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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 No. 31-11845
	)	
	)	AFFIDAVIT OF DAVID I. STANISH
	)	DATED NOVEMBER 27, 2006
Case No. 39576	)	
	)	
	)	
	)	
State of Idaho	)	
	)ss	
County of Ada	)	

DAVID I. STANISH, being first duly sworn, deposes and states:

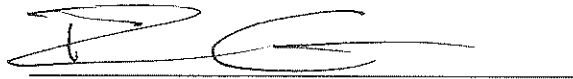
1. I am a deputy attorney general assigned to the Snake River Basin Adjudication. I am a competent adult over the age of eighteen years, and the statements made herein are based upon my own personal knowledge of the events described.

2. At the November 22, 2006 hearing held in the above-entitled matter, Special Master Bilyeu requested a copy of the transcript of Claimants/Objectors' witness, Bryce Contor.

3. On November 27, 2006, the Natural Resources Division of the Idaho Attorney General's Office received an electronic copy of the transcript of Bryce Contor.

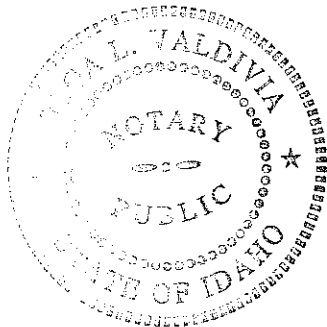
4. Attached to this Affidavit is true and correct copy of the *Transcript of the Testimony of Bryce Contor dated November 10, 2006.*

5. Further your affiant sayeth naught.



DAVID I. STANISH
Deputy Attorney General
Natural Resources Division

Subscribed and sworn (or affirmed) to before me, a notary public in and for the State of Idaho this 27th day of November 2006.



Notary Public for Idaho
Residing at Boise, ID
My Commission expires: 2/08/2012

CERTIFICATE OF SERVICE

I certify that on the 27th day of November 2006, I caused to be served the original and/or copy of this AFFIDAVIT OF DAVID I. STANISH DATED NOVEMBER 27, 2006 on each of the following persons by the indicated method.

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☒ Federal Express
- ☐ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Email: bbilyeu@srba.state.id.us
- ☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Ben D. Jernberg
Idaho Properties LLC
Represented by:
ROGER D. LING
615 H St.
PO Box 396
Rupert, ID 83350-0396

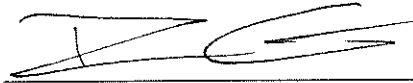
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Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



DAVID I. STANISH
Deputy Attorney General
Natural Resources Section

Transcript of the Testimony of **Bryce Contor**

Date: November 10, 2006

Volume: I

Case: In Re: SRBA, Case No. 39576

Reporter: Karla Steed, RMR, CSR

Printed On: November 27, 2006

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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

Case No. 39576

Subcase No. 31-11845

DEPOSITION OF BRYCE CONTOR

Friday, November 10, 2006, 9:00 a.m.

Idaho Falls, Idaho

Karla Steed,

RPR, RMR, CSR

DEPOSITION OF BRYCE CONTOR
 BE IT REMEMBERED that the deposition of BRYCE CONTOR was taken by the attorney for the Respondent, at the offices of T&T Reporting, 525 Park Avenue, Suite 1E, Idaho Falls, Idaho, before Karla Steed, Court Reporter and Notary Public, in and for the State of Idaho, on Friday, the 10th day of November 2006, commencing at the hour of 9:00 a.m., in the above-entitled matter.

APPEARANCES

For the Objector:

LING, ROBINSON & WALKER
 BY: MICHAEL P. TRIBE
 615 H Street
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 Rupert, Idaho 83350-0396
 (208) 436-4717

For the Respondent:

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- 1 (The deposition proceeded at 9:00 a.m. as follows:)
- 2 BRYCE CONTOR
- 3 produced as a witness at the instance of the
- 4 Respondent, having been first duly sworn, was
- 5 examined and testified as follows:
- 6 MR. STANISH: Okay. This is the deposition
- 7 of the claimant, objector's witness, Bryce Contor,
- 8 being taken in SRBA subcase number 31-11845. It's
- 9 being held at the offices of T&T Reporting, 525
- 10 Park Avenue in Idaho Falls, Idaho. Today's date
- 11 is November 10th, 2006.
- 12 Present in addition to Mr. Contor are myself
- 13 David Stanish, Deputy Attorney General for the
- 14 State of Idaho, David Barber, who is also a Deputy
- 15 Attorney General, Michael Tribe, attorney for
- 16 claimants, objectors and the certified court
- 17 reporter.
- 18 EXAMINATION
- 19 BY MR. STANISH:
- 20 Q Okay. Could you please state your name
- 21 and spell the last for the record.
- 22 A Bryce Contor. Last name C.O.N.T.O.R.
- 23 Q Okay. Mr. Contor, you were sworn to
- 24 tell the truth by the court reporter, correct?
- 25 A Yes.

1 Q Have you ever been deposed before?

2 A Yes.

3 Q When was this?

4 A I think about a year ago. It may have
5 been two years ago. It was in the fall. Either the
6 fall of 2004 or the fall of 2005.

7 Q That was the only time that you have
8 been deposed?

9 A Yes.

10 Q What kind of case was that?

11 A It was for the State of Idaho. I think
12 it had to do with the Seven Lower Valley claimants in
13 an aquifer water call. I don't know if this was
14 intended for a court case or if it was intended for
15 an IDWR hearing.

16 Q So you don't know if it was an SRBA case
17 or not?

18 A It was not a SRBA case.

19 Q Okay. Are you currently working for or
20 under contract for the State of Idaho in any other
21 capacity?

22 A I work for the University of Idaho Water
23 Resources Research Institute. We as an institute are
24 working for the State of Idaho.

25 Q Does your relationship with the State of

1 as an expert witness in this case?

2 A My understanding is that Mr. Tribe wants
3 to ask me a few questions about the work that I have
4 done. What the legal status of that is, you will
5 have to ask Mr. Tribe.

6 I don't know the difference between a
7 fact witness and an expert witness. So you will have
8 to ask Mr. Tribe that.

9 MR. STANISH: Okay. Well, at this point I
10 would like to voice an objection on the record to
11 Mr. Contor's testimony in this case.

12 For one reason, Mr. Contor's current position
13 with the State of Idaho may preclude him from
14 testifying against the State.

15 And if he is going to be offered as an
16 expert witness, we object on the basis that we
17 received no expert report on his behalf at this
18 point. And I would also like to reserve any other
19 objections to Mr. Contor's testimony.

20 Q Okay. Mr. Contor, I am going to ask you
21 a series of questions about your analysis of the
22 place that is associated with this water right,
23 number 31-11845. It's important that you understand
24 the questions that I ask and give accurate answers.

25 If there is anything that you don't

1 Idaho restrict or prohibit your ability to testify in
2 the matter against the State of Idaho?

3 A Well, I stopped doing this kind of work
4 specifically to avoid any conflict with the State of
5 Idaho. But this particular work I done for Jernberg
6 started a long time ago in 2003.

7 And so I agreed to testify what I have
8 done in the Jernberg matter. I will fully testify to
9 what I have done.

10 Q Okay. But you are not, you are not
11 really -- Do you know if your contract puts a
12 limitation -- Is there a clause in your contract that
13 does that?

14 A I have not seen the contract. I know
15 that yesterday Mr. Strong talked to my supervisor on
16 the phone. He is aware that I am giving this
17 deposition.

18 And he just wanted to know: Are there
19 other cases like this out there, old work, that I
20 have done that I maybe called to testify on.

21 He did not indicate to my boss that I
22 could not proceed. But he wanted to know what my
23 position is relative to this case and other work that
24 we're doing.

25 Q Will you be acting as a fact witness or

1 understand or anything that you don't know or are not
2 sure of, please let us know and we'll try to clear
3 that up.

4 A Okay.

5 Q And if at any time you need to take a
6 break, please let me know and we'll accommodate that
7 as well. Mr. Contor, what did you do to prepare for
8 this deposition?

9 A I looked briefly through this wad of
10 materials which is the reports that the State had
11 done, and also a report by Dave Shaw and Norm Young.
12 But I only spent a few minutes doing that.

13 I spent quite a bit of time going
14 through my own Jernberg files, both the computer
15 files and the paper files that I got. I went through
16 my field notebooks and looked at field notes that I
17 had taken.

18 Q Did you bring all those records and
19 documents with you?

20 A Yes.

21 Q Could we take a look at them.

22 A (witness complies) These are the field
23 books. There is other work in these books. The
24 places where the green stickies are the Jernberg
25 work. These are the back-up CD's of computer files.

1 One of these paper files has a CD in it
2 that I think is duplicated on these. This is the
3 soil survey of Jefferson County. This is a paper
4 list of the directories of those CD's and the notice
5 of taking of deposition.

6 This is a paper file from early in 2005.
7 It's got some faxes from Mr. Jernberg. Some paper
8 maps that I prepared for my own use. It's got a
9 letter here from Mr. Ling. Some e-mail
10 correspondence with Ray Williams, who is an IDWR
11 technician.

12 A CD that I think is duplicated on these
13 backups. E-mails from Mr. Tribe, or to Mr. Tribe.
14 This is -- Before I worked for Mr. Jernberg, Jim Rush
15 of Rocky Mountain Environmental worked for Jernberg.

16 I subcontracted some work under
17 Mr. Rush. This was the initial analysis of what was
18 the equivalent, beneficial use in acre feet per year.

19 That is the first work that I did. This
20 is the flow measurement that I did in the Spring of
21 2004 for Mr. Jernberg. This is the work that I did
22 for Mr. Jernberg directly in 2003.

23 And it is a more complete analysis of
24 the record of the water right examination and the
25 licensing -- the documents I found in the license

1 files and my analysis of equivalent irrigated
2 acreage; which at that time is what I understood that
3 IDWR had asked Mr. Jernberg to prepare.

4 Q These are materials that I prepared
5 prior to going to the field with Mr. Barber and
6 Mr. Tribe and Mr. Jernberg and Candice McHugh.

7 This is a copy of the affidavit that I
8 signed for Mr. Tribe. That is the extent of the
9 pile.

10 MR. STANISH: Well, I guess so we can move
11 along with this, I am going to let David take a
12 look through those for us.

13 MR. TRIBE: We got some issues with that.
14 It's work product and privilege. I think
15 everything else we discussed and have put either
16 in reports that we have -- Would be comfortable
17 with the rest of that being looked at. I think
18 that is fine.

19 THE WITNESS: I think I am comfortable with
20 that. These. (indicates)

21 MR. STANISH: Everything but that?

22 MR. TRIBE: Yes. What about the letter from
23 Roger?

24 THE WITNESS: That was in the --

25 Q Now, are these all the records and

1 documents pertaining to the proceedings in water
2 right number 31-11845.

3 A They are all that I could find. Since I
4 started working for Mr. Jernberg, I have had my
5 computer operating system reinstalled, and we have
6 moved. I did a second measurement for Mr. Jernberg.

7 I did the measurement in the Spring of
8 2004. His pump subsequently failed. After it was
9 repaired, I did a subsequent measurement. And I have
10 not been able to find any of the records of that
11 subsequent measurement. So they are not in here.

12 Q When did you do that measurement?

13 A It was either in the fall of 2004 or the
14 spring of 2005. I believe it was the fall of '04.

15 Q Have you ever returned any records or
16 documents back to the claimants, objectors or
17 their attorneys?

18 A There was a map. Mr. Jernberg had
19 worked on the map. And the Llamases had worked on
20 the map. And I did some analysis based on the map
21 and made some of my own maps. I think I returned
22 that probably to either Mr. Tribe or Mr. Jernberg.

23 There is probably a photocopy of it in
24 here. But I think the original map I did return.

25 Q Have you reviewed -- You said that you

1 reviewed some of the expert reports. Which ones are
2 those?

3 A They are in this envelope. And I think
4 "reviewed" is too strong a word. I thumbed through
5 them.

6 Q Okay. Well, I guess David can look at
7 those as well. I would like to talk a little bit
8 about your background.

9 A Okay.

10 Q Do you want to tell me a little bit
11 about your education.

12 A I got an Associates Degree in Farms
13 Crops Management. I got a one-year certificate in
14 Water Resources. I got a Bachelors Degree in
15 Agricultural Economics and a Masters Degree in
16 Hydrology.

17 Q Turning to your Bachelors Degree, where
18 did you get that from?

19 A Brigham Young University.

20 Q When did you graduate?

21 A I think it was '94.

22 Q Okay. And I am sorry. What was the
23 title --

24 A Agricultural Economics.

25 Q What kind of studies did that involve?

1 A Farm policy studies. Mathematics. Just
2 basic economics.
3 Q Okay. And your Masters Degree in
4 Hydrology that was at --
5 A University of Idaho.
6 Q University of Idaho?
7 A Yes.
8 Q And what kind of studies did you do
9 while you were there?
10 A It was mostly ground water hydrology.
11 Surface ground water interaction. I took a course in
12 modeling. Took a course in Surface Water Hydrology.
13 A number of courses in Ground Water Hydrology.
14 Pumping analysis. Some work in statistics.
15 Q And what was your thesis on?
16 A It was on evapotranspiration. I did
17 what is called a non-thesis masters.
18 Q You had a project?
19 A I did have a project yes.
20 Q And where was -- Was there a particular
21 area that you were looking at?
22 A The Eastern Snake Plain aquifer water
23 was the study area.
24 Q What kind of conclusion did you come to?
25 A Well, I came to the conclusion that for

1 sprinkler irrigated land that evapotranspiration
2 under current practices is typically a little bit
3 higher than the table values that were prepared in
4 the 60's and 70's, mostly on plots that were gravity
5 irrigated.
6 And what I did was, this was in
7 conjunction with work I was doing with the
8 university. We had put together a procedure for
9 calculating evapotranspiration over wide areas using
10 remote sensing data. I concluded that our procedures
11 were adequate for the type of modeling that we were
12 doing.
13 Q And you said that there is probably a
14 problem with the tables that they were using? In
15 what way were they incorrect?
16 A Well, they were not incorrect. It was
17 simply that modern practices have about five percent
18 more evapotranspiration than the practices that were
19 current at the time the tables were prepared.
20 Q And you were talking about a
21 certification that you had. Could you explain that.
22 A Yes. The College of Southern Idaho
23 offered a one-year certificate in Water Resources. I
24 took a course in soils, a course in irrigation, a
25 course in flow measurement, and a course in policy.

1 There was one more course. Those are
2 the four that I remember.
3 Q That was through the Environmental
4 Sciences Program?
5 A Well, it was the College of Southern
6 Idaho. I think it was called the Water Resources
7 Program.
8 Q And when did you get that certification?
9 A Ninety-six.
10 Q Could you please describe the job that
11 you had during the time periods from '90 to '95. I
12 think on your C.V. it indicates you were employed in
13 Production Agriculture in Oregon and Idaho?
14 A In '90, '91 and '92 I owned a farm in
15 Howe, Idaho. Summer of '93 I worked for a fertilizer
16 outfit in Moscow. I was -- I graduated from Brigham
17 Young University, but I actually completed my course
18 work at Moscow.
19 Summer of '93 I worked for a fertilizer
20 outfit. Summer of '94, I worked for a seed company
21 out of California. I worked for PETO Seed. That is
22 who I worked for.
23 In '96, the first part of '96 I worked
24 for the State of Idaho, Department of Ag. doing
25 chemigation valve inspections to make sure that when

1 farmers put chemicals or fertilizer into the water it
2 does not return to the source.
3 While I was doing that, I was serving an
4 unpaid internship with Idaho Department of Water
5 Resources in the Water Measurement Program. And when
6 I completed my Department of Ag. work, then I went to
7 work for IDWR as an employee.
8 The Summer and fall of '96 in the Water
9 Measurement Program. Through the winter of '96, I
10 worked as a file clerk in the adjudication. Starting
11 in the spring of 1997, I went to work for the North
12 Water Measurement District. It was kind of
13 convoluted.
14 The Water Measurement District had
15 contracted with Water District 1, which contracted
16 with IDWR. So the legal status of whom my employer
17 was I don't know.
18 But I did water measurement in the Mud
19 Lake area. Measured discharge of wells. Some
20 surface water measurement, but mostly of wells. I
21 did that in 1997, '98, the first part of 1999.
22 Q Maybe you could talk about your work as
23 a senior water resources agent for IDWR. What did
24 you do for them?
25 A I reviewed adjudication claims and

1 prepared recommendations.

