

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

WYOMING'S REPLY BRIEF IN SUPPORT OF RENEWED MOTION FOR
PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The legal issues Montana has raised that will be addressed in this motion are: (1) What are the components of an **adequate** call, including when it must be made, what it must contain, and who may make it. (2) Could either of the two potential excuses that the Special Master identified in his memorandum be legally applicable to the parties under the doctrine of appropriation or under this Compact--and if so, could any events since 1980 justify Montana's failure to make an adequate call? Those potential excuses, which the Special Master did not flesh out significantly in his memorandum that he drafted before a record has been developed in discovery, consist of: (1) the equitable concept of futility; and (2) the concept that Wyoming might have "sufficient reason to believe or know" on its own the condition of Montana pre-1950 diversions such that Wyoming should unilaterally curtail post-1950 diversions to comply with Article V(A).

Montana contends that there has not been enough factual development to allow partial summary judgment in favor of Wyoming on these issues. Wyoming disagrees. The parties have disclosed their documents related to the Compact, so not only could they have canvassed their own archives over the last five years, they can now rely on the documents in their opponents' archives and those of North Dakota. Further, Wyoming has deposed all of Montana's former officials that Montana contends gave any form of notice to Wyoming officials between 1980 and 2006. Wyoming therefore believes that these issues are ripe for determination, as a matter of law.

ARGUMENT

A. Taking everything in Montana’s opposition as true, it has failed to demonstrate that it diligently provided notice to Wyoming in any years other than 2004 and 2006

In these proceedings, the Special Master has recognized that “Montana generally should not be entitled to damages for a violation of Article V(A) if it did not provide notice to Wyoming that insufficient water was reaching Montana to satisfy those pre-1950 appropriations.” Mem. Opp. on Wyoming’s Mot. for Partial Summ. Judg. (Notice Requirement for Damages) at 3-4. The Special Master has further recognized that the call requirement is not an “[idle] mandate” and is a key component of the process whereby a senior establishes its legitimate demand for junior curtailment. *Id.* at 4-5. While the Special Master has opined that the notice need not take any particular form or be made by any particular official, he has found that the “key requirement is simply that Montana have placed Wyoming on adequate notice that Montana was not receiving sufficient water to meet the requirements of Article V(A) of the Compact.” *Id.* at 7-8. While Montana may not need to give notice instantaneously, it is obligated to act diligently to ascertain whether there are pre-1950 deficiencies and notify Wyoming of those deficiencies. *Id.* at 8. Thus, the Special Master has found that Wyoming’s liability is limited to those instances where Montana can demonstrate that “notice was diligently provided.” *Id.* Inherent in the concepts of diligence and mitigation is the proposition that Montana notify Wyoming at a time when Wyoming can do something to timely respond.

Putting aside for the moment Wyoming’s arguments regarding the content of Montana’s communications with Wyoming and the authority of the officials making the communications, the undisputed evidence in this case shows that Montana did not diligently provide notice to Wyoming in any years other than 2004 and 2006. In fact, the evidence shows that Montana was purposely not diligent, generally waited until after the irrigation season to raise its concerns

about water supply, and even then fell substantially short of a cognizable call for curtailment under the provisions of Article V(A). When Montana alleges that it did complain during the irrigation season, it cannot point to any specific day or week when it put Wyoming on notice.

Montana's claims that it provided diligent notice to Wyoming are based entirely on the testimony of Mr. Moy, Mr. Kerbel and Mr. Stults. *See* Montana's Opp. at 38-42. It has provided no documents, outside the years 2004 and 2006, that establish that it put Wyoming on notice at any particular time during an irrigation season at issue. Mr. Moy testified unequivocally that his complaints were made after the irrigation season during the annual or technical meetings of the Commission. Moy Dep. at 97:6-97:18, 98:9-98:19, 106:7-106:23. Mr. Kerbel testified that in addition to complaints during the annual meetings, he complained late in certain irrigation seasons, but he could not give any specific dates when he made those complaints. Kerbel Dep. at 101:22-102-25, 109:3-109:10, 144:16-145:11, 272:5-274:8, 286:1-286:25. Mr. Stults gave the most specific testimony. He testified that he could not recall dates when he made complaints, but he believed that he complained to Wyoming officials in May and June of 2002 and 2003. Stults Dep. at 91:4-14. Even crediting these accounts with every favorable inference, there can be no dispute that this testimony fails to establish that any Montana official gave notice to a Wyoming official at a time when it could have made a difference.

In its Opposition, Montana proceeds from the proposition that some scintilla of proof that it made a complaint at some indefinite time in a particular year is sufficient to create a genuine issue of fact precluding summary judgment as to that year. It is not. The date of notice is an essential element of Montana's case, and a fact that Montana has the burden of proving in any given year. In fact, the Special Master has recognized that the point in time when notice was given is critical, because "Wyoming would not have known or been able to determine how much

water was needed **at any point in time** to satisfy Montana's pre-1950 rights[.]” Mem. Opp. at 3 (emphasis added).

As the Special Master is well aware, summary judgment is appropriate if the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Thus:

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a “genuine” dispute as to those facts. Fed. Rule Civ. Proc. 56(c).” As we have emphasized, “[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’ ” *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Scott v. Harris, 550 U.S. 372, 380 (2007); *see also Luhan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888-89 (1990).

Accordingly, to prevent the entry of summary judgment, Montana as the non-moving party must present evidence such that a reasonable fact finder could return a verdict for Montana. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This it has failed to do. Conclusory statements that notice was given over broad periods of time, both within and outside of the irrigation season, are insufficient to permit any rational trier of fact to conclude that Montana acted diligently to provide Wyoming with notice at a time when Wyoming could have acted. To hold otherwise would allow Montana to recover damages for extended periods in which Wyoming may have never had any notice.

In order to ascertain whether Wyoming could have taken effective action in response to Montana's call, it is imperative to know exactly when the call was made. Without a date certain when notice was given, no reasonable fact finder could find that Wyoming acted in violation of the Compact "at any point in time." Mem. Opp. at 3. Conversely, Wyoming could never demonstrate that it was not in violation, because it could never know which days were at issue in any given year.

Accordingly, even crediting every bit of the testimony of Mr. Moy, Mr. Kerbel, and Mr. Stults, Montana has failed to present evidence sufficient to create a genuine issue for trial for any years other than 2004 and 2006. Even if the rules did not foreclose further evidence from Montana on this point, there is no likelihood that the record will be any better than it is now. The documents have been scoured, and the memory of Montana's witnesses have been dredged.

B. The content of Montana's alleged complaints, as described by its own former personnel, also supports partial summary judgment in Wyoming's favor

In his December 20, 2011 memorandum opinion, the Special Master stated that Montana's notice need not take any particular "shape or form," but he did place at least some requirements on the content of such notice. Mont. Br. at 2. He wrote that Montana had to state that it "did not believe that it was receiving sufficient water under the Compact." Mem. Op. at 7. Montana had to give "adequate notice that it was not receiving sufficient water to meet the requirements of Article V(A) of the Compact." *Id.* at 7-8.

In both of these sentences, the Special Master used the past progressive tense—"was receiving" or "was not receiving"—which as explained above, meant that Montana needed to state its belief to Wyoming at a time when the deficiency was actually occurring. Mem. Op. at 4. The Special Master further imposed a requirement that Montana's notice be "adequate;" that it inform Wyoming that Montana does not believe that it is receiving sufficient water "under the

Compact,” and to “meet the requirements of Article V(A) of the Compact.” This construct emphasizes that Montana’s notice must be notice for Wyoming to take action consistent with Article V(A) of the Compact as it exists, and not simply be Montana’s request to negotiate modifications to the Compact or to request administrative schemes that would circumvent the Compact. In its responsive brief, Montana glosses over the Special Master’s provisos that notice be intended to notify Wyoming that Montana wanted Wyoming to meet the requirements of Article V(A). Mont. Br. at 40-42.

This distinction is particularly critical for the years 2001, 2002 and 2003 when Mr. Stults testified that he complained to Sue Lowry and Pat Tyrrell about drought on some unknown dates during the irrigation season. Mr. Stults conceded that he intended that Wyoming **not** take his words as a Montana demand for action under the Compact. Stults Dep. at 88:17-89:23; 98:1-102:10; 230:7-231:25. It would be unfair to allow a person to expressly intend **not** to convey notice to be acted upon but then later assert that the other party should have received the message contrary to the speaker’s true intent. He could purposely give a whiff of notice when communicating with the other party and still keep his options open. If the other party took action relying on that whiff, and it turned out that the notice was wrongful and exposed the notifying party to liability, then the notifying party could simply deny that he intended his notice to be acted upon. On the other hand, if the receiving party failed to act on the whiff, and the notifying party later decided it was in his interest to claim that he gave notice, such a rule would allow the notifying party to pursue a damage claim founded on misdirection.

Montana cannot escape the obvious consequences of Mr. Stults’s admission that he did not intend Wyoming to take any action “under the compact” in response to his statements to Sue Lowry or Pat Tyrrell before 2004. Even if Mr. Stults had testified to a date for such

conversations, they did not create “adequate” notice under Article V(A) for the simple reason that Mr. Stults did not intend them as such.

Furthermore, Wyoming disagrees with Montana’s assertion that notification would be adequate if it consisted of something less than a demand for water “under the Compact.” There is good reason for the New Mexico Supreme Court’s formulation that a valid call must include a **demand** by the senior appropriator that the junior curtail, not just a status report or an expression of unhappiness that a severe drought is hurting the senior irrigator. Mem. Op. at 4, *quoting Worley v. U.S. Borax & Chem. Corp.*, 428 P.2d 651, 654-55 (N.M. 1967) (“An upstream junior generally cannot be held liable for a downstream senior’s shortage of water unless [the senior has] demanded that water, to the extent of his needs and within his senior appropriation, be allowed to reach his diversion point. The absence of such a demand [is] decisive.”).

A true demand should be necessary because, even if the junior appropriator knows that there is a low flow condition downstream, he cannot conclude from that knowledge whether downstream senior irrigators actually intend to use the water. They may be fallowing land that season, or temporarily suspending irrigation for purposes of harvest, or enjoying the benefits of timely rains. They may be repairing structures, or, have structures in such need of repair that irrigation is not even feasible. Only a demand by the downstream irrigators can reveal their subjective intent, and that intent is essential in avoiding waste caused by an unnecessary curtailment. Mem. Op. at 4, *discussing Worley, supra*.

