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

James R. Satterfield, Jr., Ph.D.
May 5 and 7, 2009
DV 08-614(B)

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Attorney Notes



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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 DEPOSITION OF
 13 **JAMES R. SATTERFIELD, JR., PH.D.**

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 18 On May 5, 2009, beginning at 9:08 a.m., the
 19 deposition of JAMES R. SATTERFIELD, JR., appearing at
 20 the insistence of Plaintiff, was taken at Montana Fish,
 21 Wildlife & Parks, 490 North Meridian Road, Kalispell,
 22 MT, pursuant to the Montana Rules of Civil Procedure,
 23 before Bambi A. Goodman, Registered Professional
 24 Reporter, Certified Realtime Reporter, Notary Public.
 25

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 3 **A P P E A R A N C E S**
 4
 5 **Terance P. Perry, Esq.,**
 6 **DATSOPOULOS, MACDONALD & LIND, P.C.**
 7 **201 West Main Street, Suite 201**
 8 **Missoula, MT 59802**
 9 **406-728-0810**
 10 **appeared on behalf of Plaintiff.**

11 **Alan F. McCormick, Esq.,**
 12 **GARLINGTON, LOHN & ROBINSON**
 13 **P.O. Box 7909**
 14 **Missoula, MT 59807**
 15 **406-523-2595**
 16 **appeared on behalf of Defendant.**

17 **Bill Schenk, Esq., and**
 18 **Becky Jakes Dockter, Esq.,**
 19 **MONTANA FISH, WILDLIFE & PARKS**
 20 **1420 E. Sixth Avenue**
 21 **Helena, MT 59620**
 22 **406-444-3312**
 23 **appeared on behalf of Fish, Wildlife & Parks**

24 **Also Present: Keith Simon, Sean Averill;**
 25 **Kleinhans Farms Estates**

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I N D E X

2 WITNESS: PAGE:
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 5 Examination by Mr. McCormick 298
 6 Examination by Mr. Perry 303

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 10 Deposition Exhibit No. 2
 (Petition)
 marked for identification 40
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 12 Deposition Exhibit No. 3
 (2/24/04 Letter; Bissell to Morrison)
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 (6/16/06 Letter; Williams to Stickney)
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 18 Deposition Exhibit No. 6
 (7/9/84 Letter; Flynn to Meyer)
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 5 Deposition Exhibit No. 10
 (3/19/07 Summary of Impressions)
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I N D E X

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2 **EXHIBITS:**

3 Deposition Exhibit No. 18
 4 (2/1/08 FC Planning & Zoning Report
 #FFP-07-32)
 marked for identification 282

5 Deposition Exhibit No. 19
 6 (3/26/08 Letter, Satterfield to FC
 Planning Board/Planning & Zoning)
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13 Reporter's Certificate 309

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20 * Denotes phonetic spelling

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1 Q And can you tell me a little bit about your
 2 educational history, starting with high school?

3 A I graduated from high school in 1974, Aspen
 4 Senior High School, Colorado; bachelor's degree wildlife
 5 biology, Colorado State University; master's degree
 6 fishery biologies, Colorado State University. Attended
 7 graduate school University of Missouri, Columbia; Ph.D.
 8 fishery and wildlife biology, Colorado State University,
 9 1992.

10 Q And is that an area of concentration, or has it
 11 been in your professional life so to speak, fishery
 12 management, that type of issue?

13 A Trained as a fisheries biologist. That was my
 14 educational background; trained as a fisheries
 15 biologist.

16 Q Okay.

17 And, sir, can you tell me a little bit about
 18 your work history? After you graduated from undergrad,
 19 let's say, with your BS, what did you do, if anything,
 20 for work?

21 A I was a graduate research assistant with
 22 Colorado State University from 1981 through 1984,
 23 employed by the Colorado State University; employed by
 24 the University of Missouri, 1984 to 1985; employed by
 25 Colorado Division of Wildlife from 1986 through 1995

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1 JAMES R. SATTERFIELD, JR.,
 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. My name's Terance Perry. I
 8 represent Kleinhans Farms Estates, LLC, in a pending
 9 matter against Flathead County arising out of the denial
 10 of its subdivision application regarding the North Shore
 11 Ranch. I'm here to ask you some questions today about
 12 some of the documents you drafted, some of the documents
 13 promulgated by FWP in regard to this project.

14 If you don't understand a question, just tell
 15 me. I'll be happy to rephrase it. If you need to take
 16 a break at any point in time to use the men's room, get
 17 a glass of water, I'll be happy to accommodate you in
 18 that regard. If you could, for the court reporter,
 19 though, you need to verbalize your answers. Head shakes
 20 can't be transcribed. So "yes" or "no," if you could.

21 Could you please state your full name for the
 22 record.

23 A James R. Satterfield, Junior.

24 Q And your present residential address?

25 A 634 Pebble Drive, Kalispell, Montana, 59901.

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1 fisheries biologist -- senior fisheries biologist;
 2 employed by Montana Department of Fish, Wildlife & Parks
 3 in 1995, management bureau chief fisheries division;
 4 promoted to assistant administrator in 1994 -- or
 5 19 -- pardon me -- 1998; promoted to regional supervisor
 6 Glasgow, northeast region, 1999; transferred to
 7 Kalispell in 2004, regional supervisor. Been in this
 8 job since then to this date.

9 Q Okay; and I'm sorry, since what date?

10 A Since 2004.

11 Q Two thousand four. And so it would be true,
 12 then, that when you worked for Colorado, when you ended
 13 your employment with the State of Colorado, you were a
 14 senior fisheries biologist?

15 A Yes.

16 Q And then, when you came to Fish,
 17 Wildlife & Parks in Montana, at some point in time you
 18 became a management bureau chief for the fisheries
 19 division?

20 A Yes, when I came in 1995.

21 Q And would you agree with me that fisheries
 22 issues, fisheries management issues, have been kind of
 23 central to your career?

24 A Up until 1999, yes, until 1999.

25 Q And what happened in 1999?

1 A In 1999 I was promoted to regional supervisor
 2 where I worked for five years in Glasgow which is a more
 3 administrative and managerial position. I was no longer
 4 in the fisheries division. I worked for the director's
 5 office, and I oversee, in this position, the work of all
 6 the division within the region. So I no longer
 7 was -- after 1999, I was no longer a fisheries
 8 professional. I was in administration and supervision.
 9 Q Okay. And your current position today with
 10 FWP?
 11 A Regional supervisor.
 12 Q And can you kind of tell me in -- for lack of a
 13 better word, the pecking order? You're at the top of
 14 Region One, is that fair to say, in FWP?
 15 A Yes.
 16 Q Who works directly under you? What's the next
 17 level down?
 18 A I supervise the managers, the program managers
 19 in the region; fish manager, wildlife manager,
 20 information/education, regional office manager,
 21 enforcement. Those are the direct reports I have.
 22 Q Okay. And obviously, before you became
 23 regional director -- is that the term?
 24 A Regional supervisor.
 25 Q Supervisor; I'm sorry. Before you became

1 drafted any opinion letters of any kind with respect to
 2 any of those other subdivisions?
 3 A I'd have to -- I would have to consult my
 4 correspondence --
 5 Q Okay.
 6 A -- to answer that "yes" or "no."
 7 Q Do you recall, sitting here today, having
 8 authored any opinion letter regarding any other
 9 subdivision project or application in the vicinity of
 10 the North Shore Ranch from 2003 to present date?
 11 A Well, I was here in the very end of 2004. I
 12 came here -- I was appointed this job in December of
 13 2004. So technically, that's why I told you I started
 14 2004. I moved to Kalispell -- I worked here part time
 15 between Glasgow and Kalispell from December of 2004
 16 until approximately March of 2005 when I moved over here
 17 permanently. So I wouldn't be familiar with anything in
 18 2003, for instance.
 19 Q Okay.
 20 A That would predate my tenure here.
 21 Q How about 2004 to present date?
 22 A Two thousand five -- in round numbers, 2005 is
 23 when my tenure would start here. Because I was
 24 appointed here, literally, right around Christmas 2004.
 25 Q Okay. And prior to Christmas of 2004, in your

1 regional supervisor, in your professional career, were
 2 you ever a wildlife manager person?
 3 A No.
 4 Q Sir, do you remember, in a general sense, the
 5 North Shore project, North Shore Ranch?
 6 A Sure; yes.
 7 Q Okay. And you had occasion, on a number of
 8 occasions, to author letters with respect to this
 9 project; is that fair to say?
 10 A Yes.
 11 Q Okay. In the North Shore Ranch project,
 12 obviously that was on the north shore of Flathead Lake;
 13 correct?
 14 A Yes.
 15 Q And it abutted the waterfowl
 16 protection -- production area owned by United States
 17 Fish and Wildlife Service; correct?
 18 A Yes.
 19 Q Okay. With respect to that general local, are
 20 you aware that there were other subdivision applications
 21 that had been filed regarding property in the general
 22 local of the North Shore Ranch within the year or two
 23 before or a couple years afterwards?
 24 A Yes.
 25 Q In a general sense, do you recall having

1 employment with Fish, Wildlife & Parks, had you ever
 2 rendered an opinion letter on any other subdivision, to
 3 your recollection?
 4 A I think so. I can't be -- in other words, that
 5 was -- at that point I was employed in Glasgow,
 6 northeastern Montana. And subdivisions aren't as large
 7 an issue in northeastern Montana. But I think I -- I
 8 can't say with a hundred percent certainty, but I
 9 suspect that I authored letters dealing with varying
 10 sources of development in northeastern Montana which is
 11 not as extensive as it is here.
 12 Q I noticed, in reviewing some of the other
 13 subdivision applications that had been filed in the 2003
 14 to 2007 time period in Flathead County, FWP employees
 15 offered opinion letters, but they were generally opinion
 16 letters provided by, you know, wildlife biologists
 17 employed by FWP and not, you know, the regional
 18 supervisor or, you know, a fisheries manager or wildlife
 19 manager. And I guess my question, in a general sense,
 20 is why, as the regional supervisor, did you, yourself,
 21 provide opinion letters on this particular project?
 22 A Since I've been here, my direction from the
 23 director's office has been that letters that would go to
 24 the county, letters pertaining to substantial points and
 25 processes, are generally run through me. And there

1 are -- there are parameters I'm looking for. I have
2 a -- and this spans all the programs I supervise, not
3 just, in this case, wildlife. It would be fisheries,
4 wildlife, parks. But I review those letters and approve
5 those letters and sign those letters. So this -- for
6 instance, isn't the only instance where I've done that.

7 Q Okay. And I notice in this file -- and we'll
8 get to the documents, but I noticed initially Jim
9 Williams had authored some letters regarding this
10 project. Do you recall that, in a general sense?

11 A Yes, I do.

12 Q Okay. And why, after Jim Williams had
13 initially provided his opinions on this project, did you
14 see fit to offer your own opinions after he had already
15 done so?

16 A I'd have to -- I would have to review the
17 specific nature of the letters. But I think my role
18 as -- the description of my job and my job description,
19 my position description, I'm basically -- among other
20 things, I'm a spokesman for the region. And I
21 supervise -- I supervise the region. So I think when I
22 sign a letter, when I send a letter out, it implies that
23 it's gone through the entire chain of command within the
24 region. And the more -- sometimes the more -- the more
25 gravity an issue has, the more likely I am to be

1 generally greater than the subordinate's sometimes, that
2 they're logical, they fit into the parameters of how
3 we -- how I expect our staff to respond to, in this case
4 subdivisions. It could be a whole host of issues but in
5 this case subdivisions. So I want to make sure those
6 letters fit into those parameters.

7 Q And in this particular case, I know you have
8 your letters in front of you that you forwarded to the
9 county. Was part of the reason that you, yourself,
10 authored these letters was to demonstrate to the county
11 the level of importance of the opinions that FWP was
12 providing?

13 A I'm not sure I'd say -- I'm not sure if I'd say
14 that or not. I think it was more a matter, for the
15 benefit of Fish, Wildlife & Parks, I wanted to be on
16 record -- I wanted to be on record that the regional
17 supervisor, the head of the region, was submitting these
18 comments.

19 Q And why?

20 A To make -- to verify that this was the position
21 of FWP from the top of the agency, at least at the
22 regional level.

23 Q Okay. So letters offered by, for instance, Jim
24 Williams, in your opinion, would have been insufficient
25 to convey that message that it was an opinion that was

1 authoring a letter and I provide my review on these
2 letters.

3 Q Okay. So is it your testimony that the letters
4 authored by your subordinate, Jim Williams or others in
5 the employ of FWP, were letters that you reviewed before
6 they were forwarded to the county?

7 A I don't remember. I'm not -- I can't remember.
8 I wouldn't be in a position to tell you whether or not I
9 reviewed all the letters that my subordinates signed or
10 not.

11 Q Okay. And I believe you testified that one of
12 the reasons that you, yourself, would author a letter
13 with respect to a given project would be the gravity of
14 the issues presented; is that correct?

15 A Sometimes.

16 Q Okay. And did you find issues associated with
17 the North Shore Ranch of such gravity that you felt it
18 was required on your part to wade in, in terms of
19 offering opinions?

20 A The mechanics for -- the mechanics for the
21 letters that appear under my signature are that I review
22 the letters, make sure they fit into the criteria. In
23 particular, for instance, with subdivisions, I review
24 the letters on the subdivisions and make sure, based on
25 my training and my experience, which sometimes is

1 offered by FWP?

2 A Well, I think -- I think this is fairly -- I
3 think this is fairly standard operating procedure. We
4 have seven regions in the state. We're divided into
5 seven administrative regions. And I think I would be
6 fairly consistent in the regional supervisor signing the
7 sort of letters that you're alluding to here.

8 Q Well, I suggest to you I reviewed the entire
9 file through a number of the subdivision applications
10 that were filed regarding land in the vicinity of North
11 Shore Ranch. For instance, the Tiebucker subdivision.
12 Are you familiar with that one?

13 A No.

14 Q You didn't offer an opinion letter in that one.
15 Do you recall that --

16 A No, I don't.

17 Q With respect to Fickens Farms I and II, are you
18 familiar with those subdivisions?

19 A I'd have to review them.

20 Q Okay. Well, they're in the vicinity of the
21 Blasdel WPA and the WPA next to the North Shore Ranch.
22 And I believe you've described that area, on repeated
23 occasions, as a critical habitat area. Is that fair to
24 say?

25 A I'd have to review those letters.

1 Q So you don't recall, in a general sense,
2 sitting here today, that you've already opined, on
3 multiple occasions, that the area surrounding the North
4 Shore Ranch was a quote, unquote, "critical wildlife
5 habitat"?

6 A Oh, I remember that, yeah.

7 Q Okay. But you didn't offer that opinion with
8 regard to Fickens I and II, Tiebucker, Pheasant Haven,
9 or any of the other subdivisions surrounding that
10 project. And I guess my question is why not? Why
11 didn't you, as FWP regional supervisor, offer opinion
12 letters on any of those other projects?

13 A I'd have to -- you know, I would have to review
14 those letters to tell you that.

15 Q Okay.

16 A And the dates and circumstances.

17 MR. PERRY: Why don't we get to some of
18 them right now.

19 (Deposition Exhibit No. 1 marked for
20 identification.)

21 THE WITNESS: I wasn't here in 2003. And
22 that's Dan Vincent who signed this letter. He is my
23 predecessor. He's the fellow that had this problem
24 before I came. He retired in 2004.

25 Q (By Mr. Perry) And I guess my question with

1 respect to this letter -- I recognize that you weren't
2 here in 2003. I recognize this was written by your
3 predecessor so to speak, Dan Vincent. And my question
4 is, at this point in time -- well, in a general sense,
5 are you aware of the fact that the -- that FWP was
6 concerned about Weaver Slough before you came here, in
7 terms of its being preserved as a wildlife habitat? Did
8 you ever come to learn that?

9 A I'm not sure. I can't -- probably, but I can't
10 specifically state my familiarity with this.

11 Q Okay. Are you familiar with where the Weaver
12 Slough is?

13 A Yes.

14 Q And can you approximate for me, your best
15 approximation, how far is it from the North Shore Ranch
16 property?

17 A I'm not sure.

18 Q Fifty miles, ten miles, any approximation?

19 A I've got maps here. I can consult that. But
20 again, this is -- this document is written in 2003. I
21 was working in Glasgow at the time this document was
22 written.

23 Q No; I understand that. I understand that.

24 A And the regional supervisor -- this is the
25 regional supervisor. This person occupied the same

1 position I hold now.

2 Q No; I understand that. I understand that. A
3 couple questions about this document. And feel free to
4 read the whole document if you need to. But nowhere in
5 here is there mention of the term "critical wildlife
6 habitat" with regard to Weaver Slough. And this is
7 going to be a recurring theme during the course of this
8 deposition, so we might as well get it out on the table
9 now. What does "critical wildlife habitat" mean? Where
10 is it defined?

11 A Well, one definition of critical wildlife
12 habitat, with the -- in the context of the Endangered
13 Species Act, is that critical wildlife habitat is core
14 habitat that is deemed essential to the survival of the
15 species.

16 Q Okay.

17 A And I think that's the legal -- pretty close to
18 a legal definition, per the Endangered Species Act. But
19 it's like a lot of terminology. It can often be used in
20 a broader context with that. With regard to the
21 Endangered Species Act, that's what critical habitat
22 means.

23 Q And with regard to the Endangered Species Act,
24 you'd agree with me that no portion of the north shore
25 of Flathead Lake has ever been designated by the federal

1 government as a critical wildlife habitat, under the
2 Endangered Species Act.

3 A That question -- off the top of my head, I'd be
4 more comfortable with Gael Bissell, one of the
5 field -- acting field biologists answering a question
6 like that.

7 Q Well, let me ask it another way. Do you have
8 any knowledge, sitting here today, as to whether or not
9 any portion of the north shore of the Flathead Lake has
10 ever been designated as critical wildlife habitat by the
11 United States federal government, under the Endangered
12 Species Act?

13 A I don't have any -- I'm not sure.

14 Q Okay. Can you tell me the difference between
15 critical wildlife habitat and crucial wildlife habitat?

16 A Well, I think, again, from Endangered Species
17 Act perspective, "crucial" is more generic and isn't
18 as -- is broader. There's crucial and critical. So
19 it's more general and not -- I don't -- it would
20 probably be a broader term than crucial -- or than
21 "critical."

22 Q And is crucial wildlife habitat defined
23 anywhere in any regulatory authority, to your knowledge,
24 in Montana, "crucial wildlife habitat"?

25 A I'm not sure.

1 Q So sitting here today, you have no knowledge as
2 to whether or not that term is defined anywhere in
3 Montana regulations; is that fair to say?

4 A That's fair to say.

5 Q Okay. And "critical wildlife habitat," during
6 the pendency of the North Shore Ranch application, that
7 wasn't a term defined by the Flathead County Planning
8 and Zoning regulations either, was it?

9 A I'm not sure.

10 Q You'd agree with me that the US Fish and
11 Wildlife Service identifies four threatened species that
12 are known or likely to occur in Flathead County. And
13 they are Spaulding's campion, the bull trout, the Canada
14 lynx, and the gray wolf; isn't that true?

15 A Could you state that again?

16 Q Sure. You'd agree with me that the US Fish and
17 Wildlife Service identifies only four threatened species
18 that are known or likely to occur in the Flathead
19 County. And they are Spaulding's campion, flora, the
20 bull trout, the Canada lynx, and the gray wolf. Are you
21 aware of that?

22 A Well, yeah. I'm trying to figure out where
23 grizzly bears fits in there. I mean, I guess they're
24 endangered, but sometimes endangered species are
25 referred to as threatened also. But all right; fine.

1 you, some of your letters and FWP correspondence, did
2 you have a chance to review any of the North Shore Ranch
3 application packet?

4 A No.

5 Q And, sir, did you or any of your staff ever
6 determine that the Canada lynx was found on the North
7 Shore Ranch property?

8 A I don't believe they're found on the property.

9 Q Did you or your staff ever make any
10 determination or render any opinion as to whether or not
11 they were likely to occur on the property?

12 A I'm sure they did.

13 Q Did you, yourself?

14 A Personally?

15 Q Yes.

16 A No.

17 Q And, sir, did you or any of your staff ever
18 make any determination as to whether or not the gray
19 wolf was known to occur or be present on the property or
20 likely to occur on it, in your evaluation of this
21 project?

22 A The field staff would have made all those
23 determinations.

24 Q Okay.

25 A For all the previous questions you asked me, I

1 Q And in your evaluation of the North Shore Ranch
2 project, did you ever come to conclude that Spaulding's
3 campion was known or likely to occur on that property?

4 A I don't know.

5 Q Did any of your wildlife biologists ever make
6 that determination, to your knowledge?

7 A I don't know.

8 Q Did you or any of your employees ever determine
9 that the bull trout was found on the North Shore Ranch
10 property?

11 A On the property?

12 Q On the property.

13 A I don't believe so. I don't think -- they
14 occur in the lake, of course, but I don't think -- I'm
15 not sure they occur on the property.

16 Q Okay. And you're aware of the fact that
17 there's no river or creek on the North Shore Ranch
18 property; right?

19 A Right. Go ahead.

20 Q Just stepping back for a second, before you
21 came in for your deposition today, did you have occasion
22 to review any documents?

23 A I've taken a look -- I've taken a look at some
24 documents.

25 Q Okay. And aside from the documents in front of

1 considered the field staff would have made that
2 determination for all the species. Those determinations
3 would have been made. They wouldn't have been made by
4 me.

5 Q Okay.

6 A The biologists would have made those
7 determinations.

8 Q So is it your testimony that before you offered
9 your own opinion letters on this project, you consulted
10 with your field staff to uncover or discover their
11 opinions with regard to potentially occurring threatened
12 species on the property?

13 A I reviewed -- I reviewed their findings
14 before -- before we signed the letters, before I signed
15 the letters.

16 Q Okay. And as you know, my office subpoenaed
17 all of your records on this file. You're aware of that.

18 A I suppose. I wasn't -- I wasn't specifically
19 aware that you'd done that.

20 Q Okay.

21 A But everything we do is public information. I
22 presume anything I put my name on is public information.
23 So I presume you're entitled to anything I have.

24 Q And I guess my question is, in reviewing the
25 documents received from your office regarding this

1 project, I didn't see any field notes from any of your
 2 biologists. Are they commonly part of a file, so to
 3 speak, when FWP's evaluating a subdivision, field notes?
 4 A Well, field notes would be -- you would be
 5 entitled to any field notes that they had, but they're
 6 not necessarily a process by which those field notes are
 7 going to be entered into the database. If they've got
 8 something like this, for example, (indicating)
 9 it's -- you know, it would be public information.
 10 There's not private matter in there.
 11 Q Okay. And I guess my question boils down to if
 12 I didn't receive any quote, unquote "field notes," would
 13 it be safe to assume they don't exist, or could they
 14 have been destroyed?
 15 A Could they have been destroyed?
 16 Q Yes, sir.
 17 A I suppose that's theoretically possible, but it
 18 would be -- it would be not in keeping with the
 19 direction we provide. We don't -- to my knowledge, we
 20 don't destroy any data or information.
 21 Q And do you recall specifically, with respect to
 22 the letters that you prepared and you authored regarding
 23 this project, having actually reviewed field notes from
 24 any of your subordinates? Sitting here today, do you
 25 have any memory of that?

1 that vicinity, have you not?
 2 A Yes.
 3 Q Okay. And during the course of the North Shore
 4 Ranch project, you worked -- or your department worked
 5 hand-in-hand with the Flathead Land Trust in attempts to
 6 acquire this land, did you not?
 7 A I think we are presently working on it. We
 8 continue to work in that direction.
 9 Q And, sir, with respect to the property at
 10 issue, North Shore Ranch, have you ever walked the
 11 property yourself?
 12 A I don't -- my understanding -- I've driven the
 13 perimeter. My understanding is there's been some issues
 14 in accessing the property.
 15 Q Move to strike; nonresponsive.
 16 My question is, have you ever walked the
 17 property yourself?
 18 A I don't think I've been allowed to walk the
 19 property.
 20 Q Move to strike as nonresponsive.
 21 My question is, have you ever walked the
 22 property?
 23 A The perimeter?
 24 Q The property itself, proper, the locus.
 25 A I've not been within the boundary of the

1 A No.
 2 Q And, sir, I see in Exhibit 1 to your
 3 deposition, there's an indication made on the second
 4 page, under the Weaver Slough Conservation Project,
 5 bottom of the final full paragraph, there's an
 6 indication made, and I quote, "Thus far, the approved
 7 sources of funding for Weaver Slough project area
 8 include the USDA Farmland Protection Program, Montana's
 9 Agricultural Heritage Program, and the Bonneville Power
 10 Administration. The Flathead Land Trust and FWP are
 11 completing the remaining steps to obtain funds from the
 12 state's waterfowl stamp and the North American
 13 Conservation Act," close quote. Have I read that
 14 correctly?
 15 A Yes.
 16 Q Sir, when you came into the office, so to
 17 speak, as the regional supervisor for Region One on
 18 behalf of Montana's Fish, Wildlife & Parks agency, were
 19 you then aware that your agency was working in a
 20 symbiotic relationship with the Flathead Land Trust to
 21 acquire lands in the vicinity of Flathead lake?
 22 A Shortly after I came I became aware of this.
 23 Q Okay. And during your tenure as the regional
 24 supervisor, you, too, have worked with the Flathead Land
 25 Trust as a team, so to speak, to try to acquire lands in

1 property; no.
 2 Q Okay. And in terms of rendering opinion
 3 letters, is it fair to say that you found it
 4 unimportant, then, to actually physically walk the
 5 property to be able to render an opinion letter?
 6 A Well, we were compelled to provide basically
 7 environmental assessments. And we had to do -- I guess
 8 my answer would be -- why don't you repeat your
 9 question.
 10 MR. PERRY: Would you read it back, please?
 11 (Whereupon the previous question was read back
 12 by the court reporter.)
 13 THE WITNESS: Okay; my answer to that is I
 14 don't think it's unimportant. Did I find it
 15 unimportant? No, I didn't find it unimportant.
 16 Q (By Mr. Perry) I guess the corollary would be
 17 in order to render an opinion, a competent opinion,
 18 about potential impacts posed by the project on wildlife
 19 or wildlife habitat, was it, in your opinion, necessary
 20 to actually walk the property?
 21 A I know that there were other means we used to
 22 evaluate the property. For example, biologists in the
 23 past have walked that property. We have
 24 biologists -- we have conducted surveys on the property
 25 before the access was limited. I haven't, but, for

1 example, Gael Bissell has walked that property in the
2 past before the subdivision proposal and before the
3 property was inaccessible. There have been aerial
4 surveys. There's a lot of information out there that we
5 use in lieu of being able to walk the property.

6 Q Okay. Would it be fair to conclude that you
7 felt comfortable in rendering an opinion letter or
8 opinion letters on this project without ever actually
9 physically having been on the property?

10 A Yes.

11 Q Okay.

12 Sir, you'd agree with me that wildlife, in the
13 general sense, of the vicinity of the North Shore Ranch
14 project, exists on a landscape level. And I think
15 that's a term that you folks have used in some of your
16 opinion letters. Is that fair to say?

17 A In other words -- well, I'm not sure what your
18 question is. You're going to have to ask your question.

19 Q Poorly phrased question. I'll be happy to
20 rephrase it.

21 In some of the opinion letters we'll get to
22 today, there's discussion about how wildlife in the
23 vicinity of the North Shore Ranch project doesn't really
24 exist on one particular property, per se, but uses kind
25 of a landscape global portion of land to exist. Is that

1 consistent with your understanding?

2 A Yes.

3 Q Okay. And you'd agree with me that in a
4 general sense, north of the North Shore Ranch property,
5 the land has been broken up between agricultural and
6 residential uses, in addition to some federal and state
7 lands that have been set aside. Would that be fair to
8 say?

9 A Yes.

10 Q Okay. And this stratification, for lack of a
11 better term, in a general sense, would that have any
12 impact on wildlife and wildlife habitat in that general
13 geographic area north of the North Shore Ranch project?

14 A Some wildlife to some degree, some species,
15 perhaps.

16 Q Okay; which species would be affected by that
17 stratification?

18 A The species that are not -- that don't occur
19 as -- have as much fidelity to the shoreline. Or
20 perhaps waterfowl that not only occur along the
21 shoreline but also feed north of the property might be
22 affected more than, for example, shoreline birds which
23 have a high fidelity along the shoreline, as an example.

24 Q Sir, would you agree with me that when you, as
25 a professional, are evaluating a project, it's important

1 for you to provide an objective opinion about potential
2 impacts on wildlife or wildlife habitat?

3 A Yes.

4 Q Okay. And would you agree with me that your
5 subordinates also would have the obligation to evaluate
6 any given project in an objective way?

7 A Yes.

8 Q All right. Now, in a general sense, if you had
9 any pre-existing predisposition toward being critical of
10 development, in the general sense, would it be proper
11 for you to render an opinion on potential impacts posed
12 by a project?

13 A We -- we evaluate the environmental impacts of
14 development. And we do not support or oppose
15 development. If you look at the letters, I don't think
16 you'll find any place where I specifically said -- and
17 the instructions to the staff I supervise, furthermore,
18 the specific instructions are We are not to say, quote,
19 "we support" or, quote, "we oppose" this project. We
20 provide the environmental impacts in our best
21 professional judgment associated with proposed
22 developments.

23 Q So would you agree with me that you, as a
24 professional, if you, for instance, hypothetically, had
25 a predisposition to denying subdivisions, in a general

1 sense, because you just don't like development, you'd
2 agree with me that it would be inappropriate for you to
3 render an opinion letter on that development, if you had
4 that predisposition pre-existing?

5 A That's a hypothetical question.

6 Q Can you answer it? Do you understand the
7 question?

8 A It's a hypothetical question.

9 MR. SCHENK: I want to lodge an objection,
10 because we don't have any authority to deny a
11 subdivision.

12 MR. PERRY: No; I understand that. I
13 understand that.

14 Q (By Mr. Perry) My question is real simple. If
15 you, as a professional, as the head of Region One, had a
16 pre-existing predisposition because of your own personal
17 outlook to deny subdivisions because you were
18 anti-growth, you'd agree with me that it would be
19 virtually impossible for you to render an objective
20 opinion letter on potential impacts posed by any
21 subdivision.

