

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
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Names of Parties Serving Document:

UNITED STATES OF AMERICA

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Numbers: 55-10135, 55-11061,
	)	55-11385 and 55-12452
	)	
Case No. 39576	)	UNITED STATES' MOTION IN
	)	LIMINE AND MEMORANDUM OF
_____	)	POINTS AND AUTHORITIES

MOTION

The United States respectfully moves the Special Master for an Order excluding Joyce Livestock Co.'s (hereinafter "Joyce") Exhibits as evidence at trial in the above-captioned subcases as follows:

1. Exhibits A, B, D, M, ZZ, EEE, FFF, GGG, and HHH because Joyce failed to provide the documents in response to United States' Requests for Production of Documents within the time allowed by the Special Master for completion of discovery. The United States reserves the right to exclude other documents not provided in discovery if inspection of Joyce's Exhibits reveals the documents were not provided in response to United States' Requests for Production of Documents.

2. Exhibits ZZ, EEE, FFF, and GGG because the documents are not relevant.

The United States' respectfully moves the Special Master for an Order excluding Dr. Chad C. Gibson as a witness. Dr. Gibson's intended testimony is beyond his expertise and will not assist the Special Master in understanding the evidence or determining any fact in issue. Furthermore, Dr. Gibson's intended testimony would reach legal conclusions particularly within the purview of the Special Master and District Court. A copy of the transcript of the deposition of Chad C. Gibson is filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

1. The Court Should Exclude Evidence Not Provided In Discovery

The United States propounded the following discovery requests:

INTERROGATORY #5: Identify all exhibits you may rely upon as evidence at trial

INTERROGATORY #6: Describe the basis of your objections to "BLM claims."

INTERROGATORY #8: Identify each document that forms the basis for every element of "your claim."

REQUEST FOR PRODUCTION #1: Produce each document identified or reviewed in order to respond to Requests for Admission 1 through 15 and Interrogatories 1 through 12.

REQUEST FOR PRODUCTION #2: Produce each document you may rely upon as evidence at trial

See United States' Trial Exhibit 18. The United States clearly asked Joyce to identify and produce all documents that support its objections and all documents that support each element of its water right claim.

Joyce was under a duty to seasonably amend responses to discovery requests if previous responses were incomplete or no longer true. Idaho R. Civ. P. 26(e)(2). Even though all of Joyce's exhibits are listed on Joyce's Exhibit list, the United States still does not have copies of Joyce Exhibits A, B, D, M, ZZ, EEE, FFF, GGG, and HHH. Failure to seasonably amend responses to discovery requests would be a concealment of evidence, and that evidence should be excluded by the Special Master. Idaho R. Civ. P. 26(e)(4).

Joyce Exhibits A, B, D, M, ZZ, EEE, FFF, GGG, and HHH were not timely produced in response to the United States' discovery requests. Accordingly, the Special Master should exclude Joyce Exhibits A, B, D, M, ZZ, EEE, FFF, GGG, and HHH. Idaho R. Civ. P. 26(e)(4).

2. The Special Master Should Exclude Irrelevant Evidence.

Joyce Exhibits ZZ, EEE, FFF, and GGG are transcripts of depositions taken in controversies that involve LU Ranching Company (the Claimant of Water Right Numbers 55-10288B, et al.) and the United States (the Objector in Subcases 55-10288B, et al.) where the water rights at issue were in

Grazing Allotments that are not related to the Silver City Grazing Allotment, which is the grazing allotment that encompasses the places of use at issue in the above-captioned subcases. Affidavit of Fredric W. Price in Support of the United States' Motion for Summary Judgment (hereinafter "Price Aff."), ¶ 13, ¶ 19 and, Attachment 7. The points of diversion, the places of use, the parties, and the issues in Subcases 55-10288B contrast with the points of diversion, the places of use, the parties, and the issues in this action.

Irrelevant evidence is inadmissible. Idaho R. Evid. 402. Deposition testimony in subcases that are remote, at best, lacks probative value and should be excluded. See Lehmkuhl v. Bollard, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988). Even if the deposition transcripts are relevant, the transcripts should be excluded because the deposition testimony is not related to the facts or circumstances involved in this action, thus causing confusion, causing undue delay, wasting time, and needlessly presenting cumulative evidence. Idaho R. Evid. 403. Moreover, presentation of deposition transcripts wholly unrelated to this action could be misleading. Idaho R. Evid. 403. Accordingly, the Special Master should exclude Joyce Exhibits ZZ, EEE, FFF, and GGG.

3. The Testimony of Dr. Chad C. Gibson Should Be Excluded.

Dr. Chad C. Gibson has testified as follows:

1. He has a Bachelor of Science degree in Animal Science. Deposition of Chad C. Gibson (hereinafter "Gibson Depo."), p. 5.
2. He has a Master of Science degree in Animal Science. Gibson Depo., p. 6.
3. He has a Ph.D. in Range Science. Gibson Depo., p. 7.

4. He was employed by the University of Idaho as a County Extension Agent. Gibson Depo., pp. 9-12.

5. His employment involved presenting educational programs for ranchers in livestock production, crop production, weed control and range management on private land. Gibson Depo., pp. 8-10.

6. Since retirement in 1999, he has been a range consultant. Gibson Depo., p. 21.

Dr. Gibson intends to testify to an opinion on "whether or not stock water rights are considered to be appurtenant to the privately owned ranch property." Gibson Depo., p. 34, lines 3-7; *see* Gibson Depo., pp. 38-40. He bases this opinion on the history of grazing and ranching. Gibson Depo., p. 34, line 11.

Dr. Gibson intends to testify to the "fact that the United States BLM has not historically and does not regulate or have authority to regulate the use of instream stock water rights in the State of Idaho" Gibson Depo., p. 63, lines 22-25. The statement would be based upon his conclusion that the "State of Idaho regulates the use of water for virtually all purposes today." Gibson Depo., p. 64, lines 4-5.

Dr. Gibson intends to testify that adjudication of grazing preferences under the Taylor Grazing Act "recognized and acknowledge the historic use of grazing land and water located thereon when determining the dependent property rights . . . which established grazing priorities" Gibson Depo., p. 69, lines 1-7. He bases this statement on his reading of the Taylor Grazing Act and the 1866 mining law. Gibson Depo., p. 69, lines 18-22.

Dr. Gibson intends to testify "[t]hat neither the United States BLM nor any other agency of the federal government has appropriated and used stock water rights for its intended purpose of watering livestock and (sic) land which is owned by the federal government and administered by the BLM pursuant to regulations promulgated under the Taylor Grazing Act of 1934." Gibson Depo., p. 71, lines 17-23. He bases this testimony on never seeing any information from those records that indicated that the government owned livestock that they were grazing or watering on the public lands pursuant to the Taylor Grazing Act." Gibson Depo., p. 72, lines 5-9.

Dr. Gibson would also testify to an opinion "with respect to whether or not the United States BLM can acquire a water right under the statutes of the State of Idaho" Gibson Depo., p. 78, lines 13-16. He may also "opine as to whether or not the United States by applying for a stock water right under Idaho law is doing so for the benefit of its own purposes for use of livestock which it owns or, in the alternative, does so for the benefit of ranchers whose livestock actually appropriate and put the water to a beneficial use." Gibson Depo., p. 79, lines 22-25 and p. 80, lines 1-3. He bases this opinion on "[t]he wording in the Taylor Grazing Act." Gibson Depo., p. 80, line 22.

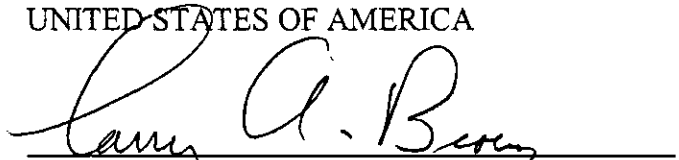
Dr. Gibson would testify to an opinion on "whether or not a stock water right is an integral part of and therefore becomes a valuable asset to a ranching operation and whether or not privately owned property of a particular stockman or rancher is enhanced as a result of the acquisition, appropriation, and/or use of stock water rights historically appropriated as a part of the individual rancher's operation both on his private land and public land both before and after the enactment of the Taylor Grazing Act

in 1934.” Gibson Depo., p. 81, lines 14-25. He bases this opinion on the Taylor Grazing Act. Gibson Depo., pp. 82-86.

Dr. Gibson’s intended testimony reaches impermissible and inadmissible legal conclusions. Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3rd 1207, 1212 (1997); Servel v. Corbett, 290 P. 200, 202 (Idaho 1930). All of the testimony is beyond Dr. Gibson’s purported expertise in Animal Science and Range Management and should be excluded. Idaho R. Evid. 702; *see State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (Ct. App. 1987 (to give expert opinion testimony, a witness must first be qualified as an expert on the matter at hand). Dr. Gibson’s specialized knowledge and experience in Animal Science and Range Management would not assist the Special Master in understanding any of the evidence or help to determine any fact in issue. Idaho R. Evid. 702; *see Jones v. Jones*, 117 Idaho 621, 790 P.2d 914 (1990). Therefore, the Special Master should exclude Dr. Chad C. Gibson as a witness at trial.

DATED this 15th day of November, 2002.

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", is written over a horizontal line.

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on Nov. 15, 2002, I served a true and correct copy of the foregoing **UNITED STATES' MOTION IN LIMINE AND MEMORANDUM OF POINTS AND AUTHORITIES** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

Original to:

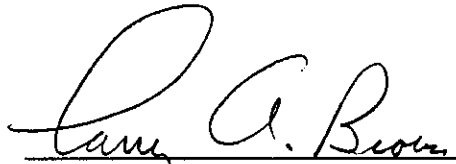
Clerk of the District Court
Snake River Basin Adjudication
253 3rd Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Copies to:

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Signature of Attorney Mailing Document

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

)
) Subcase Numbers
) 55-10135, 55-11061,
) 55-11385, and 55-12452
)

Case No. 39576
_____)
)
)
)

Caldwell, Idaho
November 1, 2002
11:00 a.m.

DEPOSITION OF DR. CHAD C. GIBSON

Reported by:
CAROLE A. WALDEN
CSR NO. 71

COPY

CAROLE A. WALDEN
Certified Shorthand Reporter
CSR #71

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 3 IN AND FOR THE COUNTY OF TWIN FALLS
 4
 5 In Re SRBA)
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 7) 55-10135, 55-11061,
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 9 Case No. 39576)
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Caldwell, Idaho
 November 1, 2002
 11:00 a.m.

DEPOSITION OF DR. CHAD C. GIBSON

Reported by:
 CAROLE A. WALDEN
 CSR NO. 71

Page 1

1 DEPOSITION OF DR. CHAD C. GIBSON, taken
 2 at the instance of Joyce Livestock at the law offices
 3 of Richard L. Harris, Esq., in the City of Caldwell,
 4 State of Idaho, commencing at 11:00 a.m., on Friday,
 5 November 1, 2002, before CAROLE A. WALDEN, Certified
 6 Shorthand Reporter and Notary Public in and for the
 7 State of Idaho, pursuant to Notice, and in accordance
 8 with the Idaho Rules of Civil Procedure.
 9
 10
 11 A P P E A R A N C E S
 12
 13 For Joyce Livestock: Craig A. Pridgen, Esq.
 14 McQUAID, METTLER, BEDFORD &
 15 VAN ZANDT, LLP
 221 Main Street, 16th Floor
 San Francisco, CA 94105-1936
 16
 17 For the BLM: Larry A. Brown, Esq.
 18 U.S. Department of Justice
 General Litigation Section
 Environment and Natural
 Resources Division
 601 D Street, NW, Room 3533
 Washington, D.C. 20004
 19
 20
 21 Also Present: Fred Price
 Paul Nettleton
 22
 23
 24
 25

Page 2

1 I N D E X
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 3 WITNESS EXAMINATION BY PAGE
 4 DR. CHAD C. GIBSON Mr. Brown 4
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 6
 7 DEPOSITION EXHIBITS
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 9 DESCRIPTION PAGE
 10 1. Curriculum Vitae 18
 11 2. Notes in Regard to SRBA Case No. 39578,
 12 Deposition 9/30/98 18
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Page 3

1 CALDWELL, IDAHO, FRIDAY, NOVEMBER 1, 2002, 11:00 A.M.
 2
 3
 4 DR. CHAD C. GIBSON,
 5 a witness having been first duly sworn to tell the
 6 truth, the whole truth, and nothing but the truth, was
 7 examined and testified as follows:
 8
 9 EXAMINATION
 10
 11 BY MR. BROWN:
 12 Q Dr. Gibson; is that correct?
 13 A Yes.
 14 Q My name is Larry Brown. I'm an attorney
 15 for the United States. I work with the Department of
 16 Justice and I represent the BLM here and this is your
 17 deposition. You've given a deposition before?
 18 A Yes.
 19 Q You know that the answers you give,
 20 you've just sworn to tell the truth, and when you go
 21 to trial, I can use the deposition answers to impeach
 22 your testimony if necessary, if you change your
 23 testimony in any way between now and then. Do you
 24 understand that?
 25 A Yes.