2 Q What did that entail?

3 A It entailed a little bit of field work.

4 I prepared recommendations, and I
5 reviewed adjudication claims. There was some field
6 work. I verified place of use, capacity of diversion
7 works, beneficial use. Most of what I did was GIS
8 analysis of aerial photography, preparation of maps
9 of recommended place of use and then review of
10 documentation to recommend the other elements of
11 water rights.

12 Q And when you said you were on the
13 ground, what kind of stuff did you do to confirm or
14 verify place of use or beneficial use?

15 A To confirm place of use, I would
16 literally walk the place of use with a GPS unit and
17 topographic maps. To verify beneficial use, I would
18 make sure that diversion works were in place.

19 If it was during the irrigation season,
20 that water was being applied. If it was not during
21 irrigation season, if it looked as though water had
22 been applied.

23 Q What kind of criteria would you use to
24 say that the water had been applied?

25 A Well, there is a book that IDWR has

1 called The Claims Verification Manual. I have not
2 been able to obtain a copy of that. But I tried my
3 best to follow the guidelines that were outlined in
4 that book.

5 The standard that we were instructed
6 was: The evidence should tend to indicate. So, if I
7 saw a dam in a ditch and I saw water running on the
8 ground, then there was irrigation occurring.

9 If I saw the ditch was in place and it
10 appeared that it had been in use since the
11 commencement of the adjudication, which was '87, and
12 if the topography looked reasonable to accommodate
13 water and if there were testimony or affidavits from
14 folks who had personally observed irrigation; then I
15 would generally recommend irrigation based on the
16 instructions that I had received.

17 Q I guess moving on to your time as Senior
18 Scientific Aide of IDWR, what did you do in that
19 position?

20 A I was actually not a scientific aide
21 with IDWR. I was with the Idaho Water Resources
22 Research Institute. I was hired specifically to work
23 on the water budget for an aquifer modeling project.

24 In addition, I have done work on a
25 ground water banking project with the Bureau of

1 Reclamation. I worked on another evapotranspiration
2 study with the USGS.

3 I am working on an aquifer model in the
4 Spokane Valley Rathdrum Prairie Aquifer. I am not
5 doing the modeling, but I am working on water budget
6 items for that. I think that is all that I have done
7 for the university.

8 Q What is your specific role in those
9 projects?

10 A The specific role in the Eastern Snake
11 Plain Aquifer Model and Project was to work with
12 Donna Cosgrove and Jim Oakley who was with the Bureau
13 of Reclamation -- he is now with the University of
14 Wyoming -- on the conceptual model of how do we
15 represent the inputs and the outflows to the aquifer.

16 Things like precipitation that falls on
17 the plain -- and some of that becomes aquifer
18 recharge. When surface water is diverted for
19 irrigation, some of that becomes aquifer recharge.

20 When canals leak, that leakage becomes
21 aquifer recharge. I worked with Donna and Jim to
22 conceptualize how we would represent that. Jim wrote
23 software. I worked closely with Donna and Jim to
24 design the structure that that software would take.
25 I supervised the people who gathered the data to

1 populate this computerized process.

2 I gathered some of the data and analyzed
3 some of the data myself. When the model was complete
4 and we went on to performing scenerios, I did a lot
5 of the work in the scenerios, both in conceptualizing
6 how the scenerio should be constructed and
7 determining the methods to be used.

8 Then actually providing the work,
9 finding the data, grooming the data, populating the
10 data and running the data through the process to get
11 output.

12 Q All right. I guess moving on to your
13 current position with Water Resources Field Services
14 LLC, what is your role within the organization?

15 A Well, I am the former sole employee and
16 owner. What happened was about two years ago it
17 looked as though my role at the university was
18 finished. I was hired initially to work on this
19 Snake Plain Project.

20 Then the understanding was that I would
21 find other employment. And about the time that that
22 was ending, Dave Tuthill approached me at IDWR and
23 asked if I would like to on a contract basis perform
24 additional field examinations for the Snake River
25 Basin Adjudication.

1 And so I formed this little company to
2 do that. I did some transfer analysis for private
3 contractors. In the spring of 2005 we agreed to
4 provide additional support for IDWR related to these
5 contested cases.

6 At that time I began passing off my
7 clients to other folks and turning down work. So
8 other than just finishing up loose ends, such as
9 this, I am inactive in that role.

10 Q Okay. Is it under that organization
11 that you were hired by the Jernbergs?

12 A Yes.

13 Q Okay. How do you explain your current
14 position -- Is it like a contract research
15 hydrologist with IDWR?

16 A My current position is as a researcher
17 with the Idaho Water Resources Research Institute.
18 But one of our roles currently is to provide support
19 to the Department of Water Resources.

20 And as the institute provides support to
21 the department, I am assigned specific tasks at the
22 request of the department or at the request of my
23 supervisors.

24 Q Moving to the specifics of your
25 involvement in this case, who first approached you

1 may describe what he did. I can't tell you right now
2 what it was that he had done.

3 Q Did you know the Jernbergs or any other
4 representatives of Idaho Properties LLC before you
5 were contacted by Mr. Rush?

6 A The employees, the Llamases were in the
7 community. I lived near the Llamases. My wife
8 worked with Mrs. Llamases. I had spoke with Ben on
9 the phone in my role as an employee of the Water
10 Measurement District.

11 As an employee of the Water Measurement
12 District, I inspected the pumps. I never measured
13 them myself in my role with the Water Measurement
14 District.

15 Q Okay. Did you ever actually meet the
16 Jernbergs or the Llamases?

17 A I met the Llamases when I went to their
18 home to review the maps that the Llamases had
19 provided. I met Ben when Ben and Mr. Barber and
20 Mr. Tribe and Ms. McHugh and Mr. Fritschle and Mr.
21 Diehl and I went out to the place of use.

22 Q Okay. Were you familiar with the
23 Jernberg property itself before you were first
24 contacted by Mr. Rush?

25 A In the Water Measurement District, we

1 regarding this matter?

2 A Jim Rush.

3 Q And what was the purpose of that
4 contact?

5 A Jim Rush was preparing a transfer
6 analysis, and IDWR had requested an analysis of the
7 equivalent beneficial use of the 663 acres. And it's
8 in the analysis -- The first paragraph gives the
9 exact question that Jim asked me to answer.

10 I believe what Jim was asked by IDWR to
11 provide and what Jim subcontracted to me was to
12 calculate the equivalent annual volume for the water
13 use described by those strange remarks that we refer
14 to the 663 acres.

15 Q Okay. Do you know what his -- What he
16 had done before he had contacted you?

17 A He had run the spreadsheet analysis tool
18 to determine the requirement for mitigation. And he
19 was looking at providing mitigation by ceasing the
20 use of water under this water right.

21 And he came up with an equivalent
22 reduction in irrigation that needed to be done for
23 this transfer that he was trying to pursue.

24 I don't know what else he had done.
25 There is some documentation in the file there that

1 did not concentrate on place of use. However, there
2 is a road that goes through the middle of the
3 Jernberg property. I travelled weekly on that road
4 for the three years that I was with the Water
5 Measurement District.

6 And so I was -- What I could see from
7 the road I was familiar with.

8 Q Okay. And I guess as I continue on, I
9 may use the phrase "the Jernberg property". And what
10 I mean by that is the 663 acres that are, you know a
11 claim as a permissible place of use on your water
12 right 31-11845.

13 A Okay.

14 Q What is your understanding of the
15 history of the water rights that are connected with
16 that Jernberg property and the larger Jernberg
17 property?

18 A There is a 2000 series water right or
19 maybe two that were I suppose developed in the 60's
20 or 70's. The dates are in there. I don't recall
21 them. They covered part of the land that is south of
22 the road that is part of the 663 acres.

23 And then there was a 7,000 permit.
24 There was a licensing exam performed for that permit
25 in '86 by IDWR. And then there was 11 years of

1 internal questioning on the part of IDWR of what
2 should be done about that.

3 A license was issued. My understanding
4 is that as part of the SRBA that license was,
5 something happened to that license. So now
6 31-11845 -- I think what happened was the license was
7 split. And the part of that 663 acres, that is now
8 what you would call developed land, received a
9 recommendation.

10 And then 11845 is intended to answer the
11 question of what should be done with the rest of that
12 parcel. That is my understanding. It may not be
13 correct.

14 Q Okay. What is your understanding of the
15 history of irrigation practices on that property?

16 A The 663 acres south of the road, in '86
17 my understanding from the IDWR field examiner, was
18 entirely irrigated. At that time, part of it was
19 improved or cultivated land.

20 Part of it was more of what you would
21 call a native irrigated pasture. The Llamases
22 indicated that for some period of time after '86 that
23 practice continued. I don't know how long that
24 continued.

25 In the 90's when I worked for the Water

1 analysis that IDWR had requested. And then this last
2 summer I was on the field trip with the others that
3 we talked about.

4 MR. STANISH: I would like to have this
5 marked as Exhibit 1.
6 (exhibit 1 marked)

7 Q Mr. Contor, I am showing you -- You are
8 looking at what was marked as Deposition Exhibit 1.
9 Is that an accurate copy of the map that you supplied
10 with your affidavit in support of the Motion for
11 Summary Judgement in this case?

12 A It looks like it. I don't have the
13 other one side by side to compare. But it looks like
14 it is.

15 Q Okay. And is that an accurate
16 representation of your understanding of the ditch
17 system on the Jernberg --

18 A Yes.

19 Q -- property?

20 A Yes.

21 Q You said that in the spring of 2005 you
22 walked the area beyond the road?

23 A Yes.

24 Q Have you ever walked the ditches?

25 A Yes.

1 Measurement District, I know that the ditch going
2 south under the road was often full nearly to
3 overflowing.

4 I know that from the road I could see
5 robust crops that had to have been irrigated on at
6 least the improved part of that land south of the
7 road.

8 Q Besides the time that you travelled the
9 road in your capacity with the Water Measurement
10 District, how many times did you actually visit the
11 Jernberg property for other reasons?

12 A Four.

13 Q When was that?

14 A In the spring of 2004, I performed the
15 measurement that I do have records for. In either
16 the fall of 2004 or the spring of 2005 -- Well,
17 actually that was two visits, because I went once to
18 install the ports. Then I went back later to perform
19 the measurements.

20 So it was twice in the spring of 2004.
21 In the fall of 2004 or the spring of 2005, I went
22 back to perform the second measurement. In the
23 spring of '05, I walked the entire south place of use
24 at Mr. Jernberg's request.

25 He wanted me to perform some additional

1 Q With this blue marker please mark which
2 ditches that you actually walked at that time.

3 A (witness complies) I walked this ditch
4 and I walked in this area.

5 Q At this point I am just going to ask you
6 which ditches you walked. We'll get to where you
7 walked outside the ditches.

8 A Well, what I am trying to say is I
9 walked this area and I observed this ditch. I can't
10 tell you -- I can't remember now if I walked the
11 ditch bank or if I walked beside the ditch in the
12 field.

13 But I am trying to give you a thorough
14 answer.

15 Q If you walked beside the ditch, go ahead
16 and mark it as well.

17 A (witness complies) This was in the
18 spring of 2005.

19 Q Okay. And are those all the ditches
20 that you walked to the best of your memory?

21 A In 2005. In 2006 we walked some
22 additional ditches here.

23 Q Okay.

24 MR. STANISH: Could I have this marked.
25 (exhibit 2 marked)

1 Q Mr. Contor, I am going to give you what
2 was marked as Exhibit Number 2. And I guess on the
3 side of that could you mark on Exhibit Number 2 the
4 date that you -- of your second visit.

5 A (witness complies)

6 Q Could you do the same for Exhibit Number
7 1 when you made the walk.

8 A (witness complies)

9 Q Back to Exhibit Number 2. Could you
10 please mark on the map which ditches that you walked
11 during that visit.

12 A (witness complies) I am going to put a
13 circle here with a question mark. We stopped here.
14 I don't recall how much we looked at here.

15 MR. STANISH: Lets mark this.
16 (exhibit 3 marked)

17 Q Mr. Contor, this is Exhibit Number 3.
18 This is the same map that you were looking at or a
19 copy?

20 A Yes.

21 Q In the spring of 2005 during your visit,
22 could you please write that on the side of the map
23 for me.

24 A (witness complies)

25 Q I am going to ask you to mark where you

1 walked during your visit beyond the ditches, so
2 outside of the ditches.

3 A (witness complies) I am going to go
4 back to this spring of 2005 ditches. I am going to
5 add a line here.

6 Q Okay. Now back to Exhibit Number 3.
7 Some of the lines that you have drawn are not exactly
8 connected. I guess, how did you access these two?
9 If you could mark that as well.

10 A If I do that it would be a combination
11 of Exhibit 1 and Exhibit 3. Because when I was not
12 walking along the ditch, I was walking some place
13 else.

14 Q Okay. All right. That is enough then.
15 And I guess we're going to do the same thing for your
16 visit in 2006.

17 MR. STANISH: Please mark this.
18 (exhibit 4 marked)

19 Q I am handing you Exhibit Number 4.
20 Again a map. And if you could mark on that map the
21 places where you walked outside the ditch system on
22 your visit in 2006.

23 A (witness complies)

24 Q If you would not mind, could you just
25 label it there for me.

1 A (witness complies)

2 MR. STANISH: Just for the record Mr. Contor
3 is marking summer of 2006.

4 Please mark this.

5 (exhibit 5 marked)

6 Q Mr. Contor, this is yet another copy of
7 that map. On this map I would like to ask you if you
8 have ever seen water actually flowing in any of these
9 ditches?

10 A Okay.

11 Q And I am going to ask you to mark on
12 this map which ditches you have actually seen with
13 your own eyes water flowing through.

14 A (witness complies)

15 Q And let me stop you for a minute. I
16 understand that you have seen water flowing through
17 the main ditch on many occasions. Have you ever seen
18 water flowing through any of the other ditches
19 besides this main ditch that parallels the road?

20 A I don't know. And the reason I say that
21 I don't know is during the years when I was
22 travelling this road, if there had been water flowing
23 in any of these ditches under the road, I would have
24 seen it.

25 But I would not have had any cause to

1 particularly make note of it.

2 Q Okay. Well, to the best of your memory
3 could you please mark on the map the ditches that you
4 actually remember seeing water in.

5 A I seen water in the main ditch coming
6 under the road at the northeast corner of the
7 property.

8 Q Do you remember seeing water any where
9 else in that ditch or the other ditches?

10 A From the road you can't see any of the
11 other ditches, so I would not have had an opportunity
12 to know?

13 Q Okay. And I am going to ask you on
14 Number 5 to just maybe label it as water I have seen
15 inside in the ditches.