22 MR. MCCORMICK: Before you answer that
23 question, I want to ask Terance a question.

24 MR. PERRY: Can we go off the record,
25 please?

1 MR. MCCORMICK: No; I want it on the
2 record.

3 MR. PERRY: Well, I'm not here to testify.

4 MR. MCCORMICK: Well, I want it on the
5 record. And she's going to take it down, because it's
6 part of the depositions.

7 MR. PERRY: Well, I'm going to move to
8 strike because I'm not here to testify.

9 MR. MCCORMICK: There is no such thing as a
10 motion to strike.

11 THE WITNESS: Can I take a break?

12 MR. PERRY: Sure, you can take a break.

13 MR. MCCORMICK: The court's not going to
14 allow a witness to answer a speculative question. Now
15 in a deposition, certainly, you can ask questions that
16 are going to elicit responses that are not admissible in
17 court.

18 That clearly is a question that's not going to
19 be admissible in court. Now, if it leads you to
20 something else, more power to you. But my question for
21 you specifically is, do you want me to lodge an
22 objection every time that we have a speculative
23 question, or can I just have a blanket objection here to
24 those form of questions so I don't have to interrupt you
25 every time that you ask that?

1 MR. PERRY: I'd like you to formally
2 interpose your objection. And it's not speculative.
3 And we'll get to the evidence on it.

4 And I'd move to strike the soliloquy as, you
5 know, irrelevant to the deposition. But if you want to
6 take a break, are you willing to let him take a break?

7 MR. MCCORMICK: He can take a break as long
8 he wants. There is no such thing as a motion to strike.
9 Now, you can argue that it's admissible or not
10 admissible that I have a soliloquy on here. I think
11 it's a valid question of whether this is admissible or
12 not, whether it's an appropriate question. And I'm
13 simply asking the question, soliloquy or not, whether
14 you're going to require me to object every time we have
15 one of those questions. I find it easier if we reserve
16 those, or if I make an objection to that kind of
17 question first and reserve it for later. But if you
18 want me to make the objection every time --

19 MR. PERRY: Make the objection.
20 Can he take a break now?

21 MR. MCCORMICK: He sure can.
22 (Deposition in recess from 9:46 a.m. to
23 9:50 a.m.)

24 Q (By Mr. Perry) Sir, back on the record, a
25 couple of general questions. If you had a staff member

1 under you who you knew was anti-growth, would you have
2 any reservations about that staff member preparing an
3 opinion letter on a given project?

4 MR. MCCORMICK: Objection; speculation.

5 THE WITNESS: Should I answer the question?

6 MR. MCCORMICK: For purposes of the
7 deposition, I have to object. Your attorney has to
8 object. But aside from attorney-client privilege
9 information, you can answer the question after all
10 objections.

11 THE WITNESS: If I had -- if I had a staff
12 member who was anti-development, you asked me would I
13 allow them to comment on subdivisions?

14 Q (By Mr. Perry) Yes, sir.

15 A And you want a "yes" or "no" answer?

16 Q However you want to answer it.

17 A If I had such an employee, I would counsel them
18 about the appropriate role FWP plays in the subdivision
19 review process. And I would also try to counsel their
20 supervisor, if it wasn't me, about the parameters under
21 which we comment which, again, as I told you before, is
22 that we don't want to, quote, "support" or "oppose"
23 subdivisions. We want to provide an objective
24 assessment of environmental impacts.

25 Q And that's the key word, isn't it, "objective"?

1 A It's important.

2 Q And you'd agree with me that as a professional
3 wildlife biologist, if you have an understanding or a
4 belief that due to your own predispositions, you can't
5 be objective of evaluating a project, you shouldn't
6 offer an opinion, should you?

7 A Well, I think that's unrealistic. I think
8 folks have -- what we work with our employees quite a
9 bit on, on a whole host of issues, is not really to
10 avoid or to eliminate personal beliefs. Basically, we
11 try to encourage and counsel employees to separate their
12 personal positions, their personal beliefs, from their
13 professional opinions, professional beliefs, and to
14 limit -- and, for example in this case, working for FWP,
15 communicating under the banner of the Department of
16 Fish, Wildlife & Parks, limiting their position to
17 scientifically-based conclusions, irrespective of their
18 personal beliefs which everyone has.

19 Q When do you counsel your employees about that
20 issue?

21 A If, for example, I read -- a hypothetical
22 example would be if I heard somebody say something in a
23 public meeting or I encountered a draft document or
24 something like that that I thought exceeded the position
25 the department should take or wasn't -- solely was based

1 inevitability of that's one of the effects of
2 subdivision.
3 Q So again, much as with the domesticated animals
4 issue, you relied upon empirical data and not any
5 point-specific data.
6 A Yes.
7 Q Now, you'd agree with me that the WPA itself
8 was created to provide recreational opportunities for
9 individuals in the vicinity of the WPA. Fair to say?
10 A Yes.
11 Q Okay. And that's one of the core purposes for
12 the creation of the WPA, was it not, to afford
13 recreational opportunities?
14 A That's one.
15 Q And you can hunt on the WPA, can you not?
16 A Yes.
17 Q And you'd agree with me that, you know, since
18 the WPA is owned and managed by the US Fish and Wildlife
19 Service, it would be that agency's responsibility to
20 effectively manage its own property to reasonably limit
21 any adverse impacts that visitors m pose?
22 A Well, we help. FWP helps.
23 Q Okay.
24 A We provide wildlife law enforcement on WPA
25 properties.

1 Would you agree with me that the potential
2 impact of the North Shore Ranch project on the entire
3 Flathead Valley, with respect to wildlife and wildlife
4 habitat, would be relatively small, given the extensive
5 property already owned by USFWS and FWP as well as
6 conservation easements that are in place in the Flathead
7 Valley?
8 A No.
9 Q So despite the fact that there are thousands of
10 acres already conserved, already owned by FWS or FWP or
11 subject to a conservation easement, it's your opinion
12 that the potential impact of the NSR project on wildlife
13 and wildlife habitat would not be small.
14 MR. MCCORMICK: Objection; asked and
15 answered.
16 THE WITNESS: It would be -- I think it
17 would be substantial.
18 Q (By Mr. Perry) How so?
19 A It's an important piece of habitat. It's a
20 critical piece of habitat on a very popular, heavily
21 used lake, one of the most important and most popular
22 lakes in the state. It occupies a substantial portion
23 of the north shore, and I think it would be a
24 substantial impact.
25 Q So this one 300-acre parcel of property would

1 Q Okay. So you work kind of in conjunction with
2 FWS in that regard?
3 A Uh-huh.
4 Q Yes?
5 A Yes.
6 Q And so between the two of you, you assume the
7 mantle of responsibility for managing the WPA. Fair to
8 say?
9 A Well, it's their responsibility, but we assist.
10 Q Okay. In the entire time that you've been
11 regional supervisor for FWP in Region One, have you ever
12 seen a management plan for the WPA authored or
13 promulgated or ratified by the US Fish and Wildlife
14 Service?
15 A I don't remember. I can't tell you that "yes"
16 or "no."
17 Q So you've never seen one?
18 A Not to my recollection, but I'm not going to
19 tell you that it doesn't exist. I can't tell you it
20 doesn't exist.
21 Q If one did exist, can you tell me, in your
22 opinion, would you have been likely to see it, if it
23 existed?
24 A Probably not.
25 Q Okay.

1 have a substantial impact on wildlife and wildlife
2 habitat in the entire Flathead Valley?
3 A Yes.
4 Q Now, when the Hungry Horse Dam was created, and
5 this was probably, obviously, before your time in 1938,
6 Bonneville Power Administration was charged subsequently
7 with the obligation to mitigate impacts posed by the
8 creation of that dam; correct?
9 A Yes.
10 Q Now, when that dam was created, it flooded
11 about 24,000 acres. Are you aware of that?
12 A Yes.
13 (Deposition Exhibit No. 6 marked for
14 identification.)
15 Q (By Mr. Perry) Sir, the document marked as
16 Exhibit 6 to your deposition, I don't know if you've
17 seen that before, but if you could give it a read, I'd
18 like to ask you a couple questions.
19 A Okay.
20 Q Sir, have you had a chance to read that?
21 A Yes.
22 Q Fair to say it's a one-page letter from James
23 W. Flynn, the director of the Montana Department of
24 Fish, Wildlife & Parks dated July 9, 1984?
25 A Yes.

1 Q Okay. And it addresses the Hungry Horse
2 hydroelectric project constructed and operated by the US
3 Bureau of Reclamation; fair to say?

4 A Yes.

5 Q And in the first paragraph, the director of
6 Montana Fish, Wildlife & Parks states that the creation
7 of that hydroelectric project "inundated 23,750 acres of
8 important wildlife habitat resulting in long-term,
9 negative impacts to the diverse wildlife populations
10 inhabiting the South Fork of the Flathead River
11 drainage." Have I read that correctly?

12 A Yes.

13 Q And in the next paragraph down, he states, and
14 I quote, "This document represents phase one of an
15 ongoing process to achieve complete mitigation for the
16 impacts to the wildlife resource resulting from the
17 construction of the Hungry Horse hydroelectric project,"
18 close quote. Have I read that correctly?

19 A Yes.

20 Q Are you aware of the fact that in 1984, the
21 director of your agency was of the opinion that the
22 impacts posed by Hungry Horse hydroelectric -- the
23 Hungry Horse hydroelectric project could be completely
24 mitigated?

25 A I wasn't aware of that until I read this.

1 you are of the opinion that the potential impacts are
2 unmitigatable. Can you reconcile those positions for
3 me? Because I'm having trouble doing it myself.

4 A Well, when Director Flynn here said "represents
5 complete mitigation," I'm not necessarily sure if that
6 means he's saying that this will be like -- when we
7 accomplish all this it will be like this never happened.
8 I think what he's saying here is that -- the way I read
9 this is This is as good as we're going to do. This is
10 going to be -- and that's also a legal term. This will
11 complete the legal mitigation requirements for the
12 impacts of this. But I don't necessarily think that it
13 was his intent to say that this means that we
14 have -- this makes up for all the damage. We basically
15 replaced this; all right? So therefore, that's why I
16 think -- that's why I don't necessarily think there's
17 any inconsistency here that you're pointing out.

18 Q That second first full paragraph, full
19 sentence, he makes it pretty clear, does he not, when he
20 states that, quote, "This document represents phase one
21 of an ongoing process to achieve complete mitigation for
22 the impacts to the wildlife resource resulting from the
23 construction of the Hungry Horse hydroelectric project,"
24 close quote.

25 A Okay.

1 Q Okay. Now, are you aware of the fact that your
2 agency has continued to work with the BPA and others to
3 mitigate the impacts posed by that dam?

4 A Yes.

5 Q And the creation of the WPA in 1970 to 1971 was
6 directly related to mitigation of those impacts, was it
7 not?

8 A Yes.

9 Q And, sir, is it your opinion that this letter
10 by the director of Montana FWP by which he opines that
11 there could be complete mitigation of the flooding of
12 almost 24,000 acres, is consistent with your opinion
13 that impacts posed by the North Shore Ranch project
14 could not be mitigated?

15 A Well, I mean, this document was written in 1984
16 and written by former Director Flynn. And this
17 doesn't -- this letter doesn't alter what I told you
18 before about my concerns about the impacts of this
19 proposal here.

20 Q And I'm just confused, because I find an
21 inconsistency of striking proportion here. Your agency,
22 on one hand, says that the flooding of almost 24,000
23 acres can be completely mitigated with respect to the
24 Hungry Horse Dam. But with respect to Mr. Simon's and
25 Mr. Averill's project that encompassed about 300 acres,

1 Q I mean, are you confused by that language at
2 all?

3 A No, but I think it's ambiguous.

4 Q In what respect?

5 A Because it's not entirely clear what
6 mitigation -- what he refers to there by "mitigation."
7 It's kind of your parsing of the word "critical,"
8 whether or not "mitigation" in this context means the
9 legal requirements of mitigation or a more general term
10 for replacing -- in this context, replacing or
11 compensating for. So I think my interpretation of the
12 letter, he was alluding to the legal mitigation
13 requirements for this project, is what I think he meant
14 here. That's what I think he meant.

15 Q Okay.

16 And with respect to the North Shore Ranch
17 project, the legal mitigation requirement, as you've
18 described it, it would be consistent with the legal
19 mitigation requirements imposed at this time, would it
20 not?

21 A I'm not sure if that's true or not. I mean,
22 this is thirty -- this twenty-five years ago. I'd have
23 to think about that.

24 Q So you find -- and let me just be clear.

25 A Sure.

1 Q You find this letter, by which the director of
2 your agency stated twenty-five years ago that complete
3 mitigation for the impacts resulting from the flooding
4 of 24,000 acres could be accomplished, you find that to
5 be consistent with your opinion in this case that a
6 subdivision on 300 acres could not be mitigated.

7 MR. SCHENK: Objection; I think you've
8 asked this question. This is the third time.

9 MR. PERRY: I just want to be clear and
10 then I'll move on.

11 Q (By Mr. Perry) Is that what --

12 A Yes.

13 Q Okay; fair enough.

14 MR. MCCORMICK: I will register the same
15 objection and also suggest that you're inserting
16 conclusions that have not been made.

17 MR. PERRY: Move to strike everything
18 except the objection.

19 MR. MCCORMICK: There is no such thing as a
20 motion to strike in this context, particularly in a
21 deposition. But if you want to keep registering those,
22 feel free.

23 MR. PERRY: Move to strike again.

24 Q (By Mr. Perry) Now, you'd agree with me that
25 any subdivision constructed anywhere near Flathead Lake

1 going to be concrete and houses and streets and so
2 forth. So I mean, that's what the staff does. That's
3 sort of the judgments the staff makes, you know, the big
4 picture. Yeah, you got this 25 acre here, you got this
5 little bit here, but big picture, this is the adverse
6 impact.

7 Q And obviously, you're of the opinion that the
8 buffer of approximately 70 acres between this
9 subdivision and the WPA is inadequate to mitigate any of
10 those impacts.

11 A I wouldn't say any impacts, but it doesn't
12 mitigate all of them. It's better than nothing.

13 Q Now, you'd agree with me that the Fish and
14 Wildlife Service, insofar as it owns the WPA, would be
15 fully entitled and empowered to plant its own forage
16 lots on the WPA if it wanted to.

17 A Yes.

18 Q Is it your testimony that none of the potential
19 impacts posed by the North Shore Ranch project on
20 wildlife or wildlife habitat were capable of mitigation?

21 A No.

22 Q Which of the impacts, in your opinion, were
23 capable of mitigation?

24 A Well, I don't know if I'm ready to detail right
25 now, but I'm not testifying here that none of the

1 would cause a loss of wildlife habitat; fair to say?

2 A Yes.

3 Q And this would be true regardless of where the
4 development's physically located; right?

5 A Well, it depends on where it's located. I
6 mean, it would just be -- the extent to which habitat
7 loss occurred would depend on where it was located.

8 Q Okay. Well, wherever you change the habitat to
9 construct homes, there's going to be habitat loss, isn't
10 there?

11 A Yes.

12 Q And the property at issue, you'd agree with me,
13 as it currently exists, is not in its native state,
14 insofar as it's been farmed for a long time.

15 A Yes. All right; yes.

16 Q Insofar as the property at issue has lost most,
17 if not all, of its native plant life, would the
18 subdivider's intent to restore native vegetation on the
19 property serve, in your opinion, to improve habitat for
20 any native species?

21 A Well, to back up, nonnative plants and farmland
22 or crops, for example, can provide pretty good habitat
23 for wildlife. Now, as far as restoring native plants,
24 that's good, but, you know, you've got to take a look at
25 the big picture in terms of that versus how much is just

1 impacts -- I think some of the things would be hardest
2 to mitigate would be the sheer presence of that many
3 folks living along the shoreline and the inevitable
4 impacts associated with their activity, their pets.
5 Just that human encroachment on the habitat, I think, in
6 general, is going to be pretty hard to mitigate.

7 Q And farming in northwestern Montana -- this
8 land, as we know, was operated as farmland for a long
9 period of time. You're obviously aware that farming of
10 land has its own noise factors; fair to say?

11 A Yes.

12 Q Okay. In your opinion, would the operation of
13 heavy machinery on this property for many years, would
14 that have had any impact, in terms of the noise and dust
15 created by it, on waterfowl, for instance?

16 A On this property?

17 Q Yes, sir.

18 A I imagine, yes.

19 Q And do you have any opinion, sitting here
20 today, as to any difference in gravity, so to speak,
21 between farming operations and their impact on wildlife
22 or waterfowl and residential use of the property? Can
23 you compare or contrast them?

24 A Well, I think the first thing that comes to
25 mind is the seasonality and the temporal nature of the

1 farming which is done at specific times which, on the
 2 other hand, this would be all year long. You'd have
 3 people that live there all year long. Where a farmer,
 4 he goes in, plants a crop, things are relatively quiet,
 5 he harvests the crop. To me, they're two entirely
 6 different things.
 7 Q Do you have any data that you could point me to
 8 and specific --
 9 A I think my staff could; I can't.
 10 Q And farming in western Montana starts in the
 11 spring, harvest's in the fall. Fair to say?
 12 A Basically, yes.
 13 Q Now, in the springtime we have migratory
 14 waterfowl coming through Flathead Lake. Fair to say?
 15 A Yes.
 16 Q Do you have any data that you could point me
 17 to, any scientific objective data, that could lead a
 18 scientist or wildlife biologist to conclude that the
 19 sheer presence of residential buildings has an impact on
 20 the migration of waterfowl?
 21 A I would defer that question to my staff.
 22 Q Okay. But sitting here today, you can't point
 23 me to any data, can you?
 24 A I wouldn't want to. I wouldn't want to imply
 25 that it doesn't exist. I would just -- my answer,

1 again, is that I would prefer to defer that question to
 2 the field staff that's delved into that data a lot more
 3 than I do now.
 4 Q Okay. But if you could just answer my question
 5 which is, can you, today, state --
 6 A No, I can't.
 7 Q Okay; fair enough.
 8 You'd agree with me that there are residential
 9 properties, subdivisions, and a golf course that already
 10 border the WPA?
 11 A Yes, yes.
 12 Q You'd agree with me that Highway 82 is a source
 13 of noise in the vicinity of the WPA?
 14 A Yes.
 15 Q And that noise, obviously -- that has to have
 16 an impact on wildlife, doesn't it?
 17 A The presence of the highway has an impact on
 18 wildlife.
 19 Q You'd think.
 20 A It has an impact on the wildlife.
 21 Q And you've had occasion in the past to
 22 yourself, personally, travel Highway 82?
 23 A Yes.
 24 Q And on the occasions on which you've been on
 25 that road, have you seen tractor-trailer trucks, that

1 type of --
 2 A Yes.
 3 Q Knowing what you know about the North Shore
 4 Ranch property, would you agree with me that there are
 5 basically three habitats that occur on the property;
 6 cultivated crop land, wet meadow, and residential areas,
 7 insofar as the four buildings on the property right now?
 8 A Well, I don't know about residential areas, but
 9 I agree those are the habitat types. I don't really
 10 call residents a habitat type. Is that what you called
 11 it?
 12 Q I did. Thank you for correcting me.
 13 A I mean, you could categorize it in such a
 14 manner.
 15 Q And there are some animals that are attracted
 16 to residential developments; correct?
 17 A Yes.
 18 Q And do you understand that the majority of the
 19 North Shore Ranch property, approximately 321 acres, is
 20 land that has historically been cultivated for grain or
 21 hay production?
 22 A Yes.
 23 Q Okay. And the historical use of that property
 24 for grain or hay production, obviously, that would have
 25 an adverse impact on any ground mammals, for instance,

1 mice, voles, that type of thing; fair to say?
 2 A No, not necessarily.
 3 Q Okay.
 4 A That's a pretty good habitat for some species,
 5 so not necessarily. I wouldn't agree with that
 6 entirely.
 7 Q Okay; fair enough.
 8 Now, with respect to this parcel of land, while
 9 you were reviewing documents associated with it and your
 10 agency, did you come to learn that about 34 acres of the
 11 project area was uncultivated wet meadow and wetlands
 12 that the developer proposed to completely set aside?
 13 A Yes.
 14 Q You'd agree with me that prior to settlement of
 15 the Flathead Valley, native plant communities over much
 16 of this portion of the Flathead Valley in the vicinity
 17 of this project were predominantly open stands of
 18 ponderosa pine with shrubs and herbaceous species
 19 characteristic of the Palouse Prairie?
 20 A Yes.
 21 Q And you'd agree with me that, at present, there
 22 are no remaining remnants of this habitat type left on
 23 the North Shore Ranch property.
 24 A I think that's right.
 25 Q And you'd agree with me that USFWS has no

1 noxious weed plan in place with respect to the WPA?
2 A I don't know. I couldn't answer that. I'm not
3 sure about that.
4 Q Would you agree with me that much of the
5 vegetation of the north shore of Flathead Lake is
6 dominated by extensive cattail and bulrush marsh?
7 A That exists; those species exist there.
8 Q And with respect to the WPA itself, would it be
9 fair to state that much of the vegetation on the shore
10 side of the WPA is cattail and bulrush marsh?
11 A Yes.
12 Q Would you agree with me that cattail and
13 bulrushes could be described as tall, thick emergent
14 vegetation?
15 A Yes.
16 Q And you'd agree with me that when cattails and
17 bulrushes invade a marsh, they tend to take it over?
18 A I don't know if they've taken that one. They
19 can take over. They can take over a marsh.
20 Q And when you were last on the property last
21 fall hunting, did you have occasion to see cattails and
22 bulrushes?
23 A Yes.
24 Q And was it dense on the shore?
25 A Yes.

1 Q Okay. So is it your testimony that the
2 existence of these stands of cattails and bulrushes has
3 had no adverse impact --
4 A No, wouldn't --
5 Q Let me finish my question.
6 A Okay.
7 Q No adverse impact on the use by waterfowl of
8 that waterfront, so to speak, on the WPA?
9 A No, I'm not saying that.
10 Q Okay. So conversely, would you be of the
11 opinion that the existence of bulrushes and cattails on
12 the waterfront, so to speak, of the WPA has had an
13 adverse impact on the use of that area by waterfowl?
14 A I couldn't answer that. I think the
15 biologists -- you'd need to ask our biologists that. I
16 don't have the historical perspective to answer that
17 question.
18 Q Okay. In a general proposition, in light of
19 your experience and training, have you ever come to
20 learn whether or not the existence of cattails and
21 bulrushes adversely impact waterfowl's use of a marsh?
22 A Well, they're more problematic in small
23 systems, small pounds, those small impoundments, farm
24 ponds where they can literally choke out the waterfowl
25 by depriving them of any open water. But in this

1 Q Would you agree with me that marshes
2 deteriorating from cattail and bulrush invasions tend to
3 be used infrequently by waterfowl due, in part, to low
4 invertebrate and benthic productivity?
5 A Well, yes.
6 Q And you'd agree with me that federal and state
7 land management agencies often control cattails through
8 the application of mechanical, chemical or prescribed
9 fire treatments?
10 A Yes.
11 Q Do you know whether that's been done on the WPA
12 that abuts this property?
13 A No, I don't.
14 Q Do you agree with the proposition that for
15 waterfowl to be inclined to use a marsh area, a 50/50
16 ratio of open water to emergent vegetation is desirable?
17 A Yes.
18 Q The existence of the extensive cattail and
19 bulrush stands on the WPA, that would serve to diminish
20 the value of that area for waterfowl and other water
21 birds, would it not?
22 A I don't think so. You know, it's pretty
23 heavily used by waterfowl right now, so there's -- I
24 would say the system -- I'd say the system is pretty
25 viable right now, that wetland.

1 situation where you have an enormous lake directly to
2 the south, it's my impression that it's not as
3 problematic. And furthermore, those species are
4 providing habitat for other sorts of wildlife, too,
5 besides just the waterfowl.
6 Q And I'm just asking about the waterfowl.
7 A Right.
8 Q So it's your testimony that at present, the
9 existence of cattails and bulrushes on the water side of
10 the WPA does not have an adverse impact on the use of
11 that area by waterfowl.
12 A Yes.
13 MR. PERRY: Do you guys want to break for
14 lunch or want to keep going?
15 MR. MCCORMICK: I have a general question
16 about your overall timing. You've still got quite a
17 stack of documents.
18 MR. PERRY: I do.
19 THE WITNESS: I've got some parameters on
20 my time. I'm available until about 4:00, 4:30. That's
21 what I told my attorney. I don't know what your
22 timetable is. I guess -- are we off the record here?
23 MR. PERRY: Why don't we just go off the
24 record; yeah.
25 (Deposition in recess from 12:01 p.m. to

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1 12:51 p.m.)
 2 Q (By Mr. Perry) A couple of questions about the
 3 dams associated with Flathead Lake. We have two, one on
 4 the north, one on the south; fair to say?
 5 A Yes.
 6 Q And the one on the north's Hungry Horse; is
 7 that correct?
 8 A Yes.
 9 Q And Kerr Dam is to the south?
 10 A Right.
 11 Q Would you agree with me that during minimum
 12 pool, the springtime, as much as about a kilometer of
 13 mudflats are exposed along the north shore of Flathead
 14 Lake?
 15 A Yes.
 16 Q And it's true, is it not, that during minimum
 17 pool, so to speak, when there's that significant
 18 exposure of the mudflats, residents in the area often,
 19 you know, operate ATVs and motorbikes on the mudflats.
 20 Are you aware of that?
 21 A Not a lot. I don't have a lot of awareness of
 22 that.
 23 Q Have you ever observed people out on the
 24 mudflats with motorized vehicles?
 25 A No, but I'm not saying it doesn't happen.

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1 Q Fair enough. And if those activities were to
 2 happen in the springtime on the mudflats, obviously the
 3 noise associated with those activities, they'd have an
 4 impact on waterfowl and wildlife, would they not?
 5 A Yes.
 6 Q Would you agree with me that the WPA itself has
 7 consistently lost waterfowl habitat as a result of wave
 8 action and fluctuating lake levels over the past
 9 approximately twenty-five years?
 10 A Yes.
 11 Q In light of the fact that a majority of the
 12 project area is land cultivated for grain or hay
 13 production, you'd agree that wildlife use of the
 14 cultivated farm land would almost entirely be seasonal
 15 and would occur mostly after the grains have matured?
 16 A No, I don't think I can agree totally with
 17 that. They -- different species would probably use that
 18 all year -- or not all year long, but throughout the
 19 year. After the crops are cultivated, there's going to
 20 be a lot of feeding in there, I think, is what you're
 21 alluding to. But otherwise, there will be some use in
 22 there even as the crops are growing and small mammals.
 23 So I think there's some use -- I guess I'm saying I
 24 think there's some use throughout the whole growing
 25 season.

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1 Q As a side note and a general proposition,
 2 you're aware of the fact that during the spring and
 3 summer and fall, Flathead Lake is itself a source of
 4 recreation in the form of boating and jet-skiing,
 5 kayaking, that type of thing?
 6 A Yes.
 7 Q And, sir, you'd agree with me that those
 8 recreational activities that occur in the vicinity of
 9 the north shore of the lake would have an impact on
 10 wildlife, would they not?
 11 A Yes.
 12 Q Okay. And to your knowledge, has FWP or USFWS
 13 undertaken any action to create a buffer zone from the
 14 north shore of the lake, and in particular WPA, to
 15 preclude or prohibit boating or jet-skiing within a
 16 certain distance from the shoreline?
 17 A We know we have a wakeless regulation on waters
 18 in the region. Waters in this region greater than 35
 19 acres have a 200-foot wakeless zone in the shoreline.
 20 Q Okay.
 21 A So we've had that for some time. Roughly 2001,
 22 I think, was -- 2003, 2001. So that's a generic
 23 regulation that comes with all waters in the region
 24 greater than thirty-five acres.
 25 Q Okay. And in your opinion, is that 200-foot

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1 setback, so to speak, is that sufficient to completely
 2 mitigate any impact from noise associated with
 3 jet-skiing or boating with respect to the WPA?
 4 A No.
 5 Q How far should that setback be, in your
 6 professional opinion, to mitigate noise impacts, in
 7 particular, on the WPA and the north shore of the lake
 8 itself?
 9 A I can't say, I'm sorry. I couldn't -- I
 10 wouldn't be able to give you that answer.
 11 Q Okay.
 12 A Just -- I wouldn't be qualified to give you
 13 that answer.
 14 Q All right. Well, previously, we discussed the
 15 distance of the -- the distance from the closest
 16 residential lot on the proposed subdivision to the
 17 lakeshore itself. You recall our discussion in that
 18 regard?
 19 A Yes.
 20 Q And it was your opinion that a half a mile
 21 setback, so to speak, from the lakeshore itself would
 22 not be adequate to effectively mitigate human adverse
 23 impacts, so to speak, posed by the subdivision. You
 24 recall your testimony?
 25 A Yes.

1 Q Would you be of the same opinion with respect
2 to boats and jet skis off of the shore of the north
3 shore, that they should be at least half a mile or more
4 distant from the shore?

5 A Well, the main thing is two different
6 scenarios. One is some traffic, the other is a
7 concentrate. Two different things, in my opinion. You
8 know, one is -- I can't remember, 200-and-something
9 residences. I'm sorry, I don't remember the exact
10 number right now. But one's more concentrated and more
11 constant than -- 24/7, if you will, than the other
12 scenario where you've got some boats coming here and
13 there and various other uses.

14 Q Okay; I understand.

15 But you'd agree with me, as a general
16 proposition, that boats and jet skis on the lake in the
17 spring and summer and fall would have the potential to
18 have an adverse effect on brooding, nesting, and
19 foraging of waterfowl in the vicinity of the north shore
20 of the lake?

21 A Some -- the possibility exists. That's a
22 pretty shallow area. And I'm not -- I would like -- I
23 would confer -- if I had the time, I would confer with
24 our warden. The person that could answer that question
25 better would probably be an enforcement person, like we

1 on wildlife foraging or nesting there?

2 A No.

3 Q No?

4 A Not really; I don't think so.

5 Q So shotguns going off, that type of thing,
6 wouldn't have any impact on wildlife?

7 A I don't think it's a negative -- I don't think
8 it's a substantial negative impact. You've got a few
9 rounds being fired there with pheasants and waterfowl.
10 I don't think it's a big impact.

11 Q But you'd agree with me that, in a general
12 sense, human presence alone on the WPA would serve to
13 adversely impact on wildlife and wildlife habitat.