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1 Q Is there any reason why you can't give
2 testimony this morning? Are you on any medication or
3 anything that you've been taking?
4 A No.
5 Q No problems, then. Good. Let's start
6 with your educational background. You have a Ph.D.,
7 you have a master's, I presume, and you have an
8 undergraduate degree?
9 A Yes.
10 Q When did you do your undergraduate
11 degree and where?
12 A University of Idaho, 1965.
13 Q And you had a major?
14 A Animal science.
15 Q Animal science?
16 A Yes.
17 Q What does that entail?
18 A Livestock management, sheep, cattle,
19 horses.
20 Q Could you define livestock management
21 for me? What do you mean?
22 A Feeding programs, breeding programs, the
23 economics of raising livestock, all of those things.
24 Q What type of science courses did you
25 take?

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1 A Chemistry, botany, biology, all of those
2 things, and then courses that were more specific to
3 livestock.
4 Q And what does that mean, what courses?
5 A Beef production, sheep production, swine
6 production.
7 Q Did you go for your Master of Science
8 directly afterwards?
9 A Yes.
10 Q And where did you apply to take your
11 master's program?
12 A Well, I applied several places. I
13 actually went to the University of Nevada.
14 Q What year did you start?
15 A I believe it was 1965.
16 Q What year did you complete your Master
17 of Science?
18 A In 1967.
19 Q And what was your major course of study?
20 A It was a general animal science course.
21 Q What type of courses did you take to
22 complete your master's program?
23 A Similar to the bachelor's degree. I
24 didn't have a specialty of genetics or anything like
25 that, so I took a general course, some additional

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1 chemistry, and a course in range management, courses
2 in veterinary science.
3 Q They were graduate level courses?
4 A Yes.
5 Q Did you have a space between your Master
6 of Science and your Ph.D. program?
7 A Yes.
8 Q When did you start your Ph.D. program?
9 A I completed it in 1994, and I think it
10 was about three years before that when I applied and
11 began the work.
12 Q What was your major for your Ph.D.?
13 A Range management.
14 Q What type of advanced courses did you
15 take in range management in order to meet the
16 requirements for a Ph.D. in range management?
17 A Some ecology.
18 Q What type of ecology? General?
19 A General.
20 Q Is that a graduate level course?
21 A I couldn't give you the course names and
22 numbers specifically. Yes, they were graduate level
23 courses. There may have been a couple of
24 undergraduate level courses as well.
25 Q You wrote a dissertation?

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1 A Yes.
2 Q Did you defend your dissertation at
3 orals they call them; is that right?
4 A Yes.
5 Q And you received a degree from which
6 university?
7 A University of Idaho.
8 Q That was in 1994?
9 A Yes.
10 Q What were you doing between 1967, is
11 that correct, when you received your Master of Science
12 and your Ph.D.?
13 A I worked for the University of Nevada
14 for a little over a year with the Agricultural
15 Extension Service in Nevada.
16 Q Doing what?
17 A I was a county agent in -- assistant
18 county agent in Elko County, Nevada, and I was
19 stationed at Duck Valley at the Indian reservation.
20 Q Again, doing what?
21 A Doing educational programs for ranchers
22 in livestock production and crop production and
23 administering the 4-H program.
24 Q And after you left there, where did you
25 go and what did you do?

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1 A I went to Adams County, Idaho at
 2 Council, and I was there about fifteen years doing the
 3 same kind of thing, primarily livestock production,
 4 crop production for livestock, and a variety of other
 5 things dealing with weed control and all of those
 6 things that deal with agricultural production.
 7 Q I bet you weren't employed by the
 8 University of Nevada while you were in --
 9 A Excuse me. I was working for the
 10 University of Idaho at that time.
 11 Q So you began employment with the
 12 University of Idaho in what year?
 13 A I believe it was 1968.
 14 Q In your dealings with ranchers in Adams
 15 County -- is that where you were?
 16 A Yes.
 17 Q It was all in Adams County?
 18 A Yes.
 19 Q You were dealing with ranchers regarding
 20 weed control on their private land?
 21 A Yes.
 22 Q Is that accurate? And crop production
 23 on their private land?
 24 A Yes.
 25 Q Livestock production on their private

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1 land?
 2 A Yes.
 3 Q Where did you go after that and when?
 4 A I believe in 1982, I moved to Owyhee
 5 County and pursued the same work with the University
 6 of Idaho as the county agent for Owyhee County.
 7 Q Exactly the same type of work?
 8 A Not exactly. In Owyhee County, I spent
 9 a lot more time dealing with range management issues.
 10 Q Did you have any other supplementary
 11 education while you were a county agent in addition to
 12 your master's and undergraduate degree?
 13 A Yeah. Yes, excuse me. The university
 14 offers courses for county agents, and then programs
 15 that are offered in other places, you're allowed and
 16 encouraged to take advantage of those educational
 17 programs for -- advanced production courses for
 18 livestock, or depending on the county you're in, I
 19 guess, whatever the job entails in that particular
 20 county.
 21 Q When you say production, livestock
 22 production, what does that mean? Increasing the
 23 number of livestock on private land, or what does that
 24 mean?
 25 A It means management of livestock to be

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1 able to make a profit with them, whether it's
 2 improving the genetics or improving the nutrition,
 3 improving management of winter feeding programs, all
 4 of those things that involve the economic production
 5 of livestock.
 6 Q When did you stop working for the
 7 University of Idaho and begin pursuing your Ph.D. in
 8 range science, range management?
 9 A I didn't stop working for the University
 10 of Idaho during that process. I took a sabbatical
 11 leave, and I couldn't tell you which year, but it was
 12 prior to '94.
 13 Q One year?
 14 A No. It was a partial year, and I don't
 15 recall whether it was six months or a semester, but I
 16 did go back up to the University of Idaho for a
 17 semester.
 18 Q So you traveled to Moscow?
 19 A Yes.
 20 Q And you took advanced courses in range
 21 management in one semester?
 22 A Yes.
 23 Q How many courses did you take in that
 24 one semester?
 25 A I couldn't give you an accurate figure

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1 without checking my records.
 2 Q Are those the only courses that you
 3 took?
 4 A No.
 5 Q Give me an idea of the other courses you
 6 took and when.
 7 A I took a correspondence course from the
 8 University of Idaho, a distance learning course from
 9 Kansas State University, and did some independent
 10 study with the University of Idaho.
 11 Q Approximately how many classroom hours
 12 were required in order to meet the requirements for a
 13 Ph.D. in range science at the University of Idaho?
 14 A I'd have to look at that to tell you. I
 15 don't remember.
 16 Q Were they all science related courses,
 17 range management related courses?
 18 A I'm not sure how you mean range
 19 management. There were some that were -- at least one
 20 course that dealt with communications in management of
 21 range.
 22 Q Communications in management of range,
 23 what do you mean?
 24 A More how you deal with public
 25 communication of range management issues, public

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1 relations.
 2 Q Do you still work for the University of
 3 Idaho?
 4 A No.
 5 Q Did you retire from the --
 6 A Yes.
 7 Q -- University of Idaho?
 8 A I retired in 1999.
 9 Q At this point I'm going to have to
 10 admonish you that before you begin your answer, I
 11 would like you to finish listening to my question and
 12 try not to interrupt me because it's very difficult
 13 for the court reporter to record the answers if she's
 14 typing on a question and then an answer gets
 15 interjected.
 16 A I'll try to do my --
 17 Q Not only that, you may not know the
 18 substance of the question unless you hear the entire
 19 question. So with that admonishment, we'll go on.
 20 Do you belong to any other organizations
 21 at this time such as the Stewards of the Range?
 22 A Yes.
 23 Q Do you belong to the Stewards of the
 24 Range?
 25 A Yes.

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1 Q What is the Stewards of the Range?
 2 A It's a group that champions property
 3 rights issues.
 4 Q What type of property rights issues?
 5 A I believe all kinds.
 6 Q Could you give me an example that may
 7 relate to this case?
 8 MR. PRIDGEN: I'm going to interpose an
 9 objection here. I'm not going to instruct him to not
 10 answer the question, but his membership in nonprofit
 11 organizations or other organizations I believe are
 12 irrelevant to the case at hand and have no probative
 13 value as to the facts and circumstances with respect
 14 to which this witness is testifying. Go ahead.
 15 Q BY MR. BROWN: Please answer the
 16 question.
 17 A I don't know that I could name one
 18 specifically.
 19 Q What types of property rights do they
 20 champion?
 21 A Issues dealing with endangered species.
 22 Any place, I guess, where there's a question of a
 23 property right that might be diminished because of
 24 actions of a state or federal government or agency.
 25 Q Do you belong to any other

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1 organizations?
 2 A Yes.
 3 Q Which ones?
 4 A I'm a member of the Idaho Cattlemen's
 5 Association, the Owyhee Cattlemen's Association.
 6 Q Do you take an active role in the
 7 Stewards of the Range, the Idaho Cattle Association,
 8 and the Owyhee Cattle Association?
 9 MR. PRIDGEN: Objection. What do you
 10 mean by active?
 11 If you understand, you can answer the
 12 question.
 13 THE WITNESS: Could you clarify that?
 14 Q BY MR. BROWN: Yes, I can. Are you an
 15 officer of any of those organizations?
 16 A No.
 17 Q Are you an employee of any of those
 18 organizations?
 19 A No.
 20 Q Do you contribute your expertise to the
 21 issues that these particular organizations are
 22 concerned with?
 23 MR. PRIDGEN: I'm going to object. Does
 24 he provide consultation, is that what you're asking?
 25 MR. BROWN: Does he contribute his

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1 expertise to them, and if the answer is yes, I'm going
 2 to ask what. But you must remember, Mr. Pridgen, that
 3 this is an expert witness, that the questions that I'm
 4 asking regarding these particular organizations go to
 5 whether he is really an independent expert or whether
 6 he is an expert for the cattle associations and the
 7 Stewards of the Range.
 8 And I'm allowed to ask all sorts of
 9 questions of an expert witness, and the objections
 10 really have no bearing at deposition. If he
 11 understands the question, then he should answer it.
 12 And if he doesn't understand the question, then
 13 perhaps he should ask me to rephrase it, and I'll be
 14 happy to do so.
 15 Q BY MR. BROWN: Did you understand the
 16 question? Do you contribute your expertise to any of
 17 the issues that any of these organizations are
 18 concerned with? And your expertise has been animal
 19 science and range management as a Ph.D.
 20 A As a member -- participating member of
 21 those organizations, I would contribute the same as
 22 any other member.
 23 Q Have you ever written any papers? Have
 24 you been asked to write any papers by any of the
 25 officers, directors, or employees of any of these

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1 organizations? I'll start with that one.
 2 A Not that I can recall. I guess if you
 3 could clarify the question, because as part of my
 4 duties as a county agent, I did write things for the
 5 cattle association at that time.
 6 Q What did they ask you to write and which
 7 cattle association, Owyhee Cattle Association or the
 8 Idaho Cattle Association?
 9 A The Owyhee Cattle Association generally
 10 would have been items when they were dealing with a
 11 resolution that the association was considering.
 12 Q Which resolution?
 13 A I couldn't tell you without going back
 14 and looking at the records.
 15 MR. BROWN: Mr. Pridgen, during
 16 discovery when I asked you to disclose your expert
 17 witnesses, I also asked for a curriculum vitae, and I
 18 haven't received one for this particular witness.
 19 Could you get one of those to me, please?
 20 MR. PRIDGEN: Uh-huh. I don't recall
 21 discussing that, but it certainly is a reasonable
 22 request.
 23 Do you understand what he's talking
 24 about?
 25 THE WITNESS: Yes.

