in when it was done, if
 4 it was done, because I can't --

5 A. I know -- I'm sure we did in '88. I can't
 6 say for a fact, but I know we did in '88. I
 7 shouldn't say I know, but I would guess if it
 8 happened at any time before 2000, it would have
 9 happened in '87, '88, or '89. But I'd have to defer
 10 to the minutes.

11 Q. You say --

12 A. Because we were short.

13 Q. And when you refer to the minutes, what
 14 minutes? Of what?

15 A. The compact meetings.

16 Q. The annual meetings?

17 A. Yeah.

18 But I know we -- I'm pretty certain we -- I
 19 wasn't -- the problem was in those years I wasn't an
 20 active participant back then. I went to some of the
 21 meetings. I don't even know if I went to that one in
 22 '88, because that year was -- for me was a hell on
 23 wheels. I mean, I almost quit I don't know how many
 24 times that summer.

25 That was a wild summer. I mean, we were
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1 But you were at the meeting earlier that
2 year, I think, at a technical meeting earlier that
3 spring, correct?

4 A. I believe so.

5 Q. I was curious. Just maybe this is a side
6 item, but one of the ranchers had mentioned it had
7 gone down to ten degrees last week around Broadus.

8 A. I wouldn't doubt it.

9 Q. This year we would doubt it, wouldn't we?

10 A. Yes.

11 Q. What does that do to alfalfa? Does that
12 damage --

13 A. It depends upon when it is.

14 Q. How mature the crop is?

15 A. (Indicating.)

16 Q. You have to say yes or no, verbally.

17 A. It basically depended upon what stage the
18 crop is in when it gets cold.

19 Q. So the letter -- we were just talking about
20 a little bit the letter that came out the next day
21 after this memo we're talking about. Mr. Stults told
22 Wyoming that Wyoming should regulate its pre-1950
23 junior water rights in favor of Montana senior
24 pre-'50 water rights. Do you recall that being in
25 that letter?

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1 A. Uh-huh.

2 Q. And you said that happened quite a bit at
3 annual meetings?

4 A. That's why we had technical team meetings.
5 We started using technical team meetings, you know,
6 to try to work out a water management plan between
7 the two states.

8 And Sue and I were supposed to get that
9 thing rolling -- and Sue and I and Chuck were
10 supposed to get that thing rolling. And we had a
11 hard time coordinating getting Sue down here to help
12 work with us on that.

13 Q. Were there times when Montana, in those
14 discussions, had asked Wyoming to work on Montana
15 seniors being able to call off Wyoming juniors? Is
16 that something Montana wanted expressed to Wyoming?

17 A. Yeah, I think so.

18 Q. And what was the theory -- was there a
19 discussion about whether that was a compact -- within
20 Montana's people -- and don't tell me what lawyers
21 said. But within your water management people, was
22 there a discussion about what the compact did in that
23 regard, how it was laid out as far as pre-'50 Montana
24 irrigators calling off pre-'50 Wyoming irrigators?

25 A. We were just working basically from the
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1 A. I think so.

2 Q. You can look at it if you want. It's on
3 the second page.

4 A. Yes.

5 Q. Were you involved in discussions that led
6 to that demand, with Mr. Stults or anybody else at
7 DNRC?

8 A. I was in Billings. A lot of those
9 discussions went on in Helena.

10 Q. Well, you did talk to Mr. Stults the day
11 before, however?

12 A. On this, yes. And I got this information.
13 As far as the decision made on this one here, they
14 never asked me one way or another. I went out and
15 got this information.

16 Q. Well --

17 A. I did volunteer -- wait a minute. I don't
18 think I did. No. I'll back off. I didn't do that.

19 Q. Didn't do what?

20 A. Say one way or another. I didn't make a
21 recommendation. That I remember, anyway.

22 Q. But were there times -- you had talked
23 earlier about Montana complaining to Wyoming that
24 they wanted to work something out as far as how this
25 compact was managed?

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1 theory that seniors making call on juniors. That
2 basically was the theory that we were working off of,
3 as far as just making a normal call on a river, on a
4 stretch of river; is just trying to make, you know,
5 seniors calling off the juniors. That's all we were
6 trying to do.

7 Q. Without regard to whether the rights being
8 called off were pre-'50 or post-'50 in Wyoming?

9 A. Pretty much. Just like a normal call would
10 be on any creek, just without the state line being
11 there.

12 But Pat made it very clear that he couldn't
13 shut anybody down in Wyoming without a higher
14 authority telling him to do so. And that basically
15 prompted our action, in my opinion.

16 Q. And he made that clear after this call
17 letter?

18 A. Right.

19 Q. After May 18th, 2004?

20 A. Yep. And I believe him. I mean, I'm not
21 going to sit here and say that -- you know, I believe
22 what he said. But with that statement, we have no
23 choice.

24 Q. So you mentioned earlier 2005 was a -- and
25 we're just about to stop here. But you mentioned

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1 ask Jack Stults. But do you know if Montana expected
2 Wyoming to release water that had been stored in
3 priority at Lake DeSmet? Is that what the request
4 was for?

5 A. There's a difference. And we talked about
6 it earlier this morning.

7 Q. Before you go -- I want you to say what
8 you're about to tell me, but I want to make sure
9 you're focused on the question.