14 A Well, I think the Service would be managing it.
15 And back east where they have a lot more hunting
16 pressure than they do here, they might manage it on a
17 reservation system or a quota basis, if that was an
18 issue. But our hunting density here relative to back
19 east is pretty light. So I think it's pretty minimal.
20 A guy out there with his dog out there -- pardon me.

21 Q Are you done?

22 A Yes, sir.

23 Q Okay. And I was just asking, not with respect
24 to hunting but, you know, the average -- a guy and his
25 wife and two kids, they go out there with their dog, if

1 have a lake ranger or enforcement personnel that can
2 tell you better how near it's possible to get into those
3 areas. Because those are pretty shallow, and I'm not
4 sure how close, throughout the year, it's practical to
5 get into that area with an outboard motor without
6 running ashore or running on the bottom. So I
7 would -- I'd be more comfortable with a warden or a
8 field biologist answering that question.

9 Q Fair enough.

10 A But theoretically, there's some impact.

11 Q In your experience -- you've lived in the area
12 for how long now?

13 A Five years.

14 Q Five years. Have you ever seen boats or jet
15 skis in that general vicinity of the north shore of the
16 lake?

17 A I've seen them on the lake. I don't know if
18 I've ever seen them, you know, encroaching on that shore
19 on the north shoreline. I can't say I have.

20 Q Now, on the WPA, obviously, residents during
21 the appropriate times of the year are permitted to hunt
22 and trap; fair to say?

23 A Yes.

24 Q And you'd agree with me that noise associated
25 with hunting on the WPA would certainly have an effect

1 there's wildlife in the area, certainly the wildlife is
2 going to hear the humans; right?

3 A Right.

4 Q You assume; right?

5 A Right.

6 Q And wildlife, as a general proposition, you'd
7 agree with me, doesn't really like to have human contact
8 when it can avoid it; right?

9 A Right.

10 Q So you'd agree with me that human presence
11 alone, that scenario, a wife, husband, couple kids and a
12 dog, is going to serve to chase off some of the wildlife
13 off the WPA, wouldn't it?

14 A Well, they've got some use rules out there,
15 some zoning rules right now. And I'm not qualified to
16 quote them to you. But I'm pretty sure that that place,
17 for example, is closed during nesting. And, for
18 example, they've identified -- Fish and Wildlife Service
19 has identified when they don't want to tolerate any such
20 disturbance for nesting wildlife, for example. So I
21 think they're pretty comfortable with what they've got
22 now. But hypothetically, yeah.

23 Q And it is my recollection, and correct me if
24 I'm wrong, but my recollection is it's open from
25 approximately May or June through November, October?

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1 A I can't tell you the exact regulations. I know
2 there's a nesting closure there, though.
3 Q And the bald eagles, as you know, they nest in
4 the early spring; right?
5 A Yes.
6 Q And certainly, if a bald eagle were to nest on
7 the WPA, it would nest in the spring and it would forage
8 during the summer and fall months; is that fair to say?
9 A Yes.
10 Q So if you had a bald eagle nest, an active one,
11 on the WPA, assuming that the WPA is open for people to
12 walk on the trails during the summer, you'd have people
13 in the vicinity, potentially, of an active bald eagle
14 nest; right?
15 A Yes.
16 Q And given your knowledge and experience and
17 training, that would, at least potentially, have an
18 adverse impact on the nesting of that eagle; fair to
19 say?
20 A Yes.
21 Q And you'd agree with me, to state the obvious,
22 that obviously killing wildlife on the WPA would
23 certainly have an adverse effect, at least on those
24 wildlife that get killed. Fair to say?
25 A Well, we may manage wildlife based on what's

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1 beneficial for population rather than the individual.
2 Q Right.
3 A So our hunting doesn't have an adverse impact
4 on the population. Regulated sport hunting doesn't have
5 an impact on the population. Yes, it has an impact on
6 the individuals that are harvested.
7 Q Point-specific impacts.
8 A Yes.
9 Q So -- and that kind of gets back to something
10 you and I discussed earlier today, that wildlife in this
11 area and in general, it exists on a landscape level and
12 not so much with respect to just one discrete parcel of
13 land.
14 A Uh-huh; yes.
15 Q So what you're saying is, although some animals
16 may be killed on the WPA during hunting season, whether
17 deer or waterfowl, that wouldn't have a significant
18 adverse impact on the numbers of those animals in the
19 general landscape area.
20 A Well, no. What I'm saying is that
21 there's -- for the species we hunt, even just confined
22 to this area here, there's always a harvestable surplus
23 of animals that can be killed every year without
24 adversely impacting the population, either
25 point-specific or in the broad picture. I'm not

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1 implying Well, yeah, you can kill all these here and it
2 hurts it here, but everything else makes up for that.
3 I'm saying that even here there's a harvestable surplus
4 of animals that can be killed without any negative
5 impact on the population.
6 Q Okay. And you'd agree with me that hunting, in
7 general, to the extent you have to discharge firearms
8 anyway, is a point source of noise.
9 A Yes.
10 Q Now, would you agree with me that there are
11 species of animals that actually thrive in human
12 landscapes in northwestern Montana?
13 A Yes.
14 Q And to your knowledge, what are some of those
15 species?
16 A Like raccoons and some certain species of mice,
17 skunks, coyotes, stuff like that.
18 Q Would sparrows?
19 A Pardon me?
20 Q Sparrows?
21 A Sparrows.
22 Q How about the house rat?
23 A Yes.
24 Q Is so there are species of animals in
25 northwestern Montana who would view residential

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1 development as a potential habitat source.
2 A Yes.
3 Q And in western Montana, some of the species
4 that thrive in human-disturbed landscapes are, in fact,
5 species of concern, are they not?
6 A What are you thinking of there?
7 Q I wasn't thinking of anything in particular.
8 It was my understanding that there were some species of
9 concern that actually did well in a human disturbed
10 landscape.
11 A I'm not -- I can't think of one, but I'm not
12 saying there isn't. I'm just trying to come up with
13 one.
14 Q Well, let me ask you this. Would you agree
15 with me that the peregrine falcon is pretty well adapted
16 to and co-exists well with human disturbance?
17 A Oh, I don't know. That would be a better
18 question for the biologist, but I thought they were
19 pretty sensitive.
20 Q How about the red fox?
21 A That's a species that would do pretty well in
22 an area like that with disturbance.
23 Q Okay; how about, you know, raccoons? I think
24 you might have spoken of?
25 A They do well.

1 Q Mice and voles?
2 A They do well.
3 Q Red-tailed hawk?
4 A Probably all right.
5 Q Great horned owl?
6 A They're pretty compatible with some
7 development.
8 Q American crow?
9 A Compatible.
10 Q Mallard?
11 A Well, they're -- they'd do all right.
12 Q I'm sorry?
13 A No, they're all right. Same with Canada goose.
14 Q Canada goose, that was the next one. House
15 finch?
16 A Yes.
17 Q And you'd agree with me that insofar as the
18 North Shore Ranch property, at present, has no forest
19 and very limited trees, forest-dwelling species would
20 already not be likely to nest, brood, forage, or depend
21 upon the North Shore Ranch property?
22 A Yes.
23 Q Now, the great gray owl, the northern goshawk,
24 the pine grosbeak, and the red crossbill, they'd be
25 examples of forest-dwelling species that would not be

1 A Yes.
2 Q Is it an endangered species under the ESA?
3 A No.
4 Q Are you aware of the fact that the parasitic
5 jaeger has only been observed on Flathead Lake once and
6 then only in 1987?
7 A I wasn't -- I wasn't aware of that knowledge
8 right now, no.
9 Q Would you agree with me that when an avian
10 species is highly unlikely to be present in the vicinity
11 of the north shore of Flathead Lake, it's virtually
12 impossible for that species to at all depend on that
13 habitat?
14 A Oh, I don't know. I mean, I see where you're
15 going, but I don't know. First of all, the fact that
16 there's been limited sightings doesn't necessarily mean
17 they don't occur more frequently than that. And second
18 of all, if they're relatively scarce, any sort of use
19 could be critical. So I'm not sure I agree with that.
20 Q Okay. You'd agree with me, though, that
21 without sightings, without scientific data supporting
22 the existence of an animal in a geographic region, it's
23 impossible, with any scientific certainty, to determine
24 or render an opinion as to whether or not habitat loss
25 would affect that species.

1 expected to depend on wetland or marsh habitats common
2 to the WPA or the cultivated fields found adjacent to
3 it; fair to say?
4 A I think so. I guess I'd like to say here that
5 we have staff that can answer -- that can give you
6 better expert opinions on these -- on some of these
7 questions than I can.
8 Q Okay; fair enough.
9 A I'll qualify my answer.
10 Q Have you ever seen a stilt sandpiper anywhere
11 on Flathead Lake?
12 A No.
13 Q Have you ever seen a parasitic jaeger in the
14 vicinity of Flathead Lake?
15 A I'm not a birder, per say, so, frankly, without
16 a bird book, I wouldn't know what a couple of those
17 species look like, so -- I don't think I have, though.
18 Q Okay.
19 Are you aware of the fact that the Montana Bird
20 Distribution database and the National Heritage Tracker
21 only contain a single observation record for a stilt
22 sandpiper from 1995?
23 A No.
24 Q And that's a species of concern in Montana,
25 stilt sandpiper?

1 A I think what the biologist would infer is
2 whether or not the loss of habitat and the sort of
3 habitat that might be lost has been documented elsewhere
4 is beneficial to that species. And if so, then I think
5 they would be concerned about loss of similar habitat,
6 regardless of how well documented its use was by the
7 species in question.
8 Q Okay; let me ask it another way.
9 You'd agree with me that any loss of habitat
10 posed by the North Shore Ranch project could not have
11 any impact on the great white shark. You'd agree with
12 that; right?
13 A I'd agree with that.
14 Q Okay. And, similarly, if there were species of
15 animals that are completely incompatible with the
16 habitat of northwest Montana, they, too, would be
17 unaffected by habitat loss; right?
18 A That's consistent with what I've said; yes.
19 Q Okay.
20 Are you aware of the fact that the Montana Bird
21 Distribution database contains only a single pre-1970
22 record of a black-bellied plover being found in Flathead
23 County?
24 A No.
25 Q Have you ever seen a black-bellied plover in

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1 the time you've lived here?
 2 A No.
 3 Q Do you know anybody who has?
 4 A No.
 5 Q As a general proposition, is it FWP's opinion,
 6 at least in Region One, over which you are the regional
 7 supervisor, is it your opinion that exotic introduced
 8 species that are nonnative to Montana should cause or
 9 result in the protection of habitat upon which they may
 10 depend?
 11 A Yes.
 12 Q Okay.
 13 A In certain situations.
 14 Q Is it your opinion that the North Shore Ranch
 15 property is unique property, with respect to the other
 16 open lands in the vicinity of the WPA?
 17 A It's unique in that it's a relatively large
 18 piece of property. With the exception of the
 19 agricultural history you've alluded to, it's -- at least
 20 along the shoreline, it's pretty pristine. It's a
 21 pretty big chunk, so we think all that is unique, that
 22 north shore.
 23 Q The entire north shore.
 24 A But -- in a lot of characteristics, it's no
 25 different than some of the other pieces of property.

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1 But we think it's pretty important and pretty unique,
 2 given its size and the amount of shoreline it abuts up
 3 to.
 4 Q You'd agree with me that in the vicinity of the
 5 North Shore Ranch land, there are literally thousands of
 6 acres of cultivated agricultural land.
 7 A Yes.
 8 Q And you'd agree with me that if the North Shore
 9 Ranch property were no longer to be cultivated, birds in
 10 the vicinity would have other cultivated land upon which
 11 to forage.
 12 A Yes.
 13 Q So the loss of this agricultural land wouldn't
 14 have a real demonstrable impact on at least avian
 15 species in this vicinity.
 16 A Oh, I don't know. I don't know if I can agree
 17 with that or not. I still think -- we think it has
 18 impacts along the shoreline. We talked about it before.
 19 It doesn't border the shoreline, constitute the
 20 shoreline, but we still think it's close enough that
 21 there's a lot of shoreline there.
 22 It's our business at Fish, Wildlife & Parks
 23 protecting habitat. Our mandate mission is to provide
 24 habitat -- protect habitat, provide recreation. It's
 25 our mission to try and preserve habitat like that.

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1 Q And aside from the waterfront issue,
 2 abstracting away from that issue, with respect to the
 3 300-or-so acres of the North Shore Ranch property that
 4 has been cultivated for agricultural use, just limiting
 5 it to the agricultural property, about 300 acres, do you
 6 consider that, in a substantive sense, to be unique in
 7 comparison to other agricultural properties in the
 8 vicinity of the WPA?
 9 A It's very -- it's similar to the other
 10 properties.
 11 Q Okay. And if one were to assume that there
 12 were a subdivision already built on the North Shore
 13 Ranch property, and aside from the waterfront issue and
 14 waterfowl, it's true, is it not, that birds that
 15 habitually may have foraged on grains on that property
 16 would have other agricultural properties in the
 17 immediate vicinity upon which to forage.
 18 A Yes.
 19 Q You'd agree with me that areas under
 20 cultivation such as the NSR property and that North
 21 Shore Ranch property tend to be monocultures and that
 22 vertical or horizontal habitat diversity in these areas
 23 is customarily very low?
 24 A I wouldn't call that monoculture. I'd say
 25 there's quite a bit of edge there. It's a term that the

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1 biologists like to use which is the interface between
 2 different habitat types. And I'd say there's a fair
 3 amount of edge. I wouldn't just call it a monoculture.
 4 I'd say there's some edge there.
 5 Q With respect to the 320-or-so acres that have
 6 customarily been cultivated for grain production, would
 7 you agree with me that that's a monoculture?
 8 A Yeah. Yes, I'd agree with that.
 9 Q Would you agree with me that the relationship
 10 between habitat diversity and species richness is well
 11 described in the ecological literature and has been for
 12 nearly fifty, sixty years?
 13 A Yes.
 14 Q And you'd agree with me, also, that as habitats
 15 become more diverse, more species can be accommodated?
 16 A Yes.
 17 Q And you'd agree with me, also, that the
 18 possible exception of periods -- that with the possible
 19 exception of periods of avian migration, wildlife
 20 species richness on the North Shore Ranch property and
 21 on adjacent portions of the WPA would be relatively low?
 22 A I'd rather you ask that question of a field
 23 biologist. I'm not comfortable answering that question.
 24 Q So you don't know.
 25 A Well, yeah. You can get a better, a more bona

1 numbers in northern pintail, to your knowledge, has the
2 loss of cultivated grain as a food source ever been
3 linked to or cited as a cause of decline in the northern
4 pintail?

5 A I don't know.

6 Q Have you ever seen any data or, you know,
7 scientific learned articles that linked those two
8 issues?

9 A No, I haven't. I haven't looked for them.

10 Q Have any of your staff ever linked those
11 issues?

12 A I don't know. I don't know.

13 Q At least they haven't informed you of any link,
14 if they made one?

15 A No. Yes; that's correct.

16 Q And you'd agree with me that waterfowl are not
17 restricted to feeding in cultivated fields.

18 A Yes.

19 Q Nor are they restricted to feeding in
20 cultivated fields near bodies of water where they loaf;
21 correct?

22 A That's correct.

23 Q And, in fact, waterfowl often travel some
24 distance from the water body in order to loaf or forage;
25 isn't that true?

1 Q You'd agree with the proposition, however, that
2 the more diverse the habitat that a particular species
3 may be able to depend on or rely upon for brooding,
4 nesting and foraging, the more likely they are to be
5 able to adapt to changes in the topography.

6 A Yes.

7 Q And pintails, they typically nest in shallow,
8 seasonal or intermittent wetlands with low vegetation;
9 isn't that true?

10 A Yes.

11 Q Now, in reviewing some of the letters that your
12 agency wrote with regard to this project, I didn't see
13 any data of any kind that would lead one to conclude
14 that pintails or lesser scaup use the WPA or the North
15 Shore Ranch property for foraging or for nesting. And
16 my question is, to the extent that there are any
17 opinions expressed linking these species -- these avian
18 species to habitat on those two parcels of land, can you
19 point me to it? I can't find any data that would
20 support the contention that these two species in
21 particular, northern pintail or lesser scaup have ever
22 been demonstrated to use the WPA or the North Shore
23 Ranch property.

24 A I'm going to have -- I would have to ask you to
25 refer that question to Gael.

1 A Yes.

2 Q Now, you'd agree with me that the lesser
3 scaup -- how do you pronounce that, s-c-a-u-p?

4 A Scaup.

5 Q Scaup?

6 A Yes, sir.

7 Q They may nest on dry or moist wet meadows,
8 uplands of native prairie, hay fields, or even in shrub
9 patches.

10 A Yes.

11 Q And so the loss of agricultural lands on the
12 North Shore Ranch property, that wouldn't necessarily
13 have any impact on the lesser scaup, given its habitat
14 diversity.

15 A Well, I think, in general, I have to say here
16 that while a lot of these species are pretty versatile,
17 adaptable in -- we've got a mallard nest under this eave
18 right over here, for example. But that doesn't
19 necessarily mean that they don't need various types of
20 habitat. But I mean, so I'm comfortable stating and
21 agreeing with you that yes, this species or that species
22 is adaptable and can nest in surprisingly different
23 sorts of habitats. But I'm not sure I can go as far as
24 then to say that whether that means that they don't need
25 this habitat.

1 MR. PERRY: To Gael.

2 Can I just take a two-minute break? Is that
3 okay with you, Alan?

4 MR. MCCORMICK: Sure.

5 (Deposition in recess from 1:30 p.m. to
6 1:34 p.m.)

7 Q (By Mr. Perry) Would you agree with me that
8 hunting over grain fields can discourage use of those
9 fields where hunting occurs, thereby increasing pressure
10 on fields where hunting is not permitted?

11 A If it's pretty heavy hunting pressure,
12 theoretically, yes.

13 Q And in western Montana, is the northern
14 pintail, to your knowledge, a bird that can be hunted
15 during hunting season?

16 A I can't remember. I think we're allowed one
17 bird. I don't remember. I'd have to consult with my
18 regulations.

19 Q Okay; Gael maybe know about that one?

20 A Yeah, she would.

21 Q You'd agree with me that in a general
22 sense -- strike that question.

23 Would you agree with me that diving ducks that
24 may congregate on Flathead Lake are more likely to be
25 disturbed or displaced by boats on the lake and

1 waterfowl hunting than they would be by a subdivision
2 development half a mile from the lakeshore?

3 A Yes.

4 Q And as a general proposition, diving ducks on
5 Flathead Lake would be even further away from the North
6 Shore Ranch property than the lakeshore itself.

7 A I don't understand the question; further away
8 from the lakeshore? Further away?

9 Q Let me rephrase that.

10 A Okay.

11 Q Probably a bad question.

12 As a general proposition, diving ducks, as you
13 previously testified -- to your recollection, the
14 shoreline off of the North Shore Ranch property and the
15 WPA is pretty shallow; is that correct?

16 A Yes.

17 Q And diving ducks, they don't generally use
18 shallow waters to dive like that, do they?

19 A A little deeper than the puddle ducks.

20 Q So a diving duck would probably be further off
21 shore than --

22 A Yes.

23 Q -- the immediate waterfront.

24 A Yes.

25 Q So a diving duck, if there were a project

1 But I believe you testified earlier that when you came
2 to write your letters on this project, you relied upon
3 information provided by Gael Bissell and Mr. Williams
4 and others under you. Is that true?

5 A Yes.

6 Q And would that information have been conveyed
7 to you verbally, or would they have written a draft
8 report for you to review, or how did that work?

9 A Both.

10 Q And so in this particular instance, before you
11 drafted your letters, did you have occasion to review
12 proposed letters from Gael Bissell?

13 A Yes.

14 Q Okay. And would the same be true of
15 Mr. Williams?

16 A Yes.

17 Q Was there anybody else who provided you with
18 any written documentation, so to speak, that you
19 reviewed in order to prepare your letters?

20 A Not that I remember.

21 Q During the course of this project and your
22 involvement, your agency's involvement in it, did you
23 have occasion to speak with a former FWP employee by the
24 name of Tom Litchfield?

25 A I think Tom Litchfield worked on this, but I

1 constructed on North Shore Ranch property, they'd be
2 even further away from the property than the lakeshore,
3 in general.

4 A They might be a hundred yards off the lakeshore
5 instead of right on the edge of the water.

6 Q Okay. Are you familiar with the North American
7 Waterfowl Management Plan?

8 A Vaguely. I know it exists. I haven't read it
9 any. I don't think I've ever read it or recently read
10 it, you know, studied it. I might have a copy in my
11 office, but I'm not real familiar with it.

12 Q Okay. Do you know whether or not, in relation
13 to this project, Gael Bissell or Mr. Williams or anybody
14 else consulted the North American Waterfowl Management
15 Plan in coming to the opinions that they did?

16 A I don't know. I'm not certain whether they did
17 or not. I suspect they did, but I couldn't absolutely
18 be positive in testifying they did.

19 Q When you drafted your letters with respect to
20 the North Shore Ranch property, did Gael Bissell or
21 Mr. Williams or anybody else actually give you copies of
22 data or journal articles or anything like that?

23 A No.

24 Q Okay. And you said earlier, and I don't want
25 to misstate your testimony, correct me if I'm wrong.

1 didn't work with him on this project. I -- I didn't
2 interact with Tom Litchfield on this project.

3 Q Okay.

4 A I basically nearly fired Tom -- I worked -- I
5 supervised or indirectly supervised him for about a year
6 and -- well, I didn't work with him on this particular
7 project.

8 Q And did you fire him? Is that --

9 A Well, I think he was -- I think, if I remember
10 correctly, he was -- I think he was -- his position was
11 eliminated by the legislature. But I didn't work with
12 Tom on this. I know that for -- I know that for a while
13 he worked -- he -- he was one of the people on the
14 ground.

15 Q Yep.

16 A But I didn't work with him on the project.

17 Q Did you -- I'm sorry.

18 A I'm sorry; I'm just trying to remember. I
19 think he -- I think they switched -- I think Gael -- I
20 think he and Gael switched assignments on this pretty
21 early on in the process, at least early on in my tenure
22 here in the department. Now, that's a better question
23 for -- with respect -- Jim can give you that chronology
24 better than I can, because he was the direct supervisor
25 for those employees, for both those employees.

1 Q Okay; fair enough.
2 A He's the direct supervisor for both those.
3 Q And you said Tom Litchfield's position was
4 eliminated by the legislature?
5 A Yes.
6 Q While he was employed by FWP, did you ever have
7 any professional interaction with him on a project or --
8 A On any project?
9 Q On any project.
10 A Yes.
11 Q And he was a wildlife biologist?
12 A Yes.
13 Q Was he good at his job?
14 A Well, we're getting into that -- I'd have to
15 ask. It's a personnel -- these are personnel matters.
16 I mean, I don't know -- specifically, I don't know how
17 much I can -- he's -- I think he's a competent
18 biologist. He has a position of some responsibility in
19 another state now. So I think he's competent.
20 Q Okay; and that was my question.
21 A Yeah, yeah, I think he's competent; yes, sir.
22 Q As a general proposition, are you aware of the
23 fact the North American Waterfowl Management Plan
24 identified areas and identifies areas of continental
25 significance to North American ducks, geese, and swan,

1 but that neither Flathead Lake nor the WPA were -- have
2 ever been identified by that Plan as areas of
3 significance?
4 A I wasn't aware of that.
5 Q Have you ever seen a long-billed curlew?
6 A I think I have.
7 Q In the vicinity of Flathead Lake?
8 A No.
9 Q Where did you see it?
10 A I don't know. I think I've seen them
11 in -- I've seen them. I'm not sure where, just in the
12 course of -- maybe eastern Montana. I'm pretty sure
13 I've seen curlews before.
14 Q Have you ever seen a black tern on Flathead
15 Lake?
16 A No.
17 Q Have you ever seen a long-billed -- strike
18 that.
19 Have you ever seen an upland sandpiper in the
20 vicinity of Flathead Lake?
21 A No.
22 Q Same question with regard to the solitary
23 sandpiper.
24 A No.
25 Q Black-necked stilt, ever seen one of those?

1 A No.
2 Q You ever seen a western sandpiper in the
3 vicinity of the lake?
4 A No.
5 Q Short-billed dowitcher?
6 A No.
7 Q Wilson's phalarope?
8 A No.
9 Q Marbled godwit?
10 A No.
11 Q Willet?
12 A No.
13 Q Stilt sandpiper?
14 A No.
15 Q Do you know anybody in your employ here at the
16 agency, to your knowledge, who has ever seen any of
17 those birds in the vicinity of the lake?
18 A I don't know; I'm not sure. I know people that
19 are in our employ that if they've seen them, they've
20 seen them.
21 Q And I know that this goes back some time, but
22 with regard to the letters you wrote on the project when
23 you had the discussions with Gael Bissell, for instance,
24 do you recall whether or not she ever informed you that
25 she had observed any of those species in or about the

1 lake?
2 A No.
3 Q Does your agency rely at all upon the Montana
4 Bird Distribution database in terms of preparing letters
5 like the ones you and I have discussed here today?
6 A I think we do. I think Gael -- you'd have to
7 ask Gael, in terms of what impact that had on her
8 recommendations she made to me and drafts. But I think
9 so.
10 Q Okay. And to the extent that your staff, Gael
11 Bissell and others, in your opinion probably relied upon
12 that database, to your knowledge, would there have been
13 any other source of objective data with respect to avian
14 species upon which they would also have relied in coming
15 to the opinions they have in this case?
16 A There would have been that. There would have
17 been any kind of surveys. They cooperate with the Fish
18 and Wildlife Service. There would have been any sort of
19 surveys that -- survey date Fish and Wildlife Service
20 had. They would have had their Christmas counts, all
21 the various bird counts. She'd be able to enumerate
22 those better than I can. But I think there's a variety
23 of sources of information for that.
24 Q Okay. And that would maybe be a better
25 question for Gael?

1 A Yes.

2 Q Now, the birds that you and I discussed
3 earlier, the upland sandpiper, solitary sandpiper,
4 et cetera, in your opinion, as a wildlife biologist and
5 having been regional supervisor for some period of time
6 now, it would be true that these are not commonly found
7 in the vicinity of the north shore of the lake; fair to
8 say?

9 A I think so. I think those -- I don't think
10 those are very common birds.

11 Q Now, the Flathead Audubon Society, I suggest to
12 you, has listed the Willet, the marbled Godwit, and the
13 short-billed dowitcher as transient and rare in the
14 Flathead Basin. Would you agree with that
15 characterization, given your knowledge and experience
16 and in light of the discussions you've had with your own
17 staff?

18 A Yes.

19 Q Are you familiar with the Intermountain Shore
20 Bird Conservation Plan?

21 A No. I mean, I'm aware of it, but I'm not very
22 familiar with it.

23 Q You've heard the term?

24 A Yes, yes.

25 Q You've never had occasion to review it?

1 source such as the ones you cited isn't necessarily
2 irrefutable evidence that, therefore, that species never
3 occurs on the lake or that habitat isn't critical for
4 that species on that lake. But I presume that's why
5 they would say that. Their source of information
6 suggests that it's not use by that species.

7 Q Are you done?

8 A Yes.

9 Q I just don't want to cut you off.

10 A Nope.

11 Q I have a tendency to do that.

12 In your experience as a regional supervisor,
13 does your agency put any faith in data provided by the
14 Montana Audubon Society?

15 A I would think so.

16 Q And are you aware that the Montana Audubon
17 Society lists approximately 37 important bird areas for
18 Montana but that the Flathead Waterfowl Production Area
19 is not identified as an IBA nor was it during the
20 pendency of this application?

21 A I wasn't aware of that.

22 Q In your opinion, would migratory birds totally
23 refrain from using the mudflats on the north shore of
24 Flathead Lake if a residential subdivision existed a
25 half a mile away?

1 A No.

2 Q And same question with regard to the
3 Intermountain Waterbird Conservation Plan.

4 A Yes; same answer.

5 Q Same answer?

6 Are you aware that -- well, you can tell me if
7 you're aware or not. I suggest to you that the
8 Intermountain Waterbird Conservation Plan only
9 identifies three sites in western Montana that it finds
10 of import. And the north shore of Flathead Lake and the
11 WPA are not amongst these sites. Can you tell me, in
12 light of your description of these areas as critical
13 wildlife habitat, why neither of the plans, the
14 Waterbird Conservation Plan or the Shorebird
15 Conservation Plan refers to these areas at all?

16 A Why it doesn't?

17 Q Why it doesn't.

18 A Well, I presume that means they don't have any
19 site, they don't have any data, they don't have any
20 sources in their collection of information to suggest
21 that these are important areas for those species. I'm
22 not sure that that necessarily means that's the case,
23 you know. We'd have to talk to the field biologist on
24 the ground. You'll have to talk to the field biologist
25 on the ground and get their opinion as well. So one

1 A No.

2 Q And some waterbirds and shorebirds actually
3 migrate through the Flathead Valley during the fall;
4 correct?

5 A Yes.

6 Q And some of these species would include the
7 common loon, the American bittern, the great blue heron,
8 and others; fair to say?

9 A Yes.

10 Q And it's true, is it not, that these species
11 would likely be affected by waterfowl hunting in the
12 vicinity of their preferred foraging and nesting areas.

13 A Yes.

14 Q There isn't any boreal forest on the North
15 Shore Ranch property; correct?

16 A I beg your pardon; what?

17 Q Boreal, b-o-r-e-a-l?

18 A Boreal what?

19 Q Forest.

20 A Oh, boreal forest; no.

21 Q And there isn't any of that on the WPA either,
22 is there?

23 A No.

24 Q And to your knowledge, USFWS has not
25 designated, under the ESA, Flathead Valley or any of its

1 environs as critical habitat.
 2 A No.
 3 Q That is true or that's not true?
 4 A They have not.
 5 Q Okay; so that's a true statement.
 6 A Yeah.
 7 Q Would you agree with me that the gray wolf is a
 8 habitat generalist?
 9 A Yes.
 10 Q And they can occupy a variety of habitats?
 11 A Yes.
 12 Q And the gray wolf, has that been delisted now,
 13 under the Endangered Species Act?
 14 A Yes.
 15 Q And with respect to the gray wolf, there was
 16 never any critical habitat designated by USFWS, was
 17 there?
 18 A I'm not sure.
 19 Q Would Gael know more about that?
 20 A She'd know more about that specific question;
 21 yeah, I think so. But they have been delisted; I know
 22 that.
 23 Q And you'd agree with me that there are no
 24 documented wolf packs, dens or rendezvous sites, near
 25 the North Shore Ranch property or the WPA that abuts it?