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1 MR. PRIDGEN: Did you bring one with you
 2 today?
 3 THE WITNESS: I don't think so, but I
 4 could check.
 5 Q BY MR. BROWN: Also in the notice of
 6 deposition that I sent to Mr. Pridgen, I asked for the
 7 witness, being you, to bring any of the documents you
 8 may have reviewed to prepare for this deposition or
 9 prepare for your testimony or anything that you've
 10 reviewed in general for this case. Did you bring any
 11 of those documents with you today?
 12 A I think all that I looked at, yeah, I
 13 have -- I think I have them with me.
 14 Q Could we stop the deposition at this
 15 point and perhaps you could bring those in? Do you
 16 have them with you here or are they in your vehicle?
 17 A They're in the vehicle.
 18 Q Thank you.
 19 (Pause in proceedings.)
 20 (Deposition Exhibit Numbers 1 and 2
 21 were marked for identification.)
 22 Q BY MR. BROWN: The question when we
 23 stopped I believe was any papers that you had done for
 24 the Owyhee Cattle Association, and you had not done
 25 any papers for Stewards of the Range at their request

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1 or the Idaho Cattle Association; is that correct?
 2 A Not that I recall.
 3 Q So the Owyhee Cattle Association, and I
 4 wasn't really understanding what that paper dealt
 5 with. Did it deal with this particular statute that
 6 we talked about off the record?
 7 A No.
 8 Q Now, I've marked here as Deposition
 9 Exhibit 1 your curriculum vitae. Is that your
 10 curriculum vitae?
 11 A Yes.
 12 Q Is that okay if we use that and she
 13 keeps this and you'll get a copy of it with a copy of
 14 the deposition?
 15 A Yes.
 16 Q I've also marked as Deposition Exhibit 2
 17 something entitled "Dr. Chad C. Gibson, Notes in
 18 Regard to SRBA Case No. 39578, Deposition 9-30-98,
 19 regarding Stock Water Rights, Idaho Code 42-113."
 20 Now, what is that?
 21 A Those were notes that were provided at
 22 the deposition that was taken on 9-30-98.
 23 Q You wrote those?
 24 A Yes.
 25 Q It says on your curriculum vitae,

Page 19

1 Exhibit 1 to this deposition, that you're also a
 2 member of the Society for Range Management.
 3 A Yes.
 4 Q You're still a current member of the
 5 Society for Range Management?
 6 A Yes.
 7 Q Have you ever been an officer of the
 8 Society for Range Management in Idaho?
 9 A Yes.
 10 Q What position did you hold?
 11 A I served as president.
 12 Q When?
 13 A It was a number of years ago. I'd have
 14 to look to see what the specific year was.
 15 Q Is that your only -- is that your only
 16 position you've held with the Society for Range
 17 Management?
 18 A I believe the two years prior to being
 19 president, I was a director.
 20 Q A director, what do you mean?
 21 A A director on the board.
 22 Q The Association of Rangeland
 23 Consultants, you also list that as a membership or
 24 participation. What is that?
 25 A It's an association of range consultants

Page 20

1 from the west who periodically meet and deal with
2 various issues.

3 Q What do you do as a range consultant?

4 A There's lots of things.

5 Q Try to be specific, please.

6 A Primarily, my involvement has been doing
7 some monitoring work on range which would look at
8 range utilizations, conditions, and developing grazing
9 plans for ranches and grazing allotments.

10 Q Would this be on private land or public
11 land?

12 A Both.

13 Q Where specifically on public land have
14 you done this sort of range consulting and for whom?

15 A I've worked for Bruneau Cattle Company
16 and Simplot Livestock Company, LU Ranch Company,
17 Stanford Livestock, Chipmunk Grazing Association, Ted
18 Blackstock.

19 MR. PRIDGEN: What was that?

20 THE WITNESS: Ted Blackstock. Wood
21 Creek Livestock Company.

22 Q BY MR. BROWN: When did you start doing
23 the range consulting?

24 A In 1999.

25 Q Is that after you retired from the

Page 21

1 University of Idaho?

2 A Yes.

3 Q What year did you retire from the
4 University of Idaho again?

5 A In 1999.

6 Q Currently, is this what you do to make a
7 living in retirement, range consulting?

8 A Yes.

9 Q Had you ever done any of this type of
10 work prior to 1999 in your duties as an extension
11 agent?

12 A Some of that would have been similar,
13 similar work.

14 Q What do you mean by some of it? Can you
15 be specific on what you did in your duties as a range
16 consultant?

17 A I didn't -- in my duties as a range
18 consultant?

19 Q I meant in your duties as an extension
20 agent, what type of consulting work did you do on
21 ranges and was it on public land or private land?

22 A I didn't do the utilization kind of
23 studies. We did do some research projects that would
24 have involved both private and federal land.

25 Q What type of research projects?

Page 22

1 A Riparian research, livestock management
2 research.

3 Q Riparian research is pretty general.
4 Could you be more specific?

5 A The project involved the photo
6 utilization study in trying to determine the kinds of
7 photo sites that would best represent trend change on
8 riparian areas.

9 Q Did you do a paper when you finished
10 this study?

11 A No.

12 Q Why?

13 A I retired at the wrong time -- at the
14 right time. I don't know.

15 Q Did someone do a paper to follow up on
16 the research?

17 A No.

18 Q Livestock research you've also said.
19 That's pretty general. Could you be more specific
20 there?

21 A Are you talking about what pertains to
22 public land or private land or both?

23 Q Both.

24 A I think the major projects are listed in
25 the vitae, so --

Page 23

1 Q Be specific to federal land while you're
2 looking through there and name them.

3 A The Desert Cow Project would have been
4 the major one which was looking at the nutritional
5 conditions of rangeland and how those conditions met
6 the requirements of livestock, particularly cattle,
7 over time and looking at management to get the
8 greatest benefit from the nutrition that was available
9 from rangelands.

10 Q And what did you discover during this
11 research? Did you come to a conclusion based upon the
12 research?

13 A Yes.

14 Q What was that conclusion?

15 A Well, there were several. One, that the
16 nutritional level and availability on rangeland was
17 high enough at certain times of the year, particularly
18 in the spring, to support a higher level of
19 reproduction than it was at other times of the year.

20 Q Higher level of reproduction of what?

21 A Of livestock. In other words, the
22 cattle conceived and produced calves better when the
23 nutrition was available at a certain time.

24 Q And that was the spring was your
25 conclusion?

Page 24

1 A Yes. And it depended on the
2 reproductive cycle of the cattle at that time. It
3 depended as well on the size of the livestock.
4 Q Any others that you were able to discern
5 from there? One at a time, and if I have any
6 questions about them, I'll ask at that time.
7 A One was a riparian shrub planting, tree
8 planting project that would have been on public land.
9 Q Did you reach any conclusions from that
10 particular study?
11 A I think we didn't do the right thing in
12 planting the trees the way we did.
13 Q What type of trees did you plant?
14 A There were two types of willow.
15 Q Was it along riparian areas on the
16 desert land like we have here in Owyhee County?
17 A Yes.
18 Q Does that pretty well cover it or is
19 there one more?
20 A And then the riparian photo monitoring
21 study was on a stream that's on federal land.
22 Q Riparian photo monitoring study, can you
23 explain what that was about?
24 A We took pictures annually, approximately
25 ten years I think we continued that study, at six

Page 25

1 different locations that were different ecological
2 sites along the stream to try to evaluate which sites
3 we should be taking pictures of to be able to do -- to
4 be able to monitor a change in those streams over time
5 with photographs.
6 Q That study went along for ten years did
7 you say?
8 A Yes.
9 Q What was your conclusion at the end of
10 that study?
11 A That it was possible to select some
12 sites that would show the change over time on those
13 streams.
14 Q What type of change?
15 A Changes in vegetation, changes in stream
16 morphology.
17 Q What caused the changes in vegetation?
18 A Nature, high water had some effects,
19 grazing had some effects, drought conditions had
20 effects.
21 Q How about stream morphology, what type
22 of changes occurred?
23 A What could be identified is the streams
24 becoming narrower and vegetation changes on the banks
25 both in terms of increased shrub and willow components

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1 and the herbaceous components for primarily the hydric
2 species that are most important to hold streams
3 together.
4 Q Is that a good thing?
5 A That's a good thing. If they're
6 increasing, that's a good thing.
7 Q What would cause it to decrease?
8 A Primarily weather conditions and the
9 amount of use that occurs.
10 Q What type of use?
11 A Grazing by both livestock and wildlife.
12 Q So if it's overused, the stream
13 morphology deteriorates; is that an accurate
14 statement?
15 A True, yes.
16 Q Can I see your curriculum vitae again,
17 please?
18 A (Witness provides document.)
19 Q Under your published articles, you have
20 something called "Federal Grazing Fees and the
21 Property Rights Issue." Can you explain that
22 particular article and where it was published and when
23 and whether it was reviewed by peers, range management
24 peers, before it was published?
25 A Where did you see that?

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1 Q Under publications. Excuse me. Right
2 here (indicating).
3 A It was not a reviewed publication.
4 Q Where was it published?
5 A Western Beef Producer and the Cascade
6 Cattleman.
7 Q Did you write that report in its
8 entirety?
9 A I believe so.
10 Q Did you reach any conclusions in that
11 report?
12 A I don't recall the report. I'd have to
13 look at it to -- I'm not exactly sure from the title
14 just what it was.
15 Q If you can find that report, would you
16 provide it to Mr. Pridgen so that he can give me a
17 copy of it?
18 A Yes.
19 MR. PRIDGEN: What's the name of it,
20 please?
21 THE WITNESS: (Indicating.)
22 Q BY MR. BROWN: Did you ever prepare a
23 report for then-Congresswoman Helen Chenoweth?
24 A Yes.
25 Q And what did that entail?

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1 A Let me clarify. I didn't help myself do
2 that. It was a report dealing with some of the
3 history and court decisions related to property rights
4 on public lands.

5 Q Who helped you with that report? You
6 said you didn't do it alone.

7 A Fred Grant.

8 Q Who's Fred Grant?

9 A He's a consultant for Owyhee County.

10 Q For Owyhee County, the county itself?
11 Is he an employee of the county?

12 A He does consulting work for legal issues
13 for the county.

14 Q The county commissioners --

15 A Yes.

16 Q -- ask him to do legal research?

17 A Yes.

18 Q Is he a lawyer?

19 A Yes.

20 Q Is he licensed in the state of Idaho?

21 A I don't -- I don't believe so.

22 Q What experience does he have with these
23 types of issues, rangeland management issues?

24 A I couldn't tell you his total
25 experience.

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1 Q What did you contribute to the report
2 yourself?

3 A Looking at some of the history of
4 grazing as it occurred through the west from the time
5 of settlement on.

6 Q What type of history? Let's start at
7 the beginning. Let me explore this history business a
8 little bit.

9 First of all, I'd like to establish,
10 you're not a lawyer, are you?

11 A No.

12 Q So you didn't go to the statutes and try
13 to discern what the legislative intent was of the
14 Taylor Grazing Act for example?

15 A No.

16 Q Did you try to research the regulations
17 from the first regulations that were promulgated under
18 the Taylor Grazing Act through the present and did you
19 attempt to discern what the legal intent of those
20 regulations were and did you contribute that to the
21 article?

