

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

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1 STIPULATIONS
 2 It is hereby stipulated and agreed by and
 3 among counsel for the respective parties that the
 4 deposition be taken by John B. Graf, Freelance Court
 5 Reporter and Notary Public for the State of Montana,
 6 residing in Billings, Montana.
 7

8 It was also stipulated by and among counsel
 9 for the respective parties that the deposition be
 10 taken in accordance with the Federal Rules of Civil
 11 Procedure.
 12

13 It was further stipulated by and among
 14 counsel for the respective parties, and the deponent,
 15 that the reading and signing of the deposition
 16 transcript would be reserved.
 17
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10 EXHIBITS
 11 NO.: DESCRIPTION:
 12 1 Water Right Dispute Options
 13 2 Final Order
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 22
 23
 24
 25

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1 Thereupon,
 2 KEITH KERBEL,
 3 having been duly sworn to tell the truth, the whole
 4 truth, and nothing but the truth, testified upon his
 5 oath as follows:
 6

7 ---
 8 EXAMINATION
 9 ---

10 BY MR. MICHAEL:
 11 Q. State your name, please.
 12 A. Keith David Kerbel, K-e-r-b-e-l.
 13 Q. Have you ever had your deposition taken
 14 before?
 15 A. Yes.
 16 Q. How many times?
 17 A. Oh, probably -- just a guess, probably
 18 five.
 19 Q. When was the last time?
 20 A. It was for my current job at the Bureau of
 21 Reclamation. And it was in December of last year.
 22 Q. Have you ever been deposed on issues
 23 involving the Yellowstone River Compact?
 24 A. No.
 25 Q. Have you ever testified in court?
 A. No.

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1 A. Yes.
 2 Q. When did you join -- well, did you have
 3 some natural resource-related work before you worked
 4 for the State of Montana, between college and working
 5 for the State of Montana?
 6 A. Just worked on farms and ranches in the
 7 summers.
 8 Q. And when did you begin working for the
 9 State of Montana?
 10 A. June 28th, 1976.
 11 Q. And what was that first position?
 12 A. I was a water rights analyst or a
 13 technician.
 14 Q. Out of what -- go ahead.
 15 A. I started in Billings. Worked there and
 16 trained there for about three weeks. And then I
 17 moved and lived in Broadus for a little over a year.
 18 And we worked on the Powder River adjudication from
 19 '76 through '79.
 20 Q. So even after you left Broadus you still
 21 worked on the Powder River adjudication for a few
 22 months?
 23 A. Out of Miles City. I was in Broadus for a
 24 while, and then they transferred me to Miles City.
 25 And I worked on the northern end of the Powder River
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1 decree, they would need to make a filing to claim
 2 those rights?
 3 A. Correct.
 4 Q. And was that something that -- did you deal
 5 with those rights in that position as water
 6 appropriation specialist?
 7 A. Correct.
 8 Q. Did you also deal with the claims for mid
 9 (ph) rights as well?
 10 A. Correct.
 11 Q. What was the -- what did you do -- what
 12 kinds of different tasks did you do when those
 13 applications -- what were they called? Applications
 14 or claims?
 15 A. They were applications for provisional
 16 permits. And they were basically under the 1973
 17 statute. Anybody who put water -- new uses of water
 18 to beneficial use or changes or adding ground of any
 19 kind needed to apply for and receive a permit before
 20 they started irrigating. And it was my job to
 21 process those applications. And once they were
 22 processed, they were issued.
 23 If no one -- if they didn't get objections
 24 -- and if they got objections, we went through a
 25 hearings process. And there would have been an
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1 Basin for several years.
 2 Q. And to your recollection, when was that --
 3 was there a temporary preliminary decree on the
 4 Powder or just a preliminary decree, do you recall?
 5 A. It was a preliminary -- temporary final, is
 6 what they called it.
 7 Q. Do you remember when that was?
 8 A. This is only my recollection, but I think
 9 it was like 1980.
 10 Q. And then do you recall when the final was
 11 issued on the Powder River?
 12 A. No, I don't remember.
 13 Q. So was it three years as a water rights
 14 technician or longer?
 15 A. I'm trying to think. I think it was 1978
 16 or '79 -- I don't remember exactly what year -- I was
 17 promoted to a new appropriations specialist in Miles
 18 City. And what I did was, is I handled permits and
 19 changes for the Department of Natural Resources in
 20 Southeastern Montana.
 21 Q. And I take it by that time the 1973 law had
 22 come into effect, so --
 23 A. Correct.
 24 Q. -- water rights -- even folks with
 25 adjudicated rights, for example, on the Tongue River
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1 administrative hearing to determine whether the
 2 application should be denied, issued, or modified.
 3 Q. At that time was the water court involved
 4 in the process?
 5 A. No. Not on the permitting process, no.
 6 Q. You mentioned changes. And let me ask a
 7 sort of hypothetical, I guess. But what if you had a
 8 situation -- we can pick a river, Tongue, Powder -- I
 9 guess it doesn't matter -- where there was a --
 10 somebody had been using water prior to 1973, said
 11 they had worked for Montana, I take it you would call
 12 a use right, and yet it hadn't been of record. That
 13 right was not either filed in the county clerk's
 14 office or had not yet been adjudicated -- let's use
 15 the Powder, in adjudicating the Powder River
 16 adjudication, and that person wanted to change, for
 17 example, the place of use from one field to another.
 18 A. Uh-huh.
 19 Q. In that process of -- would they have to
 20 apply to make that change?
 21 A. Yes.
 22 Q. And what would be the basis of their
 23 existing right? In other words, when you analyze the
 24 change they wanted to make, how would you know what
 25 their existing use right was?
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1 specialist sometime in '78 or '79. And then how long
 2 were you in that position?
 3 A. Until '81. Then I took the job in Billings
 4 as the field manager here in Billings. And that was
 5 January of '81, if my memory is correct.
 6 Q. Field manager in --
 7 A. For the Billings area office.
 8 Q. Of the DNRC?
 9 A. DNRC, yeah.
 10 Q. I believe --
 11 A. We called them field offices, we called
 12 them regional offices, we called them area offices.
 13 I mean, the names changed over the course of time,
 14 but I was in that position until I retired in 2010.
 15 Q. We took Rich Moy's deposition last week,
 16 and he stated -- and I'm not -- I'm just
 17 paraphrasing, I can't quote him. We don't have the
 18 transcript. But he stated that in the early '80s --
 19 he had started in '81 -- and he said that Montana
 20 made an effort to add resources out into the regions
 21 away from Helena for water rights purposes and water
 22 management purposes. Is that correct?
 23 A. Actually, it happened in '79, with the
 24 advent of Senate Bill 76 and new claims -- the new
 25 claims, the new adjudication program that was
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1 A. Oh, golly. It fluctuated in size from
 2 probably three to -- we had upwards of eight people.
 3 Q. Besides the task of assisting or processing
 4 claims, was there -- what other tasks was your group
 5 under your supervision supposed to do?
 6 A. In the original capacity and from '82 on,
 7 our job basically was, you know, purely adjudication
 8 and permitting and processing changes. That was it.
 9 We -- part of our office worked on claims.
 10 The first basin we started on was the Upper
 11 Yellowstone, and there was like close to 5,000 claims
 12 in the Upper Yellowstone. We examined those claims
 13 through a specific process to determine historical
 14 use. And then part of my staff, and myself included,
 15 worked on applications for new permits and changes.
 16 After the deadline we had -- cripes. I'm
 17 trying to remember. Over 120 some applications for
 18 new permits and changes. And we also had stacks and
 19 stacks of claims in our office that we needed to
 20 review and coordinate and basically get processed.
 21 And that took a good year or plus in order to go
 22 through all of that paperwork that we received from
 23 the public.
 24 Q. When was the first deadline? '82 or . . .
 25 A. Yeah. Oh, first deadline was January of
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1 initiated under Senate Bill 76, the Department hired
 2 field people, and we put them in area -- we put them
 3 in offices throughout the state of Montana to help
 4 citizens of Montana or water users in Montana fill
 5 out their water right claims.
 6 And we had offices in Missoula and Dillon
 7 and Lewistown and Billings and Miles City, all over
 8 the state. Glasgow, Havre, Kalispell. Assisting the
 9 public, filling out water right claims. And that's
 10 what I did for several years when I worked for DNRC.
 11 Even in my position in Miles City and even in my
 12 position here in Billings was, I assisted people with
 13 filling out water right claims until -- the claim
 14 period was over April 30th, 1982.
 15 Q. As field manager in Billings, besides
 16 having the responsibilities involving assisting
 17 claims, were you involved in the adjudication of the
 18 Powder River, for example?
 19 A. At that point in time, no. Because that
 20 was still handled out of our Miles City office.
 21 Q. And who were your -- did you have
 22 subordinates while you were field manager in Billings
 23 from -- after '81?
 24 A. Yeah.
 25 Q. How many?
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1 '82. And the second deadline, it was extended to
 2 April 30th of '82.
 3 Q. So how long were you the field manager?
 4 From '81 until when?
 5 A. Until I retired.
 6 Q. Let's talk specifically, then. Let's focus
 7 in a little bit on the field manager -- well, what
 8 drainages were within the purview of your office as
 9 field manager? Tongue, Powder, Little Powder, those
 10 three?
 11 A. They were out of Miles City. And we
 12 handled the Upper Yellowstone and basically Pryor
 13 Creek and the big one.
 14 Q. So who in -- did you have supervisory
 15 authority over the folks in Miles City, however?
 16 A. No.
 17 Q. Who did?
 18 A. Walter Rolf, R-o-l-f.
 19 Q. What was his title?
 20 A. Same as mine.
 21 Q. He was field manager?
 22 A. He was the field manager. Another title we
 23 had was area office supervisor. We had all kinds of
 24 titles. I don't remember the right order, when we
 25 had them.
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1 Q. How long was Walter Rolf the field manager
2 in Miles City?
3 A. I don't remember. If -- if I was to
4 recollect, it was like early '90s. And then he
5 retired.
6 Q. Did he have a successor?
7 A. Yeah. You're looking at him. I took over
8 the Miles City office.
9 Q. You stayed here in Billings, but they moved
10 the responsibilities, combined the responsibilities?
11 A. Yeah.
12 Q. So sometime in the early '90s you became
13 basically the field manager that did cover the
14 Tongue, Powder, and Little Powder, correct?
15 A. Yes.
16 Q. I was going to say, I saw your name in a
17 lot of meetings while you were dealing with the Upper
18 Yellowstone.
19 A. Well, what would happen is this, is Gary
20 Fritz and -- or Rich or whoever was coming down for
21 those meetings, they'd swing by Billings, and they'd
22 grab me and take me down to -- I went to Cody,
23 Thermopolis, Sheridan, to a lot of the meetings that
24 they had with the compact.
25 And all I did at that particular time,
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1 do that.
2 A. Okay.
3 Q. When you were field manager did you have a
4 direct supervisor in the chain of command?
5 A. Oh, yes.
6 Q. Was it always the same position, or did
7 that person change? Were there reorganizations?
8 A. Yes.
9 Q. When you started in 1981, then, who -- what
10 was the name of the position that supervised your
11 position?
12 A. He was the water rights bureau chief. And
13 that was Laurence Siroky. And he was my immediate
14 supervisor.
15 Q. Was he in Helena?
16 A. Yes.
17 Q. And then I take it, at some point did Gary
18 Fritz become water rights bureau chief?
19 A. No.
20 Q. Was he ever water rights bureau chief?
21 A. No.
22 Q. Jack Stults was then, at some point, wasn't
23 he?
24 A. Oh, boy that's a good question. No, I
25 don't think Jack was ever water rights bureau chief.
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1 basically, was they just -- I never -- I didn't
2 participate too much. I usually sat in the back and
3 visited with my counterparts on the Wyoming side.
4 Q. Was the Clark's Fork of the Yellowstone
5 ever within your --
6 A. Yes.
7 Q. Out of Billings?
8 A. Yes.
9 Q. So you had lengthy experience really in all
10 four of the streams?
11 A. Correct.
12 Q. Tributaries to the Yellowstone that are the
13 subject of this lawsuit, correct?
14 A. Yes. May I add something?
15 Q. Sure.
16 A. This lawsuit only involves Tongue and
17 Powder.
18 Q. That's true. I should say it involved in
19 the compact --
20 A. Right.
21 Q. -- between Wyoming and Montana.
22 A. Yes.
23 Q. You're right. I stand corrected.
24 Let's talk a little bit about the chain of
25 command. I think this will help us on later on if we
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1 I don't remember. I can't remember for sure.
2 Q. Well, let's just go through, and you can
3 tell me who they were.
4 A. Okay, I'll try.
5 Q. You mentioned Larry?
6 A. Larry Holman. And then there was -- well,
7 there was Laurence Siroky. And he was the one that
8 hired me. And then Ralph Saunders, and he hired me
9 originally, back in '76. And then in '81 I was
10 promoted to the field office supervisor here in
11 Billings, and Laurence hired me for that position, if
12 I remember right. And then Larry Holman got the job
13 later in the mid '80s.
14 Then we did a reorganization. And then I
15 went -- and Larry retired. And then they basically
16 put all of the area office supervisors under the
17 direct supervision of the water resource
18 administrator. And don't ask me when that happened,
19 because I can't remember the year.
20 But basically we became -- instead of
21 working for the bureau chief in water rights, we
22 started working for the administrator for water
23 resources division, which expanded our roles in our
24 jobs. It was like getting a brand spanking new job.
25 Q. And who were the water resource
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1 administrators that you would supervise --
 2 A. Gary Fritz was first, and then he retired.
 3 And then it was Jack Stults.
 4 Q. And then Tubbs?
 5 A. Yes.
 6 Q. John Tubbs, T-u-b-b-s.
 7 A. Yes.
 8 Q. Just referring to the reorganization -- I
 9 realize you didn't recall exactly when that occurred,
 10 but what was your role before the reorganization, and
 11 how did it expand?
 12 A. My role before the reorganization was
 13 predominantly water rights. We worked on the
 14 adjudication program. We had two functions in the
 15 office, primarily. One was processing applications
 16 for changes and permits; and the second function was
 17 adjudication, examining claims for the Montana water
 18 courts.
 19 After the re-org, my role was expanded, and
 20 we still did that, but then they gave us other
 21 duties. One was state projects. So I was -- worked
 22 with our state projects bureau in Helena on both --
 23 Tongue River Reservoir and Cooney Reservoir and
 24 Glacier Lake are the three projects in our area. I
 25 was also -- worked on dam safety.