1 Q And I've seen that your agency has a few
 2 collars on some of them north of Flathead Lake. Is that
 3 true?
 4 A Yes.
 5 Q And they've come down through the Flathead
 6 River, I've seen, on a couple of occasions.
 7 A Yes.
 8 Q And to your recollection, you know, how close
 9 do they ever get, since you've been regional supervisor,
 10 to the lake itself?
 11 A A few miles.
 12 Q Not as close as the North Shore Ranch property.
 13 A No.
 14 Q Would you agree with me that, as a general
 15 proposition, grizzly bears are usually limited to large
 16 areas of public land maintained in a natural state that
 17 provides necessary habitat?
 18 A No.
 19 Q Okay.
 20 Has your agency ever documented the presence of
 21 a grizzly bear on the WPA land?
 22 A I don't know.
 23 Q How about the Blasdel WPA?
 24 A It wouldn't surprise me if they had.
 25 Q On Blasdel?

1 A As in within a few miles?
 2 Q Ten, 15, 20 miles.
 3 A There probably are within 15, 20 miles.
 4 Q And to your knowledge, have any wolf packs or
 5 dens or rendezvous sites been documented within a
 6 20-mile radius of this project by you or other agencies,
 7 to your knowledge?
 8 A They're getting -- they're getting kind of
 9 close potentially, yes; 20 miles, possibly. Within a
 10 few miles no, but 20 miles maybe. They're pretty
 11 ubiquitous now.
 12 Q As I've seen. And with respect to the gray
 13 wolf, it's true, is it not, that the North Shore Ranch
 14 subdivision would have no effect on the gray wolf.
 15 A Yes.
 16 Q And you'd agree with me the grizzly bear's an
 17 omnivorous habitat generalist?
 18 A Yes.
 19 Q And they tend to be found in contiguous
 20 relatively undisturbed mountainous habitat with high
 21 topographic and vegetative diversity?
 22 A Well, they pop up all kinds of places around
 23 here.
 24 Q And I've seen -- I'm sorry; were you done?
 25 A No, I'm done; yes, sir.

1 A Or on the WPA. It would be rare. They're not
 2 common, but I wouldn't want to say they've never been
 3 there.
 4 Q You wouldn't be of the opinion, however, that
 5 grizzly bears frequent the North Shore Ranch property.
 6 A No.
 7 Q Now, are you familiar with the 1993 Grizzly
 8 Bear Recovery Plan?
 9 A Yes.
 10 Q And, in particular, are you familiar with
 11 potential linkage zones discussed in that Plan
 12 connecting the northern Continental Divide ecosystem
 13 recovery zone to the Bitterroot/Selway and Cabinet/Yaak
 14 areas?
 15 A Yes.
 16 Q And it's true, isn't it, that these potential
 17 linkage zones connecting the northern Continental Divide
 18 ecosystem to the Bitterroot/Selway and Cabinet/Yaak
 19 areas do not include the Flathead Valley at all.
 20 A Yes.
 21 Q And it's true, is it not, that the reason that
 22 these potential linkage zones don't include Flathead
 23 Valley is due, in part, to the extensive development of
 24 the valley floor that's already occurred.
 25 A Yes.

1 Q You'd agree with me that the proposed North
2 Shore Ranch subdivision would not affect grizzly bear,
3 grizzly bear habitat, or identified linkage zones?
4 A Yes.
5 Q You'd also agree that critical nest habitat for
6 bald eagle was the only critical habitat in close
7 proximity to the North Shore Ranch project? And that's
8 within the meaning of the ESA.
9 A Yes.
10 Q And you'd also agree that with the delisting of
11 the bald eagle, within the context of the ESA, there is
12 now no longer any critical habitat on or near the NSR
13 property or the WPA for that matter.
14 A I'm not sure about that. I'm not sure if any
15 of that shoreline is -- if that would be -- if there's
16 bull trout habitat, that shoreline's bull trout, that
17 would be the only thing I'm not sure about.
18 Q Limiting the question just to the bald eagle,
19 given the fact that it's been delisted, certainly there
20 can't be any critical habitat on the NSR property or the
21 WPA, in light of that delisting under Section 7 of the
22 ESA; right?
23 A Yes.
24 Q And within the context of the Endangered
25 Species Act, for a particular habitat to be quote,

1 A No, but....
2 Q Would it be fair to say that bald eagles are
3 able to coexist with human disturbance?
4 A To some degree.
5 Q And it would depend, to some extent, upon the
6 particular bald eagle; correct?
7 A And the disturbance.
8 Q And the nature of the disturbance.
9 A Yes.
10 Q You'd also agree with me, would you not, that
11 there are bald eagle nests in the Flathead Valley that
12 are active and from which young continue to be fledged
13 that have residential development within their primary
14 use areas.
15 A Gael can answer that question better than I
16 can.
17 Q Okay. And you'd agree with me that the absence
18 of large diameter trees on the North Shore Ranch
19 property itself would discourage bald eagles from
20 nesting there?
21 A Yes.
22 Q And similarly, would you agree with me that the
23 absence of large-diameter trees on the WPA would also
24 likely discourage renesting of bald eagles in that area?
25 A Yes.

1 unquote, "critical habitat," it has to be critical
2 habitat for a particular species listed under the ESA.
3 A Yes.
4 Q And within the context of the Endangered
5 Species Act, there isn't any critical habitat on the NSR
6 property at present; fair to say?
7 A Yes.
8 Q And with respect to the WPA that abuts the
9 North Shore Ranch property, similarly, within the
10 context of the Endangered Species Act, there is no
11 longer any critical habitat on that property.
12 A Well, I don't think there's any species with
13 critical habitat on there. I think you should-double
14 check that with Gael or Jim though.
15 Q Okay.
16 Would you agree with me that within the Pacific
17 Northwest, bald eagles rarely nest in trees less than 30
18 inches diameter at breast height?
19 A Within -- where did you say?
20 Q The Pacific Northwest.
21 A Yes.
22 Q And as a general proposition, are you aware
23 that in 2006, there were actually 12 active bald eagle
24 nests in the City of Vancouver, British Columbia, nine
25 of which actually fledged young?

1 Q And you'd agree with me that bald eagles
2 customarily forage primarily over open water for fish
3 and waterfowl, but they will also forage on carrion?
4 A Yes.
5 Q In the vicinity of the North Shore Ranch
6 project, primary bald eagle foraging areas would be over
7 Flathead Lake and Flathead River?
8 A Yes.
9 Q And in the end, you'd agree with me that human
10 activity associated with the North Shore Ranch project
11 would be removed from and well away from customary bald
12 eagle foraging and loafing areas?
13 A I'm not sure. I'm not sure about that.
14 Q Okay. Would you agree with me that at present,
15 and during the pendency of the North Shore application,
16 there were high levels of human activity in the home
17 range of the pair of eagles that had originally nested
18 on the WPA?
19 A I wouldn't call it -- I think you said "high
20 end"?
21 Q High levels.
22 A I don't think I'd call it "high levels" of
23 activity. Human activity, but not necessarily high
24 levels.
25 Q The lands -- the tracts of land that surround

1 the WPA, in a wildlife habitat sense, you wouldn't
 2 characterize them as pristine, would you?
 3 A No.
 4 Q Would you agree with me that the WPA would not
 5 offer suitable nesting habitat for trumpeter swans due
 6 to the low water levels in late April and early May when
 7 swans customarily initiate nesting?
 8 A I'm not sure.
 9 Q Gael would maybe know that?
 10 A Yes.
 11 Q Sounds like Gael's deposition may be longer
 12 than anticipated.
 13 Would you agree with me that there isn't any
 14 suitable breeding habitat on or near the North Shore
 15 Ranch property or the WPA for the long-billed curlew?
 16 A I can't answer that.
 17 Q Another one for Gael?
 18 A Yes.
 19 Q Would you agree with me that there's actually
 20 no black tern habitat at all on the North Shore Ranch
 21 property?
 22 A I don't know.
 23 Q Okay.
 24 Are you aware that during a two-year study of
 25 the Canada goose on Flathead Lake back in the '80s,

1 1984, 85 percent of all ground nests were located within
 2 one meter above or below the seasonal high water mark.
 3 Ten of 15 stump nests at the WPA were at or below full
 4 foot elevation (2893 feet)," close quote. Do you see
 5 that indication?
 6 A Yes.
 7 Q Okay. And, sir, as a general proposition, are
 8 you aware of the linkage that has been made between the
 9 changes in water levels on Flathead Lake and the
 10 productivity of Canada geese and other species?
 11 A Not really. I mean, I'm not sure what your
 12 question is there.
 13 Q Just as a general proposition, even without
 14 referring to this document, in a general sense, have you
 15 ever come to learn that fluctuating water levels of the
 16 lake have an impact on waterfowl?
 17 A Yes.
 18 Q Okay. Have you ever come to learn that these
 19 fluctuating water levels have an impact on raptors?
 20 A Not as much as with waterfowl.
 21 Q Have you ever come to learn that these
 22 fluctuating water levels have an effect on mink and the
 23 other fur-bearing water mammals, so to speak --
 24 A Yes.
 25 Q -- that we discussed earlier?

1 Marilyn Wood and her colleague failed to -- Daniel
 2 Casey, her colleague also with FWP, they both failed to
 3 observe any black terns on Flathead Lake? Are you aware
 4 of that?
 5 A No.
 6 Q Have you ever seen their report with respect to
 7 the effects of water levels on productivity of Canada
 8 geese in the northern Flathead Valley?
 9 A I don't think so.
 10 (Deposition Exhibit No. 7 marked for
 11 identification.)
 12 Q (By Mr. Perry) Sir, the document marked as
 13 Exhibit 7 to your deposition -- I know you haven't seen
 14 this document before. And I just had a couple of
 15 questions about this document.
 16 The first couple of pages, Mr. Casey and
 17 Ms. Wood, Marilyn Wood, they performed a two-year audit,
 18 so to speak, of Canada geese in the northern Flathead
 19 Valley. And, in particular, I suggest to you that their
 20 report summarized their conclusions with respect to
 21 effects of water levels on productivity of Canada geese.
 22 And I see on page little ii of this document, it's the
 23 third page in -- it's a double-sided document -- in the
 24 middle of the second full paragraph, Mr. Casey and
 25 Ms. Wood state in the abstract portion, quote, "As in

1 A Yes.
 2 Q And the fluctuating water levels, obviously,
 3 they adversely impact those animals in terms of
 4 fledgling young brooding, that type of thing; fair to
 5 say?
 6 A Yes.
 7 Q And you'd agree with me that the impact posed
 8 by the fluctuating water levels of such a huge body of
 9 water would have a far greater impact than would, say,
 10 the development of this piece of property, 300 acres or
 11 so.
 12 A I'm not sure. I don't know; not necessarily.
 13 These species get it done. Do these things have
 14 impacts? Yes. But they still -- most of these species
 15 are pretty adaptable. So I'm not necessarily -- I'm not
 16 sure if I agree with that or not.
 17 Q Okay. And just parsing out what you just said,
 18 you said "these species are pretty adaptable."
 19 A In terms of the water level fluctuation.
 20 Q In terms of the water level fluctuation. So
 21 they wouldn't be adaptable, though, with respect to the
 22 loss of 300 acres of agricultural farm land. Is that
 23 what you're saying?
 24 A I'm just saying that I'm not sure. I mean, I
 25 don't know. But we're looking at the cumulative effects

1 application. You'd agree with that, would you not?
 2 A Yes.
 3 Q Okay.
 4 Do you recognize the handwriting on this
 5 document?
 6 A No, I don't.
 7 Q Do you know who Jim Cross is?
 8 A I don't think so.
 9 Q Have you heard of the Flathead Basin
 10 Commission?
 11 A Okay; yes. I go to some of those meetings.
 12 Q And have you ever been an adviser or provided
 13 them any counseling to the Flathead Basin Commission?
 14 A I'm an ex-officio. Our department's an
 15 ex-officio member. And between myself and one of our
 16 employees, John Fraley*, we attend some of their
 17 meetings. I'm not a voting member of the Flathead Basin
 18 Commission. I go to some of their meetings.
 19 Q I'm sorry; go ahead.
 20 A I haven't been to one in a while, but I go to
 21 some of their meetings.
 22 Q And at any point in time in the past five
 23 years, were you ever a voting member of the Flathead
 24 Basin Commission?
 25 A No, we're not a voting member.

1 A I don't think so. I don't think so.
 2 Q And are you still -- is FWP still a member, so
 3 to speak, ex-officio?
 4 A Yes.
 5 Q In that capacity, what, during 2007, in
 6 particular December of 2007, did you view the scope of
 7 your authority, so to speak, on behalf of FWP, vis-a-vis
 8 the Flathead Basin Commission?
 9 A We provide -- we're basically a support or
 10 advisory capacity to the Flathead Basin Commission, I
 11 think, if that's what you're asking.
 12 Q That's my question.
 13 A We're on there as an ex-officio member because
 14 we don't have -- most of the full-fledged members have
 15 land-managed substantial land bases, Forest Service,
 16 Department of Natural Resource and Conservation. Aside
 17 from our fishing access sites and parks, we don't manage
 18 a substantial land base, so we're basically an advisory
 19 member. We provide biological information. So -- does
 20 that answer your question?
 21 Q It does; thank you.
 22 To your recollection, at any meeting of the
 23 Flathead Basin Commission, did you ever personally ever
 24 discuss the North Shore Ranch subdivision?
 25 A I don't think I did. I mean, if you've -- if

1 Q And when you say "we," are you talking about --
 2 A FWP. We have an ex-officio membership.
 3 Q And did you ever advise the Flathead Basin
 4 Commission with regard to a resolution they proposed in
 5 December of 2007 regarding the North Shore Ranch
 6 project?
 7 A Advise -- could you be more specific?
 8 Q It's my understanding that the Flathead Basin
 9 Commission, during the late fall, early winter of 2007,
 10 discussed the North Shore Ranch project. Were you
 11 present for any of those meetings?
 12 A I don't know if I was at that meeting or not.
 13 Probably not. I only go to about two of those meetings
 14 a year.
 15 Q Okay. Were you aware of the fact that they
 16 passed a resolution, pursuant to which, and I quote,
 17 "Various agency and nonprofit organizations are working
 18 together to explore conservation options and funding
 19 sources to develop a practical conservation strategy
 20 that can meet the needs of private landowners while
 21 conserving the special qualities of the north shore,"
 22 close quote. Are you aware of this resolution?
 23 A Yes, I was.
 24 Q Did you participate in the discussion of this
 25 resolution at all?

1 you have something -- I don't remember doing that. If
 2 you've got some minutes or something, I might stand
 3 corrected. But that's two years ago, and I don't
 4 remember personally attending one of those meetings and
 5 discussing that issue. I have attended some of those
 6 meetings. It might have been discussed at some of the
 7 meetings I had been at. But I just don't remember. I
 8 certainly didn't lead a presentation on it or play a
 9 substantial role in those conversations.
 10 Q Do you know if any of your employees did; Gael
 11 Bissell or Jim Williams or anybody else?
 12 A I'm not sure.
 13 Q Were you ever present at a Flathead Basin
 14 Commission meeting during the course of which Gael
 15 Bissell stood up and spoke about the North Shore Ranch
 16 subdivision?
 17 A I don't remember.
 18 Q Same question with regard to Jim Williams.
 19 A I just -- I don't think so, but I'm not sure.
 20 I can't tell you absolutely "yes" or "no."
 21 MR. PERRY: Fair enough.
 22 It's four o'clock.
 23 THE WITNESS: All right; 9:00 a.m.?
 24 MR. PERRY: Can we go off the record, Alan?
 25 MR. MCCORMICK: Depends on what you're

1 here. That's my job, and that's the concern -- in
 2 general, that's the concern we've had.
 3 Q Okay.
 4 Would you agree with me that as a general
 5 proposition black tern nests are fragile?
 6 A I don't know.
 7 Q Another question for Ms. Bissell?
 8 A Yes.
 9 Q Are you aware that the common loon has never
 10 been documented to occur on the WPA?
 11 A No, I'm not.
 12 Q Are you aware that there are only three element
 13 occurrence records for the common loon within 15 miles
 14 of the North Shore Ranch project and that none of them
 15 were on the north shore of Flathead Lake?
 16 A No.
 17 Q Would you agree with me that insofar as the
 18 North Shore Ranch project was not a lakefront/lakeshore
 19 project, it wouldn't affect common loons?
 20 A No, I wouldn't agree with that.
 21 Q Would you agree with me that the bobolink, all
 22 one word, b-o-b-o-l-i-n-k, is a rare breeder in Flathead
 23 Valley?
 24 A I don't know.
 25 Q Okay; question for Gael?

1 Q And to your knowledge, have any of your
 2 employees ever observed either of them on either of
 3 these pieces of land?
 4 A I don't know that; I don't know.
 5 Q And there's no data that you can point to that
 6 would support that the long-toed salamander occurs on
 7 the North Shore Ranch land or the WPA land; fair to say?
 8 A I'm not sure.
 9 Q Who would know?
 10 A Maybe Jim Williams.
 11 Q Okay. Have you ever seen a long-toed
 12 salamander?
 13 A No.
 14 Q Have been a Pacific tree frog?
 15 A No.
 16 Q Have you ever seen a Columbia spotted frog?
 17 A No.
 18 Q Have you ever seen a leopard frog?
 19 A Yes.
 20 Q Here in Montana?
 21 A I think so. I think I've -- I'm pretty sure
 22 you've seen leopard frogs. I'm not sure where I've seen
 23 them, but I'm pretty sure I've seen a leopard frog.
 24 Q Do you recall where?
 25 A Maybe in central Montana I'm pretty sure I've

1 A Yes.
 2 Q Then you're not aware that the Flathead Audubon
 3 Society lists the bobolink as uncommon in the Flathead
 4 Basin?
 5 A I wasn't aware of that.
 6 Q You'd agree with me that habitat for the
 7 western toad does not occur on the North Shore Ranch
 8 property or the WPA, for that matter?
 9 A I'm not sure.
 10 Q Are you aware that there are no element
 11 occurrence records for the leopard frog on or near North
 12 Shore land -- North Shore Ranch land or the WPA?
 13 A No.
 14 Q Are you aware that there is only a single
 15 observation from 1995 for the Pacific tree frog in the
 16 vicinity of the North Shore Ranch project and that it
 17 was 3.6 miles east of the project at Eagle Bend golf
 18 course?
 19 A No.
 20 Q Now, you, yourself, have never observed a
 21 long-toed salamander on the WPA, have you?
 22 A No.
 23 Q And you've never observed a long-toed
 24 salamander on the North Shore Ranch land, have you?
 25 A No.

1 seen leopard frogs.
 2 Q Would you agree with me that the habitats for
 3 the northern leopard frog, the Columbia spotted frog,
 4 the Pacific tree frog, and the long-toed salamander
 5 occur throughout the Flathead Valley, particularly at
 6 the sloughs, backwaters and oxbow ponds associated with
 7 the Flathead River?
 8 A Yes.
 9 Q And you'd agree with me that the wet meadows
 10 and wetlands bordering the WPA, between the WPA and the
 11 North Shore Ranch land, would not be directly affected
 12 by the proposed project, insofar as it's part of the
 13 buffer.
 14 A I'm not sure I could totally agree with that,
 15 but -- I'd say no. I can't say for certain I can agree
 16 with that, because that would presume that the buffer
 17 is there. I'm not sure how effective that buffer's
 18 going to be. So I can't say that there would be no
 19 impact there.
 20 Q Okay.
 21 You'd agree with me that migratory waterfowl
 22 that may feed on grain fields presently on the North
 23 Shore Ranch land and elsewhere in its vicinity are
 24 really feeding on an artificial food source.
 25 A What do you mean by "artificial food source"?

1 Q It's not naturally occurring. It's man
 2 created. It's not native habitat.
 3 A Well, I wouldn't characterize it as artificial.
 4 I guess I wouldn't characterize it as an artificial food
 5 source. Much of our wildlife management today is based
 6 on nonnative habitat. So I guess I just wouldn't
 7 characterize it as -- it's semantics, but it's not
 8 native, if that's the question.
 9 Q That's my question.
 10 A Yeah; it's not native.
 11 Q And certainly, if the landowner chose not to
 12 have a subdivision on the property but chose not to
 13 cultivate it anymore to raise grain, that food source
 14 would evaporate.
 15 A Yes.
 16 Q And obviously, any waterfowl or migratory birds
 17 or mammals or reptiles that may have depended upon that
 18 nonnative food source, in its absence would be compelled
 19 to go elsewhere to forage; true?
 20 A Either go elsewhere or use whatever to occupy
 21 the vacuum when the farming discontinued.
 22 Q Sure. But in terms of the grains that would no
 23 longer be available, animals that seek that as a food
 24 source would essentially be compelled to go elsewhere.
 25 A Yes.

1 another factor.
 2 A Yes.
 3 Q The potentially affected species at issue would
 4 be, yet, another factor.
 5 A Yes.
 6 Q I believe we touched on this earlier, but it's
 7 true, is it not, that some of the species of birds,
 8 bats, mammals, or reptiles that are in the vicinity of
 9 the north shore of Flathead Lake might, in fact, use
 10 structures -- residential structures constructed on the
 11 North Shore Ranch property as habitat.
 12 A Yes.
 13 Q So the building of these structures, in and of
 14 itself, might displace some species, but other species
 15 may then habituate that habitat; is that true?
 16 A Yes.
 17 Q And, in fact, it's true, is it not, that the
 18 National Audubon Society features programs to enhance
 19 wildlife habitat in yards of private residences.
 20 A Yes.
 21 Q Would you disagree with the statement that
 22 backyards and other private lands provide essential
 23 habitat for many species of birds?
 24 A No, I wouldn't disagree with that.
 25 Q And you'd agree with me that Highway 82 has

1 Q And before there was any agricultural
 2 development at all in the Flathead Valley, obviously any
 3 migratory birds or locally present waterfowl would have
 4 had to forage on naturally occurring foods in the
 5 Flathead Valley; true?
 6 A True.
 7 Q Would you agree with me that how residential
 8 development may affect a wildlife community is complex
 9 and depends on a variety of factors?
 10 A Would you please read that for me again?
 11 Q Sure. Would you agree with me that how
 12 residential development may affect a wildlife community
 13 is complex and depends on a variety of factors?
 14 A Yes.
 15 Q And among those factors would be the nature of
 16 pre-existing habitat, would it not?
 17 A Yes.
 18 Q The characteristics of the development, for
 19 instance, housing density, landscaping, that would have
 20 an impact as one of the factors.
 21 A Yes.
 22 Q And the characteristics of the surrounding
 23 landscape would be one of the factors.
 24 A Yes.
 25 Q The nature of nonnative predators would be

1 long served as a barrier to movement to some species of
 2 wildlife as well as a source of wildlife mortality?
 3 A I'm not sure how much of a barrier of movement
 4 it is. It certainly contributes to mortality.
 5 Q Bears, for instance, would it pose a barrier to
 6 a black bear?
 7 A No. Might contribute to mortality, but I don't
 8 think it's much of a barrier.
 9 Q Okay. Is there any animal species that you can
 10 think of that you would consider Route 82 to pose a
 11 barrier of movement with respect to? Poorly-worded
 12 question. Do you understand my question?
 13 A No; I understand your question.
 14 Q Are there any species to your mind?
 15 A I can't think of any.
 16 Q Okay.
 17 Are you aware that vehicular traffic, in and of
 18 itself, has been shown to reduce breeding bird density?
 19 A No. I wasn't aware of that.
 20 Q Now, would you agree with the proposition that,
 21 presently, there is ample space for sensitive wildlife
 22 to avoid the North Shore Ranch land while moving both in
 23 a north-to-south direction and an east-to-west
 24 direction?
 25 A Would you read that for me again, please?

1 Q Sure. Would you agree with the proposition
2 that, presently, there is ample space for sensitive
3 wildlife to avoid the North Shore Ranch land while still
4 being able to move in a north-to-south direction as well
5 as an east-to-west direction?

6 A That east-to-west seems a little bit more
7 implausible than a north-to-south. So I guess I don't
8 agree with that statement. I'm inclined to not agree
9 with that.

10 Q But you agree that it would have -- well,
11 strike the question.

12 With respect to north-to-south movement,
13 however, you would agree with that statement.

14 A Well, still, that's a pretty big chunk of
15 property. But I'm more comfortable with that than the
16 east-to-west.

17 Q And you'd agree with me that substantial
18 residential development has already occurred north of
19 Highway 82 in the vicinities of Somers and Bigfork?

20 A Yes.

21 Q Now, at this point in time, has the FWP, your
22 agency, has it acquired approximately 160 acres of
23 cultivated land adjacent to the WPA?

24 A We're in the process, and I've got
25 some -- there will be some other people you could talk

1 A Well, the new state park would be about a
2 20-acre -- something on the order of about a 20-acre
3 footprint out of 160 and located in a fashion that would
4 be as noninvasive as possible to the rest of the
5 property. So I think that's compatible with the overall
6 goal of a wildlife management area.

7 Q Okay. But you're not here to say that there
8 would be no impact posed by human presence on that state
9 park with respect to the WPA, are you?

10 A Probably not.

11 Q Okay.

12 And you'd agree with me that as the population
13 of Flathead County continues to increase, there will be
14 increased demand for recreation and recreational use of
15 this park land as well as the WPA, irrespective of the
16 approval of the North Shore Ranch subdivision.

17 A Yes.

18 Q Are you aware that, presently, there are
19 approximately 12 residences that are within a quarter
20 mile or less of the WPA boundary?

21 A Yes.

22 Q Has -- have there been any incidents of harm,
23 to your knowledge, from hunting on the WPA, with respect
24 to these 12 residences or the golf course that abuts it?

25 A What do you mean by "harm"?

1 to that would be better than me for that, in terms of
2 that land acquisition process.

3 Q Okay; but it's in process?

4 A Yeah. You should ask Jim Williams where that's
5 at, specifically.

6 Q And do you know, at present, whether or not FWP
7 plans to have a campground on that property?

8 A That would be the -- that's in the preliminary.
9 That would be part of the preliminary plan.

10 Q And the plan -- correct me if I'm wrong, the
11 plan is to create a state park, essentially, on that
12 land?

13 A Yes.

14 Q And there would be a campground, walking trails
15 and access to the WPA.

16 A Yes.

17 Q And you'd agree with me that these contemplated
18 development and recreational activities on that park
19 land would have an impact on wildlife, not only on that
20 land but on the WPA as well.

21 A It's -- it's been pretty well designed. It's
22 designed to be compatible with the WPA.

23 Q Well, campers, for instance. If you have
24 campers in this new state park, you'd agree with me that
25 campers make noise?

1 Q Somebody getting shot?

2 A I don't think so.

3 Q And that's what --

4 A Not during my tenure, I don't believe so.

5 Q And you raised that as a concern, though, with
6 respect to the North Shore Ranch project, did you not,
7 that due to its proximity to the WPA --

8 A Yes.

9 Q -- people on the North Shore Ranch land could
10 be harmed.

11 A Yes.

12 Q You had no pre-existing data upon which to rely
13 in that regard, though, did you?

14 A Well, it's just based on the density of
15 dwellings and occupants in that property. It's just a
16 concern we'd have. I don't know -- I think we'd have
17 some -- I think we could take a look at some similar
18 situations in other places. Either that or we'd have to
19 change hunting regulations one way or another.

20 Q And that's my question. You know, there's 12
21 residences, approximately, within a quarter of a mile of
22 the WPA boundary. To your knowledge, there have never
23 been any incidents of harm.

24 A To my knowledge.

25 Q Yet with respect to this project that had

1 approximately a 70-acre buffer between it and the WPA,
2 about 1,600 feet to the bald eagle nest that had been on
3 the WPA, you raised that as an issue of concern. But
4 yet you, as regional supervisor for Region One of FWP,
5 have not previously taken any steps to protect the
6 inhabitants of those 12 residences that are already
7 within a quarter of a mile of the WPA. And again, I see
8 a disconnect here. Can you explain that for me?

9 A Well, couple different issues that I would have
10 to delve into a little bit more. But preliminarily,
11 first of all, the shotguns, their range is pretty
12 limited. The pellet range is pretty limited. On the
13 other hand, I'd have to review the rifle hunting
14 regulations, is one thing I'd be concerned about,
15 because a rifle bullet can go a couple, three miles.
16 It's quite a ways.

17 And then sort of just a matter of density. We
18 allow rifle hunting in the North Valley. But when you
19 get into an area with a high concentration of dwellings,
20 statistically, it's just more of a mathematical
21 probability you could have a bullet landing there
22 causing a problem than when you've got 12 scattered
23 houses. But as far as the shotgunning, I don't think it
24 would be a problem. That's a pretty limited range of
25 around a hundred yards where those pellets can really

1 respect to potential harm to golfers?

2 A No.

3 Q Have any of your employees ever come to you,
4 aside from on the North Shore Ranch project, expressing
5 concerns about the welfare or the safety of golfers?

6 A No.

7 Q Are you of the opinion that people in Flathead
8 Valley should not be permitted to have domestic animals
9 such as cats or dogs?

10 A No.

11 Q Given the concerns you've voiced in this case
12 about their potential risk of harm, so to speak, to
13 wildlife, I'm just asking for your idea here. How do
14 you have a pet in Flathead Valley and still protect
15 wildlife, given your opinions in this case, which
16 essentially stand for the proposition that anybody who
17 has a pet is essentially not going to keep it confined
18 and it's going to harm wildlife?

19 A I think that my answer to your question is how
20 do you have a pet that's compatible to wildlife is you
21 don't allow them to be free-ranging. I have a dog, for
22 instance. I don't allow the dog to be free ranging. I
23 have a cat. I don't allow it to be a feral cat and go
24 out and catch songbirds. It's a house cat. I have a
25 dog that stays in its backyard or stays in the house.

1 cause any damage at the maximum.

2 Q So with respect to the North Shore Ranch
3 project, would it be fair to say that your main concern,
4 with regard to hunting, wasn't shotgun but it was rifle?