22 A Can you break that question down to the
23 three items?

24 Q Sure. Under the Taylor Grazing Act, the
25 Department of Interior had the authority to promulgate

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1 regulations. The regulations I believe were first
2 published in the late 1930s, the early 1940s. They
3 were revised and they've been in a process of revision
4 ever since. Every few years they revise the
5 regulations. You didn't contribute any expertise to
6 this paper regarding legal intent of those
7 regulations, did you?

8 A No.

9 Q You didn't look at judicial precedent
10 and try to interpret what the judges may have meant
11 within that judicial precedent, did you?

12 A I didn't, no.

13 Q Any part of your testimony regarding
14 this case have anything to do with reaching legal
15 conclusions?

16 A Not on my part.

17 Q Did you reach any legal conclusions and
18 contribute them to this particular report for
19 Congresswoman Hage?

20 MR. PRIDGEN: I'm having difficulty with
21 how you're defining the term "legal conclusions," and
22 I think the witness is.

23 MR. BROWN: well, I want to know the
24 difference between what he contributed as history,
25 that he merely looked at the history of grazing, or

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1 whether he attempted to contribute what he thought
2 Congress meant, what he thought the regulations meant,
3 or what he thought perhaps the judicial precedent
4 might have meant.

5 And I think that would be objectionable
6 testimony, so I'm trying to determine whether he did
7 any of those things and whether any of his conclusions
8 were based upon what he thought the judges meant, the
9 regulations mean, or the legislative intent of the
10 Taylor Grazing Act was, or what the Taylor Grazing Act
11 may mean as far as the issues that are involved with
12 this particular case or with this report. That's what
13 I'm trying to get at.

14 Q BY MR. BROWN: NOW, if you understand
15 the question, please answer.

16 A I think I do. The conclusions that I
17 reached were dealing with the history of a bunch of
18 court cases, as well as statutes, as well as current
19 regulations. I didn't research the grazing
20 regulations back to any significant time.

21 Q I'm not sure I'm understanding the
22 difference. You said you looked at all of the law and
23 you reached some conclusions based upon that. What
24 would not be a legal conclusion about that? Break it
25 down on what you meant by the history, then, and what

Page 32

1 conclusion that you reached.

2 A Well, I'm not sure I would phrase it as

3 a conclusion. What I tried to do is present the

4 information that was available historically with

5 regard to court cases that apparently -- or appeared

6 to be in conflict at times, the history of the

7 statutes that were passed and what they were.

8 Q What do you mean, the history of the

9 statutes that were passed?

10 A Well, just the chronology of those

11 statutes that applied, not the history of a statute

12 per se, but the fact that those statutes were passed

13 previously and the history included certain statutes.

14 Q What did you look at regarding history?

15 Any particular publications we should be aware of that

16 you looked at regarding history?

17 By the way, any time you want to take a

18 break, it's fine. I'm over fifty myself. I have to

19 take breaks occasionally. So if you need a drink of

20 water, need to go to the rest room, need to take ten

21 minutes, feel free to ask us to do that and we'll be

22 happy to do it.

23 A I couldn't tell you any specific

24 documents. That was some time ago and I'm sure there

25 were several.

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1 Q In the report that Mr. Pridgen provided

2 to me that you reviewed, Mr. Pridgen states that "I

3 believe that Dr. Gibson has formulated an opinion

4 based upon his general research and background as to

5 whether or not stock water rights are considered to be

6 appurtenant to the privately owned ranch property."

7 That seems to me to reach a legal

8 conclusion, so I'm going to question you regarding

9 that. General research, if this is an opinion you

10 formulated, upon what do you base that opinion?

11 A The history of grazing and ranching.

12 Q Okay. The history of grazing and

13 ranching. Tell me about the history of grazing and

14 ranching. I need to know specifically upon what you

15 base your opinion.

16 A Could I ask you to be a little more

17 specific about the history or do you want me to start

18 back when?

19 Q I would like you to start back when

20 because I don't know what you mean when you say

21 history, general research, background. I don't know

22 any of that, so if you could start someplace, what you

23 looked at, upon what do you base that opinion? Give

24 it to me a piece at a time. It will help me

25 understand how you reached that particular

Page 34

1 conclusion. And the Court's going to require that of

2 you also or you're not going to be able to testify to

3 it.

4 A The west was opened beginning in --

5 primarily in the 1860s to grazing when any number of

6 livestock began to come to particularly southwest

7 Idaho.

8 Q Where did you find that particular piece

9 of information?

10 A There are a number of documents and

11 books that have been written, and I couldn't give you

12 a list specifically of those books.

13 Q You will need to do that.

14 A I --

15 Q Not necessarily for my edification.

16 A I can, but not from memory, you know.

17 Q Okay.

18 A The specific dates, book titles and

19 authors I can get for you.

20 Q What you'll have to remember is when

21 you're on the stand and I cross-examine you, if you

22 made an opinion and I am questioning you on that

23 particular opinion, it's going to be very important

24 for you to be able to base that opinion upon

25 something. It's not supposed to be based on your

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1 memory from way back when. You're not a historian.

2 The Court's going to want to know upon what you base

3 your opinion, so that's why I'm asking you these

4 questions now so that I know what you base your

5 opinion on.

6 Two, whether what you're basing your

7 opinion on is something that's reasonably relied upon

8 by other people in your field. And if it isn't, then

9 the Court can make its own judgment regarding your

10 testimony, it's not necessarily an expert opinion, so

11 we've got to know these things.

12 In other words, today you can't tell me

13 where you got all of this information that led up to

14 this particular conclusion that upon your general

15 research and background, stock water rights are

16 considered to be appurtenant to privately owned ranch

17 property; is that correct? You can't tell me upon

18 what you base that opinion other than just your

19 general research and knowledge; is that right?

20 A I can tell you that there was a

21 publication -- and I'm sorry, I can't remember the

22 specific title -- that dealt with the grazing history

23 of the Birds of Prey area, which is partially in

24 Owyhee County, dealt with the grazing history around

25 Murphy and that area. There's a book written by Mike

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1 Hanley that references the historic migration of
2 cattle to the west.
3 Q Is Mike Hanley a historian?
4 A Yes.
5 Q Where does he live?
6 A Jordan Valley.
7 Q Is he a rancher?
8 A Yes.
9 Q Does he have a degree in history?
10 A I have no idea what his education is.
11 Q Is that something that's reasonably
12 relied upon by other people in your field upon which
13 to base an opinion?

14 A He's authored a number of books that
15 deal with the history of the area and generally would
16 be looked at as -- the documentation that's in the
17 books would be looked at as reliable information.

18 There's a book published in Oregon, the
19 title is "The Community of Cattlemen," and it provides
20 a lot of historic record as to the grazing that
21 occurred and when it occurred in southeast Oregon and
22 the adjacent areas of Idaho.

23 Q Who is that written by?

24 A Right off, I can't tell you.

25 Q Okay. Let's go back to Mr. Pridgen's

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1 statement again here. "Dr. Gibson has formulated an
2 opinion whether or not stock water rights are
3 considered to be appurtenant to privately owned ranch
4 property." What is that opinion?
5 A That those stock water rights are
6 synonymous with range use, which in the Taylor Grazing
7 adjudication process, they looked back at customary
8 use areas of the range to adjudicate the grazing
9 preference that came from the Taylor Grazing Act to a
10 specific base property and area of the range, and
11 those were a continuation of the custom and culture
12 that occurred prior to the Taylor Grazing Act that
13 when you bought a ranch, it was based on the number of
14 livestock that the ranch would run.

15 And typically, that included some
16 private based property and some range area that was
17 customarily used in conjunction with that property, so
18 when a ranch sold, the buyer got the base property and
19 the customary range that those cattle from that ranch
20 ran on.

21 Q Upon what do you base that opinion?

22 A The discussions that occurred at the
23 time the Taylor Grazing Act was passed and rancher
24 meetings to work with the grazing service at that time
25 to develop a way to implement the Taylor Grazing Act.

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1 The minutes of the meetings that were held show those
2 discussions of customa... range and how to incorporate
3 those customary ranges into the adjudication process.
4 Prior to the Taylor Grazing Act, there
5 were a number of conflicts over use of customary
6 range, sometimes between the customary users, but more
7 often with transient folks that would just come along
8 and graze it off and go on someplace else and the
9 local rancher is still there.

10 There were a number of states that had
11 some conflicts that often turned violent even over use
12 of those ranges, and so there were state laws that
13 mentioned the customary range and how the user of a
14 customary range could protect his use of that range
15 against a transient stockman, so the history goes back
16 to the Taylor Grazing Act and particularly where it
17 was discussed at length, but even prior to that in
18 some of the state laws that dealt with protecting use
19 rights on customary range.

20 Q Where specifically does it say in any of
21 the documents that you've mentioned that stock water
22 rights are appurtenant to privately owned ranch
23 property if the stock water is located on public land?

24 A I don't know of any place in those
25 documents where they make that statement.

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1 Q Then you reached this conclusion how,
2 then?

3 A Based on the fact that the purchase of a
4 private property, a base property that had a customary
5 range that went with it, that the buyer of that
6 property had the use of the customary range.

7 Q But that's after 1934, isn't it?

8 A Prior to 1934, that was the way that
9 ranches were bought and sold and traded.

10 Q I don't think so. In this particular
11 case in the Silver City area, all sorts of people used
12 range within the Silver City area and they were not
13 excluded by anyone. Do you agree with that?

14 A Prior to 1934, the only exclusionary
15 right that anyone had was based on state law.

16 Q That really wasn't my question. In the
17 Silver City area and on the public lands throughout
18 the west, anyone could graze, anyone could use the
19 water, and there was no attempt to exclude anyone from
20 that use. And if there was an attempt to exclude that
21 use, it would have violated federal law, the Unlawful
22 End Closures Act. Is that your understanding of it?

23 MR. PRIDGEN: You're asking for a legal
24 conclusion. I'm going to object.

25 MR. BROWN: I'm not. I'm not.

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1 MR. PRIDGEN: You're asking about
2 customary grazing & common practices, is that what
3 you're asking?
4 MR. BROWN: That's correct.
5 MR. PRIDGEN: Do you understand the
6 question?
7 THE WITNESS: Yes. I'm not sure that
8 the -- well, that's a legal matter, so I'll avoid it.
9 Q BY MR. BROWN: It isn't. It isn't a
10 legal matter. What I'm asking you, as a matter of
11 fact on public land in the west prior to 1934, anyone
12 could use the grazing commons, they could take their
13 livestock out and they could graze anywhere they
14 wanted. If that land wasn't enclosed for example
15 under a homestead entry or under an entry under the
16 mining laws, anyone could graze there and no one else
17 could exclude them.
18 A They could, subject to the state laws
19 that were trying to regulate some of the use.
20 Q Which state laws in Idaho?
21 A The only one that I'm familiar with is I
22 believe in Section 25, but it prohibited certain
23 livestock ranchers from grazing their livestock on the
24 possessory interests of another livestock owner.
25 Q Be specific. I'm not at all familiar

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1 with those.
2 A It's my belief that the law was aimed at
3 the transient stockmen so that those guys that just
4 come through the country didn't -- or if they grazed
5 on the customary range of another rancher, then the
6 other rancher could take action against them to stop
7 them from that.
8 Q Did that ever happen in Silver City?
9 A Not that I'm aware of.
10 Q Well, if you can be specific about that,
11 we'll talk about it more at trial. The only law that
12 I'm aware of is the one that excludes sheep. Are you
13 familiar with that, sheep from cattle range in Idaho?
14 A I believe that was repealed some time
15 back, yes.
16 Q It was repealed, that's correct, but
17 that was pre-1934 and the states did have some
18 authority to regulate; is that correct?
19 A Well, I don't know what authority they
20 had to regulate, but they attempted to exercise some
21 authority, yes.
22 Q I'm not familiar with any law in the
23 state of Idaho that ever excluded any other stockman
24 from using the grazing commons on public land, and I
25 would like something from you to let me know what that

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1 is --
2 A Okay.
3 Q -- so that it can be discussed.
4 A Okay.
5 Q And that's what you're basing this
6 opinion on that water that the stockman allegedly
7 appropriated on federal public land is somehow
8 appurtenant to a ranch base property that is in many
9 cases miles away from the water source; is that
10 correct?
11 A Could you restate that?
12 Q What you just said is what you base your
13 opinion on that water that's allegedly appropriated by
14 a rancher that's located on federal public land is
15 somehow appurtenant to their base ranch property; is
16 that right?
17 A Yes.
18 Q It says here you're knowledgeable with
19 respect to adjudication under the Taylor Grazing Act.
20 How did you become knowledgeable about that?
21 A By looking at some of the old records,
22 including the minutes of meetings that were held after
23 the Taylor Grazing Act was passed where the stockmen
24 were brought in to work with the grazing service and
25 determine how to implement the Taylor Grazing Act.

