

RECEIVED

JUN 06 2008

DEPARTMENT OF
WATER RESOURCES

Attorneys for Pioneer Irrigation District
and Settlers Irrigation District

Scott L. Campbell, ISB No. 2251
Tara Martens, ISB No. 5773
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
18-946.24

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. 63-3618
(Lucky Peak Reservoir)

SECOND SUPPLEMENTAL AFFIDAVIT OF
SCOTT L. CAMPBELL IN SUPPORT OF
PIONEER'S AND SETTLERS' SUR-REPLY
MEMORANDUM

State of Idaho)
) ss.
County of Ada)

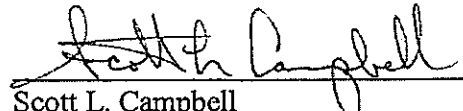
SCOTT L. CAMPBELL, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law in the state of Idaho and I am the attorney of record in the above-captioned matter for Pioneer Irrigation District ("Pioneer") and Settlers Irrigation District ("Settlers") (collectively hereinafter the "Districts").

I have knowledge of the files pertinent to this matter and I make this affidavit based upon personal knowledge, information and belief.

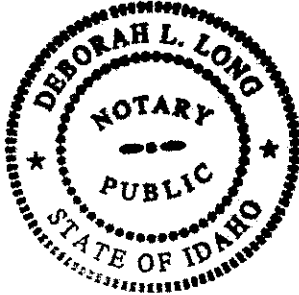
2. Appended hereto as Exhibit A is a true and correct copy of cited portions of Volumes I and II of the transcript of the Deposition of Robert J. Sutter, taken on March 28, 2008 and April 16, 2008, in Boise, Idaho.

Further your affiant sayeth naught.



Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 5th day of June, 2008.





NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 10/10/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2008, I caused a true and correct copy of the foregoing **SECOND SUPPLEMENTAL AFFIDAVIT OF SCOTT L. CAMPBELL IN SUPPORT OF PIONEER'S AND SETTLERS' SUR-REPLY MEMORANDUM** to be served by the method indicated below, and addressed to the following:

Albert P. Barker
BARKER RSHOLT & SIMPSON
1010 W. Jefferson, Suite 102
Post Office Box 2139
Boise, Idaho 83701-2139
Facsimile (208) 344-6034

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Daniel V. Steenson
RINGERT CLARK CHTD.
455 S. Third Street
Post Office Box 2773
Boise, Idaho 83701-2773
Facsimile (208) 342-4657

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

S. Bryce Farris
RINGERT CLARK CHTD.
455 S. Third Street
Post Office Box 2773
Boise, Idaho 83701-2773
Facsimile (208) 342-4657

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Jerry A. Kiser
STOPPELLO & KISER
620 W. Hays Street
Boise, Idaho 83702
Facsimile (208) 336-1027

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Natural Resources Division Chief
STATE OF IDAHO ATTORNEY GENERAL'S OFFICE
Post Office Box 44449
Boise, Idaho 83711-4449
Facsimile (208) 334-2530

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Shelley M. Davis
BARKER ROSHOLT & SIMPSON
1010 W. Jefferson, Suite 102
Post Office Box 2139
Boise, Idaho 83701
Facsimile (208) 344-6034

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Environment and Natural Resources Division
UNITED STATES DEPARTMENT OF JUSTICE
550 West Fort Street, MSC 033
Boise, ID 83724

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720
Facsimile (208) 287-6700

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Erika E. Malmen
PERKINS COIE LLP
251 East Front Street, Suite 400
P.O. Box 737
Boise, ID 83702-7310
Facsimile (208) 343-3232

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Susan Thomas
Deputy Prosecuting Attorney
Civil Division
ADA COUNTY PROSECUTOR'S OFFICE
200 West Front Street, Room 3191
Boise, Idaho 83702
Facsimile (208) 287-7719

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

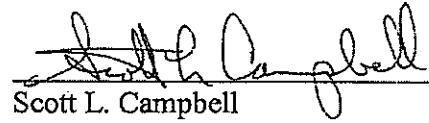
COURTESY COPIES

David W. Gehlert
DEPARTMENT OF JUSTICE
General Litigation Section
1961 Stout Street, 8th Floor
Denver, Co 80294

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Lorna K. Jorgensen
ADA COUNTY PROSECUTOR'S OFFICE
200 West Front Street, Room 3219
Boise, Idaho 83702

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

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. 63-3618
) (Lucky Peak Reservoir)
)
_____)

DEPOSITION OF ROBERT J. SUTTER

Volume I

(Pages 1 through 143)

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Friday, March 28, 2008
Beginning at 9:00 o'clock a.m.