10 A. I can't speak for Jack. I don't know what
11 he meant here. Because this letter, I -- this is
12 probably all the input I had to this thing.

13 Q. Okay.

14 A. And the decision was made to send this in
15 Helena, and I wasn't a party to that decision. I
16 mean, I was at the meetings and stuff, but that
17 decision was made up there.

18 But the context of the letter, I got a copy
19 and that was it.

20 Q. Let me go ahead because I think you and I
21 are on the same page a little. I've applied to my
22 questioning that Montana intrastate would not allow a
23 call for water that was stored in priority because
24 you just told me that in the Tongue River example.

25 A. And Tongue River is a different case than

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1 is impacted. As those flows come down, especially
2 past the middle of June, 4th of July, in that area,
3 the water quality on the Powder River is -- because
4 of the water quality, it makes the water unusable.

5 Most of the time, in most years, normal
6 years, they irrigate, basically, from February,
7 March, April, May. It bounces around dependent upon
8 when water is available. It doesn't happen in
9 February very frequently, but it has happened. I've
10 seen it.

11 And when I worked down there, they were
12 irrigating in February back in, I think it was, '77
13 or '78, because we got a spring runoff event. And I
14 think it was around February, March, where water was
15 running everywhere.

16 So, yeah, I think when they take water on
17 the Powder, it competes when they fill Lake DeSmet.
18 So in my mind, I think we're competing for the same
19 water.

20 Q. Let me go the next step then and ask you:
21 Let's say there was a year -- and you said there have
22 been years where Montana irrigators are spreading
23 water in February even if it just ices up, the land
24 behind it spider bites, because eventually that water
25 will soak in and add soil moisture.

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1 Powder.

2 Q. I want to ask you why it would be a
3 different outcome across state lines involving Lake
4 DeSmet and Powder River, because I think you were
5 trying to get to that. Go ahead.

6 A. The reason is their period of diversion is
7 different than the Tongue. The period of diversion
8 on the Powder River, basically, like I said before,
9 can start as early as February and it can quit as
10 early as June 30th. And, basically, that -- that's
11 the time period that the folks irrigate on the Powder
12 River.

13 Q. In Montana?

14 A. In Montana. And I don't know about
15 Wyoming, I don't have a clue how they irrigate. I'm
16 thinking -- but anyway, I'm not going to surmise how
17 they irrigate in Wyoming.

18 But in Montana, the problem is it's not out
19 of priority, in my way of thinking. I can't speak
20 for Jack. In my logic, their period of diversion is
21 completely different than what you are going to have
22 for the Tongue because they're looking for high
23 flows.

24 And, basically, because if they don't the
25 high flows, their water quality on the Powder River

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1 A. Uh-huh.

2 Q. How would Wyoming know that in that
3 particular year, there was a situation -- if Wyoming
4 is filling DeSmet at that very time, that Wyoming may
5 be filling out of priority based on how the system is
6 working? How would they know that?

7 Well, maybe let's ask you a better
8 question. How would -- has there been a situation
9 that you know of where Montana officials have
10 notified Wyoming that we have a situation where, if
11 you are filling Lake DeSmet, you're filling it out of
12 priority Wyoming?

13 A. Well, I know we've had historical
14 conversations from the Wyoming office from our office
15 talking about water shortages in different specific
16 years.

17 And the late '80s was one specific
18 instance, an example, where we talked about water
19 shortage situations on both sides of both sides of
20 the line. And we basically viewed this. And we're
21 short on water on our side. And I talked to those
22 guys on their side, and they're telling me the same
23 story. They don't have water to give. They says
24 everything over here is -- we're shutting off water
25 to 1890s and before on Tongue River and Goose Creek

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1 and whatever.
 2 Come to find out, they've never shut off
 3 water on the Tongue River main stem. I found that
 4 out later. But anyway, the bottom line is, is Goose
 5 Creek is what they were talking about. I thought
 6 they were talking about Tongue. But they do shut
 7 water off on Goose Creek, which is a tributary to
 8 Tongue. They've never shut water off on main stem
 9 Tongue. That's where I was coming from. And -- but
 10 they alluded to Goose Creek.

11 So the bottom line is, is that, yes, we've
 12 had conversation historically about shortages that
 13 occurred in the late '80s and the early 2000s. And
 14 there was a couple years in 1990s, but I don't
 15 remember the years, where I've talked to the guys in
 16 Wyoming and that's the conversation we had.

17 And then the frustration, like I said this
 18 morning, really develops because when you keep
 19 talking to these folks, it's like beating your head
 20 against the freaking wall, because the thing I hear
 21 over and over and over again is, on the Tongue, for
 22 example, you don't understand how the Bighorns work,
 23 Keith. They're not a rock.

24 And that's all I heard every freaking time.

25 Q. You've told us --

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1 I'm going to --

2 A. Sorry.

3 Q. I'm trying to stay focused on certain
 4 things here in the Powder -- my question was: In a
 5 particular time, did Montana, to your knowledge, make
 6 a communication with Wyoming?