5 A Yes.

6 Q Now Eagle Bend golf course immediately abuts
7 the WPA. You and I talked about that earlier; right?

8 A Uh-huh.

9 Q Yes?

10 A Yes.

11 Q Now, although there may only be 12 residences
12 within a quarter of a mile of the WPA, when the golf
13 course is in operation, obviously, there are large
14 numbers of people who go through that geographic region
15 that abuts the WPA; true? People using the golf course.

16 A Yes.

17 Q And previously, with respect to any potential
18 risk of harm to those individuals who use the golf
19 course, you expressed no concerns; fair to say?

20 A As far as I know.

21 Q Do you know whether or not your predecessor in
22 interest ever expressed any concern?

23 A I'm not sure.

24 Q Has Gael Bissell ever come to you with any
25 concerns, prior to the North Shore Ranch project, with

1 But not everybody is as responsible with their pets as I
2 am.

3 Q And I'm just asking you the question, because,
4 you know, you're obviously a knowledgeable individual in
5 the wildlife and wildlife habitat area. You've had
6 involvement in some of the projects in this area. And I
7 represent the developer in this case. And I really just
8 have a question. How can a developer, you know, assuage
9 your concerns about risk of harm posed by domestic
10 animals, if not through the covenants for the
11 subdivision and as recorded on the preliminary plat
12 which was the case in this instance? What else can a
13 developer do to mitigate that risk?

14 A I think that risk is just inherent with the
15 development.

16 Q So what do we do; have no more development? Or
17 do you outlaw pets? I mean, I'm genuinely interested in
18 your answer to this. Because, really, the developer in
19 this case is at his wit's end on the pets issue.

20 A Our experience with pets is they're pretty
21 problematic next to wildlife habitat. You know, in some
22 ways, there's really no pet problems, they're owner
23 problems.

24 Q Right. No; I agree. And that's my question.
25 I mean, you've expressed a concern. You repeatedly

1 expressed a concern, your whole staff did, about pets.
2 And my question is, what can an applicant do to mitigate
3 that risk of harm that would satisfy you and your
4 agency? Is there anything that can be done to mitigate
5 that concern on your part?

6 A I don't know. Realistically, probably not.

7 Q So it's incapable of mitigation, that risk of
8 harm.

9 A I'm not sure if mitigation is the right word,
10 but I think that's an inherent impact of development.

11 Q During the course of this project, are you
12 aware of the fact that Mr. Averill and his partner,
13 Mr. Simon, on more than one occasion, approached your
14 agency to sit down and discuss these issues to try to
15 arrive at mitigation ideas and efforts that would be
16 palatable to your agency? Are you aware of that?

17 A I'm aware of that.

18 Q Are you aware of the fact that they were, on
19 more than one occasion, stonewalled by your agency?
20 People would not speak to them for months at a time,
21 despite the fact that Sean Averill repeatedly called and
22 requested a sit-down? Geez, let's get together, sit
23 down and talk about these issues? Are you aware of
24 that?

25 A Well, I suspect there's two sides to every

1 story in that regard, so I'm not sure I'm in a position,
2 right here, to agree with you there.

3 Q And I'm just asking, do you have any knowledge
4 of that process?

5 A I'm not aware that we -- the employees
6 stonewalled -- stonewalled the developers. I wouldn't
7 ostensibly support our employees stonewalling the
8 developer.

9 Q You, as the regional supervisor of Region One,
10 do you have an opinion as to whether or not your agency
11 has an obligation to sit down with a developer in order
12 to discuss potential mitigation of impacts on wildlife
13 or wildlife habitat?

14 A Yeah; my opinion is we should.

15 Q And is that a part of any written policy or
16 protocol that you have at this agency that, you know,
17 when a subdivision application has been filed and your
18 agency gets the requisite letter from the county or the
19 developer, if the developer happens to call you or your
20 agency to request a sit-down, do you have any written
21 policy that says Yeah, we -- as an agency, we should sit
22 down with that developer?

23 A I'd have to -- I don't know if it's a policy,
24 per se. I'd have to research the memos that I've got.
25 I would just tell you that from my management

1 philosophy, in general, I would want to see the
2 employees talk, talk. And I don't like the word
3 "stonewall" in almost any context.

4 Q Uh-huh.

5 With respect to this project, have you had any
6 discussions with any of your employees about, you know,
7 any discussions that these applicants had with respect
8 to reaching any agreement on mitigation of impacts? I
9 mean, have you come to learn that there were discussions
10 and that some of your agents, your employees, made
11 representations to the applicant that Yeah, we can
12 discuss these things and there has been mitigation
13 and --

14 A Right now, up to this point, my understanding,
15 our tact, right now, like you alluded to earlier, is
16 that we've been looking at development of an
17 acquisition, some alternatives -- trying to develop some
18 alternatives to the development of this subdivision.
19 And that's where we've been. That's where we've been
20 focusing to this point.

21 Q And we know -- I mean, we've gone through some
22 of the letters, and there's more that we'll go through.
23 But we know that during the pendency of this
24 application, as you and I talked about earlier, your
25 agency and others were interested in acquiring this

1 land; true?

2 A Uh-huh.

3 Q That's a yes?

4 A Yes. I beg your pardon.

5 Q And you'd agree with me that your agency's
6 desire to either acquire this property or to assist
7 others in doing so should, in no way, have colored your
8 opinions regarding potential impacts on wildlife or
9 wildlife habitat posed by this project.

10 A Yes.

11 Q I mean, you'd agree with that.

12 A Yes.

13 Q And you'd agree with me that despite the fact
14 that Gael Bissell and others in your employment and you,
15 yourself, had an interest in either acquiring this
16 property or assisting the Flathead Land Trust or others
17 to acquire it, your agency was still required to sit
18 down with the applicant to discuss potential mitigation
19 with respect to wildlife and wildlife habitat.

20 A Yes.

21 Q So Gael Bissell's interest and your agency's
22 interest in acquiring this property, certainly, it
23 shouldn't have deprived the applicant of the ability to
24 sit down and discuss, in a substantive way, mitigation
25 efforts that would assuage your concerns with respect to

1 potential impacts on wildlife and habitat; correct?

2 A Yes.

3 MR. SCHENK: Excuse me. Can I go back to
4 the previous question?

5 MR. PERRY: Sure.

6 MR. SCHENK: Ask a question about the
7 record?

8 MR. PERRY: Yeah.

9 MR. SCHENK: Did you say that FWP employees
10 are required to sit down? Did you ask whether it was
11 FWP employees are required?

12 MR. PERRY: I believe so, yeah. And I
13 thought that was kind of consistent with the prior
14 testimony of the witness.

15 MR. SCHENK: I think the testimony of the
16 witness was that he thinks it's a good idea to do so, or
17 he would advocate that he would do so. I want to point
18 out that your required implies a legal obligation. And
19 I don't believe that the Subdivision and Platting Act
20 requires FWP to participate in the mitigation.
21 Mitigation as used in the Subdivision and Platting
22 Act --

23 MR. PERRY: Okay.

24 MR. SCHENK: -- to describe the process.

25 MR. PERRY: Could we go off the record?

1 MR. MCCORMICK: He's asking you a question.

2 I'm just wanting that question to be on the record as
3 opposed to -- and you how you deal with that question to
4 be on the record. If you have an objection to him
5 talking about it, make your objection and we'll go from
6 there. I just want the conversation on the record.

7 MR. PERRY: Well, I don't have anything to
8 say then.

9 MR. MCCORMICK: This is not my objection.
10 I'm just objecting to your suggestion that it's off the
11 record.

12 MR. SCHENK: Then let me state it this way.
13 My objection is to the fact that a question was
14 asked of Mr. Satterfield that implied, and he answered
15 affirmatively, as to a requirement of FWP employees to
16 participate in a mitigation process.

17 Jim is not an attorney; I am. My comment is
18 that the Subdivision Platting Act requires -- mitigation
19 is a process that occurs between county personnel and
20 the developer. It's a discussion that occurs between
21 those parties.

22 MR. PERRY: Okay.

23 MR. SCHENK: FWP employees are not required
24 to participate in a mitigation process, though Jim is on
25 record, I realize, saying he thinks it's advisable that

1 MR. SCHENK: Yeah.

2 MR. MCCORMICK: No; I want this on the
3 record.

4 MR. PERRY: Well, I'm going to move to
5 strike it then because it's a soliloquy. If you have an
6 objection, we know what the court says, Supreme Court,
7 make your objection.

8 MR. MCCORMICK: I'm interested in having
9 all of the discussions that are taking place here on the
10 record unless all of us agree that they're not going to
11 be on the record.

12 MR. PERRY: If there's an objection --

13 MR. MCCORMICK: We're talking about
14 information that's on a page that we can all read later.
15 If it's inadmissible testimony, it's inadmissible
16 testimony. But I don't understand why we would fight
17 about what should be in the deposition transcript or
18 not.

19 MR. PERRY: No; I'm not fighting about
20 that. I'm fighting about the fact that -- I'm not
21 fighting about anything. But I'm expressing
22 disagreement -- you know, state and federal courts have
23 repeatedly said if you have an objection in the
24 deposition, make it, provide your basis, but don't
25 provide a soliloquy.

1 we discuss those issues --

2 MR. PERRY: Okay.

3 MR. SCHENK: -- with the developer.

4 MR. PERRY: All right; I'm just going to
5 move to strike because you're not sworn, and you're
6 testifying at this point in time.

7 MR. SCHENK: Fine.

8 MR. PERRY: And I know note your objection
9 for the record. It's a competency objection, I assume,
10 to the extent that you are of the opinion that a legal
11 opinion was sought.

12 MR. SCHENK: Yes.

13 MR. PERRY: I note your objection.

14 Counsel, do you have anything you want to add?

15 MR. MCCORMICK: Are you going to move to
16 strike it?

17 MR. PERRY: Depending on what you say. But
18 I keep getting soliloquies. So if you have something
19 you want to add...

20 MR. MCCORMICK: I understand where Bill is
21 coming from. You had asked him a question about
22 "required to sit down." And he had answered that
23 "question I think it's a good idea." And I think that a
24 follow-up question you had, you inserted, whether you
25 meant to or not, the element of "required," and he just

1 missed it. So I think -- I mean, there just seemed to
2 be some loose terminology here that's creating an
3 inconsistency in his answers. Is that an objection?
4 No. It's a note for the record. Move to strike.

5 **MR. PERRY:** Move to strike.

6 And I welcome cross-examination in this
7 process.

8 Okay; are we all set, Counsel?

9 **MR. SCHENK:** Yes; thank you.

10 **Q** (By Mr. Perry) You'd agree with me that if
11 every individual in the North Shore Ranch project or
12 subdivision either kept their pets inside all the time,
13 on a run, or in an enclosed fence area, then there would
14 be no risk of harm to wildlife of any kind on the WPA.

15 **A** Yes.

16 **Q** The obligation to prevent trespass on the WPA,
17 that's not an obligation assumed by the neighbors to the
18 WPA, is it?

19 **A** I don't think so.

20 **Q** And you had testified earlier FWP and FWS work
21 together, so to speak, to, for lack of a better word,
22 police the WPA; fair to say?

23 **A** Yes.

24 **Q** And just because somebody's attempting to
25 construct a subdivision that borders the WPA does not

1 mean, in and of itself, that these future residents are
2 going to be lawbreakers who trespass on the WPA; right?

3 **A** You get a few hundred people living next to
4 that and a few hundred more people living next to that,
5 there's going to be some inevitable trespass. And
6 there's going to be some inevitable problems is what I
7 guess I'm saying.

8 **Q** Okay. And that's a problem that would exist
9 independent of the North Shore Ranch subdivision as
10 population grows in Flathead Valley; right?

11 **A** Not to the extent of having that concentration
12 of people living right next to the WPA or right next to
13 the north shore or what have you.

14 **Q** So it's your testimony that the proximity of
15 the subdivision itself has a direct correlation to the
16 likelihood of trespass.

17 **A** Yes.

18 **Q** Okay.

19 **A** That's my opinion.

20 **Q** And is that predicated upon any scientific
21 data?

22 **A** I think it probably could be.

23 **Q** But the opinion that you expressed in your
24 letters to that effect, when you expressed those
25 opinions, did you have any data upon which you relied?

1 **A** It's based on experience.

2 **Q** In other project areas?

3 **A** Or other wildlife management areas.

4 **Q** Now, Eagle Bend, that abuts the WPA as we
5 talked about. People obviously traverse the golf course
6 during the spring and summer and fall months. Do you
7 have any opinion as to whether or not their presence on
8 the golf course has increased trespass on the WPA?

9 **A** I don't know how long that's been in effect.
10 I'm not sure.

11 **Q** Okay. Well, Eagle Bend was constructed in the
12 mid-'80s. Are you aware of that fact?

13 **A** No.

14 **Q** It's been there for over twenty years now. And
15 my question is, do you have any data linking the use of
16 Eagle Bend golf course to increased trespass on the WPA?

17 **A** I think they're so busy chasing around that
18 little white ball they don't have time to go trespass.
19 They're just out there playing golf. It's not the same
20 thing as somebody living out there.

21 **Q** Okay. So you don't have any data that links
22 the use of Eagle Bend golf course to any trespass onto
23 the WPA, have you?

24 **A** No.

25 **Q** You know, in reading all of the letters from

1 your agency and from Fish and Wildlife -- the US Fish
2 and Wildlife Service, it appears, to me, that many, if
3 not all, of the concerns that both agencies have raised
4 really have more to do with cumulative effects of
5 development in the vicinity of Flathead Lake than they
6 do with this particular project, per se. Is that a fair
7 characterization?

8 **A** We're concerned about cumulative effects.

9 **Q** Okay. And is that kind of the force that was
10 driving this bus to some extent, you know, the fear or
11 the concern about cumulative impacts posed not just by
12 this subdivision but other developments in the vicinity
13 of it?

14 **A** I wouldn't say one's more than the other, but
15 it's an issue. Cumulative effect's an issue.

16 **Q** And in your opinion, was that an issue of
17 greater importance to you than other issues you raised?

18 **A** I couldn't say. It's just a substantial issue.
19 I couldn't rate it.

20 **Q** And certainly this applicant couldn't control
21 what other developments had already been approved
22 decades previously; right?

23 **A** Right.

24 **Q** Nor do they have any control over whether or
25 not the Flathead Board of County Commissioners approved

1 other projects in the vicinity of this project; right?
 2 A Right.
 3 Q Now, we went over a number of times here your
 4 agency's interest in purchasing this property or
 5 assisting others to do so. And I think, at the end of
 6 the day, my question is, wouldn't it be virtually
 7 impossible for you and your agency, and Gael Bissell in
 8 particular, Jim Williams, others, who were aware of that
 9 intent on your agency's part and who were participating
 10 in efforts to purchase this property or enable others to
 11 do so, to provide any objective evaluation of potential
 12 impacts posed by this property or of this application?
 13 A No, I don't agree with that.
 14 Q Okay. So it's your opinion that you and the
 15 rest of your employees could disassociate yourselves
 16 from your own intent and desire to secure this property
 17 for yourself or for others from the scientific
 18 evaluation of potential impacts posed by the project.
 19 A I think we could do that; yes.
 20 Q Okay. And as a general proposition, you'd
 21 agree with me that the value of this land would have
 22 increased substantially, had the subdivision application
 23 been approved.
 24 A I'm not -- there's people who can answer that
 25 question better than I can. I'm not a land man,

1 on how I'm answering that question?
 2 Q I think so. I think so.
 3 A I'm not agreeing with that.
 4 Q Right.
 5 You'd agree with me that during the pendency of
 6 this application before Flathead County, Fish,
 7 Wildlife & Parks and the Flathead Land Trust and others
 8 obviously had direct conversations about how best to try
 9 to acquire this property from the developer or to
 10 protect it from development; fair to say?
 11 A I don't know about "protect it from
 12 development." Basically, the emphasis has been on the
 13 environmental assessment here. I mean, this part of it,
 14 the emphasis is on environmental assessment.
 15 Q But during the pendency of the application, I
 16 think we went over this a little earlier, your agency
 17 was involved in discussions with the Flathead Land Trust
 18 about how to acquire it or how to enable them to acquire
 19 it; right?
 20 A Uh-huh.
 21 Q Yes?
 22 A Yes.
 23 Q And in light of your agency's desire to acquire
 24 this property, or to enable others to do so, is it fair
 25 to say that your agency wanted this subdivision

1 basically.
 2 Q And in a general sense, do you have any
 3 understanding as to whether or not land in the vicinity
 4 of the north shore of Flathead Lake is worth more or
 5 less when it's approved as a subdivision?
 6 A I presume it would be worth more if it was
 7 developed.
 8 Q And certainly, if a subdivision application had
 9 been granted with respect to this property, it's fair to
 10 say that it's likely that your agency and the Flathead
 11 Land Trust, and others who wanted to acquire it, would
 12 probably have had to pay more for it; true?
 13 A True. Or probably possibly maybe not done it;
 14 I don't know.
 15 Q Uh-huh.
 16 A I guess I believe in the integrity of the staff
 17 I supervise. So I feel compelled to answer more than
 18 you're asking there. But I believe in the integrity of
 19 the staff I supervise.
 20 Q So just to summarize -- I mean, your testimony
 21 is that neither you nor your staff, Gael Bissell, Jim
 22 William, Tom Litchfield, drafted any opinion letters
 23 regarding this project that were driven by
 24 self-interests or bias.
 25 A No. I don't think we did that; no. Am I clear

1 application to be denied?
 2 A I think if the agency -- I think the agency's
 3 concerns about the subdivision are expressed in the
 4 letters as objectively as possible, in regards to our
 5 perceived concerns in environmental impacts. And I take
 6 that -- and I would propose to take that at face value.
 7 And I don't think there's a hidden agenda in those
 8 environmental assessments. I don't think those are
 9 colored by any hidden agenda we had.
 10 I think these people -- my testimony is these
 11 people have integrity, and they're scientists, and
 12 nothing in the world means more to them than their
 13 reputation, their integrity. And they wouldn't besmirch
 14 that or compromise that for one piece of property
 15 someplace on the shore of any lake.
 16 Q When you wrote your letters, fair to say that
 17 you wanted this application to get denied?
 18 A I stand behind -- you know, we did not -- as I
 19 told you before, I'll reiterate, I believe this is Dan
 20 Vincent's approach, my predecessor. And I know it's
 21 been mine. And this is the direction I receive from our
 22 director -- several directors, we do not oppose or
 23 support subdivisions. Our intention, when we write
 24 these letters, is not to oppose or support a
 25 subdivision. It's to express our best judgment of the

1 environmental assessments or the environmental impacts
2 of the subdivision proposal.

3 Q No; I understand your testimony. My question
4 is --

5 A That is my testimony.

6 Q No; that's not the answer to the question I'm
7 looking for. The question I'm asking you is, I know
8 that you've testified that this -- you know, you're of
9 the opinion that everybody was stand-up from your
10 agency, and these were objectively reasonable
11 scientifically-based opinions. We went over that
12 before.

13 I'm talking to you on a personal level. When
14 you wrote your opinion letters, you, as an individual,
15 it's fair to say that you wanted this application to be
16 denied. Is that true?

17 A No.

18 Q That's not true?

19 A No.

20 Q And you didn't -- I'm sorry; were you done?

21 A Yes, sir, I'm done.

22 Q Okay. Did you want the application to get
23 approved?

24 A Frankly, what I want, I don't think it enters
25 into it. I don't really -- basically, I take a look at

1 a letter in like this, I have no idea -- first of all, I
2 don't -- many times -- I mean, I can't cite specific
3 examples, but I'm pretty sure there's examples in there
4 over the concerns -- specific concerns we've had, there
5 have been subdivisions that have still been approved in
6 the county or other counties where me or my counterparts
7 work. So I mean, there's always an uncertain outcome to
8 start with when you do this. Okay; so you're giving me
9 more credit -- I think you're giving me more credit than
10 I deserve for my conniving in this regard. I send this
11 in at face value, and I don't have any sort of hidden
12 agenda like that.

13 Q And I'm not saying you had a hidden agenda.
14 What I'm asking you is, when you submitted your letters
15 regarding this project, did you have any understanding
16 or belief, with respect to the ability of your agency in
17 conjunction with the Flathead Land Trust and others, to
18 be able to secure this property if the application were
19 to be denied? Did it have any bearing in your mind upon
20 your agency's ability to do that?

21 A Did that have any bearing?

22 Q The potential denial of the application.

23 A Did that have any bearing on what?

24 Q Let me ask it again.

25 A Okay.

1 the draft I write, I take a look at this. Something
2 like this -- a letter like this might be reviewed by
3 other folks. And we take a look at this and want it to
4 be the truth, as well -- we want it to be the truth.
5 And that's all there is to it. It's not based on a
6 hidden agenda. It needs to be the truth.

7 Q Okay. Well, when you wrote your letters
8 regarding this project, did you have any understanding
9 as to whether or not the likelihood of your agency,
10 along with others, being able to purchase it for
11 conservation purposes would go up, were the application
12 to be denied? Do you understand my question?

13 A I'm thinking about it. Let me think about that
14 for a second.

15 What I'm saying is that I'm submitting these
16 letters, and I want them to be taken at face value.

17 Q I understand. And my question is, it's true,
18 is it not, that you knew as an individual, director,
19 supervisor of Region One, that if this subdivision
20 application were to be denied, whether as a result of
21 your input or input from others, it would be more likely
22 that you, in conjunction with the Flathead Land Trust or
23 others, would be able to purchase the property or to
24 enable others to do so.

25 A You know, when we send a letter -- when I send

1 Q If the subdivision application were denied,
2 it's true, is it not, that it would be more likely in
3 that circumstance that you -- and by "you" I mean your
4 agency -- in conjunction with the Flathead Land Trust or
5 others, would be able to secure it for conservation
6 purposes?

7 A I'm not sure if that's right or not. Because
8 you've got to have -- you have to have a willing seller.
9 And I mean, they might be so embittered over -- I don't
10 know what they're going to do if they are denied. They
11 might try to sell it to somebody else. I don't know;
12 I'm not sure.

13 Q So did you never think about that topic during
14 the whole process that we've discussed here today; what
15 would happen if the application were to be denied
16 vis-a-vis your agency's desire to either purchase it for
17 conservation or to assist others to do so?

18 A I don't really remember ever discussing that
19 with the employees.

20 Q Ever thinking about it yourself?

21 A No, not really. I mean, this was -- this is
22 one of a myriad of issues I manage. And I'm just trying
23 to keep the ball -- all the balls up in the air and do
24 the right thing here. And I think that I -- I think my
25 thoughts at the time here looking at this and preparing

1 to sign this and participate in this is just Is this the
 2 truth? Is this as accurate as we can be? And at the
 3 time, I don't think I was thinking Well, if I can do
 4 this, well then this will happen and this will happen.
 5 Q So is it your testimony that even though your
 6 letters or FWP letters repeatedly talk about FWP's
 7 intent to try to purchase the property or helping others
 8 to do so, that consideration was never thought about by
 9 you with respect to the potential denial of the
 10 application? I mean --
 11 A And of course, I'm not the decision-maker
 12 there. We're note supporting this or not opposing this.
 13 We're just reporting on our take on the environmental
 14 impacts of this proposal.
 15 Q Well, on one hand, your agency's on record as
 16 saying FWP wants to buy this property or help others to
 17 buy it. We've been over that; right?
 18 A Right. And wouldn't that -- that would imply
 19 it was available.
 20 Q Sure.
 21 A Yeah; okay.
 22 Q And, you know, having repeatedly said, you at
 23 FWP, that Gee, we have an interest in buying this or
 24 helping others to do so, is it your testimony that you,
 25 as the regional director, never gave thought to how a

1 MR. PERRY: Okay; fair enough. Fair
 2 enough. That was all I was looking for.
 3 And by the way, can we mark this as an exhibit;
 4 do you mind? Because he's referred to it during the
 5 course of the deposition.
 6 MR. SCHENK: I don't mind, as long as we
 7 note that it really doesn't have a legend that -- all
 8 these numbers that identify all these notes.
 9 MR. PERRY: Sure. We can just designate it
 10 as a chart if you want or however you want to.
 11 MR. SCHENK: A general map of the area.
 12 MR. PERRY: That would be great.
 13 THE WITNESS: Can I have about two minutes?
 14 MR. PERRY: You bet; yeah.
 15 (Deposition in recess from 3:01 p.m. to
 16 3:07 p.m.)
 17 Q (By Mr. Perry) I'm going to try to crank
 18 through some of these documents so we can get you out of
 19 here.
 20 A I'm at your disposal when you're in town next
 21 time.
 22 Q We'll see you Thursday.
 23 A I'm at your disposal.
 24 Q Nine o'clock Thursday, here?
 25 A Yes, sir. If you don't get to where you want

1 potential denial of the application might affect your
 2 ability to purchase this property or help others to do
 3 so?
 4 MR. SCHENK: I'm going to object to this.
 5 You've asked that question several times now, and he's
 6 given you an answer.
 7 MR. PERRY: I just can't get an answer that
 8 I can understand.
 9 Q (By Mr. Perry) Do you understand my question?
 10 A I understand your question. But I think -- I
 11 guess, if I understand your question is did that affect
 12 what I was willing to sign, and did that affect these
 13 letters? And my answer is no.
 14 Q No, that's not my question. I'm not asking
 15 whether it affected the letters. I'm asking you whether
 16 or not, given FWP's expressed intent to either buy the
 17 property or help others to do so, did you ever -- you,
 18 as regional supervisor, ever consider what impact, if
 19 any, a potential denial of the subdivision application
 20 would have upon your desire to purchase the property or
 21 help others to do so?
 22 A Speaking for myself, my best answer is not to
 23 my knowledge did I ever think of that.
 24 (Deposition Exhibit No. 8 marked for
 25 identification.)

1 to be, I'm at your disposal Thursday morning.
 2 Q I appreciate it; thank you, sir.
 3 The document that's been marked as Exhibit 8 to
 4 your deposition, just a general question. Do you
 5 recognize whose handwriting this is?
 6 A No.
 7 Q All right; fair enough.
 8 A It's not mine; I know that. It ain't mine.
 9 MR. MCCORMICK: That's it?
 10 MR. PERRY: That's it; yeah.
 11 (Deposition Exhibit No. 9 marked for
 12 identification.)
 13 Q (By Mr. Perry) You know, before I get to
 14 Exhibit 9, obviously you don't recognize the handwriting
 15 on Exhibit 8?
 16 A No, I don't.
 17 Q And I suggest to you it came from your office.
 18 A Okay; I didn't even see that. Well, wait.
 19 What is that?
 20 Q MTFWP --
 21 A Yeah, but I'm not sure what that is.
 22 Q That's just a Bates stamp. These were
 23 documents received from your office.
 24 A Oh, okay.
 25 Q I figure that it's either from Gael or Jim

1 Williams or Tom Litchfield, somebody in your office.
 2 But if it's not yours and you don't recognize the
 3 handwriting --
 4 A No, I don't.
 5 Q -- we'll move on.
 6 Exhibit 9. Have you ever seen Exhibit 9
 7 before?
 8 A I'm trying to see who's it from?
 9 Q It's my understanding that this was a proposed
 10 letter regarding this project that Gael Bissell had
 11 prepared, and someone provided comments on it. And my
 12 question is, are those your comments?
 13 A No. Let me look at it to make sure.
 14 Q Okay.
 15 A It's not me. This isn't me. I can tell you
 16 that right now.
 17 Q I'm sorry; I didn't mean to interrupt you.
 18 A This isn't my writing.
 19 Q Do you know who internally at FWP Gael Bissell
 20 would have vetted, so to speak, her letter through or
 21 with if it were not you?
 22 A Could have been Jim Williams. Could have been
 23 her supervisor.
 24 Q That would have been Jim Williams?
 25 A Yes. He's her direct supervisor.

1 Q Okay.
 2 A Could have been any -- I suppose it could be
 3 some of her peers, some of her -- the other biologists.
 4 But my first thought would be Jim Williams.
 5 Q Okay. And I see in the -- well, in the
 6 first -- or the second bullet point, there's some
 7 discussion about, you know, Gael Bissell having mixed up
 8 impacts on ag with impacts on wildlife and kind of
 9 overstepping, so to speak, the scope of her opinions on
 10 the North Shore Ranch project. And I just wondered
 11 whether or not you had ever had a similar discussion
 12 with Gael Bissell about her letters regarding
 13 subdivisions.
 14 A No.
 15 MR. PERRY: Okay. All right; we'll move on
 16 to the next one.
 17 (Deposition Exhibit No. 10 marked for
 18 identification.)
 19 Q (By Mr. Perry) Sir, the document marked as
 20 Exhibit 10 to your deposition, do you recognize this
 21 document?
 22 A No.
 23 Q Okay.
 24 A Not right off the bat.
 25 Q Well, again, I suggest to you we received this

1 from your office. It's a multi-page letter regarding
 2 the north shore of Flathead Lake field tour on Monday
 3 March 19, 2007. Do you see that on the first page?
 4 A Yes, sir.
 5 Q And I see that at the top of the page there's a
 6 stop, Stop 1, Pike's Peak, and there's a list of
 7 individuals. Do you see that?
 8 A Yes.
 9 Q Okay. And then I see the next one down that
 10 first page, Stop number 2, WPA Access A, and a list of
 11 people, Lynn Verlanic, Mark Deleray, Ric Hauer, Brent
 12 Mitchell. Do you see that?
 13 A Yes.
 14 Q And do you know who Lynn Verlanic is?
 15 A I don't know. I hope -- I should know who it
 16 is. I don't think I know who they are.
 17 Q Okay. And I see if you turn to the next page
 18 under Stop number 3, Access B, North Shore landowners, a
 19 number of individuals are referenced. Do you see that
 20 indication?
 21 A Yes.
 22 Q Okay.
 23 Are you aware of the fact that during March of
 24 2007, Gael Bissell went on a tour of the north shore of
 25 Flathead Lake with a number of other individuals?