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1 Q And when did you look at those?
2 A Periodically over the last probably ten
3 years or so.
4 Q Why did you look at them in the first
5 place?
6 A It's important to be able to try to
7 understand where -- or what the basis is for the
8 grazing allotments and base ranch properties and what
9 the expectations of permittees are with regard to
10 those when you're trying to make a recommendation on
11 grazing management on an area.
12 Q Did you ever make a recommendation on
13 grazing management on areas on public land?
14 A Yes.
15 Q When?
16 A Various times over the last twenty
17 years.
18 Q Who did you make the recommendations to?
19 A Primarily to the Bureau of Land
20 Management range conservationist and managers.
21 Q Which field office?
22 A The Bruneau and Owyhee -- well, they no
23 longer exist. It would be the Owyhee field office
24 now.
25 Q On whose behalf?

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1 A At various times on behalf of the agency
2 and at other times on behalf of a per. e.
3 Q Which permittee?
4 A There would have been a number of
5 those. Most of those that I've done consulting work
6 for, most of those would have been involved in
7 recommendations either to the permittee or the agency
8 as to how they could improve grazing management.
9 Q Did the BLM ever ask you to make a
10 recommendation?
11 A Yes, at various times and with regard to
12 probably a number of different issues on those
13 allotments that they were working with.
14 Q Which allotments?
15 A I don't know that I could list every
16 single one of them, but I know that I did work with
17 the Bureau on the Cliffs Allotment, the South Mountain
18 Allotment, the Trout Springs Allotment, several
19 allotments on the Owyhee Front. The Chipmunk Grazing
20 Association has a number of allotments there and there
21 are some individual allotments.
22 Q When you say worked with the Bureau,
23 what do you mean?
24 A Sit down in a meeting with them to
25 discuss management options and opportunities.

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1 Q Is that on behalf of the ranchers that
2 you were consulting with or consulting for?
3 A Sometimes, and sometimes just on issues
4 that the BLM thought was significant on an allotment.
5 Q How did you find out about these issues
6 that the BLM thought may have been significant on any
7 allotment?
8 A In a number of ways. Sometimes it would
9 be a Bureau person that would mention an issue that
10 they wanted to discuss, or the permittees would, or
11 the permittees and the BLM had jointly determined
12 there was an issue they wanted to work with and would
13 ask me to look at the issue and give an opinion or
14 suggestions.
15 Q When you did that, were you acting as an
16 independent expert in range management, meaning you
17 were hired neither by the Bureau nor a permittee?
18 A If you go back and separate the time
19 that I was working for the University of Idaho, those
20 would all have been independent. That would have been
21 independent work.
22 Q How long have you been a member of the
23 Owyhee Cattle Association and were you a member of the
24 Owyhee Cattle Association while you were doing this
25 independent work?

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1 A No. I've been a member since I retired.
2 Q Same with the Owyhee Cattle Association?
3 A No. I've only been a member for a year,
4 two years.
5 Q How about the Stewards of the Range?
6 A I couldn't tell you when I first joined
7 that group.
8 Q Before or after you retired?
9 A I don't recall.
10 Q Well, then, you must know how the
11 adjudication under the Taylor Grazing Act worked if it
12 says that you're knowledgeable about it. In your
13 study of the old adjudication files, how does the
14 adjudication under the Taylor Grazing Act work?
15 A Initially, it was based on identifying
16 people who had a history of grazing in an area. If
17 that was the case, they looked at base property, and
18 particularly in Idaho, they looked at the base
19 property and --
20 Q Could you define base property for the
21 record here, please?
22 A It would be fee property that they owned
23 that was used in conjunction with their ranching
24 operation.
25 Q Now, hold it. Used in conjunction with

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1 their ranching operation, what do you mean?
2 A Typically, the fee property was a part
3 of the ranch, and their customary use of rangeland
4 somewhere in the vicinity would have been another part
5 of the range operation.
6 In Nevada when they were dealing with
7 the water rights based permits, they referred to the
8 ranch as a plant which included the water to supply
9 the livestock and the grazing use around it, and that
10 plant was the ranch operation.
11 Q Where did you get that information and
12 upon what do you base that statement?
13 A It's from the records of the meetings
14 held with ranchers and the grazing service to figure
15 out how to implement the Taylor Grazing Act, and they
16 were held in -- the meeting in Nevada was held in
17 1935, and as I understood, there were meetings to be
18 held in each state, and whether those were held or
19 not -- I'm familiar with the information from Nevada.
20 And then in 1936, the following year, meetings were
21 held in Utah.
22 Q Sounds an awful lot like terms that are
23 used by ranchers and not by professional range
24 managers that were hired by the BLM. Is it accurate
25 to say that those were terms and things that were

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1 suggested by the ranchers at these meetings?
 2 MR. PRIDGEN: I'm going to object. I'm
 3 going to instruct -- this calls for pure speculation.
 4 MR. BROWN: He read it. I want to know
 5 where he read it from.
 6 MR. PRIDGEN: You're asking him the
 7 background and the intent of the people who
 8 participated in these meetings.
 9 Q BY MR. BROWN: I want to know who said
 10 it. Who said it?
 11 A Ferry Carpenter.
 12 Q Who's that?
 13 A He was the person from the grazing
 14 service who was conducting the meetings.
 15 Q And he was getting input from whom?
 16 A From others in the grazing service and
 17 the ranching community that he was meeting with.
 18 Q So these terms were part of the ranching
 19 community that he's meeting with or are they terms
 20 that were invented by Mr. Carpenter?
 21 A I can't tell you what his intent was in
 22 using those.
 23 Q From your study of this, is
 24 Mr. Carpenter a rancher turned government employee?
 25 Could you tell from this?

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1 MR. PRIDGEN: The document speaks for
 2 itself. I think he came from D.C. out here is my
 3 recollection. I think the document speaks for itself.
 4 MR. BROWN: Well, he's basing this
 5 particular thing, knowledgeable of the adjudication of
 6 the Taylor Grazing Act, on these particular documents
 7 that he reviewed, as well as reviewing adjudication
 8 documents. I think it's fair to ask.
 9 Q BY MR. BROWN: If you read these things,
 10 maybe you can answer these questions.
 11 A And the question was, was he a rancher?
 12 Q Was he a rancher that became a
 13 government employee?
 14 A I don't know.
 15 Q Do you know where he came from at all
 16 other than he came from Washington, D.C. to hold these
 17 meetings?
 18 A No.
 19 Q Mr. Carpenter was the first head of the
 20 grazing service you just said; is that correct?
 21 A I don't believe he was the head of the
 22 grazing service, but he was the person who was in
 23 charge of determining how to implement the Taylor
 24 Grazing Act.
 25 Q And he was a government employee,

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1 according to your --
 2 A That's the indication in the record,
 3 yes.
 4 Q Okay. Let's try to learn more about
 5 your knowledge of the adjudication under the Taylor
 6 Grazing Act. Begin from where you left off.
 7 A I'm trying to think where I left off.
 8 Once they had determined that a ranch was a resident
 9 or local operation, had the base property, had a
 10 customary range where they ran, they made application
 11 for at that time a license to operate on their
 12 customary range and provided various information to
 13 support that claim.
 14 And then the grazing service would make
 15 a determination as to whether that information was
 16 adequate or whether they needed more or what more
 17 information they needed, and they would -- once they
 18 got that information, then they would assign a
 19 particular amount of use in a particular area to that
 20 ranch operation.
 21 And they relied fairly heavily on
 22 recommendations from the grazing advisory board which
 23 was made up of ranch operations familiar with the
 24 area.
 25 Q Ranch operations --

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1 A Ranchers.
 2 Q -- or individual ranchers? Sorry. I
 3 didn't mean to interrupt you. Go ahead.
 4 A Ranchers who were familiar with the
 5 area. And based on those recommendations, the grazing
 6 service then would make a determination as to what the
 7 license would be for that given year, and for a number
 8 of years, those were reapplied until an adjudicated
 9 right was assigned to that particular ranch operation
 10 that had requested one.
 11 Initially, the Taylor Grazing Act
 12 indicated that the land would be identified in grazing
 13 districts and there were various grazing districts
 14 delineated on various maps. And as I recall, in
 15 Idaho, there was a single district for the state, and
 16 within those, then they would identify grazing units
 17 that when they adjudicated a right, it would be into a
 18 grazing unit. But units were quite large, so there
 19 may be a number of people authorized to graze within
 20 the unit. And typically, there would have been
 21 customary ranges even within those units where these
 22 different operators would run their livestock, but the
 23 adjudication didn't differentiate those.
 24 As the adjudication went on over till
 25 now, those grazing units would be further subdivided

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1 into grazing allotments. And to the extent they
2 could, one person would be assigned an allotment.
3 However, there's a lot of allotments that are grazed
4 in common where two ranches have a preference right in
5 a particular allotment.

6 And that's kind of where we are today is
7 the allotments this last year, I think the final fence
8 between allotments was constructed for Owyhee County
9 that would totally separate use.

10 Q What do you mean by preference right?

11 A The preference was given to a ranch that
12 if livestock were grazed in a particular area and that
13 preference went to that ranch, then that rancher had
14 the right to make use of it that other people didn't
15 have that right.

16 Q Where in the Taylor Grazing Act does it
17 say preference right?

18 A I don't know that it says preference
19 right. Well, I couldn't quote the Taylor Grazing Act
20 to you, so I don't know if that's --

21 Q Just a matter of art, you're using the
22 term "preference right" for something the Taylor
23 Grazing Act confers on a particular base ranch holder;
24 is that correct?

25 A It's a separate -- it's a separate right

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1 from what someone else would have, so it's primarily
2 to distinguish between people.

3 Q People or ranches?

4 A Ranches.

5 Q How did they determine the use that any
6 particular base ranch could have within a particular
7 grazing unit?

8 A They conducted drain surveys, and at
9 that time the grazing service didn't have a lot of
10 folks, so those weren't all conducted in year one, but
11 they would do a survey of a grazing unit or, later on,
12 an allotment to determine how much grazing use was
13 available.

14 And if the grazing use that they
15 determined was available was less than the amount that
16 was allocated to the ranchers that were using that
17 area, it was proportionately -- the licensed use was
18 proportionately reduced to match the surveyed amount
19 of forage that was available.

20 Q There's something called
21 commensurability too, isn't there? Could you explain
22 that to me?

23 A Yeah. The commensurability had an
24 effect on the amount of the right by limiting the
25 amount of use that could be made on the customary

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1 range to that amount that could be supported by the
2 base ranch property.

3 Q Also dependent property survey. I
4 notice that you reviewed some dependent property
5 surveys there. Could you tell me what those are? In
6 your research of them, what does that mean?

7 A When an application was made for a
8 license, the licensed applicant would have to identify
9 the property that they intended to have used to
10 determine the commensurability for use on their
11 customary range.

12 Q Some of the things that you've reviewed
13 here for John T. Shea, did you review that dependent
14 property survey?

15 A I saw the name in there, yes.

16 Q That's really all you remember from it,
17 you just reviewed it?

18 A I just browsed through it.

19 Q Are you intending upon making a more
20 thorough review of this particular dependent property
21 survey before trial?

22 A If asked, I would, but I don't intend
23 to.

24 MR. BROWN: Mr. Pridgen, are you going
25 to ask him to review this and base any opinions that

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1 he may have upon those documents?

