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THE COURT REPORTERS

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June 8, 2009

Jim Williams
216 Apple Tree Circle
Kalispell, MT 59901

Re: *Kleinhans Farms Estates, Inc. vs. Flathead County*
Cause No. DV 08-614(B)

Dear Mr. Williams:

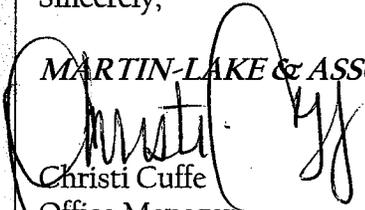
Your deposition in the above-entitled cause is ready for reading and signing. Please read the enclosed copy of your deposition and make any corrections you may have on the enclosed Certificate of Witness page. After you have completed the reading and signing process, please sign the certificate page before a notary and return it to our office.

You have 30 days from the date of this correspondence in which to read and sign as outlined in the Montana Rules of Civil Procedure. If our office does not receive your executed certificate page within those 30 days, the original deposition will be sealed and forwarded to the ordering attorney without your signature.

Thank you for your attention to this matter and please call me with any questions you may have.

Sincerely,

MARTIN-LAKE & ASSOCIATES, INC.



Christi Cuffe
Office Manager

Enclosures

cc: Terance Perry, Esq.
Alan McCormick, Esq.

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Missoula, MT 59807
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COPY

In The Matter Of:
Kleinhans Farms Estates, LLC v.
Flathead County

Jim Williams
May 12, 2009
DV 08-614(B)

Martin-Lake & Associates, Inc.
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Attorney Notes

Page 1

1 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT
 2 OF THE STATE OF MONTANA
 3 IN AND FOR THE COUNTY OF FLATHEAD
 4
 5 KLEINHANS FARMS ESTATES, LLC
 6 Montana Limited Liability
 7 Company,)
 8 Plaintiff,
 9 vs.) No. DV-08-614(B)
 10 FLATHEAD COUNTY,)
 11 Defendant.
 12
 13
 14 DEPOSITION OF
 15 JIM WILLIAMS
 16
 17
 18 On May 12, 2009, beginning at 9:07 a.m., the
 19 deposition of JIM WILLIAMS, appearing at the insistence
 20 of Plaintiff, was taken at Montana Fish, Wildlife &
 21 Parks, 490 North Meridian Road Kalispell, MT, pursuant
 22 to the Montana Rules of Civil Procedure, before Bambi A.
 23 Goodman, Registered Professional Reporter, Certified
 24 Realtime Reporter, Notary Public.
 25

Page 2

1
 2
 3
 4 A P P E A R A N C E S
 5
 6 Terance P. Perry, Esq.
 7 DATSOPOULOS, MACDONALD & LIND, P.C.
 8 201 West Main Street, Suite 201
 9 Missoula, MT 59802
 10 406-728-0810
 11 appeared on behalf of Plaintiff.
 12
 13 Alan F. McCormick, Esq.
 14 GARLINGTON, LOHN & ROBINSON
 15 P.O. Box 7909
 16 Missoula, MT 59807
 17 406-523-2595
 18 appeared on behalf of Defendant.
 19
 20 Becky Jakes Dockter, Esq.
 21 MONTANA FISH, WILDLIFE & PARKS
 22 1420 E. Sixth Avenue
 23 Helena, MT 59620
 24 406-444-3312
 25 appeared on behalf of Fish, Wildlife & Parks.
 Also Present: Sean Averill; Kleinhans Farms
 Estates

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1 I N D E X
 2 WITNESS: PAGE:
 3 JIM WILLIAMS,
 4 Examination by Mr. Perry 4
 5 Examination by Mr. McCormick 171
 6 Examination by Mr. Perry 179
 7
 8 EXHIBITS:
 9 Deposition Exhibit No. 32
 10 (6/16/06 Letter; Williams to Stickney) 26
 11 marked for identification
 12 Deposition Exhibit No. 33
 13 (JW Thoughts) 168
 14 marked for identification
 15
 16
 17 Reporter's Certificate 196
 18 Certificate of Witness 197
 19
 20
 21 * Denotes phonetic spelling
 22
 23
 24
 25

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1 JIM WILLIAMS,
 2 having been first duly sworn to testify to the truth,
 3 the whole truth and nothing but the truth, testified
 4 upon his oath as follows:
 5 EXAMINATION
 6 BY MR. PERRY:
 7 Q Good morning, sir.
 8 A Good morning.
 9 Q My name's Terance Perry. I represent Kleinhans
 10 Farms Estates, LLC, in a pending action against Flathead
 11 County, you're aware, I assume.
 12 Let me give you a couple of pointers on the
 13 deposition process we're engaged in this morning. The
 14 court reporter can't take down head nods. You have to
 15 verbalize your responses. If you're confused by any of
 16 my questions, please just tell me that you don't
 17 understand the question, I'll be happy to rephrase. If
 18 you need to take a break to use the men's room or get a
 19 glass of water, not a problem, we can accommodate you.
 20 We just can't do it if there's a question pending to you
 21 at that time.
 22 Can you please state your full name for the
 23 record.
 24 A Jim Williams.
 25 Q And your current residential address?

1 A 216 Apple Tree Circle, Kalispell, Montana.
 2 Q And can you tell me a little bit your
 3 educational background, starting with high school?
 4 A Yeah. Graduated from high school. Graduated
 5 with a bachelor's degree in science and graduated with a
 6 master's degree in science. Florida State University
 7 for my undergrad, Montana State University for graduate
 8 school. And that's almost going on ten years as a
 9 professional student for a while.
 10 Q When you graduate from Florida State
 11 University?
 12 A 'Eighty-six.
 13 Q And the degree was in?
 14 A Biological sciences.
 15 Q Biological sciences.
 16 A The marine studies-kind of emphasis at the
 17 time.
 18 Q And did you immediately attend graduate school?
 19 A Well, that depends on how you define immediate.
 20 It's very difficult to get a graduate-funded project.
 21 So I was involved with -- my thesis work was on cougar
 22 ecology in the Bob Marshall Wilderness. But I had
 23 several sputters and starts. I was assigned to some
 24 black bear work, some moose work, potentially some
 25 bighorn sheep work, doing kind of technical work,

1 Q And you commenced in '89 at MSU.
 2 A Yeah, I think it was the summer, if I remember.
 3 Jogging my memory. Would have been about the summer,
 4 because I worked in bear, moose, sheep, and some elk
 5 stuff in the Big Sky Resort area for Dr. Pickton. And
 6 he was my graduate advisor.
 7 Q And you graduated from MSU in --
 8 A 'Ninety-two.
 9 Q -- '92? And if you can, just -- and I know a
 10 lot of times you'll know what my question's going to be
 11 before I got it out. But the court reporter has a real
 12 tough time taking it down when you and I are both
 13 talking; okay? So just give me a second to get the
 14 question out and, of course, Attorney McCormick time to
 15 object to any question I may pose.
 16 So you graduated from MSU in '92. What was
 17 your degree?
 18 A Fish and wildlife management, master's degree.
 19 Q And did you have any concentration, in terms of
 20 an area of study, in grad school?
 21 A It's a pretty unique program at Montana State.
 22 It's kind of a classic, you know, wildlife science.
 23 Wildlife biologies is a science and art. And you kind
 24 of -- there's a heavy emphasis on literature and the
 25 classic literature reads, in terms of big game,

1 waiting for what's called a funded stipend. And that's
 2 a paycheck you get every month, which is kind of
 3 critical as a grad student. And eventually I did land
 4 one, and that was working on cougars. So the research
 5 was done on the east front, and graduated in '92.
 6 Q When did you start grad school; what year?
 7 A Would have been '90.
 8 Q And you graduated --
 9 A 'Eighty-nine -- '90. The lion work started
 10 in '90. But in '89 -- actually -- I'm trying to think I
 11 came up the summer before with Dr. Picton; '89-'90.
 12 Q And I'm sorry; what was the grad school again?
 13 A Montana State University in Bozeman.
 14 Q Okay. And you had testified earlier you
 15 graduated from Florida State in '86?
 16 A Correct.
 17 Q What did you do between '86 and '89?
 18 A I worked for Upjohn Pharmaceuticals in
 19 marketing and sales, saving money for graduate school.
 20 Q And where were you located for that job?
 21 A Park City, Utah.
 22 Q And, presumably, you applied sometime during
 23 that time period, '86 to '89, for admission to MSU grad
 24 program?
 25 A Correct, correct.

1 waterfowl, upland bird and habitat management programs
 2 as well as the science part of your thesis work. So it
 3 was kind of unique. And you kind of covered a little
 4 bit of everything.
 5 Now, my thesis was specific to mountain lion
 6 ecology. But the training, and one of the reasons I was
 7 interested in MSU and went there, pretty much covered
 8 the gambit and qualifies you for a lot of jobs that you
 9 don't get in some other universities or a little more
 10 traditional peer, you know, cell-biology type oriented
 11 programs. This one actually pretty applied, hands-on.
 12 And, obviously, Montana as all these native species to
 13 work with, so the university can do that. So it's a
 14 pretty broad program. And it's fish and wildlife
 15 management too. So we're trained, somewhat, in
 16 fisheries, although that was much less of an emphasis
 17 area for me.
 18 Q And when you were in grad school, did you take
 19 any courses in waterfowl management?
 20 A Correct; yeah, yeah. In fact, Dr. Eng, Robert
 21 Eng, E-n-g, kind of world-renowned waterfowl and upland
 22 bird biologist, he is -- it was like taking a class from
 23 Leopold. He was like the second generation. Albert
 24 Hochbaum, you know, The Canvasback on a Prairie Marsh,
 25 the famous book, Bob Eng out of Minnesota. But he's a

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1 classic professor of upland bird and waterfowl
 2 management. And it was, again, one of the draws there.
 3 And it was a whole semester and a graduate-level course
 4 in which we were required to read literature reviews on
 5 waterfowl ecology and management and upland birds.
 6 Upland birds were about half, migratory and waterfowl
 7 about half.
 8 Q So that would have been, as you said, a full
 9 semester course?
 10 A Yeah, yeah, graduate level.
 11 Q And aside from that course with Robert Eng, did
 12 you take any other courses in grad school about
 13 waterfowl or waterfowl management?
 14 A Well, there's a lot of overlap. Habitat
 15 management was the other course that you're required to
 16 take. And habitat, half of the program was obviously
 17 upland and waterfowl, wetland-type habitats. And
 18 there's big game habitat stuff too. But it was probably
 19 50/50 between birds and wetlands and mammals. And that
 20 was Dr. Mackie, Richard Mackie. And graduate level
 21 habitat management. So there's a lot of overlap
 22 between, you know, general wildlife management courses,
 23 your upland bird and waterfowl graduate level course,
 24 and your habitat management course, you know, when it
 25 comes to -- if you're looking at waterfowl. But the

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1 waterfowl class was specifically dedicated to that topic
 2 birds.
 3 Q I'm sorry; were you done?
 4 A That and upland game birds.
 5 Q When you graduated in 1992 from Montana State
 6 University, what, if anything, did you do at that point
 7 for either education or work?
 8 A I went straight into the Fish, Wildlife & Parks
 9 research lab in Bozeman, worked at the research lab.
 10 Q And can you tell me for how long were you
 11 employed at the research lab for FWP in Bozeman?
 12 A Dr. Weigand who was our chief of research at
 13 that time till I came up here. That would have been,
 14 oh, four months in the lab. And then I proceeded to get
 15 hired here, actually, on a research project at Hungry
 16 Horse Reservoir. And that would have been in late '92,
 17 '93 on elk.
 18 Q On elk.
 19 A On that project. A mitigation program.
 20 Q You were four months in Bozeman at the FWP
 21 research lab?
 22 A Roughly, yeah.
 23 Q Roughly, approximately.
 24 A Yeah.
 25 Q Your best estimate; that's all I'm asking.

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1 A This is a recollection thing here.
 2 Q Four months there, and then you were hired at
 3 the FWP office we're at today in Kalispell, Montana?
 4 A Correct, yeah.
 5 Q And when you were hired at the FWP research
 6 lab, I believe you stated that you were involved in
 7 research on elk. Is that correct?
 8 A At the lab, no. Here, that's when I got hired
 9 here. At the lab you kind of do a little bit of
 10 everything. There's aging skulls coming in from the
 11 mountain lion harvest. Furbearer ecology, disease, you
 12 name it. Whatever the crisis of the month is, the lab
 13 deals with it, and I was a technician, obviously, right
 14 out of school, but enjoyed it.
 15 Q And to whom did you answer while you were at
 16 the lab?
 17 A The chief, it was Keith Aune. He's retired
 18 now.
 19 Q And when you then came to FWP in Kalispell,
 20 Montana, what was your position?
 21 A It was a temporary position to begin with. And
 22 it was in the mitigation -- wildlife mitigation program.
 23 And it was under Harvey Nyberg at the time. And I was
 24 assigned to do vegetation and habitat work on the elk
 25 project just over the Swan Range, which is on the east

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1 side of the valley. Ecodata plots. We did some
 2 telemetry work, did some flying. But it was all under
 3 the research on the impacts of Hungry Horse Dam on
 4 wildlife species and, in this case, elk.
 5 Q And as a result of the work that you did,
 6 initially, anyway, at FWP in that regard, did you author
 7 any article or paper?
 8 A No, I was probably listed in the
 9 acknowledgments. When you're what I call a grunt doing
 10 work out in the field, you get listed, but you're not a
 11 coauthor or lead author on that by any means.
 12 Q Was there an article authorized by anybody
 13 else?
 14 A I can't recall any, other than annual progress
 15 reports potentially.
 16 Q Can you recall, in a general sense, what
 17 conclusions, if any, were made as a result of that work
 18 that he described?
 19 A Yeah, yeah.
 20 Q What do you recall?
 21 A Interestingly, elk in the west, as well as
 22 Montana, typically migrate to a wind-blown snow-free
 23 rough fescue, which is a bunch grass, winter range.
 24 Over there, it's like a rain forest and, more
 25 accurately, a snow forest. The elk there, instead of

1 moving -- there's no open country to move to that isn't
 2 where their groceries aren't buried under ten feet of
 3 snow. So they're a canopy winter range. So the elk
 4 migrate down under a pretty thick canopy and, believe it
 5 or not, they eat Pacific yew which is like taxol, you
 6 know, the drug taxol. Yew is kind of considered a kind
 7 of a hindrance, a nuisance brush species. It's almost
 8 like a conifer, not quite. But it's in the canopy. And
 9 they would focus on Pacific yew under a tree canopy, and
 10 that was some unique findings with that project that I
 11 worked on. It was kind of neat, interesting. It's a
 12 canopy-driven elk herd. And a lot of our big game herds
 13 up here are canopy-driven when it comes to winter. They
 14 want to get as low as they can in elevation but still
 15 want to remain under a canopy for deer and elk, in
 16 particular, because there's some thermal qualities; they
 17 can stay warm, and the snow depth is less. There's some
 18 snow intercept from that canopy. So that
 19 project -- that was probably the highlight there. And
 20 that was published, I believe, in the Intermountain
 21 Journal of Science. There's been some papers published
 22 on that project.

23 Q And were you one of the authors of that paper?

24 A No, no, no.

25 Q Or acknowledged even?

1 open slopes. Little Hungry Horse herd, you know, that's
 2 a tough place to be an elk with winter, you know,
 3 finding food and predation impacts.

4 Q As a result of that work or other education or
5 training you've received, would you consider the elk to
6 be a habitat generalist?

7 A No, not there, specifically. It depends on
 8 where you're talking. If you're talking about -- well,
 9 actually, no. They're pretty much tied -- there's two
 10 needs they have. You have -- there's four seasons.
 11 There's calving habitat which is in the spring around
 12 June 1. There's summer range. Then you have your
 13 hunting season period in the fall where winter is
 14 starting, and then you typically have a migration to
 15 winter range. So if that's a generalist, yes. If you
 16 tie it to seasons, no. You know, they have to have
 17 their ecological needs met at any given time of the
 18 year.

19 Q And we went over a little bit your initial
20 work, anyway, with FWP in Kalispell when you came after
21 your four months in the research --

22 A The lab.

23 Q In the lab.

24 A Yeah.

25 Q What did you do after this elk research that

1 A You know, I didn't look. There was a whole
 2 bunch of text, to be honest with you. Maybe; I don't
 3 know. I can't recall.

4 Q And in the discovery, so to speak, that elk
5 were feeding on canopy cover, yew, as you have
6 described, was that surprising to you or your team that
7 they were able to survive on that habitat?

8 A Yeah, it was interesting. Up here, there's a
 9 large predator component on the landscape and a large
 10 snow-driven winter component. When you combine the
 11 impacts of predation and the impacts of climate or
 12 winter, an annual climate so to speak like the last two
 13 winters we have, they can drive ungulate populations in
 14 the form of low recruitment, that's calves or fawns
 15 produced in the spring, and then adult mortality from
 16 the predators, and then throw on top of that hunting, we
 17 set all the hunting seasons up here too, they all can be
 18 very nonconsequential when recruitment is good. And
 19 when the winters are severe, hunting, predation can be
 20 additive to the normal mortality, versus compensatory.

21 And so, yeah, it did surprise us to some degree
 22 the extent that they relied on a canopy-type winter
 23 range versus most elk in Montana are in rough fescue
 24 winter ranges; Sun River, Ear Mountain, Blacktail, all
 25 these famous long-distance elk migrations to windblown

1 you conducted?

2 A Then I competed for and received the area
 3 wildlife biologist which is a permanent tenured wildlife
 4 biologist position, if you will, for Montana Fish,
 5 Wildlife & Parks. And I was based out of Great Falls.
 6 This would have been in '93. And there you're
 7 responsible for everything; waterfowl, upland birds,
 8 reptiles, nongame, game, predators, working with
 9 livestock owners, the whole bit. So I moved from here
 10 in '93 to what's called a permanent wildlife biologist
 11 position with the agency.

12 Q And for how long were you then in Great Falls?

13 A Until '99. I came back here as the wildlife
14 program manager.

15 Q So in '99 you returned to Kalispell FWP as the
16 wildlife manager?

17 A Yeah, the program manager.

18 Q Program manager.

19 A Yes, there's lots of programs.

20 Q Can you describe for me, in a general sense,
21 what a wildlife program manager does for FWP?

22 A Uh-huh. Number one, it's got a supervision
 23 component. On any given year, it's from 10 to 20
 24 people, typically, you know, bachelor's, master's, or
 25 Ph.D.-type employees, biologists. And up here we have a

1 large bear program. We have a large bear and lion kind
2 of carnivore-conflict program, if you will, in that
3 urban wildland interface. We have a mitigation program
4 which focuses pretty much a hundred percent on research
5 and habitat conservation, of which Gael has been a part
6 of that, as well as the wildlife management program.

7 Now, the wildlife management program are your
8 typical biologists that do all the survey and inventory
9 work on an annual basis for moose, sheep, goat, deer,
10 elk, from the ground, from the air, fixed-wing,
11 helicopter, and work with the commission, work with rod
12 and gun clubs, work with all the conservation groups to
13 collectively propose hunting seasons on an annual basis
14 and a biennial basis, depending upon the species.
15 Wolves are now in the mix so we're now working with
16 wolves. That's new. In addition to that I have a
17 wildlife management area crew which is strictly habitat
18 management, for instance, at Ninepipe in the Mission
19 Valley. And so -- have I left anyone out? And the
20 research -- FWP, in addition to mitigation program, has
21 a general research program too. And we, for a long
22 time, did white-tailed deer research west of town, about
23 twelve years, in the Salish Mountains as well. It
24 depends on any given year what projects are going. But
25 between 10 and 20 employees.

1 A Depends. You know, actually, no. The
2 literature can provide -- it depends on what the
3 objective is. I think you can use good research
4 that -- obviously published in a peer-review journal is
5 the ultimate. But there's a lot of great literature out
6 there as well. And there's a lot of internal reports
7 that are just as valuable, as well as firsthand
8 observation. At my level, the last ten years, obviously
9 I'm managing programs and people versus firsthand
10 observation. So that would be -- that scope of my
11 position is much more limited than when I was a field
12 biologist.

13 Q And I guess my question is, for instance, with
14 Montana Bird Distribution database, you're familiar with
15 that archive, so to speak?

16 A Uh-huh.

17 Q Yes?

18 A Are you talking this one, or are you talking
19 Heritage Program?

20 Q The Heritage Program.

21 A Yes.

22 Q Now, as we know, the Heritage Program
23 establishes -- or provides data with respect to birds
24 and where they occur, how likely they are to occur in a
25 given area of the State of Montana; true?

1 So I'm the wildlife program manager. And
2 there's three other managers; a warden captain, a parks
3 manager, and a fish manager. And the four of us report
4 to Jim who you deposed first.

5 Q Jim Satterfield.

6 A Correct.

7 Q And since '99, have you continuously held the
8 position of wildlife program manager?

9 A Yes.

10 Q And, obviously, today, you're still the
11 wildlife program manager.

12 A Yes.

13 Q And, sir, would you consider yourself to be a
14 scientist?

15 A Yes.

16 Q And would you agree with me that, as a
17 scientist, in order to render an opinion regarding
18 potential impacts on habitat posed by a subdivision or
19 any other human disturbance, you'd need to rely upon,
20 and have available, objective scientific data and
21 information.

22 A Correct.

23 Q And, certainly, the best data and information
24 upon which to rely would be firsthand observation, would
25 it not?

1 A True.

2 Q Now, if the Montana Bird Distribution database
3 says that a particular bird is likely to occur in a
4 given area, would you agree with me that an actual
5 observation by one of your biologists would be better
6 data than provided by the bird distribution database, in
7 terms of the likely occurrence of that bird in a given
8 area?

9 A It's always easier to document presence. But
10 you can document presence but not necessarily absence
11 with firsthand observations. Because species are on a
12 given chunk of ground at any given chunk of time in any
13 given season. So that the database you're referring to
14 at Heritage is only as good as the data that's fed into
15 it as well. So there's lots of gaps and problems. I
16 collectively rely on my staff here, especially because I
17 have a pretty mature fleet of biologists up here that
18 have been here for a long, long time that have seen or
19 heard or, you know, have personally observed these
20 species on a landscape. These databases are good, even
21 P.D. Skaar's. But these are a minimum. Because you can
22 always see these animals and not potentially report it
23 to that database. Or we'll have some information or
24 some experience, and it might not be in the Heritage
25 Program. But we try to get it there. That's the

1 ultimate goal. And that's been getting better every
2 year, I think, the databases. Things are becoming more
3 centralized that way, with advent of technology.

4 Q For instance, taking the black-footed ferret.
5 I know that there's information out there provided by
6 the state and other agencies and scientists that the
7 black-footed ferret may exist in certain parts of
8 Montana; fair to say?

9 A It does.

10 Q It does exist. However, you'd agree with me
11 that if -- you know, if the information that's available
12 through those sources indicates that it exists in a
13 given area, that data would have to, to some extent,
14 rely upon an observation of that animal in that area.

15 A Not necessarily. You can do what's called
16 habitat suitability modeling or gap analysis. Or you
17 can take the attributes of a particular species that has
18 been observed or marked with a radio collar or
19 telemetry, and you can apply the attributes of the
20 locations you relocate that animal in, the habitat
21 attributes, and model potential habitat. That's called
22 a gap analysis-type process. And actually use that to
23 go out and find that individual species, whatever the
24 interest animal may be, or bird, what have you, fish and
25 go look and detect it in other areas as well. So, yeah,

1 difficult to prove, that they're not there at any given
2 time. That requires more intensive monitoring,
3 potentially.

4 Q During the time that you've been in Kalispell
5 since 1999, have you been involved in authoring letters
6 to Flathead County regarding potential impacts posed by
7 a subdivision application?

8 A Yes.

9 Q Okay. Can you approximate for me, in the ten
10 years you've been in Kalispell, on how many occasions
11 you took part in authoring one of those letters?

12 A Not off the top of my head. I mean, there's a
13 record at Flathead County you could probably pull up.
14 Not too many. We get a pile of these subdivision
15 requests weekly sometimes. And, you know, a lot of
16 these in town or right around town, frankly, we don't
17 give them more than a second glance. But a host of them
18 that are out in winter ranges or wetland habitats or
19 crucial/critical areas, depending upon what you're
20 interested in, we'll look at them closer.

21 Many of them we'll prepare a written response
22 and analysis based on our collective knowledge.
23 Sometimes it includes personal observations, you know,
24 if we have that. Sometimes it does not. And then
25 they're all pretty much prepared by staff. I review

1 firsthand observation helps. But you can also use
2 information and habitat attributes from that species to
3 potentially locate it in other areas or to, you know,
4 restore habitats, improve or enhance habitats to benefit
5 that species. You know, if you were to augment or if it
6 was in a range expansion, for instance.

7 Q Would you agree with me that just because a
8 suitable habitat for a given species exists, that
9 doesn't necessarily mean, as a matter of -- or to a
10 scientific degree of certainty, that that species
11 actually does exist in that particular area?

12 A Yeah. Let me think.

13 Q Do you understand my question?

14 A No, that's why I've got to think. If you can
15 repeat the question, I'm trying to think how answer it
16 by what you're wanting.

17 Q Sure. My question, quite simply, is, just
18 because a habitat exists that would be suitable to a
19 given species, doesn't necessarily mean that that
20 species is actually present in that area.

21 A Oh, absolutely. At any given time, for
22 example, your black-footed ferret example, that could be
23 very good habitat on the south side of the Missouri
24 Breaks, and in that area there may be no ferrets there
25 whatsoever. However, you cannot say, and it would be

1 every letter. Sometimes I sign them. Sometimes Jim
2 does. And they get submitted to the county, to the
3 planning staff is where they go.

4 Q Planning staff. And in the ten years or so
5 you've been in Kalispell, have you, yourself, drafted
6 one of these letters without input -- or without, you
7 know, other employees assisting you in drafting of the
8 letter?

9 A No. It would be foolish. I mean, I have real
10 talented staff here. Why would I draft a letter on my
11 own as the program manager when the area biologist
12 that's responsible for that area and collectively the
13 staff up here, you know, that would be foolish.

14 Q And would it be fair to say that over the last
15 ten years, you've had Gael Bissell draft letters on your
16 behalf, with respect to subdivision applications that
17 you eventually signed?

18 A Gael and every other wildlife biologist in the
19 region.

20 Q And with respect to these letters, in the past
21 ten years, have you relied upon more than one of your
22 employees to draft a given letter?

23 A What do you mean?

24 Q Let's take the North Shore Ranch application.
25 Now, we know that you filed a letter in 2006. You're

1 aware of that.

2 A Uh-huh.

3 Q Is that a yes?

4 A Yes. There's actually two letters. Jim signed
5 one, and I think I signed the first one, if I remember.

6 Q And my question is, as a general proposition,
7 with respect to the one that you signed, which you've
8 had a chance to review before your deposition today?

9 A I remember it. No, but that's okay. I'm sure
10 you have it or I can look it up.

11 Q I do, and we'll mark it as an exhibit. And my
12 question is, the letter that you signed in 2006
13 regarding the North Shore Ranch application, upon whose
14 input did you rely here at FWP?