7 And we'll get into the details, if you
 8 remember one, where the statement was: We have a
 9 situation on the Powder where we have people that are
 10 irrigating, and I don't care if it's July or
 11 February. And you better not be filling Lake DeSmet
 12 or you better -- you know, we have a situation where
 13 we have certain water rights that aren't being
 14 fulfilled, so we need junior water rights in Wyoming
 15 to be shut off.

16 And we have the letter from 2004 and
 17 there's one from 2006. But I want to focus on other
 18 years.

19 MR. WECHSLER: I just want to interject,
 20 though. I think that is the question that Mr.
 21 Kerbel answered.

22 BY MR. MICHAEL:

23 Q. I just want to be clear.

24 A. We made a concerted effort, all the while I
 25 was hired in my present capacity, to talk to Wyoming.
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1 A. So the frustration, what I'm trying to tell
 2 you, Pete, is just -- continues to climb. How many
 3 times do I have to ask for water? How many times do
 4 I have to go out there and tell them we're short of
 5 water?

6 And then we go talk about the Powder,
 7 and they're going -- and Sue, for example, I mean,
 8 and Carmine, for example. Well, we're filling Lake
 9 DeSmet out of order. I mean, we're filling Lake
 10 DeSmet in the spring, basically, and -- so therefore,
 11 we're off the irrigation season. And I says, but
 12 you're not off the irrigation season on the Powder
 13 River because the Powder's a different story.

14 In 2004, I talked to Mike Whitaker. We had
 15 a conversation. This is what he told me: He said
 16 they finally filled Twin Lakes by Labor Weekend
 17 because they were scared to death they weren't going
 18 to get it filled because they needed water for the
 19 town of Sheridan. And if they didn't get that thing
 20 full, which was now one lake because they added on to
 21 Twin Lakes and they built Tyack (ph) over there by
 22 Buffalo. And I mean, you see what's going on.

23 And, Pete, the frustration level just
 24 continues when you're in my shoes.

25 Q. In order to move on with the deposition,

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1 And I talked to Sue, and I talked to Mike, and I've
 2 talked to Carmine. I've talked to all of those folks
 3 from different times in different years. I don't
 4 have a specific year. But I know those conversations
 5 existed in the '80s, a couple years in the '90s and
 6 2000s trying to get water down to our side of the
 7 river. I mean, we really tried.

8 And Mike tried to help me. I mean, he
 9 really did. But he didn't have -- he couldn't shut
 10 anybody off. I understood that. But just trying
 11 to --

12 Q. What do you mean "he couldn't shut anybody
 13 off"?

14 A. Well, that's what he told me. I mean, he
 15 didn't have the authority to shut anybody off on a
 16 call to Montana.

17 Q. But the calls -- we have these letters
 18 where there's a specific statement: We want you to
 19 shut it off so that we get water --

20 A. We had conversations. I got on the
 21 phone -- what I -- what I'm trying to tell you, Pete,
 22 is this -- and I know it's not the answer you want to
 23 hear.

24 Q. I don't want the answer, I just want to
 25 know the details, if possible. That's what I'm

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1 really looking for.

2 A. I know calls were made. I know I talked to
3 those guys and I know visited with them, talking
4 about water shortages in Montana and talking about
5 water shortages in Wyoming.

6 Q. Did you -- in those calls, did you tell --

7 A. We said we were short with water. I don't
8 know what the words were said specifically. I can't
9 remember. That's a long time ago. But I know we
10 discussed the fact that we were out of water on both
11 the Tongue and the Powder.

12 Q. And did you say this is what we're cut
13 back; so anybody that's junior to that, we'd like you
14 to shut them off?

15 A. No. We were trying to get -- Pete, we were
16 trying to get any water we could.

17 Q. And you'll agree with me that you weren't
18 entitled to any water; you were entitled to water --
19 well, I guess that's my --

20 A. We were just hoping to get some water.

21 Q. Okay.

22 A. What I was hoping for was that -- they talk
23 about how stringent they are in shutting people off
24 and they have a duty of water of 1 to 70. And how
25 they go in there and they have these reports to shut

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1 example, of what the Powder River was on May 18th,
2 May 17th, 2005.

3 And I was just curious about the various
4 ways -- you had mentioned that the Powder on May
5 17th, in your view, was not -- there was no
6 commissioner, so there wasn't really a prior
7 appropriation scheme of being enforced at that time?

8 A. No.

9 Q. There was not? Okay.

10 But there are options that various people
11 in Montana have to bring the commissioner in. We
12 talked about that quite a bit this morning, right?

13 A. Uh-huh.

14 Q. And I guess the Powder was adjudicated up
15 through a temporary decree as of the early to mid
16 2000s. So the commissioner would have known, on the
17 Powder, the various water rights, correct?

18 A. Uh-huh.

19 Q. You have to say yes.

20 A. Yes.

21 Q. Let me just look at some documents where
22 one of yours guys -- I say -- one of Montana's guys,
23 Marty Van Cleave, apparently had sent some
24 information to Jack Stults about various priority
25 dates. And that's the kind of information that would

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1 people off on all these ditches on Goose Creek. And
2 the frustrating part was, was when I found out that
3 nobody was shut off on main stem Tongue. They don't
4 have measuring devices on main stem Tongue.