(COPY)

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RDR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

Deposition of Robert J. Sutter (Volume I)

Exhibit A

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

In Re: SREA,

Case No. 39576.

Subcase No. 63-3618
(Lucky Peak Reservoir)

DEPOSITION OF ROBERT J. SUTTER

Volume I

(Pages 1 through 148)

Law Offices of
Moffatt, Thomas, Barnett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Friday, March 28, 2008
Beginning at 9:00 o'clock a.m.

OnA COURT REPORTING
Lori A. Pulsifer, CSR, ROR, CRR
Idaho Certificate No. 354
RM: 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtime@ona.com
Telephone: (208) 484-6309

APPEARANCES
(continued)

FOR BOISE PROJECT BOARD OF CONTROL:
MR. PAUL L. KIRKINGTON
Attorney at Law
BARKER HOSKETT & SIMPSON, LLP
113 Main Avenue West
Suite 303
Twin Falls, Idaho 83301-6167
Phone: (208) 733-0700
Fax: (208) 735-2444
E-mail: pla@idahowaters.com

A N D

Mr. John K. Simpson
Attorney at Law
BARKER HOSKETT & SIMPSON, LLP
Post Office Box 2139
Boise, Idaho 83701
Phone: (208) 336-0700
Fax: (208) 344-6034
E-mail: jks@idahowaters.com

APPEARANCES

FOR PIONEER IRRIGATION DISTRICT AND
SETTLERS IRRIGATION DISTRICT:

MR. SCOTT L. CAMPBELL
MR. TARA MARTENS
Attorneys at Law
MOFFATT, THOMAS, BARNETT, ROCK &
FIELDS, CHARTERED
101 South Capitol Boulevard
10th Floor
Boise, Idaho 83701
Phone: (208) 345-2000
Fax: (208) 385-5384
E-mail: slc@moffatt.com
tla@moffatt.com

FOR THE BUREAU OF RECLAMATION:

MR. DAVID GAHLERT
Assistant United States Attorney
UNITED STATES DEPARTMENT OF JUSTICE
1961 Stout Street, 8th Floor
Denver, Colorado 80294
E-mail: david.gahlert@usdoj.gov

FOR NIMES AND MERIDIAN IRRIGATION DISTRICTS:

MR. S. BRYCE FIELDS
Attorney at Law
RINGER CLARK, CHARTERED
455 South Third Street
Boise, Idaho 83701
Phone: (208) 342-4591
Fax: (208) 385-4657
E-mail: hbryce@ringertclark.com

FOR ADA COUNTY:

MR. LORNA K. JORGENSEN
Deputy Prosecuting Attorney
ADA COUNTY PROSECUTING ATTORNEY'S OFFICE
200 West Front Street
Suite 3191
Boise, Idaho 83702
Phone: (208) 287-7700
Fax: (208) 287-7719
E-mail: ljorgensen@adaweb.net

INDEX OF EXAMINATION

Deponent's Name Page Number

ROBERT J. SUTTER

Examination by Mr. Campbell 7

1 if I made a change in the program, whether it be minor
2 or whatever, I would sometimes put the date up on top.
3 I'm not sure why I chose to put this date. I don't
4 recall.

5 Q. In comparing Exhibit 28 with that portion of
6 Exhibit 29, someone changed it back to "Lucky Peak," as
7 opposed to "Yucky Peak;" is that correct?

8 A. Correct.

9 Q. Did you make that change back?

10 A. I don't recall.

11 Q. And then there is a reference, again, "RJS-June
12 1997." Do you see that?

13 A. Yes.

14 Q. And below that it says, "Modified, CAK-October
15 1998." Do you see that?

16 A. Yes.

17 Q. Do you know what that means?

18 A. "CAK" stands for Cheryl -- I'm not sure what
19 her middle name was -- Kramer. She was a part-time
20 employee at that time. This would indicate that she
21 made some change in the program in October of '98.

22 Q. Just so I understand -- well, before I ask that
23 question, let me go to your affidavit, if I could,
24 Exhibit 27. I think it has been marked. Do you have
25 that document?