15 A Primarily, Gael Bissell. She is my habitat
16 conservation biologist and an incredible amount of
17 credibility, a whole career's worth of work there. I
18 rely on Gael, frankly. She's one of the most
19 scientifically credible biologists that I have and
20 knowledgeable, and has found these creative solutions to
21 a lot of these conservation outcomes we've had in the
22 valley. So I rely on her expertise. And, also, I rely
23 on the area biologist expertise at the time. And it
24 depends on who's there. That particular letter, Tom
25 Litchfield was involved. I think before Tom -- I don't

1 to complain about shots, they want, you know, the safety
2 issues. So you tend to lose hunting opportunity as
3 these structural footprints crop up on the landscape.
4 So I always make sure, Did you address hunting in there,
5 you know. And I think on this one we did, if I remember
6 correctly. But I do review each one of them.

7 And it's primarily the area biologist and Gael
8 would be the primary -- and Doris Fischer, actually, on
9 this one. We hired Doris Fischer who is a
10 statewide -- I don't even know what her title is,
11 Becky -- land use planning. She used to be a county
12 planner. Very sharp lady. She helped out as well.
13 Used to work for the county.

14 Q And she was hired in 2007; right?

15 A I don't remember, but she's very good. And so
16 we utilized her input as well. But I review them and
17 then, process-wise, they go to Jim. Or in some cases
18 I've sent them out. I think, now, we are going to
19 regional supervisors, now. For a while I sent them out
20 too.

21 MR. PERRY: Why don't we mark that letter
22 that we've been discussing.

23 (Deposition Exhibit No. 32 marked for
24 identification.)

25 Q (By Mr. Perry) Sir, the document that's been

1 know, Sean, when did this one start; '90 -- or I mean,
2 2003, '4 somewhere? It's been a few years. It was,
3 before Tom, Kevin. I think it was an empty -- we had an
4 empty position there. But primarily, Gael and Tom
5 initially. And then Tom took the deer lead in Iowa and
6 then Gael. But in addition to Gael, we have regional
7 staff; John Vore potentially. He's my biologist there
8 now; can't recall. Dwight Bergeron, he's a nongame
9 expert, very good. American Bird Conservancy. Gael --
10 we work with a host of people in the community, whether
11 they're hunting season recommendations or the letter on
12 this particular subdivision. So it's -- we kind of cast
13 a brought net to get as much information as we can, take
14 a look at it.

15 But I review everything -- Gael doesn't
16 independently send letters out on her own. That comes
17 to my desk. And at that point, I review those letters.
18 And I either, you know, Yep, looks good. Or if I want
19 to add something, my emphasis, to those letters, number
20 one, is looking for accuracy -- and we do a lot of
21 these -- and number two, is to make sure that the
22 hunting-related side of things is incorporated in there.

23 With subdivisions, I've seen it over just the
24 last ten years I've been here. Every time a subdivision
25 goes up, they want to complain about hunting, they want

1 marked as Exhibit 32 to your deposition, obviously, this
2 is a document that you're familiar with?

3 A I signed it.

4 Q A document you're familiar with?

5 A Yes.

6 Q And it's a three-page letter dated June 16,
7 2006, regarding -- the client is North Shore Ranch
8 subdivision application, is it not?

9 A Correct.

10 Q And I see that among various comments that you
11 make in this letter, you state in the second paragraph
12 of the letter, in substance, that one of your concerns
13 with this project was its adjacency or proximity to the
14 waterfowl production area, wildlife management areas,
15 other areas that could be potentially affected by this
16 subdivision; fair to say?

17 A Correct; absolutely.

18 Q And I see that in the next sentence of this
19 paragraph you say, and I quote, "Intensive development
20 on the borders of these lands introduces disturbances
21 that usually degrade or reduce the overall wildlife or
22 habitat values of the conservation lands," close quote.
23 Have I read that correctly?

24 A Where are you, in the second paragraph?

25 Q Second paragraph, starting with "Intensive

1 development"?

2 A Okay. Correct.

3 Q Okay. Would it be fair to say that as of June

4 16, 2006, you, as the wildlife program manager in

5 Kalispell for Fish, Wildlife & Parks, were of the

6 opinion that subdivisions of the nature of the Kleinhans

7 North Shore Ranch subdivision have the potential to

8 degrade overall wildlife or habitat values of

9 surrounding areas?

10 A Well, yeah. The scope that's involved, the

11 structural footprint of homes on the landscape there,

12 will degrade. I mean, in my mind, there's no potential

13 at all. You have all the activities associated with a

14 structural footprint directly adjacent to kind of a

15 world-renowned, you know, area in the north shore of

16 Flathead Lake.

17 Q Yeah.

18 A I mean, this spring was a classic example. It

19 was phenomenal migration here. And the value of these

20 lands down there, and the whole community saw it in the

21 paper on the news. They really, especially for

22 migratory waterfowl, rely on the lake to loaf and feed

23 on the waste grain fields and the space. And the

24 structural footprint directly adjacent to that WPA will

25 have an impact. It's not potential.

1 A It's splitting hairs.

2 Q Today you say that this subdivision will

3 degrade surrounding habitats. My question is, if that

4 is your opinion today, why wasn't that opinion expressed

5 in this letter?

6 MR. MCCORMICK: Objection; asked and

7 answered.

8 THE WITNESS: It is. It says right there.

9 Q (By Mr. Perry) Where is it?

10 A "Intensive development" -- well, the whole

11 theme of the letter here. But "As we have mentioned in

12 our comments before various county working groups,

13 committees, and planning boards and commissioners during

14 the recent of growth policy," blah, blah, blah. Okay;

15 "Extensive development of lands adjoining already

16 protected wildlife areas such as waterfowl production

17 areas, wildlife management areas, national wildlife

18 refuges will undermine the purposes for which these

19 lands were purchased. Intensive development on the

20 borders of these lands introduces disturbances

21 usually --

22 THE COURT REPORTER: I'm sorry.

23 THE WITNESS: I'm just reading the letter.

24 THE COURT REPORTER: I know. But whatever

25 is spoken in this room, I must take down.

1 Q Why didn't you say that in this letter then?

2 A I don't know.

3 Q Because you talk in this letter about

4 potentialities, they usually degrade. Nowhere in this

5 letter do you say This subdivision will degrade habitat.

6 Now, you're saying that today. And my question is, why

7 today are you saying that, when you didn't say it back

8 in 2006?

9 A Oh, I don't remember, I'm just reading it. But

10 I'm kind of --

11 Q Well, take your time to read the letter.

12 MR. MCCORMICK: Objection; you're talking

13 over the witness, not allowing him to answer the

14 question.

15 THE WITNESS: I guess my feelings there

16 would be that that's what I am saying here.

17 Q (By Mr. Perry) Can you point me to that

18 letter where you say This subdivision will degrade

19 habitat, because I don't find it.

20 A Oh, well, I didn't write "will." But

21 "Intensive development on the borders of these lands

22 introduces disturbances that usually degrade or reduce

23 the overall wildlife or habitat values." To me, that's

24 the same thing.

25 Q Okay. And I just want to know --

1 THE WITNESS: Oh.

2 In my mind, Terance, that's what we're saying

3 there.

4 MR. MCCORMICK: Hang on a second. Let her

5 catch up.

6 THE WITNESS: Okay.

7 Q (By Mr. Perry) You'd agree with me that the

8 term "will degrade" is substantively different from

9 saying "usually degrades." Would you agree with that?

10 A Correct.

11 Q I see in the second page of this document, you

12 indicate in the first paragraph that "Flathead Lake

13 helps support the Flathead economy, includes an

14 opportunity for the public to hunt, trap, bird watch,

15 hike, and undertake other forms of seasonal recreation.

16 In addition, due to its relativity natural status, the

17 north shore is a favorite area for boaters, kayakers and

18 anglers. It is likely that extensive development along

19 this natural area will reduce use by the general public

20 for these purposes due to their proximity to a large

21 subdivision. Have I read that correctly?

22 A Correct.

23 Q Upon what data did you rely on making the

24 statement that this development, the North Shore Ranch

25 development, would have the potential to reduce public

1 use of the lake, in the form of boating, kayaking
2 angling and the other recreational activities you
3 identify?

4 A As I mentioned before, just across the road at
5 Blasdel waterfowl production area, there's subdivisions
6 that have gone in there. And I'm the one that gets the
7 calls -- ultimately the biologists do, but they'll get
8 kicked up to me too -- about folks complaining about
9 safety and hunting as soon as the neighborhoods go in
10 and around. And there's a lot of hunting on Blasdel WPA
11 just north of the north shore WPA.

12 And it's not unique there as well. When the
13 neighborhoods go in, right, wrong or indifferent, folks
14 are worried about hunting and trapping with their pets
15 because they tend to let their pets wander. We find
16 cats and dogs. That's based on my experience as a
17 wildlife program manager, you know, I get the calls.

18 Q Okay. You state in this paragraph that it's
19 likely to reduce use by the general public of the lake
20 and, ostensibly, the WPA. And my question is not
21 whether or not neighbors in subdivisions in proximity to
22 the WPA or Blasdel have concerns about hunting, but
23 what's the data you relied upon to conclude that
24 subdivisions actually reduce public use of Flathead
25 Lake, for instance?

1 you hunt. North is a weapons restriction area. I
2 imagine that it's just a matter of time until folks want
3 to go there, and then that will happen. But as of yet,
4 we've resisted that change at Blasdel and, frankly, at
5 the north shore as well with Somers being nearby.

6 The structural footprint of the proposed
7 project here, there's no doubt in my mind it would just
8 accelerate those complaints when folks move.

9 Q And I understand the complaints issue, and
10 you've --

11 A And that's what I'm basing my professional
12 opinion on.

13 Q Let me just get the question out. I understand
14 your discussion about complaints. My question isn't
15 about complaints.

16 My question is, you know, earlier you
17 acknowledged that in order to render a scientific
18 opinion, you, as a scientist, would need to rely upon
19 objective scientific data. Do you recall your
20 testimony?

21 MR. MCCORMICK: Objection; misstates
22 testimony.

23 Q (By Mr. Perry) Do you recall your testimony?

24 A Yes.

25 Q Did I misstate your testimony?

1 A For instance, that would be my professional
2 opinion, based on experience and fielding those
3 complaints, that once that structural footprint goes in,
4 that we'll get the calls with concerns about hunting.
5 Can we change the hunting regulations? What about
6 trapping? And it's based -- so the data is there and in
7 not only this letter, but pretty much all of them are
8 based on my professional experience and opinion, just
9 dealing with the aftermath of subdivisions. I mean, I'm
10 not aware of anything cite-specific right there.
11 However, you know, my ten years up here in the Flathead
12 was a very rapid-growth period, and we get lots of
13 calls.

14 Q Is it your testimony that subdivisions in
15 proximity to the Blasdel waterfowl production area have
16 actually reduced the number of people who have used the
17 Blasdel waterfowl production area? And if so, upon what
18 data do you rely in rendering that opinion?

19 A I guess I would answer that the complaints and
20 the pressure to change the hunting regulations have
21 come. But so far we have resisted those. But there's
22 no doubt in my mind, at some point, our state commission
23 or the local county governing bodies will become more
24 influential in terms of -- you know, for instance, south
25 of Kalispell, you're still allowed to use a rifle when

1 A No.

2 Q And my question is real simple. In rendering
3 the opinion that this development will reduce use, this
4 is your language, by the general public --

5 A Yeah, yeah.

6 Q -- of the lake and the WPA, what data, what
7 objective scientific data, do you rely upon?

8 A That I relied upon professional experience and
9 my opinion. So it depends on how you define data. If
10 phone calls and my experience as a professional program
11 manager are data, that's data. But have I gone out and
12 hired a staff to conduct research and collect, you know,
13 some before-and-after-type stuff at Blasdel? No. It's
14 just my experience as a professional program manager up
15 here.

16 Q So you don't have any data of any type that
17 would indicate that subdivisions that have been
18 developed in the vicinity of Blasdel have caused a
19 quantitative reduction in the number of people who
20 actually visit the Blasdel waterfowl production area.
21 Is that true?

22 MS. JAKES DOCKTER: Objection;
23 mischaracterizes the testimony.

24 Q (By Mr. Perry) Is that true? You can answer.

25 A So when you guys say "object," what do I do?

1 **MS. JAKES DOCKTER:** You can still answer.
2 **THE WITNESS:** Okay. Is that just for the
3 record?

4 It's based on my professional experience and
5 it's -- I mean, I don't know. How would you define
6 data? In what context are you defining data?

7 **Q** (By Mr. Perry) Well, my question is, if you
8 know knew that a thousand people a day -- I'm just
9 pulling numbers -- a thousand people a day visit the
10 waterfowl production area. My question is, have you
11 come to learn, through discussions with people who visit
12 the area or other wildlife biologists, that that number
13 decreased as a result of developments that were
14 constructed in the vicinity of the waterfowl production
15 area? And I know you've discussed complaints that
16 you've heard.

17 **A** Yeah, yeah. I based everything on my
18 experience. So in terms of actual research projects,
19 no, I don't have a research project on that.

20 **Q** And you'd agree with me that the mere fact that
21 your office received complaints about the proximity of
22 hunting on the waterfowl production area, with respect
23 to subdivisions in its proximity, is not, at all, the
24 same as data demonstrating a reduction in the number of
25 people who actually visit the waterfowl production area.

1 these agencies like the county. And a growth policy's
2 no different. That's going to define, in theory, you
3 know, the footprint, the development footprint, in the
4 valley which, you know, can pose significant impacts or
5 not, you know, to those resources. So yeah, I think
6 it's within the scope.

7 **Q** Do you feel it was within your scope at that
8 time, in 2006, to make recommendations to the county on
9 issues, for instance, like zoning?

10 **A** Yeah, we're not decision makers. But, you
11 know, we're not in the decision-making role there. We
12 are when it comes to recommending hunting seasons, to
13 our commission, but not in county zoning. That's up to
14 the counties. We defer to the counties for that. We'll
15 just provide to wildlife information, fisheries,
16 recreational type.

17 **Q** In 2006, you'd agree with me that you didn't
18 consider yourself to be a land use planner, did you?

19 **A** No.

20 **Q** Do you consider yourself to be one today?

21 **A** No.

22 **Q** Have you ever received any education in land
23 use planning?

24 **A** Well, depends how you define that. You know,
25 all through grad school you read all the literature.

1 **A** That's true.

2 **Q** Now, I see in the next paragraph you indicate
3 that you believe the decision on this application should
4 be postponed until the county had a chance to complete
5 and adopt a growth policy; fair to say?

6 **A** Uh-huh.

7 **Q** Is that a "yes"?

8 **A** Yes.

9 **Q** And did you, as a wildlife manager for FWP, did
10 you consider it to be within the scope of your authority
11 to make land use planning recommendations to Flathead
12 County?

13 **A** See what I wrote here. Yeah, our scope of our
14 job's pretty broad when it comes to conservation
15 outcomes. Yes, I do. The county will call us
16 regularly, in some cases if we haven't responded to some
17 proposals. The growth policy obviously has an impact on
18 wildlife habitat and recreational access in the valley.
19 And during a period of ten years of rapid growth, I
20 think much of the public watched that happen, you know,
21 before their eyes here. Yeah, it's within the scope of
22 our job. If it impacts recreational access,
23 environmental, water quality, fishing, wildlife,
24 nongame-type activities, birding, yeah, it's within the
25 scope of our agency to work with -- cooperatively with

1 You do -- there's a lot of literature that looks at the
2 impacts of, frankly, even subdivisions on elk. For
3 instance, right around Missoula, there's lots of work
4 done on subdivisions.

5 I worked around Big Sky Resort for a little bit
6 on presence or absence of elk around that resort
7 footprint. So, I think, all the biologists, not just
8 me, Gael, Tom, every biologist we have, to some degree,
9 is involved with -- every year there's the annual
10 meeting of the Wildlife Society, a scientific
11 organization kind of like AMA of medical or would be
12 like your bar, I guess, your annual meetings where you
13 get presentations on the current science. And for a
14 while, half of those were on, you know, development-type
15 impacts. So yeah, none of us are land use planners,
16 except for Doris Fischer, our new employee. She is.
17 And that's one of the reasons she was hired by the
18 agency. But every biologist, fisheries and wildlife, to
19 some degree, you know, is exposed to, and depending upon
20 personal interest and issues they're dealing with in
21 their local area of responsibility, these land use-type
22 planning issues. And it comes up a lot, you know, in
23 the literature at the annual chapter meetings nationally
24 and at the state levels.

25 **Q** When you prepared this letter, did you consult

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1 with Doris Fischer; do you recall?
 2 A Not this one. Doris wasn't hired at this time.
 3 This was primarily Gael and Tom, if it was back
 4 in '90 -- when did we mail this one -- 2006. Yeah,
 5 Doris Fischer, I think she came on in '07. I don't
 6 remember exactly, but no.
 7 Q I see further on down in that same paragraph
 8 you raised the issue that the postponement of a decision
 9 on this application would provide time to investigate
 10 potential acquisition of land in that area. Is that
 11 fair to say?
 12 A Where are you at, Terance? Third paragraph?
 13 Q The second paragraph -- the same paragraph that
 14 we were just discussing.
 15 A Okay. Yeah, that's fair to say.
 16 Q Okay. And, again, did you find it within your
 17 scope of expertise to recommend to the county that the
 18 decision on this application should be postponed pending
 19 potential purchase of land in this area? I mean, do you
 20 understand my question?
 21 A I do. And typically what we hear, and whether
 22 it's -- I think it might have been one of the county
 23 commissioners at the time, or it could be the planning
 24 staff or it could have been in the paper. We hear a lot
 25 of this, so it's a very property-rights oriented part of

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1 the state. And we hear, Fish, Wildlife & Parks, if you
 2 think it's important, buy it. This is from the
 3 politicians. If it's important, put your money where
 4 your mouth is. Well, we can't afford to buy property on
 5 every single piece of wildlife habitat that comes up.
 6 So in the Flathead Valley, this north shore
 7 kind of ecosystem, collectively with the sloughs along
 8 the main stem of the Flathead River, we've kind of
 9 focused the last ten, fifteen years on -- with willing
 10 sellers -- on conservation outcomes. And that's not all
 11 acquisition either. Some are conservation easements. I
 12 think we have an upland game bird project or two down in
 13 the lower valley and an acquisition, both fisheries and
 14 wildlife. But yeah, yeah, that's within our scope;
 15 absolutely.
 16 In fact, a primary part of these wildlife
 17 biologist positions are working with habitat
 18 conservation, state-wide, whether it's oil and gas
 19 impacts and sage grouse in eastern Montana. Here we're
 20 talking subdivisions, but there's elk winter range
 21 issues. And there's urban wildlife conflict issues when
 22 you get into bears and garbage. I deal with that a lot
 23 up here. That's a huge issue up here.
 24 Q Would you agree with me that, with respect to
 25 the North Shore Ranch applicant, that the applicant and

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1 Flathead County, itself, were entitled to receive an
 2 unbiased opinion on potential wildlife and wildlife
 3 habitat impacts posed by that subdivision?
 4 A Yeah, I'd agree; yeah.
 5 Q And you'd agree that FWP's interest in either
 6 acquiring the property at issue or helping others to do
 7 so, was and is, entirely irrelevant to determining
 8 whether or not it posed any impacts on wildlife or
 9 wildlife habitat?
 10 A They're, on the surface, two separate issues.
 11 One is the structural footprint of a subdivision and its
 12 impact on whatever species or habitat you're talking
 13 about. The other is a conservation outcome for a
 14 project. And we do both all the time. And the
 15 biologists -- in fact, I evaluate them on how well do
 16 they do both, all the biologists, and I think all the
 17 managers do.
 18 We typically look for conservation outcomes.
 19 That's our mission as an agency, and that's what the
 20 public tells us they want to do. We're not funded by
 21 tax dollars; we're funded by hunting dollars. And,
 22 granted, we manage wildlife for everyone, but our
 23 primary constituency are folks that love wildlife and
 24 access to them. And so we put -- we have a program
 25 called Habitat Montana. It's so important in the state.

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1 Habitat Montana is probably our highest profile
 2 statewide program, maybe outside of block management
 3 which is hunting access. That's the other part of our
 4 mission is hunting. We also have a new one called
 5 Access Montana. And that kind of has some overlap with
 6 Habitat Montana, because you may purchase a property for
 7 recreational access, but it also provides some very
 8 significant wildlife or fisheries values. So those
 9 three programs, yeah, that's what we do.
 10 Q Okay. My question, though, which I don't think
 11 you answered was, as a scientist in coming to an opinion
 12 as to whether or not a subdivision has a potential
 13 impact on wildlife or wildlife habitat, that
 14 determination, your arriving at that opinion, would be a
 15 separate and distinct inquiry unaffected by whether an
 16 FWP wants to acquire the property.
 17 A Yes, okay; I see what you're asking.
 18 Q Do you understand my question?
 19 A Yes, I do. And my response there would be,
 20 yeah, for the most part, they're two separate processes.
 21 But in many cases in the past with landowners, they kind
 22 of merge into one. And it all depends on what the
 23 landowner or the property owner's motivations are and
 24 what their estate-planning issues are and what the value
 25 of the wildlife habitat is and what the regulatory issue

1 is at the moment, you know, whether it's a subdivision
2 or zoning or what have you. But it's kind of a gray
3 area because they overlap a lot, you know. The ultimate
4 mission, I know, of the agency, and definitely here in
5 this region, is it's a conservation outcome, if at all
6 possible.

7 Q Okay. And my question -- I mean, you testified
8 you're a scientist.

9 A Yeah.

10 Q You testified that in coming to scientific
11 conclusions and opinions, you have to rely upon
12 objective data. We went over that.

13 A Uh-huh.

14 Q And my question is, real simply, whether or not
15 FWP wants to buy a piece of land or help others to do
16 that is an irrelevant inquiry when you're dealing with
17 the scientific issue of whether or not a subdivision
18 poses an impact on wildlife or wildlife habitat. You'd
19 agree with that; right?

20 A I'd agree with that.

21 Q And you'd agree with me that FWP would disserve
22 the public interest if its opinions in that regard were
23 colored by self-interest or any conflict of interest.

24 A I guess I disagree with that. Because if
25 conservation outcome is a conflict of interest, you

1 put this property on the market, you're aware of the
2 fact it was publicly advertised?

3 A I've never met Mr. Kleinhans. The first time I
4 met Sean and Keith coming in to show -- at the point I
5 got involved there was to show them the computer model
6 when you guys came in that day. So I've never met
7 Mr. Kleinhans.

8 Q And my question is not whether you met
9 Mr. Kleinhans but whether or not you became aware,
10 before this application was filed, that this piece of
11 property was on the market for public sale.

12 A Yeah. Not myself. It would have been the area
13 biologist, probably, but I don't -- yeah.

14 Q Was it ever brought to your attention?

15 A Could have been, but I don't recall.

16 Q If this is such a sensitive area, why, if you
17 know, didn't FWP seek to acquire it before my clients
18 filed a subdivision application with the county?

19 A Probably the short answer would be -- and I
20 have a lot of biologists that have areas that want to be
21 acquired -- is funding. It's very difficult to get
22 funding. It takes a lot of collaborative work to find
23 different pots of money.

24 Our Habitat Montana program -- keep in mind
25 there's six other regions besides here. And it's a

1 know, we're guilty, right now. That's what we do. It's
2 conservation for access, conservation for wildlife. So
3 there's a gray area there. I mean, how would you define
4 that? Conflict of interest? From our perspective, if
5 it's a habitat conservation or a wildlife fisheries-type
6 conservation issue, no, it's not a conflict of interest.
7 That's our mission.

8 Q Well, in this particular case, as we know from
9 the letters that were filed by your office, you, and
10 Mr. Satterfield and Ms. Bissell repeatedly brought to
11 the attention of the county that your agency, amongst
12 others, had an interest in acquiring this property.
13 You're aware of that.

14 A Yeah.

15 Q Are you aware of that?

16 A Yeah, I am now. Do you want me to --

17 Q I just want to know if you're aware of that.

18 A Yes, now. Because initially it was no, until
19 the subdivision proposed. I mean, that area is a
20 critical area down there. Once we found out it
21 was -- the project was proposed in a sensitive area,
22 that's when we became interested. Because we get a lot
23 of these subdivisions that we don't give this kind of
24 detail to. Some we do if they're in a sensitive area.

25 Q Let me ask you this area. When Mr. Kleinhans

1 limited amount of money. When you buy that sportsman's
2 license, there's a portion of that that gets dedicated
3 to Habitat Montana, and it gets prioritized on a
4 state-wide basis. So probably funding would be the
5 short answer.

6 Q But once the application was filed, would it be
7 fair to say that FWP, as an agency, considered it to be
8 a pressing issue to seek to amalgamate funding to try to
9 purchase this land? Would that be fair to say?

10 A No, no. I'm trying to think, process-wise.
11 The first issue was to look at the proposed project.
12 And Gael was the habitat conservation biologist, and Tom
13 was area biologist at the time. And so the first
14 priority was looking at what's proposed, where it's at,
15 the design. And I know for a fact both Gael and Tom and
16 other agency folks were talking with -- I wasn't at the
17 meetings -- but both Keith. I don't know if Sean was
18 there, but Keith and there were some meetings maybe even
19 with county staff; I'm not sure. But yeah, so
20 initially, yeah, no, it wasn't, you know, There's a
21 subdivision, you know, That's an important piece of
22 land, let's go buy it. But a conservation outcome,
23 obviously, is desirable from the agency's point of view.
24 And if that's an acceptable means for any private
25 landowner, we'll pursue that. It's very difficult to do

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1 because it requires a lot of money.
 2 Q And I guess my question is, would it be fair to
 3 say that the agency really only became interested in
 4 acquiring this land or helping others to do so after my
 5 clients had filed a subdivision application?
 6 A If we had the funding, we'd approach probably
 7 all the landowners south of the highway. It would be to
 8 make sense, in addition to the WPA there, in some form
 9 or another for a conservation solution to that north
 10 shore area. In addition, if we had the money, some of
 11 those critical sloughs along the river, between the
 12 braided section and Kalispell down to about Fennon
 13 Slough, are high priority target for conservation work
 14 for the impacts related to Hungry Horse Dam.
 15 And yeah, to go back a little further on that I
 16 see -- no, we've been very aware of the value of those
 17 lands for a long, long, long time. In fact, have become
 18 more aware. When Kerr Dam was put in, there was a large
 19 process. And there's a stack -- in fact, I think I
 20 mailed it to your firm. I went through and pulled out
 21 everything that had to do with -- you know, that you
 22 might be interested with Kerr Dam, because there was a
 23 lot of work done on the north end with furbearers and
 24 birds, osprey, eagles, and geese. That's been on the
 25 radar screen for long.