16 A (witness complies)

17 Q Now, you have been driving by the ditch
18 system for a long time. Have you noticed any changes
19 to the ditch system?

20 A No.

21 Q At this point I would like to turn to
22 your affidavit offered in support of the claimants,
23 objectors Motion for Summary Judgment. I would like
24 to have the court reporter mark this as exhibit
25 number mark --

1 THE COURT REPORTER: Six.
2 (exhibit 6 marked)

3 Q Go ahead and take a look through that
4 and confirm that it is an accurate copy of your
5 affidavit --

6 A (witness complies)

7 Q -- and the attachments there to.

8 Have you had a chance to look over
9 Exhibit Number 6?

10 A Yes.

11 Q And is that an accurate copy of the
12 report that you provided?

13 A It appears to be.

14 Q I would like to turn your attention to
15 the map that is included in your affidavit, which is
16 marked as Exhibit C. to the affidavit.

17 A Okay.

18 Q How did you produce this map?

19 A I had a paper map that the Llamases had
20 marked. They had marked their understanding of the
21 ditch system and their understanding of the flow
22 directions.

23 Then I had aerial photography that is
24 underlying. I had the GIS of the IDWR water rights.
25 Then I had my field notes and my photographs from

1 walking the field.

2 I used all of those in preparing both
3 the polygons of irrigated land and the lines that
4 show the ditches and the direction that the water
5 flowed from the ditches.

6 Q Have you personally seen any water --
7 You said you haven't seen any in the ditches. Have
8 you seen water actually I guess covering those areas
9 that are shown in that picture?

10 A I have seen water on the north side of
11 the road. But I don't believe that is part of the
12 land in question.

13 Q When you say the "north side", are you
14 referring to what is marked --

15 A Parcel A. and Parcel F.

16 Q Okay.

17 A I also seen robust crops in Parcel B.,
18 that in that desert climate could not have been there
19 without adequate irrigation.

20 Q Turn back to the analysis that you did.
21 What did you do to prepare that analysis that is
22 provided in your affidavit?

23 A I spent quite a bit of time reviewing
24 the adjudication files and the water right files that
25 I got from Eastern Region. And I did the

1 calculations based on those documents and
2 particularly the information from Mr. Jernberg that
3 was in those documents.

4 These things that Mr. Barber was looking
5 through, basically are the paper trail of the process
6 that I went through.

7 Q When you said you did calculations.

8 What kind of calculations did you do?

9 A I calculated the pumpage volume that was
10 indicated by the flow rate found by the IDWR examiner
11 combined with the pumping hours reported by
12 Mr. Jernberg to IDWR at IDWR's request.

13 I calculated the flow volume based on
14 the IDWR flow measurements. And I had gotten a
15 clarification from Mr. Jernberg, the report of
16 pumping that he reported to IDWR was pretty brief.
17 Based on that clarification, I calculated the volume.

18 Based on the USGS indication of the
19 consumptive use capability of typical Idaho range
20 land. I calculated the consumptive use that would be
21 required under full irrigation.

22 And based on an assumption of irrigation
23 efficiency, I calculated the volume that would be
24 required to provide that level of consumptive use
25 based on the North Water Measurement District

1 estimates.

2 I never did find a measurement that was
3 actually performed by the Water Measurement District.
4 But based on the estimate from the Water Measurement
5 District, I calculated the depth implied by those
6 volumes.

7 Q When you said you calculated the amount
8 of consumptive use that would be required for the
9 land that is out there in the uses and practice, how
10 is that represented in your affidavit?

11 A Let me look here. Item Number 6 in
12 2003. I performed an analysis of equivalent
13 beneficial use. That analysis went into Item Number
14 6.

15 Q How did you use it in coming to that
16 number of 663 acres?

17 A The 663 acres was given by the IDWR
18 water rights examiner. My understanding of the work
19 that I did in 2003 was that in order to convert that
20 to a volume -- Remember, this was the work I did for
21 Mr. Rush in 2003.

22 My understanding was that Mr. Rush was
23 seeking to apply this water right as mitigation for
24 some other transfer that he was working on. I was
25 not a party to whatever that other transfer was.

1 IDWR had said they wanted an analysis of
2 the equivalent beneficial use of applying whatever
3 the diversion rate was to those 663 acres.

4 Q Okay. Have you done any other
5 beneficial use analysis on any other ranches or farms
6 in the Mud Lake region?

7 A Yes.

8 Q And how many of those have you done?

9 A A hundred. A hundred fifty. I don't
10 know the exact number.

11 Q To your knowledge, do any other ranching
12 operations in the area apply ground water to native
13 vegetation?

14 A Yes.

15 Q Do you know which ones?

16 A The original owner I think was Sanders.
17 He sold to a man named Brown. I believe that that
18 water right has since been transferred to a new
19 location.

20 But when I was with the Water
21 Measurement District, they were still irrigating
22 that, that piece of ground. It's about eight miles
23 east of Jernbergs.

24 Q And how were they irrigating it?

25 A With a sprinkler.

1 Q Is that the only other situation that
2 you are familiar with that is similar to this?

3 A In the north end of Birch Creek Valley,
4 I recommended a water right where surface water was
5 applied through ditches to very similar land.

6 Q And do you remember a name associated
7 with that?

8 A I don't remember the name. I can tell
9 you where it is.

10 Q Go for it.

11 A As you go up Birch Creek Valley, there
12 is a little windmill. There is a big tank. On the
13 side of the tank is painted Petticoat Junction.
14 About a half mile south of that there is a road that
15 goes off to the east up into a canyon. It was that
16 piece of ground.

17 Q And do you know how big that piece of
18 ground was?

19 A There were several parcels. Three or
20 four parcels of 40 or fifty acres each, as I recall.

21 Q At this point I would like to turn --

22 A There is another one.

23 Q Go ahead.

24 A George Woody property at Birch Creek.

25 Q What kind of irrigation was used in that

1 situation?

2 A The same thing: Flood irrigation.

3 Q To irrigate native vegetation?

4 A Yes. What we would call rough pasture.

5 Q Are those the only two examples that you
6 can think of?

7 A I haven't done the exams on them. But
8 driving up Medicine Lodge Creek, I have seen a
9 similar practice. When we went to the IDWR training
10 we were told about a similar situation in the Big
11 Loss.

12 You know it's one of these things, the
13 longer it has been, the better I remember things
14 whether I have seen them or not. I have a mental
15 image in my mind. I don't know if it's from a
16 photograph or from a description of the fellow who
17 did the exam.

18 But I have images of tall sagebrush and
19 a cow bone laying at the foot of the sagebrush.

20 Q What was the purpose of presenting this
21 example?

22 A We were being instructed on how we
23 should proceed with claims of a similar nature.

24 Q And what were you told?

25 A We were told that the SRBA Court had

1 said that applying water to cause native vegetation
2 to grow is a beneficial use and it should be
3 recommended as irrigation.

4 Q Was it to be recommended without
5 qualification or --

6 A The ones that I did, the ones in Birch
7 Creek with knowledge of my supervisor I recommended
8 that the standard diversion rate per acre per the
9 IDWR tables -- We had tables by region.

10 There may have been an adjustment to
11 increase the diversion rate because of irrigation
12 efficiency and conveyance laws. But I can't remember
13 if I applied that in that particular case or not.

14 Q Okay. Okay. Well, at this point I
15 would like to turn your attention to the wells
16 themselves that service the Jernberg property or
17 water right number 31-11845. How many times did you
18 visit these wells?

19 A At least five.

20 Q And do you know when?

21 A In 1997 or perhaps early '98 I visited
22 them as part of my Water Measurement District work to
23 get a GPS location and the size and horsepower
24 information.

25 Q What was the purpose of that visit?

1 A The purpose of that visit was to -- We
2 had been tasked in the Water Management District to
3 inventory all the wells in the district to determine
4 appropriate measurement methods to make sure where
5 the wells were where the water rights said they were.
6 To find data that we could use for theoretical
7 calculations of volume pending the opportunity to get
8 out and actually measure the flow.

9 Q Okay. And that first time, do you have
10 any records of that visit? Do you remember anything
11 about the wells at that point?

12 A My exam is in one of these documents.
13 And you can get it from the North Water Measurement
14 District. Two wells open discharge to a ditch,
15 electric motors.

16 In one of my communications to
17 Mr. Jernberg, I noted that the motors still had the
18 same serial numbers that I recorded in 1997 or '98.

19 Q Okay. Maybe before we go any further:
20 If you could take a look through this folder and
21 point out the documents that pertain to these wells.
22 That would be helpful.

23 A (witness complies)

24 Q If you want to pull them out, that way
25 we can make copies of them.

1 A Everything in this file pertains to the
2 Jernberg place and these two wells. What I am going
3 to pull out now are the Water Measurement District
4 documents pertaining to those wells.

5 These documents are the Water
6 Measurement District records. There are some
7 penciled notes on here that I added after making
8 these copies from the Water Measurement District.
9 But these are the documents.

10 MR. STANISH: Could we have this marked.
11 (exhibit 7 marked)

12 Q Mr. Contor, you have in front of you
13 Exhibit Number 7. Could you explain to me what this
14 is.

15 A This looks like a copy of the materials
16 that I copied from the North Water Measurement
17 District files for the two Jernberg wells.

18 Q Starting at the first page of Exhibit
19 Number 7, walk me through what you have here.

20 A Okay. This first page is an estimate
21 that was done in 1997 or '98 for the volume pumped by
22 the Jernberg wells. The first diversion, 7 north, 34
23 east, 10 southeast of southwest is one of the two
24 wells in question.

25 That was one of the issues that we had

1 in the Water Management District, not all wells were
2 included. We only reported wells that were on the
3 data. That indicates that based on an estimated
4 power of consumption coefficient -- that was
5 theoretically calculated based on a map of depth to
6 water and the data I obtained in the field.

7 We estimated that pump would have
8 produced 2,640 acre feet. The other well, you see
9 it's in a different section. That was just a
10 domestic and stock well at the ranch headquarters.
11 That is what this first sheet is.

12 Q Could you describe one more time what
13 went into your estimation of the PCC.

14 A The power consumption coefficient is the
15 number of kilowatt hours it takes to pump an acre
16 full of water. It could be calculated theoretically
17 from the total dynamic head. The amount of
18 resistance the pump has to push against.

19 In this case where it's an open
20 discharge pump, it's the lift of the water and the
21 friction in the column and the estimated efficiency
22 of the pump.

23 From those two data you can calculate
24 theoretical power consumption coefficient. Then
25 based upon the power consumption coefficient, the

1 total kilowatt hours of electricity used, you can
2 calculate a pumping volume.

3 Q Where did you get the data to plug into
4 the estimation.

5 A The pump efficiency estimate, we just
6 used a rule of thumb based on research by the USGS.
7 They came up with a statistical distribution of a
8 large number of pumps that they had actually measured
9 the efficiency on.

10 The depth to water came from a regional
11 aquifer map. I had it there in the Water Measurement
12 District files. I can't tell you what the source of
13 that map was.

14 Q Okay. Moving on to the second page of
15 Exhibit Number 7. Explain what this is.

16 A The cover sheet -- the Water Measurement
17 District files have one leaf in the file. They are
18 multi-leaf files. They have one leaf for each point
19 of diversion. And this is the cover sheet for the 75
20 horse power point of diversion.

21 One of these wells was identified as the
22 75 horse well and one was identified as the 100
23 horse. Everything behind this, until we get to
24 another similar cover sheet, will be that 75 horse
25 well.

1 Q Okay. Is this the eastern well or the
2 western well?
3 A I don't. We maybe able to figure it
4 out by looking through here. But right now I could
5 not tell you.
6 Q Okay. Moving on to the next page. The
7 PCC exam.
8 A Yes. This was an attempted measurement
9 done by Steve Heaton in June of 2000. Down here at
10 the bottom: Changes to system, yes, no, notes.
11 Mr. Heaton wrote: Pipe not full at time of exam.
12 The instrument he was using can't give
13 an accurate measurement if the pipe is not full.
14 That is why there are no flow -- There is no record
15 of a measured flow on this sheet.
16 Q Okay.
17 A So it was a failed attempt at
18 measurement.
19 Q Okay. So not much there. How about the
20 next page.
21 A That is the photocopy of the print-out
22 from his instrument. So it is basically
23 meaningless.
24 Q Turning on to the next page.
25 A That is my report of the field exam I

1 did. It looks like I did it in January of '98.
2 These are the data that I recorded at the site.
3 Q Okay. And at the bottom of that page
4 there is a note there. Could you explain that note.
5 A The note says: Field V.I.W.A.W. should
6 be blank.
7 Q Correct.
8 A Okay. Sometimes when there are two
9 wells close to each other they run off one power
10 meter. In that case we calculate the pumping of
11 volume and assign it to arbitrarily to one of the
12 wells.
13 The Water Measurement District
14 calculates the volume for the two wells since the
15 volume is based on power consumption. Assigns it
16 arbitrarily to one of the wells.
17 And then in the data base field
18 V.I.W.A.W. -- It stands for Volume Included with
19 Another Well. You put the I.D. of the well for which
20 the volume was recorded.
21 In this case I wanted to be sure that
22 the data entry person left that field blank. That
23 probably means each well had its own power meter, but
24 I can't remember for sure.
25 Q That was going to be my next question.

1 The second page to your field exam --
2 A Yes.
3 Q -- there is some symbols here along,
4 that describe under the pumping plant sketch. What
5 do those mean?
6 A Well, those were guidance to the field
7 technician. I put a photograph there. But if
8 instead of putting a photograph I had done a sketch,
9 those would have been the symbols that I would have
10 been guided to use.
11 I did not do a sketch, so I did not use
12 any of those symbols.
13 Q Okay. Is this the well closer, or the
14 one that is kind of up into the field as compared to
15 the one that is down --
16 A Yes. This would be the, what I would
17 call the southeast well.
18 Q Okay. Field Exam Page 3. Is there
19 anything of significance on this page that you see?
20 A No.
21 Q And this just describes the make and
22 model and horsepower of the well out there?
23 A Yes.
24 Q Page 4. It says at the very top:
25 System type O.D. What does that mean?

1 A Open discharge.
2 Q Okay. The next page that we're looking
3 at is entitled Water User Interview Sheet. Could you
4 explain what you have here.
5 A Yes. In May of 1997, I talked to
6 someone from Jernberg's firm. May have been Ben
7 himself. It may have been one of the Llamases. I
8 did not record who I talked to. I should have put it
9 down.
10 And these notes are notes that I took
11 during the discussion. I proposed using an adjusted
12 PCC measurement method. I proposed actually going to
13 the field in '98 or 1999. Jernberg had indicated 30
14 or 40 feet of lift in open discharge pump.
15 Falls off some, means that later in the
16 season his production declines. Then here are the
17 three water right numbers that my records indicated
18 were associated with those two wells. And the
19 authorized diversion rate for each of those.
20 Then I note here see AJ claim 2 POD's.
21 My records indicated there was only one well. But
22 looking at the adjudication claim, it appeared there
23 were two. And then here's a note: Put all the acre
24 feet on this record 3,158. Volume included with
25 another well equals Y. for the new record.

1 At the time I assumed they both would be
2 on the same power meter. Then I identified the new
3 record and I assigned a record number. And the
4 identification was 60-horsepower.