The concern with the downstream senior’s intentions is even more pronounced when, as here, the downstream party is a state representing a large group of water users, some of whom are entitled to water that would be released by curtailment upstream, but some of whom are not so entitled. If the downstream state must make a clear-cut demand for curtailment, it could not

escape the consequences of a wrongful demand, such as a Montana demand for post-1950 curtailment when its own post-1950 rights are still diverting. Thus, a stout demand requirement puts appropriate pressure on the downstream state to be sure it has its own house in order before it can expect curtailment upstream.

Montana contends that Wyoming officials received adequate notice to impel them to curtail diversions even when that notice came in the form of broad oral complaints. For example, Montana contends that Mr. Moy complained in 1981 and 1982. Mont. Br. at 40-41. Yet, in 1983, Montana water engineer Dan Ashenberg drafted a formal report that Montana provided to Wyoming, in which he wrote:

Analysis of the Compact would lead one to believe that drafters of this document intended that flow during periods of high runoff would someday be stored and then apportioned on a percentage basis for later use. Therefore, the real purpose of the Compact is to divide excess spring flow.

The Yellowstone River Compact recognizes all water rights existing as of January 1, 1950. The result is that the Compact does not address the division of water during extremely low flow periods because the majority of appropriations in the Yellowstone Basin have a priority date earlier than 1950. If there is insufficient water to satisfy all pre-1950 uses in both states, Wyoming water users would first satisfy their pre-1950 demands. Montana users could then appropriate the remainder, including the accumulated return flow generated in Wyoming. Because agricultural and industrial development since 1950 has been minimal, the need to regulate post-1950 appropriations in Wyoming for the purpose of satisfying pre-1950 appropriations in Montana would also be minimal.

Exh. D. to Wyo. Br. at 1 (Exh. S. to Mont. Br. at 1)

Now, twenty-nine years later, Montana contends that Wyoming should have listened to Mr. Moy's belated complaint's 1981 & 1982, even though it was inconsistent with Montana's official summary of the Compact's intent in the Ashenberg report. The mixed message problem arose again in the late 1980s. Mr. Kerbel testified that he told Mr. Whitaker about Montana shortage in July or August 1988, while Commissioner Fritz essentially told Wyoming's

delegation at both the 1988 and 1989 annual meetings that pre-1950 rights were not an important issue deserving study under the Compact. Kerbel Dep. at 286:17-286:25; 1988 Ann. Rep. at IV-V. Finally, Montana continued to send mixed messages into the 2000s, when Mr. Stults sought discussions of protocols that would circumvent the Compact, and when, in his 2004 call letter, he asked Wyoming to curtail **pre-1950 rights** junior to Montana pre-1950 rights. Exh. A to Moy Decl. at 2. It was not until 2006 that Montana untangled its thinking and sent a demand to Wyoming that comported with Article V(A).

Such mixed messages could be ameliorated if the Special Master were to hold that adequate notification required at least a notice by Montana that it was seeking compact compliance because it believed that its irrigators were facing shortage to entitlements “under the Compact.” The failure of Mr. Moy and Mr. Kerbel to state their complaints about water supply conditions in Montana as demands for priority regulation under the terms of the Compact should remove them from the realm of adequate notice as a matter of law, even if they had been timely made. Moy Dep. at 229:15-229:20; Kerbel Dep. at 286:4-286:14. Wyoming is entitled to judgment as a matter of law.

C. The undisputed facts bar the application of any futility exception to the call requirement in this case

Montana contends that, based on the equitable doctrine of futility, it should be relieved from its obligation to give adequate notification. But there are both factual and legal reasons why the doctrine of futility cannot excuse Montana’s failures in any year.

First, as to 2005, there is no justification for Montana to assert a futility excuse because, as Wyoming explained in its opening brief, 2005 was a good water year in which Tongue River

Reservoir spilled. If there was no shortage to cause Montana officials to consider making a call on Wyoming, then futility would not even be a consideration.¹

Second, futility could not apply to 2005 because the call letter Mr. Stults sent in 2004 contained a fatal flaw. In it, he demanded that Wyoming curtail **pre-1950** diversions in order to satisfy more senior Montana diversions, which is not permissible under the Compact. Exh. A to Moy Decl. at 2; *Montana v. Wyoming*, ___ U.S. ___, 131 S.Ct. 1765, 1772 (2011). Therefore, even if Wyoming had rejected Montana's 2004 call out of hand, that rejection could not support a futility excuse in 2005 or other later years because Wyoming was privileged to reject that improper call. Montana could not conclude that it would be futile to assert a proper call simply because Wyoming had previously rejected an improper one. Mere belief that a claim might be denied is not enough to support the futility excuse. The claimant must be certain that the later claim will be denied. *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 650 (7th Cir. 1996). In order to obtain that certainty, the claimant must have received a rejection of a claim that was identical to the second claim which the claimant later contends would have been futile to assert. *Id.*

Finally, in 2006, the next difficult water year, Mr. Stults made another written call on July 28. His actions show that he did not believe after 2004 that a call would be futile.

Montana's assertion of futility in years before 2004 is similarly baseless. If the Montana water resources division of the DNRC, led by Jack Stults, actually believed that it was futile to make a call under the doctrine of appropriation, then one must wonder why Mr. Stults made calls in 2004 and 2006. Even in administrative settings in which the equitable doctrine of futility is recognized as an excuse for failure to exhaust remedies, the futility doctrine is quite restricted.

¹In its brief on this motion, Montana stated that it was "willing to" voluntarily limit its claims for damages to fifteen separate years after 1980. Mont. Br. at 26-27. It is not clear to Wyoming if this is a binding concession, or just a report to the Special Master about an offer to settle part of the case by stipulation that Montana made to Wyoming. See Mont. Br. at 27 n.1. If Montana intended to withdraw any damage claim for 2005, then of course, the Special Master should skip over Wyoming's discussion of futility specific to 2005 in the next several paragraphs.

The party asserting futility must make a clear and positive showing of futility. *Fallick v. Nationwide Mutual Ins. Co.*, 162 F.3d 410, 419 (6th Cir. 1998). He must show that he had reason to be **certain** that asserting the claim would be futile. *Lindemann*, 79 F.3d at 650 (emphasis added). Montana cannot make that showing of certainty in light of Mr. Stults's 2004 and 2006 calls.

Further evidence negates Montana's futility excuse for years before 2004. Mr. Stults testified quite clearly that after the good water years of the late 1990s gave way to drought in the early 2000s, he approached Wyoming believing he could work something out to alleviate shortage in Montana outside of the "random" doctrine of appropriation. Stults Dep. at 58:24-61:11. He said he purposely did not make a call "under the compact" because, if he had done so, he felt that Wyoming would overreact, raising the issue to the highest authorities in the two states, including the governors and legislatures. Stults Dep. at 46:5-50:16. In other words, he confirmed that he did not see a call as futile but rather saw it as potentially too effective.

Montana also had no basis to conclude that a call would be futile during the nineteen years that Gary Fritz held the water division directorship. Rather, its materials confirm that other issues besides V(A) were paramount during Gary Fritz's tenure and that Wyoming worked closely with Montana on those issues, even if it did not always agree with Montana. As the Special Master explained in footnote 5 of his Memorandum Opinion, Mr. Fritz promised in both 1982 and 1983 to notify Wyoming if he believed pre-1950 rights in Montana were not receiving water because of Wyoming water administration upstream. Mem. Op. at 6 n.5; 1982 Ann. Rpt. at III-IV; 1983 Ann. Rpt. at III-IV. If Mr. Fritz believed it would be futile to raise such issues with Wyoming, he would not have promised to do so.

The Special Master explained that such promises were so significant that they could have estopped Montana from denying that it had to give actual notice to Wyoming. But, he stated that since he believed the law required such notification in any event, he did not have to impose the estoppel doctrine against Montana. Mem. Opp. at 6 n.5. Then, later in his memorandum opinion, the Special Master described the futility exception under which Montana would **not** have to give actual notice. *Id.* at 8-9. He did not explain how Montana could avoid actual notice under the futility exception and yet not be re-subjected to equitable estoppel. Wyoming believes that if the Special Master believes that Montana can evade making an actual call because of an exception, he must account for Montana's promises to Wyoming that it would make an actual call. A party who seeks equity must do equity. 30A C.J.S. *Equity* § 96 (2007) available Westlaw CJS.

Mr. Kerbel testified that when he made a telephone complaint to Mr. Whitaker on some uncertain date in 1988, he failed to tell his superiors in Montana that he did so. Kerbel Dep. at 288:5-288:14. And he did not even attend the annual compact meeting that fall. 1988 Ann. Rpt. at II. Montana cannot fairly contend that the DNRC water division could have gleaned futility from how Mr. Kerbel's complaint fared, when its division director, Commissioner Gary Fritz, did not even know that the complaint had been made. *Fallick v. Nationwide Mutual Ins. Co.*, 162 F.3d 410, 419 (6th Cir. 1998) (person asserting futility must show with clear and positive indication that they were certain their claim would be denied). Moreover, at the annual meeting after the end of that 1988 irrigation season, Commissioner Fritz stated his belief that "when Montana experiences water-supply problems, Wyoming has already began [sic] restricting water use to pre-1950 rights. Administrative models may be of little value. He asked if the Compact should be addressing water shortages and noted that perhaps the only issues the Compact can

address are the new projects or post-1950 rights.” 1988 Ann. Rep. at IV-V. If Commissioner Fritz felt futility regarding Compact administration, it was not about Article V(A).

Four years later, the 1992 annual report revealed that Mr. Fritz stated at that year’s commission meeting that Montana had endured shortages of water in earlier years, perhaps indicating a Montana change of position on Article V(A). In any case, Wyoming Commissioner Fassett did not reject Mr. Fritz’s concern but responded that this was a serious issue that Montana should timely bring to Wyoming’s attention. 1992 Ann. Rpt. at VI. After hearing that, Mr. Fritz could not have reasonably concluded that it would be futile to make a timely call in the future.