1 A Not per se.
 2 Q Okay. And it's my understanding that this is a
 3 document that it's likely Gael Bissell drafted after
 4 this visit that she made to the lake during which she
 5 was accompanied by people from US Fish and Wildlife
 6 Service, people from the Flathead Land Trust, and
 7 others. And keeping that in mind, I just have a couple
 8 of questions with respect to this document.
 9 First of all, you've never seen it before; is
 10 that correct?
 11 A I don't remember this document.
 12 Q Okay.
 13 A Yeah, I don't remember seeing it before.
 14 Q On the second page of the document, two-thirds
 15 of the way down under Stop, number 3, there's a
 16 discussion about a quote, unquote, "Domino effect." Do
 17 you see that. It's the third full paragraph down, just
 18 one sentence?
 19 A Okay; yes.
 20 Q And it states "If North Shore Estates is
 21 approved other farmers might move to sell out since
 22 change will be inevitable. A good time to cash out,"
 23 close quote. Do you see that?
 24 A Yes.
 25 Q Did you ever have this discussion with Gael

1 Bissell about this quote, unquote, "Domino effect,"
2 whether if the project was approved by the county, that
3 it's likely other properties would go the same way; that
4 type of discussion?

5 A It doesn't immediately come to mind. I think
6 we probably -- I wouldn't be surprised if we didn't talk
7 something about just land use patterns. And I don't
8 remember calling it like the "Domino effect" or anything
9 like that. But I think we've talked about the idea
10 that -- I vaguely remember talking about the idea that
11 this could happen.

12 Q Okay. And you know -- and I guess this is
13 probably more appropriately discussed with Gael Bissell.
14 But did you have any understanding that in March of
15 2007, Gael Bissell and others wanted to discuss the
16 North Shore Ranch project with Dale Lauman outside of
17 the public hearing process? And Dale Lauman, I suggest
18 to you, was a commissioner at the time. Did you have
19 any understanding of that?

20 A No.

21 Q I see on page four there's a statement made
22 under Concerns and Next Steps, and I quote, "Need to
23 follow up with Dale Lauman to get his impressions and
24 stress the importance of denying dense development
25 proposal on North Shore Ranch. 300 houses is

1 this document, have you ever heard of this River to Lake
2 organization?

3 A I think I've vaguely heard -- I've vaguely
4 heard of them. I'm not sure. I don't know a lot about
5 it.

6 Q Okay. Well, I suggest to you this is another
7 document produced by your office in response to our
8 subpoena in this case.

9 A I see.

10 Q And at the top of the document, Exhibit 11,
11 it's noted, and I quote, "River to Lake Meeting, Montana
12 Department of Fish, Wildlife & Parks, Kalispell, October
13 9, 2007." Do you see that indication?

14 A Yes.

15 Q Okay. And I see under Participants, there are
16 a variety of people listed. The first one is Gael
17 Bissell. Do you see that indication?

18 A Yes.

19 Q Okay. And as a general proposition, in October
20 of 2007, did you, as the boss of Gael Bissell and others
21 in Region One, did you make available your conference
22 rooms here at your Kalispell offices for meetings to be
23 held by other entities?

24 A Well, we allow -- we provide these meetings.
25 We have this conference room, we have a larger

1 inappropriate. Dennis Hatton, owner of Somers Cafe, has
2 coffee with Dale in the mornings and would be good
3 spokesperson to do this. Marilyn will contact Dennis
4 Hatton. Ken Siderius also knows him," close quote. Do
5 you see that indication? Have I read that correctly?

6 A Yes, you have.

7 Q Do you know who Ken Siderius is?

8 A I know who he is.

9 Q Who is he?

10 A I know he's involved in the Flathead Land
11 Trust, I think. I mean, I've met him before.

12 Q Okay. And have you met Marilyn Wood before?

13 A I'm not sure if I have or not. I'm not sure.

14 Q Okay.

15 A That may sound unbelievable, but I'm not sure
16 if I've met her or not.

17 MR. PERRY: That's fine. I guess this is a
18 document we'll discuss with Gael. We'll move on to the
19 next one.

20 (Deposition Exhibit No. 11 marked for
21 identification.)

22 Q (By Mr. Perry) Sir, the document marked as
23 Exhibit 11 to your deposition, do you recognize it?

24 A No.

25 Q Sir, before we get to some of the issues in

1 conference room, and we make these meeting rooms
2 available to all sorts of entities. And I don't track
3 that. The front desk staff does, but we make them
4 available to a whole myriad of outfits.

5 Q Okay. So this group meeting on October 9, 2007
6 at which Gael Bissell and Marilyn Wood and Lynn Verlanic
7 and Mayre Flowers and attorney Katherine Maxwell and
8 Robin Steinkraus and others were in attendance, this
9 wasn't a meeting that you attended.

10 A No.

11 Q And this wasn't a meeting that you were aware
12 of; is that true?

13 A Yes.

14 Q And I see that on the second page of this
15 document, under Key Elements of the North Shore Project
16 include:" Second bullet "A funding strategy to include:
17 a) Buy out the North Shore Ranch developer and
18 landowner. A negotiated option agreement with the
19 developer/landowners would need to be reached before the
20 project receives approval from the county." Do you see
21 that indication?

22 A Yes.

23 Q Do you have any understanding as to why this
24 group of people apparently had concluded that an option
25 agreement to purchase the North Shore Ranch at issue in

1 this case would need to be reached before the project
2 received approval from the county?

3 A No.

4 Q You ever have any discussion with your
5 subordinate, Gael Bissell, with respect to her opinions
6 that this property needed to be purchased or an option
7 reached on it before it received approval -- subdivision
8 approval by the county?

9 A No. Again, her direct supervisor's Jim
10 Williams.

11 Q Uh-huh.

12 A Her direct supervisor's Jim Williams, and I
13 haven't had that conversation with either him -- her or
14 Jim.

15 Q And I think, reading between the lines, that
16 gets back to a discussion you and I had earlier, the
17 value of the property.

18 A Right.

19 Q And I think -- I don't mean to mistake your
20 testimony, correct me if I'm wrong, but I think you
21 testified, in words or substance, that Yeah, it's likely
22 that the property would have had a value that was higher
23 if it had been approved as a subdivision. Is that
24 correct?

25 A Right.

1 involved in evaluating this project for impacts early
2 on, you indicate had worked with the developers and that
3 your staff acknowledged that the developers in this
4 case, Kleinhans Farms Estates, LLC, had addressed your
5 site-specific concerns with respect to the potential for
6 human/wildlife conflicts and other on-site issues that
7 could occur if the proposed development is built at this
8 location next to the WPA; fair to say?

9 A Well, we said here that -- to be specific, we
10 said here that they had come a ways, so to speak, here
11 is what we're saying here. I don't necessarily think
12 we're saying here that they've alleviated the concerns.

13 Q Right. And I didn't mean to put words into
14 your mouth or misstate what's in the document.

15 A That's all right.

16 Q I see further on down in that paragraph that
17 you stated, and I quote, "The developers have included
18 measures that should help reduce wildlife conflicts.
19 Examples of some of the incorporated subdivision changes
20 include increased setbacks from the wetlands and shared
21 US Fish and Wildlife Service boundary, no access through
22 the property to the WPA, and relatively strong pet
23 controls." Have I read that correctly?

24 A Yes.

25 Q But in your opinion, the pet controls weren't

1 Q And it would appear that this group of people
2 had some concern about that. Is that fair to say, from
3 reading this?

4 A Yes.

5 (Deposition Exhibit No. 12 marked for
6 identification.)

7 Q (By Mr. Perry) Sir, we finally get to your
8 letter of November 16, 2007; fair to say?

9 A Yes.

10 Q And this is a three-page letter that you wrote
11 regarding the North Shore Ranch project; fair to say?

12 A Yes.

13 Q And I believe I have a signed copy somewhere,
14 but I suggest to you it's identical to this one.

15 A That's fine.

16 Q And you and I went over some of the issues
17 earlier today at some length, in terms of your
18 conclusions in this letter, the conclusions that you
19 reached.

20 And I see in the first paragraph of this
21 letter, you're essentially laudatory with respect to the
22 developers and the attempts they've made to mitigate
23 potential impacts of this subdivision; fair to say?

24 A Yes.

25 Q Okay. And Tom Litchfield, who had been

1 enough. Is that fair to say? Just with respect to the
2 pets issue, obviously.

3 A Well, I mean, it's the big picture. It's the
4 sum of a lot of things here.

5 Q Right. And the relatively strong pet controls,
6 as you describe them in this letter, in your opinion,
7 weren't enough to mitigate potential impacts.

8 A Not totally. Okay; so I'll say no, no to your
9 question.

10 Q You seem to have some delay in responding to
11 that. Has your opinion changed since you wrote this
12 letter?

13 A No. And I'm trying to be kind of careful when
14 I answer your questions.

15 Q Okay; all right. You further say in the next
16 sentence, you know, "We recognize" -- and I quote, "We
17 recognize that some of the recommended conditions or
18 rules for this subdivision go beyond what many
19 developers have agreed to in the past," close quote.
20 Have I read that correctly?

21 A Let me see; where are you?

22 Q First paragraph, last sentence.

23 A Okay; yes, you have.

24 Q And so in terms of your involvement in prior
25 other subdivisions, would it be fair to characterize the

1 developers' conduct in trying to mitigate or assuage
 2 concerns raised by FWP, that these individuals, Keith
 3 Simon and his partner Sean Averill, had gone beyond what
 4 a lot of developers had done in the past?
 5 A Yes, yes.
 6 Q And would it be fair to say that, in your
 7 opinion, these developers had tried in good faith to
 8 address the concerns that your agency had raised?
 9 A Yes.
 10 Q But at the end of the day, in your opinion, it
 11 just wasn't enough. Is that --
 12 A Yes.
 13 Q And we went over a little earlier, you know,
 14 your description or delineation of this area as a
 15 nationally significant area. And I won't go over that
 16 again.
 17 Turning to the next page, you indicate in this
 18 letter that -- it is in the first paragraph,
 19 second-to-last sentence, quote "These agricultural lands
 20 also provide a buffer and security for birds and other
 21 wildlife using the WPA, as well as secure nesting and/or
 22 wintering habitat for large raptors such as bald eagles,
 23 harriers, rough-legged hawks, kestrels, short-eared
 24 owls, and occasional snowy owls," close quote. Do you
 25 see that indication?

1 There's no habitat on the North Shore Ranch property for
 2 a bald eagle, because there's no trees of sufficient
 3 diameter to support a nest; right?
 4 A Yeah, but that's only part of the habitat
 5 component.
 6 Q Okay. Well, let's take -- you indicate "it
 7 provides secure nesting and/or wintering habitat."
 8 Let's talk about secure nesting.
 9 A "And/or habitat."
 10 Q All right; let's parse it out. Let's take
 11 secure nesting. Would any of those birds find secure
 12 nesting habitat on the North Shore Ranch property, as it
 13 currently exists?
 14 A I think that would be a better question for you
 15 to ask the biologists here on this.
 16 Q Well, you and I talked earlier about bald
 17 eagles at length.
 18 A Right. But I mean, all these species, I'm not
 19 prepared to unequivocally say that there would be no
 20 secure nesting for any of the species.
 21 Q Well, let's just take a bald eagle in a vacuum
 22 then.
 23 A All right.
 24 Q You already testified earlier today that there
 25 was no nesting habitat on the North Shore Ranch

1 A Yes.
 2 Q And you and I went over, as Attorney McCormick
 3 points out, ad nauseam, a variety of animals and avian
 4 species that you discussed, at least in part, in this
 5 paragraph; correct?
 6 A Yes.
 7 Q And you and I talked about the lack of
 8 appropriate nesting habitat for large raptors on the NSR
 9 property. Do you recall our discussion?
 10 A Yes.
 11 Q And your statement in this letter that, you
 12 know, the NSR property would provide nesting or
 13 wintering habitat for large raptors, that's not
 14 consistent with your prior testimony today, is it?
 15 A I didn't say here that there would be no
 16 nesting or wintering habitat. I don't think I said that
 17 there would never be any nesting or wintering habitat.
 18 I'm not sure that's inconsistent with my testimony.
 19 Q Okay. And the way I read it, and correct me if
 20 I'm wrong in reading it, you indicated "These
 21 agricultural lands also provide a buffer and security
 22 for birds and other wildlife using the WPA, as well as
 23 secure nesting and/or wintering habitat for large
 24 raptors such as bald eagles." Let's just stop at the
 25 bald eagles. You and I talked about this earlier.

1 property.
 2 A To the best of my knowledge; right.
 3 Q So with respect to this sentence, it would be
 4 true, then, that although this sentence would seem to
 5 indicate that North Shore Ranch property provided secure
 6 nesting and/or wintering habitat for large raptors such
 7 as bald eagles, you acknowledge that there is not
 8 currently any secure nesting habitat for a bald eagle on
 9 the North Shore Ranch property.
 10 A To my knowledge, that's correct.
 11 Q Okay. With respect to wintering habitat, when
 12 you use the term "wintering habitat" with respect to
 13 specifically a bald eagle, to what do you refer? What
 14 does that mean?
 15 A Well, it wouldn't be necessarily nesting. It
 16 might be an opportunity -- it might be an opportunity
 17 before the lake freezes, or if the lake freezes to fish
 18 or to forage for pray. So I don't think my testimony is
 19 inconsistent with what I'm saying right here.
 20 Q Okay. What does "wintering habitat" mean? Is
 21 that a term of art?
 22 A Basically, where they live -- partly where they
 23 would occur or habitat they would use in the winter.
 24 Q Well, you and I went over earlier that the bald
 25 eagle, foraging habitat anyway, is the river and the

1 lake; right? Correct?
 2 A Correct.
 3 Q Now, the North Shore Ranch property, in the
 4 wintertime, it wouldn't provide any foraging habitat for
 5 a bald eagle, would it?
 6 A Again, I'm going to let the biologist speak to
 7 that.
 8 Q Okay. And it wouldn't provide winter nesting
 9 opportunities for a bald eagle, due to the lack of
 10 sufficiently sized trees, as you and I went over
 11 earlier; right?
 12 A That's my understanding, yes.
 13 Q And now harriers -- can you tell me,
 14 would -- strike the question.
 15 With respect to harriers, you and I went over
 16 earlier that there was a paucity of trees located on the
 17 North Shore Ranch property. And my question is, would
 18 that property, given that knowledge, provide any secure
 19 nesting for harriers?
 20 A I'm not as familiar with their life cycle and
 21 their nesting requirements as I am bald eagles.
 22 Q How about with respect to rough-legged hawks?
 23 Would the North Shore Ranch property have provided any
 24 secure nesting for rough-legged hawks?
 25 A I'm not sure about -- again, I stand behind the

1 general concept. But as far as eliciting, you know, the
 2 specific nesting and wintering habitat requirements for
 3 each one of these species, I'd refer you to the
 4 biologist for these questions.
 5 Q So for all these birds of prey, the kestrels,
 6 the short-eared owls and the occasional snowy owl, it's
 7 your testimony that, really, I shouldn't be asking you
 8 these questions, I should be asking your subordinates,
 9 Gael Bissell in particular?
 10 A Well, if you want to get -- I stand behind the
 11 letter I signed. But if you want to delve into the real
 12 specifics of these species, there are better people to
 13 talk to than me.
 14 Q Okay. And that's my question. I mean, you're
 15 the one who signed this letter. You're the one who
 16 submitted it --
 17 A Right.
 18 Q -- but what you're telling me is you don't
 19 really have any personal knowledge of, you know, whether
 20 or not these statements are even true, aside from what
 21 your own subordinates told you. Is that true?
 22 A I think these statements are logical. I don't
 23 have as much familiarity with the specifics here as my
 24 subordinates do. I would submit to you that anybody
 25 that supervises anywhere from a hundred to a thousand

1 to, you know, hundreds of thousands of people is in the
 2 same dilemma. You know, you trust your people. You
 3 know you have the training to know the broad training.
 4 But I don't have the same degree of familiarity with the
 5 specifics as the staff that I supervise.
 6 Q Okay. And in reviewing this letter which I
 7 know you did, I believe you testified, before you came
 8 to your deposition, is there anything stated in this
 9 letter that you actually had personal knowledge of at
 10 the time you signed this letter versus information that
 11 you obtained from a subordinate?
 12 A Oh, I think I had the general personal
 13 knowledge of the whole letter. But what I'm telling you
 14 here is that some of the -- you want to delve into some
 15 very specific biological issues here, and there are
 16 better people to talk to than I am about that. I'll
 17 talk to you about it, but....
 18 Q Can you understand my confusion, in light of
 19 the fact, though, that you signed this letter?
 20 A I don't think that's very remarkable, to tell
 21 you the truth, is what I'm telling you.
 22 Q All right. So basically, is it your custom and
 23 habit, with respect to subdivision applications on which
 24 you are rendering a letter, to rely entirely upon your
 25 staff for -- let me get the question out.

1 A All right.
 2 Q -- for the scientific bases for the opinions
 3 you're going to articulate?
 4 A I rely on them a great deal. I would submit to
 5 you that the wheels of almost any work wouldn't get done
 6 if people in my position didn't. Because I can't
 7 micromanage the work of a hundred people. But I stand
 8 behind this. I read it, and I'm familiar with quite a
 9 bit of it. So, I mean, we can just go through this line
 10 by line if you want, but that's what I'm going to tell
 11 you about the specific biology of these raptors here.
 12 Q And, you know, in a general sense, during this
 13 time period, November of 2007, how many of these
 14 letters -- this type of letter regarding a subdivision,
 15 would you send out in the average week?
 16 A Well, we get about -- I think we get
 17 about -- we get several -- close to several hundred of
 18 these a year. I think we get two or three a week. But
 19 we don't necessarily -- we don't have the time to
 20 comment on all of them.
 21 Q Okay.
 22 A So I'd have to look at my files, my
 23 chronological files, to tell you how many I send out.
 24 But not an extraordinarily large number of them. We
 25 don't comment on all of them. All of them aren't nearly

1 as significant as this one is.

2 Q Okay.

3 A This is a big deal.

4 Q I get that.

5 A Yeah, this is a big deal.

6 Q I get that. And in light of the fact that it's
7 such a big deal, not just to your organization and the
8 Flathead Land Trust and these others, but to these
9 individuals here who have their life's work tied up in
10 this project, it's a big deal to them too. You
11 recognize that; right?

12 A Sure.

13 Q And don't you think that in writing a letter
14 like this, or signing a letter like this, when the clear
15 import of the letter is that -- whether or not you
16 expressed it or not -- that this application should be
17 denied, that these applicants deserved a good-faith
18 review on your part of the data that actually
19 substantiates your opinions?

20 A Well, I guess I take exception to the "clear
21 import." I've already told you this several times. Do
22 I have to keep answering this the same -- do I have to
23 continue to provide these answers? I think I'm being
24 badgered here. Can I take a break? Do I have the right
25 to ask for a break here?

1 to be addressed by the county. I mean, you'd have to
2 agree with me that your letter goes well past an
3 evaluation of potential impacts on wildlife and wildlife
4 habitat. I mean, do you disagree with that?

5 A I think we're just addressing the potential
6 loss of habitat, potential loss of -- the environmental
7 impacts of potential loss of habitat to wildlife.

8 Q You know, in light of the fact that you've
9 testified that the bases, scientific bases for your
10 opinions in this letter, were provided to you by
11 subordinates and you, yourself, didn't do any
12 independent evaluation of those bases, I guess it would
13 be fair to say that I should ask these questions of Gael
14 Bissell or Jim Williams? Is that your testimony?

15 A No. Go ahead; we can talk about it.

16 Q Well, you know, I don't want to go through
17 every line of this. I mean, you just testified that we
18 can go through every line but that you relied upon your
19 subordinates and that you don't really have any personal
20 knowledge of, you know, whether or not kestrels would
21 nest on the North Shore Ranch property and the specifics
22 of the opinions that you offer here.

23 MR. MCCORMICK: Objection; Counsel is
24 testifying. Move to strike.

25 Q (By Mr. Perry) My question is, do you have

1 Q No; you have the question on the table. This
2 is a whole new question.

3 A It seems like the same question over and over
4 to me.

5 MR. SCHENK: Can you repeat the question?

6 MR. PERRY: Yeah.

7 Q (By Mr. Perry) All I'm saying is, you say
8 "This is a big deal" to your organization. It was a big
9 deal to these applicants too. And my question to you
10 is, don't you think that you, as a regional supervisor,
11 owed them an actual review of the data that you say or
12 your staff said substantiates the opinions you express
13 in this letter? That's my question. And I haven't
14 asked it before.

15 A Well, I did review it. But I mean, that
16 doesn't mean I looked up the life history of these
17 birds, if that's what you're asking me. But I reviewed
18 this. And I take exception to your saying that the
19 import here is that we deny -- that it be denied.
20 That's not. It is to express our best -- our best
21 estimation of the environmental impacts.

22 Q Sure. But you address a bunch of other issues,
23 too, in terms of, you know, whether or not the growth
24 policy should be considered, whether or not
25 public -- increased public ownership should be a topic

1 personal knowledge upon which, you know -- regarding
2 which I can examine you in this letter with respect to
3 these wildlife issues?

4 MR. MCCORMICK: Objection; asked and
5 answered numerous, numerous times. He has informed you
6 of where he got the information for the letter, how he
7 put it in the letter that he reviewed.

8 MR. PERRY: Do you have an objection that
9 you can summarize in a succinct manner without
10 testifying?

11 MR. MCCORMICK: Asked and answered.

12 MR. PERRY: That's the end of your
13 objection. Move to strike everything after that. We'll
14 swear you after this witness, if you want, Alan, and you
15 can testify.

16 MR. MCCORMICK: That would be fine. You
17 notice my deposition, I'll tell you what I think of your
18 line of questioning.

19 MR. PERRY: That's fine.

20 Q (By Mr. Perry) My question is, with respect to
21 the biological data and opinions that are rendered in
22 this letter, I believe you previously testified that you
23 were not the proper person to ask questions about those
24 issues.

25 MR. MCCORMICK: Objection; asked and

1 answered.

2 Q (By Mr. Perry) And that I should ask Gael
3 Bissell. And my question is now, are you changing your
4 testimony and are there, in fact, issues in here,
5 scientific issues, that you feel that you have personal
6 knowledge of that I can examine you on?

7 A We had most of this discussion centered around
8 these birds of prey here.

9 Q Right.

10 A All right. That's what I've told you about the
11 birds of prey. The third paragraph, for example, the
12 use of rifles, shotguns, hunters, I mean, we can
13 talk -- I mean, I'll talk about any of this with you.

14 Q Okay; great.

15 Second paragraph down on page two of this
16 letter is an indication made in the middle of the
17 paragraph, and I quote, "Over the last decade, fall
18 waterfowl migration numbers appear to have declined in
19 the Flathead Valley. We believe this decline may be
20 due, in part, to the amount of development on
21 agricultural lands near the Flathead River and Flathead
22 Lake," close quote. Have I read that correctly?

23 A Yes.

24 Q And when you stated "We believe this decline
25 may be due," et cetera, et cetera, when you said "we,"

1 MR. MCCORMICK: The problem, Terance, is I
2 don't know what you're going to be asking. And I don't
3 know what kind of conversation we're going to be having
4 here. So if the point of the conversation is to clarify
5 what you're asking, I'd like that on the record.

6 MR. PERRY: Well, I don't think it's
7 appropriately on the record. It's not testimony. I
8 mean, you know, I'm just trying to examine this witness.

9 MR. MCCORMICK: Well, I think he's answered
10 your question. If you're not getting the answer you
11 need or you're looking for, you're asking it different
12 ways, and there's only so many times you can ask it
13 before that is the answer.

14 MR. PERRY: No; that's not it.

15 He testified previously that with regard to
16 nesting and wintering habitat for large raptors that the
17 information set forth in this letter was not information
18 that he had personal knowledge of, it was information
19 that had been provided to him by subordinates. And my
20 follow-up question was whether or not there's anything
21 in here, in that vein, with respect to opinions on
22 wildlife habitat and wildlife issues, that he didn't get
23 from his staff that he has personal knowledge of upon
24 which I can examine him.

25 MR. MCCORMICK: Sure.

1 you meant FWP, Fish, Wildlife & Parks?

2 A Yes.

3 Q And your statement that "We believe the decline
4 may be due, in part, to the amount of development on
5 agricultural lands near the Flathead River and Flathead
6 Lake," upon what data did you rely in so opining?

7 A I don't have the citations at my disposal, but
8 this is the belief of my staff.

9 Q Okay. And so -- and I'm not trying to harass
10 you here. I'm just trying to find out what statements
11 in here you actually, personally, have a basis for
12 versus what your staff told you.

13 MR. SCHENK: Do you want to take a couple
14 minutes and talk about this a little bit?

15 THE WITNESS: Yeah.

16 MR. SCHENK: Can we take a couple minutes
17 and talk about this?

18 MR. PERRY: Yeah; sure.

19 Do you understand what I'm inquiring about,
20 though?

21 THE WITNESS: You know I'm the regional
22 supervisor of Fish, Wildlife & Parks. I'm not the
23 fishery biologist. I'm the regional supervisor.

24 MR. PERRY: Can we go off the record? Is
25 that okay, Alan?

1 MR. PERRY: And that's what I'm trying to
2 get to.

3 MR. MCCORMICK: I understand. The
4 follow-up question that you asked, then, was What's the
5 data. And you're not very satisfied with his answer
6 that some of it is just professional opinion as
7 professionals in this area. And so I don't think that's
8 just what you're asking. But that issue is directed to
9 them. I get what you're asking. I think he's answered
10 the question.

11 MR. PERRY: And my question -- I mean, I'm
12 happy to keep it on the record.

13 Q (By Mr. Perry) My question is, aside from
14 nesting and wintering habitat for raptors which we
15 discussed, and I believe you referred me to your
16 subordinates to inquire about that, we go to the next
17 paragraph and -- you know, I just want to be clear that,
18 you know, this belief that the decline of waterfowl
19 migration numbers being linked to development, was that
20 information, again, that you obtained from staff or --

21 A Yes.

22 Q Okay. And I think maybe we can simplify this
23 if you could, you know, maybe review the rest of this
24 letter and just tell me, is there anything in this
25 letter that you didn't get from your staff?

1 A Probably -- I mean, I concur with all of this,
2 but I rely on the staff that is in the field to provide
3 recommendations for me in a letter such as this. I
4 mean, I've got a lot of direct experience. For example,
5 the third paragraph, I'm familiar with the various sorts
6 of hunting here and what the various methods and what's
7 generally considered to be safe and what's not.

8 Q Okay.

9 A But a lot of this is based on the professional
10 opinion of the field staff in the region.

11 Q And that's all I'm inquiring.

12 A Yeah; okay.

13 Q I mean, if you got it from your staff, that's
14 fine.

15 A Okay.

16 Q I'm just trying to inquire as to what, if
17 anything, on page two, after the raptor issue through
18 the end of the letter, was information that you
19 personally had and that you personally opined on versus
20 obtaining it from your own staff. And I know that the
21 hunting issue is one that you said you had personal
22 knowledge of. And I acknowledge that. I'm just asking
23 the rest of the letter, is there anything in there --

24 A I'd have to study it for a while. But I'll
25 just say right now, to be expedient, in general, this is

1 your offices?

2 A No.

3 Q Were you -- strike the question.

4 Did you ever become aware of the fact that your
5 employee, Gael Bissell, was attempting to engage in
6 outreach mechanisms to influence the public with respect
7 to the North Shore Ranch project?

8 A In 2007, I'm not sure if I was aware of that or
9 not. I don't think so.

10 Q Let me ask you a question. In 2007, at that
11 point in time, obviously, you were the regional
12 supervisor.

13 A Yes.

14 Q At that time, would it have been appropriate
15 for one of your staff biologists to be conducting
16 meetings here at the Fish, Wildlife & Parks office in
17 Kalispell, Montana, a state-owned office, funded by the
18 taxpayer, to organize a group of people to arrive at a
19 plan of attack to reach out to the public to foment
20 outcry at the North Shore Ranch proposition, the
21 application? Would that have been appropriate, in your
22 opinion?

23 A I don't think that would be appropriate, but I
24 don't know if that's -- I'm not sure that that is what
25 this is. First of all, we're not funded by the

1 the collection of recommendations to me from the staff.

2 Q Okay. And that's fine. So from the raptors on
3 page two through the end of the document, aside from the
4 hunting issue, would that be a true statement, what you
5 just stated?

6 A In general, this is the recommendations I
7 received from the staff.

8 MR. PERRY: Fair enough.

9 (Deposition Exhibit No. 13 marked for
10 identification.)

11 Q (By Mr. Perry) I show you the document marked
12 Exhibit 13 to your deposition. Are you familiar with
13 this document?

14 A No.

15 Q Well, again, it's another document I suggested
16 to you was provided by your office in response to
17 Plaintiff's subpoena in this case. And it appears, from
18 the top of it, it's captioned North Shore Conservation
19 Meeting Agenda, Tuesday, November 13th, 10:00
20 a.m. - 12:00, Montana Fish, Wildlife & Parks small
21 conference room, Kalispell. Do you see that indication?

22 A Yes.

23 Q Are you aware of the fact that a meeting of
24 this quote, unquote, "North Shore Conservation" group
25 occurred on November 13th, I would suggest 2007, here at

1 taxpayers. We're funded by hunters and fishermen. And
2 second of all, I'm not sure that the intent of this is
3 to foment opposition or necessarily undermine
4 necessarily as well as it is to educate the public in
5 the public involvement process and just what's being
6 proposed and what the implications are and what's going
7 on here.

8 Q Okay. The top of the page, underneath the
9 caption, it states, and I quote, "North Shore Ranch
10 subdivision proposal" bullet one, "Option/buyout
11 scenario." Do you see that indication?

12 A Yes.

13 Q Next bullet, "Immediate funding possibilities,"
14 next bullet, "Meeting with developers," next bullet,
15 "Other." Do you see those indications?

16 A Yes.

17 Q And, sir, it's true, is it not, underneath that
18 is a designation or delineation that the Flathead County
19 Planning Board hearing was set for November 28th. Do
20 you see that indication immediately under it?

21 A Yes.

22 Q And under that, there are a number of starred
23 points. The first one, "expert reviews needed -
24 hydrology, Lakeside sewer capacity, other." Do you see
25 that indication?

1 A Yes.

2 Q Now, does your agency get involved or does it
3 have a custom or habit of getting involved in seeking
4 expert reviews from hydrologists or sanitarians
5 regarding projects on which a county has solicited your
6 input with respect to potential impacts on wildlife and
7 wildlife habitat?

8 A I can't -- I can't think of an instance where
9 we've done this, but I wouldn't want to say that we have
10 never sought some additional outside -- or outside
11 experts to help us augment our environmental assessment
12 process. I wouldn't want to say that we have never done
13 that.