5 When I got out there, obviously, it was
6 a 75-horsepower. But that is what that means. That
7 is my notes from my interview with Mr. Jernberg or
8 one of his employees.

9 Q Sixty is what they had represented to
10 you. But it was actually 75-horsepower?

11 A Yes. And the 60 may have -- Well, I
12 suppose it came from them.

13 Q Okay. The next page is just the cover
14 page to the second well?

15 A Correct.

16 Q And again, there is another PCC exam.
17 What does this say?

18 A Down in the lower right corner
19 Mr. Heaton again makes a note: Unable to get
20 reading. Need to obstruct opening to fill conduit.
21 Then at the bottom he has asterick: Measurement not
22 complete. Pipe not full.

23 So this was another failed attempt at a
24 measurement on the other well.

25 Q Just for the record another reading from

1 the measurements. Then either in the fall of 2004 or
2 the spring of 2005 I went again to perform a
3 follow-up measurement.

4 Then this summer, in the summer of 2006
5 when we were altogether at the field we went up to
6 the wells.

7 Q Okay. Back to your 2004 measurements.
8 Do you have records of those?

9 A I got measurements -- a record of the
10 May measurement in '04. I can't find my records of
11 the other measurement.

12 Q Would you point out those records to us.

13 A This file here that says "flow
14 measurement" has -- It's got a paper copy of the
15 notes from I guess both of the wells and some
16 calculations, and a print-out of the Excel files
17 where I actually did the final calculation. A copy
18 of the letter to Jernberg.

19 MR. STANISH: Lets mark this.
20 (exhibit 8 marked)

21 Q I would like to direct your attention
22 back to Exhibit Number 7.

23 A Okay.

24 Q The first page where you come up with an
25 estimated acre foot number of 2,640.

1 his instrument and your field report?

2 A Correct.

3 Q Is there anything that stands out to you
4 in this first page?

5 A No.

6 Q It doesn't look to be anything else in
7 Exhibit 7. Is there anything else that you would
8 like to add that maybe was not in the exam?

9 A No.

10 Q Okay. You said that you visited the
11 wells five times I think it was?

12 A Yes.

13 Q And your field exam that is contained in
14 Exhibit Number 7 represents one --

15 A Correct.

16 Q -- visit.

17 A Yes.

18 Q When were the other visits that you had
19 to the wells?

20 A In the spring of 2004, I went to the
21 wells to install fittings for my instrument. My
22 instrument is not as sensitive to the conditions that
23 caused Mr. Heaton trouble. So I went once in 2004 to
24 install fittings.

25 I went again in 2004 to actually perform

1 A Okay.

2 Q Could you define, or put that in the
3 context of a time period.

4 A That would have been for the course of
5 the irrigation season to which this referred. I got
6 a penciled note here that I wrote: This was not
7 dated. But I believe it refers to the 1997 or '98
8 water year.

9 That would have been the volume pumped
10 by one of the wells during one or those two
11 irrigation seasons. In my calculations I assumed
12 that this was the larger well and that the other well
13 would have pumped less.

14 If this had actually been the smaller
15 well, then there would have been more volume produced
16 than what I had calculated.

17 Q When you say the "irrigation season", is
18 that the irrigation season defined by the water
19 itself or the amount of water that actually came out
20 of the pump?

21 A Well, this is the amount of pumping
22 implied by this estimated power consumption code
23 efficient. And the amount of electricity consumed by
24 that pump.

25 I can't tell you -- You could ask Tim

1 Luke what the period of record is -- Tim Luke
2 extracts these power data from the power company.
3 Tim could tell you the months of power records that
4 went into this calculation.

5 Q So it was based on a calculation based
6 on the amount of power consumed by the pumps?

7 A Correct. And this estimated power
8 consumption coefficient.

9 Q Okay. I see. Now, before you, you have
10 Exhibit Number 8. Are these the records that pertain
11 to your 2005 visit to the pumps?

12 A It looks like it's the 2004 measurement
13 visit.

14 Q Okay. And could you walk me through
15 these again as well.

16 A Okay. First is a letter to Mr. Jernberg
17 reporting my findings. Thirteen CFS on the larger
18 pump, the northwest pump. Seven point five CFS on
19 the smaller southeast pumps. Total 20.5 CFS. The
20 next one is a bill for the time that I spent
21 performing the work.

22 The next are my field notes from the
23 southeast well. It was a Collins type pitot tube
24 measurement. A.B.C.D.E. The letters refer to
25 stopping stations. You measure velocity of water at

1 different points in the pipe.

2 The next column is the distance inside
3 from the pipe wall. The next column is the head on
4 the manometer with the port of the instrument facing
5 upstream.

6 The next column D. is the head on the
7 manometer with the port pointing downstream. Then GE
8 50-horsepower -- There is a number that is probably
9 the serial number of the motor. Johnston pump. The
10 serial number of the pump. Here it says: Power,
11 both pumps running.

12 So this indicates that by the time 2004
13 came along they had apparently put both pumps on one
14 power meter. Twenty revolutions in 55 seconds. The
15 northwest motor was a U.S. motor. There's the serial
16 number and the pump serial number.

17 So those are the field data from the
18 southeast well. Then this is spreadsheet. This
19 spreadsheet is the calculations for the measurement
20 of the northwest well.

21 Actually, I had another visit because
22 the southwest well, southeast well was not running.
23 So this was done on the 8th of May. The first
24 section here with the A.B.C.D. and the decimal
25 numbers, the inches up and down; those are the same

1 type of data for the measurement on the upstream
2 well.

3 This V. is the velocity in feet per
4 second from the pipe. Then the next section: Check
5 with current meter on the end of the pipe where the
6 pipe discharged. I actually just measured with a
7 string-type measurement device.

8 I came up with a higher velocity. There
9 is a note here. This is reasonable because the pipe
10 was not quite full. The area was smaller. Then
11 this next section: Check with current meter and
12 velocity rod in the ditch.

13 This is a confirmation measuring the
14 same water in the ditch, but of course there is some
15 leakage in the ditch. There is some imprecision,
16 particularly in the current meter, the surface water
17 measurement.

18 THE WITNESS: This is the exhibit?

19 MR. STANISH: Yes.

20 THE WITNESS: I circled the Q 13.0 cubic
21 feet per second. That was the discharge that I
22 measured of that pump. Down here at the bottom,
23 there is 11.8. That was the discharge measured
24 in the ditch.

25 So you know the saying: If you have an

1 instrument, you have a measurement. If you have
2 two measurements, you have an argument. But in
3 this case the second instrument confirmed the
4 results of the first.

5 Q Could you explain what kind of, or how
6 you went about measuring those two different areas.

7 A Okay. The detailed process of
8 performing the flow measurement?

9 Q Correct.

10 A The Collins device -- You bore a hole in
11 the pipe. I had done that previously. You install a
12 fitting. And the tube that I used -- I call it
13 Collins type. It's actually called Prandtl.

14 It's about the size of my finger. It
15 has an upstream -- It has a single port that can be
16 turned to face upstream or downstream. Then there is
17 another port. So it measures the pressure of the
18 force of the water hitting that port.

19 There is another pressure port that is
20 on the side of the pipe. So you put this thing into
21 the pipe. You hook a manometer, which is a tube with
22 water in it. One side of the manometer goes to what
23 we call the static port. That is sideways to the
24 flow.

25 The other port faces upstream. The head

1 difference is an indication of the force of the
2 velocity of the water hitting that. Then you turn it
3 over so that the port is facing downstream.

4 The head reverses. The sum of those is
5 equivalent to the sum that you would have had if you
6 had an instrument that had ports facing both ways,
7 which is how the Collins devise works. Then you can
8 apply the Collins equations.

9 The reason I use this single tube
10 instead of the Collins, it's tough -- To do the
11 Collins you got to have holes on both sides of the
12 pipe that are perfectly aligned to the center line of
13 the pipe.

14 In the configuration of that system,
15 that was not practical. So I performed this at ten
16 stations across the flow pattern. The stations are
17 selected so that each one represents an equal area.
18 So each one is ten percent of the area.

19 Velocity times area is a volume per
20 time. That is this upper box. Now this section
21 here -- I will put a bracket here. I will put number
22 2. I got a devise that has a propeller. It has a
23 counter.

24 You stick it down into the water with a
25 stopwatch and you time it for 60 seconds or a 120

1 seconds. You pull it out and read the counter and
2 how many tons it has made. So it gives a velocity
3 reading.

4 Velocity times the area is quantity. In
5 this case, I made two different trials. I got a
6 velocity of 16.9 feet per second. Seventeen point
7 3 feet per second, which is twice -- Well, not twice,
8 but once and a half the velocities that I measured
9 with the PITO tube.

10 But at the end of the pipe, the flow
11 drops. So you got the same amount of water going
12 through a smaller area. You would expect the
13 velocity to be higher. In my mind, Number 2 is a
14 confirmation. Number 3, there is actually two
15 different measurements.

16 This first section here I am going to
17 circle. I am going to mark Number 3. I got a devise
18 called a Zimmerman Velocity Head Rod, which is a
19 fancy name for a yardstick.

20 You stick the yardstick in the water.
21 And the force of the velocity of the water makes the
22 water pile up on the high side and draw down on the
23 low side. -

24 The head difference between upstream and
25 downstream is a function of the velocity. And for

1 lower velocity, it's somewhat imprecise. This first
2 section, Number 3, is the velocity head measurement.
3 It came out 9.3 CFS. It's reasonably close.

4 It indicates to me that I had not made
5 any blunders in my methodology. This second one
6 here, I am going to label it Number 4. It's the
7 second open channel measurement.

8 I used the same devise, the propeller
9 meter with the counter. You string a tape measure
10 across the stream. You take individual stations.
11 And the width times the depth of the station is the
12 area of the velocity. From the instrument you get a
13 Q. You add them up. That is how these measurements
14 were performed.

15 Q Okay. Next page.

16 A The next page are the Collins
17 measurements for the second well. The southeast
18 well. I will circle the final result: Seven point
19 five cubic feet per second. One of my notes said it
20 was done on the 11th of May. The other note said it
21 was done on the 10th of May.

22 So it is done about the 10th or 11th of
23 May.

24 The next page are calculations of the
25 electrical power that was used. You see some numbers

1 here with question marks after them. There is a
2 requirement for a multiplier on a power meter. Power
3 meter can't measure all of the power that goes
4 through a big pump like it measures all the power
5 that goes through your house. So there is a coil in
6 it.

7 It intercepts part of the power. You
8 have to take what is on the meter and then multiply
9 it times the multiplier. I was unsure of the
10 multiplier. A lot of times the power company is
11 supposed to write it on the face of the meter. A lot
12 of times they don't.

13 A lot of times you can sometimes
14 ascertain it if you can see the writing on the coil.
15 I could not see it well. So I said is it 80? Is it
16 100? Is it 40? These different results are based on
17 different assumptions of which of those multipliers
18 it was.

19 I got a May 8th PCC here at 92 kilowatt
20 hours per acre feet. May 11, PCC at 111 kilowatt
21 acres per acre feet. It looks like I assumed then
22 that the multiplier was 80 to get that result.

23 Q How did you come up with that
24 multiplier?

25 A Well, my notes are not clear. Forty and

1 80 are typical multipliers for that type of an
2 installation. I wrote 80 or 100 question mark, and
3 then 40 on the second line with a question mark. I
4 don't remember how I did it.

5 Typical way is to look at that coil and
6 see if you can read the number on the coil, or look
7 at the result and the number of kilowatts produced
8 relative to the size of the motor.

9 Q Fair enough. The last two pages.

10 A Those were pages that I had prepared to
11 fill out in the field and did not use those.

12 Q So these were your notes from the year I
13 guess 2004?

14 A Yes.

15 Q Now you said that you had also visited
16 the area and did some measurements during 2005?

17 A Yes.

18 Q Do you have any records of those
19 measurements?

20 A I do not.

21 Q Do you remember any conclusions that you
22 had come to?

23 A Yes. The conclusion was that the
24 repaired pump had a similar capacity to the pump that
25 I measured in 2004. And that the flow was

1 essentially the same.

2 Q Was there any change in the horsepower
3 on those pumps?

4 A Jernberg's letter suggested that he was
5 planning to put on a larger motor. But I don't have
6 my notes. So I could not tell you if indeed he did
7 put on a larger motor.

8 MR. STANISH: Maybe we should mark this as
9 Exhibit 9.

10 (exhibit 9 marked)

11 Q What I am handing you is a letter from
12 what appears to be Ben Jernberg to yourself dated
13 February 21, '05?

14 A Looks like March.

15 Q I am sorry.

16 A Yeah.

17 Q And is that the letter that you were
18 referring to --

19 A Yes.

20 Q -- where he discussed the horsepower
21 change?

22 A Yes.

23 Q And is it your understanding that the
24 horsepower did in fact not change?

25 A I don't know if it changed or not. You

1 could ask Mr. Jernberg.

2 Q Okay. Did you visit the pumps again in
3 2006?

4 A Yes.

5 Q And what was the purpose of that visit?

6 A We were all out in the field.

7 Apparently, the judge had asked that the claimant and
8 the state together visit at the place. While we were
9 there someone suggested we go up to the pumps.

10 I don't remember who suggested it or for
11 what purpose. We did go up to the pumps.

12 Mr. Llamases turned -- -- He turned one of them on I
13 know.

14 Q Did you take any measurements or
15 recordings or observances at that point?

16 A No.

17 MR. STANISH: Lets mark these -- --

18 THE COURT REPORTER: Ten and eleven.
19 (exhibits 10 and 11 marked)

20 Q I am going to hand you what was marked
21 as Number 10?

22 A Okay.

23 Q Could you explain to us what that is.

24 A Yes. I am going to cross out the
25 right-hand side of the page because that does not

1 relate to Mr. Jernberg. This is -- It's a copy from
2 my field notes 4-29-04, when I drilled the holes and
3 installed the ports.

4 I measured the thickness and diameter of
5 the pipes on the two wells. That is at the point of
6 measurement. That is what is recorded on the first
7 page.

8 Q How about the second page?

9 A The second page, I am going to cross out
10 the left-hand side half. That does not relate. This
11 is the field notes for the measurement of the
12 northwest pump on 5-8-04.

13 It's the same type of data that we
14 talked a little bit ago. The ABCD are the stations.
15 The next column are the measurements in inches that I
16 needed to insert the instrument. Upstream and
17 downstream measurement. The power meter serial
18 number. The case multiplier is known. The demand
19 was 1.278.

20 I counted 10 revolutions of the power
21 meter disk in 52.06 seconds. The next page,
22 propeller current meter at the end of the pipe.
23 These are the data that those estimates of velocity
24 on the spreadsheet came from, from using the current
25 meter on the end of the pipe.

1 Q I will refer you back to Exhibit Number
2 8.

3 A Okay.

4 Q Do you want to check to make sure that
5 they are the same?

6 A Let's see. The start number is the
7 same. The stop number is the same. The time for the
8 first trial is the same. The second trial, the stop
9 number is the same. And the time is the same.

10 Q Okay.

11 A Do you want me to go back and look at
12 the Collins?

13 Q Sure. Just note if there is anything
14 that looks different or that you may have changed.

15 A I don't see any differences.

16 Q Okay.

17 A Then there is a line through the middle
18 of the page. It says ditch timing from time of
19 insertion. Then these are the data that -- The first
20 column has 11 -- 10 feet, 9 inches, 10 feet, three
21 inches.

22 Those are the stations that I measured.
23 The next column starting with .91, those are the
24 upstream measurements from that velocity rod.