Montana responsive materials dated before 1980 do not show that it ever gave notice to Wyoming under Article V(A), so Montana could not have concluded in the 1980s that giving notice under that article would have received a Wyoming rejection. *See, e.g.*, Mont. Exh. AA (letter from Wyoming Governor Herschler to Montana Governor Schwinden dated April 10, 1984, in which Governor Herschler defends Wyoming continuing post-1950 development of the Powder River as long as Wyoming respects the Compact allocations, which from context refers to V(B) percentage allocations for new development). Furthermore, Mr. Ashenberg’s 1983 report that Montana submitted to Wyoming stated that “[b]ecause agricultural and industrial development since 1950 has been minimal, the need to regulate post-1950 appropriations in Wyoming for the purpose of satisfying pre-1950 appropriations in Montana would also be minimal.” Exh. B to Wyo. Br. at 1 (Exh. S to Mont. Br. at 1). This also shows that any Montana feelings of futility in the 1980s did not arise from an expectation that Wyoming would reject a V(A) notice.

After submitting the Ashenberg report, Montana could have been frustrated at Wyoming's insistence that the parties adhere to Articles V(B) and V(C) as written, rather than through Ashenberg's model. But any such frustration involved an issue different than V(A) deliveries. Montana is not entitled to claim that it was futile to make a V(A) call because Wyoming had rejected its entreaties on another issue, the V(B) allocation scheme. *Lindemann*, 79 F.3d at 650 (identical claims are required for a claimant to argue futility as an excuse for failure to exhaust remedies in the second claim process).

In summary, the evidence submitted on this motion, and all reasonable inferences from that evidence, shows that Montana officials lacked any basis to conclude that a V(A) call would be futile at any time before 2004. There is no genuine issue of material fact as to whether Montana could carry its burden of proving futility. 30A C.J.S. *Equity* § 96 (2007) available Westlaw CJS ("A party seeking to invoke an equitable doctrine bears the burden of proving the doctrine's applicability.") (citing *Citizens State Bank v. Raven Trading Partners*, 786 N.W.2d 274 (Minn. 2010)). Wyoming is entitled to judgment on this sub-issue.

Outside of the undisputed facts, Wyoming questions whether the equitable doctrine of futility should be available at all. As the Special Master has noted, there are no water law cases in which a court has found futility to be an excuse for a senior to fail to make a call. Mem. Op. at 9. Futility, like other equitable theories, is only available to overcome another legal or equitable rule to prevent injustice or to relieve hardship. 30A C.J.S. *Equity* § 96 (2007) available Westlaw CJS. A senior appropriator suffers minimal hardship when a court insists that he make a call on an upstream junior, either directly or through an official water commissioner, as a condition for a later damage claim. The senior is in the best position to know his own circumstances and submitting a call for regulation is a simple act.

The call requirement in water law is designed to impel timely action that leads to delivery of wet water. The requirement functions by barring a later damage claim in court when the claimant failed to take timely action during the water year. If Montana had rushed into court in one of the years it now claims it wanted water, and Wyoming had argued failure to exhaust, then at least Montana would have some reasonable basis to claim that exhaustion should not have applied because it needed to act fast and a call would have actually slowed things down. But here we have the opposite. Montana asserts futility without any showing that the call requirement would have hindered it from timely seeking relief. It waited many years before finally going to court.

If the courts recognized futility as an exception to the simple call requirement, it would encourage complicated post-hoc rationalizations like those Montana offers here. The balance of equities is especially egregious where Montana, a sovereign state with plenty of technical and legal firepower, asks the Court to excuse the simple expedient of a timely affirmative call. *Rodriguez v. Airborne Express*, 265 F.3d 890, 901-902 (9th Cir. 2001) (equities must be balanced in a case where a party asserts equitable exception to exhaustion of remedies and one of those balancing factors is whether the claimant is unsophisticated). Montana can hardly claim that it lacked a forum to raise any issues it had with Wyoming since the Compact itself established a commission and provided that issues of administration should come before it. Compact Art. III.

Wyoming should not be in the position of disproving the long ago motivations of Montana's officials, two of whom, Gary Fritz and Orrin Ferris, remember little about what occurred or what they were thinking. Several of their Wyoming counterparts, former State Engineer George Christopulos and his subordinate Lou Allen, are dead, as is former Governor Herschler. It is questionable whether futility could ever be an excuse to the call requirement of

prior appropriation, in this case or any other, even if the doctrine was not so readily refuted by the undisputed facts.

D. The prior appropriation doctrine could not support an exception to the affirmative duty to make a call based on what the called party knew or should have known about the calling party's circumstances, and the undisputed facts in this case would negate that exception even if such exception existed

In its brief on this renewed motion, Montana contends that even if its personnel failed to give adequate notice that they believed Montana's pre-1950 rights were suffering a shortage, it can still obtain damages if it can prove that Wyoming had knowledge of how much water Montana needed to satisfy those rights. Mont. Br. at 46-47. Thus, although it is the law of the case that the Compact does not require a quantitative delivery by Wyoming at the state line, Montana posits that Wyoming officials would have to determine such a quantity on their own volition if Wyoming officials merely knew how many pre-1950 rights Montana had in force that could potentially receive water. This concept contradicts one of the most basic principles of prior appropriation—the idea that a water right is usufructury.

Nothing in prior appropriation law would require or assume that Montana appropriators divert water at all times during an irrigation season. As explained above, there can be many reasons why a water right may lay dormant based on the intent of the irrigator. Given the waste that could occur if a junior bypassed water that a senior will not use and, given the ease with which the senior can make his needs and desires known, the law requires the senior to make a clear demand to trigger the junior's curtailment.

Even if the junior has perfect knowledge of the water rights of seniors downstream, and perpetually travels downstream to determine which of those rights are receiving sufficient water at the diversion points, the junior can never know without being told, whether those that are not diverting a full appropriation are actually experiencing a shortage relative to their desired

exercise of their rights. It would be impossible, without the senior's communication, for the junior to have adequate knowledge to spontaneously offer a curtailment. If the junior and senior reached an agreement establishing a surrogate or substitute for this knowledge (such as: the senior is always presumed to want the water under certain conditions), then perhaps the junior could then be bound to comply as a matter of contract. But without such an agreement, an exception based on the junior's knowledge can never be appropriate, because he can never know a key fact, the senior's intentions, without being told.

This analysis applies to the Compact as much as to other prior appropriation situations. As the runoff from snowmelt or a storm event declines, the water users on a river have their diversions curtailed in order of priority. If Montana is following its laws on the Tongue and Powder, its users should be curtailing in reverse order of priority. In a year when the supply in Montana becomes inadequate to supply pre-1950 rights, there should be certain rights that cease diverting first. At the time that the first pre-1950 right ceases diverting, Montana could make a call on Wyoming to curtail post-1950 diversions on that river. However, there is no guarantee on any particular date in any particular year that, when the streamflow drops below the total of Montana appropriations of some specified priority, the holders of those rights have actually been using water or wish to continue using water. Even if Wyoming had perfect knowledge of all the factors that would normally make it difficult to correlate state line flows with the condition at the most junior Montana pre-1950 headgate, it could not know whether that Montana user actually desires the water.

The reverse is also true. As Montana notes in its brief on this motion, water users in Montana know how to complain to Montana officials when they are experiencing shortage. Mont. Br. at 20, 22. They may not always go to district court to get a water commissioner

appointed (and have never done so on the Powder), but they do complain. Mont. Br. at 20, 22. Montana officials are in the best position of learning the intent of those users and passing it on to Wyoming, embedded in a call.

In a prior appropriation scheme, there is no justice in imposing a burden on the upstream diverter, or the upstream state, to know the unknowable—that is, the intent of the downstream senior appropriators. Such an exception to the call requirement would defeat the simple rule that the downstream users, or in a compact setting, their authorized public official, make a demand expressing actual need.

Montana attaches to its brief a few reports containing estimates of water rights that it provided to Wyoming up until 1978. Exhs. A,² D,³ and E to Mont. Br. But, even if there was any legal basis for the “should have known” exception, and even if these reports had contained data that Montana believed to be accurate, these estimates would not have put Wyoming in a position to correctly curtail post-1950 rights at any particular time. First, a 1978 estimate is not going to accurately present the viability of pre-1950 water rights in later years.⁴ Water rights are

² Exhibit A is the 1950 Engineering Committee Report created during Compact negotiations. It stated: “The area of land actually irrigated in any given area is subject to change from year to year, due to water supply variations, crop and price changes, ownership changes, and other factors. The committee has defined irrigated land as arable land for which facilities have been constructed capable of delivering a reasonably adequate and continuing water supply. **In other words, it includes both land actually irrigated and the additional land under constructed systems that could be irrigated.**” Exh. A at 50.

³ Exhibit D is a 1962 memorandum from the Montana deputy state engineer to the federal compact commissioner which states that Montana furnished a list of **post-1950** rights to the commission. Such a list would not help Wyoming know what pre-1950 rights Montana might have.

⁴ Exhibit E to Montana’s brief is a 1978 Montana document that Montana claims gave the acreage that could be irrigated with pre-1950 rights. Mont. Br. at 5. But attached to that list within the exhibit is a Montana analysis in which a Montana official named Smith, stated, “we do not know how the prior to 1950 Water Rights were recorded or what can be done to show the Montana rights.” He also stated: “The irrigated acreages, crop data, and water requirements in this report will be an estimate **that we cannot back up legally**, the reason being the lack of information.” Exh. E at MT-00776. Similarly, in his cover letter to United States Commissioner Scott containing the 1978 report, Montana Commissioner Fritz wrote: “Since adjudication is not complete in the Montana portion of the Tongue River Basin, it was impossible to accurately determine pre and post 1950 water use and rights. . . .All information presented here should be considered preliminary estimates.” Exh. E at 1, MT-00739. In fact, Montana did not complete a preliminary adjudication of the Tongue River until February 28, 2008 for the pre-1950 rights that were not covered by the 1914 Tongue River decree, which was also updated in that preliminary adjudication.

frequently permanently abandoned or changed in other ways that affect how and when they require satisfaction. Second, even the most current list of water rights would not reveal the extent to which the holders are actually employing their rights at a given time. Third, the list of rights would not give Wyoming the other side of the equation, the amount of water available at various points downstream of the state line on a particular date. This can change because of events solely within Montana, including local storm events, reservoir releases, whether priority regulation is imposed, or return flows. *See* Kerbel Dep. at 172:23-174:7; 200:14-202:11; 219:16-222:14; 82:8-83:9 (describing how Montana irrigators on the Powder River share water without regard to priority) *and* Stults Dep. at 94:16-95:18 (poor man's storage water sharing). A particular state line flow in one year could cause shortage to certain pre-1950 rights downstream, but not cause a pinch in another year, depending on a multitude of hydrologic factors.