14 Q Okay. When you say "an a environmental
15 assessment," your agency, when it's opinion is
16 solicited, it's limited, statutorily, under Title 76, to
17 input on two factors; wildlife -- impacts on wildlife
18 and wildlife habitat; right?

19 A I think -- I'm not familiar with that statute,
20 but....

21 Q Is it your testimony that your agency, in
22 responding to a letter from a county requesting your
23 input on wildlife and wildlife habitat issues,
24 customarily retains experts in hydrology?

25 A Well, that could be relative -- that could be

1 germane.

2 Q When was the last time you gained knowledge
3 that any of your employees had done that with respect to
4 any subdivision application?

5 A Well, that's what I say. Off -- like I already
6 told you, off the top of my head, I can't think of an
7 instance like this. But I can see that -- it could
8 be -- hydrology could be germane to even the narrow
9 scope you mentioned of what we are entitled to comment
10 on.

11 Q How about sewer capacity? Is that also
12 something, in your opinion, that is within the purview
13 of potential impacts on wildlife and wildlife habitat?

14 A I guess it could be, if it affected water
15 quality.

16 Q And in your experience, having been the
17 regional supervisor for, what, five years now; is that
18 correct?

19 A Going on five years.

20 Q Going on five years? Are you aware of any
21 other project in which your agency solicited input from
22 a sanitarian regarding sewer capacity?

23 A The only one I can think of might be Lake Five,
24 a fishing access site. But it was a little different
25 situation. But like I said, I can't think of where

1 we've done this, but I wouldn't want to swear that we've
2 never done this before.

3 Q To your knowledge, sitting here today, with
4 respect to any other subdivision application, has your
5 staff ever solicited input from a sanitarian?

6 A No.

7 Q To your knowledge, with respect to any other
8 subdivision application in your tenure as the regional
9 supervisor, has your staff ever asked for an opinion
10 from a hydrologist?

11 A No.

12 Q I see further on down, under Flathead County
13 Planning Board Hearing, 11/28, there's the last bullet
14 states, and I quote, "Outreach strategy for public
15 hearing and comment letters - target audiences -
16 outreach tools - spokespeople - other," close quote.
17 Have I read that correctly?

18 A I think it -- "Follow up with Senators," that
19 part, is that where you're reading?

20 Q It's right here. It's just right up at the
21 top.

22 A Okay; I'm sorry. I looking in the wrong spot.
23 Yes; that's correct.

24 Q Now, "Outreach strategy for public hearing and
25 comment letters." Do you see that statement?

1 A Yes.

2 Q Okay. Now, you previously testified that your
3 agency, in your opinion anyway, shouldn't express an
4 opinion one way or the other on whether a subdivision
5 application should be approved or denied; right?

6 A Right.

7 Q And you'd agree with me that it would be
8 entirely appropriate for any of your employees, Gael
9 Bissell or Jim Williams or anybody else, to organize
10 here at your offices, in your conference room, outreach
11 efforts to seek to get an application denied. You'd
12 agree with that; right?

13 A That that would be inappropriate?

14 Q That would be inappropriate.

15 A Yes.

16 Q And you'd agree with me that, you know, Gael
17 Bissell, or any other of your employees, who sits -- is
18 this the small conference room, by the way?

19 A Yes, it is.

20 Q So Gael Bissell, sitting in this room with
21 other people who are potentially interested in either
22 acquiring this property or, at minimum, obtaining denial
23 of the subdivision application, she should not, nor any
24 of your other employees, have engaged in a concerted
25 effort to induce the public to seek denial of this

1 application. You'd agree with that, would you not?
2 A Yes.
3 Q Okay.
4 Do you recognize the handwriting on this
5 document?
6 A No, I don't.
7 Q Do you know who Jim Cross is?
8 A I don't think so.
9 Q Have you heard of the Flathead Basin
10 Commission?
11 A Okay; yes. I go to some of those meetings.
12 Q And have you ever been an adviser or provided
13 them any counseling to the Flathead Basin Commission?
14 A I'm an ex-officio. Our department's an
15 ex-officio member. And between myself and one of our
16 employees, John Fraley*, we attend some of their
17 meetings. I'm not a voting member of the Flathead Basin
18 Commission. I go to some of their meetings.
19 Q I'm sorry; go ahead.
20 A I haven't been to one in a while, but I go to
21 some of their meetings.
22 Q And at any point in time in the past five
23 years, were you ever a voting member of the Flathead
24 Basin Commission?
25 A No, we're not a voting member.

1 Q And when you say "we," are you talking about --
2 A FWP. We have an ex-officio membership.
3 Q And did you ever advise the Flathead Basin
4 Commission with regard to a resolution they proposed in
5 December of 2007 regarding the North Shore Ranch
6 project?
7 A Advise -- could you be more specific?
8 Q It's my understanding that the Flathead Basin
9 Commission, during the late fall, early winter of 2007,
10 discussed the North Shore Ranch project. Were you
11 present for any of those meetings?
12 A I don't know if I was at that meeting or not.
13 Probably not. I only go to about two of those meetings
14 a year.
15 Q Okay. Were you aware of the fact that they
16 passed a resolution, pursuant to which, and I quote,
17 "Various agency and nonprofit organizations are working
18 together to explore conservation options and funding
19 sources to develop a practical conservation strategy
20 that can meet the needs of private landowners while
21 conserving the special qualities of the north shore,"
22 close quote. Are you aware of this resolution?
23 A Yes, I was.
24 Q Did you participate in the discussion of this
25 resolution at all?

1 A I don't think so. I don't think so.
2 Q And are you still -- is FWP still a member, so
3 to speak, ex-officio?
4 A Yes.
5 Q In that capacity, what, during 2007, in
6 particular December of 2007, did you view the scope of
7 your authority, so to speak, on behalf of FWP, vis-a-vis
8 the Flathead Basin Commission?
9 A We provide -- we're basically a support or
10 advisory capacity to the Flathead Basin Commission, I
11 think, if that's what you're asking.
12 Q That's my question.
13 A We're on there as an ex-officio member because
14 we don't have -- most of the full-fledged members have
15 land-managed substantial land bases, Forest Service,
16 Department of Natural Resource and Conservation. Aside
17 from our fishing access sites and parks, we don't manage
18 a substantial land base, so we're basically an advisory
19 member. We provide biological information. So -- does
20 that answer your question?
21 Q It does; thank you.
22 To your recollection, at any meeting of the
23 Flathead Basin Commission, did you ever personally ever
24 discuss the North Shore Ranch subdivision?
25 A I don't think I did. I mean, if you've -- if

1 you have something -- I don't remember doing that. If
2 you've got some minutes or something, I might stand
3 corrected. But that's two years ago, and I don't
4 remember personally attending one of those meetings and
5 discussing that issue. I have attended some of those
6 meetings. It might have been discussed at some of the
7 meetings I had been at. But I just don't remember. I
8 certainly didn't lead a presentation on it or play a
9 substantial role in those conversations.
10 Q Do you know if any of your employees did; Gael
11 Bissell or Jim Williams or anybody else?
12 A I'm not sure.
13 Q Were you ever present at a Flathead Basin
14 Commission meeting during the course of which Gael
15 Bissell stood up and spoke about the North Shore Ranch
16 subdivision?
17 A I don't remember.
18 Q Same question with regard to Jim Williams.
19 A I just -- I don't think so, but I'm not sure.
20 I can't tell you absolutely "yes" or "no."
21 MR. PERRY: Fair enough.
22 It's four o'clock.
23 THE WITNESS: All righty; 9:00 a.m.?
24 MR. PERRY: Can we go off the record, Alan?
25 MR. MCCORMICK: Depends on what you're

1 going to talk about off the record.
 2 **MR. PERRY:** Going home.
 3 **MR. MCCORMICK:** Absolutely.
 4 (Deposition in recess from 4:00 p.m. to
 5 Thursday, May 7, 2009 at 9:10 a.m.)
 6 (Deposition Exhibit No. 14 marked for
 7 identification.)

8 **Q** (By Mr. Perry) Mr. Satterfield, you'd agree
 9 with me, as a general proposition, that the North Shore
 10 applicant, as well as Flathead County, were entitled to
 11 an unbiased opinion on potential wildlife and wildlife
 12 habitat impacts posed by the North Shore Ranch
 13 subdivision.

14 **A** Yes.

15 **Q** And you'd agree with me that FWP's interest in
 16 potentially acquiring the property or assisting others
 17 to acquire it was, and is, irrelevant to any
 18 determination as to whether or not it posed any impacts
 19 on wildlife or wildlife habitat.

20 **A** Yes.

21 **Q** And you'd agree with me that FWP would disserve
 22 the public interest if it's opinions on this project,
 23 potential impacts in particular, were colored by
 24 self-interest or any conflict of interest; right?

25 **A** Yes.

1 **A** Wildlife staff Jim Williams, Gael Bissell,
 2 possibly ^ Allen Wood. I'm not certain all the
 3 individuals -- I couldn't tell you for sure all the
 4 individuals that might have had some role in developing
 5 those drafts. But those are some of the people that I'm
 6 pretty sure -- well, I'm certain of Jim and Gael. I'm
 7 not entirely certain of ^ Allen. He might have been
 8 involved too.

9 **Q** And just to be clear, at the time that you
 10 actually signed these letters and forwarded them to the
 11 county, had you seen any of the underlying data or
 12 objective scientific evidence upon which your staff had
 13 relied in preparing the drafts that you reviewed and
 14 essentially executed, eventually executed rather?

15 **A** No.

16 **Q** Do you consider yourself to be an expert on
 17 waterfowl habitat?

18 **A** No.

19 **Q** Do you consider yourself to be an expert on
 20 upland game bird habitat?

21 **A** No.

22 **Q** Is there any particular area of wildlife
 23 management or wildlife biology that you would consider
 24 yourself to be an expert on?

25 **A** Yes.

1 **Q** And wouldn't you agree that there was, in fact,
 2 a conflict of interest in this case in rendering any
 3 opinion, in so far as FWP itself wanted to acquire the
 4 property or to assist others in doing so?

5 **A** No.

6 **Q** And, sir, with regard to our prior discussion
 7 about Gael Bissell, you had indicated that your letters
 8 that I had characterized as opinion letters but the
 9 letters that you had sent to the county yourself, as you
 10 testified, were predicated upon information you received
 11 from, at least, Gael Bissell; is that correct?

12 **A** Yes.

13 **Q** Okay. And in preparing your letters -- well,
 14 strike the question.

15 Did you actually prepare your own letters? Did
 16 you write them yourself?

17 **A** No.

18 **Q** Who would have authored them?

19 **A** I drafted -- I edited drafts.

20 **Q** Okay.

21 **A** Drafted by staff.

22 **Q** Okay. And do you recall which staff in
 23 particular?

24 **A** Yes.

25 **Q** And who would that have been?

1 **Q** What area or areas would that be?

2 **A** Certain areas of fishery science.

3 (Deposition Exhibit No. 15 marked for
 4 identification.)

5 **Q** (By Mr. Perry) Sir, have you had a chance to
 6 review Exhibit 15?

7 **A** Yes, I have.

8 **Q** Sir, do you recognize the document?

9 **A** Yes, I do.

10 **Q** Fair to say it's an e-mail trailer chain dated
 11 on or about December 5, 2007?

12 **A** Yes.

13 **Q** And, sir, I see at the bottom of the page -- or
 14 at the bottom of the second page -- top of the second
 15 page, there's a letter from my partner's assist, Katy
 16 Hartney, or referenced to an attachment of a letter. Do
 17 you see that indication?

18 **A** Yes.

19 **Q** And do you recall, in a general sense, what
 20 that letter said or what that letter was about?

21 **A** No.

22 **Q** Okay.

23 **A** No, I don't.

24 **Q** I see on the next page that you drafted an
 25 e-mail dated December 4, 2007, to Doris Fisher.

1 A Yes.

2 Q And can you tell me, who's Doris Fisher?

3 A She is an employee with Montana Fish,
4 Wildlife & Parks. I would have to consult my personnel
5 directory to tell you what her formal title is. We can
6 arrange that. And she participates -- she has a
7 state-wide job in assisting department employees in land
8 use matters such as this.

9 Q Okay. And is she -- well, strike the question.
10 Do you know whether or not she had experience
11 in land use planning?

12 A I'm -- I think she has, yes.

13 Q Okay.

14 A I'm not real -- yeah, I think she has.

15 Q And in your region, Region One, do you or your
16 agency, does it employ a land use planner on staff?

17 A No.

18 Q Does she serve that function for all of the
19 regions of FWP; do you know?

20 A Well, again, she has a state-wide position
21 where she could potentially assist people anywhere in
22 the state. She's not just stationed in one region, so
23 yes, she's available for state-wide help.

24 Q And I see you indicated to her on December 4,
25 2007, and I quote, "Doris, here's a pressing issue we

1 with that e-mail on December 4, 2007?

2 A Just keeping him in the loop.

3 Q Were you concerned about potential litigation
4 arising out of the letters that had been filed by your
5 agency with Flathead County?

6 A The nature of our agency and the way Bob and
7 his staff function is that they're utilized -- they're
8 actually utilized for issues not just when litigation is
9 necessarily an issue. They just -- they provide a lot
10 of expertise to us just in procedural matters. And this
11 isn't -- this would not have been unusual for me to copy
12 Bob on this.

13 Q Okay. And I see that he responded that same
14 day, about two hours later, and he stated, quote, "Jim,
15 what can legal do to help here? This is similar to a
16 proposed subdivision in Region Two that FWP commented
17 on, and now we are in litigation. Let me know. It
18 would be helpful to have a copy of your letter and an
19 idea of what is going on here. Thanks, Bob," close
20 quote. Have I read that correctly?

21 A Yes, sir.

22 Q Were you familiar at this time, on or about
23 December 4, 2007, with pending litigation in Region Two
24 in which FWP was a named defendant?

25 A No.

1 need your help with. There's a large proposed
2 subdivision proposed on Flathead Lake that we commented
3 on (I'll forward my comments to you). Looking forward
4 to your input." Signed "Jim Satterfield," close quote.
5 Sir, can you tell me, in a general sense, do you recall
6 what input you were seeking from her?

7 A Well, her position -- I don't know if she's a
8 land use planner, per se, but she's involved in that
9 process quite a bit. And we wanted -- we utilize her
10 expertise and experience to make sure that we are
11 commenting on these in an appropriate fashion and that
12 we are addressing the appropriate issues when the
13 department makes a comment on these projects.

14 Q Okay. And at this time in December of '07, was
15 it your opinion that FWP, in the context of a
16 subdivision application, was empowered to or should
17 comment on land use planning issues?

18 A Yes.

19 Q Okay. I see above that e-mail that we
20 discussed -- well, there had been a cc to Bob Lane in
21 that e-mail; fair to say?

22 A Yes.

23 Q And Bob Lane, he's in legal for FWP?

24 A He's the chief legal counsel for FWP.

25 Q Is there a particular reason why you cc'd him

1 Q Did you ever come to learn about that
2 litigation?

3 A I know very little about that. I don't know
4 anything about that litigation besides, frankly, what
5 the e-mail says. I don't know much about that -- I
6 couldn't tell you -- I couldn't give you a case history,
7 or I don't know anything about that litigation.

8 Q Fair enough. I see that you forwarded his
9 e-mail to Gael Bissell that next day at about 8:30 in
10 the morning. Do you see that?

11 A Yes, sir.

12 Q Is there a particular reason that you forwarded
13 Bob Lane's e-mail of December 4 to Gael Bissell that
14 next morning?

15 A Just to keep her abreast of what was going on
16 with the project. She was the point person, and this
17 would be standard operating procedure for me on this or
18 anything else, to try to keep the field staff aware
19 of -- they're the point people on the project. So I
20 want them to have a full understanding of everything
21 that's going on.

22 Q Did you ever have any discussion, on or about
23 December of 2007, with Gael Bissell about potential
24 exposure, in a legal sense, arising out of opinions that
25 had been rendered by FWP regarding the North Shore Ranch

1 project?

2 A I -- I'm sure I talked to her that day. We're
3 in the same office. And I don't really just rely on
4 e-mail to communicate. So I would guess I talked to
5 her. I don't remember, but I would guess I talked to
6 her. I don't remember -- I don't remember if that came
7 up or not. I'm sure I would have talked to her that
8 day.

9 Q Okay. And in terms of talking with her that
10 day about this e-mail chain, do you have a general sense
11 as to what you would have discussed with her that day?

12 A Well, I would have discussed with her just
13 the -- I would have just discussed with her just this
14 overall issue, the involvement of the legal -- just the
15 gist of this e-mail; the involvement of Doris Fisher,
16 legal staff. I presume that's what we would have talked
17 about. I just don't remember the details of that
18 conversation.

19 Q Fair enough.

20 A I presume that's what we talked about.

21 Q Do you recall during the pendency of this
22 application, yourself, having any discussions with any
23 employ of USFWS regarding the project or letters that
24 were going to be filed with the county, that type of
25 thing?

1 Q Have you had a chance to read the first
2 paragraph?

3 A Yes.

4 Q And sir, fair to say that this is an August 16,
5 2006 letter from Lynn Verlanic, a biologist with US Fish
6 and Wildlife Service forwarded to Kirsten Holland at
7 Flathead County Planning and Zoning office?

8 A Yes.

9 Q And I see in the first paragraph, kind of about
10 halfway down, she states, and I quote, "We strongly urge
11 the planning board to either deny this proposal or
12 postpone any decision on this development until the
13 Flathead County Growth Policy has been delved; critical
14 wildlife habitats have been identified and mapped; and
15 incentives and compensation strategies have been
16 developed to encourage nondevelopment in areas of
17 critical habitat," close quote. Have I read that
18 correctly?

19 A Yes.

20 Q Were you aware of the fact that as of August
21 16, 2006, US Fish and Wildlife Service was of the
22 opinion that critical wildlife habitats had yet to be
23 identified and mapped in the vicinity of the North Shore
24 Ranch project?

25 A No.

1 A Me?

2 Q Yes, sir.

3 A No; I don't remember.

4 Q Do you know whether or not any of your
5 employees, and in particular Gael Bissell, had
6 communications with USFWS regarding this project or
7 letters to be filed with the county regarding it?

8 A I'm not sure. I'm not sure. I don't -- I
9 can't say for certain.

10 Q And in a general sense, in responding to notice
11 letters, for lack of a better term, from a county
12 regarding a pending subdivision application, does your
13 agency communicate, just in a general sense, with USFWS
14 in terms of the evaluation of potential impacts?

15 A I would think so, yes.

16 (Deposition Exhibit No. 16 marked for
17 identification.)

18 Q (By Mr. Perry) Sir, the document marked as
19 Exhibit 16 to your deposition, do you recognize it?

20 A No, not yet. I don't recognize it.

21 Q Okay. Sir, just -- I really just want to
22 discuss the first paragraph of the document, at least
23 initially. If you could just give that read -- give
24 that a read.

25 A All right.

1 Q Did anybody on your staff ever inform you that
2 US Fish Wildlife Service was of the opinion, at least as
3 of August 16, 2006, that critical wildlife habitats in
4 the vicinity of the North Shore Ranch project had yet to
5 be identified or mapped?

6 A Not to my -- not to my recollection.

7 Q Okay. Now, you'd agree with me, sir, that her
8 statement in this letter of August 16, 2006 that these
9 critical wildlife habitats had yet to be identified or
10 mapped, is inconsistent with letters that your
11 department had forwarded with regard to this project in
12 which you had said that the land at issue was, in fact,
13 a critical wildlife habitat?

14 MS. JAKES DOCKTER: I'm going to interject
15 here. I think you're misrepresenting the letter. It
16 clearly indicates, and you read, "critical wildlife
17 habitats have been identified and mapped."

18 MR. PERRY: Let me just -- I'll be happy to
19 clarify the question.

20 MS. JAKES DOCKTER: That'd be great;
21 thanks.

22 MR. PERRY: She states, and I'll quote
23 again, "We strongly urge the planning board to either
24 deny this proposal or postpone any decision on this
25 development until the Flathead County Growth policy has

1 been developed; critical wildlife habitats have been
2 identified and mapped; and incentives and compensation
3 strategies have been developed to encourage
4 nondevelopment in areas of critical habitat, "close
5 quote. Have I read that correctly?

6 **MS. JAKES DOCKTER:** Yes. Sorry for the
7 interrupt.

8 **MR. PERRY:** Yeah, that's okay.

9 **Q** (By Mr. Perry) And the word "until," do you
10 disagree with the fact that this sentence represents
11 that there are three things that Lynn Verlanic was of
12 the opinion should be accomplished before the planning
13 board ruled, so to speak, on this project; fair to say?

14 **A** Yes.

15 **MS. JAKES DOCKTER:** He's already said that
16 he's not familiar with this letter. This is the first
17 time he's seen it. And I would suggest that we read it
18 for what it is and move on.

19 **Q** (By Mr. Perry) Do you understand this
20 sentence?

21 **A** I do.

22 **Q** Do you understand it to say that there were
23 three issues that Lynn Verlanic was of the opinion
24 should be addressed prior to any ruling on the
25 application by the planning board?

1 answered.

2 You went over this for hours on Tuesday. He
3 stated several times that critical wildlife habitat is
4 not defined.

5 **MR. PERRY:** Move to strike. Move to
6 strike. You know, can we go off the record here for a
7 second?

8 **MR. MCCORMICK:** No.

9 **MR. PERRY:** Okay. You're entitled, under
10 the Rules of Civil Procedure, to interpose your
11 objection and the basis for it. You don't get to
12 comment on the line of inquiry or any other component of
13 a soliloquy which you continue to bring to bear on these
14 depositions.

15 **MR. MCCORMICK:** Your objection is noted.

16 **MR. PERRY:** Well, you know, you're just
17 delaying the process here. Interpose your objection and
18 the basis for it, please.

19 **MR. MCCORMICK:** Your objection is noted.

20 **Q** (By Mr. Perry) Do you have any understanding
21 as to what "critical wildlife habitats" means in this
22 letter?

23 **A** I'm not sure what it means in this letter.

24 **Q** Okay. Do you have an understanding as to
25 whether or not it's consistent with that term, as used

1 **A** Yes.

2 **Q** Okay. And as we discussed, one of them was the
3 identification and mapping of critical wildlife
4 habitats; fair to say?

5 **A** Yes.

6 **Q** Okay. And, sir, you'd agree with me that her
7 indication that these critical wildlife habitats had yet
8 to be identified or mapped, would be inconsistent with
9 letters that had been forwarded by your department
10 previously identifying these very areas as quote,
11 unquote, "critical wildlife habitats."

12 **A** No.

13 **Q** You wouldn't agree with that.

14 **A** No.

15 **Q** Why not?

16 **A** I'm not sure the word "critical" is being used
17 in the same sense in the seemingly different conflicting
18 statements.

19 **Q** And "critical wildlife habitats," I guess, in
20 the context of letters that had been sent by your agency
21 and the US Fish and Wildlife Service, is kind of a
22 moving target? It's undefined; is that fair to say?

23 **MR. MCCORMICK:** Objection; argumentative.

24 **Q** (By Mr. Perry) Fair to say it's undefined?

25 **MR. MCCORMICK:** Objection; asked and

1 by your agency?

2 **MS. JAKES DOCKTER:** He already said he
3 wasn't familiar with this letter. I think we could
4 leave it at that.

5 **Q** (By Mr. Perry) My question is, do you have any
6 understanding as to whether or not the term used in this
7 letter is consistent with the same terms that you have
8 used and your agency has used in other letters?

9 **THE WITNESS:** Could you repeat that
10 question for me?

11 (Whereupon the previous question was read back
12 by the court reporter.)

13 **THE WITNESS:** Yes.

14 **Q** (By Mr. Perry) Okay; what's your
15 understanding?

16 **A** My understanding is that the term "critical"
17 has at least a couple of meanings.

18 **Q** Okay. And from the context of this letter, is
19 it your testimony that you can't determine what meaning
20 she meant to bring to that term in this letter?

21 **A** Yes.

22 **Q** Okay; fair enough.

23 Next page of this exhibit, Exhibit 16, top full
24 paragraph, there's an indication made by Lynn Verlanic,
25 and I quote, "There are three bald eagle nests on the

1 Flathead WPA. One of the nests is located 120 yards
2 from the boundary of the subdivision," close quote.
3 Have I read that correctly?

4 A Yes.

5 Q Did your agency, to your knowledge, ever come
6 to conclude that there were three bald eagle nests on
7 the Flathead WPA?

8 A I don't remember.

9 Q Because I've seen in some of the correspondence
10 you and I have gone over, and some of Gael Bissell's
11 letters, that there's a continual reference to one bald
12 eagle nest. Do you recall that?

13 A Yes.

14 Q And I guess my question is, did you or your
15 agency ever come to conclude that there were three?

16 MR. MCCORMICK: Objection; asked and
17 answered.

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

19 THE WITNESS: Would you repeat the
20 question? Sorry, Bambi.

21 (Whereupon the previous question was read back
22 by the court reporter.)

23 THE WITNESS: I don't remember.

24 Q (By Mr. Perry) If you or your agency had come
25 to conclude that there were three on the WPA, would it

1 quote. Have I read that correctly?

2 A Yes.

3 Q Do you recall, in a general sense, that in
4 December of '07, my partner, Bill VanCanagan, had
5 requested FWP to provide clarification regarding
6 potential mitigation associated with this project?

7 A Yes.

8 Q Did you, yourself, ever respond to my partner
9 on behalf of North Shore Ranch with respect to ideas for
10 mitigation?

11 A I don't remember.

12 Q If you had responded, would that have been in
13 writing?

14 MR. MCCORMICK: Objection; speculation.

15 THE WITNESS: Yes.

16 Q (By Mr. Perry) And assumedly, if you had
17 responded and it had been in writing, it would have been
18 in your file, so to speak, on this project?

19 MR. MCCORMICK: Objection; speculation.

20 THE WITNESS: I need you to read back a
21 question he asked me about two questions ago. I need to
22 hear that question again, please.

23 (Whereupon the previous questions and answers
24 were read back by the court reporter.)

25 THE WITNESS: Yes, if I had responded.

1 be fair to assume that that fact would have been
2 referenced in letters that you forwarded to Flathead
3 County?

4 MR. MCCORMICK: Objection; speculation.

5 THE WITNESS: Yes.

6 (Deposition Exhibit No. 17 marked for
7 identification.)

8 Q (By Mr. Perry) Sir, have you had a chance to
9 review Exhibit 17?

10 A Yes.

11 Q And, sir, looking back to Exhibit 15 you and I
12 previously discussed, you'll recall that your
13 correspondence or your e-mail to Bob Lane was an e-mail
14 that was also forwarded to Doris Fisher, and you and I
15 previously discussed that.

16 A Yes.

17 Q And fair to say that Exhibit 17, at least in
18 part, delineates Doris Fisher's response to that e-mail
19 set forth in Exhibit 15.

20 A Yes.

21 Q Okay. And I see that, among other things, she
22 noted in the third bullet point that, quote, "I read
23 Bill VanCanagan's letter as a request for clarification
24 of what additional mitigation FWP recommends above and
25 beyond what your first paragraph alludes to," close

1 Q (By Mr. Perry) And as a general proposition,
2 does your agency -- or did your agency, during this time
3 period, have any custom or habit with respect to
4 responding to applicants who requested ideas on
5 mitigation?

6 A I'm not sure. I'm not sure.

7 Q Okay. Does your agency, and in particular
8 Region One, regarding which you're regional supervisor,
9 have any written policies or protocols regarding the
10 subdivision process itself, in terms of how to respond,
11 when to respond, that type of thing?

12 A I'm not sure.

13 Q Well, let me ask you this question. At this
14 time, in December of '07, did your agency, and in
15 particular Region One of it, have any written policies
16 aside from an employee manual?

17 A Yes.

18 Q Can you tell me, in a general sense, what those
19 policies addressed?

20 A You asked Do we have any policies besides a
21 written general employee manual?

22 Q That's correct.

23 A We have a myriad of policies aside from that on
24 a whole host of subjects.

25 Q And can you just generally describe for me what

1 they address, those policies?
 2 A Aside from subdivisions, are you asking that?
 3 Q Just in a general sense, all written policies.
 4 A All our policies for everything?
 5 Q Yeah; right.
 6 A I've got -- we have policies -- we have
 7 policies on a myriad of subjects covering almost
 8 everything we do; ranging from personnel management to
 9 game damage to various wildlife management, fish
 10 management, parks approaches, public involvement, far
 11 too lengthy for me to tell you now or for me to remember
 12 what they comprise.
 13 Q Fair enough. And just with respect to the
 14 myriad of policies that you have, I just want to be
 15 clear in your testimony, you don't have any policy that
 16 addresses how your agency should respond to a notice
 17 letter regarding a pending subdivision application?
 18 A I think my answer to that question was I'm not
 19 sure. I couldn't remember. Off the top of my head, I
 20 can't tell you.
 21 Q Okay. Is there anyone, to your knowledge, who
 22 would know?
 23 A Yes.
 24 Q Who would that be?
 25 A Doris Fisher.