25 Then the next are the downstream

1 measurements from the velocity rod. Then the next
2 column are the numbers on that meter. And in each
3 case the previous start number --

4 This first station 23384 is the start
5 number for that station. Then the next number down
6 is the stop number for the same station and the start
7 number for the next station. The last column is the
8 time in seconds.

9 Just glancing at the times, I am not
10 reading every one -- But they look to be the same.
11 And the start and stop numbers look to be the same.

12 Q Okay.

13 A I got a note here: I repeated
14 station -- The nine foot nine station instead of
15 looking at the number, there is a mark on the
16 propeller. I counted the marks: A hundred turns in
17 so many seconds.

18 Then the next section: Timing from time
19 of insertion. It was a new meter. And I was
20 experimenting with the meter. This has something to
21 do with that. It really does not relate to
22 Jernberg's measurement.

23 The next page it says: Experimenting in
24 still water. That is experimenting with the meter.
25 Does not refer to the work I did for Jernberg.

1 The next page: Jernberg 5-10-05,
2 southeast well. Collins measurement. I prepared
3 this -- This was in preparation for doing the
4 measurements. And I left the book at home, so I took
5 the notes on note paper. That is why this note: See
6 paper file. I left the book home.

7 The next page, 22 of March of '05,
8 Jernberg. These are my field notes from
9 Mr. Jernberg asking me to walk the whole place of use
10 and take some photos. These are my notes. They are
11 way point numbers. Some cryptic descriptions.

12 The numbers that are circled refer to
13 photo numbers. And I did not -- unless the negatives
14 are in that photo envelope in one of these files -- I
15 did not find the negatives. Jernberg has the photos.
16 Maybe you got a copy of the report with the photos.

17 The next page. There are a number of
18 those. I am looking at -- It's the last page of
19 this. There is a number 7456664 FSA extension 2.
20 Mr. Jernberg gave me a letter to the Farm Service
21 Agency authorizing me to look at his records.

22 I called Bonnie at that number, at the
23 Farm Service Agency. She said our records won't have
24 any record of irrigated pasture.

25 The rest of this, I will cross out. It

1 doesn't relate to Mr. Jernberg.

2 MR. STANISH: Thank you.

3 Q I will hand you Exhibit 11. Some more
4 notes of yours?

5 A Okay.

6 Q Can you explain what these are.

7 A Yes. These are preparations. I had
8 told Mr. Jernberg based on the work we were going to
9 do for IDWR at the university that he needed to find
10 someone else.

11 He did not have time to find anyone
12 else. He asked me to participate in a phone
13 conference. These are the notes that I took while I
14 was preparing.

15 Q Do you know who was a party to that
16 phone conference?

17 A Mr. Ling. He was present. I think Mike
18 was there. I think you were there. Candice McHugh
19 was there.

20 MR. TRIBE: You need to identify who "he" is.

21 THE WITNESS: Yes. Mr. Barber. Deputy
22 Attorney for the State. Candice McHugh, who I
23 guess is a deputy attorney assigned to IDWR.

24 Q Okay.

25 A I don't remember if Mr. Jernberg was

1 there or not. But those people were there.

2 Q Okay. Lets mark this.

3 (exhibit 12 marked)

4 Q Mr. Contor, I will hand you what was
5 marked as Deposition Number 12. Could you explain to
6 us what this is.

7 A This looks like a photocopy of the
8 directories for the CD's that I brought. What I did
9 was just went into Explorer and opened different
10 folders and did a screen dump and printed the screen
11 dumps.

12 Q Now, your Notice of Deposition asked you
13 to bring a number of records for our review. Are all
14 the records listed in this screen dump, as you
15 described it, records that were in compliance with
16 that notice and request?

17 A Well, as I understood, the request was
18 to bring everything that had anything to do with the
19 work that I performed for Jernberg. So in that
20 context and with that understanding, yes, these are
21 in compliance with that request.

22 Q Okay.

23 MR. TRIBE: Could I ask something. Bryce, is
24 there anything on those CD's that you haven't
25 brought in a hard form?

1 anticipation of litigation. Strategies.

2 Different ideas.

3 Q Are those e-mails -- Who are they from
4 and to whom?

5 A They are from me to Mr. Tribe.

6 MR. STANISH: Are you claiming an e-mail from
7 your witness to yourself is work product?

8 MR. TRIBE: I am.

9 MR. STANISH: Do you have any suggestions as
10 to how we should proceed with this?

11 MR. TRIBE: I think we have an absolute
12 problem with the e-mails. I am saying I am
13 uncomfortable to turn those over without us
14 reviewing that or printing that out and taking a
15 look through --

16 I got a feeling 99 percent of it -- Well,
17 first of all, I think about 85 percent of it is
18 already here.

19 THE WITNESS: Well, there is nothing that you
20 would get by printing this that you don't have in
21 front of you in paper form.

22 MR. STANISH: Is what you are saying the only
23 thing that is on here --

24 THE WITNESS: They are shape files of the GPS
25 points. Shape files of the lines that are drawn

1 A Yes. There are -- For instance there
2 are GIS maps that I brought in hard form. The
3 underlying electronic data are on these CD's. And
4 the spreadsheets that were in one of these exhibits,
5 the actual calculations are in electronic form on the
6 CD's.

7 MR. STANISH: Is there anything objectionable
8 that you would object to us having or taking a
9 look at?

10 THE WITNESS: Look at the last page. There
11 are two e-mails. E-mail 20060630 dot TXT. E-mail
12 20060701 dot TXT. Those are e-mails from myself
13 to Mr. Tribe that are probably not appropriate to
14 be shared.

15 MR. STANISH: Mr. Tribe, do you object to us
16 having a copy of the CD?

17 MR. TRIBE: Well, my objection is just to
18 turn over the CD's. I think it would be best if
19 Bryce would print out everything and then let us
20 sort through that first, just to make sure there
21 is no other work product tucked in those
22 documents.

23 MR. STANISH: Could you specify what your
24 claimant privileges are on the e-mails?

25 MR. TRIBE: Well, discussions we had in

1 on the maps. But you got maps that show the
2 points and show the lines.

3 MR. BARBER: I would still get them and -- I
4 want to make this as easy as possible, Michael.
5 If -- And you know some of the files may not be
6 amenable to be printed out because of the nature
7 of the file.

8 So if there is some way you people could
9 review them and simply copy everything over to the
10 e-mail -- I mean copy everything over to another
11 CD that excludes the e-mails. And if there is
12 something else that you exclude for whatever
13 basis, at least tell us about what you are
14 excluding.

15 You know, I think that would be perhaps the
16 easiest way. I don't want to have a mound of
17 paper five feet high in terms of having to look at
18 and everything. But I think that is perhaps the
19 easiest way. But I think we ought to be able to
20 look at it.

21 I feel uncomfortable saying: I am not
22 interested in it because I don't know what is
23 there.

24 MR. TRIBE: That is my discomfort as well.

25 MR. BARBER: Okay.

1 THE WITNESS: For both of you, I should point
2 something out. If you look on the first page,
3 there is this folder 20060506. Then there is
4 20060707. What those are is on those dates I just
5 burned everything in my Jernberg file to a folder
6 on a CD. So this third one down 20060707 under-
7 score 2, will contain everything that is in the
8 prior 2.

9 So this is a real dog's breakfast. It was
10 not organized to be, you know a coherent record.
11 It's just my literal interpretation of the order
12 that I was to bring everything.

13 MR. BARBER: I mean, there is a whole bunch
14 of files that are indicated as DMP's. I mean that
15 is some type of image file I believe.

16 THE WITNESS: It is.

17 MR. BARBER: I don't know what an SBX file
18 is.

19 THE WITNESS: It's a GIS file. We can take a
20 few minutes and I could just tell you -- each of
21 these folders is opened up later on so the
22 individual file is there.

23 I could quickly tell you what these things
24 are if that would be useful.

25 MR. BARBER: Go through and give us a brief

1 a bunch of blank boxes with labels.

2 Next page, there is some redundancy because I
3 paged down. The new item is IRR, underscore
4 1992, terraserver. Dot DBF, that is a shape file
5 based on a '92 image. The next one down: The
6 jpg, that is the image that I used.

7 The next two files are the rectified
8 versions. These others: Layout dot jpg, layout
9 '92, layout 2004, layout exam sketch. Those are
10 output. Some of them were file documents that I
11 gave to Mr. Jernberg that you got.

12 Some were intermediate products that I used
13 in my analysis.

14 Project one dot APR, that is a GIS. It's a
15 map file. It's a directory that tells where all
16 the data were. Terraserver screendump, that is a
17 documentation of where I got the image.

18 Next page: For Tribe 2006. Those are some
19 memos that I think you got copies of in the files
20 here.

21 Mike had asked me to look over the soils map
22 and the ditch map and the Contor map that
23 Mr. Hornbecker had done. Those are my responses.

24 These "napp" excerpts. Those are 2004
25 irrigated -- or aerial photos. This 31-11845 is a

1 summary. I don't want to take an hour or two on
2 it.

3 THE WITNESS: The first page: Jernberg bill
4 XL. It's a bill I sent to Jernberg. The two
5 images: Pre Jernberg. And UNCH Jernberg, those
6 are aerial photos that were intermediate products
7 that I don't think I relied on.

8 But they were things that I did in 2003,
9 probably for Mr. Rush.

10 Next page there is a bunch of -- Page 1 --
11 Those are scans of one of the documents that you
12 got in the files there. Affidavit: Contor
13 edited. They are my notes to an earlier draft of
14 the affidavit.

15 Affidavit: Contor unedited. That is the
16 first edition. Attachment A. is Attachment A.
17 This copy Llamases affidavit shape file, those are
18 GIS. They are either the ditches or the flow
19 direction aeriels that are in one of those --
20 papers. Paper maps.

21 GPS 22, March, Mr. Jernberg dot text: Those
22 are the raw GPS points. The points are one of the
23 maps you got there.

24 The photo record is the piece of paper I
25 printed off to attach the photos to. So it's just

1 worksheet that Candice McHugh had e-mailed either
2 to me or to Mike Tribe. And it's some of the
3 field notes from Sunny's work.

4 It says: Bryce edited. Because I added a
5 copy where I converted some metric units to
6 English units.

7 The rest of these on this page are shape
8 files and images that were used in the analysis
9 that Mike asked me to do of the Contor map and the
10 ditch map that Hornbaker had done.

11 Legend one dot AVL, that just tells GIS, we
12 want this line yellow. We want those dots yellow.
13 The next page, more GIS files related to that same
14 analysis. Next page, I told you that there was
15 this folder for Tribe.

16 This next page, it has three-word documents.
17 Those are the contents of that folder. And those
18 are analyses that are in these files here.

19 Next page, it's the same thing. It's one of
20 these redundancy things. Because these were just
21 my back-up files. Same thing: This next one is
22 redundant. It's a later version of the same
23 folder. Now it has four files instead of three
24 files in it.

25 The next page, Page 1987 "napp", that is an

1 aerial photo from IDWR. 2000 landsat. It is a
2 thermal image, infrared image from the year 2000.
3 Equivalent irrigation 5 12, that is a document
4 that is in here that I prepared for Mr. Rush.

5 Another bill to Mr. Jernberg. Northwest pump
6 Collins. That is the spread sheet that we looked
7 at in one of these exhibits and how I calculated
8 the flow.

9 Now I am looking at directories of the CD:
10 Jernberg 20060706 downloads. These are data that
11 Candice McHugh put on the IDWR FTP site that I
12 downloaded. This next is the contents of that
13 folder.

14 Those are all IDWR data. The last page are
15 additional IDWR data from the IDWR Website. Water
16 right files for some other water rights.

17 Then each of those folders has a file in it
18 called PM dot JS. I have no idea what those are.
19 But I downloaded from IDWR and recorded them so I
20 produced them. Then this last one is directories
21 of the last CD. The downloads, 30 June 2006,
22 Contor.

23 There is some PDF documents that I down-
24 loaded from the Web from the FTP site. Then these
25 two records of e-mails from myself to Mr. Tribe.

1 MR. STANISH: Off the record.
2 (discussion held off record)

3 Q (By Mr. Stanish) Mr. Contour, did you
4 bring three CD's of data along with you as part of
5 our request in the notice?

6 A Yes.

7 Q Two of them are not in dispute. And
8 will be marked as exhibit 13 and 14.
9 (exhibits 13 and 14 marked)

10 Q Exhibit Number 13 is a blue HP disk
11 entitled "Jernberg Archive Contor".

12 Exhibit Number 14 is a white -- I am
13 not -- It's a white disk entitled "Jernberg 20060706
14 downloads, Contor." And there is a third disk
15 entitled, "Jernberg downloads June 30th, 2006,
16 Contor."

17 MR. STANISH: I believe Mr. Tribe would like
18 to voice an objection at this time to this third
19 disk?

20 MR. TRIBE: Included on that third disk are
21 e-mail communications between Mr. Contor and
22 myself discussing litigation strategy, other
23 materials garnered in anticipation of litigation.

24 And as the claimant objector's attorney of
25 record, we object to turning that over to the

1 State. Therefore, Mr. Contor will remove the
2 contents of those two e-mails.

3 THE WITNESS: Two?

4 MR. TRIBE: And then we'll forward the
5 remaining contents of that CD to the State as soon
6 as it is sent from Mr. Contor to my office.

7 MR. STANISH: And for the record, the State
8 will retain Exhibit Numbers 13 and 14, the two
9 CD's just spoken of. They will not be included
10 with the deposition transcript.

11 Q (By Mr. Stanish) Mr. Contor, back to
12 your flow measurements?

13 A Yes.

14 Q Have you taken any flow measurements at
15 any locations away from the well area?

16 A On Mr. Jernberg's property?

17 Q Correct.

18 A No.

19 Q So the only ones that were taken were in
20 the immediate vicinity of the well itself?

21 A Yes.

22 Q Have you tried to determine ditch losses
23 or delivery efficiencies for any of the ditches?

24 A No.

25 Q To your knowledge, are the wells, the

1 two wells described in your report, are those the
2 only two wells that are used for irrigating the
3 property owned by Jernbergs or now owned by Idaho
4 Properties?

5 A I don't know the extent of the property,
6 so I can't -- You know, I don't know how much ground
7 Jernberg owned or how much he conveyed.

8 MR. STANISH: Okay. Lets mark this 15.
9 (exhibit 15 marked)

10 Q Mr. Contor, I am showing you what was
11 marked as Exhibit Number 15.

12 A Carter Fritschle showed me something
13 similar to this this summer when we were in the
14 field.

15 Q And what is it a photo of?

16 A It's a photo of a red tractor hooked to
17 a well.

18 Q And what is your understanding of this
19 tractor's role in this case?

20 A Well, there is a number on here: 317311.
21 You know, I don't know where this photo came from
22 other than Carter showed me.

23 I do know that Jernberg told me that
24 originally one of the wells used a diesel power
25 source. That is really all that I know about this.

1 Q Okay. Did Mr. Jernberg describe to you
2 the power source that he spoke of?

3 A You could look at one of those letters.
4 He may have told me the horsepower. In the field
5 exam there is a discussion of the power source. I
6 don't remember the details.

7 Q What is your understanding of the
8 historical diversion rate at the wells?

9 A There was the flow measurement done in
10 '86 by the IDWR examiner. And I can't remember the
11 exact number, but it was very close to what I
12 measured. It was in the 20 CFS range.