37

1 A. Yes.

2 Q. On page 2 of Exhibit 27, paragraph 2, it
3 indicates, in the first line -- and I will read this
4 into the record -- "In 1986, I developed the Boise River
5 Water Right Accounting computer program (hereafter
6 called the 'Accounting Program') and the Boise River
7 Storage Allocations computer program (hereafter called
8 the 'Allocations Program') for the Boise River."

9 Did I read that correctly?

10 A. Yes.

11 Q. From that statement, I understand that to mean
12 that, in 1986, you developed the first computer programs
13 which are reflected, in part, by Exhibits 28 and 29? Is
14 that a correct conclusion for me to reach?

15 A. No.

16 Q. Why not?

17 A. Exhibits 28 and 29 are only the Boise River
18 storage allocations program and not the water right
19 accounting program.

20 Q. All right. So 28 and 29 reflect the
21 allocations program?

22 A. Yes.

23 Q. So does my statement hold true with respect to
24 Exhibit 29, relative to the allocations program? Does
25 29 represent the Boise River storage allocations

38

1 computer program which you developed in 1986?

2 A. What do you mean by "represent"?

3 Q. Well, this is a print-out?

4 A. Yes.

5 Q. So the actual program is in the computer?

6 A. Yes.

7 Q. The program you developed is in the computer;
8 correct?

9 A. Yes.

10 Q. This document, Exhibit 29, is a representation
11 of what is in the computer; correct?

12 A. Yes.

13 Q. That is why I say "representation."

14 A. It is the same as a -- it is a program of the
15 same name. It is not exactly the same because the
16 computer program is a dynamic tool for which
17 modifications are made several times in order to
18 accomplish the correct storage allocations on the Boise.
19 So the statements won't be exactly the same, but it is
20 the same function and the same named program.

21 Q. I understand. I think I understand. So what
22 you are saying is that Exhibit 29 reflects the
23 representation as it existed at a particular point in
24 time; is that correct?

25 A. Yes.

39

1 Q. Exhibit 29 represents the representation of the
2 program for allocations in approximately 2002, in June,
3 when you retired; is that correct?

4 A. Yes.

5 Q. All right. And Exhibit 28 represents the
6 allocations program currently; is that correct?

7 A. Yes.

8 Q. All right. So I would like to ask you, Mr.
9 Sutter, if there are any representations available with
10 the Department of Water Resources, as far as you know,
11 that represent the allocations program that you
12 developed in 1986?

13 A. I don't think that the exact program exists
14 that was used in 1986.

15 Q. Are there any documents that represent the
16 program that was prepared by you in 1986?

17 A. The output from the program showing the storage
18 allocations that exist.

19 Q. And what do you mean by "the output"?

20 A. The table which shows the reservoir fill, the
21 space allocations that were in existence at that time,
22 the carry-over from the previous year, and the
23 disposition -- the fill of -- the new fill of that
24 space, the water that was used by the various
25 entitlements, and the carry-over for the next year.

40

1 A. No.

2 Q. So you were describing the Flood Control
3 Manual?

4 A. Yes. They use the curves in the Flood Control
5 Manual. You know, it is quite professionally done. If
6 a mistake it made, it's because of statistical
7 forecasting procedures. It's not because somebody
8 actually was wrong. That was my point, sir.

9 Q. I understand, I think. The next sentence in
10 paragraph 8 reads, "If the 'unaccounted for' storage is
11 less than the storage released for flood control, this
12 shortfall is termed the 'failure to refill due to flood
13 control.'"

14 Is that phrase, "failure to fill due to flood
15 control," a term that is reflected in your programs?

16 A. No.

17 Q. So where does it come from?

18 A. Again, that's a term that we coined in the
19 Upper Snake when similar things happened there. When
20 the unaccounted-for storage was less than the storage
21 released for flood control -- those exact words are not
22 used in the program, but it was a term that we used
23 between professionals that operated the reservoirs to
24 describe this difference in -- yeah, the difference.

25 Q. Is that term used in the Boise River

133

1 Watermaster's Annual Report?

2 A. No.

3 Q. Is it used or documented someplace internally
4 within the Department of Water Resources with regard to
5 these accounting program or allocations program runs for
6 each year?

7 A. It could only be found in worksheets.

8 Q. So it is not an official term?

9 A. It is not official.

10 Q. Is this calculation -- excuse me -- not
11 "calculation." Is this term a term that was utilized
12 when you were at the Department to calculate a specific
13 number?