5 And I'm going, okay. The bottom line is,
6 is that when -- and my calls to Mike were: Is there
7 any way that you could go out there to make sure that
8 these guys are using their rightful share. So if
9 there's anything that's leftover, it comes across the
10 state line. How do you know that they're using what
11 they're supposed to be using?

12 Because I'm at Dayton and hay's this high,
13 like I said earlier today, and on other side of the
14 line, it's not. So you understand?

15 Q. Oh, I understand seeing green hay. But
16 that's true in any appropriation system, correct?

17 A. True. I agree.

18 Q. The prior appropriator may have great hay
19 and the junior may have nothing. It's designed to
20 work that way, correct?

21 A. Yeah.

22 Q. I want to show you -- this is a document
23 from Montana's DNRC website. And what I want to just
24 follow up on a little bit is -- because we've looked
25 at some documents here involving what the status, for

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1 have been available, correct?

2 A. Correct.

3 Q. So I guess I'm trying to work my way
4 through -- if we look at -- I want to use this to
5 help us maybe as an outline a little bit about
6 different ways that a stream could be regulated in
7 Montana depending on various circumstances.

8 We just talked about the Powder, which had
9 a preliminary decree. So it was in a position to be
10 regulated by commissioner, right?

11 A. Uh-huh. Yes.

12 Q. But what about the Tongue River? And, you
13 know, there's a hierarchy in this document that
14 explains -- the State of Montana explains the various
15 ways how this works. But Item No. 3, would you look
16 at Item No. 3 on this document.

17 A. Yes.

18 MR. WECHSLER: Excuse me. Are you going to
19 make this a --

20 MR. MICHAEL: I think we should. It's a
21 rule, but we had talked about --

22 MR. WECHSLER: That's true.

23 MR. MICHAEL: For clarity, the court
24 reporter mark -- let's stop now and have the
25 court reporter mark it.

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1 permits in the Tongue or Powder?

2 A. No. Because I don't think they have
3 groundwater applications in the Tongue or Powder. If
4 we did, I don't remember them.

5 Q. I'm going to whiz through my notes and see
6 if there's anything burning, and then we'll call it a
7 day.

8 Of course, Jeff may have a questions.

9 MR. WECHSLER: Just a few, yeah.

10 THE WITNESS: And then you're going to have
11 some.

12 BY MR. MICHAEL:

13 Q. That is when the fun begins. This is the
14 2:30 in the morning stuff.

15 A. I thought I was just joking. Obviously,
16 I'm not.

17 (Whereupon, an off-the-record discussion
18 was had, and a break was taken.)

19 BY MR. MICHAEL:

20 Q. In answer to a prior question, in terms of
21 groundwater, you basically said that you didn't --
22 weren't aware of groundwater applications for permits
23 in the Tongue and Powder River Basins?

24 A. I don't remember any.

25 Q. But when you say that, are you referring to
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1 irrigation or -- I mean, it seems to me that -- were
2 there applications for domestic or stock or --

3 A. Yes. You're absolutely right. And I was
4 referring to larger well permits. See, the
5 connotation, basically, is that if they're a small
6 groundwater well that's less than 35 gallons a minute
7 and 10 acre-feet, that's a domestic stock well, in my
8 mind, and that's not a permitted well.

9 A permitted well, in my definition,
10 basically, is anything that exceeds those two
11 parameters. So that would constitute a permit.

12 MR. MICHAEL: Well, I think I'll go ahead
13 and pass the witness. And Jeff may have some

14 questions for you. Thank you.

15 THE WITNESS: You bet.

16 ---
17 EXAMINATION
18 ---

19 BY MR. WECHSLER:

20 Q. So, Mr. Kerbel, as you know, my name is
21 Jeff Wechsler, and I represent Montana. And I have
22 just a couple of questions, and they are in four
23 areas. The purpose, really, is to just clarify some
24 of your earlier testimony so there's no fusion on the
25 record.

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1 So the first area that I have questions
2 about has to do with this question of what
3 notification Montana gave to the State of Wyoming
4 about needing water. And earlier you testified in
5 questions from Mr. Michael that -- well, Mr. Michael
6 was asking you had there been any specific calls
7 asking for either written or otherwise saying you
8 need to curtail X, Y, and Z water right.

9 Do you remember that testimony?

10 A. Yes.

11 Q. And I believe you indicated that you had
12 had several discussions at annual meetings about the
13 need that Montana had for water to satisfy early
14 priority water rights; is that correct?

15 A. Correct.

16 Q. And at those annual meetings -- well, Mr.
17 Michael asked you about the minutes of those annual
18 meetings. What I'm wondering is: Did all the
19 discussion that occurred at those commission meetings
20 end up in the minutes?

21 A. Of course not.

22 Q. And why was that?

23 A. A lot of the discussions were sidebar.
24 They happened during breaks. A lot of them
25 happened -- even conversation across the table. And
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1 a lot of times -- I mean, whether it was at the
2 commission meeting or whether it was at our meeting
3 that we had in the spring, technical team meeting, a
4 lot of that stuff just didn't get typed into the
5 minutes.

6 I mean, they weren't comprehensive, was
7 what I was trying to say. I mean, they hit the high
8 spots, like I said earlier.