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1 And we had to hire an engineer at that
 2 time, and he basically worked on the dam safety
 3 program for Southeastern Montana. And then his area
 4 was from Livingston to Glendive, Sidney area, for dam
 5 safety.
 6 And then floodplain, we had to work with
 7 the floodplain program in Eastern Montana, and our
 8 engineer and I basically worked -- our area basically
 9 was from Park County, Livingston, Gardner area, all
 10 the way down to Miles City, Glendive, and Sidney.
 11 For that area, even though we had a Miles City
 12 office, we still worked that area with those two
 13 programs in particular.
 14 And then -- let me see. I know I'm missing
 15 some. But our list was greatly expanded in our
 16 duties all the way through this whole process, then.

17 Q. Did you have involvement in the expansion
 18 and rebuild of the Tongue -- or refurbishing, I
 19 guess, of Tongue River Reservoir? Was that within
 20 your purview?
 21 A. My engineer spent four years down there on
 22 that project. So I was involved through his
 23 involvement.
 24 Q. How about the --
 25 A. And I -- excuse me. And then when they did

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1 the EIS, I helped John Sanders with the EIS and
 2 worked with reviewing EIS and operating plans for the
 3 dam.
 4 Q. The Cheyenne compact -- I think it was '92,
 5 if I recall -- but in the early '90s. Montana
 6 obviously was negotiating that with the Cheyenne
 7 Tribe and the United States. Were you involved in
 8 that process?

9 A. No. My counterpart in Miles City was
 10 involved with the Cheyenne compact, more so than I
 11 was. I sat in on some of the meetings when they were
 12 here in Billings, just as an observer.

13 Q. Who was your counterpart that was involved
 14 in --

15 A. Walter Rolf.

16 Q. Is he around?

17 A. He's in Miles City.

18 Q. Retired?

19 A. Yes. They closed the office in Miles City,
 20 and then I took over that area, because of the lack
 21 of work.

22 Q. When was that office closed?

23 A. I think it was '94, but don't hold me to
 24 that. And that's only -- like I said, I'm trying to
 25 be as accurate as I can, but that's what my memory

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1 seems to tell me. That was early '90s.

2 Q. Your estimates are fine for most of these.
 3 We have documents if we need to get more specific.

4 A. Okay.

5 Q. If you have an estimate, it helps us. I
 6 think these can mostly be confirmed on our documents
 7 if necessary?

8 A. Okay. Now, what participation he had in
 9 the compact? I don't know. I just know that it was
 10 in his area, and he was involved to some extent.

11 Q. In the area of administration of water
 12 rights, which I understand that Montana -- we have
 13 documents we'll look at later, I'm sure. But Montana
 14 water courts will at times -- based on requests via
 15 court filings, will appoint commissioners to regulate
 16 a stream during the water year, for example?

17 A. Yeah, district court does that. Not
 18 Montana water court.

19 Q. Montana water court is an adjudication
 20 court?

21 A. Sure, yes.

22 Q. So the district court will appoint those.
 23 Do you have any involvement within your position
 24 here, that longtime position, with that process?

25 A. Yes.

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1 Q. If we wanted to go back from, say, 2008 --
 2 was it 2008 that you left the --
 3 A. 210.
 4 Q. 2010, rather.
 5 -- and tried to reconstruct which post-'50
 6 water rights took what water and when, is there any
 7 database that we could use other than trying to find
 8 the ranchers' own records or their recollections?
 9 A. You would have to -- there would be
 10 individual ranchers.
 11 Q. Let's kind of follow that thread a little
 12 bit on the Tongue River, because there was a decree
 13 on the Tongue River after 1914, correct?
 14 A. Correct.
 15 Q. And we know there were some years that
 16 there were commissioners appointed to administer the
 17 Tongue River diversions, right?
 18 A. Uh-huh.
 19 Q. And that was in the 2000s?
 20 A. Yes.
 21 Q. How many years -- can you give me an
 22 estimate of how many years it was administered?
 23 A. No, I can't.
 24 Q. I take it the record source for -- well,
 25 let me ask you this about the Tongue: Is it similar
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1 measuring device?
 2 A. They know how much they're diverting, so I
 3 assume they do, yes.
 4 Q. Is there a weir, do you know?
 5 A. I don't know, to be honest with you.
 6 Q. And I can ask Roger --
 7 A. Muggli.
 8 Q. -- Muggli?
 9 A. Right.
 10 But they do measure the flows out of the
 11 river. And they kept track of those wells.
 12 Q. Can you describe for me the systems going
 13 up to the Tongue River Reservoir in Montana, or is it
 14 a combination of pumps and also head gates?
 15 A. That pretty much describes how they use
 16 water on the Tongue. It's pumps and head gates for
 17 the most part. A lot of it is sprinkler. People
 18 have gone more to sprinkler than they have in the
 19 past.
 20 They had -- and that was part of the NRCS.
 21 They had a program, basically, that they felt
 22 sprinklers saved water. We found out differently.
 23 But anyway, to make a long story short, they gave a
 24 lot of cost share money, the individuals, to install
 25 sprinklers. So a lot of people took that cost share
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1 to the Powder, or is there also other types of
 2 diversions besides pumping that's significant on the
 3 Tongue?
 4 A. They have gravity ditch. T sprinklers.
 5 Q. Is T&Y -- that starts as a ditch?
 6 A. Yes. That's a gravity ditch with a
 7 diversion dam across.
 8 Q. So the individual users within the -- is
 9 that an irrigation district?
 10 A. Yes.
 11 Q. Are the individual water users within that
 12 district -- how do they remove the water from the
 13 canals?
 14 A. Checks and head gates.
 15 Q. That's a major nonpumping type of diversion
 16 in the Tongue, correct?
 17 A. Correct.
 18 Q. I say "major," but it's a fairly large
 19 diversion, right?
 20 A. Yeah. It's -- they burn 200 cfs about.
 21 And they irrigate about 9,700 acres.
 22 Q. Let me ask you the same questions about --
 23 let's just talk about T&Y. Is there a measuring
 24 device at the T&Y's, a conversion point from the
 25 river? They have a dam, you say, but is there a
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1 and put sprinklers in.
 2 And another reason is -- same thing in
 3 Wyoming is -- is that it's hard to get people to help
 4 in flood irrigation anymore and carry a shovel and go
 5 out there and walk around and tramp in the mud. So
 6 sprinklers accomplish another thing, too; they allow
 7 an opportunity to irrigate without having to hire a
 8 bunch of irrigators to carry a shovel around out
 9 there and push water.
 10 Q. On the Powder River it sounds like it's
 11 more of a flood irrigation system because, you're
 12 talking -- you're telling about me about spreaders
 13 being commonly used in Montana, correct?
 14 A. Yes.
 15 Q. Has there been some sprinkler system in the
 16 Powder River?
 17 A. I understand there's one or two. There's
 18 not very many, a very small amount. But I understand
 19 they've tried to use a few.
 20 Q. How about the Little Powder?
 21 A. That is purely water spraying. They pump
 22 and divert through ditches and pump depending upon
 23 how much lift they have. But the Powder River,
 24 they'll irrigate -- like the Little Powder, they'll
 25 irrigate in February. They'll go out and chop a hole
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1 used most of the water.
 2 After the 4th of July, normally speaking,
 3 the only water available was dam water. Dam water
 4 generally ran out by Labor Weekend, as a normal time
 5 frame. Some years it was earlier, some years it was
 6 later. But as a rule of thumb, they ran out of
 7 storage by Labor Weekend. And they were pretty much
 8 done.