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1 But obviously, you have to have two things.
 2 You have to have a willing seller to do any type of land
 3 work or, if it's habitat enhancement, a willing partner.
 4 Or you have to have money for an acquisition. And
 5 that's limited right now. In this economy it's probably
 6 tougher.
 7 Q In the ten years that you've been at FWP in
 8 Kalispell, aside from this project, have you personally
 9 been involved in seeking to acquire any other properties
 10 on the north shore of Flathead Lake?
 11 A Yeah, the Miller property. We just acquired
 12 one. It's -- oh, I don't know acreage, but it's east of
 13 this project and -- yeah, we just acquired. That was
 14 part of our -- it was a combination, if I recall, of
 15 duck stamp and access. That's one of those three
 16 programs, Block Management, Access Montana, and Habitat
 17 Montana. And that was in the last two years. In the
 18 last year, I think, we closed on that.
 19 Q Is that in proximity to the waterfowl
 20 production area that abuts the North Shore Ranch?
 21 A Yeah, yeah, locally. Yeah, it's all
 22 collectively in that ecological complex on the north end
 23 of the lake, yeah. But it's probably a mile away; I
 24 don't know. Well, it's right here (indicating).
 25 Q And you're referring to Exhibit 14?

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1 A Yeah, number 3 and number 7. Number 7 we own
 2 in fee title, number 3 is what we're talking and
 3 discussing today.
 4 Q And in terms of the WPA, can you tell me, in
 5 your best approximation, how close would this Miller
 6 property be, the new proposed public park?
 7 A It doesn't have the value that this property
 8 does because of the long adjacent border. It is close
 9 and, frankly, from our perspective, biologically,
 10 ecologically, what have you, that everything kind of
 11 collectively, in this complex here, has pretty
 12 significant value.
 13 So in addition, you know, there's habitat
 14 restoration potential as well for wetland, food-plant
 15 cover and all sorts of work we can do. And frankly are
 16 planning on doing for some habitat improvement on that
 17 parcel. But it doesn't have the long adjacent boundary
 18 with the WPA that, frankly, I'd even look at this piece
 19 as even more. Even though we acquired this, this has a
 20 long shared boundary with the federal waterfowl
 21 production area, more so. We have a short boundary, but
 22 it's close. And it's in that zone where it's going to
 23 impact species that are using this complex.
 24 Q Does the new park -- I'll call it the Miller
 25 property so we have a point of reference -- does it abut

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1 the WPA?
 2 A In a small area on the south end, right here
 3 (indicating).
 4 Q And that park, obviously, is going to be open
 5 to public use when it --
 6 A It --
 7 Q Let me just get the question out. That park
 8 will be open to public use once it is set up officially
 9 as a park. Is that fair to say?
 10 A Partially.
 11 Q Okay; what do you mean by "partially"?
 12 A There will be seasonal closures. I didn't mean
 13 to interrupt you. But what it's going to be is a joint
 14 wildlife management area/park. Because of the habitat
 15 value, there we'll be restoring habitats and probably
 16 creating some wetlands in there. And there will
 17 probably also be a seasonal closure to mirror the WPA.
 18 But yeah, all that planning's in the works right now.
 19 It's a new addition.
 20 Q And the WPA, it's fair to say, is closed from
 21 approximately December to July?
 22 A No. It closes in April -- don't quote me on
 23 the dates -- to July. It's a spring nesting closure.
 24 Q So it's closed for three or four months; is
 25 that about right?

1 A Roughly, yes.
 2 Q And is that the same proposal, to your
 3 knowledge, that will apply with respect to the Miller
 4 property, the new park?
 5 A Yeah. We will probably -- and again, we're in
 6 the planning stages. And the federal United States Fish
 7 and Wildlife Service is engaged in what's called a CCP
 8 planning process. And they do that periodically to
 9 adjust their rules or policies or maintain them.
 10 Mirror, to some degree, a closure for waterfowl.
 11 Q So would it be fair to say that this new park
 12 will be closed April to July, something like that?
 13 A Yeah. It's -- that's what I would predict.
 14 Q Okay. And is it true that this new park will
 15 permit people, during the open season anyway, to camp on
 16 it?
 17 A There will be a small clustered park footprint.
 18 And I'm not sure whether we'll put it here because, we
 19 have several other landowners that are interested down
 20 the road as well -- where we'll put the state park. But
 21 the desire is to put a state park footprint where folks
 22 can camp, and then we can manage the rest as wildlife
 23 management area. But it will be a -- yeah, there will
 24 be a footprint, but it will be relatively small, maybe
 25 ten, 15 percent maximum of the habitat base out there.

1 2006, first sentence, and I quote, "The decision on this
 2 development should also be delayed pending the results
 3 for more detailed scoping and analyses of wildlife
 4 issues," close quote. I have read that correctly?
 5 A Yeah, verbatim.
 6 Q Would it be fair to say that as of that date,
 7 those analyses and scoping functions had yet to be
 8 accomplished?
 9 A Let me finish reading.
 10 Now, what was your question again.
 11 Q My question, quite simply, is, as of the
 12 writing of this letter, June 16 of 2006, would it be
 13 fair to say that the detailed scoping and analyses of
 14 wildlife issues, with respect to this area on the north
 15 shore of Flathead Lake, had yet to be accomplished?
 16 A That's correct. We still are collecting data
 17 today in that general area. In fact, we even flew some
 18 surveys this spring to collect data. But again, we've
 19 been working in the general area since the Kerr project
 20 started in the early '80s. But it's ongoing continuous
 21 today. But I think -- trying to think of context.
 22 Yeah, I think that if I remember correctly, it was just
 23 to the county that Hey, this is an important area.
 24 Let's take our time and get as much information as we
 25 can. And -- yeah.

1 The rest will be in wildlife habitat, fisheries, what
 2 have you.
 3 Q How big a piece of land is that; do you know?
 4 A Not off the top of my head. It's probably on
 5 one of your forms in here; I'm not sure.
 6 Q With respect to that piece of land, do you know
 7 whether or not hunting will be allowed on it?
 8 A Absolutely.
 9 Q And hunting's allowed on the WPA, is it not?
 10 A Absolutely.
 11 Q And that's one your core functions, isn't it,
 12 to further interests of hunting, of hunters; is that
 13 fair to say?
 14 A Yes. We operate off the north American model
 15 of conservation. And it's revered across the world
 16 where hunter-funded conservation, people willing to put
 17 up funds to fund their passion, and that's hunting,
 18 whether it's habitat, whether it's survey and inventory
 19 activities, that's one of the tenets of the seven -- or
 20 one of the seven tenets, seven sisters of the North
 21 American Wildlife Conservation, and that's hunter
 22 funding.
 23 Q With respect to this letter, returning to
 24 Exhibit 32 to your deposition, I see in that next
 25 paragraph that you stated in this letter in June of

1 Because it goes on to talk about the issue
 2 of -- you know, when a structural footprint of homes
 3 goes in, and -- in the neighborhood plans -- in fact,
 4 now I remember when the computer model was coming in and
 5 the maps, you know, you got all these footprint of
 6 people with dogs and pets, and what's the issue
 7 of -- and what it's referring to in this paragraph of,
 8 you know, covenants are only as good as people enforce
 9 them.
 10 And, heck, I was president of my homeowners'
 11 association, helping out, vice-president. And you know,
 12 people ignore covenants all the time. So the concern
 13 here is trespass with cats and dogs and people. If we
 14 had a closure, heck, they'd probably violate the closure
 15 right now. If I were to ask the wardens, I'm sure they
 16 write citations there now. But to probably more fully
 17 look at these impacts, given the sensitivity of the
 18 area. That would be my answer there.
 19 Q Okay.
 20 A In terms of recalling memory.
 21 Q And it's fair to say, is it not, that nowhere
 22 in your letter do you indicate that any of the lands in
 23 this vicinity of the North Shore Ranch project were
 24 critical wildlife habitats?
 25 A No. I don't think we called anything critical.

1 We just started our crucial areas and critical program
2 here a year ago. We're actually going to be coming out
3 with at least the department's based on wildlife and
4 fisheries value and linkage and migratory corridors;
5 some crucial and critical corridors work in the next
6 several years that will actually call things that. It's
7 actually semantics, but it's been important. And we
8 spent a lot of money there over the years in the river
9 and the Kerr Dam.

10 Q My question is, is it fair to say that in this
11 letter, you failed to characterize any of the land in
12 the vicinity of the North Shore Ranch project as
13 critical wildlife habitat?

14 A Critical nesting. It's kind of semantics.
15 It's important, but no, I don't think we said This is
16 critical. And that depends on how you want to define
17 critical.

18 Q Well, critical wildlife habitat is a term of
19 art under the Endangered Species Act, isn't it?

20 A I don't recall. I haven't read the Act in the
21 long time.

22 Q Have you ever read section 4 of the Act that
23 defines what critical wildlife habitat is?

24 A No. We're not the regulatory agency for the
25 Act. The Fish and Wildlife Service is.

1 tools I'd never seen before. That 3-D flyer was very
2 cool. And I've looked at a lot of subdivisions as a
3 biologist; we all have. But there are other alternative
4 like a ten-acre cluster with 340 of open space, you
5 know. You can cluster things similar to our state and
6 park footprint's going to be very small. Probably at
7 that time, I remember Tom and Gael discussed clustering.
8 But obviously there's different motivations. And some
9 of that's probably more financially feasible than
10 others. And that's up to the landowner.

11 But other viable alternatives to the proposed
12 subdivision potentially could have been clustering in a
13 corner 40 homes that maybe sell for 4 million to make
14 whatever an individual needs. It depends on what their
15 goals are. I mean, certain developers do certain
16 things. First is a uniform structural footprint that's
17 pretty significant across the whole property. That's a
18 viable alternative. That's probably, thinking back in
19 2006, because I remember that was the discussions that
20 Tom and Gael were having with Keith and probably Sean.

21 Q Do you recall, during the 2006 time period,
22 having had a discussion yourself with Keith Simon, one
23 of the principals of Kleinhans Farms Estates, LLC?

24 A I met in person with Keith and Sean when he
25 showed up. And I think I talked to him once or twice on

1 Q That's not my question. My question is, have
2 you ever read it?

3 A No, that's why I haven't. I'm telling you why,
4 you know. Not that I don't think it's important or I'm
5 ignoring it, but, yeah, we're just not in a regulatory
6 role.

7 Q You're aware that that term is defined under
8 the Act, though?

9 A Yeah, yeah. Oh, yeah, I see it in the paper
10 all the time, critical habitat designation. We're just
11 not under that role, under the auspices of the Act.

12 Q I see at the bottom of the page, on page two of
13 Exhibit 32 to your deposition, you state, and I quote,
14 "This proposal is of such a magnitude and precedence for
15 the rest of the north shore and lower valley that we
16 believe it needs careful scrutiny by the decision makers
17 in perhaps consideration of other viable alternatives,"
18 close quote. Have I read that correctly?

19 A Absolutely.

20 Q Okay. What were the other viable alternatives
21 that -- to which you refer in that sentence?

22 A If I remember correctly, the footprint
23 of -- the structural footprint of the
24 neighborhood -- and it's a very sophisticated
25 subdivision. I mean, they've -- obviously, they had

1 the phone. But most of the contact was Gael and Tom.

2 Q Do you recall during the course of one of the
3 conversations you had with Keith Simon that you
4 indicated to him, in words or substance, that if Tom
5 Litchfield were okay with this project, then so were
6 you?

7 A Oh, yeah. I pretty much tell everyone that.
8 And not just this project, but all of them. The area
9 biologist -- and we used Gael's input as well. Oh,
10 yeah. But Tom never was fully -- he was okay -- to
11 quote Tom, and I don't know if you'll ask Tom, is Tom
12 will tell you it was a really -- looked like a wonderful
13 neighborhood to move into. You know it's a place that
14 he may, heck, buy a lot. Move in a nice neighborhood.
15 Just that it's a nice subdivision in the wrong place.
16 You know, I mean, it's a subdivision. It was a well
17 thought out -- it's probably one of the most
18 sophisticated models I've ever seen. And I think Tom
19 was -- had no issues. He had issues with covenants,
20 because I remember -- now it's coming back as we're
21 talking a little bit with Keith, talking about dogs and
22 cats. And I think there was horse issue. I don't know.
23 Did you guys have some horse thing going? It's coming
24 back a little bit. And access issue to the WP and the
25 closure. So he had issues. But in terms of how the

1 neighborhood's laid out from a development point of
2 view, he had no issues there whatsoever. Just
3 it's -- it looked like a wonderful neighborhood to live
4 in, just in an area that's in a sensitive spot.

5 Q Would it be fair to say that in June of 2006
6 you were not of the opinion that potential impacts on
7 wildlife and wildlife habitat posed by this subdivision
8 were unmitigateable?

9 A Mitigation, that's a whole other issue. It
10 depends on how you define mitigation. And depends on
11 how much time you want me to -- sometimes -- are you in
12 a hurry?

13 Q Well --

14 A I'm sorry. Mitigation is funny. It depends on
15 how you define mitigation, you know, if it's
16 unmitigateable or not. Is a structural footprint of 300
17 or whatever homes on the whole property mitigateable?
18 Really, no. That's a permanent impact. It's concrete,
19 it's there forever on the people. And it's not rocket
20 science. But we do deal with a lot of subdivisions
21 where -- for instance, Tom was reviewing one south of
22 Lakeside and spent a lot of time. Tom is a very smart
23 biologist, super guy. He's reviewing this, very
24 detailed. And it had all these interesting, you know,
25 wildlife corridors in there. And at one point Tom

1 area. And I remember talking with Keith about that.
2 And I disagreed with that, from my experience. That's a
3 nice little small piece, but that footprint of homes is
4 still there. It was right next to the Burlington
5 Northern piece or the WPA. But it depends on how you
6 define the benefit, long-term, of the mitigation versus
7 the impact of the project, from my perspective.

8 Q Would you agree with me that there's no
9 objective scientific mechanism by which to quantify
10 mitigation in the subdivision context?

11 A I'd agree, it's very difficult, and there's
12 more being learned now as we speak, you know. That's a
13 difficult thing to quantify. You're relying on
14 professional experience and careers of watching projects
15 come to fruition there.

16 That's where Gael's very good. She's been here
17 long enough. She's seen wetland projects grow in where
18 it looks like it's a natural wetland that's been there
19 for 300 years that was just put in ten years ago. You
20 know, you're going to rely on kind of long-term career
21 experience there. You're right; yeah, it's hard, black
22 and white, X plus Y equals Z, you're not going to find
23 it.

24 Q Subjective determination?

25 A In part, based upon your scientific training

1 walked in to me and said Do you golf? Yeah, yeah, I
2 golf. Are these wildlife corridors or a golf course?
3 It's a golf course. I mean, so mitigation comes in many
4 forms. I mean, these guys -- and it was one of the
5 subdivisions south of town. Their idea was a golf
6 course as wildlife space. That's not mitigation, from
7 my point as a biologist and my career of experience. It
8 may be space and green grass, but it's not mitigation.
9 So --

10 Q What's your understanding of what mitigation
11 means?

12 A I don't have a perfect answer for you there.
13 Mitigation, we're still learning. We have a whole
14 mitigation program here. And, you know, mitigation is
15 to replace or offset the impacts, in my mind, of any
16 given project. And it's going to have varying degrees
17 of success, depending upon the level of mitigation that
18 is applied. And so like I mention the little clustering
19 of the homes that are in, you know, a little ten-acre
20 footprint and leaving 300, that's a little more
21 significant mitigation than a giant subdivision and a
22 pond with frogs in it in the middle to call a wildlife
23 area, you know. I mean, Keith had a little small piece
24 that was right next to the wetland that he said is
25 mitigation for the entire structural footprint of the

1 and experience in a career. But yeah, in part.
2 Wildlife biology is part art, part science. That's the
3 art part, in my mind.

4 Q In terms of mitigation, in respect to this
5 office, your office has obviously been involved in the
6 past with off-site mitigation efforts?

7 A Yes.

8 Q Was that ever discussed when you spoke with
9 Keith Simon, potential mitigation by off-site action?

10 A Not by me. I'm not -- I don't deal at that
11 level. Gael and Tom potentially, not by me.

12 Q And you're aware that your office, back in the
13 '80s, was of the opinion that the 24,000 acres,
14 approximately, flooded by the Hungry Horse hydroelectric
15 project, the impacts posed by that could be completely
16 mitigated?

17 A Depends how you define mitigation. I think we
18 have met -- the Hungry Horse and Libby Dam mitigation
19 requirement, we've met the numerical requirements, but
20 the impacts are still there. One of our other partners,
21 the Confederated Salish/Kootenai Tribes, I think they
22 would probably submit that no, they haven't been
23 mitigated. So it depends on your perspective.

24 But Libby and Hungry Horse Dam, if I recall
25 correctly, I think we've met one or the other. I

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1 couldn't, off the top of my head, again, because
 2 that's -- I don't deal with that at my level.
 3 I do remember, though, now that you did jog a
 4 memory of Keith talking about a project up on the
 5 mountain, another place. Or a horse -- I remember
 6 discussions, not with me but with Tom -- or with Gael,
 7 it was with Gael -- about another chunk of ground,
 8 maybe, that would be a horse development property
 9 somewhere else. I do remember that now. But -- it was
 10 Gael probably.
 11 Q Let me show you Exhibit 6 to Mr. Satterfield's
 12 deposition and ask you if you recognize that document.
 13 A No, I've never seen this.
 14 Q Give that a read, and I'll ask you a couple of
 15 questions.
 16 A Okay. Yeah, I actually helped, when I was
 17 working on the elk project, also worked on some of the
 18 habitat targets for BPA stuff. This is in '84. This is
 19 way before my time. I was a lot younger.
 20 Q Have you had a chance to read the document?
 21 A Yeah, yeah. I've had the document read, yeah.
 22 Q Let me ask you a question. Fair to say that
 23 the director of your agency Fish, Wildlife & Parks for
 24 the State of Montana, was of the opinion in 1984 that
 25 approximately 24,000 acres of, quote, unquote,

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1 "important wildlife habitat" that had been flooded by
 2 the Hungry Horse hydroelectric project posed impacts on
 3 wildlife and wildlife habitat that could be completely
 4 mitigated?
 5 A I assume that was his opinion; I don't know.
 6 But yeah, yeah.
 7 Q Well, that's what it says in the letter, isn't
 8 it.
 9 A I'm just reading what you are, yeah.
 10 Q Would you disagree with his conclusion, knowing
 11 all that you do today?
 12 A Probably, yeah, yeah. Just -- you
 13 want -- okay. I mean, we know a lot more. There's been
 14 a lot more research. And it depends on what you're
 15 talking about. I think you can achieve mitigation, and
 16 we settled with the trust fund there. I think you can
 17 achieve legal mitigation required. But actually on the
 18 land, you know, I think we're learning more every year
 19 about long-term effects. That climate changes in there
 20 now of some of those habitats, we're still trying to
 21 recover a sheep population on Libby Dam that was
 22 supposed to be mitigated for. We purchased another W in
 23 May, but that sheep herd's still not recovered from the
 24 impacts of the inundation of the reservoir. So we're
 25 still learning on some of these. But yeah, 1984, yeah,

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1 I think we can achieve targets. But we're still
 2 learning about impacts, still, to this day, you know,
 3 potentially.
 4 Q Would it be fair to say on Exhibit 32, your
 5 letter, going back to that letter, you don't, anywhere,
 6 express the opinion that potential impacts posed by the
 7 North Shore Ranch project were incapable of mitigation.
 8 A No, I don't think we say that anywhere in
 9 there.
 10 Q Tom Litchfield, he was of the opinion that
 11 impacts were mitigateable, wasn't he?
 12 A Well, again, you'd have to ask Tom. But in any
 13 discussions I had with Tom, is, you know, depends on how
 14 you define mitigation, you know. And it depends to the
 15 outcome you want. A structural footprint of this large
 16 down there, really, in the long-term, you're not going
 17 to mitigate. But given that most of these subdivisions
 18 get approved, I think Tom is always trying to find the
 19 best things you can get, regardless of the impacts. I
 20 mean, Tom is a realist. You'll talk to him or already
 21 have.
 22 Q We will on Friday.
 23 A Yeah. He's very sharp, and he's got a good
 24 memory. And that's a question I'd ask Tom.
 25 Q And let me ask you this question. At this

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1 point in time in 2006, was there other property in the
 2 vicinity of the North Shore Ranch land that abutted
 3 Flathead Lake that was characteristically similar to the
 4 North Shore Ranch property?
 5 A Ficken Farms didn't abut the north shore, but
 6 it abutted Blasdel waterfowl production area. And that
 7 was a subdivision, and there are pretty similar concerns
 8 there. In fact, you can see the fingerprint now the
 9 development's occurred. And it was interesting this
 10 spring to look at the migration. They weren't using
 11 those lands. They were right next to it where there's
 12 space that's still left.
 13 Q And I'm not talking about subdivisions. I'm
 14 talking about any land. Is there any land, or was there
 15 in 2006, when you wrote your letter in the vicinity of
 16 the North Shore Ranch land, that you would consider to
 17 be similar to the North Shore Ranch land?
 18 A Oh, just off the cuff, this eco-complex up
 19 here, they're all relativity similar. I think this
 20 project shares the greatest border with the WPA. But
 21 some of the others, the border is less so. And that's a
 22 pretty critical component. You're next to a federal
 23 waterfowl production area. I mean, Kurfess looks
 24 similar, Miller, Worm, Harmuth. They're all directly
 25 adjacent to the WPA, just looking. But I mean, I can't

1 recall in 2006, but just right now.

2 Q Sure. And so would it be your testimony that,
3 with respect to the habitats that exist on the North
4 Shore Ranch property, those habitats, in a general
5 sense, were not unique in its vicinity?

6 A The North Shore Ranch is unique in its
7 location, and the common border with the WPA is the
8 greatest, more than any of the properties there. I
9 mean, that is kind of -- it is. It shares the greatest
10 common boundary with the WPA than any other property on
11 the north shore. Just looking here, there's no other
12 property that comes close.

13 Q That's not my question, though.

14 A Oh.

15 Q My question is about habitats. It's not about
16 whether or not it borders the WPA or its physical
17 location. My question, quite simply, is, does the North
18 Shore Ranch property offer habitats that are unique in
19 its vicinity?

20 A Yeah. We tend -- it depends on how you want to
21 look at it. All these habitats here, the north shore
22 included, are somewhat unique in their proximity to the
23 north shore of the lake. It's a complex kind of issue
24 or a systems kind of issue. But yeah, is this three
25 feet of farmed soil and this part of the project unique

1 remember, it's the wetland properties that are just
2 immediately -- all wetlands are unique. Eighty percent
3 of your biological diversity occur in 20 percent of the
4 land. And these are the wetlands. Whether it's a
5 slough, a pothole wetland or a marsh wetland or kind of
6 the shoreline type habitats around the lake. There was
7 some pieces, down here, that are unique. And from our
8 perspective too, just like we found at Ninepipe, is even
9 the uplands are potentially restoreable. And
10 two -- given its location -- and two unique habitats
11 like pothole creation, restoration. We've done that
12 pretty successfully with DU and some other partners. So
13 yeah, there actually was some wetland right next to the
14 border that I would call unique, but not unique in the
15 sense that it's different from a wetland maybe on Justin
16 Sliters or one of the others. But those wetlands are
17 unique, in terms of wildlife. They're of special
18 importance.

19 Q That's my question, though, and maybe I'm not
20 expressing it well.

21 A No.

22 Q And just tell me if I'm not, because I'm happy
23 to rephrase the question.

24 My question is, is there any habitat on the
25 North Shore Ranch property that is unique, in a

1 alone in its three feet? No. But cumulatively, taken
2 into context of where it's at and how it's used, yeah,
3 compared to a lot of areas in the valley up in North
4 Valley and West Valley. But around here it's a
5 significant one. But no, if it's three feet of soil
6 here or here, no, of course not. But where it's
7 located, and in a cumulative sense with the other
8 habitats around it and its proximity to the WPA and the
9 loafing areas on the lake for just migratory birds alone
10 in the space, it is somewhat unique. That's part of the
11 reason.

12 MR. MCCORMICK: Can we note for the record
13 that the witness is referring to and pointing to Exhibit
14 Number 14?

15 Q (By Mr. Perry) Let me ask you this question.
16 To your knowledge, you wrote a letter on this project.
17 You consulted with Gael Bissell and others regarding
18 potential impacts on wildlife and wildlife habitat. Can
19 you tell me what, if any, habitat on the North Shore
20 Ranch property is unique, with respect to the
21 surrounding and/or abutting properties on the north
22 shore of Flathead Lake?

23 A I think the most unique thing, just -- and
24 again, the area biologist and Gael are the two to ask
25 these questions. And you'll get Tom and Gael. But if I

1 scientific or ecological sense, when compared to that
2 property either abutting it or within its proximity, as
3 shown on Exhibit 14?

4 A Yeah. No, I see what you're saying there. No,
5 it's very similar to this whole area which we would
6 consider, you know, pretty much an important area for
7 conservation. It's not unique and stand-alone there.
8 It's just larger acres of that habitat. I see.

9 Q And I guess, at the end of the day, one of my
10 questions is -- well, we've talked about mitigation.
11 You've described it as a subjective standard. It's not
12 black and white, in terms of mitigation. It's not
13 well-defined.

14 With respect to this project, assuming that
15 this other land that abutted the lake, some of it was
16 available for purchase, could mitigation have been
17 accomplished by purchase and conservation of land in the
18 vicinity of the North Shore Ranch project?

19 A Yeah. Oh, I see what you're saying. So
20 that -- if, let's say, Sean wanted to pick up a piece
21 here to mitigate for development here, that's what
22 you're saying.

23 Q Yes, sir.

24 A And I see what you're saying. That makes
25 sense, but that would kind of essentially create a

1 sacrifice area on half. And our goals or agency's
 2 trying to achieve conservation wherever we can. And
 3 that WPA is pretty large. Yeah, that could do it, but
 4 you're essentially writing off and putting that
 5 footprint and all the impacts with it. You're kind of
 6 writing off half the area. But yeah. I mean, if that
 7 was the objective was to kind of write -- you know, just
 8 basically tolerate the impacts permanently from the
 9 footprint of that project on this part of the area and
 10 focus on this area, you could do it. Does that mitigate
 11 for losing, you know, the complex as we know it now? I
 12 don't know. You know, I mean, that's long-term.
 13 Probably not. But yeah, that would require kind of a
 14 sacrifice concept you're saying; high impact in one
 15 area, low impact on another.

16 Q Let me ask you this question. Is there no
 17 amount of property that this applicant could have
 18 conserved in the vicinity of the North Shore Ranch land
 19 that, in your opinion, would have accomplished
 20 mitigation of the impacts -- potential impacts posed by
 21 the subdivision?

22 A Yeah, that's a good question. I think -- first
 23 off, I mean, keep in mind, we're not the decision
 24 makers. We provide the information here. Because our
 25 goal is to -- you know, not just here but everywhere.

1 question just lingers, is what impact would the
 2 structural footprint be there, you know. And that -- I
 3 can't answer that. That's the unknown. The potential
 4 negative unknown.

5 Q Who would know? Because we're here at FWP.
 6 I've deposed your boss, Jim Satterfield, your wildlife
 7 biologist, Gael Bissell, and you're the wildlife manager
 8 for FWP. If you don't know the answer to that question,
 9 who would know?