14 A. Yes.

15 Q. And what number was calculated relating to this
16 phrase?

17 A. It would be different for each year in which
18 there was a failure to fill. It would depend upon that
19 particular year.

20 Q. And as part of your preparation for today's
21 deposition or as part of your preparation of the
22 affidavit, did you conduct any evaluation of the years
23 where the failure to refill due to flood control amount
24 was calculated and a figure was derived?

25 A. Yes.

134

1 Q. For which years did you do that?

2 A. I came up with the years 1986, 1989, 1993, and
3 1999.

4 Q. And do you have amounts that are related to
5 those years?

6 A. These amounts are reported in Mary Mellen's
7 Affidavit, and I checked those. I don't have those. I
8 just --

9 Q. Well, let's look at her affidavit. I think
10 that is Exhibit 2, if I am not mistaken.

11 MR. GEHLERT: At one point you asked Bob to
12 hold on to it.

13 THE WITNESS: I probably didn't give it back to
14 you. Is this it? I've got something on the back there
15 that's not supposed to be there.

16 BY MR. CAMPBELL:

17 Q. No. I think it is part of it. Identify, if
18 you would, please, the portion of that affidavit that
19 you are identifying.

20 A. Okay. It would be page 4, the table at the
21 top.

22 Q. Which figures?

23 A. The 1989, '93, and '99 values.

24 Q. '93 -- I am sorry.

25 A. In 1989, it was 126,473; in 1993, it was

135

1 15,372; and in 1999, it was 6,968.

2 Q. Just so I am following you, you are saying,
3 then, that you calculated out the failure to fill due to
4 flood control amount in 1989 as being 126,473 acre-feet?

5 A. Correct.

6 Q. And the same with regard to 1993; it was 15,372
7 acre-feet?

8 A. Correct.

9 Q. And in 1999, the amount was 6,968 acre-feet?

10 A. Correct.

11 Q. Did you do anything to verify the amounts in
12 years '72, '75, '76, or '78?

13 A. I did not.

14 Q. And, Mr. Sutter, what about 1986?

15 A. That was a year -- I looked at the 1986 report.

16 Q. Which report?

17 A. The Watermaster Report for 1986. I was fairly
18 certain it was a flood control year, and I think there
19 was a slight amount that was not refilled. It's an
20 additional year that Mary Mellen did not have.

21 Q. Do you recall the amount of the failure to
22 fill?

23 A. I don't. It was small.

24 Q. By "small," do you mean a couple thousand
25 acre-feet?

136

CERTIFICATE OF WITNESS

I, ROBERT J. SUTTER, depose and say the following:

That I am the witness in the foregoing deposition transcript, Volume I,
consisting of pages 1 through 143;

That I have read said deposition transcript and that I know the contents
thereof;

That the questions contained therein were propounded to me; and

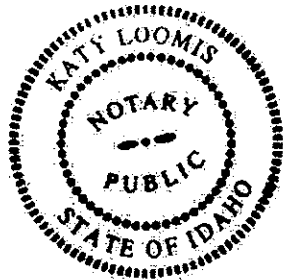
That the answers contained therein are true and correct except for
any changes that I may have listed on the Change Sheet attached hereto.

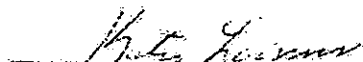
DATED AND SIGNED this 21 day of APRIL 2008.


ROBERT J. SUTTER

SUBSCRIBED AND SWORN to before me this 21 day of

April 2008.




Notary Public in and for the
County of Ada

My commission expires:

October 17, 2009

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. 63-3618
) (Lucky Peak Reservoir)
)
_____)

DEPOSITION OF ROBERT J. SUTTER

Volume II

(Pages 144 through 262)

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Wednesday, April 16, 2008
Beginning at 1:10 o'clock p.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RDR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)

Deposition of Robert J. Sutter (Volume II)