9 So they had committee meetings, operating
 10 committee meetings, basically on the river several
 11 times during the year to determine releases, when to
 12 start storing, when to start releasing, and who's
 13 making call for water. And then they would
 14 coordinate those decisions with the water
 15 commissioners.

16 The first year the water commissioners were
 17 on, they started shutting people off. They had to go
 18 down and basically determine what the flow rate was
 19 for all the users down the stream, between the dam
 20 and T&Y.

21 So the first summer both guys went down and
 22 measured all the diversions to double-check their
 23 flow rates. And then they enforced it as they went
 24 on. So they were the ones making the call, but they
 25 had to coordinate the releases with the dam tender

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1 water user whose direct flow right was post-'50 or
 2 pre-'50, correct?

3 A. Correct. Generally speaking, if there was
 4 any natural flow in the river after the 4th of July,
 5 it belonged to T&Y and Brown Cattle, on most years.

6 So after the 4th of July -- and I'm just
 7 talking about normal years and below normal years --
 8 those two water rights had to be filled first.
 9 Generally speaking, that was about all that was in
 10 the river, when you start looking at losses.

11 After 4th of July, normally, anybody who
 12 wanted to irrigate a second cutting of hay -- and
 13 here's a big number. Everybody pretty much irrigated
 14 in April and May on the Tongue. I mean, the water
 15 was pretty good. A lot of times there were high
 16 flows; we could fill a reservoir except for those
 17 four years.

18 And then you go back in the '80s, and you
 19 ran into the same situations in the '80s. The '90s,
 20 not so bad. We were in better shape in the '90s.
 21 But the late '80s especially and the early 2000s to
 22 2006 -- 2005 was an interrupter, as I called it.
 23 That's how it normally operated, you know, in those
 24 dry years. And they pretty much ran out of storage
 25 by Labor Weekend, like I said before.

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1 and the president so they knew enough water was being
 2 dumped into the river to mandate who's using what
 3 water, where, downstream and characterize the losses
 4 involved. So those two guys basically ran the river
 5 for those years.

6 Q. You mentioned that there were some rights
 7 between the Wyoming state line and the intake of the
 8 Tongue River Reservoir. Would the commissioners go
 9 up and regulate?

10 A. They had authority to. I don't know if
 11 they did.

12 Q. I would have to ask them, I guess.

13 A. Yes.

14 Q. Do you know what kind of diversion points
 15 there are between the dam and up to the Wyoming line?

16 A. Pumps.

17 Q. I take it when there's a release from --
 18 your understanding, I guess, from what you've
 19 said is -- well, you haven't said this, but let me
 20 ask you: If the waters being released from Tongue
 21 River Reservoir -- say it's after the 4th of July and
 22 most of the water in the river is going to be
 23 released from storage.

24 A. Uh-huh.

25 Q. Those releases could be contracted for by a

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1 But that's why I say if you weren't those
 2 two early users that were 1886, you were calling for
 3 and buying -- you basically were using your purchased
 4 water. Contract water was from the reservoir. That
 5 was a normal operation. If I was to issue a permit
 6 on Tongue River, I would only issue it for the spring
 7 runoff. Because that's all that's available, in my
 8 mind.

9 Q. Which is -- and what you just talked a
 10 little bit ago -- in other words, if you put a date
 11 restriction --

12 A. A date restriction would be right, June
 13 30th.

14 Q. That would be the end date?

15 A. That would be the end date.

16 Q. So do you know how the commissioners would
 17 operate -- let's say -- Brown Cattle is near where
 18 Hanging Woman is?

19 A. No. Yes, correct.

20 Q. Where Hanging Woman and --

21 A. Birney.

22 Q. Birney, Montana?

23 A. Yes.

24 Q. Say Brown Cattle had irrigated and they
 25 were ready to cut hay -- I'm just going to give you a

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1 down.
 2 A. Yes.
 3 Q. Forsyth would be the courthouse?
 4 A. Yes.
 5 Q. And the paper right was never put to
 6 beneficial use. Let' say 1927 somebody went to the
 7 courthouse and filed a right to use water on the
 8 Tongue River.
 9 A. Correct.
 10 Q. And then it was never put to beneficial use
 11 at all before the adjudication, which is now still in
 12 process today. Could that right have been
 13 recommended for approval by DNRC, typically?
 14 A. If it was never put to beneficial use, then
 15 what DNRC would have done -- they would have looked
 16 at the aerial photos. They would have looked at the
 17 '44 photos, they would have looked at this late '70,
 18 early '80s photos, and they would have seen no
 19 irrigation. They would have put zero acres found in
 20 the '44 photo, zero acres found in the '80 photo or
 21 '79 photo or '78 photo. If it didn't show -- if it
 22 didn't have any irrigation, like you said, they would
 23 put that remark on that claim, if a claim was filed
 24 on that piece of paper.
 25 Now, someone else would have to object to
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1 somehow. I don't know. I wasn't around.
 2 I should say the 450 is a number that I
 3 heard. I don't know if it's accurate, but a large
 4 percentage of the objections were name changes.
 5 Q. Go ahead and open that -- go back to the
 6 first page. And what it is, is -- and, again, this
 7 is the declaration of Richard Moy?
 8 A. Uh-huh. He's over 18?
 9 Q. He is over 18. He said he was. He looked
 10 to be last week, but well preserved.
 11 A. I would say he's probably all of 19. Just
 12 kidding.
 13 Q. Now, you're aware that -- well, let's just
 14 go through a couple things. I want you to turn some
 15 pages, real quick. Turn to the next page after his
 16 signature page, will you.
 17 A. Yes.
 18 Q. And we have a letter dated May 18th, 2004,
 19 and it's a letter from Jack Stults to Pat Tyrrell?
 20 A. Uh-huh.
 21 Q. And I've been referring to this as the call
 22 letter, because it says it's a call letter.
 23 A. Okay.
 24 Q. If you look on the second page of that
 25 letter, the middle paragraph. And I don't know whose
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1 it.
 2 Q. What if someone else didn't object to it,
 3 and it got before the judge? Do you kind of have a
 4 feel for whether judges in the Tongue and Powder
 5 River were approving those?
 6 A. Well, it fell on the water court. And
 7 knowing the master that I know on the Powder River,
 8 in all likelihood, in my opinion, she's pretty
 9 hard-nosed. She'd toss it.
 10 Q. And was that true leading up to the -- in
 11 the '80s, leading up to the preliminary decree on the
 12 Powder, that those kinds of claims got tossed?
 13 A. We would no-right them, yes.
 14 Q. But did the judge at that time tend to toss
 15 them?
 16 A. I would -- yes. Unless that claimant
 17 objected and came in and convinced the judge
 18 otherwise over our recommendation. I don't know. I
 19 wasn't around then, so I can't -- I don't know.
 20 It was my understanding there were close to
 21 10,000 water rights on the Powder River, and we got
 22 500 objections, and 450 of them were name changes.
 23 And it's my understanding that the balance of the
 24 ones that were objected to, were ran through the
 25 system, were resolved through the water court
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1 writing's on that, it may have been Rich Moy, may
 2 have written that when we talked to him last week.
 3 A. I don't see any writing.
 4 Q. These little notes, marks here. But
 5 anyway, we were talking about that paragraph with
 6 him, so it's good that it's highlighted.
 7 It says this letter comes to -- it's
 8 Montana's call on the terms of the compact -- for a
 9 valid and protected pre-'50 water rights on the
 10 Tongue River and Powder Rivers. We're calling for
 11 all pre-'50 junior waters in Wyoming to satisfy our
 12 senior pre-'50 water on the Tongue and Powder Rivers.
 13 I just read that to you, okay?
 14 A. Okay.
 15 Q. I have a question with that.
 16 First of all, do you know of any other
 17 letters that reported to be call letters from Montana
 18 DNRC to Wyoming prior to 2004?
 19 A. Letters?
 20 Q. Yeah.
 21 A. No, I'm not aware of any.
 22 Q. Are you aware of any instance prior to May
 23 18th of 2004 when a representative of Montana DNRC
 24 said to a representative of the State of Wyoming we
 25 want you -- the State of Montana would like you to
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1 curtail water use on the Tongue River and the Powder
2 River to allow more water to pass the state line into
3 Montana?