9 Q. You remember during some of those annual
10 commission meetings that you discussed with officials
11 from Wyoming, Montana's need for water rights to
12 satisfy early priority water --

13 A. Oh, yeah. On water-short years, yeah,
14 that's all we talked about.

15 Q. In your position with the DNRC, did you
16 have the opportunity to communicate with Montana
17 irrigators?

18 A. Oh, yes. I mean, that was part of my job.
19 I mean, they communicated with me as much as I
20 communicated with them. So I got phone calls during
21 dry years wanting to know -- what questions I would
22 get is: What priority date does their neighbor have?
23 And if they're using water and how things were going.
24 And a lot of questions on enforcement and that type
25 of stuff, but sometimes it didn't go that way.

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1 I mean, there were tons and tons of
 2 questions, especially during drought years, about the
 3 process and what they needed to do and everything
 4 else. And it's typical when you get into a western
 5 state like we are here in Montana and they are in
 6 Wyoming and what have you, that by the time you get
 7 into a situation in the summer and you're water short
 8 and you're fighting with your neighbor and you're
 9 throwing things at each other, a lot times you'll go
 10 hire an attorney and file a lawsuit.

11 And by the time winter comes along, you get
 12 three feet of snow on the ground or you get a bunch
 13 of rain or whatever, and they're going do I want to
 14 spend 40, 50 thousand dollars or not? So a lot of
 15 those cases, the person finally goes, well, maybe
 16 things are looking better this winter, we'll forego
 17 it. So a lot of times -- sometimes they don't make
 18 it to court.

19 I know when we had the meetings with
 20 Wyoming, both in the fall and the spring, we were
 21 always discussing water availability, how to get
 22 water across the state line, what avenues do we need
 23 to do in order to accomplish that. And the bottom
 24 line is, is there a willingness in order to Wyoming
 25 to participate in this -- or develop a management

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1 plan to get more water across the state when we get
 2 into short years.

3 And that was the purpose for these meetings
 4 ever since I started attending them in the '80s and
 5 '90s and even through my history in my career, was to
 6 try to -- and then open lines of communication, was a
 7 lot of it, just what was going on in each state. But
 8 the reason we were there at every damn meeting was to
 9 try to -- at least my purpose was, was to try to
 10 influence Wyoming to work with us, to try to get
 11 water in Montana.

12 Did I think that would happen? Probably
 13 not, but it was worth a try. At least I could go
 14 back and tell the water users in Montana that we gave
 15 it a valiant effort.

16 Q. We were talking about those water users in
 17 Montana. And just to be clear, those were irrigators
 18 that you were communicating with on the Tongue and
 19 Powder River in Montana?

20 A. Correct.

21 Q. Did those irrigators on the Tongue and
 22 Powder River in Montana communicate that they needed
 23 water to satisfy early priority water rights?

24 A. They just wanted water, Jeff. I mean, to
 25 be honest with you, Jeff, we didn't talk about water

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1 rights, per se. We talked about getting the dam full
 2 and getting releases so they had water during course
 3 of the summer in order to get some crops, because
 4 that's their livelihood.

5 Q. You mentioned some years earlier, and I
 6 think you were talking about water-short years; is
 7 that correct?

8 A. Yes.

9 Q. And as you recall, I heard your testimony
 10 earlier, you were talking about the period from 1987
 11 to 1989, a couple years in the 1990s and the 2000s.

12 Did I miss any years?

13 A. '83 and '85 were not good, but I don't
 14 think I went to too many meetings back then. But I
 15 know '85 was a dry year, '86 was a wet year. The
 16 fall of '87, things really went downhill from then
 17 on. And then kind of climbed back out in the early
 18 '90s, 1990s. '89 was a better year, but '88 was the
 19 worst year.

20 I know I talked to the Sheridan boys, the
 21 Wyoming constituency, my counterparts in Wyoming
 22 about what we could do together to work out a
 23 scenario where we could get more water across the
 24 state line. And if they were using water -- if there
 25 was any wasting of water, different scenarios we

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1 discussed showing our frustration. And they,
 2 basically, came back and they had the same
 3 frustration I did too.

4 So I knew for a fact when we were talking
 5 about trying to get water and making call and all
 6 this stuff, per se, it was going to be a frustrating
 7 discussion because we were all in the same boat.
 8 But, yeah, it was a water-short year. And we talked
 9 back and forth quite a bit those summers.

10 Q. In your position with the DNRC, one of your
 11 responsibilities or one of your job duties was to be
 12 in contact with the Wyoming state engineer personnel?

13 A. With the compact program, yeah, that was
 14 part of my job.

15 Q. Do you remember which individuals you would
 16 have been in contact with?

17 A. Historically, Carmine LoGuidice, and Mike
 18 Whitaker, and Bill Knapp.

19 Q. During those -- did you communicate to
 20 those Wyoming individuals that Montana was needing
 21 water during those water-short years?

22 A. Of course.

23 Q. And those are those same water-short years
 24 that we talked about earlier?

25 A. Yes.

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1 Q. And were those communications, say,
2 separate from the annual commission meetings?
3 A. Yeah. They were mostly phone calls. And
4 they occurred in, probably, August when we were all
5 frustrated as hell.