2 MR. PRIDGEN: Well, I sent it to him so
3 he could become familiar with the general area we're
4 talking about in this adjudication. This particular
5 package has to do with what ultimately became the Shea
6 homestead and the supporting documentation which I
7 provided him probably within the last two weeks.

8 I'm not exactly sure if I'm going to
9 have him testify on any of the specific documents, but
10 I will tell you that I am going to have him review
11 them and become familiar with it, and if he hasn't had
12 an opportunity to do that, I will ask him to do that.

13 Q BY MR. BROWN: It says here you're going
14 to testify to statutory and other authority for the
15 proposition that instream stock water rights are
16 governed by state law and not federal law or
17 regulations. Tell me about that. How are you going
18 to testify to that?

19 Do you have a copy of this, by the way?
20 Maybe you should be looking at it. I'm on page 2 and
21 it's paragraph number 1 midway down the page.

22 MR. BROWN: And we've been at this for
23 an hour and a half and I need to take a break. Could
24 we stop right here for a minute or two and you can
25 look through that, because the remainder of the

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1 questions are going to be on here. And if you need to
2 go to the rest room or get a drink of water, it would
3 be a great time to do that.

4 THE WITNESS: I won't object.

5 (Recess taken.)

6 Q BY MR. BROWN: Back on the record. I
7 had asked you a question regarding the paragraph
8 numbered 1 on this report that Mr. Pridgen gave me,
9 that you're going to testify to the statutory and
10 other authority for the proposition that instream
11 stock water rights are governed by state law and not
12 federal law or regulations. And upon what would you
13 base that testimony?

14 A As I read the 1866 mining law, it allows
15 persons to divert water and obtain the rights under
16 local custom and law. And following that on up to
17 1889 when the Idaho constitution was written, they
18 established a position of priority of use as the basis
19 for water rights in Idaho, and that would have
20 presumably carried forward from when the 1866 law was
21 passed.

22 Q And you consider that as a matter of
23 fact and not a conclusion of law?

24 A I consider it as what my reading of the
25 statutes indicates happened.

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1 Q So you're not reaching a conclusion of
2 law with that you don't think?

3 A I would hope not. I don't know.

4 Q I guess we'll find out when you start
5 testifying to it, won't we?

6 Regarding the same issue, you mention
7 the doctrine of prior appropriation. What do you know
8 about the doctrine of prior appropriation?

9 A It essentially says that if you put the
10 water to beneficial use and there's a competing
11 interest that has put some water to beneficial use,
12 then the priority of use determines who has the better
13 right.

14 Q Have you researched the history of the
15 doctrine of prior appropriation?

16 A Not extensively. I know that in some of
17 the historic accounts, it's traced back to the mining
18 laws that were established in California back when the
19 Spanish first came there, and some even say it goes
20 back to Roman law dealing with mining claims or mining
21 interests clear back to there.

22 It was discussed at the time the Idaho
23 constitution was written that there were competing
24 interests that thought riparian rights should be the
25 law of the land, and somehow through those

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1 discussions, the constitution ended up with the prior
2 appropriation doctrine as the constitutional law in
3 Idaho.

4 Q I'm not sure, but I think your knowledge
5 of the history of it might be a little lacking.
6 Wasn't it developed in California after the discovery
7 of gold in 1849?

8 A Well, there's some scholars that say
9 that it came from -- what was done in California was
10 developed based on law that goes back to the laws of
11 Rome that dealt with mining. And as I understand, its
12 migration to Idaho came directly -- or more or less
13 directly from the way that it was applied in
14 California for mining.

15 Q Well, we won't get into any of the legal
16 part of that, but what came from that was you needed a
17 diversion; is that correct? Your knowledge of the
18 history of it, you needed a diversion of a water
19 source?

20 A Diversion of a water source to
21 beneficial use.

22 Q There's two prongs to it. First,
23 there's the diversion, you had to have a diversion
24 from a water source; is that correct? The next prong
25 is beneficial use, you had to put it to a beneficial

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1 use. Is that your understanding of it?

2 A I don't know how you'd make it two
3 prongs, but you had to divert water to beneficial use.

4 Q That's the test of a valid appropriation
5 according to your understanding of the history of it?

6 A That's correct.

7 Q Did it make a difference where they put
8 that water to a beneficial use in your understanding
9 of the history of the doctrine of prior appropriation?

10 A Prior to the time that it was dealt with
11 with the Idaho constitution, I couldn't say what the
12 specifics were for California law.

13 Q How about for Idaho from 1865 forward
14 before the Idaho constitution? Some of the things
15 you're talking about is history, history of grazing.
16 Doctrine of prior appropriation was invented in 1849
17 according to my study of the history. Let's just take
18 that as a fact. Does it make any difference where the
19 water is used?

20 A Well, I'm trying to think of an example
21 that would distinguish that or whether there is one.
22 So far as I'm aware, it wouldn't make any difference
23 where the water was used.

24 Q Okay. Let's give you an example from
25 mining law. In order to establish a claim, you had to

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1 stake a claim; is that correct?
 2 A Yes.
 3 Q Okay. That claim belonged to the
 4 individual who staked it; is that correct?
 5 A Yes, as I understand it.
 6 Q So he's diverting water from a stream up
 7 here, he's making a beneficial use up here. Does this
 8 individual have a water right for use on his property
 9 according to your understanding?
 10 MR. PRIDGEN: Where's his property in
 11 relationship to --
 12 Q BY MR. BROWN: Not where the water is
 13 being put to a beneficial use. This is his mining
 14 claim. Anywhere else besides where he's washing his
 15 gold.
 16 A I couldn't answer that. I don't know
 17 what the specifics in regard to the mining would be.
 18 Q Very well. Suppose he's diverting water
 19 to his own mining claim and he's putting the water to
 20 a beneficial use right here, washing his gold, washing
 21 gravel so that he can get gold out of it. Is that a
 22 beneficial use?
 23 A It would be under the Idaho law.
 24 Q Suppose he doesn't have a mining claim
 25 here and someone else wants to divert up here so he

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1 has really no entrance but he's here. Someone can
 2 dispossess him of that interest at any time because he
 3 hasn't staked a claim but he's here using the water.
 4 Does he still have a water right according to your
 5 knowledge of the history of prior appropriation?
 6 A I'm not sure I follow the whole gist of
 7 that.
 8 Q He's never staked a mining claim, he's
 9 just there, he's panning gold. Does he have a water
 10 right?
 11 A I would assume that he has a water
 12 right.
 13 Q If he can be dispossessed at any time
 14 when someone does come in and stake that claim, he
 15 still has a water right there?
 16 A It would be -- it would be a water right
 17 that was subject to his ability to maintain it, and if
 18 he gets dispossessed, he would lose it.
 19 Q How is that different from someone
 20 grazing on the grazing commons where they can be
 21 dispossessed at any time by a homestead entry?
 22 A Let me follow. Someone is grazing in a
 23 particular area.
 24 Q Along a stream.
 25 A Uh-huh.

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1 Q Someone comes in and follows the statute
 2 for putting in a home. d entry --
 3 A Uh-huh.
 4 Q -- and takes possession of the land.
 5 How is that different from the scenario here? Does
 6 the rancher lose his water right if he can be
 7 dispossessed of that -- using that property at any
 8 time?
 9 A I'd have to think about the comparison
 10 between the two here. It would seem to me that that
 11 water right could be dispossessed if someone else took
 12 up a homestead in that location. And under the laws
 13 at the time, even if you had been adjudicated a
 14 preference to graze in a particular area, if there was
 15 a homestead legally placed in that area, that water
 16 right in regard to the homestead property would be
 17 displaced.
 18 Q Thank you. Let's go on to number 3.
 19 I'm not going to go into number 2, your reasons and
 20 support for your intentions with respect to amendment
 21 of Idaho Statute 42-113.
 22 Number 3, "The fact that the United
 23 States BLM has not historically and does not regulate
 24 or have authority to regulate the use of instream
 25 stock water rights in the State of Idaho," let's take

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1 that piece of that particular paragraph first. Could
 2 you explain why the BLM doesn't have authority to
 3 regulate the use of instream stock water rights?
 4 A The State of Idaho regulates the use of
 5 water for virtually all purposes today.
 6 Q Since 1934, has the BLM issued permits
 7 that allow ranchers in the livestock business to enter
 8 public land to graze livestock?
 9 A The permits initially were to set forth
 10 the terms and conditions of use. The permit itself
 11 was a recognition of that adjudication that had
 12 occurred previously, so I don't know if that's a yes
 13 or no, but that's --
 14 Q I'm not sure you understood my
 15 question. Has the BLM issued permits since 1934 that
 16 allow ranchers to enter public land to graze their
 17 livestock?
 18 A I'm not sure when they were termed
 19 permits. Initially, they issued a license to ranchers
 20 to use their customary range on the public land.
 21 Q You refer to it as a license. I'm
 22 referring to it as a permit. I think the terms back
 23 in 1934 were somewhat interchangeable, but we'll use
 24 your term, "license."
 25 A Sure.

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1 Q They started with licenses, and then
2 they started doing grazing permits; is that correct?
3 A Yes.
4 Q And they've done that since 1934?
5 A Yes.
6 Q They have a season of use on those
7 licenses, don't they?
8 A Yes.
9 Q So by issuing a permit that excludes use
10 during a certain portion of the year, which in many
11 cases was wintertime, doesn't BLM regulate the use of
12 water on United States property?
13 MR. PRIDGEN: Use or access to?
14 MR. BROWN: You can't use it if you
15 don't have access to it, Craig.
16 MR. PRIDGEN: We'll stipulate to that.
17 MR. BROWN: I'm asking Dr. Gibson, not
18 you.
19 MR. PRIDGEN: All right.
20 THE WITNESS: Now, run that by again,
21 Larry.
22 Q BY MR. BROWN: Okay. By issuing a
23 permit or a license that excludes use of public land
24 during a certain portion of the year, most of the time
25 winter, doesn't that regulate the use of water on

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1 United States property?
2 A In a way, it would. If it's a livestock
3 water right, I would assume that it would be
4 applicable when livestock were grazing in the area, so
5 whether specifying the season of use would be a
6 regulation of use of water, I would view it as a use
7 of rangeland, but the water right itself would be used
8 whenever it was available. You wouldn't -- you
9 wouldn't irrigate at the time you weren't growing
10 crops, so the water right would be used at the time
11 that the grazing was occurring.
12 Q But BLM regulates the use of their
13 property; is that correct? And the water is on public
14 land; is that correct?
15 Answer one at a time. BLM regulates the
16 use of their property; is that correct?
17 A Yes.
18 Q So BLM does regulate the use of water on
19 their property too, don't they?
20 A As the use of water is connected to the
21 time that livestock were there, the regulation of the
22 time of use would affect the regulation of the water.
23 But if it's being diverted to a beneficial use through
24 a cow, you don't regulate when the cow drinks or
25 where.

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1 Q We don't?
2 A During the time that she's there, yeah.
3 Q Okay. So the statement here should be
4 limited somehow -- I mean, this is a pretty
5 all-encompassing statement that the BLM does not
6 regulate or have authority to regulate the use of
7 instream stock water rights. That's kind of an
8 overstatement, then, isn't it? Because we do have
9 authority to manage when the cattle go on United
10 States property or whether they go on at all. If the
11 area is burned and there's no forage available, they
12 don't go on at all; is that correct?
13 A That would be true. If it doesn't rain,
14 the reservoir doesn't fill, you can't irrigate
15 either.
16 In what this says, what I'm looking at
17 is the regulation of instream stock water rights in
18 the State of Idaho that would be where you wouldn't
19 say I don't care when you graze out there, you just
20 can't use the water, so there's some influence on when
21 that water right is used. But as far as regulating
22 the water right at the time it's being used, then this
23 would be the case.
24 Q Let's take it another step, then,
25 Dr. Gibson. Through the planning process, BLM decides

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1 to fence off Jordan Creek. They can do that. They
2 have the authority to do that within their own
3 regulations. Isn't that regulating the use of water
4 from the stream banks of Jordan Creek?
5 A Well, to the extent they have the
6 authority to make that decision, yes. To the extent
7 that they could prevail if challenged, that's still a
8 question.
9 Q Prevail if challenged, what do you mean?
10 A If it's determined by the courts that
11 the permittee holds a stock water right in that
12 section of Jordan Creek that's being fenced off, then
13 there's a question of law that would have to be
14 settled.
15 Q So you think that the state court could
16 force the BLM, the United States government, into
17 making water available from Jordan Creek, open up the
18 fences, you can't do that, Mr. United States
19 Government; is that what you're saying?
20 A That would be a matter for the courts to
21 determine.
22 MR. PRIDGEN: You can pay for it too.
23 Q BY MR. BROWN: Notwithstanding the
24 unsolicited statement from Mr. Pridgen, we will move
25 on. I'd like to go on to number 4, "That the

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1 adjudication under the Taylor Grazing Act recognized
2 and acknowledged the historic use grazing land and
3 the water located thereon when determining the
4 dependent property rights and preferences of ranchers
5 in the area during the course of the adjudication
6 which established grazing priorities and permits under
7 and pursuant to the Taylor Grazing Act of 1934."