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

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

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

24 A. Correct.

25 Q. -- of each year?

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1 letter?

2 A. Yes.

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

5 A. Yeah.

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

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

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

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

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

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

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

25 Q. Was that something that was after this call

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

5 A. Uh-huh.

6 Q. Yes?

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

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

16 A. Well --

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

19 A. Yes.

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

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

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1 away accomplishing nothing.
 2 We didn't develop any kind of mechanism
 3 to -- if there was a difference of opinion between
 4 the two states, we always felt frustrated walking
 5 away that Wyoming always had the upper hand because
 6 they're upstream.
 7 Now, whether someone sat there at the table
 8 and said Jeff or Pat, we need water; it's December;
 9 the year's gone by. We're meeting after the fact.
 10 It already happened. We talked about what happened
 11 this last summer. The frustration was already there
 12 in a lot of cases in dry years that we experienced.
 13 And basically, when you walked out of the
 14 room, there was nothing accomplished other than
 15 trading information. But there was no mechanism in
 16 place to have Wyoming release water to Montana. And
 17 I think that was a frustration with a lot of folks on
 18 the compact on the Montana side.
 19 I think it was inferred. I don't know if
 20 it was specifically said, but I know that it was
 21 inferred.
 22 Q. But the one you -- you again lapsed back
 23 into telling me about what was inferred in annual
 24 meetings after the water year. And I'm looking for
 25 the communications that say this water year going
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1 water to give to you. I know we talked about trying
 2 to get water in '88 down to Montana. And I was told
 3 that basically it was used up. I mean, Wyoming used
 4 it all.
 5 And I know in recent years Carmine, he
 6 always told me that -- he says Kerbel, you've got to
 7 understand something. You fail to understand that
 8 the Bighorns are a sponge. They're not a rock.
 9 Q. If you hit the table, I'm not sure about
 10 the people on the phone --
 11 A. But I'm just saying that's what I was told.
 12 And that was a frustrating part of my job, because
 13 you would go down and talk to people to try to work
 14 up a way to manage the water in the basin. And
 15 that's the response I met.
 16 So how many times am I supposed to ask for
 17 water and when, when I don't get a response better
 18 than that, that this is a sponge and it's not a rock?
 19 You think this is a rock and everything runs off.
 20 Q. Well --
 21 A. And I'm going okay, then that sends me a
 22 message that this is a futile -- everything's futile.
 23 Q. Well, I'm not really interested in how
 24 you're supposed to, because I'm not in your shoes,
 25 okay? But I am interested in --
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1 forward we would like you to curtail.
 2 A. You would have to look in the minutes.
 3 Q. Well, I'm asking for your memory, though.
 4 We can look through the --
 5 A. I can't answer that. I'm just saying it
 6 was --
 7 Q. Well, let me say this. My question is: Do
 8 you recall that being said at a time in a water year
 9 where Montana is saying this year we would like you
 10 to curtail water use in Wyoming so more water flows
 11 down the Tongue, Powder, or Little Powder Rivers?
 12 A. I don't recall it ever being said, but I
 13 know it was inferred.
 14 Q. Well, who inferred it?
 15 A. I think Rich did or Gary did.
 16 Q. And do you recall what year that --
 17 A. No, I don't. No, I don't.
 18 Q. Do you know where? What city? What town?
 19 A. No, I don't. I know they inferred -- I
 20 know in '88 we had a hell of a time. In '87, '88,
 21 and '9, I know we were short on both sides of the
 22 border. I know it was a frustrating summer.
 23 Talking to the Wyoming folks and Montana
 24 folks, when I talked to those guys, they kept saying
 25 well, it's the same thing down here. There's no
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1 A. Well, I wish you were. You would
 2 understand what it's like.
 3 Q. But I'm interested in when it was done, if
 4 it was done, because I can't --
 5 A. I know -- I'm sure we did in '88. I can't
 6 say for a fact, but I know we did in '88. I
 7 shouldn't say I know, but I would guess if it
 8 happened at any time before 2000, it would have
 9 happened in '87, '88, or '89. But I'd have to defer
 10 to the minutes.
 11 Q. You say --
 12 A. Because we were short.
 13 Q. And when you refer to the minutes, what
 14 minutes? Of what?
 15 A. The compact meetings.
 16 Q. The annual meetings?
 17 A. Yeah.
 18 But I know we -- I'm pretty certain we -- I
 19 wasn't -- the problem was in those years I wasn't an
 20 active participant back then. I went to some of the
 21 meetings. I don't even know if I went to that one in
 22 '88, because that year was -- for me was a hell on
 23 wheels. I mean, I almost quit I don't know how many
 24 times that summer.
 25 That was a wild summer. I mean, we were
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1 running seven ways from Sunday on complaints, because
 2 I was the enforcing agency, my office.
 3 Q. But if we look at the annual minutes and it
 4 shows you weren't there, I guess you couldn't say if
 5 it was said, could you?
 6 A. That's correct.
 7 Q. And so we rely on the minutes to have the
 8 attendees -- Rich Moy said he made an effort to get
 9 the minutes up to speed, beginning in the early '80s,
 10 to have those minutes really reflect what went on.
 11 A. He did.
 12 Q. He made that effort?
 13 A. Yes.
 14 Q. And was it successful, as far as you know?
 15 A. As far as I know.
 16 Q. You actually had opportunities in the 2000s
 17 to review the minutes, correct?
 18 A. Yes, I did.
 19 Q. And if --
 20 A. I did, too.
 21 Q. And if you had concerns or comments, you
 22 would speak up, correct?
 23 A. That's correct.
 24 Q. And so would Rich Moy?
 25 A. Yes.

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1 measuring device of anybody on main stem Tongue. And
 2 those are the things that we were trying to work
 3 toward and -- is to try to work on main stem Tongue.
 4 And the frustrating part I have, too, is
 5 over by Dayton -- I would go over to Dayton, and
 6 there's alfalfa higher than my hip. Now, I don't
 7 know what water rights they had. I don't know what
 8 priority they had. But I didn't see that on our side
 9 of the hill. You know, and that's kind of the
 10 frustrating part.
 11 And then another situation was -- and I
 12 don't know the water right. I don't know anything
 13 else. But I talked to Mike -- and it was in this
 14 2000 period. And I asked Mike, I said, hey, there's
 15 a ditch -- and I was up to Dayton, and Mike wanted me
 16 to go up and look at this gauging station up there in
 17 the canyon, which I did. And so I went up there and
 18 checked it.
 19 Every month I'm working at Tongue River
 20 Reservoir, Tongue River Dam. We're doing piezels
 21 (ph) and making sure that there's no leakage in the
 22 dam. A lot of times I ran into Sheridan, grabbed a
 23 bite of lunch, and sometimes I'd run up to Dayton and
 24 see how the creek is doing. And this is in the
 25 summer months.

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1 Q. Jack Stults?
 2 A. Yes.
 3 Q. So what was -- you talk about the
 4 frustration. But in your discussion here with me you
 5 talk about Montana wanting to get this compact to be
 6 workable in a sense. I'm paraphrasing what you said,
 7 but is that a fair characterization?
 8 A. Yeah. Well, basically, my characterization
 9 was -- I don't know if it was the compact, but the
 10 compact was the overriding umbrella. But just work
 11 out a system on dry years where we could both share
 12 shortages.
 13 Q. And what water rights would -- share
 14 shortage? I mean, was there a discussion -- did
 15 Montana want pre-'50 rights in Wyoming to share
 16 shortages with pre-'50 rights in Montana?
 17 A. Well, like there's 200,000 acre-feet in
 18 Lake DeSmet, and it's post-'50 water. The storage on
 19 Lake DeSmet, it's post-'50. You know, there's a
 20 opportunity to -- in my mind, that we could work
 21 together on that.
 22 And basically, there's -- as far as I know,
 23 there was no enforcement. I was told this by Mr.
 24 Whitaker that they've never shut off any water user
 25 on main stem Tongue. In fact, they never required a

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1 Well, one time when I was up there -- and I
 2 think it was 2004. I won't -- I'm not certain, but I
 3 think it was. And there was a pipe going up a
 4 hillside from a ditch, an irrigation ditch. It
 5 looked like it was coming from an irrigation ditch,
 6 and it was an existing ditch.
 7 And they've got a wheel line system and
 8 they've got sprinklers and they've got everything
 9 going up there. And I mean, it's a heyday field.
 10 They're irrigating like crazy. And it looked like it
 11 was coming under the irrigation ditch.
 12 So I called up Mike. Mike, being the good
 13 old boy that he is -- which he is. I have a lot of
 14 good feelings about Mr. Whitaker. He at least tried.
 15 He said he went out and did the field investigation
 16 and found out they're irrigating from springs. Well,
 17 it wasn't coming out of the ditch. So it was coming
 18 out of springs right there by Dayton.
 19 I took him at his word.
 20 Q. So did you follow up on that at all? Did
 21 you ever get any further --
 22 A. No. I never got any other feedback. And I
 23 asked Mike, I said, well, is there -- because they're
 24 spring water, basically -- I don't know -- is that
 25 post-'50, whatever? I was asking him questions about

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1 But you were at the meeting earlier that
 2 year, I think, at a technical meeting earlier that
 3 spring, correct?
 4 A. I believe so.
 5 Q. I was curious. Just maybe this is a side
 6 item, but one of the ranchers had mentioned it had
 7 gone down to ten degrees last week around Broadus.
 8 A. I wouldn't doubt it.
 9 Q. This year we would doubt it, wouldn't we?
 10 A. Yes.
 11 Q. What does that do to alfalfa? Does that
 12 damage --
 13 A. It depends upon when it is.
 14 Q. How mature the crop is?
 15 A. (Indicating.)
 16 Q. You have to say yes or no, verbally.
 17 A. It basically depended upon what stage the
 18 crop is in when it gets cold.
 19 Q. So the letter -- we were just talking about
 20 a little bit the letter that came out the next day
 21 after this memo we're talking about. Mr. Stults told
 22 Wyoming that Wyoming should regulate its pre-1950
 23 junior water rights in favor of Montana senior
 24 pre-'50 water rights. Do you recall that being in
 25 that letter?