10 A Well, first, you're giving me a lot more
 11 question than is due. I don't know. You know, that's
 12 one of those things you learn as you go. We do know
 13 directly, or undisputably, that these footprints of
 14 these neighborhoods are going to have some impact. The
 15 question is to what degree, and to what degree do they
 16 play a role in the cumulative impacts of many other
 17 projects in the local area.

18 There's been a huge growth period, just a
 19 really rapid growth period, where lots of properties
 20 were converted from agricultural to residential
 21 subdivision. To what degree is this project, in a
 22 cumulative sense, going to really impact let's say the
 23 migratory flocks? There's still some unknowns that we
 24 won't learn until later. I mean, I can't sit here and
 25 tell you, you know, with absolute certainty, that the

1 And we provide it to the county. They make their
 2 decisions. We just point out the impacts.

3 Again, that's the same question you just asked
 4 me, I think. It would require writing this area off.
 5 Which you can do. And you could disclose to the world,
 6 We're just writing that area off, and that's going to be
 7 a neighborhood. But there are permanent long-term
 8 impacts there, and the world would have to live with
 9 those. You could surely do that. It wouldn't be what
 10 we would recommend, you know.

11 Q Okay. And I'll ask you a hypothetical. This
 12 property, the North Shore Ranch property, is about 400
 13 acres. Are you aware of that, 370 acres?

14 A Yeah.

15 Q Now, if this applicant had been able to buy
 16 5,000 acres next to it that immediately abutted the
 17 waterfowl production area and then offered the same
 18 habitat as the North Shore Ranch property and was
 19 willing to put it into a conservation easement for
 20 perpetuity, is it your testimony that that conduct would
 21 not adequately mitigate potential impacts posed by the
 22 North Shore Ranch project?

23 A Yeah, that's a tough one to answer. I don't
 24 know. I don't know. I think, you know, that's
 25 obviously a very positive step for conservation. The

1 migrations will cease to exist next year because that
 2 property's going in. But cumulatively, there's been
 3 some significant changes in the landscape in the lower
 4 valley and all over the Flathead Valley in the last ten
 5 years. And that's slowed down now with the economy
 6 flattening out. But it was probably one of the more
 7 rapid rate-of-change areas, other than Gallatin
 8 County -- probably Flathead and Gallatin in the state.

9 But yeah, cumulative, Terance, I don't know. That's the
 10 \$64,000 question. At what point will the flock stop
 11 using the area; Church Slough, Weaver Slough, North
 12 Shore, Fennon Slough because of, you know, that impact
 13 of, you know, people, dogs, pets that go along with
 14 neighborhoods. I don't know.

15 Q Would it be fair to say that during the
 16 2006-2007 time period, you, yourself, didn't have an
 17 answer to that question?

18 A Still don't.

19 Q During the time that letters were rendered
 20 regarding this project by FWP, obviously Mr. Satterfield
 21 and Ms. Bissell, they didn't have an answer to that
 22 question either, did they?

23 A No. Not -- I mean, no one does. But we are,
 24 as an agency, going to err on the side of caution, when
 25 it comes to conservation, every time.

1 Q But absent an ability to express that opinion
2 with any scientific certainty, you'd agree with me that
3 that opinion would be speculative.

4 A In part. But it's based on a career's worth of
5 knowledge and science. But it's a luxury. You want
6 that site-specific data which we're never going to have
7 on any -- it's a luxury on -- the more you drill down,
8 the more difficult it is to get site-specific. But we
9 can tell you, you know, as an area, you know, it's a
10 function of size, really, and systems, you know, from my
11 perspective. But yeah, I couldn't sit here today and
12 say That one thing is going to stop, you know, all these
13 uses of the general area; no, of course not.

14 Q When you prepared your letter or signed your
15 letter, your June 16, 2006 letter, I believe you
16 testified that you relied upon information you would
17 obtain from Gael Bissell and Tom Litchfield?

18 A Correct.

19 Q Anybody else?

20 A Oh, yeah, yeah. Well, the letter -- the
21 letters are drafted. And obviously, Gael and Tom in '06
22 are it would have been Gael and Tom probably were
23 primarily folks that put the letter together. But the
24 office -- and one of the advantages of having this
25 office is we have a real talented bunch of biologists

1 letter.

2 A Okay.

3 Q Who did you rely upon at your agency in
4 proffering, at the end of the day, the opinions that you
5 did?

6 A Gael and Tom would be the experience. And my
7 own. You know, like the hunting. I always -- every one
8 of these, I'm going to go look at What are the impacts
9 to hunting, trapping? Because that's something that
10 we're seeing poor recruitment, in terms of kids going
11 into hunting. And I really try and look at the impacts
12 on hunting. But Gael sometimes will forget that, you
13 know. And, yeah -- but I read them all and then sign
14 them. And now, of course, they're going to Jim. And he
15 does the same thing after I read them and sign them.
16 But Gael primarily, Tom. And then I know they have a
17 broad net of conservation-type folks that they rely on,
18 you know. Flathead Lakers has water quality-type
19 experts on there that will never be -- we work with
20 Ducks Unlimited, Pheasants Forever, Rocky Mountain Elk
21 Foundation. You know what I mean? We have a lot of
22 folks that are interested in wildlife. It's a public
23 agency. They're at us all the time.

24 Q And during this process, in a general sense, of
25 rendering letters of the type and nature of Exhibit 32,

1 here. We have nongame people, bear people, habitat
2 people, research people. We have statewide folks that
3 are involved with subdivision stuff. So collectively,
4 at least in my mind, the process I use when I get a
5 letter from a biologist to sign -- and I edit them. I
6 mean, I read every one of them. I mean, it isn't Gael
7 out there running rogue, you know, Gael Bissell, you
8 know. I read every one of these. And she takes a lot
9 of input from all sorts of groups. We have American
10 Bird -- we're lucky enough to have American Bird
11 Conservancy located here. He's a worldwide expert on
12 birds. We rely on him. I probably give some of their
13 staff equal weight to definitely some of these -- the
14 published literature, because the published literature
15 is updated every year, in theory, you know. The more
16 data the better. And we rely on collective experience
17 and rely on county planning staff too. They have some
18 talented staff. They've had lots of different county
19 planners since I've been here in '99. So it's kind of a
20 group process that goes into creating the comments. And
21 then, in this case, Gael and/or Tom, and I don't
22 remember, will walk in and say We have a comment on a
23 subdivision. Love for you to read and sign and mail out
24 because there's a due date out and the county wants it.

25 Q My question is real specific to just this

1 have you, in the past, relied upon input from the
2 Flathead Lakers?

3 A Well, I know Gael has communicated.
4 I -- part -- not myself, no. I sign the letter and edit
5 it. That's mine.

6 Q Fair enough.

7 A That's the short answer. I sign the letter and
8 I edit it.

9 Q Thank you.

10 A But I do -- and I evaluate Gael's performance
11 and/or the area biologist in whatever region. I have
12 four, which Tom was one at one time. But there's four
13 area biologists. And they set all the seasons, do all
14 the wildlife surveys, deal with pretty much everything
15 in the geographic area. I evaluate them on how well
16 they collaborate with all the other conservation
17 agencies, NGO, and tribes. I want that communication
18 there. So I know they do. But, you know, I don't sit
19 in on the talk. You know --

20 Q I understand.

21 A Interested, but I don't have time.

22 Q Do you have an understanding, in a general
23 sense, that with respect to the North Shore project
24 anyway, Gael Bissell got input from the Flathead Lakers?

25 A Oh, I'm sure. You know, Constanza is the water

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1 quality -- I don't know her last name. Oh, I'm sure. I
 2 remember, you know, many times her referencing not only
 3 Flathead Lakers but several other agencies and NGOs.
 4 Lynn Verlanic, Fish and Wildlife Service who's a
 5 biologist down on the WPA.
 6 Q Flathead Land Trust, was that one of them?
 7 A We work with Flathead Land Trust, Nature
 8 Conservancy, Montana Land Reliance, and Vital Ground,
 9 all the land trusts in the state. In fact that's
 10 another one. I require them to network there because
 11 there's a lot of good conservation that occurs under the
 12 radar with these land trusts that are voluntary. And
 13 they're tax incentives versus us having to raise money
 14 to secure our conservation easement. So yeah, I
 15 evaluate her and the other biologists on how well they
 16 network there. So they better be. I don't know, but
 17 they better be, because that's, you know, when I
 18 evaluate them.
 19 Q That's my question here. I mean, with respect
 20 to this project, are you aware that Gael Bissell got
 21 input on, you know, potential impacts on wildlife and
 22 wildlife habitat from the Flathead Land Trust?
 23 A I assume so. I remember the discussions there.
 24 I'm not aware to the details. But yes, the
 25 communication -- I know Gael communicated with Marilyn.

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1 And I know she communicated with the Lakers and DU,
 2 all -- you know, the NGOs of conservation agencies.
 3 Q Citizens for a Better Flathead, another one
 4 that she communicated with.
 5 A I don't know about that one. But I do remember
 6 Marilyn, and I do remember the Lakers. And it might not
 7 even have been Constanza. But she did the critical
 8 lands map a few years ago for water quality in the
 9 floodplains and whatnot in the valley. But yeah, I hope
 10 they do. That's what I expect.
 11 Q But in preparing these letters, would it be
 12 fair to say that, at least in 2006, you had knowledge
 13 that Gael Bissell was coordinating with some of these
 14 nongovernmental organizations?
 15 A Oh, yeah.
 16 Q And relying upon their input.
 17 A Yeah, that's part of her job; yes.
 18 Q Now, I notice in this letter you didn't express
 19 the opinion -- letter, Exhibit 32 to your
 20 deposition -- you didn't express the opinion that the
 21 north shore of Flathead Lake was an area of national
 22 significance; fair to say?
 23 A Yeah. I mean, I could have written that in
 24 there. But it doesn't take rocket science. The
 25 Flathead Lake is the largest cleanest -- the largest

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1 clean pure fresh water lake west of the Continental
 2 Divide other than Lake Tahoe. Those are the two
 3 biggies. I mean, that's one of the drivers of the
 4 economy here is the lake and the park.
 5 Q So from an economic sense it would be of
 6 national significance?
 7 A In my mind, yes. I'm biased.
 8 Q How about in a biological sense?
 9 A Yeah; oh, absolutely. Clean water? My gosh.
 10 Look at the other lakes east of the Mississippi. I
 11 think you can still drink out of this one.
 12 Q But again, you didn't express that opinion?
 13 A No. Could have, but no. That was kind of down
 14 the scope at the time, in my mind. I'm trying to
 15 remember, but no. I could have. I'd submit that it is
 16 today.
 17 Q Today you do.
 18 A Well, I would then, too, but it just
 19 wasn't -- you know.
 20 Q What would the criteria be for determining
 21 whether or not any habitat constitutes an area of
 22 national significance?
 23 A In my mind, in Montana, we have such an
 24 incredible amount of nonresident angler and hunting
 25 participation, we're on the map as the Last Best Place.

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1 And we market that as a state. I deal with nonresidents
 2 from all over, not only in Montana, but some
 3 internationals. We're a destination for hunting, for
 4 quality of life, for fishing, just open space, in terms
 5 of these wilderness areas, you know, depending on what
 6 your interest is. I think -- you know, there's a lot of
 7 states in this country. And I work with a lot of agency
 8 folks all over. I think we have something special here.
 9 It is the Last Best Place. That's the reason I live
 10 here and work here and chose to come to school in
 11 Montana. I mean, just personal opinion.
 12 Q Just following up on your comments, would it be
 13 your opinion that the entire State of Montana is a state
 14 of national significance?
 15 A Yeah. It's fantastic. The Missouri Breaks
 16 from Ekalaka. We have some phenomenal -- I'd submit
 17 that the Missouri Breaks are wilder than the Bob
 18 Marshall in space and context. Montana's got an
 19 incredible amount of diversity in its scope and depth,
 20 in terms of wildlife species and fishing opportunities.
 21 It's a wonderful state. But I'm biased. That's why I'm
 22 in this field.
 23 Q This term "national significance," you'd agree
 24 with me that it is -- it's not based upon any scientific
 25 criteria, is it?

1 A No. I'm giving you my personal opinion.
 2 Q Subjective; right?
 3 A Yes, my subjective personal opinion here. But
 4 I think it's very significant nationally. But that's
 5 Jim telling Terance.
 6 Q And it's true, is it not, that the federal
 7 government has failed to designate any part of the north
 8 shore of Flathead Lake as a critical habitat for any
 9 endangered species; true?
 10 A Yeah. To my recollection, I think lynx is the
 11 only thing they've looked at for critical habitat since
 12 I've been here in the last ten years. And obviously,
 13 that's not a lynx area.
 14 Q And you'd agree with me that regional
 15 management plans for waterfowl, shorebirds and
 16 waterbirds fail to list the north shore of Flathead Lake
 17 or the WPA as an important bird site.
 18 A No, not necessarily. I think that when you
 19 look at waterfowl, you look at flyways. And I think
 20 the -- we're in the Pacific flyway here, Intermountain
 21 flyway. And the Intermountain, just by name itself,
 22 there's a lot of mountainous habitats that aren't
 23 waterfowl habitat. It's the valleys. And they're
 24 limited in scope. And then you go beyond that to the
 25 wetlands and the rivers in the valleys are even limited

1 Flathead, and I believe Flathead County is identified in
 2 here too. And these are our two guiding documents that
 3 we work -- you know, we're not in the regulatory role,
 4 the federal government or the county. But as
 5 biologists, in terms of working for conservation
 6 outcome, this is going to guide us. And Mission, Swan,
 7 Clark Fork. It's in here. Give me a second. There it
 8 is; page 13.
 9 Page 13 of the Comp Plan, the Flathead River
 10 Valley. It's identified -- not the north shore, per se,
 11 but the Flathead River Valley is identified as a
 12 priority. It's a million 500-acre focus area. But some
 13 of the big concerns: Number one, habitat fragmentation
 14 as a result of human population growth, development and
 15 expansion, over the transportation network. There's
 16 been a lot of work. We work cooperatively with the
 17 tribes on Highway 93 when you come up here from Missoula
 18 on the crossing and structures. So I mean, it's
 19 identified in a broader sense here and in our Habitat
 20 Montana plan. But I'm not aware -- there could be, but
 21 I'm not aware of any, you know, joint venture areas
 22 talking specifically about the north shore.
 23 Q Let me ask you a question. Does the term
 24 "scientific impact" -- or I'm sorry; strike the
 25 question.

1 more in scope. So, yeah, it might not say that, you
 2 know, right here is identified in the plan. But the
 3 Pacific flyway, the Intermountain joint ventures kind of
 4 highlight the importance of these wetlands and
 5 complexes. Like the lower Mission Valley as well is
 6 significant. There's Bear Lake in Utah. It's a very
 7 large waterfowl -- it's a refuge, I think. And,
 8 frankly, those central valleys in California where a lot
 9 of these birds winter spend the winter.
 10 Q Well, let me ask you this question. Are you
 11 aware of any regional management plan in the State of
 12 Montana that establishes that the north shore of
 13 Flathead Lake or the WPA is an important bird site for
 14 waterfowl, shorebirds, or waterbirds?
 15 A Yeah. Our Habitat Montana plan describes
 16 wetlands. It doesn't go site-specific to the degree
 17 that you're interested in here. But it describes the
 18 Intermountain grasslands and wetlands, as our habitat
 19 Montana as a focus area for biologists to look at for
 20 conservation. And I think in this -- can I open that?
 21 Q Sure, yeah.
 22 A I think, to my recollection.
 23 Q Just for the record, that's the Montana FWP
 24 Comp Plan; is that right?
 25 A Yeah, the Comp Plan; correct. And we go to

1 Does the term "significant impact" have a
 2 scientific definition anywhere in any of your literature
 3 that you rely upon in rendering letters such as Exhibit
 4 32?
 5 A No. When we say "significant impacts" or
 6 "potential significant impacts," it's based on a
 7 career's worth of experience and the knowledge we've
 8 accumulated in our careers. It would be subjective for
 9 you in that sense of the word. I'm assuming you're
 10 wanting, yeah.
 11 Q Now, in the comp plan that you just referred
 12 to, the 2005 comp plan, Montana's Comprehensive Fish and
 13 Wildlife Conservation Strategies its full title. Fair
 14 to say that the page you just referred to, page 13,
 15 doesn't, in any way, indicate that the north shore of
 16 Flathead Lake is a critical wildlife habitat?
 17 A No, it does not say that in there.
 18 Q Now, you'd agree with me any subdivision
 19 constructed anywhere near Flathead Lake would cause at
 20 least some degree of loss of wildlife habitat.
 21 A In a cumulative sense, yes. And it's a little
 22 bit dependent upon the location and the scope.
 23 Q Uh-huh.
 24 A But potentially, yes. It depends on the scope
 25 and location.

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1 Q For instance, this project.
 2 A Correct.
 3 Q If we had 290 houses that were ten miles north
 4 of the lake on a piece of land --
 5 A Yes.
 6 Q -- obviously it's going to have some impact on
 7 wildlife habitat, wherever that size project's located;
 8 right?
 9 A Yeah, but to a much lesser degree than where
 10 it's located here; correct.
 11 Q And you'd agree with me that the property at
 12 issue, the North Shore Ranch property, as it currently
 13 exists, is not in its native state?
 14 A Other than maybe a few wetlands; correct, yeah.
 15 Because there are some wetlands. I'm not sure whether
 16 those were created. BNSF owns number 10. And they did
 17 some -- that was some mitigation for the railroads,
 18 wetland mitigation. And I don't know whether that was
 19 purchased as is or it was restored. And I
 20 assume -- these are as is down here. But for the most
 21 part, it would be agricultural land.
 22 Q And you'd agree with me that the property at
 23 issue, the North Shore Ranch property, has very few
 24 trees on it to provide habitat for a variety of avian
 25 species?

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1 A Well, it depends what species are you talking
 2 about. I mean, trees -- if you're talking about raptors
 3 and nesting trees or geese nesting in a tree, it depends
 4 on which season of need and what species.
 5 Just -- you're correct if it's, for instance, a nesting
 6 osprey and there's no poles or trees for them to nest
 7 on. You're absolutely right.
 8 There's some trees nearby with eagles, and
 9 there's a sphere of influence there with behavior from
 10 eagles.
 11 But if you're looking at open species, open
 12 little more type grassland or wetland complex species,
 13 once these properties are restored, for instance, the
 14 potential is for a lot of use. But even in the
 15 agricultural sense, we find at Ninepipe in the Mission
 16 Valley -- we own 4,000 acres down there. We do a lot of
 17 farming, weed control, pothole restoration, kind of
 18 collectively with the community down there. Is that you
 19 with can put a wetland in and in three years it looks
 20 like it's been there three hundred. So you get these
 21 native species uses. But even the open farm grounds
 22 that we do for weed, to turn over weeds, are used by
 23 owl. You'd be surprised. Maybe farm ground. But
 24 short-eared owls or -- some of these species. We even
 25 had snowy owls from the arctic come down two winters

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1 ago. They were on the open farm ground there because
 2 there were voles on there. So what was important to
 3 that species were these montane or meadow voles. And it
 4 was a vole-high cycle. And even though it was farm
 5 ground, there were all these beautiful white owls on it.
 6 Which doesn't happen but once every several years when
 7 you have a lemming crash up north. But nonetheless, the
 8 point is, it depends on the species and the time of
 9 year, I guess.
 10 Q Have you been on the property?
 11 A No. I have not been granted permission, but
 12 nor have I asked. So it's not that they've said No,
 13 you, you can't come on. But you drive by it every week.
 14 It's pretty easy. And we've been of the WPA and I've
 15 been on the highway. But I've never set foot on the
 16 property.
 17 Q Would you agree with me that the North Shore
 18 Ranch developers, my clients in this case, they're
 19 intent to restore native vegetation on a large portion
 20 of the property would, in fact, serve to improve habitat
 21 for a variety of native species?
 22 A No, because I thought it what a small portion,
 23 just a little piece in the corner. It wasn't a large
 24 portion, to my recollection. I'd have to see -- you'd
 25 have to show me the map. I remember Tom and Gael

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1 talking about it. But I remember it being a small piece
 2 with a 300-home footprint on the property. But that's
 3 my memory of it.
 4 Q Would you agree with me that the US Fish and
 5 Wildlife Service is fully empowered to plant forage lots
 6 the WPA if it wanted to?
 7 A I don't know, to be honest, with their rules
 8 and policies.
 9 Q Have you ever seen the management plan or a
 10 management plan for the WPA that abuts the North Shore
 11 Ranch?
 12 A No. They're working on that right now, the
 13 CCP, the current revised one. And we do have the rules,
 14 though. We tend to get more involved with the hunting
 15 season, for obvious reasons. We're the agency hunters
 16 come to with access. You know, Where can I go? And we
 17 hand out the rules. I'm familiar with those. For a
 18 while we had trapping. I don't know if trapping was
 19 always included or not. I think that might be a newer
 20 one that they opened up as a recreational opportunity.
 21 But hunting's always been an issue. And folks are
 22 always curious where the boundary is, where they can
 23 park and get on. So the Service delivers to our front
 24 desk a map and on the back has their rules. Not ours,
 25 but we provide that.

1 Q When you say "their rules," are those rules
2 that pertain to hunting?

3 A Primarily access, yeah, so they don't trip up
4 and trespass on neighboring landowners primarily.

5 Q Would you consider that to be a management plan
6 for the WPA?

7 A No.

8 Q A management plan substantively distinct from
9 the document you described.

10 A In my mind, that's rule rules and access, from
11 my perspective, my opinion.

12 Q You said they're working on a management plan,
13 USFWS right now. Did they ever have a management plan
14 in place since 1971, when it first became a waterfowl
15 production area?

16 A I would guess yes. You'd have to ask them.
17 But they are so heavy on plans and rules and
18 regulations. It's the federal government. I would
19 almost with certainty guess yes. But I don't know.

20 Q You've never seen it, have you?

21 A No, I have not.

22 Q Have you ever asked to see it?

23 A No, not on my own; no, no.

24 **THE COURT REPORTER:** Can we take a break
25 whenever?

1 Q Would you agree with me, also, that cattail and
2 bulrushes can be described as tall, thick, emergent
3 vegetation?

4 A Yes.

5 Q And would you agree with me that when cattails
6 and bulrushes invade a marsh or establish themselves in
7 a marsh, they tend to take it over?

8 A Yes. I keep resisting going into a full-blown
9 explanation of the differences because we do all the
10 time. Yes, they do that.

11 Q And you'd degree with me that marshes that have
12 been deteriorated, for lack of a better word, from
13 cattail and bulrush invasion, tend to be used
14 infrequently by waterfowl due, in part, to low
15 invertebrate and benthic productivity?

16 A No. Redheads are nest pairs. There's certain
17 species that enjoy and use the cattail complex and
18 certain species that prefer the open water. So, in that
19 context, no. But generally, yeah, we deal with -- on
20 our properties -- cattail management.

21 Q Would you agree with me that federal and state
22 land management agencies often control cattails through
23 the application of mechanical, chemical, or prescribed
24 fire treatments?

25 A Yes.

1 **MR. PERRY:** You bet.

2 Take a break?

3 **THE WITNESS:** Yeah, I'm fine.

4 **MR. PERRY:** Attorney McCormick, can we go
5 off the record?

6 **MR. MCCORMICK:** Sure.

7 (Deposition in recess from 11:00 a.m. to
8 11:10 a.m.)

9 Q (By Mr. Perry) Would you agree with me that
10 prior to settlement of the Flathead Valley, native plant
11 communities over much of this portion of the Flathead
12 Valley in the vicinity of the North Shore Ranch project
13 were predominately open stands of ponderosa pine with
14 shrubs and herbaceous species characteristic of the
15 Palouse prairie?

16 A Yes.

17 Q And you'd agree with me that, at present, there
18 are no remaining remnants of this habitat type left on
19 the North Shore Ranch property?

20 A I don't know. Again, I haven't been on the
21 property. I'm assuming no, but yeah.

22 Q Would you agree with me that much of the
23 vegetation of the north shore of Flathead Lake is
24 dominated by extensive cattail and bulrush marsh?

25 A On the southern fringe, yes.

1 Q Would you agree with me that for waterfowl to
2 be inclined to use a marsh area, generally a 50/50 ratio
3 of open water to emergent vegetation is desirable?

4 A I don't know of the ratio off the top of my
5 head; can't answer.

6 Q Would you agree with me that presently the WPA
7 has extensive cattail and bulrush stands?

8 A I don't know, off the top of my head.

9 Q Would you agree with me that the existence of
10 cattail and bulrush stands on the WPA would serve to
11 diminish the value of this area to waterfowl and many
12 waterbirds?

13 A No.

14 Q Would you agree with me -- strike the question.
15 In light of the fact that lake levels are

16 controlled by Kerr Dam, would you agree with me that
17 during minimum pool, as much as about one kilometer of
18 mudflats is exposed along the north shore of Flathead
19 Lake?

20 A Yes.

21 Q Would you agree with me that during minimum
22 pool, residents in the area often use these mudflats for
23 ATVs and motorbikes, that type of thing?

24 A No, not motorized. I know hiking. I'm aware
25 of that. And skiing in the winter. But I'm not aware

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1 of any motorized use.

2 Q Would you agree with me that wave action has
3 resulted in shoreline erosion and loss of wildlife
4 habitat on the east side of the WPA?

5 A I don't know. I'm assuming yes. But at my
6 level I don't go out there and look at the impacts. I
7 rely on the biologists so I don't know. I'm not going
8 to disagree with you, though, because it probably has.

9 Q It's true, is it not, that in order to mitigate
10 this loss of habitat posed by wave action, FWS, Fish
11 Wildlife Service, itself, implemented a shoreline
12 protection project to stop further erosion and habitat
13 loss?

14 A I'm aware of a program but not the details.

15 Q Would you agree with me that the WPA has
16 consistently lost waterfowl habitat as a result of wave
17 action and fluctuating lake levels over the past
18 twenty-five years?

19 A Yes.

20 Q In light of the fact that a majority of the
21 project area of the North Shore Ranch project is land
22 cultivated for grain or hay production, would you agree
23 with me that wildlife use of the cultivated farmland
24 would almost entirely be seasonal and occur mostly after
25 grains have matured?

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1 A Partially, yes. But in part, there's other
2 seasonal uses of open haying fields as well. But
3 there's a concentrated seasonal component; correct.

4 Q And that would generally be in the fall.

5 A Spring. Spring is the biggie, and then fall
6 would be to a lesser degree but another big one. But
7 spring is the biggie, that I'm aware of.

8 Q Would you agree with me that residences that
9 could be located on this property, as proposed by the
10 applicant, North Shore Ranch, would provide increased
11 habitat for some species of animals?

12 A Skunks, potentially, yes, which are nest
13 predators, and corvids which are nest predators. That's
14 the problem we see with developments. Even sometimes
15 leaving old barns out, you get these nest predators that
16 it provides habitat for them.

17 Q How about the great-horned owl?

18 A That's a nest predator, but that's an avian
19 predator, in part, but primarily small mammals. But
20 yeah, great-horned owls will use vacant buildings as
21 well. Now, if they get habituated -- now and again,
22 I've seen them near a residence. But typically they're
23 going to be out on a farm field or near a lone home
24 where there's not a lot of disturbance. We have that on
25 Ninepipe.