6 Q. Some of those occurred during the
7 irrigation season?

8 A. Oh, of course, they did.

9 Q. And by making those communications to the
10 State of Wyoming, was it your intent to get Wyoming
11 to do something to get water to Montana?

12 A. Well, I probably knew the answer before I
13 called, but at least it was worth a try.

14 Q. Was that your intent?

15 A. Yes.

16 Q. Well, you mentioned you got frustrated.
17 And I think at one point you said that it felt like
18 banging your head against the wall.

19 What do you mean by that?

20 A. Well, basically when I called Wyoming
21 several times, I was told -- well, I said it earlier
22 today, that, basically, Keith, you think the Bighorn
23 mountain is a rock. And I've said this before and
24 I'll say it again -- and, basically, I was told it's
25 a sponge; not all the water runs off. So therefore,

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1 showed by Mr. Michael a document that was, I believe,
2 Montana 12988, and that was a memorandum from you to
3 Jack Stults.

4 Do you recall that document?

5 A. Yeah. That was in 2004?

6 Q. You don't have that before you, but do you
7 generally recall that document?

8 A. Yes.

9 Q. Do you remember when you were asked to talk
10 to the irrigators in order to produce that
11 memorandum?

12 A. Yeah. Just, I think, a day or two before.

13 Q. Were you able to talk to all of the
14 irrigators?

15 A. No. No. We only did a sampling.

16 Q. So that doesn't reflect a complete
17 discussion with all of the irrigators?

18 A. Of course not.

19 Q. Third topic. During that same discussion
20 with Mr. Michael, you were shown a document that, I
21 believe, was labeled Montana 13285, which was an
22 e-mail from a Marty?

23 A. Van Cleave.

24 Q. Thank you. And that wasn't written by you;
25 is that correct?

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1 you're not going to get anything, because it's a
2 sponge, and, basically, there isn't any water
3 available.

4 And I got the impression, from talking to
5 the boys in Wyoming, that they couldn't do anything
6 and they weren't going to do anything.

7 Q. During any of those years you mentioned, in
8 the mid '80s, in the '90s, and the 2000s, when you
9 had these discussions with people from Wyoming, did
10 that result in any additional water crossing the
11 state line into Montana?

12 A. Not that I saw. But I will say one thing,
13 and I said it earlier, I did appreciate the fact that

14 Pat Tyrrell asked Mike Whitaker to get some measuring
15 device installed on the diversions on main stem,
16 because I was told and I was informed that there's
17 never been a commissioner on main stem Tongue. Water
18 has never been shut off on main stem Tongue.

19 Q. Fair enough.

20 A. And I think there's an expansion of water
21 that's a post-'50 on the main stem and tributaries.

22 Q. I promised you I would asked about four
23 topics, that was the first. And so I want to make
24 this promise: The other three are much shorter.

25 So my first question had to do -- you were

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1 A. No, it was not.

2 Q. And you didn't have any input into that
3 e-mail?

4 A. No, I didn't.

5 Q. And did you agree with all of the
6 information that was in that e-mail?

7 A. No. I was kind of taken aback on Elgin's
8 water rights being so junior. I didn't think their
9 water rights were that junior.

10 Q. Fourth and final topic. You were shown a
11 couple of oversized maps by Mr. Michael, that I
12 believe you testified -- or there was discussion
13 about it being a 2009 map.

14 Did you have any involvement in producing
15 that map?

16 A. No. That was done by Helena.

17 Q. Would you consider that map to be the
18 authoritative, most accurate source of information
19 about Montana water rights?