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1 A. Uh-huh.
 2 Q. And you said that happened quite a bit at
 3 annual meetings?
 4 A. That's why we had technical team meetings.
 5 We started using technical team meetings, you know,
 6 to try to work out a water management plan between
 7 the two states.
 8 And Sue and I were supposed to get that
 9 thing rolling -- and Sue and I and Chuck were
 10 supposed to get that thing rolling. And we had a
 11 hard time coordinating getting Sue down here to help
 12 work with us on that.
 13 Q. Were there times when Montana, in those
 14 discussions, had asked Wyoming to work on Montana
 15 seniors being able to call off Wyoming juniors? Is
 16 that something Montana wanted expressed to Wyoming?
 17 A. Yeah, I think so.
 18 Q. And what was the theory -- was there a
 19 discussion about whether that was a compact -- within
 20 Montana's people -- and don't tell me what lawyers
 21 said. But within your water management people, was
 22 there a discussion about what the compact did in that
 23 regard, how it was laid out as far as pre-'50 Montana
 24 irrigators calling off pre-'50 Wyoming irrigators?
 25 A. We were just working basically from the

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1 A. I think so.
 2 Q. You can look at it if you want. It's on
 3 the second page.
 4 A. Yes.
 5 Q. Were you involved in discussions that led
 6 to that demand, with Mr. Stults or anybody else at
 7 DNRC?
 8 A. I was in Billings. A lot of those
 9 discussions went on in Helena.
 10 Q. Well, you did talk to Mr. Stults the day
 11 before, however?
 12 A. On this, yes. And I got this information.
 13 As far as the decision made on this one here, they
 14 never asked me one way or another. I went out and
 15 got this information.
 16 Q. Well --
 17 A. I did volunteer -- wait a minute. I don't
 18 think I did. No. I'll back off. I didn't do that.
 19 Q. Didn't do what?
 20 A. Say one way or another. I didn't make a
 21 recommendation. That I remember, anyway.
 22 Q. But were there times -- you had talked
 23 earlier about Montana complaining to Wyoming that
 24 they wanted to work something out as far as how this
 25 compact was managed?

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1 theory that seniors making call on juniors. That
 2 basically was the theory that we were working off of,
 3 as far as just making a normal call on a river, on a
 4 stretch of river; is just trying to make, you know,
 5 seniors calling off the juniors. That's all we were
 6 trying to do.
 7 Q. Without regard to whether the rights being
 8 called off were pre-'50 or post-'50 in Wyoming?
 9 A. Pretty much. Just like a normal call would
 10 be on any creek, just without the state line being
 11 there.
 12 But Pat made it very clear that he couldn't
 13 shut anybody down in Wyoming without a higher
 14 authority telling him to do so. And that basically
 15 prompted our action, in my opinion.
 16 Q. And he made that clear after this call
 17 letter?
 18 A. Right.
 19 Q. After May 18th, 2004?
 20 A. Yep. And I believe him. I mean, I'm not
 21 going to sit here and say that -- you know, I believe
 22 what he said. But with that statement, we have no
 23 choice.
 24 Q. So you mentioned earlier 2005 was a -- and
 25 we're just about to stop here. But you mentioned

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1 2005 was a pretty good year.
 2 A. Uh-huh. Well, it was around Billings. I
 3 was busier than hell up here with flooding.
 4 Q. And Tongue River Reservoir spilled that
 5 year, correct?
 6 A. Yeah.
 7 Q. So are you aware of any kind of a letter or
 8 oral call like this May 18th, 2004, letter to Wyoming
 9 from Montana, that year that said shut down the users
 10 so that we can get enough water?
 11 A. No.
 12 MR. MICHAEL: Let's just stop there. And
 13 we'll get some lunch, and we'll come back.
 14 (Whereupon, a break was taken.)
 15 BY MR. MICHAEL:
 16 Q. Mr. Kerbel, we're back on the record.
 17 You're still under oath.
 18 I want to give you a couple documents, and
 19 then we can make sense of these. I am going to give
 20 you back 12 -- Montana 12988, which is that
 21 interoffice memorandum we spent time with.
 22 A. Right.
 23 Q. And then I'm going to give you also another
 24 document, which is an e-mail string. It's Montana
 25 13285. And I want you to look at that really quick.
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1 for others, including Marty Van Cleave.
 2 Do you think that's probably a fair
 3 representation of what probably happened that day?
 4 A. It sounds reasonable.
 5 Q. And who is Marty Van Cleave?
 6 A. Marty and I worked together in the Billings
 7 office. He was a water resource specialist.
 8 Q. And what does a water resource specialist
 9 do?
 10 A. He did permitting and changes; we both did.
 11 I was the supervisor. He worked with me.
 12 Q. As we go up, it looks -- we see --
 13 there's -- towards the bottom of 13285, there's a
 14 message where Jack Stults has sent your original memo
 15 to Marty Van Cleave, it appears, at 2:45 on the 17th.
 16 Does that make sense?
 17 A. Yeah. Yes.
 18 Q. And Marty e-mailed back two minutes later
 19 to Jack, we'll see what I can find?
 20 A. Correct.
 21 Q. And so then apparently Marty would be up
 22 maybe doing some research to follow up on your
 23 interoffice memo?
 24 A. Yes.
 25 Q. And then we go further up and eventually
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1 A. Okay.
 2 Q. And I'm going to see if I can get that as
 3 well.
 4 A. Okay.
 5 Q. So I've got both available. I noticed
 6 13285, at least the top part, it's a -- the part of
 7 an e-mail string is an e-mail from Marty Van Cleave
 8 to Jack Stults on May 17th, 2004.
 9 That's what it says, correct?
 10 A. Yes.
 11 Q. And it doesn't appear that some of the top
 12 parts of the string were actually copied to you, but
 13 we go back a little further down and we see at the
 14 very beginning of the string appears to be an e-mail
 15 from you to Jack Stults, which starts with the same
 16 language that was in the interoffice memo?
 17 A. This one here?
 18 Q. Yes.
 19 A. Yeah, it probably is.
 20 Q. So I'm afraid I don't have both pages, so I
 21 guess can't confirm that. I'm going to ask you to
 22 operate from the supposition that ultimately we'll be
 23 able to connect this up. And that we started --
 24 earlier in the day you had sent the interoffice memo
 25 to Jack Stults and he had some follow-up questions
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1 Marty sends the top e-mail back to Jack Stults with a
 2 subject, "Interstate Water Flows, May 17th."
 3 And we're still on that same document,
 4 13285, correct?
 5 A. Uh-huh. Yes.
 6 Q. And I was interested in that because
 7 Marty's e-mail, the first sentence, is Jack, quote,
 8 we have not heard of any junior rights being shut off
 9 in the Powder/Little Powder/Bighorn or Clark's Fork,
 10 end quote.
 11 And you had testified early that in the
 12 interoffice memo had actually been in personal
 13 contact by telephone with some of the irrigators out
 14 there on the Powder, correct?
 15 A. Uh-huh.
 16 Q. Maybe Mr. Gay was one of them?
 17 A. Uh-huh.
 18 Q. And before we go up in the interoffice
 19 memo, there's different people that you identify in
 20 that memo.
 21 A. Uh-huh. This one here?
 22 Q. Yeah.
 23 A. Yeah.
 24 Q. Can you tell me as we sit here today
 25 whether that was confirmed that day whether any
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1 ask Jack Stults. But do you know if Montana expected
2 Wyoming to release water that had been stored in
3 priority at Lake DeSmet? Is that what the request
4 was for?

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

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

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

13 Q. Okay.

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

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

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

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

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

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

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

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

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1 Powder.

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

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

13 Q. In Montana?

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

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

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

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1 A. Uh-huh.

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

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

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

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

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

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

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

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

25 Q. You've told us --
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1 I'm going to --

2 A. Sorry.

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

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

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

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

21 Kerbel answered.

22 BY MR. MICHAEL:

23 Q. I just want to be clear.

24 A. We made a concerted effort, all the while I
 25 was hired in my present capacity, to talk to Wyoming.

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1 A. So the frustration, what I'm trying to tell
 2 you, Pete, is just -- continues to climb. How many
 3 times do I have to ask for water? How many times do
 4 I have to go out there and tell them we're short of
 5 water?

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

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

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

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

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

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

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

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

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

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

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1 really looking for.
 2 A. I know calls were made. I know I talked to
 3 those guys and I know visited with them, talking
 4 about water shortages in Montana and talking about
 5 water shortages in Wyoming.
 6 Q. Did you -- in those calls, did you tell --
 7 A. We said we were short with water. I don't
 8 know what the words were said specifically. I can't
 9 remember. That's a long time ago. But I know we
 10 discussed the fact that we were out of water on both
 11 the Tongue and the Powder.
 12 Q. And did you say this is what we're cut
 13 back; so anybody that's junior to that, we'd like you
 14 to shut them off?
 15 A. No. We were trying to get -- Pete, we were
 16 trying to get any water we could.
 17 Q. And you'll agree with me that you weren't
 18 entitled to any water; you were entitled to water --
 19 well, I guess that's my --
 20 A. We were just hoping to get some water.
 21 Q. Okay.
 22 A. What I was hoping for was that -- they talk
 23 about how stringent they are in shutting people off
 24 and they have a duty of water of 1 to 70. And how
 25 they go in there and they have these reports to shut