13 Q Okay. I am going to turn back to
14 Exhibit Number 6 of your affidavit in support of the
15 motion for summary judgement.

16 If you turn to Paragraph Number 3. In
17 Paragraph 3 of your affidavit it states that you
18 found that 1100 acres were being irrigated based on
19 your analysis of the infrared aerial photo taken in
20 '87, is that correct?

21 A I am not finding what you are referring
22 to.

23 MR. TRIBE: What paragraph?

24 MR. STANISH: Paragraph Number 11 of the
25 affidavit itself.

1 THE WITNESS: Yes.

2 MR. STANISH: Lets mark this.
3 (exhibit 16 marked)

4 Q Here's what was marked as Exhibit Number
5 16. Again, is that a correct presentation of the map
6 that you put together?

7 A That is a representation of the map that
8 I put together to accompany the Llamases affidavits.

9 Q Okay. I am going to give you a blue
10 marker. Could you please mark on that map the areas
11 where you found to be irrigated based upon the aerial
12 photo analysis.

13 A You know, I probably can't. But in your
14 pile of papers some where there is a map that I
15 produced with that analysis.

16 Is this the one?

17 Q Can you find it in your files?

18 A I maybe able to. I found a document,
19 the document of analysis of place of use for
20 adjudication recommendation 3111845 Jernberg,
21 March 22, 2005. And my figure 2 --

22 Q Okay. Is what you were pointing to
23 figure 2, is that part of the analysis that is
24 attached to Exhibit Number 6?

25 A Let me look and see. It is. I just

1 missed it. Yes, it is. I am sorry.

2 Q Now, did your analysis as represented in
3 figure number 2, did that include the 40-acre section
4 owned by the BLM?

5 A You know, when I performed this
6 analysis, I just used the place of use described by
7 IDWR in 7311.

8 I did not inquire of Jernberg as to the
9 exact property lines. So you know -- I could not
10 even tell you which 40 belongs to BLM.

11 Q Okay.

12 MR. STANISH: Lets mark this.
13 (exhibit 17 marked)

14 Q I am handing you what was marked as
15 Exhibit Number 17. Does it appear to be an accurate,
16 I guess a large version of the map that is described
17 in Figure Number 2?

18 A It's similar, but there are some
19 differences.

20 Q And what are those differences?

21 A If you look at section 21, the northwest
22 of the northeast, the southwest of the northeast,
23 whoever prepared this has drawn the boundary
24 differently than I drew the boundry.

25 You look at 16 southwest of the

1 southeast, again the boundry is drawn differently. I
2 had also mapped the not disputed irrigated lands,
3 which are omitted from this map.

4 It looks like in 22, what would be the
5 northeast of the northwest, there is a difference.
6 It looks like in the southwest of the southwest of
7 15, it looks like I incorrectly excluded some lands
8 that are included in this Exhibit 17.

9 Q I am going to hand you a black marker.
10 Do you think that you could make the corrections as
11 accurately as you can with a black marker?

12 A I will try. I am going to -- let me
13 look back at my copy to see if I can. The southwest
14 of the southwest of 15, I am confused about what I am
15 seeing there. I see what has happened.

16 In my copy, I can see that a red line
17 overlays a green line. And so this area that was in
18 question of the southwest of the southwest of 15, I
19 did include as irrigated, but I included it within
20 the green line.

21 That is why I was confused. Because the
22 red line in your copy obscures the green line. So
23 we're in an agreement on the southwest of the
24 southwest of 15.

25 Q So based on how accurate you could be

1 with the black marker, does Exhibit Number 17 now
2 accurately represent the areas that you found to be
3 irrigated in '87?

4 A I believe it is.

5 Q Okay.

6 A I see some mistakes. But I believe it's
7 the same as what I put in this report.

8 Q What do you mean by "mistakes"?

9 A There is a piece of ground in the
10 southeast of the northeast of 21 that I believe
11 should also have been indicated as irrigated.

12 Q Do you want to mark that area with this
13 blue marker?

14 A (witness complies)

15 Q When you say that should be corrected,
16 what do you base your conclusion on?

17 A This light uniform color that is similar
18 to these fields here to the north. And then the
19 fact, if you look at it, you can see a white line
20 going north and south, then some white horizontal
21 lines going east and west.

22 That suggests those could be wind rows
23 indicating that a crop has been harvested. Or those
24 could be dikes indicating that it has been irrigated.

25 But the uniform color -- It's not red

1 because it was not actively growing when this photo
2 took place. So it was probably a grain field and
3 this photo was probably taken later in the year.

4 Q What does the color "white" mean to you
5 when you see that on a map?

6 A The color "white" means that there is
7 infrared radiation coming off of the ground which
8 means usually it's either stubble or it's cultivated
9 ground or bare ground.

10 Q What do the darker, I guess the black
11 almost -- What does that represent?

12 A That represents vegetation. Then the
13 redder it is the more actively the vegetation is
14 growing.

15 Q And from a map such as this, could you
16 determine what kind of vegetation is being grown?

17 A Not really. You know, I identified
18 these as grain fields. This up here in the corner
19 that is bright red, I would identify probably as
20 either an alfalfa field that has not yet been cut or
21 else fully mature potatoes.

22 But you know the thing is that a very,
23 very good photo analysis is a poor substitute for an
24 eyewitness account. And photo analysis is kind of
25 tough.

1 Q What kind of problems did you run into
2 when you, or trying to you know rely on this type of
3 photo analysis?

4 A Well, specifically the problem that you
5 identified as knowing what particular kind of
6 vegetation is represented by what particular color.

7 Q And is it also a problem that you may
8 know that vegetation is growing, but doesn't
9 necessarily tell you that water is being applied to
10 it, does it?

11 A Well, in some places that is a problem.
12 It is not a problem in Mud Lake.

13 Q Why is that?

14 A If there is no water, there is no
15 vegetation.

16 Q Okay. When you say "there's no
17 vegetation", do you mean there is no I guess
18 cultivated vegetation? I mean: Can you say that
19 there is no vegetation on these darker areas on this
20 map, or on that white area?

21 A On the white area, you can expect that
22 either there is no vegetation or the vegetation that
23 was there has been grazed off or has been harvested.
24 You can expect that.

25 But you can't know it for sure.

1 Q I guess, what I am saying say: Say you
2 have drought-tolerant native vegetation, would that
3 show up as a white spot possibly?

4 A Well, you know that is what I would
5 refer to as this gray area here that I excluded. You
6 know, again you asked me about my work that I did for
7 IDWR.

8 And for cultivated fields, you know, you
9 got the additional benefit of geometric shape. For
10 an uncultivated field, if I had been asked to make
11 the recommendation on this, I would have not relied
12 on the aerial photo. I would have relied on
13 eyewitness accounts.

14 Q Okay. That is based on the idea that
15 uncultivated vegetation does not necessarily show up
16 the same way that cultivated areas do?

17 A Right.

18 Q Okay. What kind of training or
19 education do you have in doing infrared photo
20 analysis of this type?

21 A On-the-job training with IDWR. They
22 would send us to Boise and give us an agent-training
23 day. Then you know in the process of learning to
24 make the recommendations, I would look at a photo.
25 Do the interpretation.

1 If I was confused and had the time, go
2 to the field and do a field inspection and ground the
3 truth of what I saw in the photo with the field
4 inspection.

5 Show my work to my supervisor. Receive
6 instruction from my supervisor.

7 Through that process repeatedly, I
8 became comfortable with doing these for water right
9 purposes.

10 Q Okay. And what is your experience with
11 doing these for areas that have not been cultivated?

12 A You know, probably five or ten percent
13 of the water rights that I worked on were in areas
14 where either there was cultivated land that was
15 claimed as irrigated next to uncultivated land that
16 was not claimed as irrigated.

17 I needed to find the dividing line
18 between those two parcels. Or there would be parcels
19 like this that some part of the place of use was you
20 know what we called wild flood or rough pasture.

21 So you know there is a percentage of the
22 ones that I worked on that had this kind of
23 determination that needed to be made.

24 Q That had wild flood native plant
25 cultivation or non-cultivation areas?

1 A Yes.

2 Q So again back to the accuracy of this
3 type of analysis. How accurate is it in
4 distinguishing between actually irrigated areas that
5 have a high water table, recent rainfall or natural
6 flooding events?

7 I guess are these other things that
8 effect the ability to rely on this type of infrared
9 analysis?

10 A They are. That is why in one of these
11 affidavits I noted the discrepancy between my
12 findings and the licensing examiner. I said I would
13 defer to the licensing examiner. Because an
14 eyewitness account is by far superior to photo
15 analysis.

16 Q Would you make a recommendation based
17 primarily on the infrared analysis that you did?

18 A Not if I had an eyewitness account, no.

19 Q Okay. What if you did not have an
20 eyewitness account? I mean, maybe that is
21 hypothetical.

22 A Yes, it is hypothetical.

23 Q What you would do is you would ask
24 someone to go out there and confirm what you were
25 seeing?

1 A We were told to do the best job we could
2 given the resources that we had. And if I had an
3 aerial photo that I felt I could not interpret, I
4 would not make a recommendation until I found a
5 witness or performed an exam.

6 Q Okay. Is this the type of photo that
7 you would put in that box?

8 A Yes.

9 Q Now, would an ordinary person be able to
10 read one of these maps and tell you which areas were
11 irrigated and which ones were not, areas that were
12 uncultivated?

13 A I don't know.

14 Q I am going to change gears a little bit
15 and ask you about the cattle.

16 A Okay.

17 Q Have you seen cattle out there grazing
18 on the Jernberg property?

19 A I don't know. I don't pay a lot of
20 attention to cattle.

21 Q Sure.

22 A Yes. I have seen cattle north of the
23 road, but that is not the area in question.

24 Q Okay. Now, you also -- We talked about
25 your training in agricultural economics. Have you

1 evaluated the economics of pumping water on the
2 uncultivated area described here?

3 A No.

4 Q Do you plan on doing such analysis.

5 A No.

6 Q Have you been asked to do it?

7 A No.

8 Q Have you done that kind of thing before?

9 A Very limited amount.

10 Q Based on your experience, what times
11 during the year is it reasonable to irrigate the
12 uncultivated areas in the Jernberg property?

13 A First of April until Halloween.

14 Q Okay. What kind of benefit do you think
15 they would get from irrigating the native vegetation
16 in that way?

17 A Well, there are two things. One is the
18 grass will grow. And I don't know if Jernberg has
19 prepared an affidavit. But the day we were out there
20 he pointed to areas and said in there the grass was
21 as high as the belly of a horse.

22 So, number one, water is the missing
23 ingredient to make the vegetation grow. Number two:
24 If you water it, it will crowd out the brush. I seen
25 that in other places. So it's an inefficient way,

1 but it is a way to improve the range.

2 Q What kind of training or education do
3 you have in I guess in looking at the way vegetation
4 reacts to water and different water practicing?

5 A No training. But I seen it for thirty
6 years.

7 Q And can you distinguish between
8 different native plants that are out there?

9 A You know, I am not a range biologist.

10 Q So could you tell the different growing
11 seasons for the different native vegetations?

12 A Well, you know I know that cheap grass
13 dries up early. I know that some other grasses stay
14 green long in the season.

15 But you know when I drive past a piece
16 of pasture that is being irrigated and it's August
17 and there is green grass out there and sagebrush, no,
18 I can't tell you the spieces of that green grass.

19 Q Okay. In preparing your analysis, all
20 the analysis that we have done here, who have you
21 consulted with besides Ben Jernberg, Diehl Gross and
22 their attorneys?

23 A Omar and Lamar Llamas. This woman, I
24 gave you her name earlier at the NRCS. I talked with
25 Terry Klipfel at North Water Measurement District in

1 when they were doing the irrigating. Which direction
2 the water flowed in the ditches. Which parcels of
3 ground they actually put water on.

4 Q Okay. I would ask you to take another
5 look at your affidavit here.

6 A Okay.

7 Q On Paragraph Number 6, could you read
8 that for me. You do not need to do it outloud.

9 A Okay.

10 Q Now, when you said that you did an
11 analysis of the equivalent beneficial use, what
12 exactly did you do?

13 A I did a whole bunch of things. First of
14 all, I looked at the USGS estimate of the ET
15 potential of range land, if it had an adequate water
16 supply.

17 Q Let me clarify something. When I asked
18 you what analysis you did, I am talking about
19 specifically leading up to this affidavit.

20 A Okay. I was answering specifically what
21 I did leading up to Item 6 of the affidavit.

22 Q Correct. I am talking about in terms of
23 time. What you did up to I guess April 26 when you
24 signed this affidavit.

25 A Okay. How is that different from what I

1 an attempt to get more pumping data from the Water
2 Measurement District.

3 I spoke with Shelley Keen at IDWR. I
4 believe I spoke with Harold Jones at IDWR when he
5 still worked there.

6 Q What was the purpose of those
7 conversations?

8 A Well, the conversation with Harold Jones
9 was to find out what was it had Jones asked -- Jim
10 said: IDWR wants something and said I want you to do
11 it for me. I called Jones and said: What do you
12 want?

13 Shelley, I called to ask for
14 clarification on some of the things that I read in
15 the water right file record.

16 I knew that Jones was responding to a
17 request from the office Shelley worked in, and I
18 hoped Shelly could give me more clarification on what
19 it is that Jones wanted.

20 Talked to the gal at NRCS to see if I
21 could get a record of NRCS's data on what reports
22 Jernberg filed over the years. Talked to Omar and
23 the other Llamas --

24 MR. TRIBE: Joe.

25 A Joe. To find out where the ditches were

1 am giving you.

2 Q I am asking you not to really go into
3 what you have done did since then.

4 A Okay. I looked at the USGS estimate of
5 the consumptive use of the range land that had a full
6 water supply.

7 I looked at the amount of water pumped
8 according to Jernberg's records and found that
9 Jernberg had pumped enough water to meet that
10 requirement on those acreages.

11 Looked at the Water Measurement District
12 pumping data and found that the Water Measurement
13 District suggested that Jernberg had pumped enough
14 water to meet those requirements. I looked at the
15 diversion rate limitation that was in the original
16 7,000 series license.

17 Found that if the pumping rate had been
18 applied for the full irrigation season, that the
19 volume of water pumped either for immediate use or
20 for storage in the route zone for the subsequent
21 season would also have been within the amount of
22 water required to meet that estimated potential
23 consumptive use of irrigated range of vegetation.

24 Q Is that all the analysis that you did?

25 You also did some aerial photo analysis. Did you do

1 anything else in that manner?

2 A I did the aerial photo analysis not as
3 part of Item Number 6. Later on, I was asked by
4 Jernberg to give an analysis of whether or not the
5 IDWR field exam seemed reasonable. And in the
6 process of answering that question, I did do the
7 aerial photo analysis.

8 Q And you did that before, or in
9 conjunction with this affidavit?

10 A I did it prior to the affidavit. This
11 affidavit -- I did not do anything for this
12 affidavit. This affidavit just represents work that
13 I had done previously for various requests.

14 Q Okay. Was there anything else you did
15 leading up to this March analysis in conjunction with
16 your determination of how much of the property was
17 irrigated?

18 A You know, we could paw back through the
19 notes. I think -- You know, I visited with Joe and
20 Omar. I looked at the aerial photos. I walked the
21 piece of ground. I looked at the licensing exam.

22 I contacted the NRCS. I performed those
23 calculations based on the USGS data. I found other
24 data from 8-or 9000 feet in the mountains of Arizona
25 which indicated more use, but I felt that that was

1 A That is a draft of a document I prepared
2 for Mr. Tribe. It's my analysis of the ditch system
3 based on the data that were in the IDWR spreadsheet.