	Page 145
1	
2	APPEARANCES
3	FOR PIONEER IRRIGATION DISTRICT AND
4	SETTLERS IRRIGATION DISTRICT:
5	Ms. Tara Mariens
6	Attorney at Law
7	MOFFATT, THOMAS, BARRETT, ROCK &
8	FIELDS, CHARTERED
9	101 South Capitol Boulevard
10	10th Floor
11	Boise, Idaho 83701
12	Phone: (208) 345-2000
13	Fax: (208) 385-5384
14	E-mail: tms@moffatt.com
15	FOR THE BUREAU OF RECLAMATION:
16	Mr. David W. Gehlert
17	Assistant United States Attorney
18	UNITED STATES DEPARTMENT OF JUSTICE
19	1961 Stout Street, 8th Floor
20	Denver, Colorado 80294
21	Phone: (303) 844-1386
22	Fax: (303) 844-1350
23	E-mail: david.gehlert@usdoj.gov
24	FOR Nampa AND MERIDIAN IRRIGATION DISTRICTS:
25	Mr. S. Bryce Farris
	Attorney at Law
	RINGIER CLARK, CHARTERED
	455 South Third Street
	Boise, Idaho 83701
	Phone: (208) 342-4591
	Fax: (208) 385-4657
	E-mail: bryce@ringierclark.com
	FOR ADA COUNTY:
	Ms. Lorna K. Jorgensen
	Deputy Prosecuting Attorney
	ADA COUNTY PROSECUTING ATTORNEY'S OFFICE
	200 West Front Street
	Suite 3191
	Boise, Idaho 83702
	Phone: (208) 287-7700
	Fax: (208) 287-7719
	E-mail: ljorgensen@adaweb.net

	Page 147
1	
2	INDEX OF EXAMINATION
3	Deponent's Name Page Number
4	ROBERT J. SUTTER
5	Further Examination by Ms. Martens . . . 149
6	Examination by Mr. Farris 237
7	Further Examination by Ms. Martens . . . 259
8	
9	***
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

	Page 146
1	
2	APPEARANCES
3	(continued)
4	FOR BOISE PROJECT BOARD OF CONTROL:
5	Mr. Paul L. Arrington
6	Attorney at Law
7	BARKER RSHOLT & SIMPSON, LLP
8	113 Main Avenue West
9	Suite 303
10	Twin Falls, Idaho 83301-6167
11	Phone: (208) 733-0700
12	Fax: (208) 735-2444
13	E-mail: pla@idahowaters.com
14	
15	***
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

	Page 148
1	INDEX OF EXHIBITS
2	Exhibit No. Page Marked
3	*(Exhibit Nos. 1 through 35, inclusive, having been
4	previously marked for identification, are incorporated
5	herein by reference.)
6	Exhibit No. 36 Series of e-mails between
7	Robert J. Sutter and David Gehlert
8	re: drafts of the
9	Affidavit of Robert Sutter 150
10	
11	Exhibit No. 37 "Review of Boise River Flood
12	Control Management,"
13	Idaho Department of Water
14	Resources, Statehouse,
15	November 1974 157
16	
17	Exhibit No. 38 Reply Brief In Support of the
18	United States' Motion for Summary
19	Judgment, prepared by David Gehlert,
20	dated February 14, 2008 220
21	Exhibit No. 39 Juno e-mail for bsutter@juno.com
22	printed on Thursday, February 21,
23	2008, 11:22 a.m., re: Affidavit
24	of Mary Mellema 259
25	***