20 A. No, I don't think so.

21 MR. WECHSLER: That's all questions I have.

22 ---
23 EXAMINATION

24 ---
25 BY MR. MICHAEL:
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1 Q. I have a few.
 2 A. I figured.
 3 Q. You discussed with Mr. Wechsler 1988, but
 4 you said -- you talked that year, but then you said
 5 "those summers." And I'm just trying to get a handle
 6 on dates here.
 7 When did you talk to Mike Whitaker about
 8 your frustration? Do you have a date?
 9 A. No, I don't.
 10 Q. When we talked earlier today in your direct
 11 examination, you talked about meeting with him at
 12 annual meetings?
 13 A. Yes.
 14 Q. And --
 15 A. We had conversations during the course of
 16 the summer on the phone.
 17 Q. And this was in what time frames? '80s?
 18 '90s? 2000s? When --
 19 A. All the way.
 20 Q. From when to when?
 21 A. Oh, God. I'm trying to remember when.
 22 We had conversation in the '80s. We had
 23 less in the '90s because we had better water years in
 24 the '90s. And then we had several discussions in the
 25 drought years of the 2000s.
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1 to -- he liked to take control of things and do
 2 things on his own.
 3 Q. Do you believe that you had authority on
 4 behalf of the State of Montana to write such a letter
 5 as that May 18th, 2004, letter to Pat Tyrrell?
 6 A. I would have felt uncomfortable doing it,
 7 but, yes, I would have.
 8 Q. Based on what?
 9 A. Pardon me?
 10 Q. What was the basis --
 11 A. On my position.
 12 Q. In the 1980s, how did you keep phone
 13 records?
 14 A. I didn't.
 15 Q. What if somebody called in and -- was there
 16 somebody to answer the phone here other than you in
 17 the '80s?
 18 A. Uh-huh.
 19 Q. And it was a man or a woman?
 20 A. It was a woman.
 21 Q. What was her name? Or if there were more
 22 than one --
 23 A. Carla Bornhoft.
 24 Q. So if calls came in to her -- so let's say
 25 Mike Whitaker tried to called you and a call came in
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1 Q. So you had phone calls with Mike Whitaker
 2 during some of those summers?
 3 A. Uh-huh.
 4 Q. Mostly '80s and 2000s?
 5 A. Late '80s.
 6 Q. And what about '83, '85? You mentioned
 7 those and then you seem to be unsure of yourself?
 8 A. Oh, I just was saying those were dry years,
 9 too, but I never contacted Wyoming in those years.
 10 Q. Okay.
 11 A. I know that for a fact. But we did talk in
 12 '87, '88, and '89.
 13 Q. Now, in 2004, why was it that Jack Stults
 14 wrote that May 18th of 2004 letter to Pat Tyrrell and
 15 you didn't?
 16 A. And I didn't?
 17 Q. Yeah. Why didn't you write that letter?
 18 A. He was the commissioner on the compact.
 19 Q. And what difference does that make?
 20 A. Well, I don't know. But he felt it
 21 appropriate to come from him, I guess. He felt it
 22 was more appropriate to come from him than me or he
 23 would have asked me to write it. He was the division
 24 administrator, I assume.
 25 And Jack was an individual that he liked
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1 to her and you weren't here. Would she make a note?
 2 A. Yes.
 3 Q. And leave it for you?
 4 A. Yes.
 5 Q. And were those kept?
 6 A. No.
 7 Q. When were they tossed away?
 8 A. When I got ahold of Mike.
 9 Q. So you didn't have a practice of
 10 maintaining those records of missed calls, correct?
 11 A. Correct.
 12 Q. And then if he would call you on an issue,
 13 would you take notes?
 14 A. Sometimes.
 15 Q. Did Mike Whitaker ever initiate a phone
 16 call to you in the 1980s?
 17 A. Oh, God. You want me to remember that? I
 18 don't remember. I know I initiated calls to him.
 19 Q. How about in the 1990s? Did he ever
 20 initiate a call to you in the '90s?
 21 A. Yeah, we did.
 22 Q. He --
 23 A. I think we did in the '90s because we got
 24 to know each other better as time went on.
 25 Q. But you think he initiated at least one
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1 call to you in the 1990s?

2 A. I would think he would have, yes. I mean,
3 Mike called me up on good years. We had a pretty
4 decent -- I thought Mike and I had a pretty good
5 relationship. I mean, when we got good years, I'd
6 get a phone call from Carmine, I'd get a phone call
7 from Mike, and they would let me know, Keith, I've
8 got a feeling we're going to smile at the end of the
9 summer. You know what I mean?

10 We'd get those kind of calls. I mean, and
11 that's not a direct quote. But, basically, it was
12 that kind of conversation. And we communicated more
13 during -- I will say we communicated more during
14 better years. And we stayed in pretty good contact.
15 Mike and I still e-mail each other today. But the
16 bottom line is, is that we don't talk about work.

17 Q. Why should he; he's retired?

18 A. That's right.

19 So the bottom line is, is that, yeah, I
20 mean, in the '90s and 2000s, we got along pretty
21 well. We -- at the meetings and stuff -- like we had
22 a meeting down in Buffalo, and we all went golfing
23 together.

24 I mean, Jeff went with us, and Mike went
25 with us and a bunch of us from Sheridan, we all

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1 A. Yeah. To get more water. If we ran into a
2 water-short year and the snowpack was looking pretty
3 bleak, next spring is to work out a management plan
4 where we could work together and share the shortage,
5 that was our goal; that was the reason I felt that we
6 had those annual meetings and the technical team
7 meetings, was to try to develop a management plan so
8 we could work together, two states, and didn't have
9 to sue each other. That was my purpose for being
10 there.

11 And that's what we discussed. We tried to
12 discuss -- I mean, Susan -- I mean, Sue -- I mean,
13 she was the interstate coordinator. I mean, that was
14 her job. I talked to Sue too. I'd call Sue up and
15 visit with her on occasion to visit about water
16 shortages on Tongue, water shortages on Powder, maybe
17 even the Clark's Fork at times, to see what can be
18 done. And I visited with Sue, basically. She talked
19 about Bear. I don't know where Bear is, but she
20 talked about they had a water management on Bear.
21 And she said it seemed to work with the different
22 states.

23 I felt maybe that could be a -- Jack and I
24 talked about this. And we asked questions about
25 something to that effect at one of the -- I think it
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1 golfed the Buffalo course. It was a great course.
2 So, yeah, we had conversations, good times and bad.

3 Q. Of any of those calls, do we have any
4 notes, any documentation of calls between you and
5 Whitaker?

6 A. Not on my behalf.

7 Q. You don't have any?

8 A. No. I didn't keep a call log.

9 Q. You said that in your cross-examination,
10 Mr. Wechsler's questions, every meeting you would try
11 to influence Wyoming to work with us and give it a
12 try?