4 Q And you say on this first page, I find
5 nothing -- You say: I find nothing in this analysis
6 that would contradict the '86 IDWR licensing
7 examination, findings or the Llamases affidavits.
8 What do you mean by that?

9 A Well, you know it appeared that the
10 purpose of this spreadsheet and the purpose of the
11 mapping was to suggest that the irrigation that the
12 examiner found or the irrigation that Llamases
13 testified to in their affidavit could not have
14 occurred.

15 And my analysis of the data failed to
16 find anything that would contradict what those
17 eyewitness accounts said they observed.

18 Q When you say "your analysis of the
19 data", what do you mean?

20 A Well, the first thing that I did was I
21 looked at the water surface elevation where the water
22 would have come out of the culvert on to the road on
23 the northeast corner where I myself have seen a good
24 strong head of water.

25 And the first thing was to identify

1 probably less representative.

2 Q Did you take any other measurements of
3 the ditches or the property leading up to this
4 analysis?

5 A Well, you know I walked the ditches and
6 took the GPS readings that are referred to in one of
7 those reports.

8 Q The photos?

9 A And the photos.

10 Q Did you take measurements of the ditches
11 themselves in terms of the elevation?

12 A No.

13 Q What kind of analysis have you done
14 since the submission of this affidavit?

15 A I looked at the topographic map and
16 the map of ditch flow directions. Determined which
17 parts of the place of use water would have had to
18 climb up hill to get to.

19 MR. STANISH: Okay. Lets go off the record.
20 (exhibit 18 marked)

21 MR. STANISH: Back on.

22 Q (By Mr. Stanish) Let me give you what
23 was marked as Exhibit Number 18.

24 A Okay.

25 Q Could you explain to me what that is.

1 places on the parcel where the land surface elevation
2 was higher than that. And that analysis indicated
3 that there was you know far more acreage that met
4 that test potentially irrigable than what the
5 Llamases or the examiner said they had seen
6 irrigated.

7 So that test did not violate what they
8 said to have found. Then I said: Well, that is all
9 well and good. But it requires energy to cause water
10 to move.

11 So I imposed a gradient saying it would
12 take a half a foot per mile of gradient to make water
13 move. So what that did was points distant from that
14 northeast corner.

15 What actually I did, I added to their
16 elevation to make them appear higher than they
17 actually were.

18 So if the -- Water would have to be at
19 that elevation plus the allowance for gradient in
20 order to irrigate that. I found with that analysis
21 that there was still far more irrigated land than
22 what folks said they had observed.

23 Then I realized that this instrument
24 that Sunny used is not -- If you have an instrument,
25 you have measurement. If you have two instruments,

1 you have an argument.

2 I found a data field in his data that
3 indicated imprecision. The units were not specified.
4 I assume the units were meters because in another
5 project I worked with IDWR personnel with either that
6 very instrument or one similar to it.

7 And at that point the error units were
8 reported in meters.

9 The other thing is, assuming those units
10 were meters would be the least advantageous to the
11 clients. So it would make the test, the harshes test
12 possible. What I did, I repeated the analysis
13 assuming that the elevation where the water comes
14 under the road was too low -- It was too high.

15 So I artificially lowered the elevation
16 of that water coming under the road. So it made it
17 less likely for water to be able to reach that point
18 to any point out in the field.

19 Then conversely to all the other points
20 out in the field, I added the error. So I assumed in
21 that one case the error went against my client. All
22 the other cases the error was reversed but still
23 against my client.

24 Even with that harsh error criteria, I
25 still found that essentially the land that they said

1 Mountains in February.

2 But if you got the dimensions of a ditch
3 and the slope of a ditch, you can calculate -- using
4 theoretical calculations, you can calculate the
5 capacity of that ditch.

6 So in the adjudication context I used
7 GIS to determine slopes of ditches in order to
8 perform these calculations.

9 Q Is that the extent of your experience
10 doing ditch analysis using GPS elevations?

11 A Yes.

12 Q Are you an engineer?

13 A No.

14 Q Do you have any engineering education?

15 A Well, you know I got the surveying
16 class. Water measurement classes. It's not
17 engineering training per se.

18 But you know at least three years, I
19 went over to Boise to the IDWR Senior Agent
20 Training, where they trained us in the approved IDWR
21 methods for doing these types of analyses.

22 I have been trained in IDWR's Hubble
23 analysis and Worstell Analysis, which are the
24 methodologies that the State commissioned for doing
25 these types of analyses.

1 was irrigated was capable of being irrigated.

2 Q Have you done this type of irrigation
3 ditch system analysis before?

4 A Not this particular type. But what I
5 have done, I studied surveying and I done contour
6 maps of surveying. You know done level surveys. I
7 had the IDWR GIS training. I have pushed water with
8 a shovel.

9 Q So what is your background with using
10 GIS data of this type?

11 A The adjudication work that I did was all
12 GIS based. We used GIS, both GPS readings to
13 identify corners of places of use, to identify ditch
14 locations, to identify point of diversion location.
15 Then used all kinds of GIS in the processing of the
16 data for my work at the university.

17 Q How about using GIS to determine
18 elevations of like in this situation, ditch system
19 water movement through them?

20 A In some of the adjudication
21 recommendations I did, for instance the Newman
22 recommendation up in Birch Creek. Part of the issue
23 of the recommendation was to verify --

24 It was one of these deals where there is
25 not a lot of water running in the Birch Creek

1 Q Have you ever built or participated in
2 the building of a ditch irrigation system?

3 A Yes?

4 Q When was that.

5 A In '87. Yeah. Eighty-seven on my farm
6 in Mud Lake. I did not build the whole system, but I
7 moved ditches and changed the pattern of irrigation.

8 Q Was the ditch system there before you
9 moved there?

10 A The original one was, but the new one of
11 course was not.

12 Q And did you design the changes?

13 A Well, I would not say "design". We went
14 out with a dumpy level and decided where we wanted
15 the ditches and moved them.

16 Q Have you ever been contracted to design
17 a ditch system?

18 A No.

19 Q If someone approached you with that
20 idea, would you feel comfortable doing it?

21 A No.

22 Q Do you believe that I guess the design
23 of a ditch system involves an expertise in
24 engineering?

25 A No.

1 Q Why is that?

2 A Because there are ditches all over this
3 country that have been built by guys with a couple of
4 mules and some good horse sense. They worked fine.

5 Q Whether or not they work fine, looking
6 at it from a viewpoint of like a paper trail or a GPS
7 trail, do you think you need some sort of engineering
8 experience to evaluate it in that way?

9 A Well, you know I guess it depends on the
10 kind of analysis that is done. The analysis that I
11 did here was you know strictly a geographer's
12 analysis, you know coupled with some understanding of
13 hydraulics from the course work I had taken in the
14 IDWR training.

15 It takes head to move water from a high
16 location to a low location. That we had GPS
17 measurements of elevations, there is some imprecision
18 in those, and there are methods to adjust for those
19 imprecisions. That is not engineering. That is
20 geography. That is GIS analysis.

21 Q When you say there are "measures", what
22 type of measures are used?

23 A Well, you know you can get
24 sophisticated. This would have been more favorable
25 to my client, but more complex. That error range

1 that is reported is a statistical distribution of
2 uncertainty.

3 And so it does not say that this point
4 is wrong by .4 meters or .1 meter or .2 meters. It
5 says that there is a probability that it could be
6 wrong by that amount. So you can adjust those
7 probabilities.

8 I took the more conservative and more
9 straightforward approach and took the error at face
10 value and assumed it was wrong by that amount.

11 It was wrong to the detriment of my
12 client by that amount. So a more sophisticated
13 analysis would have been more favorable to the
14 client.

15 Q Besides elevation change, what other
16 criteria did you use to evaluate the ability of the
17 water to move through the system?

18 A None.

19 Q So all you really looked at was the
20 slope or change in elevation?

21 A Yes.

22 Q Did you account for ditch loss?

23 A No.

24 Q Or friction problems with the bottom of
25 the ditch?

1 A Well, that is really what the purpose of
2 the elevation difference is, that imposed gradient
3 that I applied to cause water to move.

4 That is the energy required to overcome
5 the friction of the entire system, not just in the
6 ditch, but in moving water across land surface.

7 Q And when you say that is the amount of
8 energy needed to be used, how much energy is needed
9 to be used to push water across that?

10 A You can go down to Mud Lake, closer to
11 the lake there are fields that are nearly flat.

12 You know, there is like two-tenths of a
13 foot in a half a mile fall. They are almost flat.
14 Yet the water moves across them.

15 So I took a more conservative -- I took
16 a half a foot per mile. I took a more conservative
17 stricter requirement.

18 And again we got to remember the
19 context. I was not tasked with looking at a piece of
20 ground that had never been irrigated to do an
21 evaluation of whether and how it ought to be
22 irrigated.

23 I was tasked with examining an
24 eyewitness account to see if there were any factual
25 indications that the eye witness account could not be

1 true.

2 Q So when you said you used an error, what
3 error mode did you use?

4 A In that data table 31-11485 or 845 dot
5 XLS, there is a field -- I don't know if the name of
6 the field is error or imprecision.

7 But it's an indication of the vertical
8 precision of the elevation that was taken. That is
9 an output of the GPS instrument.

10 It was not labeled with units. I took
11 the assumption that was most consistent with my
12 experience and least favorable to my client which was
13 to assume that the units were meters.

14 Q Did you produce any other reports or
15 documents besides the one in front of you?

16 A Well, I think the three that you got in
17 your lap.

18 Q Okay. Lets look at those.

19 MR. STANISH: Lets mark these.

20 (exhibits 19, 20 and 21 marked)

21 Q I will hand you 19, 20 and 21. I want
22 you to explain to me what those are. I guess we can
23 start with 19. What is 19?

24 A Nineteen is my responses to the soil
25 survey comments. Mike asked me to take a look at the

1 soil survey. There was some concern that some of the
2 soils were identified as not irrigable.

3 What does that mean in the context of
4 the record in the license file? This is my response
5 to that request.

6 Q What did you find?

7 A What I found was that indeed there were
8 some soil series within the place of use that were
9 classed by the NRCS as not irrigated or irrigable.
10 What I also found was that one of those soils was a
11 combination of two other soil types.

12 And those two subtypes themselves were
13 classified as irrigable. Item Number 2, Series 93,
14 the soil survey description indicates that it's a
15 complex of the IC Heiseton and Montlid.

16 And while Series 93 is classified as
17 non-irrigated. Those two component series are
18 classified as irrigated.

19 I found adjacent to the place in
20 question areas of soil type 93 and 59 that are
21 irrigated in cultivated developed crops.

22 Q Are you a soil scientist, Mr. Contor?

23 A No.

24 Q What is your experience with I guess
25 evaluating soils for irrigability.

1 A Nineteen, I haven't looked at yet. When
2 you asked about 19, I described 21. So 21 is the
3 draft of the soil survey analysis.

4 Q Okay.

5 A Twenty is the draft of the place of use
6 elevation. Nineteen looks like another copy of the
7 draft of the place of use elevation.

8 Q So what you are saying is, you basically
9 did two analysis. One of the place of use in terms
10 of the total graphic analysis and then the soil
11 survey analysis?

12 A There is a third. That is Document 18.
13 I responded to the ditch survey that was done by
14 Hornbecker.

15 Q What did you say in that one?

16 A This is not the one that I went through
17 last night as thoroughly as I thought I had.
18 Hornbecker based his analysis on the bottom elevation
19 of the ditches which is absolutely worthless.

20 Because water moves according to the
21 gradient of the water surface. And how high that
22 water surface can be is a function of the elevation
23 of the ditch banks.

24 In essence, I found two things that
25 if -- The ditches are incised in the ground, so they

1 A I looked at a lot of farms before I
2 bought the one I farmed. I farmed my own farm. I
3 watched my neighbors. I had six or seven semester
4 hours of soil course work.

5 But this analysis is just a report of
6 the findings from the soil survey which was done by
7 soil scientists.

8 Q But you would not consider yourself an
9 expert in soil science, would you?

10 A No.

11 Q Let's move on to Number 20.

12 A Okay.

13 Q What is that?

14 A That is -- Well, let me correct.
15 Nineteen -- twenty is a draft. There is a line that
16 I crossed out here.

17 So this is a draft of a document that I
18 provided to Mr. Tribe, basically describes this
19 elevation analysis that we have talked about
20 previously.

21 Q Okay. Twenty-one.

22 A What I described as Exhibit 19 was
23 actually Exhibit 21. I apologize.

24 Q So 21 is the -- Nineteen was the draft
25 and 20 was --

1 can carry water to any point where the land surface
2 is lower than the water surface elevation at the
3 beginning of the property.

4 And the one area of concern -- there was
5 an area about a quarter mile southeast of where the
6 water comes under the road at the northeast corner.
7 The bottom elevations were very deep.

8 A lot of Hornbecker's concern was based
9 on the elevation of the ditch at that point. I
10 pointed out that at that location the ditch banks are
11 very high, number one.

12 And number two: That ditch is also the
13 ditch that conveys water to the improved irrigated
14 parcel, that I seen robust vegetation on that
15 indicates that that has to have been irrigated
16 through the nineties.

17 Q Now in your analysis, did you look at
18 any ditch bank height data?

19 A I did not for two reasons. One:
20 Hornbecker did not -- If he gathered these data, he
21 did not report them. And number two: The relevant
22 ditch bank height would have been the height of the
23 ditch bank that existed when the witnesses said they
24 saw irrigation occurring.

25 It would be tough to gather data today

1 that would give an indication of what that relevant
2 ditch bank height was.

3 Q Okay. Are you saying that any analysis
4 of the ditches today would be unrepresentative of the
5 ability of that ditch system to service the entire
6 place of use?

7 A No. For instance, if you found that the
8 entire place of use had higher elevation than the
9 source, then you could conclude that water would not
10 run there.

11 The other thing that you could do is,
12 you could survey the height of the ditch banks and
13 perhaps without adjustment you would find what could
14 be irrigated. Then you could determine what would be
15 the expected height of the ditch banks while they
16 were in repair and in current use.

17 But I did not perform that. Apparently
18 no one else has done that either.

19 MR. STANISH: Lets mark this.
20 (exhibit 22 marked)

21 Q I am going to hand you Exhibit Number
22 22.

23 A Okay.

24 Q Do you recognize that?

25 A You know, I think that I had looked at

1 If I had found no indication that any of
2 this land at all was likely to have been irrigated in
3 '87, then that perhaps could have been something to
4 contradict the eyewitness account.

5 What I found was that within the
6 described place of use on the license there was
7 approximately the right number of acres.

8 I know from my own farm and observing
9 other farmers, the 300 acres I irrigated may not be
10 the same exact 300 acres that I irrigate last year or
11 next year.

12 There is an indication in a given year
13 it's reasonable that I was irrigating about
14 300 acres. Then 300 acres is a reasonable
15 description of my irrigation practice.

16 Q If you look at sentence Number 4 of
17 Paragraph 8, starting with: After deleting the lands
18 not owned by Mr. Jernberg --

19 A Okay.

20 Q Based on what you see there, do you
21 believe that would be an accurate conclusion that he
22 came to?

23 A You know, depending on what lands it was
24 that I mapped that were not owned by Jernberg, one
25 could accept if you take a map and you trim areas off

1 this. This is -- It's an affidavit of Carter
2 Fritschle. I don't have a copy of it.