Therefore, in order for these estimates to even assist Wyoming to adopt preliminary assumptions as to when Montana pre-1950 rights might be short under various conditions, Wyoming would have had to develop some sort of hydrologic/administrative model. The model would have had to include assumptions about the shifting intentions of Montana irrigators in a particular year. And such a model certainly would have been inaccurate because of the unreliability of the acreage estimates as noted by Montana officials when they presented the lists to Wyoming. Moreover, Montana never even asked Wyoming to develop such a model with respect to Article V(A), presumably because Mr. Ashenberg and Mr. Fritz did not believe that V(A) was an issue. Exh. D. to Wyo. Br. at 1; 1988 Ann. Rep. at IV. Montana's modeling

Five years later, in his 1983 report, Mr. Ashenberg proposed to Wyoming that implementation of his Cooperative Plan to Administer the Yellowstone River Compact would: "Develop documentation of actual diversion and water use." Exh. D to Wyo. Br. at 6. Later in the report he identified potential problems for Phase I of the plan's implementation, and concluded: "Administration of the Yellowstone River Compact depends on the availability of accurate and up-to-date water appropriation information including actual irrigated acres, flow rates, and priority dates. At the present time, this information is not available, and subsequently [sic] the basin's water resources are not truly managed." *Id.* at 20-22.

proposal, and Wyoming's modeling response, entailed V(B) rights. Exh. D to Wyo. Br. (Ashenberg model); Exh. T to Mont. Br. (Wyoming's Lou Allen model). Montana's apparent motivation for asserting that Wyoming should have built some sort of model **is so that Montana can assert an excuse years later for not having taken the simple step of making a call on Wyoming at a time when Wyoming could have curtailed.** The imbalance in the equities is breathtaking.

Since Montana water users have never imposed priority regulation by court appointed commissioners on the Powder River, Montana has no official data on that river over the years that could be used to recreate the past diversions on that river. Kerbel Dep. at 32:1-17; 125:24-128:3. The Tongue River has been regulated by commissioners, but only in a few years in the 2000s. *Id.* at 32:1-11. Surely, even those irrigators that are alive will not remember what they did on a specific date, just as Montana's officials cannot remember the dates when they allege they made complaints to Wyoming. Perhaps Montana and Wyoming could agree to a surrogate for a call going forward, although this is unlikely given the simplicity of the call requirement. But to have a court impose one retroactively into the doctrine of appropriation or into this compact is tantamount to rewriting the Compact. Wyoming is entitled to judgment as a matter of law with respect to this exception.

E. Neither the law of equity nor the undisputed facts would support an exception to the actual notice requirement based on Wyoming preventing the adoption of a rule or process for V(A) enforcement without a call or notice

In a single sentence comprising footnote 10 of his Memorandum Opinion, the Special Master mentioned the following idea: "Similarly, the notice requirement **might** not apply if there were evidence that Wyoming prevented the adoption of a rule or process for enforcing Montana's rights under Article V(A) without the need for a call or notice." Mem. Op. at 9 n.10

(emphasis added). As Wyoming pointed out in its opening brief on this renewed motion, Montana and Wyoming presented evidence on many issues surrounding the Compact between 1980 and 2004, which proved “what Montana did **not** communicate to Wyoming about the division of water.” Wyo. Br. at 4-6. With respect to Article V, the states discussed possible protocols to allow them to allocate water under the percentages of Article V(B). *Id.* at 5-6. Wyoming included with its brief the key document to support this point, the 1983 Ashenberg report. Exh. D to Wyo. Br. at 1. Wyoming also explained that on those rare occasions when Montana’s Commissioner Gary Fritz mentioned V(A) issues, he promised Wyoming that Montana would give actual notice of shortage. *Id.* at 12 *quoting* Mr. Fritz’s statements in annual reports.

Similarly, in its discussion of its depositions of Montana personnel, Wyoming recounted the specific testimony of what those witnesses communicated to Wyoming about pre-1950 rights in Montana. As can be seen by this testimony, these witnesses struggled mightily to assert that they made sufficient complaints to constitute calls. None of them ever said that Montana had proposed a rule or process to Wyoming as a substitute for actual notice.

This is not to say that commissioners from the states did not discuss other rules or processes. As Wyoming mentioned in its opening brief, before 2004, the commissioners discussed and adopted rules for the creation of water rights on interstate ditches, and rules for resolution of disputes over administration of the Compact. Wyo. Br. at 4, 22 and sources cited therein. This entire historical discussion in Wyoming’s brief should have dispelled the notion that there was any evidence that would create a need for further analysis of the idea the Special Master tentatively floated in footnote 10 of his memorandum opinion.

Nothing Montana has presented in its responsive brief creates a live issue involving footnote 10. Montana has offered the same Ashenberg report that Wyoming offered as Exhibit D. Exh. S to Mont. Br. Mr. Ashenberg stated at the outset of his report that “the real purpose of the Compact is to divide excess spring flow,” and the Compact “recognizes all water rights existing as of January 1, 1950.” Exh. D. to Wyo. Br. at 1. He went on: “Because agricultural and industrial development since 1950 has been minimal, the need to regulate post-1950 appropriations in Wyoming for the purpose of satisfying pre-1950 appropriations in Montana would also be minimal.” Then, over many pages, Mr. Ashenberg presented his model to measure and allocate post-1950 rights by percentage, largely based on forecasts of flows rather than actual measurements. Mr. Ashenberg noted that his management plan “stresses the importance of measuring and keeping accurate records of water use. Without this data the Yellowstone River Compact cannot be administered.” *Id.* at 5.

Montana has attached the response of Wyoming’s Lou Allen to its brief as Exhibit T. In that document, which he sent to Mr. Ashenberg on June 30, 1983, with a friendly cover letter, Mr. Allen offered a different, simpler model by which the states could administer V(B) based on actual measurements rather than forecasting. Exh. T to Mont. Br. at 1. Like Mr. Ashenberg, Mr. Allen downplayed concerns about pre-1950 rights, stating that diversions for those rights would not need to be monitored for compact purposes, although they would need to be monitored by each state for compliance with their own laws. *Id.* at 4 (pg. MT-14223). There is nothing in these documents in which Ashenberg or Allen mentioned rules or processes for enforcing V(A) rights without notice from Montana, which is not surprising, since they expressly stated no concerns about V(A) deliveries. Consistent with Mr. Ashenberg’s 1983 report, Mr. Fritz essentially told Wyoming at both the 1988 and 1989 annual meetings that pre-1950 diversions were not worth

analyzing, which explains why he proposed no rules or processes involving V(A). *See Wyo. Br.* at 12.

In summary, Montana has not presented evidence to rebut Wyoming's substantial evidence that Montana never proposed rules or processes to relieve Montana of its duty under the appropriation doctrine to give actual notice seeking to satisfy its rights under Article V(A). Additionally, there are serious legal problems that would have to be overcome even if evidence existed to support the concept embodied by footnote 10 of the Memorandum Opinion.

To paraphrase the legal concept in the footnote: If Montana proposed a rule or process by which the normal call requirement of the doctrine of appropriation could be avoided, and Wyoming declined to accept such change, but instead insisted that the normal requirement be applied, then Montana would get its way and the call requirement would disappear. In other words, this exception would allow Montana to unilaterally discard a recognized feature of the doctrine of appropriation at its sole option, even though the Compact itself states that pre-1950 rights shall continue to be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."

If the doctrine of appropriation requires a downstream senior appropriator to make a demand for his water, and "[t]he absence of such a demand [is] decisive" for the downstream senior's ability to later claim damages, then how could the downstream senior also have a continuing option to eliminate the requirement simply by proposing an alternative?⁵ This would swallow the rule by giving the downstream senior the sole control over whether the rule is applied or not. Moreover, it would swallow the rule to no good purpose.

First, as explained above, the call requirement is well-established and easily complied with, so there is no need to for the courts to search for a less burdensome option. Second, if a

⁵ *See Mem. Op.* at 4 *quoting Worley v. U.S. Borax & Chem. Corp.*, 428 P.2d 651, 654-655 (N.M. 1967).

senior wanted to eliminate his call obligation through this exception, he could simply propose an expensive or clumsy surrogate as a poison pill that the upstream junior would reject, thereby allowing the senior to exercise his option to escape the ordinary rule. The exception would thus impose a penalty on a party that simply elected to retain his right to insist on notification, a right given to him by the law.

If the answer to this analysis is that this possible exception would not generally apply to the law of appropriation, but only specially to this Compact, that answer founders as well. The drafters did **not** say that the doctrine of appropriation applies to Article V(A) only to the extent that the Supreme Court does not later adopt a special exception in the event that it finds that Wyoming did not play nice because it refused to waive its legal rights at Montana's request. Rather, the drafters ended Article V(A) with a period following the phrase "doctrine of appropriation," because they expected that doctrine to be applied. That doctrine does not give senior appropriators the option to unilaterally dissolve their obligation to make a call for curtailment.

Another legal issue raised by the footnote concept arises from an earlier footnote in the Memorandum Opinion, footnote 5. Montana's commissioner Gary Fritz promised that if Montana thought its pre-1950 rights were being shorted, Montana would give actual notice to Wyoming. 1982 Ann.-Rep. at IV; 1983 Ann. Rep. at IV. Based on this promise, the Special Master stated in footnote 5: "As Wyoming notes, it would seem **particularly unfair** for Montana to agree in the early 1980s that it would provide notice to Wyoming if it was receiving inadequate water to meet its pre-1950 water uses and then to argue that such notice was unnecessary in order to pursue damages or other relief." (emphasis added)). Not only did

Wyoming have the right to obtain actual notice because the Compact incorporated the doctrine of appropriation, it had a reinforcing promise from Mr. Fritz upon which to rely.

In summary, even if there was any factual support for the idea floated in footnote 10, there would be no basis for its application in this case.