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1 example, of what the Powder River was on May 18th,
 2 May 17th, 2005.
 3 And I was just curious about the various
 4 ways -- you had mentioned that the Powder on May
 5 17th, in your view, was not -- there was no
 6 commissioner, so there wasn't really a prior
 7 appropriation scheme of being enforced at that time?
 8 A. No.
 9 Q. There was not? Okay.
 10 But there are options that various people
 11 in Montana have to bring the commissioner in. We
 12 talked about that quite a bit this morning, right?
 13 A. Uh-huh.
 14 Q. And I guess the Powder was adjudicated up
 15 through a temporary decree as of the early to mid
 16 2000s. So the commissioner would have known, on the
 17 Powder, the various water rights, correct?
 18 A. Uh-huh.
 19 Q. You have to say yes.
 20 A. Yes.
 21 Q. Let me just look at some documents where
 22 one of yours guys -- I say -- one of Montana's guys,
 23 Marty Van Cleave, apparently had sent some
 24 information to Jack Stults about various priority
 25 dates. And that's the kind of information that would

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1 people off on all these ditches on Goose Creek. And
 2 the frustrating part was, was when I found out that
 3 nobody was shut off on main stem Tongue. They don't
 4 have measuring devices on main stem Tongue.
 5 And I'm going, okay. The bottom line is,
 6 is that when -- and my calls to Mike were: Is there
 7 any way that you could go out there to make sure that
 8 these guys are using their rightful share. So if
 9 there's anything that's leftover, it comes across the
 10 state line. How do you know that they're using what
 11 they're supposed to be using?
 12 Because I'm at Dayton and hay's this high,
 13 like I said earlier today, and on other side of the
 14 line, it's not. So you understand?
 15 Q. Oh, I understand seeing green hay. But
 16 that's true in any appropriation system, correct?
 17 A. True. I agree.
 18 Q. The prior appropriator may have great hay
 19 and the junior may have nothing. It's designed to
 20 work that way, correct?
 21 A. Yeah.
 22 Q. I want to show you -- this is a document
 23 from Montana's DNRC website. And what I want to just
 24 follow up on a little bit is -- because we've looked
 25 at some documents here involving what the status, for

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1 have been available, correct?
 2 A. Correct.
 3 Q. So I guess I'm trying to work my way
 4 through -- if we look at -- I want to use this to
 5 help us maybe as an outline a little bit about
 6 different ways that a stream could be regulated in
 7 Montana depending on various circumstances.
 8 We just talked about the Powder, which had
 9 a preliminary decree. So it was in a position to be
 10 regulated by commissioner, right?
 11 A. Uh-huh. Yes.
 12 Q. But what about the Tongue River? And, you
 13 know, there's a hierarchy in this document that
 14 explains -- the State of Montana explains the various
 15 ways how this works. But Item No. 3, would you look
 16 at Item No. 3 on this document.
 17 A. Yes.
 18 MR. WECHSLER: Excuse me. Are you going to
 19 make this a --
 20 MR. MICHAEL: I think we should. It's a
 21 rule, but we had talked about --
 22 MR. WECHSLER: That's true.
 23 MR. MICHAEL: For clarity, the court
 24 reporter mark -- let's stop now and have the
 25 court reporter mark it.

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1 point out, falls in line with what I told you about a
 2 little bit earlier today.
 3 Q. Tell me if you have independent
 4 recollection of this, but I look at these documents
 5 from 2005 and I see a lot of worry going into the
 6 water year as the agenda -- or the meeting we
 7 discussed in April. But then Mother Nature bailed
 8 folks out with a very good April and May.
 9 A. Yeah. If I remember right, '05 wasn't the
 10 greatest snowpack. It started off pretty bad in the
 11 fall. But Mother Nature redeemed us and helped us
 12 out later in the spring, if I remember right.
 13 Because we met late in April that year, and it might
 14 be raining in '05 when we met, and we were praying,
 15 like, keep it going. We really were.
 16 Because I think the weather really turned
 17 on us from the -- January, February, March scared the
 18 living bejesus out of us, if I remember right.
 19 Q. I'm going to turn the page on 2005 and see
 20 if I have any questions about '06. I don't think I
 21 have many, if any.
 22 A. You mean in this?
 23 Q. Yeah. We'll take that away.
 24 I'm going to give you back the Moy
 25 declaration. In fact, let me turn to a page so it
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1 Tongue?
 2 A. Correct. And if I remember right, it was
 3 broken out into post- and pre-'50 water.
 4 Q. At the bottom of that page we're looking
 5 at, the second page letter, final paragraph. Mr.
 6 Stults says although this letter is not required by
 7 the compact, as compact commissioner for Montana and
 8 as directed by Governor Schweitzer, this letter
 9 constitutes Montana's call and demand under the terms
 10 of the compact for water to satisfy our valid and
 11 protected pre-1950 water rights on Tongue and Powder
 12 Rivers.
 13 That's what it says, correct?
 14 A. That's correct.
 15 Q. And my question to you is: Earlier today
 16 we had looked at some work that you had done along
 17 with another fellow whose name escapes me.
 18 A. Van Cleave.
 19 Q. Van Cleave, to get some research together
 20 prior to the May 18th, 2004, call letter that we
 21 talked about.
 22 Were you involved in getting data together
 23 in 2006 to go into this letter that we just -- July
 24 28th of 2006?
 25 A. Well, I would assume that I did because I
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1 makes it easier for both of us that I want to talk to
 2 you about.
 3 A. That would be great.
 4 Q. That's a letter dated -- I'm looking at
 5 page -- there's several page markings on it. Let me
 6 turn to my copy and then you can keep that one; that
 7 would be better.
 8 A. Okay. That'd be great.
 9 Q. This is Exhibit B to the declaration of
 10 Richard Moy, you will see, correct?
 11 A. It looks like it, yes.
 12 Q. And it's a letter dated July 28, 2006, to
 13 Patrick Tyrrell?
 14 A. Yes.
 15 Q. From Jack Stults?
 16 A. Yes.
 17 Q. If you look on the second page of that
 18 letter, the second paragraph down, at the end of that
 19 paragraph, says -- Stults says, if so, this should be
 20 made available immediately to our users.
 21 Speaking of release of storage water for
 22 Tongue River users?
 23 A. Yeah. I remember this. I think I
 24 remember -- Mike gave us that chart, actually.
 25 Q. A chart of storage in Wyoming on the
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1 was in pretty much -- I was in communication with the
 2 water users on both Powder and Tongue. There was a
 3 group of people on the Powder River that I
 4 communicated with pretty much during dry years. And
 5 I would imagine I probably spent weekends and
 6 evenings trying to catch up with those guys to find
 7 out how the drainage was and how things were going
 8 and how much they irrigated and where they were with
 9 their water use for the year.
 10 So I would imagine I -- not knowing full
 11 well that I did. But based on my history and what I
 12 did in my job, I would think that -- and I'll
 13 volunteer the fact that I probably -- and I'm pretty
 14 sure that I did, even though I can't directly
 15 remember. But I was in pretty good communication
 16 with the water users on the Powder River and the
 17 board members, like Roger Muggli and Art Hayes on the
 18 Tongue.
 19 So I would imagine I was -- if Jack called
 20 me and asked me, I'm pretty sure I gave him a pretty
 21 good update on where everybody was on the river that
 22 year. But God, to tell me what it was, I can't
 23 remember what I might have said.
 24 Q. Not what you said so much, but what did you
 25 know as of July 28th, 2006, the status to be?
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1 permits in the Tongue or Powder?
 2 A. No. Because I don't think they have
 3 groundwater applications in the Tongue or Powder. If
 4 we did, I don't remember them.
 5 Q. I'm going to whiz through my notes and see
 6 if there's anything burning, and then we'll call it a
 7 day.
 8 Of course, Jeff may have a questions.
 9 MR. WECHSLER: Just a few, yeah.
 10 THE WITNESS: And then you're going to have
 11 some.
 12 BY MR. MICHAEL:
 13 Q. That is when the fun begins. This is the
 14 2:30 in the morning stuff.
 15 A. I thought I was just joking. Obviously,
 16 I'm not.
 17 (Whereupon, an off-the-record discussion
 18 was had, and a break was taken.)
 19 BY MR. MICHAEL:
 20 Q. In answer to a prior question, in terms of
 21 groundwater, you basically said that you didn't --
 22 weren't aware of groundwater applications for permits
 23 in the Tongue and Powder River Basins?
 24 A. I don't remember any.
 25 Q. But when you say that, are you referring to
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1 So the first area that I have questions
 2 about has to do with this question of what
 3 notification Montana gave to the State of Wyoming
 4 about needing water. And earlier you testified in
 5 questions from Mr. Michael that -- well, Mr. Michael
 6 was asking you had there been any specific calls
 7 asking for either written or otherwise saying you
 8 need to curtail X, Y, and Z water right.
 9 Do you remember that testimony?
 10 A. Yes.
 11 Q. And I believe you indicated that you had
 12 had several discussions at annual meetings about the
 13 need that Montana had for water to satisfy early
 14 priority water rights; is that correct?
 15 A. Correct.
 16 Q. And at those annual meetings -- well, Mr.
 17 Michael asked you about the minutes of those annual
 18 meetings. What I'm wondering is: Did all the
 19 discussion that occurred at those commission meetings
 20 end up in the minutes?
 21 A. Of course not.
 22 Q. And why was that?
 23 A. A lot of the discussions were sidebar.
 24 They happened during breaks. A lot of them
 25 happened -- even conversation across the table. And
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1 irrigation or -- I mean, it seems to me that -- were
 2 there applications for domestic or stock or --
 3 A. Yes. You're absolutely right. And I was
 4 referring to larger well permits. See, the
 5 connotation, basically, is that if they're a small
 6 groundwater well that's less than 35 gallons a minute
 7 and 10 acre-feet, that's a domestic stock well, in my
 8 mind, and that's not a permitted well.
 9 A permitted well, in my definition,
 10 basically, is anything that exceeds those two
 11 parameters. So that would constitute a permit.
 12 MR. MICHAEL: Well, I think I'll go ahead
 13 and pass the witness. And Jeff may have some
 14 questions for you. Thank you.
 15 THE WITNESS: You bet.
 16 ---
 17 EXAMINATION
 18 ---
 19 BY MR. WECHSLER:
 20 Q. So, Mr. Kerbel, as you know, my name is
 21 Jeff Wechsler, and I represent Montana. And I have
 22 just a couple of questions, and they are in four
 23 areas. The purpose, really, is to just clarify some
 24 of your earlier testimony so there's no fusion on the
 25 record.
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1 a lot of times -- I mean, whether it was at the
 2 commission meeting or whether it was at our meeting
 3 that we had in the spring, technical team meeting, a
 4 lot of that stuff just didn't get typed into the
 5 minutes.
 6 I mean, they weren't comprehensive, was
 7 what I was trying to say. I mean, they hit the high
 8 spots, like I said earlier.
 9 Q. You remember during some of those annual
 10 commission meetings that you discussed with officials
 11 from Wyoming, Montana's need for water rights to
 12 satisfy early priority water --
 13 A. Oh, yeah. On water-short years, yeah,
 14 that's all we talked about.
 15 Q. In your position with the DNRC, did you
 16 have the opportunity to communicate with Montana
 17 irrigators?
 18 A. Oh, yes. I mean, that was part of my job.
 19 I mean, they communicated with me as much as I
 20 communicated with them. So I got phone calls during
 21 dry years wanting to know -- what questions I would
 22 get is: What priority date does their neighbor have?
 23 And if they're using water and how things were going.
 24 And a lot of questions on enforcement and that type
 25 of stuff, but sometimes it didn't go that way.
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1 I mean, there were tons and tons of
 2 questions, especially during drought years, about the
 3 process and what they needed to do and everything
 4 else. And it's typical when you get into a western
 5 state like we are here in Montana and they are in
 6 Wyoming and what have you, that by the time you get
 7 into a situation in the summer and you're water short
 8 and you're fighting with your neighbor and you're
 9 throwing things at each other, a lot times you'll go
 10 hire an attorney and file a lawsuit.