1 it, to your knowledge, set forth elsewhere, or is it
 2 just in the employee handbook?
 3 A I couldn't say if it's spelled out elsewhere.
 4 But my source would be the employee handbook.
 5 Q Okay. And in a general sense, with regard to
 6 that issue, conflicts of interest, in your or your
 7 agency's employee handbook, is there a process by which
 8 an employee is compelled to bring an issue of a
 9 potential conflict of interest to a supervisor or an HR
 10 director; do you know?
 11 A Yes.
 12 Q And do you have a general understanding of how
 13 that process works?
 14 A Yes.
 15 Q How does it work?
 16 A There are guidelines for what constitute
 17 conflict of interests. Most issues are going to be
 18 readily resolved without assistance from anyone that's
 19 going to be fairly clear-cut to the employee. In gray
 20 areas or areas that are less easily defined, the
 21 employee should discuss the matter with their
 22 supervisor.
 23 Q With respect to the North Shore Ranch, did any
 24 of your employees, to your knowledge, ever discuss with
 25 you or Mr. Williams any potential conflict of interest,

1 Q Does your agency, to your knowledge, and in
 2 particular Region One of it, or did it during the
 3 pendency of this application, have any written policy
 4 about conflicts of interest?
 5 A Yes.
 6 Q Okay. And who would know about that policy?
 7 A I know something about that policy. The HR
 8 director would be the ultimate expert on that policy.
 9 Q And who would that be?
 10 A Julie Sanders.
 11 Q And does she work out of the Kalispell office?
 12 A No; she works out of the Helena office.
 13 Q Out of Helena. In a general sense, do you have
 14 an understanding of what that policy says?
 15 A Yes.
 16 Q Can you tell me, just in your best -- best
 17 words or your best estimation, your recollection of what
 18 the policy says?
 19 A In general, it's a policy that spells out, in
 20 more specificity than I can recite to you now, the
 21 appropriate way an employee does business. In respect
 22 to conflict of interests, it provides guidelines on what
 23 consists a conflict of interest. It's in the employee
 24 handbook.
 25 Q It's in the employee handbook; okay. And is

1 within the context of the employee handbook?
 2 A I'm not sure; not with me. But I'm not
 3 sure -- I'm a couple of -- I'm two employees removed,
 4 for example, from Gael as a supervisor. So I'm not sure
 5 about her supervisors.
 6 Q Okay. And correct me if my memory fails me,
 7 but I believe you testified two days ago that
 8 Mr. Williams was Gael Bissell's supervisor?
 9 A I think ^ Alan Wood is her immediate
 10 supervisor.
 11 Q Okay.
 12 A And then Jim and then me.
 13 Q Okay; fair enough.
 14 I see, further on down on Exhibit 17, Doris
 15 Fisher states, at the fourth bullet point, quote, "If R1
 16 has some good data and reference material that support
 17 the evaluation statements made in your letter, it might
 18 be good to assemble a summary of that and make it
 19 available," close quote. Have I read that correctly?
 20 A Yes.
 21 Q And this was obviously an e-mail she had sent
 22 to you; fair to say?
 23 A Yes.
 24 Q And do you recall whether or not you ever
 25 responded to her and provided her with data or reference

1 material that supported evaluation statements that have
2 been made in your letter?

3 **MR. MCCORMICK:** Objection; misreading the
4 context of this e-mail.

5 **Q** (By Mr. Perry) Do you understand my question?

6 **A** I'm going to read this real quick.

7 **Q** Sure.

8 **A** Could you repeat the question, please.

9 **Q** I'll be happy to rephrase it. My question is,
10 in light of Doris Fisher's statement at the fourth
11 bullet point essentially requesting reference material
12 or data that support evaluation statements made in your
13 letter, do you know whether or not you ever assembled
14 that?

15 **MR. MCCORMICK:** Objection; misrepresenting
16 the context of this e-mail.

17 **Q** (By Mr. Perry) Well, let me ask you this
18 question. Did you ever assemble any reference
19 data or -- I'm sorry -- any data or reference material
20 as a result of this e-mail?

21 **A** No.

22 **Q** Do you know if any of your employees did?

23 **A** Yes.

24 **Q** Okay; who did?

25 **A** Jim Williams.

1 **Q** And had you reviewed this at the time or on or
2 about the time you had letters rendering opinions
3 regarding this project?

4 **A** Yes.

5 **Q** And, sir, turning your attention to page 17 of
6 this document and, in particular, paragraph 41.2 at the
7 top of the page, do you see that paragraph?

8 **A** Yes.

9 **Q** Okay. I see that the Flathead County Planning
10 and Zoning Department states, and I quote, "Subject
11 property has not been identified by Flathead County as
12 critical wildlife habitat but is adjacent to a large US
13 Fish and Wildlife Service Waterfowl Production Area.
14 (Flathead 2,370 acres)," close quote. Have I read that
15 correctly?

16 **A** Yes.

17 **Q** It would be fair to assume, would it not, that
18 on or about February 1, 2008, you were aware of the fact
19 that Flathead County, itself, had not identified this
20 subject property, this property, as critical wildlife
21 habitat?

22 **A** Yes.

23 **Q** Okay. And had you ever had occasion to review
24 the Flathead County Planning and Zoning Regulations
25 yourself?

1 **Q** And do you know what that material consisted
2 of, in a general sense?

3 **A** Very generally, more biological information is
4 as specific as I can be.

5 **Q** Okay. When you say "biological information,"
6 can you expound on that for me? What does that entail?

7 **A** Just the general -- whatever general
8 information they had on -- they had on this issue.

9 **Q** Okay. And to your understanding, would that
10 have included prior letters that your agency had sent,
11 that type thing?

12 **A** I'm not sure. I can't tell you what all it
13 would have included. I didn't review whatever data or
14 information it was they collected and forwarded.

15 **MR. PERRY:** Okay; fair enough.
16 (Deposition Exhibit No. 18 marked for
17 identification.)

18 **Q** (By Mr. Perry) Sir, the document marked as
19 Exhibit 18 to your deposition, have you seen that
20 document before?

21 **A** Yes.

22 **Q** And, sir, fair to say it's a Flathead County
23 Planning and Zoning subdivision report dated February 1,
24 2008 regarding the North Shore Ranch subdivision?

25 **A** Yes.

1 **A** No.

2 **Q** Sir, turning your attention to page 27 of this
3 document, at the bottom of the page, I see there's an
4 indication made under finding number 6, and I quote,
5 "The impact of the proposed subdivision to local
6 recreation services is acceptable because many
7 recreation amenities will be offered within the proposed
8 subdivision, and utilization of existing services
9 outside the proposed subdivision is unlikely to create
10 an undue strain on those services," close quote. Have I
11 read that correctly?

12 **A** Yes.

13 **Q** Do you disagree with that statement?

14 **A** Do I agree with that statement?

15 **Q** Do you agree or disagree with it?

16 **A** No, I don't agree with that.

17 **Q** Turning your attention to page 35 of this
18 document, finding number 20, I see that the Flathead
19 County Planning and Zoning staff stated, and I quote,
20 "The proposed subdivision will have an acceptable impact
21 on existing wetlands on the subject property because the
22 functional wetlands will be permanently preserved as
23 open space and buffered from contamination by storm
24 water runoff from driveways and roads," close quote.
25 Have I read that correctly?

1 A Yes.
 2 Q Do you agree or disagree with that statement?
 3 A I disagree.
 4 Q And, sir, turning your attention to page 39,
 5 finding number 26 that states, and I quote, "The impact
 6 of the proposed subdivision on the natural flora on the
 7 subject property is acceptable because portions of the
 8 subject property, historically used for agricultural,
 9 are absent any native or natural vegetation and native
 10 vegetation in existing wetlands and grasslands will be
 11 preserved through clustered open space development
 12 design," close quote. Have I read that correctly?
 13 A Yes.
 14 Q Do you agree or disagree with that?
 15 A Disagree.
 16 Q Sir, turning your attention to page 41, I
 17 see -- I'm sorry -- page 42, I see in the first
 18 paragraph, the continuation of the paragraph from the
 19 prior page, planning staff stated in the last sentence,
 20 and I quote, "There appears to be general consensus that
 21 increased human activity in the area of the proposed
 22 subdivision as a result of the proposed subdivision can
 23 displace species of wildlife that do not adapt well to
 24 increased human presence but that species that do adapt
 25 well will be only minimally impacted," close quote. Do

1 generated by the proposed subdivision will be a negative
 2 impact, since the lands are open to the public during
 3 the majority of the year," close quote. Do you agree or
 4 disagree with that statement?
 5 A I disagree.
 6 Q Sir, on the next page, the second-to-last
 7 paragraph, second sentence states, and I quote, "While
 8 most pet owners are responsible with their animals,
 9 preventing animals from venturing off the subject
 10 property and killing, injuring, harassing, or molesting
 11 wildlife is virtually impossible. Flathead County
 12 Animal Control and USFWS will both have the authority to
 13 enforce restrictions on free-roaming pets on or near the
 14 proposed development providing a measure of enforcement
 15 and mitigation," close quote. Do you agree or disagree
 16 with that statement?
 17 A Disagree.
 18 Q Further on down in the next paragraph, the
 19 middle of the paragraph, I see that the staff stated,
 20 and I quote, "The developer has a right, under state
 21 law, to apply for a subdivision and be reviewed based on
 22 the criteria outlined in this staff report," close
 23 quote. Do you agree or disagree with that statement?
 24 MR. MCCORMICK: Objection; calls for a
 25 legal conclusion.

1 you agree with that statement?
 2 A No.
 3 Q Further on down in the next paragraph, I see,
 4 last sentence, it states, and I quote, "Although staff
 5 does not question the value of agricultural forage for
 6 wildlife, this concern could be interpreted as not a
 7 significant impact, given the thousands of acres that
 8 remain in agricultural production and the overall size
 9 of the FWPA," close quote. Do you agree or disagree
 10 with that statement?
 11 A I disagree.
 12 Q Sir, further on down in the next paragraph, I
 13 see there's a statement, and I quote, "Concerns were
 14 expressed by agency comments regarding an eagle nest
 15 near the proposed subdivision. An existing eagle nest
 16 is identified in the EA as being 1,620 feet away from
 17 the nearest lot boundary, far in excess of the 660 feet
 18 suggested by the Draft National Bald Eagle Management
 19 Guidelines cited in the wildlife report," close quote.
 20 Do you agree or disagree with that statement?
 21 A I disagree with that statement.
 22 Q Okay. I see at the bottom of the page, the
 23 final paragraph on that page, the staff stated, and I
 24 quote, "It is difficult for staff to find conclusive
 25 evidence that additional pedestrian traffic in the FWPA

1 THE WITNESS: I was going to say I'm not
 2 sure I'm qualified to answer that question. I don't
 3 know. My answer is I don't know.
 4 Q (By Mr. Perry) I see further on down in that
 5 same paragraph there's an indication made, and I quote,
 6 "Desires by the public or agencies to seek alternatives
 7 to a proposed subdivision is not a criteria for local
 8 government review on which findings of fact can be
 9 based."
 10 MR. MCCORMICK: Same objection.
 11 MR. PERRY: I haven't finished, please.
 12 Q (By Mr. Perry) "Furthermore, applicants for
 13 subdivision in Montana have a right to a procedural
 14 timeline outlined in 76-3-604 MCA. The applicants have
 15 voluntarily waived their review timeline in order to
 16 provide additional information for consideration, but
 17 forced delay while alternatives are sought by various
 18 groups would be an unreasonable imposition," close
 19 quote. Do you agree or disagree with those statements?
 20 MR. MCCORMICK: Objection; calls for a
 21 legal conclusion.
 22 THE WITNESS: I'm not sure.
 23 Q (By Mr. Perry) Sir, earlier in your deposition
 24 you referred to your letter of March 26, 2008. Do you
 25 recall you and I discussed that a couple days ago?

1 A Yes.
 2 MR. PERRY: And I don't think we marked it
 3 as an exhibit, so why don't we mark that now.
 4 (Deposition Exhibit No. 19 marked for
 5 identification.)
 6 Q (By Mr. Perry) Sir, the document marked as
 7 Exhibit 19 to your deposition, obviously you've seen
 8 this document before; you wrote it.
 9 A Yes.
 10 Q And it's a letter regarding the north --
 11 MR. MCCORMICK: Could I get a
 12 clarification? I thought she just said Exhibit 20 and
 13 you said Exhibit 19.
 14 THE COURT REPORTER: No; 19.
 15 MR. MCCORMICK: Oh.
 16 Q (By Mr. Perry) Sir, this is a document
 17 obviously you authored on March 26, 2008; correct?
 18 A Yes.
 19 Q And, again, this was a document that had been
 20 put in draft form by your staff before you actually
 21 executed it; true?
 22 A Yes.
 23 Q And, sir, I see in the very first paragraph of
 24 your letter of March 26, 2008, the last sentence, you
 25 state, and I quote, "FWP has revisited this project in

1 WPA -- the subdivision applicant in this case, to your
 2 knowledge, did it have any power to regulate the
 3 public's entrance to the WPA?
 4 A No.
 5 Q That would have been beyond its control, would
 6 it not have been?
 7 A Yes.
 8 Q I see in the second page of this
 9 document -- you and I went over a couple of the issues
 10 the other day, and I won't revisit them now. I see that
 11 you stated in that paragraph, about the middle of the
 12 paragraph, quote, "We have provided information to
 13 support the importance of this area in our previous
 14 comments to Flathead County that this area should be
 15 considered 'critical' or 'crucial' wildlife habitat,"
 16 close quote. Do you see that indication?
 17 A No; I'm sorry.
 18 Q I'm sorry; second page, right at the bottom.
 19 A Oh, I'm sorry. All right; yes.
 20 Q Can you tell me what the difference between
 21 crucial wildlife habitat and critical wildlife habitat
 22 is?
 23 A Well, with the exception -- my understanding
 24 would be that with the exception of how it relates to
 25 the Endangered Species Act, which is more objective,

1 more detail based on need to gather additional
 2 information to pursue funding for conservation in the
 3 north shore area and address specific project concerns
 4 raised by the community," close quote. Have I read that
 5 correctly?
 6 A Yes.
 7 Q Why was that issue of funding with respect to
 8 pursuing conservation of the north shore area placed in
 9 this letter in the very first paragraph? Do you know
 10 why?
 11 A Introductory, introductory comment.
 12 Q In your opinion, was that the most important
 13 issue with respect to this project, in your mind, that
 14 FWP was pursuing funding to conserve the north shore of
 15 Flathead Lake?
 16 A No.
 17 Q Okay. Was it just happenstance that it was
 18 placed in the very first paragraph of the letter?
 19 A It was a issue -- an issue.
 20 Q Okay.
 21 You'd agree with me that the WPA itself, during
 22 open times of the year, was open to all people to come
 23 and visit it; right?
 24 A Yes.
 25 Q Okay. And with respect to regulating the

1 that these would be more descriptive terms, subjective
 2 terms.
 3 Q Okay. And if I understand your testimony,
 4 under the ESA, critical wildlife habitat, I believe it's
 5 under Section 7, is described with some specificity, is
 6 it not?
 7 A Yes.
 8 Q But in the context of your letter, you weren't
 9 using that data or that -- those criteria, in terms of
 10 your use of "critical wildlife habitat."
 11 A Only as it relates to endangered species or
 12 listed threatened species. But otherwise, no.
 13 Q And "crucial wildlife habitat," that's not a
 14 term of art in terms of wildlife biology, is it?
 15 A No.
 16 Q Subjective term?
 17 A Yes.
 18 Q Would you consider five to 15 white-tailed deer
 19 per square mile to be an intensive concentration of
 20 white tail?
 21 A Not -- I'd say no to that. My answer to that
 22 would be no.
 23 Q And you and I talked the other day about pets.
 24 And we keep coming back to the pet issue. And you had
 25 testified that you, yourself, have a dog and a cat; is

1 that true?

2 A Yes.

3 Q Okay. And you keep your dog on a leash or
4 inside.

5 A Yes.

6 Q And you keep your cat inside.

7 A Yes.

8 Q So you would be an example of a responsible pet
9 owner; fair to say?

10 A Yes.

11 Q Okay. And to your knowledge, are you the only
12 one in the Flathead area who's a responsible pet owner?

13 A No.

14 Q Okay. Do you know other people who are
15 responsible pet owners?

16 A Yes.

17 Q They don't let their dogs roam free; fair to
18 say?

19 A Yes.

20 Q And, again, you wrote this letter -- or you
21 signed this letter, I believe you testified a couple
22 days ago, to bring some gravity to this process; is that
23 fair to say?

24 A I would like to have an opportunity to re -- I
25 would like to have an opportunity to restate my answer

1 Q And I noticed when we subpoenaed or -- yeah, we
2 subpoenaed records regarding these subdivisions in the
3 area of Ficken Farms I and II, Pheasant Haven, Sky View
4 Estates, et cetera, a number of letters had been filed
5 by Gael Bissell or subordinates of yours. Are you aware
6 of that?

7 A Yes.

8 Q And in regard to the vast majority of those
9 projects, you, yourself, didn't write any letter
10 personally; would that be fair to say?

11 A Yes.

12 Q And I guess my question would be why, with
13 respect to North Shore Ranch, did you find it necessary,
14 yourself, to author a letter, whereas, with respect to a
15 variety of other subdivisions in the general vicinity of
16 the North Shore Ranch property, you didn't see the need
17 to do that?

18 MR. MCCORMICK: Objection; asked and
19 answered.

20 THE WITNESS: Well, it's within my realm of
21 authority as the regional supervisor to make decisions
22 on when I'm going to provide correspondence myself
23 versus the subordinate staff. And in this instance, my
24 recollection is that I collected comments from a variety
25 of staff within the region and outside the region and,

1 to that question. Am I entitled to that?

2 Q If you can just answer my question, that would
3 be great. You can answer it however you want.

4 A One of my roles as the regional supervisor in
5 the region is to analyze -- is to prepare letters like
6 this or review drafts of letters like this, send them
7 out under my ^ cron, having reviewed the recommendations
8 of the staff, based on my general administration and
9 management expertise, to make sure they're logical and
10 they're consistency -- general consistency with
11 department policy. That is why -- also, in general, at
12 substantial points and processes, not just with respect
13 to land use issues but a whole host of areas, that is
14 why key points, in general processes, regional
15 supervisors provide correspondence.

16 Q And as you know, you and I went over as Exhibit
17 1 to your deposition, the letter to Johna Morrison dated
18 October 14, 2003 from Gael Bissell -- I'm sorry; from
19 Dan Vincent who was the regional supervisor.

20 A Yes.

21 Q And he addressed a number of different projects
22 in that letter; Ficken Farms Phase II, Sky View Estates,
23 et cetera. You recall our discussion in a general
24 sense?

25 A Yes.

1 therefore, I felt like it was appropriate for me to put
2 this under my signature.

3 MR. PERRY: Okay; fair enough. I'm just
4 about done. Let me just take a quick look here.

5 Q (By Mr. Perry) Oh, by the way, before coming
6 here for the continuation of your deposition, aside from
7 Counsel, did you discuss your testimony at all with
8 anybody else here at FWP?

9 A Yes.

10 Q With whom?

11 A I discussed it with the attorney that
12 represented me that day, Bill Schenk, the attorney --

13 Q Sir, and I don't -- that's protected, and I'm
14 not asking about any communications with Counsel. Just
15 in terms of employees of FWP, Gael Bissell, Jim Williams
16 anybody else.

17 A Gael Bissell, Jim Williams.

18 Q How long a discussion did you have with Gael
19 Bissell about your deposition on Tuesday?

20 A Fifteen minutes.

21 Q You described to her, in a general sense, the
22 line of inquiry that I had pursued?

23 A Yes, uh-huh.

24 Q Is that a "yes"?

25 A Yes, yes.

1 Q And did you discuss with her, in any respect,
2 how she should respond to certain inquiries that I may
3 pose to her?

4 A I discussed with her the nature of the
5 questions I received. I discussed with her the nature
6 of the questions I received and my perception of the
7 strategy.

8 Q And did you give her any advice, in terms of
9 how she should respond to inquiries I may pose to her?

10 A No.

11 Q Did you review any documents between your
12 deposition on Tuesday and today, in preparation for your
13 continued deposition today?

14 A No.

15 MR. PERRY: I have nothing further. Thank
16 you very much for your time; I appreciate it.

17 THE WITNESS: All right; thank you.

18 MR. MCCORMICK: Fortunately, I believe
19 we're over time.

20 MR. PERRY: No, not for you.

21 THE COURT REPORTER: No; hold on.
22 (A discussion was held off the record.)

23 MR. MCCORMICK: Do you need a break or
24 anything before we start?

25 THE WITNESS: Yes, two minutes.

1 MR. PERRY: Object to form and scope.

2 THE WITNESS: The intent of our comment is
3 to provide an assessment of the impacts of
4 subdivision -- of a proposed subdivision on wildlife
5 habitat, wildlife populations, recreational
6 opportunities.

7 Q (By Mr. McCormick) Do you know any
8 irresponsible pet owners?

9 A Yes.

10 Q Whether the habitat on this parcel comprising
11 the North Shore Ranch is called "critical," "crucial,"
12 or really not, is there any question in your mind that
13 this development proposal has an impact on wildlife and
14 wildlife habitat?

15 A No.

16 Q Would you say that the impact is a potentially
17 significant adverse impact?

18 A Yes.

19 Q Are there species of wildlife that use the
20 North Shore Ranch property?

21 A Yes.

22 Q Is the North Shore Ranch property important, in
23 a landscape sense, to wildlife and wildlife habitat in
24 the lower Flathead Valley?

25 A Yes.

1 (Deposition in recess from 10:11 a.m. to
2 10:12 a.m.)

3 EXAMINATION

4 BY MR. MCCORMICK:

5 Q Jim, my name is Alan McCormick. I'm an
6 attorney with Garlington, Lohn & Robinson, and I
7 represent the Flathead County Commissioners.

8 In a general sense, can you describe for me
9 Fish, Wildlife & Parks's mission?

10 A Fish, Wildlife & Parks has a dual mission. The
11 first strategy is to protect wildlife resources,
12 cultural resources in the State of Montana. The second
13 strategy is to provide the public the opportunity to
14 enjoy those resources.

15 Q Why is Fish, Wildlife & Parks concerned about
16 subdivisions?

17 A Because subdivision displaces wildlife habitat,
18 often displaces recreational opportunities.

19 Q Would you say that residential subdivisions
20 affect Fish, Wildlife & Parks's mission?

21 A Yes.

22 Q In a positive or negative way?

23 A In a negative way.

24 Q What is Fish, Wildlife & Park's intent when it
25 comments on subdivision?

1 Q Is it important, in a landscape sense, to
2 Flathead Lake?

3 A Yes.

4 Q Can you tell me what properties, relatively
5 nearby the North Shore Ranch are owned by the federal
6 government?

7 A The waterfowl pro -- primarily, the waterfowl
8 production area is the primary -- the waterfowl
9 production areas, the WPAs.

10 Q Is it fair to say that the federal government
11 purchased those properties because of their importance
12 to wildlife and wildlife habitat?

13 A Yes.

14 MR. PERRY: Object to form; calls for
15 speculation, foundation.

16 Q (By Mr. McCormick) Why does Fish,
17 Wildlife & Parks seek to purchase properties?

18 MR. PERRY: Object to form, foundation,
19 scope.

20 THE WITNESS: To ensure continued habitat
21 for wildlife and sometimes to provide managed
22 recreational opportunities for the public.

23 Q (By Mr. McCormick) Does Fish, Wildlife & Parks
24 often collaborate with other agencies for purchasing
25 property that's valuable for wildlife and wildlife

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1 habitat?
 2 A Yes.
 3 Q Does Fish, Wildlife & Parks collaborate with
 4 nongovernmental agencies for the same purpose?
 5 A Yes.
 6 Q Why collaborate with others?
 7 MR. PERRY: Object to the form and scope.
 8 THE WITNESS: To leverage -- primarily, to
 9 leverage funding.
 10 Q (By Mr. McCormick) Has it been any secret that
 11 Fish, Wildlife & Parks has been interested in purchasing
 12 North Shore Ranch, both prior to and during the pendency
 13 of this subdivision application?
 14 A No.
 15 Q Have you been up -- has Fish, Wildlife & Parks
 16 been up-front with the applicant, as well as Flathead
 17 County, about their interest in purchasing the property?
 18 A Yes.
 19 Q Is it fair to say that Fish, Wildlife & Parks
 20 is interested in purchasing the property because Fish,
 21 Wildlife & Parks believes it has significant importance
 22 to wildlife and wildlife habitat?
 23 A Yes.
 24 Q Would you be seeking to purchase the property
 25 if it did not have valuable significance for wildlife

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1 and wildlife habitat?
 2 MR. PERRY: Object to form.
 3 THE WITNESS: No.
 4 Q (By Mr. McCormick) Is habitat for wildlife
 5 decreasing in the Flathead Valley?
 6 A Yes.
 7 Q Does the cumulative loss of habitat in the
 8 Flathead Valley make the preservation of the North Shore
 9 Ranch property more or less important?
 10 A More important.
 11 Q Does designating property Fish,
 12 Wildlife & Parks has purchased as a state park give you
 13 the ability to regulate the public's use of that
 14 property?
 15 A Yes.
 16 Q Does Fish, Wildlife & Parks have the ability to
 17 regulate land uses in privately-owned subdivisions?
 18 MR. PERRY: Objection; calls for legal
 19 conclusion.
 20 THE WITNESS: No.
 21 Q (By Mr. McCormick) Did you have any
 22 conversations directly with any of the three county
 23 commissioners for Flathead County?
 24 A Could you be more specific?
 25 Q Yes. In fact, I should be more specific.

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1 Regarding the North Shore Ranch subdivision application,
 2 did you have any conversations, directly, with any of
 3 the three county commissioners for Flathead County?
 4 A No.
 5 Q Did you have any conversations regarding the
 6 North Shore Ranch subdivision application directly with
 7 any members of the Flathead County Planning Board?
 8 A No.
 9 Q Is it fair to say that you expect the county
 10 to -- let me rephrase that question.
 11 Is it fair to say that you would like the
 12 county to respect the comments and suggestions that
 13 Fish, Wildlife & Parks makes on subdivisions?
 14 A Yes.
 15 Q Is it fair to say that you hope the county
 16 commissioners will take action to implement your
 17 suggestions?
 18 A Yes.
 19 MR. MCCORMICK: I think that's enough.
 20 MR. PERRY: I have a couple follow-ups.
 21 EXAMINATION
 22 BY MR. PERRY:
 23 Q You said it was no secret that FWP wanted to
 24 purchase the property at issue; true?
 25 A Yes.

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1 Q It was public knowledge. It was all over the
 2 newspaper up here, was it not?
 3 A I'm not sure about that.
 4 Q You don't recall having seen Daily Inter Lake
 5 articles in which the Flathead Land Trust and others
 6 indicated that they were working with FWP to try to
 7 secure this property?
 8 A I know to some extent it was in the newspaper.
 9 Q And wouldn't you agree with me, having lived in
 10 this area for about five years, that the Daily Inter
 11 Lake is one of the more popular papers here?
 12 A Yes.
 13 Q You said that habitat for wildlife would
 14 be -- would decrease if the North Shore Ranch project
 15 had been approved. I believe you said that; is that
 16 true?
 17 A Yes.
 18 Q And you'd agree with me that, in a general
 19 sense, as the population increases in Flathead Valley,
 20 Montana, United States, habitat is lost.
 21 A Yes.
 22 Q Is there any way to avoid the loss of habitat
 23 when the population grows?
 24 A Yes.
 25 Q How do you do that?

1 A Through planned -- through strategic and
 2 planned growth and the stratification of important
 3 habitats in planning and site development of
 4 development.
 5 Q Okay. So is it your position that, in a
 6 scientific sense, despite the fact that the population
 7 may grow in Flathead Valley, it is scientifically
 8 possible to completely mitigate impacts posed by that
 9 population growth on wildlife and wildlife habitat?
 10 A Not completely.
 11 Q You said that FWP has the right to regulate the
 12 public's use of state parks in your region. Is that
 13 fair to say?
 14 A Yes.
 15 Q Okay. And in the state -- by the way,
 16 approximately how many state parks are in Region One?
 17 A Approximately a dozen, approximately.
 18 Q And of those dozen state parks, does FWP have
 19 any regulation or rule in effect that limits the amount
 20 of people who can be in the state park at any given
 21 time?
 22 A Essentially.
 23 Q Can you describe that for me?
 24 A Well, we have -- there are parking limitations,
 25 for instance, in some state parks and, after which, we

1 question?
 2 A Yes.
 3 Q Earlier on cross-examination, you testified
 4 that FWP, obviously, would like counties to view
 5 their -- its comments favorably. Do you recall that
 6 testimony?
 7 A Yes.
 8 Q Okay. And when you said that, would it be fair
 9 to say that recommendations that may be made by FWP with
 10 regard to potential changes to a growth policy or to
 11 density issues, those would be issues that FWP would
 12 like a county to adopt or to view favorably to the
 13 extent that FWP makes recommendations on those issues?
 14 A I don't understand the question.
 15 Q Okay. Well, I know in your letter of March 26,
 16 2008, there were some statements in the second page of
 17 your letter regarding concerns, for lack of a better
 18 word, with regard to the growth policy. Do you recall
 19 that?
 20 A Yes.
 21 Q And, obviously, your concerns that you
 22 expressed with regard to the growth policy, they were
 23 concerns that you hoped the county would view favorably,
 24 I assume.
 25 A Yes.

1 have to turn people away. So it's essentially a measure
 2 or a method of limiting the number of people in the
 3 park. Simply with the number of campground lots,
 4 campground sites, we have a finite number and,
 5 therefore, it creates a limit on the number of people
 6 that can use the parks.
 7 Q And I guess my question would be, whether or
 8 not people park in the park or not, is there any rule or
 9 regulation in effect that says Gee, for this park, only
 10 50 people per day are allowed in it, or anything like
 11 that?
 12 A We have a regional park supervisor that I would
 13 be more comfortable answering that question.
 14 Q Okay. And I guess my question is, as the
 15 regional supervisor for Region One of the Montana Fish,
 16 Wildlife & Parks, do you have knowledge as to whether or
 17 not any of the parks in your region have a daily limit
 18 for the amount of people, the number of people who can
 19 be on the land, in the park?
 20 A As the regional supervisor, I don't supervise
 21 the parks program in the region. And I'm more
 22 comfortable -- I would defer that question to the
 23 regional park supervisor.
 24 Q Okay; when you say you defer the question,
 25 would it be fair to say you don't know the answer to the

1 MR. PERRY: Okay; I have no further
 2 questions. Thank you, sir.
 3 MR. MCCORMICK: I'm good.
 4 (Deposition concluded at 10:29 a.m.; witness
 5 excused, signature waived.)
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REPORTER'S CERTIFICATE

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

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

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

16 IN WITNESS WHEREOF, I have hereunto subscribed
17 my name and affixed my seal of office this 27th day of
18 May, 2009.

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

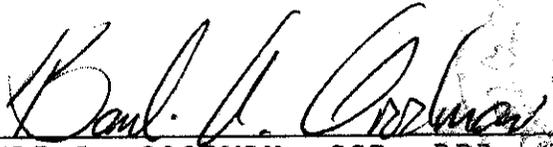
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15 otherwise interested in the event of this suit.

16 IN WITNESS WHEREOF, I have hereunto subscribed
17 my name and affixed my seal of office this 27th day of
18 May, 2009.

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21
22
23 
24 BAMBI A. GOODMAN, CSR, RPR, CRR and
25 Notary Public, State of Montana
Residing at Whitefish, Montana
My Commission expires 3/21/10



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