CONCLUSION

In his first interim report, the Special Master concluded that the drafters intended the "doctrine of appropriation" language in Article V(A) to create a prior appropriation scheme that functioned between pre-1950 rights in Montana and post-1950 rights in Wyoming without regard to the state line. He rejected Wyoming's argument that the engineering committee and compact commission eschewed any prior appropriation scheme because of the difficulty of aligning the different systems in each state. In rejecting this argument, the Special Master noted that the drafters could have intended the "typical process for protecting senior appropriative rights under the prior appropriation doctrine" to apply under Article V(A). First Interim Rep. of Special Master at 29.

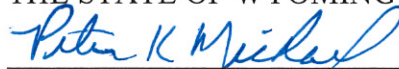
Now, Montana argues against one of the basic tenets of prior appropriation, the requirement that the senior make a call if he desires more water. Its assertion that this requirement is riddled with exceptions would turn the call requirement on its head and shift the burden onto junior appropriators to embark on unilateral model building and surveillance. Moreover, Montana suggests retroactively that Wyoming, the equivalent of the junior appropriator, should have engaged in these gymnastics even though Montana failed to request them; even after affirmatively promising that it would shoulder its straightforward duty to make a call on particular dates when future shortages occurred. These exceptions cannot be a feature of the doctrine of appropriation, so Montana's reliance upon them should fail as a matter of law.

The only question then, is whether Montana made actionable calls in any years before 2004. Here again, there is no room for a special doctrine of appropriation. The downstream senior must make an adequate call; that means he must make a call at a time when it would result in water and that the call must be sufficiently firm that the calling senior is committed to it and can be later held responsible if he makes it in error. Another feature of sufficient firmness is that the call be made by an authorized representative of the downstream senior. Whether that senior is an individual, corporation or governmental entity, a call that carries sufficient commitment can be made only through an authorized representative.

There is no genuine issue of fact that Montana failed to make a call before 2004 that met any of the requirements under the doctrine of appropriation. Therefore, Wyoming is entitled to judgment as a matter of law on its motion. By granting judgment, this Court and the parties will avoid getting improperly bogged down with pre-2004 events. The judgment will also establish a call requirement for the future that Montana should have little trouble honoring. Given the Court's decision on Article V(A) and a decision requiring an affirmative call from Montana as a condition of Wyoming curtailment, Wyoming will have the confidence to respond expeditiously to such a call, leaving verification by both states about the correctness of the call, and adequacy of Wyoming's compliance, for follow-up cooperation. To be sure, the granting of this motion will not resolve all issues ancillary to the events of 2004 and 2006, including the major issue of the extent of hydrologically connected groundwater. But it will ensure substantial progress.

Dated this 23rd day of July, 2012.

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the *Wyoming's Reply Brief in Support of its Renewed Motion for Partial Summary Judgment* was served by e-mail and United States mail, postage paid to the below parties, this 23rd day of July, 2012.

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Wyoming Attorney General's Office

Appendix

- 1) Keith Kerbel Deposition

Keith Kerbel
Deposition Transcript

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 Rintop 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

1 Q. Could you describe what that involvement
2 would be.

3 A. I helped train them, the water
4 commissioners. Mike Roberts basically was the
5 main -- he did most of the training. They set up
6 training sessions. Okay, let me explain how I
7 helped.

8 Mike Roberts basically -- from -- and he's
9 the most recent person we have, but we had others
10 before him. Mel McBeth (ph). But they would set up
11 a water commissioner training seminar that would be
12 held once a year, statewide. And anybody who was a
13 water commissioner, who had any interest in this
14 training, could attend these training sessions.

15 And they were normally in Helena.
16 Sometimes they were in Billings and sometimes in
17 Bozeman, different areas of the state, but normally
18 they were in Helena. And then the regional managers,
19 at times, would be called up to assist. And once in
20 a while I would go up and help Mike. And then we
21 held some down here in Billings.

22 Basically for training sessions for the
23 public and water commissioners, because we only had
24 two water commissioners in this area of the state.

25 And one was basically up by Big Timber, and the other
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1 Q. Were there water commissioners, then --
2 well, I'm trying to get my years right. You became
3 field manager in '81, correct?

4 A. Uh-huh.

5 Q. Between '81 and your leaving the State of
6 Montana employment, were there water commissioners,
7 say, from -- anytime from '81 until 2000 on the
8 Little Powder, Powder, or Tongue, to your knowledge?

9 A. Little Powder and Powder, the answer is no.
10 The Tongue River, not to my knowledge until the
11 2000s. There could have been earlier, I don't know.

12 Q. So the Little Powder or Powder, there were
13 no water commissioners appointed by district court
14 anytime between --

15 A. Not to my knowledge.

16 Q. -- when you were field manager?

17 A. Not to my knowledge.

18 Q. So the names we've seen for the Tongue were
19 Gebhart and Kepper?

20 A. Uh-huh.

21 Q. Those two; is that correct?

22 A. I believe so.

23 I didn't work with -- those two characters,
24 I did not work with directly, no.

25 Q. In order to be appointed by the district
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1 one is by Red Lodge.

2 And I helped both of those individuals at
3 times when they got into predicaments, that they
4 wanted someone to consult, for a lack of better term.
5 And I worked with them off and on during the summers
6 when they got into sticky situations with water users
7 on their creek.

8 Q. And that's Mr. Gebhart?

9 A. (Indicating.)

10 Q. Correct?

11 A. I'm trying to think. Yeah -- well,
12 actually, the one I helped a lot, basically, has
13 passed away, and his name was Hanson. But he's
14 passed away, and I helped him the most, because he
15 was on duty on -- with Rock Creek the longest.

16 Q. S-o-n?

17 A. H-a-n-s-o-n. And it's Carl, C-a-r-l. And
18 he was the water commissioner on there forever.

19 Q. On Rock Creek?

20 A. Yeah, by Red Lodge.

21 Q. But on the Tongue, the Powder, the names
22 I've seen were Kepper?

23 A. Okay. They didn't come until later. They
24 were later. And basically they got appointed in the
25 early 2000s when we hit the major dry spell.

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1 court, would they have had to go through the
2 training? Was that a requirement?

3 A. No.

4 Q. Do you know if DNRC keeps records of who
5 got trained? Were there certificates or some kind of
6 a recordkeeping process? Any idea on that?

7 A. The only thing I could remember is that we
8 had an enrollment form. Other than that, that's all
9 I remember.

10 Q. But then were there times when you assisted
11 Mike Roberts or his predecessors in the training
12 process, actually were in the training session in
13 Helena?

14 A. Mostly here in Billings, and in the
15 Billings session. I participated in the Billings
16 sessions. I did go up to Helena and help him on
17 occasion.

18 Q. In the 2000s were either of the two I
19 mentioned, Kepper and Gebhart, did they get -- do you
20 recall them being trained here in Billings?

21 A. No, we didn't have one in Billings then.
22 Ours were earlier. If I remember right, they were --
23 we didn't hold any here. We were -- with the
24 drought in the late '80s and 2000 we were swamped.
25 And we didn't have the staff to put those on. We

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1 you're done.
 2 Was there -- it was never actually -- no
 3 commissioner was ever appointed on the Powder to
 4 date, correct, to regulate, to priority scheme?
 5 A. Not to my knowledge.
 6 Q. In Montana?
 7 A. Correct.
 8 Q. Was there an effort -- was there some kind
 9 of effort or informal effort by the users on the
 10 Powder River to work within a priority scheme, that
 11 you know?
 12 A. I don't think it was a priority scheme per
 13 se. They shared shortages. So on the years they
 14 would call each other up. It was a good-old-boy
 15 system on the Powder River, and they shared shortage.
 16 A lot of times they would tell each other when
 17 they're done or close to being done, and they would
 18 release it so the next guy downstream or whatever
 19 could get the water.
 20 Not everybody was happy, but basically
 21 that's -- it was the buddy system, and it basically
 22 -- they tried to keep the water high, and they kept
 23 running it downriver. So that's how they
 24 irrigated -- a lot -- and when you're working -- and
 25 you know this.

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1 A. Well, let's talk about one thing then. If
 2 you're asking questions, I'll ask you a question: Is
 3 Middle Fork Dam still on the books in Wyoming?
 4 Q. It is.
 5 A. That's a threat.
 6 Q. I know that. I've read all the documents.
 7 That's definitely perceived as a threat?
 8 A. It's a damn big threat, right? I mean, and
 9 I went out there -- they had a meeting at Kaycee --
 10 now you're getting me fired up.
 11 Q. All right.
 12 A. We had a meeting at Kaycee.
 13 Q. Do you know when the meeting was at Kaycee?
 14 A. Oh, God. Mid 2000s. I don't remember what
 15 year it was. But it was put on by -- well, the folks
 16 from the water development group were there. I think
 17 Mike was there, Mike Bessner [sic]. Was it Bessner?
 18 Q. Bessen.
 19 A. Bessen. Mike was there. And they had two
 20 or three retired water engineers there. I don't know
 21 their names. I wasn't introduced to them.
 22 But when you're from Montana and you're
 23 standing in this group of Wyoming people, in Kaycee,
 24 at the dam site above Kaycee and you've got an X
 25 state engineer standing there telling me specifically

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1 I'm not telling you anything you already
 2 don't know, but when you're working with water
 3 spraying, 50 percent of the water or higher is going
 4 back to the river, so they're working off each
 5 other's wastewater. Because when they're filling
 6 those dikes, they're putting a ton of water on, it
 7 flushes out below ground, basically, sumping out, and
 8 it's getting back to the river, return flow and then
 9 surface flow.
 10 Q. I take it that -- I assume at least on the
 11 Powder there would be -- would the downstream water
 12 users be concerned about quality then?
 13 A. Well, of course. I mean, they are always
 14 concerned about quality. Not only downstream users,
 15 but upstream users.
 16 Q. But I'm saying --
 17 A. I mean, the more water that Wyoming took
 18 from Clear Creek, it left poorer water in the river
 19 for the Montana irrigators. I mean, that's a simple
 20 fact. I mean, your folks in your office in Sheridan
 21 knew that.
 22 Q. And the compact drafters probably knew
 23 that, didn't they?
 24 A. I would assume so.
 25 Q. That's a longstanding --

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1 that if I have my way, when I was -- stayed an
 2 engineer, I would build a God damned -- and I won't
 3 tell you the words he used --
 4 Q. Yeah, let's keep it clean here.
 5 A. We would build a canal or a moat around
 6 Wyoming and make sure every damn drop of water stays
 7 in our state.
 8 Do you perceive that as a threat? I did.
 9 And he wasn't the only one that said that. That was
 10 the start of the story. It went on from there, and
 11 it got -- actually, he was the worst one, but the
 12 rest of the folks were -- actually respected the fact
 13 that I was from Montana. And I was there, and they
 14 weren't as belligerent. But the bottom line was, is
 15 that was what I heard. They do -- as a state
 16 engineer, it's their responsibility to make sure
 17 every damn drop of water stays in Wyoming.
 18 And that was a long afternoon. I was
 19 definitely the outsider. But that's still on the
 20 books, and that was made in 1940, if I remember
 21 right, when that application was made. And Wyoming
 22 still carries that permit on the books. So I don't
 23 understand how that can be.
 24 Q. What? That a permit can remain on the
 25 books?