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1 Q Now, these residences proposed to be
2 constructed on this land, would they provide increased
3 habitat for the house sparrow?

4 A I don't know. I'm assuming so, but I don't
5 know.

6 Q How about the starling?

7 A I'm assuming so, there too, but I can't answer
8 that. I don't know. I'm not at the scope of my job
9 right now.

10 Q How about the American robin?

11 A I don't know.

12 Q How about the house finch?

13 A I don't know.

14 Q How about the barn swallow?

15 A Bridges and cliffs. No, not a barn.
16 Definitely not a barn swallow, I would guess, unless
17 they're nesting on a home which is probably pretty rare.
18 I don't know.

19 Q It's true, is it not, that during the spring,
20 summer and fall, Flathead Lake is, itself, as you
21 pointed out in your letter marked as Exhibit 32, a
22 source of recreation in the form of boating and
23 jet-skiing, that type thing?

24 A Oh, I'm sure there's lots of -- yes.

25 Q And you've seen those recreational activities

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1 on occasion, have you not?

2 A Yes, primarily myself, fishermen, and lake
3 trout fishing.

4 Q And you're aware of the fact, are you not, that
5 these boats and jet skis are not restricted in any way
6 from approaching the marshes on the north shore of
7 Flathead Lake?

8 A I don't know.

9 Q Would you agree with me that boats and jet skis
10 produce noise?

11 A Yes.

12 Q Would you agree with me that the noise created
13 by boats and jet skis during the spring, summer and fall
14 on the northern part of Flathead Lake would have the
15 potential to have an adverse effect on brooding, nesting
16 and foraging of waterfowl?

17 A Yeah. Yes, to some degree; yes.

18 Q Has FWP, to your knowledge, ever done anything
19 to put in place a buffer on the lake to keep boats and
20 jet skis from approaching the marshes on the north
21 shore?

22 A Not to my knowledge, no.

23 Q And would you agree with me that to the north,
24 east and west of the North Shore Ranch property, the
25 land is characterized by either being cultivated land or

1 residential use? And that's to the north, east, and
2 west.

3 A You're saying in this area right in here
4 (indicating)?

5 Q Yes, sir.

6 A Yes, it's subdivisions and agriculture.

7 Q And you'd agree with me that there are, in
8 fact, residential uses within a quarter of a mile of the
9 WPA?

10 A Yes.

11 Q And as we discussed earlier, you're allowed to
12 hunt and trap and bird watch on the WPA?

13 A Correct; yeah.

14 Q And you'd agree with me that noise associated
15 with hunting would certainly have an effect on wildlife
16 foraging or nesting on the WPA during hunting season?

17 A Temporary effect, yes.

18 Q And you'd agree with me that, in a general
19 sense, human presence alone on the WPA would serve to
20 adversely impact wildlife and wildlife habitat?

21 A Temporarily, yes.

22 Q And you'd agree with me that, certainly,
23 killing wildlife on the WPA would have an adverse
24 impact, at least on those wildlife you kill?

25 A If you're that individual, it's a bad day.

1 upon in making that statement that it would be
2 temporary?

3 A Personal observations hunting.

4 Q Personal observations hunting.

5 A Yeah. The bird moves and I try and shoot it
6 and, yeah, sometimes they come back the next day,
7 sometimes maybe a couple days. Not on the WPA, but in
8 my experience hunting in Montana.

9 Q How do you know it's the same birds that were
10 displaced that return within a couple of days?

11 A Oh, it's impossible to know.

12 Q Would you agree with me that there are species
13 of animals in northwestern Montana that actually thrive
14 in human-disturbed landscapes, such as a residential
15 subdivision?

16 A Yeah. You mentioned them earlier; sparrows,
17 nonnative sparrows, nonnative starlings. I believe they
18 probably thrive. Not native species, but they probably
19 thrive.

20 Q And in western Montana, some of the species
21 that thrive in human-disturbed landscapes are, in fact,
22 species of concern, are they not?

23 A It depends -- on before the landscape was
24 disturbed, did they thrive? Or do think thrive after
25 the landscape has changed?

1 Q It's a bad day. And you'd agree with me that
2 bird hunting on the WPA during the appropriate season
3 would obviously have an adverse effect on upland game
4 birds to the extent that they're hunted.

5 A No. It's a population-versus-individual issue.
6 It's insignificant in terms of population management in
7 the flyways for migratory waterfowl and residents, for
8 the most part. And upland birds population are driven
9 by the hatch and the conditions in the hatch. So
10 hunting is not a population driver in that context.

11 Q Let me ask you this question. In terms of
12 three or four guys going to the WPA during hunting
13 season with their shotguns, and they hunt a couple of
14 days in a row, in your opinion, would that have any
15 impact on upland game birds that are nesting or foraging
16 on the WPA during that two or three-day time period?

17 A Well, first off, they wouldn't be nesting in
18 the fall when they hunt. So nesting, no. Everything
19 pretty much nests in the spring, in midsummer. But in
20 the fall, yeah, temporarily you're going to flush birds.
21 It depends on your degree of impact. Is it a flushing
22 distance, avoidance of the area, are they back in an
23 hour the next day? Temporary impacts, yes.

24 Q And you've describe it as a temporary impact.
25 Is there any data or scientific information you rely

1 Q Let me ask it again.

2 A I'm confused.

3 Q Would you agree with me that there are species
4 of animals -- strike the question.

5 Would you agree with me that in western
6 Montana, some of the species that thrive in human
7 disturbed landscapes, such as a subdivision, are, in
8 fact, species of concern?

9 A Oh, I understand that. Off the top of my head
10 I'm trying to think of probably, but I can't recall off
11 the top of my head. Let me think. I can't recall in my
12 entire list of species, especially birds of concern.
13 There's a lot of them. I can't recall off the top of my
14 head.

15 Q Do you consider yourself to be an expert on
16 avian species --

17 A No.

18 Q -- that exist in western Montana?

19 A No.

20 Q To your knowledge, does -- strike the question.
21 To your knowledge, during the time period that
22 the North Shore Ranch application was pending, did FWP
23 employ an expert on avian species in northwestern
24 Montana?

25 A I don't know if Dan Casey -- all of our

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1 biologists are, more than me -- as a program manager I'm
 2 managing staff -- all of them are experts on all species
 3 to some degree. But even beyond that, we had a nongame
 4 bird expert on staff; Dwight. Very remotely involved in
 5 this unless Gael asked him a question here and there.
 6 But all of them are very familiar with the literature.
 7 Are they published experts? Probably not -- I'm
 8 thinking of my staff right now -- other than Dan. And I
 9 think he had left at the time. And he's with American
 10 Bird Conservancy now.
 11 Q That's Dan Casey?
 12 A Yeah; correct. He's a world-renowned expert.
 13 He's very good.
 14 Q Would you agree with me that white-tailed deer
 15 are adapted to and coexist well with human disturbance?
 16 A Yes.
 17 Q And you'd agree with me that red fox, striped
 18 skunk, raccoons, mice and voles, the red-tailed hawk,
 19 great-horned owl, the American crow, the mallard, the
 20 Canada goose, the house finch, and the peregrine falcon
 21 are adapted to and coexist relatively well with human
 22 disturbance?
 23 A Most of those species, I would agree with.
 24 However, in the context of our discussion today, that's
 25 our waterfowl production area -- two-thirds of them are

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1 predators that increase when a structural footprint goes
 2 in like we're talking about. For the record. Yeah, but
 3 just so you know that.
 4 Q But you would agree with that proposition.
 5 A Yeah, in terms of across the country, that
 6 would be my guess. I'm assuming so.
 7 Q And you'd agree with me that insofar as the
 8 North Shore Ranch property, at present, has no forests
 9 and very limited trees, forest-dwelling species would
 10 already not be likely to nest, brood, forage, or depend
 11 on that property?
 12 A Yes.
 13 Q And the great gray owl, the northern goshawk,
 14 the pine grosbeak, and the red crossbill, would be
 15 examples of forest-dwelling species that would not be
 16 expected to depend on wetland or marsh habitats common
 17 to the WPA or cultivated fields found adjacent to it?
 18 A Yeah, other than seasonal use or foraging. I
 19 wouldn't expect them to nest on the property other than,
 20 you know, there may be seasonal use, but not nests.
 21 Q Have you ever seen a stilt sandpiper anywhere
 22 on Flathead Lake, in the last ten years?
 23 A No.
 24 Q Have you ever seen, in the last ten years, a
 25 parasitic jaeger in the vicinity of Flathead Lake?

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1 A No.
 2 Q Are you aware of the fact that the Montana Bird
 3 Distribution database and Natural Heritage Tracker only
 4 contain a single observation record for the stilt
 5 sandpiper? And that was from 1995 from an undisclosed
 6 location?
 7 A No.
 8 Q Are you aware of the fact that the parasitic
 9 jaeger has been observed on Flathead Lake only once and,
 10 then, only in 1987?
 11 A No.
 12 Q And you'd agree with me that when an avian
 13 species is highly unlikely to be present in the vicinity
 14 of the north shore of Flathead Lake, it's virtually
 15 impossible for that species to, at all, depend on that
 16 habitat?
 17 MS. JAKES DOCKTER: Object to form.
 18 Q (By Mr. Perry) Do you understand my question?
 19 A No. What's form? Okay.
 20 Q You can answer it, if you understand my
 21 question.
 22 A It's -- again, it's a seasonal migratory. With
 23 all species, there's seasonal times of importance and
 24 migrational periods of importance that are totally
 25 separate from nesting and brood-bearing importance. So

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1 with most of the projects we do, we consider -- you
 2 know, even if it may just be a month or two or an
 3 opportunity there, we'll note it. Because, you know,
 4 who's to know if that's a critical component of a life
 5 cycle versus we know pintails are using this area
 6 significantly. And it's a critical component. They
 7 loafing and nutrition, you know, in their layover
 8 heading north. But that would be my answer.
 9 Q In a scientific sense, if a species of animal
 10 is unlikely, given the data that you have access to as a
 11 wildlife biologist -- if it's unlikely to occur on the
 12 north shore of Flathead Lake, would it be fair, also, to
 13 conclude that it's unlikely to depend on that habitat?
 14 A I don't know. I'm not a bird expert there.
 15 Q And I used this analogy in a recent deposition.
 16 You'd agree with me that it would be unlikely for the
 17 great white shark to rely upon any habitat on the north
 18 shore of Flathead lake.
 19 A Correct.
 20 Q Have you ever seen a black-bellied plover in
 21 the vicinity of Flathead Lake, in the last ten years?
 22 A Never seen one.
 23 Q How long have you lived in Montana now?
 24 A Almost twenty years.
 25 Q Is it FWP's opinion, to your knowledge, that

1 exotic introduced species that are nonnative to Montana
2 should cause or result in the protection of habitat upon
3 which they may depend?
4 A No, except for game birds, pheasants, huns,
5 partridge.
6 Q Okay.
7 Would you agree with me that the cropland and
8 wet meadow habitat on the North Shore Ranch property
9 ever been heavily disturbed by current and past
10 agricultural practices?
11 A Heavily altered. Disturbed, soil disturbance,
12 yes, yeah.
13 Q You'd agree with me that the North Shore Ranch
14 property has few or no trees and shrubs?
15 A Correct.
16 Q You'd agree with that?
17 A Yes.
18 Q And you'd agree with me that it contains many
19 nonnative plant species, at present?
20 A Yes.
21 Q Would you also agree with me that areas under
22 cultivation, such as the North Shore Ranch property,
23 tend to be monocultures and that vertical or horizontal
24 habitat diversity in these areas is characteristically
25 very low?

1 A Vertical/horizontal. What do you mean by
2 horizontal?
3 Q Have you not ever heard the term "horizontal
4 habitat diversity"?
5 A I can't recollect. No, I have not.
6 Q Have you ever heard the term "vertical habitat
7 diversity"?
8 A Structural habitat diversity. Which I'm
9 assuming height. And then are you -- define your
10 definition and then I can answer that question.
11 Q Well, I guess my question is, have you ever
12 heard those terms before?
13 A No, no. Structural diversity I've heard, but
14 not horizontal and vertical.
15 Q Fair enough.
16 Would you agree with me that the relationship
17 between habitat diversity and species richness, and by
18 that I mean number of species, is well described in the
19 ecological literature and has been for decades?
20 A Yes.
21 Q You'd degree with me, also, that as habitats
22 become more diverse, more species can be accommodated?
23 A To a degree, yes.
24 Q And would you agree with me that with the
25 possible exception of periods of avian migration,

1 wildlife species richness on the NS -- North Shore Ranch
2 property and on adjacent portions of the WPA is
3 relatively low?
4 A Yeah, no question. Spring and fall there's a
5 huge amount of diversity. And then there's a lull in
6 winter, obviously, and a lull in midsummer; correct.
7 Q Would you agree with me that the conversion of
8 ponderosa pine savannah hay and cropland has
9 substantially altered the plant and animal communities
10 of the Flathead Valley?
11 A Yes.
12 Q And you'd agree with me that many of the
13 wildlife species at the North Shore Ranch project and
14 adjacent areas are habitat generalists and have adapted
15 to human activities and disturbance?
16 A No.
17 Q Well, we know that this land has been
18 cultivated for many years; fair to say?
19 A Yes.
20 Q Would you agree with me that species that exist
21 in the vicinity of this property have, likely, adapted,
22 at least to those activities?
23 A Resident or migratory species?
24 Q Resident.
25 A Probably. I mean, I'm guessing here. I mean,

1 I don't have data -- local data for you. But I'm
2 guessing yeah.
3 Q And you'd agree with me, would you not, that
4 under Fish, Wildlife & Parks' game range data, nearly
5 all of the Flathead Valley is mapped as transitional
6 habitat for moose?
7 A Game range data. You mean the winter range
8 data?
9 Q Yes.
10 A At NRIS or which data?
11 Q In the Flathead Valley.
12 A No, no; but which data source are you talking
13 about, which map?
14 Q Well, let me ask you the question. Do you know
15 of any data, promulgated by FWP, that would stand for
16 the proposition that the Flathead Valley is, in fact, a
17 transitional habitat for moose?
18 A Yeah, we deal with wayward moose. We just
19 moved one out of the valley here a month ago and moved
20 it back into the mountains. They prefer the -- a moose
21 likes -- they like wetlands and ponds. And they'll
22 cross the valley. They'll -- we had one set up on a
23 pond north of here in the valley that -- you know, and
24 we moved into the mountains just because he was getting
25 a little too habituated to people; conflict. But they

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1 do prefer these marshland habitats. So the valley is
 2 moose -- historically, it was all moose habitat. But
 3 we've changed it such that the moose habitat probably
 4 varies, depending on where you're at. From their
 5 perspective, you know, they have the forage needs and
 6 the security needs.

7 Q Would you agree with me that the entire
 8 Flathead Valley is mapped as part of the general
 9 distribution of black bear habitat?

10 A Oh, absolutely. Even my yard right up the
 11 road. We can have black bears. If you've got berries
 12 or apples -- there's a lot of anthropogenic food sources
 13 that draw in bear.

14 Q Would you agree with me that preferred habitat
 15 for black bear does not occur on the North Shore Ranch
 16 or even on the WPA?

17 A Yeah, that would not be what I would call a
 18 critical black bear habitat in its own. For bears, the
 19 whole north shore complex, and I'm not referring to that
 20 property, it's a movement area. You can
 21 essentially -- as a human, it can get dark; right? And
 22 we go inside our homes. For animals, that's an activity
 23 period. And so, although the cover may not be there,
 24 that cover of darkness and if it's still agriculture,
 25 bears will use it, mountain lions will use it, large

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1 carnivores as a linkage area potentially. You've got
 2 Crane Mountain in Bigfork here, you've got Blacktail
 3 here (indicating). There's no doubt in my mind they're
 4 used because we pick up bears all the time in conflicts.
 5 We've even had grizzly bears out Fennon Slough, you
 6 know, with radios on and bombing around. But it's not
 7 an area where they're going to stay, except in August
 8 when the berries ripen up. There's an -- native
 9 berries; chokecherries, hawthorn, saskatoon can pull
 10 bears in. But in terms of -- yeah, the open ag field in
 11 broad daylight, that's not going to be an area, in my
 12 mind, that's preferred by either species of bear, you
 13 know, during the daylight. But they do move through,
 14 probably.

15 Q Would you agree with me there's no elk winter
 16 range or crucial winter range, summer range, or
 17 migration areas that have been identified in the valley
 18 bottom in the vicinity of the North Shore Ranch project?

19 A Not on the -- I would say this particular
 20 project in its area is not going to be an elk area
 21 unless there's a transitional elk move through. You're
 22 right here with the elk (indicating), with all these big
 23 game animals, except for mountain goats. There's
 24 definitely no mountain goats down there. There's
 25 definite not bighorn sheep and there's moose,

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1 white-tailed deer, probably not mule deer. But every
 2 now and again you get the movement issue. But in terms
 3 of foraging areas on a daily basis during the summer,
 4 no.

5 Q Would you agree with me that FWP has failed to
 6 map any mule deer winter range near the North Shore
 7 Ranch project or the WPA?

8 A Yeah, it would be transitional just moving
 9 through versus -- I'm guessing now. Because wildlife
 10 are funny. As soon as I say they're not going to use
 11 it, they'll show up some year. And where I say it's not
 12 important, all of a sudden it is which is why we tend to
 13 err on the side of caution. But the biggest there are
 14 going to be these avian species on the north shore
 15 property, not all these big game ones.

16 Q And white-tailed deer, they're year-round
 17 residents in Flathead Valley; true?

18 A True.

19 Q Have you ever personally observed or seen any
 20 specific data substantiating a contention that muskrat,
 21 beaver, mink, or river otter nest, breed or forage on
 22 the North Shore Ranch property?

23 A Not on the property. In the area, we've done a
 24 lot of work as part of the Kerr mitigation studies. And
 25 that was in that stack. I tried to put together a whole

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1 history there for you. One of those reports was a
 2 furbearer report. A lot of money and time went into
 3 otter, muskrat. Mink, I think, they looked at as well.

4 Q Would you agree with me that preferred habitat
 5 for those species does not occur on the North Shore
 6 Ranch land?

7 A Most of it. There's -- those wetland complexes
 8 on the south border, they probably forage mink,
 9 definitely. Probably even otter. Otter are up and down
 10 the north shore. And muskrats, definitely. Part of it,
 11 yes. The uplands that are dry, the wetland portions
 12 probably are used; personal opinion.

13 Q Would you agree with me that the north shore of
 14 Flathead Lake has never been demonstrated to support
 15 year-round beaver habitat?

16 A I don't know. I don't know, honestly, beaver.
 17 Yeah, I don't know.

18 Q Would you agree with me that river otter prefer
 19 waterways that have densely vegetated and undercut
 20 banks?

21 A In part, yes. They need water and they need
 22 fish, and shell fish; invertebrate foot, invertebrate
 23 fish. So they do -- I mean, we have people put in
 24 trophy fish ponds. They'll find them and people want
 25 them dead. So they're pretty good at finding fish. If

1 there's a wetland around, they'll find it and forage.
 2 But I think, yeah, their physical makeup is that they
 3 want to be near water or within some distance of water.
 4 Q And for brooding, it's true, is it not, that
 5 they seek out overhanging banks, in general?
 6 A I don't know, off the top of my head.
 7 Q Would you agree with me that ospreys are common
 8 in the Flathead Valley?
 9 A No. They're residents year-round, but depends
 10 on how you define common. They're here every year and
 11 migrate to South America. They come back literally
 12 within the same two or three days. That was another
 13 couple reports I put in that stack for you.
 14 Q Well, let me ask you this. Is the osprey a
 15 rare occurrence in the Flathead Valley?
 16 A Relative to the numbers of all the other birds,
 17 yes. You know, it's a relative game. You take robins
 18 versus osprey -- robins, they're declining potentially.
 19 Take -- what's it common -- even ravens versus osprey.
 20 It depends on how you define rare. If ospreys
 21 are -- the populations are stable, yes. Are they rare
 22 in terms of number, you know, relative to other species
 23 of birds, yeah, then ospreys and eagles, you see a lot
 24 fewer of those species relative to the numbers you'd
 25 find of other species. And they're more localized in

1 of many waterfowl species have a tendency to fluctuate,
 2 showing declines during periods of drought and increases
 3 during wet periods?
 4 A Yes.
 5 Q Would you also agree with me that one of the
 6 sources of mortality for waterfowl, obviously, includes
 7 hunting?
 8 A Yes.
 9 Q Now, you'd agree with me that Montana Fish,
 10 Wildlife & Parks classifies the northern pintail as a
 11 tier-3 species?
 12 A I know -- I don't know off the top of my head
 13 the tier or the ranking or protection. But I do know
 14 there's a species there's great interest now to look at
 15 for population reasons; pintail.
 16 Q Can you tell me what the difference between a
 17 tier-3 species and a tier-2 species is?
 18 A It's defined but I'd have to look it up. Off
 19 the top of my head, no, but it's in the comp plan that
 20 you have.
 21 Q How about a tier-1 species, in terms of a
 22 tier-3 species?
 23 A Well, yeah, but --
 24 Q Let me just get the question out.
 25 Let me ask it again.

1 their habitat association.
 2 Q Would you agree with me that little, if any,
 3 suitable nesting habitat for ospreys occurs on the North
 4 Shore Ranch property?
 5 A No, no. Because you could put a pole up there
 6 today, and there would probably be a nest on it
 7 tomorrow. That's habitat restoration work. And not
 8 having been on it, I'd have to go out and look. I
 9 assume the biologists have. If there's anything on
 10 there that's remotely high, you could potentially -- or
 11 might have an osprey nest. But I don't know, off the
 12 top of my head.
 13 Q And back in 2006 when you wrote your letter,
 14 did you have any knowledge as to whether or not there
 15 was naturally occurring osprey habitat on the North
 16 Shore Ranch --
 17 A No. I'd rely on the biologists to have that
 18 data, site-specific data, if they had it.
 19 Q Would you agree with me that, as a general
 20 proposition, wetland drainage and conversion of native
 21 grasslands to cropland, particularly in prairie
 22 habitats, are major contributors to the loss of
 23 waterfowl habitat?
 24 A Yes.
 25 Q Would you also agree with me that populations

1 Can you tell me the difference between a tier-1
 2 species and a tier-3 species?
 3 A In my mind, what I know, the closer you get
 4 to -- tier-1 is the number-one slate of species of
 5 concern, off the top of my head. The tier-2, 3, there's
 6 still interest. But there were rankings within the
 7 agency and the process where we'd focus our comp dollars
 8 on. And tier-1 was the number one tier. But it doesn't
 9 mean, you know, that a tier-3 is less important. It
 10 just was ranked by the criteria that we used when we
 11 wrote the plan, higher. That's my understanding.
 12 Q Okay.
 13 Now, although drought has been linked to low
 14 numbers in northern pintails, to your knowledge, has the
 15 loss of cultivated grain as a food source ever been
 16 linked to, or cited as, a cause of decline in the
 17 northern pintail?
 18 A Let me think. There's a lot of literature with
 19 pintails. Pintails are unique in that they utilize, in
 20 their migratory routes, which are significant, that's an
 21 important part of their life cycle, field feeding, and
 22 they like shallow water. And in particular, they'll use
 23 shallow water even on alfalfa. It doesn't have to be
 24 grain. They'll need the space. They're easily
 25 disturbed. They want -- the more space, the better.

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1 And shallow water, when that snow melts, in the
 2 spring -- we're talking about spring -- they're going to
 3 depend upon these areas where they can replenish
 4 nutrients and loaf. And so they use the lake,
 5 obviously, the lake. And there's thousands of birds out
 6 there in the spring. They'll loaf, and at night, you
 7 know, it's a safe place to go to sleep in some of these
 8 sloughs. But they use these fields extensively for
 9 invertebrates and for waste grains. And it's called
 10 field feeding. So a lot of folks look at open
 11 agriculture and say What value's that? And that's been
 12 documented in the literature. And you can Google it.
 13 Get on Google Scholar, use that one, and call up
 14 pintails and field feeding and you'll find pages and
 15 pages. It's common knowledge. But does that answer
 16 your question?
 17 Q No. Let me ask it again.
 18 To your knowledge, has the loss of cultivated
 19 grain as a food source ever been linked to, or cited as,
 20 a cause of decline in the northern pintail?
 21 A Oh, yeah, I don't know if it's -- that's a
 22 flyway issue at a population level. And at my job, I
 23 don't know.
 24 Q By the way, do you, as a wildlife biologist,
 25 subscribe to any scientific journals or periodicals?