8 What do you mean by that? Honestly, I
9 couldn't make heads or tails out of that statement, so
10 I'm asking you what you mean by that.

11 A There's saving provisions I believe in
12 most of the statutes that have been passed that
13 recognize preexisting rights.

14 Q Which rights?

15 A I don't know that they specified
16 preexisting rights.

17 Q Are you talking about water rights?

18 A That would be one of them, because like
19 the Taylor Grazing Act has that provision, and a water
20 right that was established under the 1866 mining law
21 would then prevail or be recognized as the -- under
22 that provision of the Taylor Grazing Act.

23 Q That's what you meant by that statement,
24 that if there was a water right out there, it would be
25 recognized by the Taylor Grazing Act, or what?

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1 A That the Taylor Grazing Act didn't
2 extinguish any preexisting right, whether it's water
3 access or whatever it might have been.

4 MR. PRIDGEN: By the way, I'm compelled
5 to correct a misunderstanding, if there is any, at
6 least on the record. I prepared this as a summary
7 based on discussions that I had with Dr. Gibson. He
8 did not prepare this document. I prepared this
9 document.

10 MR. BROWN: But he reviewed it.

11 MR. PRIDGEN: He's reviewed it, but --

12 MR. BROWN: And basically, this is what
13 he's testifying to.

14 MR. PRIDGEN: The purpose of this
15 document was for me to provide you a general guideline
16 in lieu of a lengthy report, which we agreed he did
17 not have to prepare.

18 MR. BROWN: We did agree to that.

19 MR. PRIDGEN: And this is intended to be
20 a summary of the areas that he has a familiarity with
21 and expertise in based upon review of historic
22 documents as well as legal documents, not for purposes
23 of rendering a legal opinion but for purposes of how
24 those provisions are implemented.

25 These are not his words, these are my

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1 words, so if you don't understand it, I just want the
2 record to be clear that I don't tell me put down
3 number 4, that the adjudication under the Taylor
4 Grazing Act, et cetera.

5 MR. BROWN: I understand.

6 Q BY MR. BROWN: Do you have any other
7 comments regarding that statement, the Taylor Grazing
8 Act did not extinguish previously existing water
9 rights? That's basically what you would testify to?

10 A (Witness nods head.)

11 Q Let's go to number 5, "That neither the
12 United States BLM nor any other agency of the federal
13 government has appropriated and used stock water
14 rights for its intended purpose of watering livestock
15 and land which is owned by the federal government" --
16 hang on. I'm going to back up and start that over.

17 "That neither the United States BLM nor
18 any other agency of the federal government has
19 appropriated and used stock water rights for its
20 intended purpose of watering livestock and land which
21 is owned by the federal government and administered by
22 the BLM pursuant to regulations promulgated under the
23 Taylor Grazing Act of 1934."

24 MR. PRIDGEN: I'm going to -- and I'm
25 glad you read that. There's a typo in there. It

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1 should be "on land" and not "and land." I apologize.
2 I didn't pick that up.

3 Q BY MR. BROWN: If you're going to
4 testify to that, on what do you base your testimony?

5 A In all of the records that I've seen,
6 I've never seen any information from those records
7 that indicated that the government owned livestock
8 that they were grazing or watering on the public lands
9 pursuant to the Taylor Grazing Act.

10 Q Is it fair to say, then, that that
11 testimony would be based upon your belief that in
12 Idaho, you must own livestock in order to get a
13 livestock watering right?

14 A No, I don't believe that's a requirement
15 of Idaho law.

16 Q Then how can you testify to that?

17 A How can I testify to -- clarify.

18 Q The United States never being able to
19 get a livestock watering right because they don't own
20 livestock.

21 A That seems to be a separate question
22 from what's here, so --

23 Q Well, I realize that, but didn't you
24 just say that BLM doesn't own livestock so they can't
25 have a livestock watering right? Did you say that?

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1 A No.
 2 Q What did you say, then?
 3 A Well, I'll tell you what I intended to
 4 say.
 5 Q Okay.
 6 A If that would be helpful.
 7 Q It would be. Maybe I misunderstood what
 8 you said too. I don't know.
 9 A That they have not owned livestock in
 10 any of the records that I've seen that they watered on
 11 public land in connection with the regulations under
 12 the Taylor Grazing Act.
 13 Q Ergo, what follows from that? BLM
 14 cannot have a livestock watering right because they
 15 don't own livestock?
 16 A I think that Idaho law does provide that
 17 persons not owning livestock can have a water right on
 18 land that belongs to them.
 19 Q That's correct. Does the United States
 20 own the land within the allotments that you've worked
 21 on previously?
 22 A Yes.
 23 Q Then why can't they have a livestock
 24 watering right?
 25 A To obtain the water right, the water has

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1 to be diverted to a beneficial use. If the government
 2 has no record of owning livestock, then there's a
 3 question of did the water get diverted to beneficial
 4 use. Even though they can have the water right, did
 5 they perfect it.
 6 Q I'm sorry, Dr. Gibson. You have
 7 confused me thoroughly. I don't know if I should
 8 follow up on this or not.
 9 Let's go back to something that you
 10 attended in 1998. You were here for the deposition of
 11 Mr. Miller, were you not, the same day that you were
 12 deposed by Fritz Holliman? Do you remember
 13 Mr. Miller?
 14 A Johnny Miller?
 15 Q Yes, sir.
 16 A Yeah.
 17 Q Do you remember that Mr. Miller
 18 testified that he owned private property and he had a
 19 grazing permit?
 20 A Yes.
 21 Q Do you remember him testifying that he
 22 hadn't owned cattle for 25 years?
 23 A I don't recall that, but I believe
 24 that's correct.
 25 Q If he had a stock watering right on his

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1 own property, then did he give it up and abandon it
 2 and forfeit it when he sold all his cattle and someone
 3 else began using his property for pasturage of their
 4 livestock?
 5 MR. PRIDGEN: That calls for a legal
 6 conclusion.
 7 MR. BROWN: No. It's going right with
 8 what he's saying here, either you own livestock and
 9 you can have a water right or you don't own livestock
 10 and you can't have a water right.
 11 MR. PRIDGEN: Larry, I'm not going to
 12 argue with you. They're two entirely different
 13 questions. One is acquiring a water right and one is
 14 abandoning and forfeiting a water right.
 15 MR. BROWN: Okay. Well, let him answer
 16 the question.
 17 MR. PRIDGEN: Those are two different
 18 concepts. One's appropriation and one's forfeiture
 19 and abandonment. But if you understand, go ahead.
 20 THE WITNESS: Okay. Ask that again.
 21 Q BY MR. BROWN: Okay. Mr. Miller
 22 testified that he hadn't owned livestock for 25
 23 years. Does he still have a water right on his own
 24 property?
 25 A I would assume that that's going to have

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1 to be a legal question. If he leased his property to
 2 someone else under a contract of some sort, then the
 3 Idaho law does allow him to maintain the water right.
 4 Q I don't know that. I just gave you the
 5 scenario that I remember from the deposition. I was
 6 here also. That was the first time that I met you.
 7 He hadn't owned livestock for 25 years.
 8 I don't know under what circumstances other people
 9 were using his property for pasturage. Let's just say
 10 he was doing it for a fee, no lease, no nothing, maybe
 11 a license like the BLM issued. Does he still have a
 12 riparian water right -- not riparian water right, but
 13 a water right for riparian areas on his own property
 14 for the watering of livestock?
 15 A I'd have to see more of the
 16 circumstances of -- you know, if he's converted it to
 17 wildlife use and nobody's grazing there, it certainly
 18 would be gone.
 19 Q So if you think that's a legal
 20 conclusion, then how can you testify to a legal
 21 conclusion that the United States can't own a water
 22 right or put it to a beneficial use?
 23 A I don't think I ever said that they
 24 couldn't.
 25 Q They didn't put it to a beneficial use

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1 because they don't own livestock, you did say that, so
2 we never perfected a water right, therefore, there's
3 no water right; is that right?

4 One of the prongs is putting water to a
5 beneficial use. That's a necessity. We didn't put it
6 to a beneficial use, no water right. And if you think
7 that's a legal conclusion, as you said when I gave you
8 the scenario of Mr. Miller, how can you testify to
9 this, that the United States can't own a water right?

10 MR. PRIDGEN: It's a different fact
11 circumstance, but go ahead.

12 THE WITNESS: Yes.

13 MR. PRIDGEN: Mr. Miller, you said,
14 owned stock water, and therefore, appropriating an
15 acquired stock water right. That's a different set of
16 facts.

17 MR. BROWN: Hadn't owned cattle for 25
18 years.

19 MR. PRIDGEN: I don't give a shit. You
20 said he owned cattle, and because of the ownership of
21 cattle, you acquire a stock water right. Then you
22 asked him whether or not --

23 MR. BROWN: I didn't say that at all.
24 You'll have to read it back. Read the transcript when
25 we're done.

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1 Q BY MR. BROWN: Please answer the
2 question, please.

3 A Please restate the question.

4 Q How can you testify to the conclusion
5 that BLM cannot own a watering right when you said
6 that for Mr. Miller's property, that's a legal
7 conclusion?

8 A Based on the fact that I've never found
9 in the records that the government ever perfected a
10 water right in the first place by diverting water with
11 their livestock. That's the basis of this question.

12 Q Okay. That's enough said. Let's go
13 on. "Dr. Gibson may have formulated opinions with
14 respect to whether or not the United States BLM can
15 acquire a water right under the statutes of the State
16 of Idaho either as part of the SRBA litigation with
17 respect to which the United States BLM has filed
18 uncontested water right claims to stock water and/or
19 pursuant to an application to the Idaho Department of
20 Water Resources for a license or a permit to
21 appropriate a water right either instream or from a
22 spring."

23 First of all, tell me what you'll be
24 testifying to regarding that statement right there.
25 I'm not so sure I understand. It says you formulated

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1 an opinion. What is that opinion?

2 A Well, I think per the Idaho statute,
3 certainly the federal government can acquire a water
4 right.

5 Q Did you say "can"?

6 A Can.

7 Q Thank you. For the purpose of stock
8 water?

9 A Yes.

10 Q Okay. Even though the United States
11 doesn't own livestock?

12 A Depending on the circumstances, I would
13 assume if the person who owns the livestock is
14 intending to perfect a water right for the government,
15 then certainly that could be an option. And I would
16 assume that where there's uncontested claims, if the
17 State awards that water right to the government, then
18 they award it to the government. I mean, that's
19 not -- I wouldn't assume that courts couldn't do
20 whatever they decide to do.

21 Q The next part of the statement is, "In
22 this regard, Dr. Gibson may opine as to whether or not
23 the United States by applying for a stock water right
24 under Idaho law is doing so for the benefit of its own
25 purposes for use of livestock which it owns or, in the

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1 alternative, does so for the benefit of ranchers whose
2 livestock actually appropriate and put the water to a
3 beneficial use."

4 Now, as I understand that statement --
5 you may have already answered it -- your testimony is
6 that the ranchers are actually perfecting the water
7 right because they own the cattle or however they have
8 the cattle or operate the cattle that actually use the
9 water; is that your testimony? Otherwise, I don't
10 understand what that statement is. Maybe you could
11 explain it to me.