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1 junior rights had been shut off on the Powder?
 2 A. Not by a authority, no. I mean, they -- it
 3 was a shared shortage by the water users on there,
 4 and I'm assuming that's what Marty means.
 5 Not heard of any junior rights being shut
 6 off. I mean, there are no water commissioners on
 7 those sources, so therefore nobody would be shut off.
 8 So if there's a shortage, they would have to
 9 participate in that voluntarily.
 10 Q. So potentially on May 17th, based on these
 11 priority dates that Marty identified further down in
 12 that e-mail list, there are some rights on May 17th,
 13 2004, on the Powder that potentially could still have
 14 been diverting water and been a post-1950 water
 15 right, correct?
 16 A. Correct.
 17 Q. Did you -- in your efforts that day to talk
 18 to people, did you ascertain whether some of the
 19 post-1950 water rights were still diverting water on
 20 the Powder?
 21 A. It would be in my memo.
 22 I think they all got about -- according to
 23 my memo, they all got one irrigation. And some of
 24 the guys, I remember talking to them, didn't get all
 25 of their ground irrigated, like Leo Jurica. He
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1 already May and the creek's -- and the river's --
 2 it's already in tough shape. So they felt it was a
 3 loss to do anything that year.
 4 Q. Would you agree with me that under a strict
 5 prior appropriation scheme that if -- and I'm not
 6 talking about either state's law necessarily but just
 7 in general, that if, for example, on May 18th, when
 8 Montana made its call letter that we talked about
 9 earlier, that, for example, Elgin, at top of the list
 10 in the e-mail, who had 1974, 1978 priority dates, if
 11 Elgin was still diverting water from the Powder
 12 that -- under strict scheme Elgin could not call off
 13 a 1973 or earlier right from Wyoming, correct, under
 14 a strict scheme?
 15 A. I don't think these are correct.
 16 Q. Okay.
 17 A. I know Ted Elgin, and he has water rights
 18 that are '74 and '78. I mean, he has earlier rights
 19 than that.
 20 Q. Let's do a hypothetical. Let's say that on
 21 May 18th of 2004 there was a water right holder in
 22 the Powder River in Montana that had a 1960 water
 23 right, just as a hypothetical, whether these are
 24 correct or not, and that the irrigator was diverting
 25 water on May 18th. That diverter could not -- when
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1 didn't get everything irrigated, if I remember right.
 2 And what I said in the memo, he will not
 3 irrigate 200 acres of grain this year. So he's got
 4 dryland grain. And he's at Powderville.
 5 Q. Which is down below Broadus?
 6 A. It's below Broadus. It's about the middle
 7 of the basin.
 8 So therefore, everybody kind of tried to
 9 work together. But you know how that is, on how
 10 things go. If there's water available. I mean,
 11 they -- basically, that's what they did that year.
 12 And every one of them told me this, is they shared
 13 the shortage.
 14 Q. And the way for them to go into the
 15 regulation scheme, the strict prior appropriation
 16 would have required somebody to contact the water
 17 court and get a commissioner -- not the water court,
 18 again, it would be district court.
 19 A. It would be district court.
 20 Q. District court. Is that correct?
 21 A. Correct.
 22 Q. And --
 23 A. And I talked to them about that option.
 24 But when I talked to them on May 17th, they felt it
 25 wasn't worthwhile doing that year because it's
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1 they were receiving that water, they couldn't call
 2 for Wyoming to shut off the water to supply the water
 3 they're already getting; is that correct?
 4 A. (No response.)
 5 Q. A senior Wyoming irrigator.
 6 A. Oh, yeah. Agree.
 7 Q. That would be a --
 8 A. That's a prior appropriations.
 9 Q. Right.
 10 A. Unless the guy -- you know, unforeseen
 11 circumstances we weren't aware of. Let's say he had
 12 a 1960 priority date but it was abandoned and we
 13 didn't know that, you know, something like that.
 14 But under your scenario, yes, you're
 15 correct.
 16 Q. And then going back to your memo, I had a
 17 few questions that I forgot to ask you on the second
 18 page, if you would turn to that.
 19 A. Oh, you can't go back now.
 20 Q. Don't do that. If that applies to me, that
 21 applies to Montana when they take depositions.
 22 Second page.
 23 A. At least you have a sense of humor.
 24 Q. Second page. So we're on page 12999 of
 25 Montana. It did interest me.
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1 Q. Is that a system where you still have
2 active irrigation?

3 In other words, the -- a big storm event
4 comes and they got their dam and it fills up to as
5 high as it can fill up and then it starts bypassing
6 to the neighbor downstream, but they've got a supply
7 of water they can now spread --

8 A. Uh-huh.

9 Q. -- affirmatively speaking?

10 A. Yes.

11 Q. So it's not just Mother Nature does it all.
12 We have a dam across the ephemeral drainage that
13 spreads the water. That's not what you're talking
14 about?

15 A. No. There's a manmade diversion out there.

16 Q. Okay.

17 A. And then on a lot of those, especially
18 under any permit that we issue, it's impossible to
19 have a measuring device, of course. But a lot of
20 them, basically, put in tubes. And they, basically,
21 go out there and they open and close gates and divert
22 the water around, or they close the gate and divert
23 water around into a water-spreading system, or they
24 open a gate and let it go down to the neighbor.

25 And a lot of those permits that we issued

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1 neighbor, basically, was calling for water, but his
2 diversion was so inefficient that he needed the
3 entire flow of the creek to make it work. Well, his
4 diversion, basically, was, he would clean out his
5 corrals, and the manure going across the creek was
6 his diversion. Well, that's not acceptable to DEQ.
7 So we had another issue dealing with this. We have a
8 water quality issue on that particular one in Eastern
9 Montana.

10 That's how we handle complaints in Eastern
11 Montana.

12 Q. Those kinds of systems that we're just
13 talking about, which is the ability to pass some
14 water to a neighbor but it's kind of a fixed system,
15 do those exist in the Powder and Tongue drainage to
16 any degree?

17 A. On the tributaries.

18 Q. On Otter Creek, for example, maybe?

19 A. I can't remember.

20 Q. Mizpah Creek?

21 A. There's diversion dikes on that as well,
22 and some have tubes and some don't.

23 Q. In that circumstance, if you have a senior
24 irrigator down on the main stem of the river, do they
25 have an opportunity to call, make some kind of a

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1 in Eastern Montana, we required that if they put in a
2 diversion dam that doesn't hold water, that they put
3 a tube in of sufficient size to pass enough water for
4 their neighbor. And then that's their job to tell us
5 how the size of tube is, and we can agree or
6 disagree. And that's part of the permitting process,
7 and they control the outlet works. So, basically,
8 when we issued permits, we made sure that it was
9 controllable. They could throw a gate down.

10 We got complaints in Eastern Montana up by
11 Fallon where two neighbors would never get along, and
12 they were always fighting over water. And we
13 finally, basically, went to a show-cause hearing.
14 And the hearings officer basically told the permittee
15 that your pipe is too small. You've got to put in a
16 bigger pipe.

17 So we went from an 18-inch pipe to 30-inch
18 pipe. I think it was 18 -- well, anyway, he jumped
19 it up to the next size. So that's what he -- and
20 that was ordered. And I think that was -- yeah, and
21 he agreed. I mean, we didn't have to issue an order
22 because he finally realized through the course of the
23 hearing that he had too small of a pipe. The
24 neighbor wasn't getting water.

25 Then we had another situation where the

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1 call on those -- a big storm event. They had an
2 opportunity to say, look, I'm senior down here on the
3 river; you've got to pass everything?

4 They can't be regulate it, I take it? The
5 device can't really be regulated?

6 A. Well, the problem with the water spreader,
7 you need -- and you know the answer to this, Pete.
8 I'm not telling you anything you don't know.

9 A lot of it's after the fact --

10 Q. Storm event?

11 A. Yeah, a storm event. A storm event, a big
12 rain cloud comes down, the creek runs, goes down the
13 creek, and all of a sudden the neighbor downstream is
14 going what happened to my water?

15 Well, I always got water before from a
16 storm event; I'm not getting water now. So nine
17 times out of ten, somebody did something upstream.
18 They -- some dikes, they made a bigger dike, they did
19 something different.

20 So a lot of things, when you get a
21 complaint in Eastern Montana, was because their
22 neighbor upstream did some modification that changed
23 the amount of water coming down the source. And
24 that's what we had to deal with on a lot of
25 complaints, was trying to figure out, okay, what did

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1 you do? Why did you do it? And what's it going to
2 take to get it back to where it was before so this
3 guy isn't screaming bloody murder?

4 And a lot of times DNRC took too much time
5 to get things done. They ended up going to court
6 between the two of them. And that happened on
7 occasion if we didn't have a quick resolution.

8 Q. But let's say DNRC has gone ahead and
9 recommended the issuance of a -- what we call a
10 permit?

11 A. Yes.

12 Q. For one of those devices and the rancher
13 puts it in just like he should, but his priority gate
14 is going to be junior to others that may be down the
15 drainage?

16 A. Yes.

17 Q. Does DNRC basically say in some
18 circumstances this person upstream is going to get
19 water with the junior priority date, but it happens
20 in such a way that we don't care?

21 A. No. Basically, there is a notice process,
22 like I explained earlier. And, basically, in Eastern
23 Montana, we do a public notice, and we notify people
24 to downstream according to DNRC water records with
25 their water rights.

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1 heartburn with this, you better get us this piece of
2 paper.