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

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

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

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

8 A. Yes.

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

12 Did I miss any years?

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

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

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

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

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

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

20 A. Correct.

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

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

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

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

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

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

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

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

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

22 A. Of course.

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

25 A. Yes.

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1 Q. And were those communications, say,
 2 separate from the annual commission meetings?
 3 A. Yeah. They were mostly phone calls. And
 4 they occurred in, probably, August when we were all
 5 frustrated as hell.
 6 Q. Some of those occurred during the
 7 irrigation season?
 8 A. Oh, of course, they did.
 9 Q. And by making those communications to the
 10 State of Wyoming, was it your intent to get Wyoming
 11 to do something to get water to Montana?
 12 A. Well, I probably knew the answer before I
 13 called, but at least it was worth a try.
 14 Q. Was that your intent?
 15 A. Yes.
 16 Q. Well, you mentioned you got frustrated.
 17 And I think at one point you said that it felt like
 18 banging your head against the wall.
 19 What do you mean by that?
 20 A. Well, basically when I called Wyoming
 21 several times, I was told -- well, I said it earlier
 22 today, that, basically, Keith, you think the Bighorn
 23 mountain is a rock. And I've said this before and
 24 I'll say it again -- and, basically, I was told it's
 25 a sponge; not all the water runs off. So therefore,

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1 showed by Mr. Michael a document that was, I believe,
 2 Montana 12988, and that was a memorandum from you to
 3 Jack Stults.
 4 Do you recall that document?
 5 A. Yeah. That was in 2004?
 6 Q. You don't have that before you, but do you
 7 generally recall that document?
 8 A. Yes.
 9 Q. Do you remember when you were asked to talk
 10 to the irrigators in order to produce that
 11 memorandum?
 12 A. Yeah. Just, I think, a day or two before.
 13 Q. Were you able to talk to all of the
 14 irrigators?
 15 A. No. No. We only did a sampling.
 16 Q. So that doesn't reflect a complete
 17 discussion with all of the irrigators?
 18 A. Of course not.
 19 Q. Third topic. During that same discussion
 20 with Mr. Michael, you were shown a document that, I
 21 believe, was labeled Montana 13285, which was an
 22 e-mail from a Marty?
 23 A. Van Cleave.
 24 Q. Thank you. And that wasn't written by you;
 25 is that correct?

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1 you're not going to get anything, because it's a
 2 sponge, and, basically, there isn't any water
 3 available.
 4 And I got the impression, from talking to
 5 the boys in Wyoming, that they couldn't do anything
 6 and they weren't going to do anything.
 7 Q. During any of those years you mentioned, in
 8 the mid '80s, in the '90s, and the 2000s, when you
 9 had these discussions with people from Wyoming, did
 10 that result in any additional water crossing the
 11 state line into Montana?
 12 A. Not that I saw. But I will say one thing,
 13 and I said it earlier, I did appreciate the fact that
 14 Pat Tyrrell asked Mike Whitaker to get some measuring
 15 device installed on the diversions on main stem,
 16 because I was told and I was informed that there's
 17 never been a commissioner on main stem Tongue. Water
 18 has never been shut off on main stem Tongue.
 19 Q. Fair enough.
 20 A. And I think there's an expansion of water
 21 that's a post-'50 on the main stem and tributaries.
 22 Q. I promised you I would asked about four
 23 topics, that was the first. And so I want to make
 24 this promise: The other three are much shorter.
 25 So my first question had to do -- you were

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1 A. No, it was not.
 2 Q. And you didn't have any input into that
 3 e-mail?
 4 A. No, I didn't.
 5 Q. And did you agree with all of the
 6 information that was in that e-mail?
 7 A. No. I was kind of taken aback on Elgin's
 8 water rights being so junior. I didn't think their
 9 water rights were that junior.
 10 Q. Fourth and final topic. You were shown a
 11 couple of oversized maps by Mr. Michael, that I
 12 believe you testified -- or there was discussion
 13 about it being a 2009 map.
 14 Did you have any involvement in producing
 15 that map?
 16 A. No. That was done by Helena.
 17 Q. Would you consider that map to be the
 18 authoritative, most accurate source of information
 19 about Montana water rights?
 20 A. No, I don't think so.
 21 MR. WECHSLER: That's all questions I have.
 22 ---
 23 EXAMINATION
 24 ---
 25 BY MR. MICHAEL:

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1 Q. I have a few.
2 A. I figured.
3 Q. You discussed with Mr. Wechsler 1988, but
4 you said -- you talked that year, but then you said
5 "those summers." And I'm just trying to get a handle
6 on dates here.

7 When did you talk to Mike Whitaker about
8 your frustration? Do you have a date?

9 A. No, I don't.

10 Q. When we talked earlier today in your direct
11 examination, you talked about meeting with him at
12 annual meetings?

13 A. Yes.

14 Q. And --

15 A. We had conversations during the course of
16 the summer on the phone.

17 Q. And this was in what time frames? '80s?
18 '90s? 2000s? When --

19 A. All the way.

20 Q. From when to when?

21 A. Oh, God. I'm trying to remember when.

22 We had conversation in the '80s. We had
23 less in the '90s because we had better water years in
24 the '90s. And then we had several discussions in the
25 drought years of the 2000s.

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1 to -- he liked to take control of things and do
2 things on his own.

3 Q. Do you believe that you had authority on
4 behalf of the State of Montana to write such a letter
5 as that May 18th, 2004, letter to Pat Tyrrell?

6 A. I would have felt uncomfortable doing it,
7 but, yes, I would have.

8 Q. Based on what?

9 A. Pardon me?

10 Q. What was the basis --

11 A. On my position.

12 Q. In the 1980s, how did you keep phone
13 records?

14 A. I didn't.

15 Q. What if somebody called in and -- was there
16 somebody to answer the phone here other than you in
17 the '80s?

18 A. Uh-huh.

19 Q. And it was a man or a woman?

20 A. It was a woman.

21 Q. What was her name? Or if there were more
22 than one --

23 A. Carla Bornhoft.

24 Q. So if calls came in to her -- so let's say
25 Mike Whitaker tried to call you and a call came in

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1 Q. So you had phone calls with Mike Whitaker
2 during some of those summers?

3 A. Uh-huh.

4 Q. Mostly '80s and 2000s?

5 A. Late '80s.

6 Q. And what about '83, '85? You mentioned
7 those and then you seem to be unsure of yourself?

8 A. Oh, I just was saying those were dry years,
9 too, but I never contacted Wyoming in those years.

10 Q. Okay.

11 A. I know that for a fact. But we did talk in
12 '87, '88, and '89.

13 Q. Now, in 2004, why was it that Jack Stults
14 wrote that May 18th of 2004 letter to Pat Tyrrell and
15 you didn't?

16 A. And I didn't?

17 Q. Yeah. Why didn't you write that letter?

18 A. He was the commissioner on the compact.

19 Q. And what difference does that make?

20 A. Well, I don't know. But he felt it
21 appropriate to come from him, I guess. He felt it
22 was more appropriate to come from him than me or he
23 would have asked me to write it. He was the division
24 administrator, I assume.

25 And Jack was an individual that he liked

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1 to her and you weren't here. Would she make a note?