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1 A Yeah; Journal of Wildlife Management, Wildlife
 2 Citing Bulletin which has now changed into The
 3 Wildlifer. And we have online access to -- you name it,
 4 there's zoological journals, conservation, yeah.
 5 Q But in terms of journals that you receive on a
 6 monthly or weekly basis --
 7 A The Wildlife Society Journals are what we get
 8 at the office here. And we have -- the department
 9 offers an online subscription. And actually, the staff
 10 actually can request from the state library, for free,
 11 any reprint, if a topic comes up or literature cited and
 12 the paper comes out in the journal and we don't have it.
 13 Let's say it's in Zoology Journal or American Midland
 14 Naturalist, some of these more obscure journals. We
 15 can -- I don't know; it's Ellen Bryson or someone in
 16 Helena. Send her an e-mail and she'll photocopy it and
 17 get it to you. So the biologists have access to a lot
 18 of information these days, obviously, with the Internet.
 19 Q You referred to Helena. Is that --
 20 A Headquarters.
 21 Q -- agency headquarters for FWP?
 22 A Correct, correct.
 23 Q And do you know, with respect to the North
 24 Shore Ranch project, whether or not any of the employees
 25 here in the Kalispell office actually spoke with

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1 headquarters about this project?
 2 A I have no idea.
 3 Q Did you?
 4 A Well, let me think. This project
 5 directly -- well, since then, yes. As soon as the
 6 attorneys got involved, yeah. North shore is an issue,
 7 and we're being deposed.
 8 Q During the pendency of this application, the
 9 '06, '07, '08 time period, up until its denial in
 10 approximately April of 2008, did you have any
 11 discussions with anybody at FWP headquarters about this
 12 application?
 13 A Not are that I remember specifically. Although
 14 we're always talking subdivisions as a group of managers
 15 around the state. A subdivision always comes up. And
 16 this was one of many.
 17 Q Do you have any knowledge as to whether or not
 18 anybody at headquarters, as you've described it, during
 19 the pendency of this application, had concerns with it?
 20 A I don't know, off the top of my head. Maybe,
 21 but I don't know. That's going a couple years back.
 22 Q Would you agree with me that waterfowl are not
 23 restricted to feeding in cultivated fields?
 24 A Yes.
 25 Q And would you agree with me that waterfowl are

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1 not restricted to feeding in cultivated fields that may
 2 lie near a body of water where they loaf?
 3 A Yes.
 4 Q Now, you don't have the opinion that the North
 5 Shore Ranch land provides goose nesting habitat, do you?
 6 Do you have that opinion?
 7 A I couldn't answer that, because it could.
 8 Geese -- well, it -- definitely, I depends. In its
 9 currently state?
 10 Q In its current state.
 11 A In its current state.
 12 Q Yes, sir.
 13 A It would be more on that southern border
 14 that -- and again, I haven't walked it, but you can see
 15 it from the highway -- where those berms are. And if
 16 it's elevated enough where -- and, frankly, the osprey
 17 nests that are close buy, if they're not on the place,
 18 they'll -- there were geese this spring in an osprey
 19 nest trying to bring up a brood. I'm not sure who won
 20 the battle. But potentially, geese, as long as there's
 21 marshes and wetlands, if there's a pair that wants to
 22 use it, they might try and bring up a brood. But on the
 23 agricultural soil that's bare, no, I would say, from my
 24 opinion.
 25 Q Would you agree with me that lesser scaup may

1 nest on dry or moist wet meadow zones, uplands of native
 2 prairie, hay fields, or even in shrub patches?
 3 A Probably. I don't know off the top of my head.
 4 Q And you'd agree with me that pintails typically
 5 nest in shallow, seasonal, or intermittent wetlands with
 6 low vegetation?
 7 A For nesting, yeah.
 8 Q To your knowledge, from 2006 to the spring of
 9 2008, did FWP have any data that would speak to the
 10 degree to which mallards or pintails may use waste grain
 11 in fields of the North Shore Ranch project?
 12 A FWP, no. We rely on the literature for all
 13 those concepts. They're a little broader in scope for
 14 life histories and ecology on all those waterfowl
 15 species.
 16 Q I'm sorry; go ahead.
 17 A The service does conduct surveys of the lake
 18 from the air, actual specific north shore population
 19 flights, the federal government. But we don't do that.
 20 Q Would you agree with me that in western
 21 Montana, the northern pintail is a bird that can be
 22 hunted during hunting season?
 23 A Correct. The bag limit varies based on
 24 concern, but yes.
 25 Q And would you agree with me that, in a general

1 North American ducks, geese, and swan, but that neither
 2 Flathead Lake nor the WPA are identified as areas of
 3 significance?
 4 A I'm not aware. I would say the Pacific flyway,
 5 and especially this Intermountain valley are an area of
 6 concern, or have been. I've read or heard about it in
 7 the last ten years. But I have not read the plan in
 8 over ten years. And then it was only certain chapters.
 9 Q Have you ever seen a long-billed curlew in the
 10 vicinity of the North Shore Ranch project?
 11 A Curlew. We have them in the valley. I'm
 12 trying to think. It would just be from my vehicle
 13 because it's just driving by. Never been on the
 14 property. No.
 15 Q Have you ever seen a black tern in the vicinity
 16 of the North Shore Ranch project?
 17 A No, no. That is a species in the comp plan.
 18 It's a tiered species, though.
 19 Q Have ever seen either of those species,
 20 yourself, in the last ten years in the vicinity of
 21 Flathead Lake?
 22 A Within 60 miles.
 23 Q How about within ten miles?
 24 A No. I'm just driving by. I just drive by. So
 25 anything I'd see is at 60 miles an hour looking out my

1 sense, hunting of the northern pintail would have an
 2 adverse impact on that species of bird?
 3 A No.
 4 Q Would you agree with me that diving ducks that
 5 may congregate on Flathead Lake are more likely to be
 6 disturbed or displaced by boats on the lake and
 7 waterfowl hunting than they would be by a subdivision
 8 about half a mile inland?
 9 A I don't know. That's a tough one. It's a
 10 displacement issue, and a permanent footprint of 300
 11 homes on an area, again, versus a boat on maybe a daily
 12 or two-day disturbance. Versus once the neighborhood's
 13 there, it's there forever.
 14 Q Would you agree with me that diving ducks on
 15 Flathead Lake would generally rely upon depths that are
 16 40 to 60 feet?
 17 A I don't know.
 18 Q Are you familiar with the North American
 19 Waterfowl Management Plan?
 20 A I know of it, and I read it years ago. But I
 21 have not peeked at it in over ten years. But I know
 22 it's a flyway priority to have those plans. That's the
 23 extent of my knowledge.
 24 Q Having reviewed it, are you aware of the fact
 25 that it identifies areas of continental significance to

1 window.
 2 Q Have you ever seen an upland sandpiper in the
 3 vicinity of the North Shore Ranch project?
 4 A No, not personally.
 5 Q You ever seen a solitary sandpiper in the
 6 vicinity of the project?
 7 A No.
 8 Q How about a black-necked stilt?
 9 A No.
 10 Q How about a western sandpiper?
 11 A No.
 12 Q How about a short-billed dowitcher?
 13 A No.
 14 Q Wilson's phalarope?
 15 A No.
 16 Q Marbled godwit?
 17 A No.
 18 Q Willet?
 19 A They're hard to tell. The shorebirds get tough
 20 to ID. Shorebirds, as you drive by, yeah, you see them
 21 out there in the fields. But IDing them specifically,
 22 me, no.
 23 Q Ever seen a stilt sandpiper in the vicinity of
 24 the project?
 25 A No.

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1 Q Have you ever seen any of those species in the
2 last ten years?
3 A Yes.
4 Q Where?
5 A Like I mentioned before, earlier in the
6 deposition, at Ninepipe we own 400 of pothole wetlands,
7 an incredible pothole complex. It's a different kind
8 of -- it's when the glaciers melt, the ice chunks melt
9 last and they leave a bunch of potholes. And you drive
10 through between Ronan, and before you go down the
11 glacial moraine into St. Ignatius, that spot there is
12 full of birds there as well, in a concentrated area.
13 Q And that's a waterfowl production area?
14 A No, that's a wildlife management area.
15 Q Wildlife management.
16 A And it's a federal wildlife refuge.
17 Q Kicking Horse; right?
18 A And that's tribal wildlife land.
19 Q Okay. So there's three different interests
20 there? Is that federal, state --
21 A Federal, state and tribal.
22 Q -- and tribal?
23 A I'm trying to think if there's a fourth.
24 Federal, state and tribal complex, primarily.
25 Q And do you know, in a general sense, how many

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1 acres conglomerating all of those interests?
2 A No, no.
3 Q But FWP owns 4,000?
4 A Four. We're just under four.
5 Q Is it on one side or the other of route 93?
6 A Both.
7 Q Would it be fair to say that route 93
8 bifurcates the land there?
9 A Yeah, that's an issue right now with the
10 transportation. We're working through the SCIS and
11 impacts right there.
12 Q And in your opinion, does the fact that that
13 highway goes right through the FWP property there have
14 any adverse impact on waterfowl or waterfowl habitat?
15 A Well, there's direct mortality from road kill.
16 So the tribal wildlife program is working really hard to
17 mitigate those impacts. The problem is with birds and
18 cars, it can be difficult, if there's wetlands right
19 where the highway crosses the pond. And that tends to
20 be the issue. And there's a couple ponds down there.
21 Q And aside from direct mortality from impacts
22 with vehicles, do you have an opinion as to whether or
23 not that highway that bifurcates that 4,000 acres owned
24 by FWP at Ninepipe has an adverse impact on wildlife or
25 wildlife habitat?

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1 A Yeah. The tribal -- again, we don't take the
2 lead on wildlife management within the exterior
3 boundaries of the Flathead Reservation. The tribal
4 program does. And I know the tribal program and the
5 wildlife program has very strong feelings and direction
6 to deal with the highway and the impacts on wildlife
7 from Evaro hill all the way to Polson. And Ninepipe's
8 included in that. So they're very concerned culturally,
9 as well as biologically. And locally, we pretty much do
10 habitat restoration management down there and provide
11 that hunting-related access.
12 Q When FWP acquired those 4,000 acres, did the
13 highway already exist?
14 A Yes. I think the highway's been there a long
15 time.
16 Q Okay. So obviously, when FWP purchased that
17 land, those 4,000 acres, it had knowledge of the
18 existence of the highway.
19 A Of the highway correct; correct, yeah.
20 Q I'd suggest to you that Flathead Audubon
21 Society has listed the willet, the upland sandpiper, the
22 marbled godwit, and the short-billed dowitcher as
23 transient and rare in the Flathead Basin. Would you
24 agree with that characterization?
25 A Yeah, I assume so. They're more -- their

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1 expertise is greater than mine when it comes to birds.
2 And I assume the biologists work with them closely.
3 Q Do you agree that these birds that I've
4 identified do not breed in the Flathead Basin, occur in
5 low numbers there, and may not occur every year?
6 A I don't know; I'd have to look it up.
7 Q Are you aware that a query of the Montana Bird
8 Distribution database yields no current records of
9 upland sandpiper or short-billed dowitcher in the
10 vicinity of Flathead Lake?
11 A I'm not aware of it, but it doesn't surprise
12 me. I mean, to predict a species, you know, we talked
13 about this earlier. The potential to occur versus does
14 occur, is the data or all the observations for a species
15 that may be there, have they been reported to that
16 database? Database has some weaknesses. It's getting
17 better, but it has some weaknesses.
18 Q Would you agree with me that the primary
19 migration route for the stilt sandpiper is eastern
20 Montana?
21 A I don't know.
22 Q Are you familiar with the Intermountain
23 Shorebird Conservation Plan?
24 A I've heard of it. But at my level, I don't
25 deal with those plans.

1 Q Do you have a general understanding that it
2 fails to list the WPA or the north shore of Flathead
3 Lake as an important site in western Montana?
4 A I don't know.
5 Q Are you familiar with the Intermountain
6 Waterbird Conservation Plan?
7 A No, not off the top of my head.
8 Q Are you aware that the Montana Audubon Society
9 lists approximately 40 important bird areas for Montana
10 but that the Flathead waterfowl production area is not
11 identified as one?
12 A I've heard of the IBAs, but I don't know if the
13 Flathead is or not, to be honest with you.
14 Q Would you agree with me that migratory birds,
15 using the mudflats at low water during the spring of the
16 year on Flathead Lake, would be unlikely to be affected
17 by the North Shore Ranch project due to the substantial
18 distance between the project and the mudflats?
19 A No, because that permanent footprint, people
20 tend to trespass, dogs, people. It's a
21 people-management issue then and what the displacement
22 is. Right now there's not 300 homes, whatever the
23 proposal was plus -- I don't know -- what's the average
24 family in a home; three, four, times -- that's a
25 thousand people in that area. You're probably going to

1 eventually, there's no doubt in my mind that that will
2 be quantified better.
3 Q But it hasn't been yet?
4 A I don't know. I mean, it could be, but I'm not
5 aware of it.
6 Q With regard to that inquiry, would it be fair
7 to assume that reasonably competent wildlife biologists
8 could have different opinions?
9 A Oh, we have internal debate all the time. The
10 scientific process is internal debate. We're one of the
11 few fields that challenges each other, besides yours,
12 yours and mine. We're very similar that way. For
13 birds, it's very difficult to quantify that cause and
14 effect with birds. With big game it's easy. There's
15 been lots of literature. You get on Google Scholar.
16 That's the easiest way for you to check. There's lots
17 of literature out there on big game and subdivisions and
18 displacement. But birds become -- when you get to
19 behavioral issues with individual species, and there's a
20 lot of different species, then the questions arise.
21 It's more difficult to quantify what you're looking for,
22 other than, you know, professional opinion.
23 Q Now, you and I discussed earlier the fact that
24 some waterbirds and shorebirds, in fact, migrate through
25 the Flathead Valley during the fall; true?

1 have impacts.
2 Q So you assume that there would be impacts.
3 A Yes, I would.
4 Q And assuming that people and their pets don't
5 trespass on the mudflats, would you still be of that
6 opinion?
7 A Not as much. But the unknown is that, again,
8 the activity of that structural component, is that
9 enough to displace those species that behaviorally don't
10 tolerate that activity that isn't there now? That's
11 unknown but would be a concern.
12 Q Is it your testimony that migratory birds would
13 not use the mudflats if a residential subdivision
14 existed a half a mile away?
15 A I don't know; unknown. It would be a concern,
16 but I don't know.
17 Q Is there any data or scientific treatise or
18 journal that you could consult to get an answer to that
19 question?
20 A To my knowledge, no. It's what we talked about
21 earlier, kind of a long-term experience looking at
22 before and after subdivisions and, in your words,
23 subjective. But nonetheless, it's a career's worth of
24 accumulation of kind of cause and effect. Yeah -- so
25 but data -- there's work being done right now. And

1 A Correct, yeah, coming home to the Pacific,
2 yeah.
3 Q And some of these species would include the
4 common loon, the American bittern, the great blue heron;
5 fair to say?
6 A Fair, yes.
7 Q And these species -- these avian species that
8 do migrate through the Flathead Valley during the fall,
9 would it be fair to conclude that they would be likely
10 to be disturbed or displaced from their preferred
11 foraging areas by waterfowl hunting?
12 A Again, temporarily, that's definitely a
13 possibility. It's a spatial-temporal issue.
14 Q Uh-huh.
15 A And again, relative to our discussion, that may
16 be an hour, a day, or two days, you know, versus forever
17 with that other potential impact. So yeah, it's a
18 spatial-temporal issue, from my perspective.
19 Q Do you have a general understanding, in the
20 general sense, during hunting season, waterfowl hunting
21 season, how often the WPA is used for hunting?
22 A Probably daily.
23 Q Would you agree with me that Montana species of
24 concern do not have protected status on private lands?
25 A Montana, the way -- and I'm sure you're aware

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1 of this. Wildlife is managed as a public trust. So as
 2 a private property owner, you have the right to deny
 3 access for any recreational use. It's your private
 4 property, it's your right as a property owner. However,
 5 the wildlife is not owned by the property owner. It's
 6 owned by the state in a trust. And that's part of that
 7 whole model of conservation we have in Montana and many
 8 western states -- actually, many states in this country.
 9 I think Texas is the only one that's a little bit
 10 different.

11 Q And I guess my question is, species of concern
 12 that exist on private property, do you have an
 13 understanding as to whether or not they have protected
 14 status?

15 A If it's a species of concern, it's a species of
 16 concern, regardless of land ownership they occur on.
 17 But we're not in a regulatory role there; the federal
 18 government is. But that -- this ranking, it doesn't
 19 matter where they live, that's their ranking. But we're
 20 not in a regulatory role there.

21 Q Would you agree with me that special status
 22 species include those listed as threatened or endangered
 23 under the Endangered Species Act of 1973?

24 A In many cases, yeah. I couldn't, off the top
 25 of my head, rattle off the list and match them up

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1 between ours and, you know, the comp plan, for instance,
 2 that we work under and the federal ESA. I'm assuming
 3 they're probably pretty close. Ours goes beyond their
 4 list; I do know that.

5 Q Uh-huh. It's true, is it not, that the term
 6 "critical habitat" receives -- strike the question.
 7 It's true, is it not, that the term "critical
 8 habitat" is a term that's used in the Endangered Species
 9 Act?

10 MS. JAKES DOCKTER: Objection; asked and
 11 answered.

12 Q (By Mr. Perry) You can answer.

13 A I assume so. I mean, I'm not an ESA expert;
 14 never have been. I'm not the federal government.
 15 I need to pee real quick; is that okay?

16 MR. PERRY: Sure.

17 (Deposition in recess from 12:03 p.m. to
 18 12:05 p.m.)

19 Q (By Mr. Perry) Now, sir, it's true, is it
 20 not, that at least within the context of the Endangered
 21 Species Act, there are four threatened species that are
 22 known or likely to occur in Flathead County. Are you
 23 aware of that?

24 A Off the top of my head, grizzly bear, wolves
 25 are delisted, eagles are delisted, lynx. Let's see,

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1 what are the others? Help me out. I'm aware there's
 2 listed species. But off the top of my head -- grizzly
 3 bear, lynx, bald eagles and wolves were. They've been
 4 removed. What are the other two?

5 Q Spalding's campion?

6 A Blanking on that one.

7 Q Bull trout.

8 A Yeah, it's a fish.

9 Q None of these species are found in the North
 10 Shore Ranch property, are they?

11 A Bull trout are right there in the north shore
 12 of the lake. I know there in the Flathead Lake and
 13 that's a huge species of concern for the fish crew and
 14 the tribes.

15 Q On this lake?

16 A No. The only animal that could be, and I
 17 talked about it before, and you've got the record there,
 18 is grizzly bears. I've literally flown in a plane and
 19 located a grizzly right here, here, (indicating)
 20 just -- they move through.

21 Q And you are referring to Exhibit 14.

22 A Correct, yeah.

23 Q And you're referring to the Flathead River
 24 area?

25 A River and the sloughs just north of the

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1 highway, within about two miles of the property. So
 2 who's to say? It depends on your level of intensity of
 3 monitoring. This bear, believe it or not, we marked way
 4 down in the Swan Valley. And all of a sudden in August
 5 the berries became ripe, here he is, feeding, foraging.
 6 Well, and then other bears we picked up and caught in
 7 conflict. So it turns out there's a seasonal component
 8 where grizzly bears -- you're speaking of a delisted
 9 species here -- actually use the valley bottom.

10 Q Uh-huh.

11 A And when it gets dark -- we had an Argos collar
 12 on this bear -- they'll cross this farm ground. And
 13 they use them because -- they travel around in this
 14 space. And darkness is kind of the cover, and they
 15 localize in the valley. So that would be probably the
 16 one species that could potentially meander through there
 17 in the dark as a year-round foraging habitat when the
 18 other dens, no. But I can't say that they're not on the
 19 property.

20 Q Has FWP ever documented their existence on the
 21 North Shore Ranch property or the WPA?

22 A I don't know about the WPA; maybe on this end.
 23 But definitely within three miles or two miles. I think
 24 we had a radio right here (indicating).

25 Q That's not my question, though. My question --

1 A Not on the property. And I don't know about
2 the WPA.

3 Q Okay. Now, you'd agree with me that the Canada
4 lynx, in terms of habitat, relies upon boreal forest?

5 A That's preferred habitat, yes.

6 Q That's not existent in the vicinity of the WPA
7 or the North Shore Ranch; right?

8 A No. Lack of forest would being transitional
9 use moving through from maybe the Salish to the Swan if
10 they ever did. But I'm not aware of them occurring on
11 the property specifically.

12 Q To your knowledge, is there any data in the
13 possession of FWP that you've ever seen that would
14 establish that any species protected under the
15 Endangered Species Act has been found on the WPA?

16 A Well, yeah. Bald eagles, when they were
17 listed, were there all along. Bald eagles and bull
18 trout are right in the water there. And that's two of
19 the species. Grizzly bears, the guys might have picked
20 them up there or not. I'll have to ask them. Because
21 we deal with conflicts all the time when people call.
22 You'd be surprised where grizzly bears show up. So
23 grizzly bears maybe.

24 Q And the bald eagle was delisted as an
25 endangered species under the Endangered Species Act back

1 large diameter trees on the North Shore Ranch property,
2 in and of itself, would serve to discourage nesting
3 there?

4 A For what species?

5 Q For bald eagle.

6 A Yeah. They need a tree, you know, of a certain
7 height where they feel comfortable enough probably
8 bringing off their brood. And what's on the property
9 and when's right off, I can't tell you off the top of my
10 head. We'd have to run down there and look.

11 Q Would you agree with me that primary loafing
12 areas for bald eagles would be along the Flathead River?

13 A No. The lake, also, is an important area for
14 foraging or --

15 Q Loafing.

16 A -- loafing. And you describe loafing as just
17 resting and in the trees?

18 Q As you previously used it in your testimony.

19 A That was for waterfowl, in my reference, not
20 eagles.

21 Q Okay.

22 A For eagles, it would -- I mean, there's a tree
23 complex down here they loaf in, too. We find them and
24 see them all the time. So they use both areas. But the
25 river's a real key spot for eagles as well; very

1 in 2007; right?

2 A Right off the top of my head I don't recall the
3 date, but they're delisted.

4 Q And it's true, is it not, that no critical
5 wildlife habitat -- or critical habitat, rather, for
6 grizzly bears has ever been established under the ESA?

7 A I don't know about critical habitat. We
8 have -- there's been lots of court cases on road density
9 standards and core habitat in grizzly bear ranges. But
10 I don't know -- I assume not. A line hasn't been drawn
11 other than the recovery areas, under ESA.

12 Q You'd agree with me that your agency never
13 documented the existence of a bald eagle nest on the
14 North Shore Ranch property.

15 A I'm assuming no. There's one somewhere right
16 down here (indicating). I don't know where it is.
17 But -- and I can't tell you off the top of my head
18 either if it was on or off. Gael would know, I'm sure,
19 and would be the one to ask.

20 Q Would you agree with me that there are bald
21 eagle nests in the Flathead Valley that are active and
22 from which young have been fledged that have residential
23 development within their primary use areas?

24 A Yes. And -- yes.

25 Q Would you agree with me that the absence of

1 important habitat. It's one of the other focus areas.

2 Q Would you agree with me that the WPA would not
3 offer suitable nesting habitat for trumpeter swans due
4 to the low water levels in late April and early May when
5 they would initiate nesting?

6 A That I don't know. And the reason I say that
7 is we're still learning about trumpeter swan ecology.
8 As it happens, we have a pretty intensive monitoring
9 program -- when I say "we," the Confederated Salish and
10 Kootenai Tribes -- on the south end of the lake in the
11 Mission Valley. And we're learning, as we speak, more
12 about this swan ecology and how they're cygnets are
13 raised, the type of habitats the cygnets use. And so I
14 couldn't answer that question yet. In a couple more
15 years, Dale Becker -- the tribal wildlife program has a
16 very sophisticated trumpeter swan monitoring program and
17 augmentation program in the Mission Valley. So we're
18 still learning. So I don't know. Maybe, but maybe not.

19 Q Will you agree with me that there's no black
20 tern habitat on the North Shore Ranch property?

21 A No. Black terns -- the marsh stuff -- this
22 southern piece right in here on Exhibit 14 on the
23 boundary where there's wetlands adjoining WPA, they
24 could potentially use that (indicating). I don't know
25 if they're there, but that's potentially an area they

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1 could use.
 2 Q Would you agree with me that the bobolink is a
 3 rare breeder in Flathead Valley?
 4 A Shows up in here as present. And beyond that,
 5 I don't know. I --
 6 Q I'm sorry; go ahead.
 7 A I just wanted to see Jim Satterfield's face
 8 when you asked him about a bobolink.
 9 Q Are you aware that the Flathead Audubon Society
 10 lists the bobolink as uncommon in the Flathead Basin?
 11 A No, I'm not aware.
 12 Q Would you agree with me that the habitat for
 13 the western toad does not occur on the North Shore Ranch
 14 property?
 15 A That I don't know.
 16 Q Do you consider yourself to be an expert in
 17 herpetology?
 18 A No, but I loved them as a kid.
 19 Q Didn't we all.
 20 Do you consider yourself and expert on avian
 21 species?
 22 A Not an expert but relatively knowledgeable. My
 23 whole career has been dealing with, you know, all these
 24 species.
 25 Q Do your consider yourself to be an expert on

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1 ungulates?
 2 A Very knowledgeable.
 3 Q Not an expert?
 4 A How do you define "expert"?
 5 Q As the term is commonly understood; your
 6 knowledge?
 7 A I'm very knowledgeable about ungulates as well
 8 as waterfowl, in my mind. I'm pretty proud of it. I
 9 mean, that's my whole career. That's what I do for a
 10 living.
 11 Q Fair enough.
 12 Have you ever seen a long-toed salamander in
 13 northwest Montana?
 14 A I have seen salamanders in ephemeral ponds on
 15 the roads. What type they are, I'm not sure, because I
 16 had other biologists with me that were nongame oriented.
 17 But I've held them in my hand. I probably -- they were
 18 about this big (indicating). And I can't recall the
 19 name of them. But that was right over in the Hungry
 20 Horse area.
 21 Q Would you recognize a long-toed salamander and
 22 be able to distinguish it from another species of
 23 salamander?
 24 A Sure, if I pull out my field guide when I go
 25 out in the field. It's pretty simple. But off the top

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1 of my head, I'd know it was a salamander, and then I'd
 2 narrow it down in my mind to Okay, what do we have here?
 3 There's not too many Coeur d'Alene salamanders.
 4 Q What do it looks like, a long-toed salamander?
 5 A All salamanders -- the one I had in my hand, if
 6 it was a long-toed, and that's what I don't know -- are
 7 relatively small. They're not like the salamanders you
 8 find in other parts of the country that are very large.
 9 It was pretty small and it was dark. It was black with
 10 some -- I want to say yellow on it. But I don't know
 11 what -- it was a salamander. And that's all I can tell
 12 you.
 13 Q Yellow stripes, polka dots, what type of
 14 yellow?
 15 A I don't remember. I just remember yellow. And
 16 I remember on black. But it was neat. And there was
 17 lots of them in these ephemeral ponds just over the Swan
 18 range. It was a long time ago.
 19 Q Have you ever seen any salamander in the
 20 vicinity of the north shore of Flathead Lake?
 21 A No, no, no, haven't looked.
 22 Q Have you ever seen a Pacific tree frog in the
 23 north shore of Flathead Lake?
 24 A No.
 25 Q How about a Columbia spotted frog?