3 Q. You mentioned Eastern Montana quite a bit.
4 I just want to make sure . . .

5 A. Well, that's where I thought you were
6 going.

7 Q. I'm geographically challenged here. But
8 the Powder and the Tongue, you don't consider them in
9 the Eastern Montana?

10 A. Yeah, I do.

11 Q. Oh, you do?

12 A. Yes.

13 Q. So when you mentioned that, for example in
14 Mizpah Creek, there were some of these structures,
15 this is something that is an issue in the Tongue and
16 in the Powder drainages in Montana, correct?

17 A. Uh-huh. Yes. But mostly -- Pete, mostly
18 on trips, with the water spreading systems,
19 basically, are located on the tributaries. Main
20 stems are mostly pumps.

21 Q. You said three to five miles down, looking
22 down for a neighbor. What do you do about the long
23 stream? I mean, Mizpah Creek, I think, looks pretty
24 long on a map to me.

25 A. Yes.

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1 They have an opportunity, and it's right
2 around 35 days, to file an objection to this guy's
3 application. He also has to come in in his
4 application process and convince us that there's
5 enough water in the creek for what he's trying to
6 divert and still keep enough water in the creek for
7 his neighbors, based on hydrology, based on the size
8 of the drainage, and based on any gauging stations or
9 anything else.

10 So it is rocket science when you're trying
11 to determine whether or not there's water available
12 in a stream during a storm event for the new permit
13 and the water users downstream. And I -- since we go
14 two to three miles downstream, sometimes five miles,
15 in order to find a neighbor -- because there's big
16 ranches out there -- I'll get on the phone and I'll
17 call them during the public notice and ask them
18 whether or not they got the notice. And they said
19 yes or no.

20 And then I'd make sure that we get it
21 fixed. And then I'd quiz them and see if they had a
22 problem with it. And tell them that there's the
23 opportunity here that, if you don't file an
24 objection, this is what -- this is what this person
25 can do under this permit. And if you have a

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1 Q. What do you do with the -- one of your
2 irrigators we've identified for you today that are
3 way down -- is Powderville below Mizpah Creek or --

4 A. No. Mizpah comes in below Powderville.

5 Q. Let's assume somebody below Mizpah, though.
6 Is that a consideration? Do they get notice to be
7 able to complain to this?

8 A. Yes.

9 Q. Is going in up drainage?

10 A. (Indicating.)

11 Q. They do?

12 A. Yes. We go to downstream dependent upon
13 how many irrigators -- we have to look at how many
14 irrigators are downstream, how many diversions are
15 downstream on how many places. And we look at,
16 basically, an immediate impact for that area.

17 And, actually, the applicant, part of their
18 process and the application process has to come in in
19 the application process and tell us why they think
20 they will not impact their neighbors downstream for a
21 given distance.

22 We contact them, and then we also put a
23 public notice in the newspaper, like the Broadus
24 paper, to see if anybody -- and we put an
25 advertisement in the paper to see if anybody would

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1 Q. So if it did begin there -- let's see if I
2 can find the next report.

3 This is -- I'm going to move on to 2006.
4 That was December 2003. Now we're in 2006. And this
5 is page Romanette 6, and that's at page WY016310.

6 I'm sorry. Page 8, Romanette 8, page
7 WY016312. And I read this to you and see if it makes
8 sense. Quote, Mr. Kerbel added that the Billings
9 DNRC offices concentrated efforts on the Bighorn
10 River. Currently, the Bighorn River adjudication is
11 99 percent complete. Billings DNRC has examined 28
12 percent of the Tongue River Basin. The Powder River
13 is fully adjudicated.

14 So that was April of 2006. You had 28
15 percent done on the Tongue, which would have been
16 three years to do 28 percent?

17 A. Well, yeah, because here's what happened.
18 The Crow Tribe -- if I remember right, the Crow Tribe
19 talked to the water court and made -- and DNRC, and
20 we had to change our efforts to the Bighorn River for
21 that compact because they were trying to settle a
22 contract on the Bighorn. And so they wanted us to go
23 through and examine the Bighorn River before we
24 finished with the Tongue. And that was one of the
25 reasons why we had to give up the Tongue River and

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1 the air conditioner.

2 (Whereupon, a break was taken.)

3 BY MR. MICHAEL:

4 Q. We've got fresh air, and we'll start with a
5 fresh -- it's a fresh document. I've handed you a
6 document, which is Document 638, a Wyoming document
7 This is from the -- I think, the CD that we disclosed
8 early on.

9 We're on Document 638, Wyoming 638.
10 Anyway, this is an older document. It's before your
11 time with DNRC, correct, December of 1982? Upper
12 left?

13 A. Yes.

14 Q. I thought I'd have you take a look at it to
15 see if it helps with your recollection. I've seen
16 some numbers bandied about and I thought you might be
17 able to explain this to me. I'm talking about winter
18 flows, releases from Tongue River Reservoir, is our
19 topic. Okay?

20 And you said earlier -- you threw a number
21 out of 75 cfs. And then I've seen numbers in other
22 documents of 167 cfs as a -- some sort of a target
23 type of a flow. And we'll have some more documents,
24 and I'll get some of them out in a minute, later
25 ones.

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1 send it to Helena for the team up there to finish
2 it -- actually, they redid what we did.

3 They did the whole basin over. They
4 started over from scratch. And they basically tossed
5 out what we did and started over.

6 Q. Which basin did they start over with?

7 A. 42B and 42C.

8 Q. Tongue River --

9 A. Tongue River. Because we were pulled off,
10 and we spent most of our time on the Bighorn, and
11 that was because they were working on the compact for
12 the Crow Tribe. So we had to change our efforts.
13 And that's why we only got 28 percent done.

14 And that 28 percent, basically, was Pumpkin
15 Creek, for the most part. If I remember right, most
16 of that was Pumpkin Creek.

17 Q. A manpower issue?

18 A. Yes.

19 Q. And then you left in 2010. What was the
20 status of the Tongue River examinations?

21 A. It's done.

22 Q. It was done before you left?

23 A. Yeah. And the water master is going
24 through the objection process right now.

25 MR. MICHAEL: Let's take a break, turn on

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1 But I just want to know: What do you know
2 about the flows out of Tongue River Reservoir, say,
3 in the 2000s? Was there sort of a target flow? And
4 can you explain why there was a target flow.

5 A. Fish, Wildlife & Parks has an instream flow
6 water rate in Tongue River based on a 1978 priority
7 date. I forget what those numbers were, but,
8 basically, those -- to be good neighbors, sometimes I
9 think they tried to work with Fish, Wildlife & Parks
10 in the operation of the reservoir during the winter
11 months to make sure that -- I know we had --
12 remember, I told you we had meetings, operation
13 committee meetings?

14 We tried to do it monthly, but sometimes
15 they ended up being two months apart. And the
16 president of the association used information that
17 was presented at those monthly meetings to look at
18 filling and releases during the whole year, be it
19 irrigation season or the winter, during the fall or
20 fall or spring. And they worked with the department,
21 they worked with Fish, Wildlife & Parks, they worked
22 with the Northern Cheyenne and tried to determine
23 what would be a good way to operate the river with a
24 consensus of the water users and the consensus of the
25 other players in Tongue River.

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1 Based on those -- that information, that's
2 what they tried -- they agreed to numbers over a
3 period of time based on the input from the players;
4 and those are the participants.

5 A lot of times they had a target number,
6 but it changed because of input from Fish, Wildlife &
7 Parks or input from the tribe or what have you. So I
8 don't think there was -- to answer your question,
9 Pete, I don't think there was a hard, fast number
10 that we ever had. I think it was dictated on the
11 current events.

12 Q. You mentioned instream flow. Was there a
13 stock component to it?

14 A. Not that I know of. Not with the industry
15 flow of the Fish, Wildlife & Parks, with the reserve
16 right, no. The stock water component was something
17 that they felt that they needed to address with the
18 releases by the water users association.

19 Q. Would the --

20 A. And I don't know what that component would
21 be.

22 Q. Do you know if Montana managed -- or the
23 Tongue River water users -- well, let's go back to
24 basic principles.

25 The management of the dam is actually

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1 A. A little bit. Back in 1978, '77, the Board
2 of Natural Resources -- we had a board then. And the
3 Board of Natural Resources received applications for
4 reserved water for future uses. And part of those
5 future uses are reserved rights that they entertained
6 through applications were for irrigation, municipal,
7 and in-stream flow rights for Fish, Wildlife & Parks
8 and Health, Department of Health.

9 And they made that -- and they issued an
10 order in December of 1978 based on all the input in
11 hearings. They had hearings in Billings, based on
12 all the input on those applications. And the
13 conservation districts were assigned and were given
14 certain acres and volume of water for future
15 expansion with a priority date of 1978.

16 Q. So we just looked at some maps that had --
17 would they actually show up in the database, a Fish,
18 Wildlife & Parks water right with a flow rate with a
19 1978 priority date?

20 A. There should be.

21 Q. And would we call that a reservation or
22 would we call that something different?

23 A. It would be a reservation.

24 Q. But it could be put to use immediately,
25 could it not?

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1 controlled by Kevin Smith's group, correct?

2 I mean, they actually --

3 A. No. The operation of the dam is basically
4 controlled by the Tongue River water users
5 association. The State of Montana owns it and
6 maintains it. The operation was -- is relegated to
7 the water users association.

8 Q. And that's done with a formal MOU or
9 something of that nature?

10 A. I assume so. I'm not sure.

11 Q. We can ask somebody else.

12 Montana 13570.

13 Here's a May 24th, 2006, memo to Sarah Bond
14 from Andy Brummond, in-stream flow and water rights
15 specialist.

16 Now, he would be an employee of Montana
17 Fish, Wildlife & Parks, correct?

18 A. Yes.

19 Q. And he does mention fairly early in the
20 document, in the first bullet point on the first
21 page, a 75 cfs reservation of Fish, Wildlife & Parks
22 on the Tongue River.

23 A. Yes.

24 Q. What's the difference -- does reservation
25 mean something different than a water right?

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1 A. Yeah. As of December '78.