2 A. Yes.

3 Q. And leave it for you?

4 A. Yes.

5 Q. And were those kept?

6 A. No.

7 Q. When were they tossed away?

8 A. When I got ahold of Mike.

9 Q. So you didn't have a practice of
10 maintaining those records of missed calls, correct?

11 A. Correct.

12 Q. And then if he would call you on an issue,
13 would you take notes?

14 A. Sometimes.

15 Q. Did Mike Whitaker ever initiate a phone
16 call to you in the 1980s?

17 A. Oh, God. You want me to remember that? I
18 don't remember. I know I initiated calls to him.

19 Q. How about in the 1990s? Did he ever
20 initiate a call to you in the '90s?

21 A. Yeah, we did.

22 Q. He --

23 A. I think we did in the '90s because we got
24 to know each other better as time went on.

25 Q. But you think he initiated at least one

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1 call to you in the 1990s?
 2 A. I would think he would have, yes. I mean,
 3 Mike called me up on good years. We had a pretty
 4 decent -- I thought Mike and I had a pretty good
 5 relationship. I mean, when we got good years, I'd
 6 get a phone call from Carmine, I'd get a phone call
 7 from Mike, and they would let me know, Keith, I've
 8 got a feeling we're going to smile at the end of the
 9 summer. You know what I mean?
 10 We'd get those kind of calls. I mean, and
 11 that's not a direct quote. But, basically, it was
 12 that kind of conversation. And we communicated more
 13 during -- I will say we communicated more during
 14 better years. And we stayed in pretty good contact.
 15 Mike and I still e-mail each other today. But the
 16 bottom line is, is that we don't talk about work.
 17 Q. Why should he; he's retired?
 18 A. That's right.
 19 So the bottom line is, is that, yeah, I
 20 mean, in the '90s and 2000s, we got along pretty
 21 well. We -- at the meetings and stuff -- like we had
 22 a meeting down in Buffalo, and we all went golfing
 23 together.
 24 I mean, Jeff went with us, and Mike went
 25 with us and a bunch of us from Sheridan, we all
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1 A. Yeah. To get more water. If we ran into a
 2 water-short year and the snowpack was looking pretty
 3 bleak, next spring is to work out a management plan
 4 where we could work together and share the shortage,
 5 that was our goal; that was the reason I felt that we
 6 had those annual meetings and the technical team
 7 meetings, was to try to develop a management plan so
 8 we could work together, two states, and didn't have
 9 to sue each other. That was my purpose for being
 10 there.
 11 And that's what we discussed. We tried to
 12 discuss -- I mean, Susan -- I mean, Sue -- I mean,
 13 she was the interstate coordinator. I mean, that was
 14 her job. I talked to Sue too. I'd call Sue up and
 15 visit with her on occasion to visit about water
 16 shortages on Tongue, water shortages on Powder, maybe
 17 even the Clark's Fork at times, to see what can be
 18 done. And I visited with Sue, basically. She talked
 19 about Bear. I don't know where Bear is, but she
 20 talked about they had a water management on Bear.
 21 And she said it seemed to work with the different
 22 states.
 23 I felt maybe that could be a -- Jack and I
 24 talked about this. And we asked questions about
 25 something to that effect at one of the -- I think it
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1 golfed the Buffalo course. It was a great course.
 2 So, yeah, we had conversations, good times and bad.
 3 Q. Of any of those calls, do we have any
 4 notes, any documentation of calls between you and
 5 Whitaker?
 6 A. Not on my behalf.
 7 Q. You don't have any?
 8 A. No. I didn't keep a call log.
 9 Q. You said that in your cross-examination,
 10 Mr. Wechsler's questions, every meeting you would try
 11 to influence Wyoming to work with us and give it a
 12 try?
 13 A. That's what I thought the meetings were
 14 about.
 15 Q. Okay.
 16 A. Those were the kind of meetings, I thought.
 17 Q. And are we talking the annual meetings at
 18 that point?
 19 A. No.
 20 Q. It would be some other meeting besides an
 21 annual meeting?
 22 A. No. It would be mostly the annual meeting
 23 or the technical team meeting.
 24 Q. And work with us to plan, what -- this is
 25 in December, November?
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1 was one of the -- I don't know if it was a telephone
 2 conversation or if it was at one of the commissioner
 3 meetings, annual meetings, about -- she came in and
 4 talked about how the Bear project works, and we were
 5 wondering if that would work for Tongue River.
 6 But it didn't go anywhere. It never got
 7 off the ground.
 8 Q. So the idea in those cases, with the annual
 9 meetings in November, December, would be to work over
 10 the winter to come up with something -- some way to
 11 administer water between the two states?
 12 A. That was my goal.
 13 Q. And when I say "administer water," I mean
 14 as a practical matter, X head gate gets shut off at X
 15 date type thing?
 16 A. Yeah. And Sue was always busy. I mean,
 17 she went to more meeting -- I mean, I tried I don't
 18 know how many times to set up a meeting to meet Sue
 19 in Sheridan or Buffalo or Casper so we could work on
 20 this thing with Mike, her, and myself, and Carmine
 21 and bring our hydrologist down. And every time we
 22 tried to set up a date, it got postponed or something
 23 happened or whatever. But she's Miss Meeting
 24 Attender. She's got meetings all over the United
 25 States.
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1 So, you know, it got frustrating in a
 2 sense, and it all went by the wayside, I'm sorry to
 3 say.
 4 Q. So do you remember a conversation that you
 5 had with Mike Whitaker where the gist of what you
 6 said to him was Montana demands that Wyoming . . .
 7 A. No, it wasn't worded that way.
 8 Q. Or that Montana would like, pretty
 9 please -- okay? And this is in an irrigation season.
 10 A. Uh-huh.
 11 Q. -- Wyoming to regulate one or more water
 12 users in Wyoming so that more water shows up at the
 13 state line this year sometime in the near future?
 14 A. Correct.
 15 Q. You said that to him?
 16 A. Yes.
 17 Q. And what year was that?
 18 A. I'm sure it was '88. I'm thinking it was
 19 '88. I know we talked about it in 2000 because 2000,
 20 2001 were tough years as well, that whole period in
 21 there.
 22 Q. In '88, what time of year was that when
 23 you --
 24 A. I was thinking it was probably late summer.
 25 July, August would be my recollection.

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1 figure out if there's a way to get it done. And
 2 I think we both ended up with a frustrating
 3 conversation by the time we both hung up.
 4 BY MR. MICHAEL:
 5 Q. So after you made that statement to Mike
 6 Whitaker in one of those years and then immediately
 7 call up Jack Stults or Gary Fritz and say, hey, I
 8 told Wyoming I want them to deliver water, curtail
 9 water users to satisfy water use on the Tongue and
 10 Powder; I want you to know this, that I've done this?
 11 A. No, I did not.
 12 Q. And why didn't you do that?
 13 A. This was a conversation between Mike and I
 14 to try to solve a problem.
 15 Q. But did you expect Mike Whitaker to report
 16 that to Wyoming authorities and take action --
 17 A. I can always hope.
 18 Q. -- in the near future?
 19 You expected that?
 20 A. No. To answer your question, no. But I
 21 thought it was worth a try. My expectations were
 22 really low, and they were met.
 23 Q. In 2004, May 17th of 2004, we looked at
 24 your interoffice memorandum of that date.
 25 A. Yes.

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1 Q. And your recollection would be just you and
 2 Mike Whitaker?
 3 A. Yes.
 4 Q. No witnesses?
 5 A. No. It would just be Mike and I.
 6 Q. And you don't have any records of that --
 7 any written records of that yourself?
 8 A. No, I don't.
 9 Q. So the only possibility for written record
 10 would be Mike Whitaker would have something in
 11 writing?
 12 A. (Indicating.)
 13 Q. Is that correct?
 14 A. That is correct.
 15 Q. Any other years than the two you just said?
 16 You said 1988 and 2000 that occurred.
 17 MR. WECHSLER: I think he's answered that
 18 as well.
 19 THE WITNESS: Yeah. I mean, we talked
 20 other years too. But I mean, those were the few
 21 worst years: 2004, 2002, 2006. I know we had
 22 those conversation in those years, by my
 23 recollection. And a lot of it was frustration
 24 on both our parts.

We ended up talking to each other, trying
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1 Q. Do you recall that?
 2 And you just testified a minute ago that at
 3 that time you did not make an effort to cover all the
 4 irrigators in the Powder River and see what their
 5 situation was; is that correct?
 6 A. That is correct. I just took a sampling.
 7 I tried to pick out the larger water users that I
 8 knew and that I had a communication with. And then I
 9 went through and checked out some of the other guys
 10 downstream. So I tried to get a sampling from top to
 11 bottom.
 12 Q. So as of the next day, May 18th, 2004, did
 13 you have enough information to be able to say that
 14 there are no -- which water right users were
 15 diverting and which ones weren't?
 16 A. No. I didn't know if all of them were or
 17 if -- I just knew the people that I talked to. They
 18 mentioned other water users in the drainage had
 19 similar situations as they did, and that's as far as
 20 it went. They pretty much ran out of water by the
 21 4th of July.
 22 MR. MICHAEL: I don't have any further
 23 questions. You're done.
 24 (Whereupon, the deposition concluded at
 25 5:23 p.m.)

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CERTIFICATE OF DEPONENT

PAGE: LINE: CORRECTION:

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

DATED this day of , 2012.

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KEITH KERBEL, Deponent
SUBSCRIBED AND SWORN to before me this day of , 2012.

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Notary Public for the State of Montana
Residing at , Montana
My Commission expires:
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CERTIFICATE OF COURT REPORTER

State of Montana)

ss:

County of Yellowstone)

I, John B. Graf, Court Reporter and Notary Public in and for the State of Montana, residing in Billings, Montana, do hereby certify:

That I was duly authorized to and did report the foregoing deposition after having duly sworn KEITH KERBEL to the truth; that the deposition was taken at the time and place stated on the caption hereto; that the testimony of the deponent was taken in shorthand by me and subsequently reduced to writing under my direction; that the foregoing is a true and correct transcript of the testimony given by said deponent.

I further certify that I am not counsel, attorney nor relative or employee of any party, nor otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal this 12th day of May 2012.

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JOHN B. GRAF, Court Reporter and
Notary Public, State of Montana
Residing in Billings, Montana
My Commission Expires 9-11-2012
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CERTIFICATE OF DEPONENT

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PAGE:	LINE:	CORRECTION:	PG	Line	Correction:
9	16	take out	198	22	contract compact
47	20	use	220	17	exit excess (2K's)
48	11	AS well.	232	12/16	Fort Union Fort
50	12	tand to line	235	10	five
59	3	zone 200	264	17	At Murray's McBirney
61	7	above			
78	3	river dam			
83	3	for spraying haying			
85	1	stayed state			
99	7	Powder River Tongue River			
103	9	may MAKE			
112	20	piezets "piezometers" "piezos"			
113	9	head hay			
113	11	order from			

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

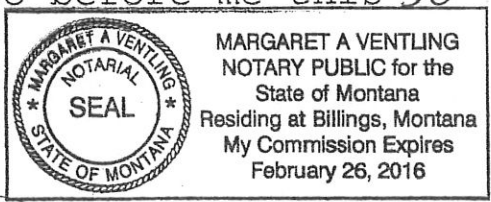
DATED this 30th day of MAY

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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