3 Q Would you like to read it before you go
4 forward?

5 THE WITNESS: Do you want me to read the
6 whole thing.

7 MR. STANISH: It's up to you? I guess what
8 I want you to take a look at first is paragraph
9 number eight.

10 THE WITNESS: Okay.

11 Q If you look at the second sentence which
12 starts: Mr. Contor included in his analysis.

13 A Okay.

14 Q It state's that you included lands not
15 owned by Mr. Jernberg. Do you know what he is
16 referring to?

17 A I do. When I did my analysis it was
18 based on -- I was asked to analyze the original
19 license, the 7,000 license. Seventy-three eleven, or
20 whatever it is. And I just took the described place
21 of use that that described.

22 Found what appeared to be irrigated
23 within that. But again this is -- You know this is a
24 photo analysis which is far inferior to an eyewitness
25 account.

1 of it, I could expect that you are going to come up
2 with a smaller number of acres.

3 Q Okay. And Paragraph Number 11. Please
4 read that for me.

5 A (witness complies) Okay.

6 Q Do you agree with the statements made in
7 that paragraph?

8 A No.

9 Q What specifically do you disagree with?

10 A Well, I disagree with the assertion that
11 the benefit appears to be limited to the immediate
12 area around the ditch or depression.

13 Q And how would you correct that
14 statement?

15 A Well, I would correct the statement to
16 say: Based on the findings of the field examiner and
17 the description of the Llamases and Jernberg as to
18 the practice, the examiner found the whole place of
19 use irrigated.

20 Llamases and Jernberg stated the method
21 that they would do it. Jernberg's wording: You fill
22 up one lake, and then you push that lake over into
23 the next lake. And that description in my mind is
24 consistent both with what I observed and what the
25 examiner said he found.

1 Q You said that you reviewed some of the
2 expert reports that were submitted by the State?

3 A I thumbed through them. Literally
4 thumbed through them.

5 Q Okay. Are those contained here in this?

6 A Yes. Look in there. There maybe a
7 cover letter -- Can we go off the record?

8 (discussion held off record)

9 MR. STANISH: Back on the record.

10 Q (By Mr. Stanish) Mr. Contor, I will
11 hand you an expert report created by David Young.
12 Take a look at that.

13 A (witness complies)

14 Q Is that your understanding of what that
15 is?

16 A Well, it's what it says it is.

17 Q Take a look at Page 1 where they express
18 a number of opinions. Opinion Number 1. Could you
19 read that for me.

20 A Outloud?

21 Q To yourself.

22 A (witness complies) Okay.

23 Q Do you agree with that statement in
24 Paragraph 1?

25 A You know, I don't know the procedure

1 that I fail to agree. I was not there when the
2 system was new. So I can't speak to the adequacy of
3 the system when it was new.

4 Q How about Number 3?

5 A Starting with the second sentence, this
6 seems reasonable. I don't know if the 169 acres is
7 exact or the elevation different, five feet is exact.
8 But the rest of that seems reasonable. The first
9 statement I don't agree with.

10 Q What don't you agree with it about?

11 A Well, it asserts that the system
12 delivers adequate rate and volume for only some of
13 the area. Apparently intended to serve.

14 That is counter to both my calculations
15 of the water supply used and water supply available,
16 and the finding -- And the testimony of the witnesses
17 who saw the system when it was in use.

18 Q I would like to point you to Exhibit
19 Number 20. Figure Number 4.

20 A Okay.

21 Q Does this figure represent your
22 understanding of the area that could possibly be
23 irrigated with the system?

24 A This is my representation of the very
25 worst case, stacking all of the assumptions against

1 under which that irrigation system was built and
2 designed. So I am not sure I can answer that.

3 Q How about Number 2. Could you read that
4 as well.

5 MR. TRIBE: Are you planning on having him go
6 down through the findings for all these four
7 reports?

8 MR. STANISH: I think just probably this one.

9 MR. TRIBE: Bryce has not read that. I think
10 it's just going to be an exercise in futility
11 getting him to agree or not agree on those without
12 having looked at a lot of that data in those
13 reports.

14 MR. STANISH: I would still like -- I think I
15 am only going to have him look at this one.

16 MR. TRIBE: Sure.

17 MR. STANISH: I would like him to have an
18 opinion on it.

19 MR. TRIBE: If you don't know, just indicate.

20 THE WITNESS: I read 2.

21 Q Do you agree with the statements made in
22 Paragraph 2?

23 A I agree it's not been maintained.

24 Q What do you disagree with?

25 A Well, it's not that I disagree. It's

1 the possibility of irrigation. These are the lands
2 that are still potentially irrigable.

3 Q In Figure 4, does it show that all areas
4 within the place of use are irrigable?

5 A No.

6 Q How much of a place of use does Figure 4
7 say could be irrigated?

8 A Six hundred and eight acres.

9 MR. STANISH: Thank you.

10 Q Back to the report of David John Young.
11 Could you read Number 4.

12 A Okay.

13 Q Do you agree or disagree with that
14 statement?

15 A I disagree with that statement.

16 Q And why?

17 A Well, the first sentence I disagree with
18 because it's counter to both my analysis and
19 eyewitness accounts. The second sentence, I frankly
20 don't understand.

21 Q How about skipping to Number 6.

22 A Okay.

23 Q Do you agree with that?

24 A I do not.

25 Q And what do you disagree with?

1 A Well, the fact that stacking all the
2 errors against the proposition of delivering water to
3 the southend and applying a gradient required to
4 deliver water greater than exists in other irrigated
5 systems in the area, I still found that parts of the
6 southern end of that place were irrigable.

7 Q What does the minimum amount of head
8 require to service the entire place of use?

9 A You know, I haven't calculated that.
10 That would depend entirely on the condition of the
11 ditches. If the ditches are in very good
12 condition -- You know those ditches are very, very
13 large. So with a large ditch and a small amount of
14 head, you can still move a lot of water.

15 Q Have you calculated the amount of head
16 required -- strike that. Number 7. Take a look at
17 that.

18 A Okay.

19 Q Any comment on Number 7?

20 A That is possible for some of the ditch
21 segments.

22 Q Do you know which ones?

23 A I don't.

24 Q What would be the purpose of doing that
25 to the ditch segments?

1 you are trying to limit water on that place. That
2 place will still be irrigated. You are trying to get
3 the water some where else.

4 Q Number 10.

5 A Okay.

6 Q Do you agree with those statements?

7 A I don't.

8 Q Why not?

9 A There is not enough snowmelt
10 precipitation in that area to do anything with.

11 Q How about 11?

12 A I was not there when they did their
13 measurement.

14 Q Is that something similar to the
15 measurement that you got?

16 A It's lower than the measurement I got
17 and lower than the licensing examiner's measurement.

18 Q How about 12?

19 A It's true that the ditch can divert
20 water either north or south. I have lost track of
21 the places of use of the 2000 series water rights.
22 So I can't verify those assertions.

23 Q Number 13?

24 A I neither verify nor dispute the change
25 in horse power of electric pump. The other

1 A Well, you know it's hard to know what
2 was going on at the time. Sometimes you will have an
3 area that water flows to and you need to convey water
4 beyond that to another place of irrigation.

5 If this parcel is adequate and irrigated
6 from this source, the ditch adjacent to it doesn't
7 need to have a cut out.

8 The important analysis would have been:
9 What did it look like in '86 when it was being
10 irrigated. I don't have that picture. I don't think
11 these folks had that picture either.

12 Q How about Number 8?

13 A It's true that the system is not in
14 repair right now. This assertion that it may have
15 been many years or perhaps decades, I have no way to
16 confirm the truth or falsity of that assertion. But
17 it certainly has not been used this year or last
18 year.

19 Q How about Number 9?

20 A I think "limit" is probably not as good
21 of word as control would be. And you know when you
22 are flood irrigating, you take your shovel and you
23 make some cross dykes.

24 Nearly always the cross dyke is in a
25 place that already has too much water. It's not that

1 statements appear to be true.

2 Q Number 14?

3 A I haven't done those calculations or
4 conferred with Jernberg?

5 Q Number 15?

6 A I haven't reviewed the ownership of the
7 land.

8 Q Sixteen?

9 A I haven't reviewed the ownership.

10 Q I guess, I am going to go back a little
11 bit to a statement you made about the amount of
12 consumptive use they used to calculate the amount of
13 acre foot and of water.

14 A Okay.

15 Q What did you base that calculation on?

16 A It's a RASA, Regional Aquifer Study.
17 It's a regional aquifer study. It's the USGS. And
18 they did an aquifer study of the Eastern Snake Plain
19 Aquifer. The water use USGS specialist, Sally
20 Goodell, put together a report of water use on the
21 plain.

22 She described water use on native
23 vegetation. She described that it's typically
24 limited by precipitation. Then she described the
25 upper limit. She said that native vegetation -- It

1 was about 2 feet.

2 There is an e-mail. Candice McHugh
3 requested those data, and I don't -- I lost my copy
4 of Sally's report, but I borrowed a copy. And I gave
5 her the page numbers and the figures.

6 There is an e-mail in those files. It's
7 about two feet of consumptive use if the native
8 vegetation received the full supply. She also
9 reported on the rule of thumb -- She has documented
10 the sources for this information.

11 The rule of thumb is that irrigated
12 native vegetation will consume about 75 percent of
13 what an irrigated crop would consume.

14 MR. STANISH: Well, it's almost time to wrap
15 up. I want to get an idea from you which fields
16 of study --

17 Q What fields would you consider yourself
18 an expert in?

19 A I guess you will have to define "expert"
20 for me. You know, that is a legal term. I am not a
21 legal person.

22 You know just like beneficial use means
23 something entirely different to a water attorney than
24 my brother who is the fisheries biologist. What do
25 you mean by "expert"?

1 Q Well, I am asking you for your
2 interpretation of the term. I mean, do you consider
3 yourself an expert in what?

4 A I consider myself an expert in
5 Adjudication Recommendations and in preparing water
6 budgets for ground water modeling.

7 Q In what areas of the analysis you have
8 done in this case do you consider yourself an expert
9 in?

10 A Well, in the sense that the whole thing
11 is an adjudication analysis, then I consider myself
12 an expert in the analysis. But you know it's a
13 little bit like an M.D. could be considered an expert
14 in medicine. Even so, if he comes up with an unusual
15 case he will contact the pharmacist.

16 He has a working understanding of
17 Pharmacy, but he would not consider himself an expert
18 in Pharmacy.

19 I have enough understanding of soils to
20 review soils data, soils survey maps to see if the
21 data correspond to what I find in the field.

22 And in the sense that that is part of
23 many pieces that go into performing adjudication
24 analyses, then that is within myself as an expert.

25 Am I an expert soil scientist, no, I am

1 not.

2 Q What about a hydrologic engineer: Do
3 you consider yourself an expert engineer in that
4 sense?

5 A Not in the sense of specifically
6 designing for instance hydraulic structures. But in
7 the sense of performing an expert analysis on an
8 adjudication recommendation, I would consider myself
9 an expert in adjudication recommendation with
10 adequate understanding of hydraulic principles.

11 Adequate to analyze whether the evidence tends to
12 indicate that the claimed beneficial use took place.

13 Q But when you say it would tend to take
14 place, -- Would you feel comfortable saying that it
15 did take place based on your analysis as an engineer
16 or applying these hydrological engineering practices?

17 A What I would say is that as an expert
18 reviewer of adjudication claims, what I find is I
19 find eyewitness accounts that state that irrigation
20 took place.

21 I find nothing in my own hydraulic
22 analyses or the limited review that I have done of
23 Young's and Shaw's or in my review of Sunny
24 Hornbecker's --

25 I found nothing that would indicate that

1 the eyewitness accounts could not be true.

2 Q I understand your role as reviewing
3 adjudication is being kind of an all-encompassing
4 generalist kind of idea. But do you consider
5 yourself an expert in those particular technical
6 aspects such as engineering?

7 A No.

8 Q How about the range sciences component?

9 A I am not these ten experts. You can go
10 down the list and the answer to each of those is no.
11 But to the extent that those fields contributed to
12 the general knowledge base necessary to perform
13 adjudication recommendations, I am an expert in
14 Adjudication Recommendations.

15 Q In your role as an adjudication
16 recommender, do you usually rely on the technical
17 expertise of people working under you?

18 A No.

19 Q Do you generally do the technical work
20 that you rely on?

21 A Well, I guess if there is technical work
22 that is not part of the record, then I go do the
23 technical work.

24 But if there is technical work that has
25 been performed in the past -- For instance, if there

1 is a licensing exam, a licensing examiner measured
2 flow and there is nothing in the record to indicate a
3 problem with that flow measurement, then I rely on
4 that.

5 So it's not that I did the measurement
6 myself nor is it that I had the measurement performed
7 by a subordinate. It's that I relied on the finding
8 of another party that one would expect to be
9 competent based on his or her position.

10 Q Okay. Before we wrap up I would like
11 to give you a chance to either provide a supplemental
12 answer or any change that you can remember or to
13 something that you had previously said, because this
14 has been a four-hour ordeal.

15 Is there anything that you remembered as
16 we went along or anything that you want to add or
17 change?

18 A Thank you. There is one thing. You
19 asked earlier about examples of other irrigation of
20 rough pasture land. And when I was subcontracted
21 under IDWR to do field exams in the Crow Creek area
22 and the Sage Creek area of Basin 24, I did some exams
23 on lands that had some of this rough type irrigation
24 that were decreed in former decrees.

25 Q What was the extent of your

VERIFICATION

STATE OF _____)

COUNTY OF _____)

I, BRYCE CONTOR, say that I am the witness
referred to in the foregoing deposition, taken the 10th
day of November 2006, consisting of pages numbered 5 to
131; that I have read the said deposition and know the
contents thereof; that the same are true to my
knowledge, or with corrections, if any as noted.

Page	Line	Should Read	Reason
_____	_____	_____	_____
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_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

BRYCE CONTOR

Subscribed and sworn to before me this _____
Day of _____, 2006, at _____.

(Seal)

Notary Public for Idaho
My Commission Expires _____
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1 investigation?

2 A I was contracted specifically to do the
3 field investigation. So what I did was walked and
4 photographed, took GPS readings of the place of use.
5 Took flow measurements in some instances.

6 In some instances took measurements of
7 ditch dimensions. In other instances, interviewed
8 the water users. Located the points of diversion.
9 Prepared the maps of the place of use that I found.

10 Then the recommendation was actually
11 performed by an IDWR agent.

12 MR. STANISH: With that, I think that we're
13 finished.

14 THE WITNESS: Well, I am glad.

15 MR. TRIBE: I have no questions.

16

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(Deposition concluded at 2:15 p.m.)

REPORTER'S CERTIFICATE

STATE OF IDAHO _____)

COUNTY OF BONNEVILLE _____) ss.

I, Karla Steed, CSR, RPR, RMR, and Notary Public
in and for the State of Idaho, do hereby certify:

That prior to being examined BRYCE CONTOR, the
witness named in the foregoing deposition, was by me
duly sworn to testify to the truth, the whole truth,
and nothing but the truth;

That said deposition was taken down by me in
shorthand at the time and place therein named and
thereafter reduced to typewriting under my direction,
and that the foregoing transcript contains a full, true
and verbatim record of said deposition.

I further certify that I have no interest in the
event of the action.

WITNESS my hand and seal this _____ day of
November, 2006.

Karla Steed
Idaho CSR No. 272
Notary Public in and
for Idaho.

My Commission Expires: 8-21-12