2 Q. And you would still call it a reservation
3 for future . . .

4 A. Yeah. That was just a name; that's just a
5 name that was associated with it.

6 Q. And then can it be enforced like any other
7 water right, then?

8 A. Oh, you bet. Yes.

9 Q. And the holder of the right is Fish,
10 Wildlife & Parks?

11 A. State of Montana, Fish, Wildlife & Parks,
12 yes.

13 Q. In this memo Mr. Brummond tells Sarah Bond,
14 in that sentence that we're looking at the first
15 bullet point, that he's referring to -- he's
16 referring to some kind of a table. Let's see if it's
17 attached.

18 Is it attached?

19 A. Yeah.

20 Q. Unfortunately, it's not in color. It's --
21 the bullet point.

22 But anyway, he goes on to talk about that
23 only in the Tongue River, where the reservation
24 was -- 75 cfs is completely inadequate, in his
25 view -- was the reservation met on an annual basis.

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1 although, the in-stream flow rights were in place by
 2 then?
 3 A. Well, they're combined. I mean, they would
 4 be part of the same thing. I mean, your releases for
 5 stock water and fisheries would be pretty much one on
 6 top of the other. They would be maintained as a
 7 block of water going down the river.
 8 Q. So fish consume it or deer can drink from
 9 it or a cow can drink from it, correct?
 10 A. Yes. I mean, a lot of it was access too.
 11 You've got to look at the stream banks and access for
 12 the livestock down to the river to -- you know, so
 13 they're not tearing up banks, that type of thing.
 14 I know they talked about access and keeping
 15 a reasonable amount of water in the river, basically,
 16 for the livestock so they're not trampling in the
 17 banks and that kind of stuff along the river. And
 18 people had water dams built so they didn't get blown
 19 out when we had high releases and that type of stuff
 20 in the wintertime to make sure they were functioning
 21 correctly.
 22 So there was a lot of input. I mean, the
 23 board ran the project, and they ran the project based
 24 on the input they got from their constituents. And
 25 those releases are all dependent upon what's coming

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1 right now; just keep it simple, a simple example. If
 2 that reservoir is filled on June 1 and then releases
 3 begin and it loses 10,000 acre-feet over a two-week
 4 period.
 5 A. Uh-huh.
 6 Q. And then other -- there's a big rainstorm,
 7 for example, and the folks that have contracts
 8 downstream say we don't want anymore water. Hold up.
 9 Stop. Don't let them send any more water down here.
 10 We don't need it right now.
 11 Under Montana law, that reservoir could
 12 then close and refill during the irrigation?
 13 A. They wouldn't close the gate, but they
 14 could reduce those outflows and fill what's available
 15 coming into the dam, yes. If the system's full, if
 16 no one's making call, they can take some of that
 17 exit -- I don't know if you call it exit -- that
 18 water from that rainfall event and store it as long
 19 as the system below is full and nobody's taking
 20 water. If someone's taking water, those releases
 21 have to go through the dam to maintain their needs.
 22 Q. From direct flow rights?
 23 A. Yes.
 24 Q. So let's add to my example and say that the
 25 pre-'50 rights downstream are satisfied, they're

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1 in from across the border at the state line,
 2 basically, trying to work with those constituents
 3 because we had a finite product that we had to deal
 4 with.
 5 We had to fill a reservoir over the
 6 wintertime -- the fall, winter, and spring. A lot of
 7 times it was filled late spring. We had to maintain
 8 the livelihood of the river, and that included
 9 fisheries and stock waters.
 10 So I mean, all of this is an equation that
 11 these water users worked into the whole
 12 decision-making process on how they filled it and how
 13 they released. And it always depended upon what came
 14 across the state line. There's nothing more than I
 15 can add to that.
 16 Q. Let's talk about Tongue River Reservoir
 17 specifically. But if you have to answer it more
 18 generally, the issue often comes up: How many fills?
 19 A. You can have multiple fills.
 20 Q. You did not have multiple --
 21 A. We can.
 22 Q. You can?
 23 A. Yes.
 24 Q. And so if Tongue River Reservoir -- let's
 25 just go with the 1937 water right and ignore tribal

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1 getting their direct flow because they have seniority
 2 and we've delivered two weeks of storage water to
 3 post-'50 Montana rights that otherwise wouldn't get
 4 water because we're at that tipping point -- you're
 5 following me?
 6 A. I think I am. Keep going.
 7 Q. So you've taken a couple of weeks of
 8 releases from the storage from the reservoir and
 9 delivered it to those with contracts. They could be
 10 anybody, right?
 11 Could be pre-'50, post-'50, tribal --
 12 A. Anybody, prior to --
 13 Q. It wouldn't matter?
 14 A. It wouldn't matter.
 15 Q. Because the issue owned by -- it was stored
 16 in priority and whoever downstream has a contract can
 17 get it, correct?
 18 A. Right.
 19 Q. And then if the reservoir now has some
 20 space in it and those contractors don't need the
 21 water and you're getting pass through satisfying the
 22 pre-'50s, you said the reservoir could be refilled to
 23 a degree?
 24 A. Uh-huh.
 25 Q. And to do that --

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1 A. To some extent, until a call is made.
 2 Q. To some extent. And so the reservoir then
 3 at that point could -- you mentioned there was a few
 4 water rights in Montana upstream from there. If the
 5 water rights upstream from there was junior to the
 6 '37 -- let's say it was a 1940 water right in
 7 Montana. Could the reservoir make a call and force
 8 that pumper to turn off the pump so they could fill
 9 the reservoir in July?
 10 A. They could.
 11 Q. And DNRC would allow that -- or the
 12 recovery of the water users and Kevin Smith would
 13 allow that to occur?
 14 A. If they saw the need, yes.
 15 Q. Do you know if Montana ever said to
 16 Wyoming -- officials from Montana said to Wyoming we
 17 want you to shut off water rights that are junior to
 18 1937 so we can fill Tongue River Reservoir?
 19 A. In fact, I know when I first started
 20 with -- I'm pretty sure this occurred.
 21 When I first started with going to the
 22 meetings back in the '80s and stuff, Rich was pretty
 23 upset because -- at some of the meetings because they
 24 were trying to negotiate a workable agreement between
 25 Wyoming and Montana to -- when we get into a short
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1 talking about there.
 2 Q. Well, do you believe that? Do you believe
 3 that?
 4 A. I -- the problem I had with the compact, I
 5 guess -- no, I think it's a working document.
 6 Q. If it's a working document with respect to
 7 Article 5B, why has Montana not required measuring
 8 devices at all post-1950 diversion points?
 9 MR. WECHSLER: I'm going to object to the
 10 extent that it mischaracterizes his earlier
 11 testimony.
 12 BY MR. MICHAEL:
 13 Q. I said all. I know there were some that
 14 they require measuring devices.
 15 Is it true that Montana has required
 16 measuring devices at all post-1950 diversion points?
 17 A. I don't know.
 18 No document's perfect. It's a working
 19 document --
 20 Q. We know that, don't we?
 21 A. Yes, we do.
 22 Q. We've looked at enough today. Except for
 23 my notes; they're perfect.
 24 A. Then I'll agree with that.
 25 Q. So, for example, on May 18th, 2004, when we
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1 situation, that we could amicably work together to
 2 get water rights satisfied in Montana and Wyoming and
 3 work together to make sure that we're all on the same
 4 page and make this thing work. And not only the
 5 reservoir, but everything else.
 6 I don't remember them talking about
 7 priority dates at that time. They were just trying
 8 to work out a water management plan. And I know Rich
 9 was telling me about this, so it's secondhand. And I
 10 know there was quite a bit of frustration from Rich
 11 because he kind of used the -- that Wyoming was kind
 12 of dragging their feet on this particular project
 13 like before, but I know they tried.
 14 And I know I called and talked to the
 15 Wyoming folks, tried to figure out a way to get water
 16 down -- more water into Montana even though we knew
 17 there was a shortage on both sides of the state,
 18 basically, in the late '80s and stuff.
 19 And I know we talked several ways of trying
 20 to figure out something, but it was just pretty tough
 21 to do.
 22 Q. Rich testified last week that he thought
 23 there was a hole in the compact that needed to be
 24 corrected with some negotiations. Is that true?
 25 A. I have no idea. I don't know what he was
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1 looked at that letter that Jack Stults sent and said
 2 Wyoming should release water from reservoirs and
 3 should curtail pre-1950 water rights to produce more
 4 water at the state line for senior Montana pre-'50
 5 water rights.
 6 A. Uh-huh.
 7 Q. That would include a demand to -- in your
 8 view, it would be appropriate, I guess, for Montana
 9 to demand that Wyoming pre-1950 direct flow rights
 10 that are junior to the reservoir could be called to
 11 supply the reservoir for a second fill?
 12 A. Correct.
 13 Q. How about a third fill?
 14 A. If it could be done, yes.
 15 Q. The hypotheticals get more and more
 16 difficulty.
 17 A. Yes, it is. I don't think it could be
 18 done. I mean, to me, a third fill, you're looking at
 19 a full system. It wouldn't be necessary to make a
 20 call for a third fill, would be my response, because
 21 we're talking about a full system.
 22 Q. So 2011 would be --
 23 A. A full -- that's a full system. So we're
 24 talking a full system.
 25 Q. Right.
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CERTIFICATE OF DEPONENT

PAGE:	LINE:	CORRECTION:	PG	Line	Correction:
9	16	take out	198	22	contract compact
47	20	use	220	17	exit excess (2x's)
48	11	as well.	232	15/16	Fort Union Ford
50	12	land to line	235	10	tree
59	3	2700 200	264	17	Attorneys McBirney
61	7	above			
78	3	river dam			
83	3	for spraying haying			
85	1	staple state			
99	7	Powder River Tongue River			
103	9	any make			
112	20	piezets "piezometers" "piezos"			
113	9	Academy Hwy			
113	11	staple from			

I have read the foregoing transcript of my testimony and believe the same to be true, except for the corrections noted above.

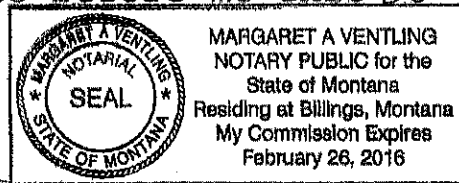
DATED this 30th day of May

2012.

Keith Kerbel

KEITH KERBEL, Deponent *Keith Kerbel*

SUBSCRIBED AND SWORN to before me this 30th day of *May*, 2012.



Margaret A. Ventling
Notary Public for the State of Montana
Residing at *Billings*, Montana
My Commission expires: *February 26, 2016*
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