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1 A No.
 2 Q How about a northern leopard frog?
 3 A Well, those occur not on this property.
 4 Q Have you seen them is my question? Have you
 5 ever seen one?
 6 A No, just photos of them taken here.
 7 Q Would you agree with me that human activity on
 8 the trails in the WPA, during the times that it's open
 9 for public access, can, itself, affect use of that area
 10 by wildlife?
 11 A Temporarily, yes.
 12 Q You'd agree with me that migratory waterfowl
 13 that may feed on grain fields presently on the North
 14 Shore Ranch property are really feeding on an artificial
 15 food source?
 16 A No; insects aren't artificial.
 17 Q In terms of utilizing the grains.
 18 A Oh, yeah. There's a lot of invertebrate
 19 components in these fields too. And it depends on the
 20 time of year. In the fall, there's probably more of an
 21 invertebrate component than the spring. Those are all
 22 native invertebrates and they're not artificial. But
 23 there's also the grain, and there's also the vegetation
 24 component which, yeah, obviously if it's not native
 25 Palouse prairie that was here in 1800, they're deriving

1 a substantial benefit from something that's there right
 2 now.
 3 Q That's my question.
 4 A Oh, yeah, yeah; correct.
 5 Q We discussed earlier the northern pintails.
 6 And they eat grain, obviously. To the extent that they
 7 eat grain, they're relying upon an artificial food
 8 source that's not native?
 9 A For the vegetation, yeah; for the
 10 invertebrates, maybe no. Invertebrates are native.
 11 Q And before there was agricultural development
 12 on the North Shore Ranch property in the Flathead Valley
 13 in general, obviously any migratory birds or locally
 14 present waterfowl would have had to forage on naturally
 15 occurring foods in the Flathead Valley?
 16 A Yeah. There's no nonnative species before we
 17 got here, assuming preColumbian, pretribal? Yeah, I'm
 18 assuming that as well, you know.
 19 Q Would you agree with me that how residential
 20 development may affect a wildlife community is, itself,
 21 a complex inquiry and depends on a variety of factors?
 22 A Yes.
 23 Q Are you aware that the United States Fish and
 24 Wildlife Service has, itself, noted that much of the
 25 wildlife associated with the WPA that abuts the North

1 Q And it's true, is it not, that Eagle Bend golf
 2 course directly abuts the WPA?
 3 A Correct.
 4 Q And it's true, is it not, that in that
 5 vicinity, the direct vicinity of the golf course itself,
 6 is a substantial residential community?
 7 A Correct.
 8 Q Would you agree with me that as the population
 9 of Flathead County continues to increase, there's likely
 10 to be increased demand for recreation and recreational
 11 use of the WPA as well as the Miller property you and I
 12 discussed earlier today?
 13 A Absolutely.
 14 Q To your knowledge, have there been any
 15 incidents of harm from hunting on the WPA, with respect
 16 to the golf course that abuts it?
 17 A I don't know. The wardens deal with those.
 18 Q Do you have any knowledge?
 19 A I don't, you know.
 20 Q And if somebody had been hurt in the vicinity
 21 of the WPA on the golf course by, say, someone hunting
 22 with a rifle, would it be fair to assume that you
 23 probably would have heard about it?
 24 A Yeah, yeah. What we don't hear about are, you
 25 know, are the smaller incidents. Some people see a

1 Shore Ranch property has adapted to noise and human
 2 disturbance?
 3 A I am not aware of that being written down, but
 4 it -- habituation is always possible for some species
 5 more than others. It depends on their own behavioral
 6 characteristics.
 7 Q Are you aware that vehicular traffic, in and of
 8 itself, has been shown to reduce breeding bird density?
 9 A Not off the top of my head, no. But it
 10 wouldn't surprise me if it did, depending upon the
 11 species. And there's diving ducks, there's puddle
 12 ducks. There's nest parasites. There's lots of
 13 differences in the ecology. Depends on the species
 14 you're talking about.
 15 Q Would you agree with me that substantial
 16 residential development has already occurred north of
 17 Highway 82 in the vicinities of Somers and Bigfork?
 18 A Yes. However, there's a large component that
 19 we've worked with with conservation outcomes with
 20 landowners for a real beneficial outcomes for
 21 conservation easements on these critical sloughs. So
 22 yes, there's some developments that have occurred, and
 23 some of this them are pretty significant. But there's
 24 also a lot of conservation that's occurred up and down
 25 the river from Kalispell south as well.

1 hunter and just don't like seeing someone with a
 2 firearm, especially if they're from out of state or from
 3 a nonhunting state where it's part of the culture here.
 4 A bunch of guys with guns is unsettling to some folks.
 5 So we have those incidents, you know. But I would
 6 guess, yes, that I would have heard about it, if someone
 7 was shot from a duck hunter down there in Eagle Bend.
 8 Q Now, concerns expressed by your agency with
 9 respect to this project and potential adverse impacts
 10 posed by pets, you've read the letters; right?
 11 A Tom and Gael primarily, yeah, I mean, to the
 12 extent that it's in here.
 13 Q Now trespass on the WPA by pets or by humans on
 14 the North Shore Ranch property, that presupposes a
 15 violation of law, does it not?
 16 A Yeah. Yes, because in our experience -- based
 17 on our experience, is that we have residential pet and
 18 subdivision -- in fact, one of the most glaring
 19 examples -- I mentioned I worked on white-tailed deer
 20 for twelve years west of town, telemetry. Hundreds of
 21 thousands of dollars spent on that research. And this
 22 is working with the county too and the number of septic
 23 permits. There's a direct correlation, if I remember,
 24 between the number of septic permits and the number of
 25 dogs, you know, assumed for family household. And we

1 had a remote camera system monitoring set up for
2 populations of deer on the winter range on Kuhns and
3 Bowser. The first picture would be a deer. Second
4 picture would be dog number one. Third -- these were
5 remote cameras. It was amazing the amount of people, in
6 our experience, cannot control their pets. They violate
7 that all the time. So, yes, we presuppose that there
8 will be violation, you're right, based on our experience
9 in other areas. And probably, if you ask the wardens
10 down on the north shore, you know, they enforcement them
11 and folks have to respond to the trespass, during the
12 closure.

13 Q Do you have any pets?

14 A Yes.

15 Q Do you have a dog?

16 A Yes.

17 Q More than one?

18 A No.

19 Q Do you have a cat?

20 A No.

21 Q Do you let your dog roam wild?

22 A Within the confines of a chain link fence.

23 Q So you properly control your dog, do you not?

24 A I do.

25 Q And there are others like you in the Flathead

1 Valley, are there not?

2 A I hope so.

3 Q Fair to assume there are?

4 A Of course.

5 Q It would be speculative to assume that all the
6 people who might live in the North Shore Ranch
7 subdivision are going to be law breakers.

8 A Absolutely speculative. But, like I said, just
9 based on our experience, there's probably an impact,
10 so -- otherwise, we wouldn't bring it up. But we've had
11 experience with violations of closures on wildlife
12 management areas and that WPA. In fact, I think there
13 might have been some violations this spring. You'd have
14 to ask the wardens. They deal with all the responses; I
15 don't.

16 Q You'd agree with me that Fish Wildlife
17 Service -- US Fish Wildlife Service already has problems
18 with regard to illegal trespass by humans on the WPA?

19 A Yeah, yeah, probably. I'm assuming, from what
20 I've heard, yeah.

21 Q And you'd agree with me that, insofar as the
22 United States government owns that land, it needs to do
23 whatever it needs to do to curtail trespass on its own
24 property.

25 A We work with them too. We're a partner. There

1 are enforcement staff. I know we can respond as well.

2 But yeah, that their role, it's --

3 Q Obligation; right?

4 A -- their land. They own it in fee title, Fish
5 Wildlife Service.

6 Q In reading all of the letters from your agency
7 and from other agencies, including Fish Wildlife
8 Service, it appears that many, if not all, of the
9 concerns that both of the agencies have raised, really
10 have more to do with cumulative impacts of development
11 in the vicinity of Flathead Lake than they do with this
12 particular project. Is that fair to say?

13 A No; it's both. I've said all along to Keith
14 and to Sean, it's like a beautiful neighborhood to live
15 in. But from a biological point of view, and the issues
16 we've talked about today, it's just in the wrong spot.
17 They did a fantastic job, technologically, laying out a
18 livable neighborhood. It's just in a sensitive area.
19 So that site, as well as -- you're absolutely correct.
20 There's a huge issue that -- and cumulative impacts.
21 And that's a difficult one to wrap your hands around
22 too.

23 Q Let me ask you a question. Do you think it's
24 fair to place that problem on the doorstep of this
25 applicant, insofar as your concerns with cumulative

1 impacts have, to a large extent, to do with other
2 subdivisions that were previously approved with which
3 these applicants had no involvement?

4 A That's a great question. We get lots of
5 applications for subdivisions, some of which I look, I
6 don't give them more than a thought if they're not in a
7 sensitive area. This one is. It showed up. And so all
8 of a sudden it's on our radar screen, environmentally,
9 for all the issues we've discussed. So while it might
10 not be fair to Keith and Sean, whomever owns it, it
11 showed up in an area that we're concerned about in terms
12 of potential impacts for everything we've discussed. So
13 yeah, it's unfortunate and regrettable. But we're not a
14 regulator. We just assess impacts. And that showed up
15 on our radar screen for that reason, as they do on this
16 slough complex, too, to some degree.

17 Because we've worked with a lot of landowners
18 that have approached us before the subdivision phase
19 about, you know, easements or acquiring land. And where
20 we could, we've tried to work with them to make a
21 win-win.

22 Q Did your agency try to work with these -- this
23 applicant to have a "win-win," as you've described?

24 A Prior to right now, I don't think we were aware
25 of it until the county showed up with a platted

1 subdivision. We weren't approached by the developers,
2 to my knowledge. I do know that Gael, right now, is
3 actively trying to work on a conservation solution with
4 them. But then, I think we first were aware of it when
5 it came from the county or the development -- the plan,
6 was in place. The wheels were rolling.

7 Q Would you agree with me that wildlife habitat
8 in the Flathead Valley was already highly fragmented due
9 to agriculture, residential development, and road
10 networks before this applicant was ever filed?

11 A It's a relative statement. I would agree with
12 that statement that it's fragmented. But I would also
13 state, for the record, that there's some critical and
14 important wildlife habitats in this valley that are not
15 subdivided and platted that offer more solutions for
16 water quality fish and wildlife, in particular, the
17 other areas on the north shore. In fact, the
18 river-to-slough complex has some pretty critical places
19 for wildlife values. So yeah, it's fragmented, and it's
20 subdivided in many cases. But there's also some pretty
21 valuable habitats left in terms of wildlife.

22 Q In your opinion as a wildlife biologist, can a
23 biologist express an opinion, an objective, scientific
24 opinion, on potential impacts on wildlife or wildlife
25 habitats posed by a particular subdivision application,

1 review this multitude of subdivision proposals coming
2 in. And again, we get lots of them. And we try and
3 focus our energy, because we're paid for by sportsmen's
4 dollars, on where the impacts are most significant, both
5 on recreation and wildlife and fisheries. So it's a
6 balancing act for that individual biologist, but they
7 truly are advocates for conservation. I'll make no
8 bones about it there, and access. Access is very big in
9 this state. And they can separate those projects, to
10 the degree that it's possible. But the reality is, when
11 you're dealing with one property owner, you're dealing
12 with one property owner. And depending upon what his or
13 her interests are on any given project, the direction of
14 that line of communication can go different ways. If
15 it's just a subdivision and there's no interest in doing
16 anything else, well, then, we'll focus on that. If
17 there's an interest or possible other outcomes, we'll
18 definitely make that landowner or property owner aware
19 of them.

20 Plum Creek, Gael, for instance -- and you
21 deposed Gael -- has worked phenomenally. She's probably
22 the leader in the State of Montana, and I'd argue the
23 west, in working with private property owners with
24 easements and acquisitions, and that's Plum Creek. She
25 is single-handedly responsible for the Thompson and

1 when his or her own agency is trying to acquire that
2 very property or assist others in doing so?

3 A That's a good question. You're describing two
4 independent processes that sometimes occur concurrently.
5 One is the assessment of a project. The other is if a
6 landowner wants a conservation outcome at the same time
7 and another alternative is what -- one is a habitat
8 conservation project, the other is a working with the
9 county and reviewing impacts on a subdivision.

10 You're saying -- or your question to me, then,
11 is can a biologist do both at the same time; is that
12 right? And how do you do it? Is that your question?

13 Q That's pretty much it.

14 A It's yes, yes, and it's very difficult to do.
15 It's not easy, for obvious reasons. When our area
16 biologists, the way they're structured -- and wildlife
17 biologist has, in their performance appraisals that I
18 evaluate them on every six months, a lot of boilerplate
19 language with survey and inventory, working with
20 landowners for -- you know, in eastern Montana it's a
21 big deal with rest-rotation grazing systems and whatnot.
22 But our area biologists have to, and it's in their jobs,
23 for better or for worse, work with habitat, whether it's
24 easements or acquisitions or habitat enhancements or
25 shelter belts, you know, and at the same time also

1 Fisher conservation easement, the Swan and this big
2 Montana Legacy project. That all started with Gael
3 working with the private property owner for a
4 conservation outcome. So yeah, it's probably squirrely,
5 from your point of view, especially being an attorney.
6 But that's in their job description to do both.

7 None of them are realtors. We don't deal with
8 money, other than asking for it. We're really good at
9 asking for it. In fact, we put our hands out all the
10 time. And Gael's very good with that. But we don't
11 deal with appraisals, we don't deal with markets, other
12 than what we see.

13 You know, it doesn't take a rocket scientist to
14 see that the valley just screamed and now it's just
15 flat. My kids know that, and they're thirteen and
16 fourteen in junior high. To that extent, yeah, we know
17 what's going on. But they're not appraisers.

18 When a land project happens, the biologist is
19 then pulled out. Because they have to work with the
20 landowner, if it's an easement, whether they're here or
21 there. For instance, in eastern Montana with a
22 conservation easement, you get an agricultural landowner
23 that wants to do and easement, the biologist doesn't
24 negotiate money. They're not involved in markets or
25 appraisals or all that. A land agent is then brought

1 in. Because let's say that landowner argues with
2 this -- you don't want that relationship to suffer with
3 the farmer after the land agent's gone. So we pull them
4 out.

5 They will do all the biology. They'll
6 collaborate with all the conservation community, whether
7 it's rod and gun clubs or land trust or whomever, to try
8 and find pots of money because it's very different and
9 very competitive to go out and get money in this day and
10 age, especially now, the last year with the economy.
11 But both of those -- the evaluation of the subdivision
12 and these acquisition enhancements, easements, what have
13 you, are both in their job descriptions, and they do do
14 both. It's not easy and it takes a skill.

15 Gael's very good at it. Most of our biologists
16 are very good at that. And that's part of the reason we
17 hire -- in their backgrounds and we hire them so that
18 they can do those things. Because habitat is one of the
19 major focuses of our agency, the Habitat Montana
20 program. And they're going to deal with that, whether
21 they like it or not.

22 Q Would you agree with me that when your agency
23 is interested in acquiring a piece of property, or
24 assisting others to do so, at the same time that it's
25 being called upon by a county to offer objective

1 A I have no clue; I'm not a realtor. Again, we
2 don't deal with the money and all the markets, and
3 they're not --

4 Q I'm just asking what you know.

5 A I know. I'm just telling you. And for that
6 reason, because I don't want them to get involved with
7 money, other than asking for it.

8 Q Well, you're aware of the fact that Gael
9 Bissell had a number of meetings with Flathead Land
10 Trust, Flathead Lakers and others, during the course of
11 which money was discussed.

12 A But she's there as a technical expert. I mean,
13 she's a biologist, not a realtor, an appraiser. I mean,
14 my gosh, that's not her expertise, and I don't think
15 you'd want her appraising your house. She's not an
16 appraiser.

17 Q Should she have been involved in those
18 discussions, in so far as you've just testified that we
19 don't get involved in the money side of things?

20 A Yeah, but that might have been one component of
21 the meeting. But I actually evaluate them on how well
22 they network with these conservation groups and clubs.
23 And especially those land trusts. Yeah, yeah. But in
24 terms of money, that's not her expertise. She's a
25 technical expert.

1 opinions on potential impacts on wildlife and wildlife
2 habitats, your agency has a conflict of interest in that
3 context?

4 A I don't agree there, Terance. I think the
5 difference is that whether there's a -- let's say Sean
6 and Keith -- and they may. They just want to own it or
7 whatever, the county does. And they don't want to work
8 in terms of an easement or an acquisition or
9 enhancement, or whatever project they could want, we'd
10 still be the same comments because of where it's located
11 and the species that are there. That's not a conflict
12 of interest in their mind. In my mind, they're doing
13 their job.

14 You know, and they also are supposed to network
15 too and communicate. And I evaluate them on that, you
16 know. To me, that is not a conflict; that's our
17 mission. And it's kind of broad. It depends on your
18 perspective. If you're sitting right here, you might
19 have a different opinion, or here or here. But that's
20 their job, for better or for worse, from my perspective.

21 Q In a general sense, would you agree with me
22 that during the time frame that this application was
23 pending, the land itself would be worth substantially
24 more, in a general sense, if an application for a
25 subdivision had been approved?

1 Q Were you aware, during the pendency of this
2 project, that all of these nonprofit organizations,
3 Flathead Lakers, Flathead Land Trust, and Citizens for a
4 Better Flathead, had repeatedly expressed their desire
5 to have this subdivision application denied?

6 A Oh, the denial, I'm sure that was their wish.
7 But I never heard that directly spoken to me. I'm sure.
8 I'm assuming that's their desire. But I know the Lakers
9 and the Land Trust -- I'm not aware of the Citizens for
10 a Better Flathead being there. But the Lakers, water
11 quality, the Land Trust, obviously with their habitat
12 conservation bent with Gael on lots of other projects
13 we've done in the valley. You know, land trusts are
14 pretty important for land conservation in Montana. We
15 have a significant amount under easement, as a state.

16 Q Would you agree with me that, to the extent
17 that Gael Bissell integrated with members of the
18 Flathead Land Trust and the Flathead Lakers as well, who
19 wanted this application denied, to the extent that Gael
20 relied upon any input from them, whether on water
21 quality studies or habitat, it ran the risk of her
22 opinions eventually being colored by their
23 self-interest?

24 A I can see where it might look like that on the
25 surface. But, in reality, I mean, she's a wildlife

1 biologist. And her job is wildlife habitat. And she
2 is, if you will, biased, to begin with, of a
3 conservation outcome from that perspective. But short
4 of being inside her brain and knowing what her emotions
5 are, you know, she's a passionate biologist. I know
6 that. But I don't know. I'd have to be in there and
7 know -- you know, able to read her mind. But she is
8 biased to conservation outcome. She's a wildlife
9 biologist, and I expect her to be a technical expert in
10 whatever project she's in, as well as all the
11 biologists, not just Gael. Talking about Gael, it's all
12 of them.

13 Q Mr. Satterfield testified last week that the
14 conflict of interest policy that governs the conduct of
15 FWP employees is set forth in the employee handbook. Is
16 that consistent with your understanding?

17 A Yes. I know -- yes.

18 Q Okay. Is it set forth in any other written
19 policy or protocol, to your knowledge?

20 A No, no, no, it is not.

21 Q With regard to the drafting of the letters to
22 be forwarded to a county with respect to a subdivision
23 application that's been filed, to your knowledge, does
24 the FWP have any written policy or procedure regarding
25 how to approach the preparation of such a letter?

1 A No. That's up to the individual wildlife
2 managers and fish managers and, ultimately, the regional
3 supervisor on the process in a given region. But I can
4 tell you, for the record, it's using the best science
5 you have, the career experience, and the issues in the
6 local area wherever your at -- in this case it's the
7 north shore of Flathead Lake vicinity, you know -- as
8 you put these letters in. But we're not decision
9 makers, and we're not regulatory in that manner. It's
10 just providing that information.

11 And then, those counties will dissect it. And
12 a lot of times they disagree with us. Or they'll say,
13 You know what? Your impacts here, FWP, we acknowledged
14 you're concerned about white-tailed deer winter range at
15 Kuhns, but, you know, sorry, we're going to recommend
16 approval anyway. So we're not in that role, they are.
17 But we do try and assemble all the information we can.
18 And if you -- I guess we could be called biased because
19 it's conservation information. We're very much
20 concerned about a conservation outcome.

21 But in terms of conflict of interest, no.
22 That, in my mind, is our mission. And I evaluate them
23 on it and how good they are at that twice a year.

24 Q And fair to say that you've known for a decade,
25 here in Kalispell, that these letters, one of which you

1 and I discussed earlier today, Exhibit 32, they have at
2 least the potential to impact the final decision made by
3 a county on whether to approve or deny a subdivision
4 application?

5 A Potentially, I know the county considers a lot
6 more than just Fish, Wildlife & Parks. And, frankly,
7 I'm not a county planning expert, never will be, you
8 know. But yeah, ours is probably one of many, is what I
9 assume. If I'm wrong, well then, I'm wrong.

10 Q But would you agree with me that the opinions
11 that your department, your agency, renders with respect
12 to a potential subdivision application, it, first of
13 all, is information that's considered by the county in
14 rendering a final decision.

15 A Yes. And I think it's very important
16 information. As the wildlife manager for northwest
17 Montana, I think it's very important information.

18 Q And you'd agree with me that your opinions,
19 your agency's opinions, have the potential to influence
20 the final decision rendered by the county.

21 A Oh, I don't know. Then you've got to read
22 minds. But it's one of everything that's there. Ninety
23 percent of the subdivisions, you know, probably float
24 through, you know. And they take us into consideration
25 and no other look. I'm not a county -- I've never

1 served on a county board. I don't know the process.

2 Q Are you aware that, in this particular
3 circumstance, the North Shore Ranch project, that one of
4 the bases for denial of the application was, in fact,
5 opinions that had been proffered by your agency?

6 MR. MCCORMICK: Objection; misstates
7 the -- let me phrase it this way.

8 Assumes facts not established.

9 Q (By Mr. Perry) Are you aware of that?

10 A I heard wildlife was one of the issues that was
11 denied, that and that the whole place can be flooded by
12 the lake, which is kind of obvious to me. But that's
13 way out of my expertise.

14 Q You'd agree with me that, as a general
15 proposition, an applicant like Keith Simon and Sean
16 Averill and their project, they're entitled to good
17 faith opinions rendered by your department with regard
18 to potential impacts posed by a subdivision.

19 A Absolutely; and I believe that's what we gave
20 them. You know, I mean, I got along with Keith fine. I
21 didn't meet with him that much.

22 Q And you'd agree with me that they're entitled
23 to have opinions rendered by your agency, with respect
24 to their application, that are consistent with good,
25 objective, scientific analysis.

1 A Yes.
 2 (Deposition Exhibit No. 33 marked for
 3 identification.)
 4 Q (By Mr. Perry) Sir, the document marked as
 5 Exhibit 33 to your deposition, do you recognize this
 6 document?
 7 A No.
 8 Q I see at the top it says "JW thoughts." And
 9 you were the only JW at FWP.
 10 A That's probably Gael thinking of me. Yeah, I
 11 actually told Gael when she was working with the county,
 12 and actually with the attorneys too, that We don't make
 13 this stuff up. We've got a pile of stuff that I mailed
 14 to you from the Kerr Dam work, this much, on the value
 15 of the north shore. I mean, this is probably her notes.
 16 But what I told Gael specifically is We don't make this
 17 stuff up. We've got a stack of -- and I mailed you
 18 everything I could find on the Kerr Dam work and the
 19 north shore and the value of the area. It's an
 20 important area to us, and that's why we commented.
 21 That's probably what this is. Yeah, I didn't write
 22 this, Gael did. But I told Gael that we've
 23 been -- since when was Kerr Dam built; '83? I don't
 24 know. Wherever Kerr Dam was built, we've been doing
 25 work nonstop. That's an important area for our agency

1 2006 letter that's marked as Exhibit 32 to your
 2 deposition, did you ever review any data or scientific
 3 information upon which Gael Bissell, or any other
 4 employee who assisted in the drafting of that document,
 5 relied?
 6 A No, I trust them that they are on top of their
 7 game.
 8 MR. PERRY: Thank you; I have no further
 9 questions at this time. Thank you, sir, very much for
 10 your time.
 11 EXAMINATION
 12 BY MR. MCCORMICK:
 13 Q Jim, my name is Alan McCormick. I'm an
 14 attorney with Garlington, Lohn & Robinson in Missoula.
 15 And in this lawsuit, I represent the Flathead County
 16 Board of Commissioners.
 17 Earlier today we had a discussion about the
 18 uniqueness of this North Shore Ranch property in
 19 relationship to other properties. Do you remember that
 20 discussion?
 21 A Yes.
 22 Q Now, it's my understanding that the North Shore
 23 Ranch property shares a border with the WPA for several
 24 miles. I think, if I understand, it's three miles.
 25 A Correct; yes, yes.

1 in terms of conservation. These are probably Gael
 2 getting her thoughts together. But I recognize that as
 3 what I tell her, because she asked me. I'm not the area
 4 biologist.
 5 But I do know, big picture, as the program
 6 manager, we have spent not hundreds of thousands of
 7 dollars, millions probably, when you look at the BPA
 8 funds used to do research and conservation work in this
 9 general area with -- through BPA, through the Hungry
 10 Horse and dam mitigation programs. So that is
 11 probably -- I mean, it's got to be -- I don't know
 12 Gael's handwriting, but it's probably my thoughts,
 13 because I told her exactly that.
 14 Q Okay; fair enough. I just was trying to
 15 identify the document.
 16 A She's probably trying to capture what I told
 17 her there. Because I recognize that's exactly what I
 18 told her.
 19 MR. PERRY: Fair enough.
 20 If I could have just a second, I think I'm
 21 done. Could we go off the record?
 22 MR. MCCORMICK: Sure.
 23 (Deposition in recess from 12:46 p.m. to
 24 12:46 p.m.)
 25 Q (By Mr. Perry) With respect to your June 16th,

1 Q Now, is that unique, compared to other
 2 properties in the area?
 3 A Yeah, it's the most.
 4 Q Is that unique characteristic significant?
 5 A From our perspective, yes.
 6 Q There was also a discussion about residential
 7 development creating habitat for certain species of
 8 animals. Do you remember that?
 9 A Yes.
 10 Q I should say wildlife instead of animals. And
 11 I recall you started to say that approximately
 12 two-thirds of the species Mr. Perry listed were
 13 predators.
 14 A On waterfowl species, because of it's a
 15 waterfowl production area, not necessarily a wildlife
 16 refuge for fall species. It emphasizes waterfowl.
 17 Yeah, the raptors and corvids and the foxes and
 18 raccoons are nest or fledgling predators on waterfowl.
 19 So they can tolerate that footprint of humans greater
 20 than many species. But for that area, their potential
 21 negative impacts on the breeding birds are there.
 22 Q So is it fair to say that although development
 23 of the North Shore Ranch project would create habitat
 24 for some species, it has a negative effect on other
 25 species in the WPA?

1 A That was our opinion.

2 Q Is there any question in your mind that the
3 development of the North Shore Ranch project, as
4 proposed, would have a potentially significant adverse
5 impact on wildlife and wildlife habitat?

6 A No. I mean, it's obvious in my mind. That's
7 why we commented on the process and spent the time and
8 energy, why we're here today.

9 Q At one point you started to discuss Ficken
10 Farms which, I presume, is a subdivision adjacent to the
11 Blasdel WPA; is that correct?

12 A Correct.

13 Q And you've had an opportunity to see the
14 changes of that property from vacant, for lack of a
15 better word, to construction and development of the
16 subdivision; is that correct?

17 A Correct.

18 Q And I believe you began to describe some of the
19 impacts that you've seen from that conversion from
20 undeveloped to developed state; correct?

21 A Correct.

22 Q Can you explain to me what those impacts are
23 that you've seen?

24 A I guess, most obvious, and it's just this
25 spring, we had a very significant migration. We do

1 A In my mind, and this is my professional
2 opinion, and I don't have quantifiable telemetry data to
3 back it up --

4 MR. PERRY: Object to foundation.

5 THE WITNESS: -- but you know what I mean.
6 It's my opinion. That's what I'm trying so say. My
7 professional opinion as manager is displacement of areas
8 of use for this particular time of year and those
9 species we're talking about, pintails and swans.

10 Q (By Mr. McCormick) You personally observed
11 that.

12 A This spring. I took pictures. Beautiful. The
13 news -- it was on the news, phenomenal coverage on the
14 news. It was really -- you can get on the Channel 13
15 website and probably find it. And Hungry Horse News has
16 a phenomenal video documentation of the birds in the
17 field.