13 A. That's what I thought the meetings were
14 about.

15 Q. Okay.

16 A. Those were the kind of meetings, I thought.

17 Q. And are we talking the annual meetings at
18 that point?

19 A. No.

20 Q. It would be some other meeting besides an
21 annual meeting?

22 A. No. It would be mostly the annual meeting
23 or the technical team meeting.

24 Q. And work with us to plan, what -- this is
25 in December, November?

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1 was one of the -- I don't know if it was a telephone
2 conversation or if it was at one of the commissioner
3 meetings, annual meetings, about -- she came in and
4 talked about how the Bear project works, and we were
5 wondering if that would work for Tongue River.

6 But it didn't go anywhere. It never got
7 off the ground.

8 Q. So the idea in those cases, with the annual
9 meetings in November, December, would be to work over
10 the winter to come up with something -- some way to
11 administer water between the two states?

12 A. That was my goal.

13 Q. And when I say "administer water," I mean
14 as a practical matter, X head gate gets shut off at X
15 date type thing?

16 A. Yeah. And Sue was always busy. I mean,
17 she went to more meeting -- I mean, I tried I don't
18 know how many times to set up a meeting to meet Sue
19 in Sheridan or Buffalo or Casper so we could work on
20 this thing with Mike, her, and myself, and Carmine
21 and bring our hydrologist down. And every time we
22 tried to set up a date, it got postponed or something
23 happened or whatever. But she's Miss Meeting
24 Attender. She's got meetings all over the United
25 States.

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1 So, you know, it got frustrating in a
2 sense, and it all went by the wayside, I'm sorry to
3 say.

4 Q. So do you remember a conversation that you
5 had with Mike Whitaker where the gist of what you
6 said to him was Montana demands that Wyoming...

7 A. No, it wasn't worded that way.

8 Q. Or that Montana would like, pretty
9 please -- okay? And this is in an irrigation season.

10 A. Uh-huh.

11 Q. -- Wyoming to regulate one or more water
12 users in Wyoming so that more water shows up at the
13 state line this year sometime in the near future?

14 A. Correct.

15 Q. You said that to him?

16 A. Yes.

17 Q. And what year was that?

18 A. I'm sure it was '88. I'm thinking it was
19 '88. I know we talked about it in 2000 because 2000,
20 2001 were tough years as well, that whole period in
21 there.

22 Q. In '88, what time of year was that when
23 you --

24 A. I was thinking it was probably late summer.
25 July, August would be my recollection.

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1 figure out if there's a way to get it done. And
2 I think we both ended up with a frustrating
3 conversation by the time we both hung up.

4 BY MR. MICHAEL:

5 Q. So after you made that statement to Mike
6 Whitaker in one of those years and then immediately
7 call up Jack Stults or Gary Fritz and say, hey, I
8 told Wyoming I want them to deliver water, curtail
9 water users to satisfy water use on the Tongue and
10 Powder; I want you to know this, that I've done this?

11 A. No, I did not.

12 Q. And why didn't you do that?

13 A. This was a conversation between Mike and I
14 to try to solve a problem.

15 Q. But did you expect Mike Whitaker to report
16 that to Wyoming authorities and take action --

17 A. I can always hope.

18 Q. -- in the near future?

19 You expected that?

20 A. No. To answer your question, no. But I
21 thought it was worth a try. My expectations were
22 really low, and they were met.

23 Q. In 2004, May 17th of 2004, we looked at
24 your interoffice memorandum of that date.

25 A. Yes.

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1 Q. And your recollection would be just you and
2 Mike Whitaker?

3 A. Yes.

4 Q. No witnesses?

5 A. No. It would just be Mike and I.

6 Q. And you don't have any records of that --
7 any written records of that yourself?

8 A. No, I don't.

9 Q. So the only possibility for written record
10 would be Mike Whitaker would have something in
11 writing?

12 A. (Indicating.)

13 Q. Is that correct?

14 A. That is correct.

15 Q. Any other years than the two you just said?
16 You said 1988 and 2000 that occurred.

17 MR. WECHSLER: I think he's answered that
18 as well.

19 THE WITNESS: Yeah. I mean, we talked
20 other years too. But I mean, those were the few
21 worst years: 2004, 2002, 2006. I know we had
22 those conversation in those years, by my
23 recollection. And a lot of it was frustration
24 on both our parts.

25 We ended up talking to each other, trying

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1 Q. Do you recall that?

2 And you just testified a minute ago that at
3 that time you did not make an effort to cover all the
4 irrigators in the Powder River and see what their
5 situation was; is that correct?

6 A. That is correct. I just took a sampling.
7 I tried to pick out the larger water users that I
8 knew and that I had a communication with. And then I
9 went through and checked out some of the other guys
10 downstream. So I tried to get a sampling from top to
11 bottom.

12 Q. So as of the next day, May 18th, 2004, did
13 you have enough information to be able to say that

14 there are no -- which water right users were
15 diverting and which ones weren't?

16 A. No. I didn't know if all of them were or
17 if -- I just knew the people that I talked to. They
18 mentioned other water users in the drainage had
19 similar situations as they did, and that's as far as
20 it went. They pretty much ran out of water by the
21 4th of July.

22 MR. MICHAEL: I don't have any further
23 questions. You're done.

24 (Whereupon, the deposition concluded at
25 5:23 p.m.)

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