12 A Well, at the time that the Taylor
13 Grazing Act was passed, the purpose of the grazing
14 service was to administer grazing use of the land and
15 to adjudicate that grazing use to private individuals
16 who qualified for that use. And there was -- that was
17 the primary purpose of the land was to graze it, so
18 I'm of the opinion that if the government acquired a
19 water right of any kind, it would be for the benefit
20 of grazing use on those lands.

21 Q Upon what do you base that opinion?

22 A The wording in the Taylor Grazing Act.

23 Q Which wording?

24 A That says that its chief purpose is to
25 administer the -- or to administer -- yeah, to

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1 administer and manage that land for grazing purposes.
 2 Q Well, there's many purposes to the
 3 Taylor Grazing Act.
 4 A Yes.
 5 Q That's just one of them?
 6 A That's one.
 7 Q Do you remember any of the others?
 8 A To take care of the orderly use and
 9 administration of the land, to protect it from undue
 10 degradation or harm.
 11 Q Number 7, "Dr. Gibson, as a result of
 12 his historic review of grazing practices in general
 13 and in Idaho and his long history in dealing with
 14 stockmen, has formulated a professional opinion as to
 15 whether or not a stock water right is an integral part
 16 of and therefore becomes a valuable asset to a
 17 ranching operation and whether or not privately owned
 18 property of a particular stockman or rancher is
 19 enhanced as a result of the acquisition, appropriation
 20 and/or use of stock water rights historically
 21 appropriated as a part of the individual rancher's
 22 operation both on his private land and public land
 23 both before and after the enactment of the Taylor
 24 Grazing Act in 1934."
 25 Okay. What's your professional opinion

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1 and upon what do you base it?
 2 A I would put a couple of periods in that
 3 sentence someplace.
 4 Q You can tell it was written by a
 5 lawyer.
 6 A Yes.
 7 MR. PRIDGEN: I don't deny it.
 8 MR. NETTLETON: It's self-explanatory.
 9 THE WITNESS: As you look at the
 10 history, one of the major concerns in trying to
 11 implement the Taylor Grazing Act was how ranches would
 12 be able to continue financing through -- well, at that
 13 time, the Federal Land Bank was --
 14 Q BY MR. BROWN: Can I stop you right
 15 there? Where in the Taylor Grazing Act is that
 16 concern expressed?
 17 A The only place that that reference comes
 18 in is in the section that says that if the ranch
 19 property is the asset for a particular loan, then the
 20 permit for that grazing use that's associated with
 21 that ranch would be -- would not be terminated.
 22 It was an attempt to provide some kind
 23 of stability for ranchers to be able to go out and
 24 obtain a loan on their livestock or ranch or whatever
 25 and be able to say to the lending agency that, yes,

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1 this can't be paid off in ten years and these are the
 2 assets that I'm going to use to pay it off with.
 3 Q I may want you to point that out if I
 4 cross-examine you on that particular point at trial,
 5 so you may want to prepare, have a look at the Taylor
 6 Grazing Act and have that available.
 7 A Sure.
 8 Q Because I've read it two dozen times and
 9 have never seen that. It may be part of a
 10 regulation. Are you sure it's not a regulation, or is
 11 it somewhere else?
 12 MR. PRIDGEN: I've read that too in
 13 conjunction with the Taylor Grazing Act, whatever
 14 that's worth.
 15 THE WITNESS: It's in the Act itself,
 16 not in those words, but the intent was to accomplish
 17 what I was trying to say, at least.
 18 Q BY MR. BROWN: Okay. So you'd be
 19 testifying to legislative intent, then?
 20 A No. It was my intent to say -- it was
 21 my intent to try to represent what the legislation
 22 said.
 23 Q Well, perhaps you can continue with
 24 trying to explain this rather long-winded paragraph to
 25 me and what your opinion is.

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1 A Well, again, going back to the process
 2 of trying to implement the Taylor Grazing Act, that
 3 concern over being able to finance those ranches and
 4 keep them in operation was a major -- a major concern
 5 of all of those folks when they were doing that. And
 6 the concern was that to go and buy a ranch that would
 7 run a hundred head of cows and that ranch consisted of
 8 base property and some customary range that was being
 9 licensed now under the Taylor Grazing Act, that there
 10 would be some way to go to the lender and say this is
 11 not just the 1936 license, it's going to go on for
 12 some period of time after that.
 13 And there was a lot of discussion
 14 whether it should be an annual license or a two-year
 15 license, and the consensus ended up being that ten
 16 years was the appropriate time. Maybe lenders were
 17 less patient in those days and they wouldn't give you
 18 a 20-year loan. I don't know.
 19 But the ranch that supports that hundred
 20 head of cows has to have all the elements that support
 21 a hundred head of cows, whether it's the base property
 22 that feeds them in the winter, the customary range or
 23 licensed unit that they're going to graze in, and that
 24 includes the water that the cattle are going to be
 25 using at that time. And at that time, folks looked at

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1 the 1866 mining law as saying that if I used it, I had
2 a right out there, and the --
3 Q Could I stop you again right there? How
4 do you know that at that time? Unless you're a lot
5 older than I think you are, you weren't around in 1934
6 to know what folks thought about it.
7 A Well, the best way to determine what
8 folks thought in 1934 is to go back and read the
9 minutes of the meetings and the comments that were
10 made by various people. And the first thing you find,
11 it's not a universal position that cattlemen had,
12 because certainly the folks in the south, in Nevada
13 and Arizona and New Mexico that were looking at
14 water-based -- or a water-based preference system as
15 compared to the folks in the north that were looking
16 at a land-based -- and land-based maybe is not the
17 right term, but a land base that would produce enough
18 forage to be complementary of the grazing land.
19 And there was a tremendous amount of
20 effort to try to make the use of the public land that
21 was awarded to a person something that contributed to
22 the production from the base property, getting back to
23 their calling it plant.
24 Q And these documents that you brought
25 with you today are the basis for that particular

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1 statement, that's where you found that, or did you
2 base your opinion upon something else other than these
3 documents you brought with you today?
4 A Well, those documents and other historic
5 books such as the -- I wish I could remember the
6 author's name, but "The Community of Cattlemen" that
7 was published in Oregon primarily dealing with
8 southeast Oregon but at the same time spilling over
9 into Idaho. The state lines were a lot like the
10 grazing units. They weren't -- they were discreet on
11 paper.
12 Q You may want to refresh your memory upon
13 what you're basing your opinion, because if we get to
14 trial and I cross-examine you, I'll be asking you
15 about that.
16 A Simpson is the author.
17 Q Simpson, whoever that may be. I don't
18 know.
19 MR. PRIDGEN: Let me interject here. We
20 had talked during the break and he was going to make a
21 statement and offer -- maybe I should interject that
22 at this time. He's made a reference to a lot of
23 documents that he's read over the years and other
24 publications and other books. In addition to
25 reviewing the Taylor Grazing Act, Idaho statutes, he

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1 was an author of an amendment to an Idaho statute.
2 And his recollection -- y is not very good with
3 respect to these sources.
4 I think it's important that you be given
5 a list of everything that he's read and studied over
6 the years that supports his opinion as to the
7 implementation of the regulations and the
8 administration of the public rangeland, so what I've
9 asked him to do is to put together a list of those
10 publications -- I think your comment was I've got a
11 whole bookshelf full of them at home -- and provide
12 that to you as the basis of his historical analysis in
13 addition to these minutes that we've produced today.
14 So you can do that in about a week, do
15 you think, get that to me? No? Well, how long?
16 I mean, we've got a month and two days,
17 so he needs some lead time.
18 THE WITNESS: I can probably get it in a
19 week.
20 MR. BROWN: Okay. A week will be fine.
21 THE WITNESS: I'll have to.
22 Q BY MR. BROWN: Are you finished
23 explaining your professional opinion?
24 A Unless you have another question on
25 that.

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1 Q I don't, really, have another question
2 on your professional opinion if you think you've
3 pretty well flushed out what your professional opinion
4 is and what it's based upon, and you'll provide me a
5 list of the books, other references that you've gone
6 through.
7 The other thing that I would request is
8 to make sure you look at the books and to make sure
9 that the references are reasonably relied upon by --
10 other people in the field base their opinions for
11 historical research or whatever you're testifying to
12 here. It's going to be very important, because if
13 they aren't, if it's written by someone who isn't a
14 historian, it's just anecdotal data in my opinion and
15 I'll object to it. The judge may or may not grant the
16 objection, but be that as it may, you're a
17 professional, you're a Ph.D., and other Ph.D.s or
18 other experts in your particular field would
19 reasonably rely on this as a resource. So if it
20 isn't, we need your professional opinion on that.
21 You're the professional and you're the guy that's
22 going to be testifying to it and opining on it, in
23 other words, giving an opinion to the Court.
24 A Sure.
25 Q So be careful with it.

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1 MR. PRIDGEN: The only thing -- as long
2 as we're doing this on the record, the only thing I
3 will tell you, the treatises and documents that are
4 produced that are a rendition or recitation of
5 historic events in a particular area based upon -- it
6 could be based upon newspaper articles, it could be
7 based upon conversations with people who were alive at
8 that time and photographs and that type of thing, not
9 unlike the book that his mother wrote, for example.

10 THE WITNESS: Right.

11 MR. PRIDGEN: Those can come in as a
12 historic document if they are at least 25 years old,
13 okay. I'm not trying to contradict what Mr. Brown
14 tells you. Obviously, credibility of the author is
15 important from a historic perspective and whether or
16 not other professionals rely upon that. I just wanted
17 you to also be aware as you go through this analysis
18 that, for example, newspaper articles, things written
19 more than 25 years ago, conversations that were
20 memorialized and photographs and that sort of thing,
21 those are admissible.

22 MR. BROWN: Well, hopefully, we won't be
23 admitting any of those documents since Mr. Pridgen has
24 not produced them to me in response to my request for
25 production. Otherwise, we'll have a big fight. I'm

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1 just asking upon what you relied to make your
2 opinions. So be that as it may, I am finished, so
3 let's call it a day.

4

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6 (The deposition concluded
7 at 1:45 p.m.)

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9 (Signature requested.)

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1 VERIFICATION
2 STATE OF)
3 COUNTY OF) ss.
4
5 I, DR. CHAD C. GIBSON, being first duly
6 sworn on my oath, depose and say:
7 That I am the witness named in the
8 foregoing deposition taken the 1st day of November,
9 2002, consisting of pages numbered 1 through 90,
10 inclusive, that I have read the said deposition and
11 know the contents thereof; that the questions
12 contained therein were propounded to me; that the
13 answers to said questions were given by me, and that
14 the answers as contained therein (or as corrected by
15 me on the change sheet) are true and correct.
16 Corrections made: Yes ___ No ___

17

18

19

20

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24

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DR. CHAD C. GIBSON

Subscribed and sworn to before me this

___ day of ___, 2002, at ___,
Idaho.

Notary Public for Idaho
Residing at ___, Idaho.
My Commission Expires ___

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1 REPORTER'S CERTIFICATE
2 STATE OF IDAHO)
3 COUNTY OF CANYON) ss.
4
5 I, CAROLE A. WALDEN, Certified Shorthand
6 Reporter and Notary Public in and for the State of
7 Idaho, do hereby certify:
8 That prior to being examined, the
9 witness named in the foregoing deposition was by me
10 duly sworn to testify to the truth, the whole truth
11 and nothing but the truth;
12 That said deposition was taken down by
13 me in shorthand at the time and place therein named
14 and thereafter transcribed by means of computer-aided
15 transcription, and that the foregoing transcript
16 contains a full, true and verbatim record of said
17 deposition;
18 I further certify that I have no
19 interest in the event of the action.
20 WITNESS my hand and seal this 8th day of
21 November, 2002.

22

23

24

25

CAROLE A. WALDEN, CSR NO. 71
Notary Public in and for the
State of Idaho, residing in
Caldwell, Idaho.
My commission expires 10-29-2005.

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