18 Q So is it your opinion that the Ficken Farms
19 subdivision contributed to a loss of habitat for
20 waterfowl?

21 A In my opinion, yes. You're asking me my
22 opinion; yes.

23 Q Did it displace wildlife and wildlife habitat?

24 MR. PERRY: Object to foundation.

25 THE WITNESS: Certain species, yes.

1 in -- starts in late March, goes through April. You can
2 see it from the road and half of the valley -- or a lot
3 of the people that are interested in birds were down
4 there watching the migration -- the footprint -- the
5 development footprint of the Ficken Farms proposal.
6 It's pretty obvious there's homes on it. Some are not
7 even occupied yet; the market's changed. But the open
8 farm ground, for instance, the Bigfork Sewer District
9 which is adjacent to it that is kind of an open soil
10 habitat, kind of like what we were discussing earlier,
11 hundreds of thousands of pintails. People photographing
12 them. It was on the news. They're going to be where
13 that footprint is not. It doesn't mean there's not
14 going to be other species where the homes are. I mean
15 there's always going to be bird feeders and birds and
16 trees and animals that move through. But in terms of
17 what we're talking about today and those species and
18 migratory flocks, it was -- even this spring, half the
19 people that like birds in the valley were down there
20 watching it. It's pretty significant. And that's
21 just -- you can see the footprint that's there. And
22 actually, that footprint is, I think, to a much less
23 density than is proposed right next to the WPA, too, if
24 I'm not mistaken.

25 Q What did that footprint cause?

1 Q (By Mr. McCormick) Earlier, you discussed the
2 cumulative effect of the loss of habitat to
3 subdivisions. Would this be an example of the
4 cumulative loss of habitat?

5 A This particular subdivision's one of several
6 that, in a cumulative sense, have removed a, in my mind,
7 significant amount of habitat available to many of these
8 species, especially in the spring migration and fall
9 migration. That's my opinion.

10 Q Early in your deposition, there was a
11 discussion about your need to rely on scientific data in
12 order to render an objective opinion about the impacts
13 to wildlife from subdivisions. And you recall, I
14 objected during part of that discussion.

15 The confusion that I have is that it appears
16 you have a broader definition of scientific data than
17 Mr. Perry. Could you describe for me what you believe
18 is included in the realm of scientific data?

19 A Sure.

20 MR. PERRY: Object to form.

21 Q (By Mr. McCormick) You can answer.

22 A Sure. Data comes from site-specific data down
23 to the square foot, down to, you know, research projects
24 that are in the local area, to research projects on the
25 species that can be applied to a local area, to data in

1 literature, especially peer-review data, but even the
 2 the great literature, agency work years and years. So
 3 data take is a collective of observations, a career's
 4 worth of experience by the biologist, local
 5 site-specific data in some cases, good research and
 6 progress reports from the agencies, and any other
 7 journal articles that apply or experience, you know,
 8 collectively, to that individual biologist when they
 9 have to make a decision Is this an impact or not and
 10 why? And so data can come in many forms. Obviously,
 11 site-specific local data is the easiest to understand
 12 and people to relate to. But there's -- it's probably
 13 similar to your field. You have to pull from legal
 14 journals and case law and case studies and put it all
 15 together and make a decision. We do the same.
 16 Q So in the context that you've described here,
 17 does it include your professional judgment?
 18 A Oh, yeah. And in the context of Gael, she's
 19 been here twenty-five years. She's watched it change.
 20 She's seen it before her very eyes. So she has a lot of
 21 experience in this area, more so than I do even.
 22 Q Have you had any conversations directly with
 23 the Board of County Commissioners with respect to the
 24 North Shore Ranch application and process?
 25 A No, no.

1 their deadlines. Sometimes we can make them, sometimes
 2 we can't. We send the comments in no matter what.
 3 Because I tell them If you've got scientific expertise
 4 that you want expressed to any planning entity, get them
 5 in. And they can ignore them. And a lot of times they
 6 probably throw them in the garbage. I don't know what
 7 happens there. But we'll get them in.
 8 Q Just so we're clear, did you personally have
 9 any conversations --
 10 A I don't remember.
 11 Q -- with planning staff with respect to the
 12 North Shore Ranch property?
 13 A No, no; I don't remember any.
 14 MR. MCCORMICK: That concludes my
 15 questions.
 16 MR. PERRY: I just have a couple
 17 follow-ups.
 18 EXAMINATION
 19 BY MR. PERRY:
 20 Q You stated, unequivocally on the record, just a
 21 minute or two ago, that, in your opinion, this North
 22 Shore Ranch subdivision posed a potentially significant
 23 adverse impact on wildlife or wildlife habitat. Do you
 24 recall your testimony?
 25 A Yes.

1 Q Have you had any conversations directly with
 2 members of the planning board with respect to the North
 3 Shore Ranch project?
 4 A No.
 5 Q Have you had any conversations directly with
 6 Flathead County planning staff with respect to the North
 7 Shore Ranch project?
 8 A Maybe. They call -- when we don't comment in
 9 time -- and those poor folks get overloaded. And a lot
 10 of times, you know, if it's one out in West Valley and
 11 it's next to a gravel pit and it's a lot that they're
 12 proposing to go from two homes to five, we don't give it
 13 any time; you know what I mean? It's not a significant
 14 impact. But they want the answer. So they call,
 15 depending upon who the planner is or the staff, Are you
 16 guys going to comment on this? And they're very
 17 objective. They don't ask or try and, you know, coerce
 18 us into commenting at all. They just want to know if we
 19 are. So we might have gotten -- probably Gael, more
 20 than me as program manager.
 21 Q You, personally?
 22 A No, I don't remember personally. I can't
 23 recollect ever talking to them. But they probably
 24 talked to Gael and said Are you going to get a comment
 25 in, or There's a deadline. Because they live and die by

1 Q Why didn't you say that in your June 16, 2006
 2 letter, if you're of that opinion?
 3 A Well, in retrospect, I probably should have.
 4 Q Hindsight always 20/20?
 5 A Yeah.
 6 Q You'd agree with me that the WPA, as it
 7 currently exists, undoubtedly already serves as a food
 8 source for raptors or foxes and other predators?
 9 A Correct.
 10 Q And you'd degree with me that to the extent
 11 that waterfowl or other avian species utilize it during
 12 various times of the year to stage or to forage or brood
 13 or nest, it would become a source of food for all of
 14 those predators in that area.
 15 A At the levels they currently exist at; correct.
 16 Q And you'd agree with me that raptors, for
 17 instance, are usually pretty well keyed into staging
 18 areas of waterfowl and other prey species?
 19 A Yes, small mammals as well.
 20 Q You'd agree with me that during the spring and
 21 fall when waterfowl tend to conglomerate on the WPA,
 22 raptors have an understanding that they can be found
 23 there.
 24 A I don't know. I would assume so. I mean,
 25 yeah, you're supposing.

1 Q They come to feed there, do they not?

2 A They are present there during the migration.
3 And there's no doubt in my mind that they take advantage
4 of a prey base. But to what extent and to what level
5 there, I don't know.

6 Q And in your experience, having been a wildlife
7 biologist for all these many years, it's fair to say, is
8 it not, especially in terms of your studies of the
9 oceans, when, for instance, a migratory species that is
10 a food source for a predator or group of predators has a
11 time during the year when it comes through a specific
12 geographic area, usually the predators come there to
13 look for that; fair to say?

14 A Oh, yeah, fair; correct.

15 Q Would it be fair to assume that the seasonal
16 migrations of avian species on the north shore of
17 Flathead Lake would also be consistent with your
18 testimony just now, with respect to predatory species?

19 A Yes. The context or the concern is the current
20 level of use versus a development footprint that could
21 potentially create a lot more additional predators like
22 corvids. You mentioned ravens and some of the species
23 you mentioned besides raptors that are all potentially
24 significant predators on some of these bird species,
25 fledglings and that. So it's kind of a what's there now

1 of agricultural lands, in a general sense, have
2 prevented avian species from finding other substitute
3 lands in the general vicinity of the North Shore Ranch
4 project?

5 A No. What would occur is exactly what you just
6 said. It would probably displace, yet again,
7 the -- we're talking migratory flocks now --

8 Q Yes.

9 A -- to another property. You know, keep in
10 mind, it's a cumulative time progression of as these
11 development footprints occur, that available area to use
12 shrinks. And this would have been, you know, step four
13 on five, or six on seven. And probably would have
14 caused a significant displacement yet again. That's why
15 we were concerned and still are.

16 Q In your opinion, if that had occurred, if this
17 subdivision had been approved and these houses had been
18 constructed and these avian species that had previously
19 foraged on this property went to other agricultural
20 lands in the general vicinity to forage, in your
21 opinion, would that have adversely affected their
22 ability to raise a brood or to effectively breed?

23 A It's a two-part question. For breeding, I
24 would separate the breeding components of the species
25 that are there and the migrants. There's two different

1 versus how many additional predators would that
2 footprint bring in and what additive impact would that
3 be on the species you're talking about.

4 Q Is there any way to quantify that,
5 scientifically?

6 A Not that I'm aware of. The concept's there
7 ecologically, and the science is pretty sound. But
8 quantifying, that's when it gets expensive and
9 difficult.

10 Q You talked a little bit about displacement of
11 areas of use on cross-examination --

12 A Yes.

13 Q -- with respect to the Ficken Farms project.
14 Do you recall your testimony?

15 A Correct.

16 Q And you'd agree with me that north of the
17 North Shore Ranch project lies, literally, thousands of
18 acres of farmland.

19 A There's farmland. I don't know the acreage;
20 yes.

21 Q A lot of farmland?

22 A In my mind, it's kind of 50/50 what's left.
23 Just my personal opinion, off the top of my head.

24 Q In your opinion, had this project been
25 approved, the North Shore Ranch project, would the loss

1 needs. Now, for the migrants -- for the breeding, it's
2 a direct displacement, if they're breeding in an ag
3 field, which they do all the time, whether it's upland
4 game birds or whatever the species. That's direct
5 displacement. You put homes and mowed lawns, that's
6 direct elimination.

7 For the migrants, it's displacement, because
8 they're probably going to breed where they go, you know,
9 if it's a pothole complex in Canada. However, the
10 unknown is that this area's well known in the flyway as
11 a prime loafing area and feeding area that's a stop on
12 the migration. And migration is not easy for a lot of
13 these species. They require some rest and some
14 nutrition. And at what point are we going to lose that
15 altogether with the development footprint in the valley?
16 We couldn't answer that.

17 Q I'm sorry; you couldn't?

18 A We could not answer that. At what point -- but
19 we are concerned about it and that it is a likely
20 outcome if development continues. And that's life. But
21 we, as a wildlife agency, that is not our desired
22 outcome. We would want a conservation solution.

23 Q And, sir, do you have a general understanding
24 of the number of thousands of acres that have already
25 been conserved in the Flathead Valley?

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1 A Uh-huh.
 2 Q What's your general understanding?
 3 A We're -- rather than a shotgun, at least our
 4 agency and our projects, are like a rifle. It's a very
 5 targeted approach. And I mentioned earlier in the
 6 deposition this 20/80 rule. Eighty percent of the
 7 biodiversity that's been kicked around is occurring in
 8 20 percent of the available habitat, these areas around
 9 lakes and rivers and sloughs and marshes. So we tend to
 10 target our funds and staff time -- and for me, I'm very
 11 jealous over staff time; where they're spending their
 12 time. I want the biggest bang for the conservation buck
 13 to these areas where they're going to get, you know,
 14 where 80 percent of the biodiversity is, access is
 15 there.
 16 You know -- I'm losing my train of thought.
 17 Now, what was the question? I got on this 80/20 rule
 18 trying to explain it.
 19 Q My recollection, my memory, is that Ray
 20 Washtak -- you know Ray Washtak?
 21 A Retired, yes.
 22 Q He worked for FWS, did he not?
 23 A Yes.
 24 Q I believe he stated at one of the hearings on
 25 this project that there approximately 15,000 acres in

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1 the Flathead Valley that had already been conserved --
 2 A Okay.
 3 Q -- either through FWP action, FWS land that it
 4 owned, conservation easements, that type of thing. My
 5 question is, is that consistent with your understanding?
 6 A I don't know the exact acreage, but there's
 7 been some real, in my mind, beneficial conservation
 8 outcomes with some of the private lands in the valley,
 9 especially from the braided section right at Kalispell
 10 down through Weaver Slough. Gael and the biologists
 11 worked real well on the Weaver Slough project for a
 12 conservation easement down there, Foys Bend, some key
 13 pieces, that will help maintain some of those attributes
 14 that -- for instance, we're talking migratory waterfowl,
 15 why they come down and rest and use this are. They need
 16 water. That's obvious. But they also need some other
 17 things. They need some security, they need food. It's
 18 kind after a unique mix. But yeah, there's been some
 19 good conservation projects down in the valley. Is it
 20 enough? Can we stop here? No, not if we want to
 21 maintain what we have. Because the rate of
 22 change -- and now it's climate change. And what's going
 23 to happen is drought, although we haven't seen that in
 24 the last two years. There's some unknowns out there
 25 too. And it's our agency mission. We're going to keep

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1 working on projects as long as we have willing
 2 cooperators, on private land or federal partners, or
 3 tribal. We work with the tribes a lot too.
 4 Q Getting to the topic of the scientific process
 5 that you and I addressed earlier today, on
 6 cross-examination you identified a couple of components
 7 of the scientific process and -- at least in the
 8 wildlife biology arena that are worthy of consideration
 9 in coming to an opinion or a conclusion. Site-specific
 10 data was one component; fair to say?
 11 A Yes.
 12 Q Research projects another component.
 13 A Yes.
 14 Q Literature --
 15 A Yes.
 16 Q -- treatises, journals, that type of thing,
 17 that would be another component.
 18 A Yes.
 19 Q Personal observations, that's another
 20 component.
 21 A Can be beneficial, if that experience is there.
 22 Q Right.
 23 A That's another component, yes.
 24 Q I'm just saying, amongst the panoply of
 25 subparts of data or scientific information that you, as

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1 a wildlife biologist, would deem worthy of evaluation
 2 and analysis, certainly, personal observation, that's
 3 one component.
 4 A Yes.
 5 Q Now, you'd agree with me that once you
 6 aggregate the scientific data, whether through
 7 scientific journals, literature, all the plethora of
 8 subparts that you and I discussed, once you, as a
 9 wildlife biologist, have an opportunity to aggregate
 10 these sources of information and data, you, then, are in
 11 a position to reach some type of opinion or conclusion;
 12 fair to say?
 13 A Correct.
 14 Q Okay. Now, as you and I discussed earlier
 15 today, some of the conclusions or opinions that you, as
 16 a wildlife biologist, may reach are subjective in
 17 nature; fair to say?
 18 A Fair.
 19 Q That's where your professional judgment comes
 20 in; fair to say?
 21 A Yeah. It's the art of wildlife science and
 22 management versus the hard, site-specific data. You
 23 have a career's worth of knowledge and personal
 24 experience. And yeah, it's not too different than your
 25 field, really.

1 Q So really, at the end of the day, you take all
2 this data and information, objective project results,
3 peer-reviewed articles, whatever the case may be, you
4 aggregate it all, you review it all, and using your
5 professional judgment, you come to a conclusion.

6 A Well, the biologist does. And -- for that
7 individual area working with staff. And then they'll
8 bring their, in this case, comments on a particular
9 project to me.

10 Q Uh-huh.

11 A And then I will read it and see if I agree with
12 it. And I may edit it. Like I said, I really focus on
13 hunting access. And I actually personally edit many of
14 them, above and beyond the biological issues. And then
15 I'll take a look at it. And in this case, at that point
16 in time, mailed it to the county planning staff. And
17 now, we'll hand them to Jim, and he'll review my edits,
18 you know, or staff edits coming from me, and want to
19 know if I was okay with it and thought it was as
20 objective as can be. And yeah, that's the process.

21 Q That's the scientific process, isn't it? You
22 have a hypothesis, you have data and information that
23 you evaluate, and you reach a conclusion at the end;
24 right?

25 A Well, we don't have a hypothesis at the

1 to go to five, we may not comment.

2 A Yes; correct.

3 Q However, a small subdivision, it could impact a
4 sensitive species such as the long-toed salamander,
5 could it not?

6 A Absolutely. And, in fact --

7 Q Who do you -- I'm sorry.

8 A I was just saying Mr. Averill has personal
9 experience with a small wetland that was small that we
10 did work with for a conservation outcome with one of my
11 biologists. So it varies. I depends on the species
12 that are there.

13 Q The that's my question. The actual relative
14 size of a plot of land is not, itself, dispositive of
15 the inquiry as to whether or not development on it or
16 disturbance -- human disturbance on it will adversely
17 impact wildlife or wildlife habitat.

18 A That's correct. I should have said the species
19 component versus the size and the concerns. But that
20 was an example of we get a lot of subdivisions that
21 aren't worth spending the time on for the precious staff
22 time I have, because there aren't those environmental
23 concerns. But yeah, if it's a one-acre fen with a bog
24 with a Spalding's catchfly on it, yeah, that's pretty
25 important. And if there's three of those left in

1 beginning other than here's the project. It's more
2 starts out at more Okay an analysis impacts. And then
3 we put the data together, and you assemble the comments
4 based on the species that are there and the issues, and
5 provide that to the planning staff.

6 Q And your professional judgment really only
7 comes into play -- or Gael Bissell's professional
8 judgment, or whoever, whatever wildlife biologist is
9 involved in answering an inquiry -- professional
10 judgment only comes into play at the very end when you
11 have all the data and scientific information and then
12 you can weigh it consistent with your real-life
13 experience. Is that fair so say?

14 A Yeah, that's fair. She's putting it all
15 together in her case and, based on her training and her
16 rational and thought process of how to assimilate data
17 and impacts, and then presenting me with something to
18 approve or deny or kick back to her and say I don't
19 agree with that, you know, keep looking at that. We
20 criticize each other and have lots of internal debate.
21 Science is a neat thing because we really challenge each
22 other. And that's inherent in the field; yeah.

23 Q Earlier on cross-examination, you talked
24 about -- just briefly, you talked about Well, some of
25 these small subdivisions. A guy's got two houses, wants

1 Montana, it's really important. But if it's a dirt lot
2 next to a gravel pit that's already, you know, in the
3 middle of the valley, not on a winter range or near a
4 wetland, you know, we're not going to spend the time on
5 it. I have to prioritize what they spend time on.

6 Q How do you make that initial determination,
7 when you folks get alerted to the pendency of a
8 subdivision application? How do you -- how do you make
9 that determination whether or not you need to do a
10 full-blown analysis on this project or whether or not
11 you're just going to refrain from any comment at all?

12 A That's an excellent question. We target,
13 obviously, the riparian wetlands for the Flathead Valley
14 locally here. By I have an area that's pretty large and
15 a lot of staff. It depends on the area and the impacts.
16 If it's a -- you know, is it a large mammal? Is it a
17 carnivore? Is it everything? Is it a wetland? Is
18 it -- you know, and it's beyond just wildlife. There's
19 fisheries issues too. There's two houses here, you
20 know. Then we'll walk it over, this proposal, to the
21 fisheries shop. And they'll look at listed fish
22 species, water quality, phosphorous draining into
23 rivers, all the fish and water chemistry and clean water
24 issues. And together they'll go in, typically, if it's
25 an issue. But it's that oh, what you may think of as an

1 arbitrary decision of what to not spend time on and
2 whatnot is an assessment, essentially, of what are the
3 potential impacts if it goes through. And each
4 biologist, as they get these letters in their box -- and
5 we get a lot of subdivision requests. And some may say
6 No, not an issue. I got 90 percent public land for elk.
7 And this is going to affect three elk. And in my mind
8 it's not worth my time spending on working with a land
9 trust on an easement over here where we're doing a big
10 winter range with Stoltze timber, you know. You know,
11 that's where I'm spending my time and then let it go.
12 It just depends on the assessment of risk. It's kind of
13 a risk assessment.

14 Q But what information, initially, those first
15 days, do you rely upon?

16 A Oh, the biologist. Me, personally, I rely on
17 the biologist.

18 Q No, no, no. And I'm probably not being clear
19 here.

20 A All right.

21 Q When you get the letter in from the county that
22 just says There's an application that's been filed
23 regarding this piece of land and here's the applicant,
24 what do you folks at FWP then do to determine whether or
25 not this is even something we want to comment on?

1 although I'm familiar with all of the areas relatively
2 well over the last ten years. And then they start to
3 work on it. Walk it over to fisheries, then it comes to
4 me and then goes through chain of command and out to the
5 counties. Easiest way to explain.

6 Q So from that initial letter, you just basically
7 are alerted to the location of the property?

8 A Oh, yeah. Is it in the middle of town?

9 Q Who looks it up? Does somebody then --

10 A No; I get a map. There's a map.

11 Q You get the map.

12 A The county's very good. They have a proposal.
13 They have a map. And if it's a sea of homes and a lot
14 in the middle....

15 Q Okay. Could still be a Spalding's champion
16 there, though, couldn't there be?

17 A There could be.

18 MR. PERRY: I have no further questions.

19 Thank you, Mr. Williams; I appreciate it.

20 Alan?

21 MR. MCCORMICK: I'm done.

22 (Deposition concluded at 1:20 p.m.; witness
23 excused, signature reserved.)
24
25

1 A Got you. Good question. If I get it and it's
2 a lot in the middle of Kalispell, I personally take it
3 and put it in the garbage.

4 Q Okay.

5 A It's not worth their time. If it's not on the
6 river -- if it's a neighbor -- right next to county
7 fairgrounds has to go through a process with the county,
8 sometimes, to divide the lot.

9 Q No end to the bureaucracy.

10 A But if not, I slide it into the mailbox of the
11 individual biologist that's that area. Or if it's big
12 project in a sensitive area, of which -- I mean, I'm
13 sure you've come to your own conclusions as to what are
14 a little more environmental sensitive areas for this
15 agency, at least our agency -- that goes to the
16 biologist or a team of biologists to work on it. And
17 then there's usually a deadline, and we have to respond
18 to the county, because they're under the gun. And
19 usually they're understaffed. I don't know how big the
20 Flathead County, but with the growth here, they don't
21 have -- they earn their money, I'm assuming, because
22 they are busy with the rate of growth we've had.

23 So it's a process of risk assessment. I give
24 it to the biologist. The biologist looks at it. They
25 know the area better than I. I'm kind of a notch above,

REPORTER'S CERTIFICATE

1 I, BAMBI A. GOODMAN, CSR, RPR, CRR and Notary
2 Public in and for the State of Montana, residing in
3 Whitefish, Montana, do hereby certify:

4 That I did report the foregoing deposition
5 after having duly sworn JIM WILLIAMS to the truth; that
6 the deposition was taken at the time and place stated on
7 the caption hereto; that the testimony of the witness
8 was taken in shorthand by me and subsequently reduced to
9 writing under my direction; that the foregoing is a true
10 and correct transcript of the testimony given by the
11 witness;

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

15 IN WITNESS WHEREOF, I have hereunto subscribed
16 my name and affixed my seal of office this 8th day of
17 June, 2009.
18
19
20
21
22

23 BAMBI A. GOODMAN, CSR, RPR, CRR and
24 Notary Public, State of Montana
25 Residing at Whitefish, Montana
My Commission expires 3/21/10

CERTIFICATE OF WITNESS

1
2 PAGE LINE CORRECTION
3
4
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10
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14
15 I, JIM WILLIAMS, have read the foregoing
16 transcript of my testimony and believe the same to be
17 true, except for the corrections noted above.
18 DATED this day of , 2009.
19
20 Deponent
21 SUBSCRIBED AND SWORN to before me this day
22 of , 2009.
23
24 Notary Public for the State of Montana
25 Residing at Montana
My Commission expires:

1 REPORTER'S CERTIFICATE

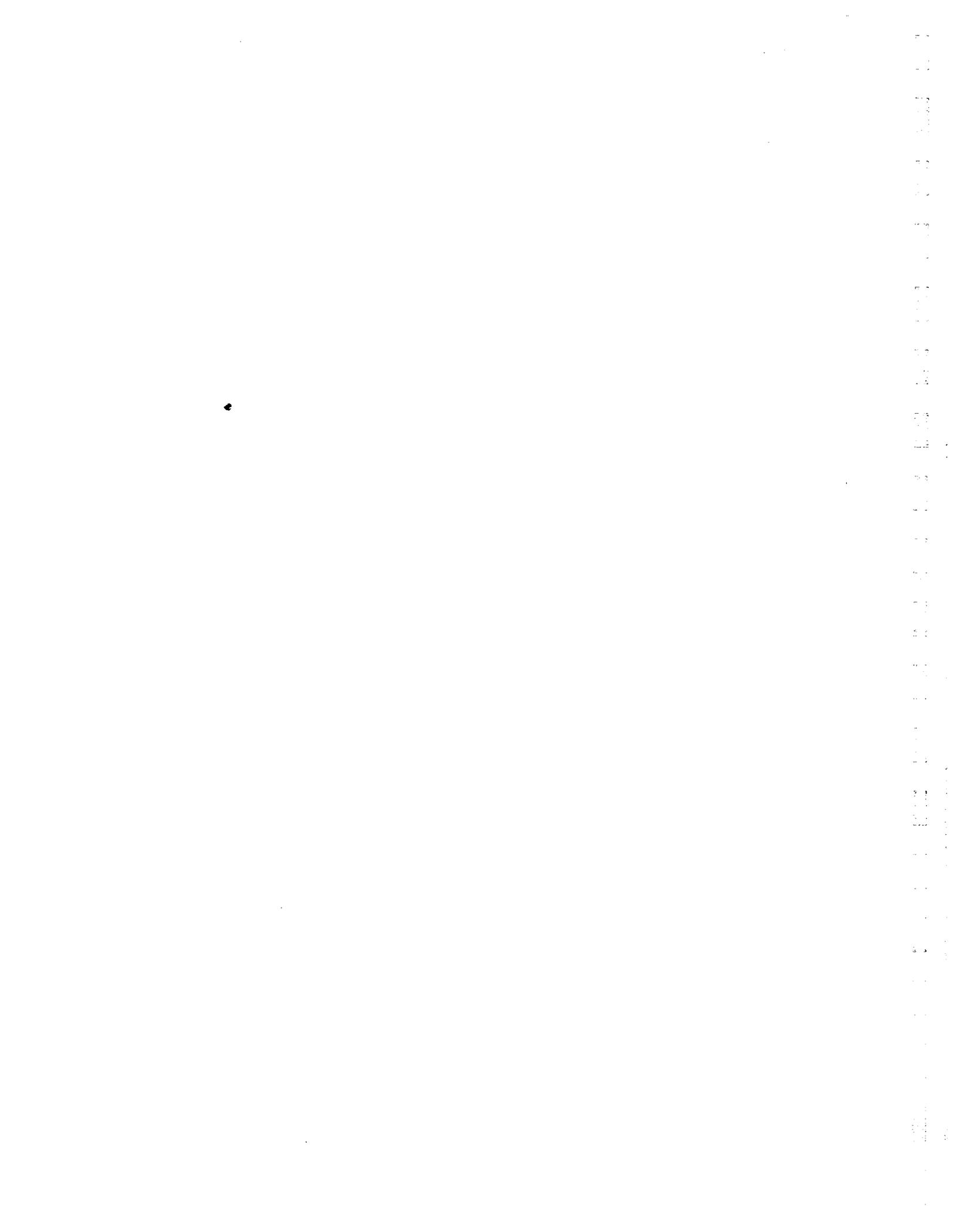
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25 Notary Public, State of Montana
Residing at Whitefish, Montana
My Commission expires 3/21/10



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