Page 165 1 A. It was either Mr. -- it was either Jerry Gregg, 2 Gail McGarry, or David Gehlert. 3 Q. So if I understand you correctly, you took her 4 affidavit and you deleted out the content that she had 5 included and drafted your own content? 6 A. Yes. 7 Q. And how long, approximately, did that take for 8 you to complete? 9 MR. GEHLERT: Tara, can you clarify? Are you 10 talking about the first draft or the whole affidavit? 11 MS. MARTENS: Yes, the first draft. 12 THE WITNESS: I would say, five or six hours. 13 BY MS. MARTENS: 14 Q. So this all occurred within the same day? 15 A. I could go back and check my records, but I 16 think it was all in the same day. 17 Q. While you were drafting your affidavit, did you 18 have any discussions with anybody about the content? 19 A. Which do you have as the last three pages? 20 Q. It ends with Paragraph No. 6. I think it is 21 the only one that only has six paragraphs. 22 MR. GEHLERT: This one was the first draft of 23 the last three pages. My numbering may have confused 24 you. 25 THE WITNESS: No, I did not.	Page 167 1 Memorandum of Understanding between the Corps of 2 Engineers and the Bureau of Reclamation for operating -- 3 for the existing Water Control Manual at that time. 4 He had explained to me that, as a result of 5 that Memorandum of Understanding, the irrigation 6 districts had signed contracts with the Bureau of 7 Reclamation, subsequent to that Memorandum of 8 Understanding, agreeing to the terms of that. As I 9 recall, I asked to see that. 10 Q. You received it electronically? 11 A. Yes. 12 Q. I assume there was some sort of message 13 attached to it? 14 A. Yes. 15 Q. And what did the message say, if you can 16 recall? 17 A. I think it was something like, "Here is the 18 1954 contract that we talked about." 19 Q. Did he ask you to review it? 20 A. No. 21 Q. Did you review it? 22 A. I briefly reviewed it, yes. 23 Q. And what portion of the contract did you 24 review? 25 A. The two portions -- there were two -- as I
Page 166 1 BY MS. MARTENS: 2 Q. No discussions with anyone? 3 A. No. 4 Q. If I look at the next draft, which I believe, 5 if I am reviewing the records correctly, came from you, 6 dated February 6, 2008, with an e-mail -- 7 A. Okay. 8 Q. I want to talk to you a little bit about the 9 e-mail first. You thank the sender for -- I think 10 something was sent to you, anyway, which I am not sure 11 that you have. You say, "Thanks for the 1954 contract." 12 Did you receive a contract from 1954? 13 A. Yes. 14 Q. When did you receive that contract? 15 A. That would have been sometime between February 16 2nd and February 6th. 17 Q. You have not produced that document or any 18 correspondence that came with that document, correct? 19 A. No, I have not. 20 Q. Did you receive it electronically or in paper 21 format? 22 A. Electronically. 23 Q. What was the purpose of your receipt of that 24 contract? 25 A. Mr. Gehlert and I had discussed the 1953	Page 168 1 recall, there were two paragraphs. There was a 2 Paragraph A and a Paragraph B in that contract which 3 discussed the fill of irrigators' space under conditions 4 of having Lucky Peak Reservoir present. 5 Q. And did you understand that those provisions 6 were guarantees made to the irrigation districts by the 7 Bureau of Reclamation? 8 MR. GEHLERT: Would you like to look at the 9 contract? 10 THE WITNESS: Could you rephrase that? 11 BY MS. MARTENS: 12 Q. Yes. Did you understand that Paragraph 7 -- I 13 will represent to you it is Paragraph 7 because you 14 reference that in your electronic mail. 15 A. Yes. 16 Q. Did you understand that that represented a 17 guarantee to the irrigation districts made by the Bureau 18 of Reclamation? 19 MR. GEHLERT: And before Mr. Sutter answers the 20 question -- and you can answer it -- I will just object 21 on the basis that Mr. Sutter is not being offered as a 22 witness to interpret the contracts. 23 THE WITNESS: I understood that to be a 24 provision in a contract that was signed by both the 25 irrigators and the Bureau of Reclamation. I am not sure

Page 169

1 what we would be guaranteeing. I can't speak to any
 2 guarantee.
 3 BY MS. MARTENS:
 4 Q. In your e-mail, you indicate that you believe
 5 that the contract may have been relevant prior to 1985.
 6 What is your basis for that comment?
 7 A. In 1986, we instituted the Water Right
 8 Accounting Program and the new Allocations Program and
 9 revised the way that the system fill and system use of
 10 storage water was accounted for.
 11 Prior to that, I am not familiar with the exact
 12 procedures that the watermaster used to allocate
 13 storage. That is the reason I said that, prior to 1985,
 14 I couldn't speak to the exact procedures.
 15 Q. For purposes of creating the Accounting and
 16 Allocations Programs that you reference in this
 17 paragraph, was any validity given to these contracts --
 18 and I mean the contracts from 1954 in this case that you
 19 reviewed.
 20 A. I had not read that particular contract that
 21 we're talking about in the e-mail ever before.
 22 Q. So when you created the Allocations and
 23 Accounting Programs, absolutely no consideration was
 24 given to this provision?
 25 A. I was not aware of that contract.

Page 170

1 Q. So it could not have been a part of your
 2 creation of the Accounting and Allocations Program?
 3 A. No.
 4 Q. And how about the 1953 Memorandum of
 5 Understanding between the Bureau of Reclamation and the
 6 Corps of Engineers? Was any consideration given to that
 7 Memorandum of Agreement at the time that the Allocations
 8 and Accounting Programs were created?
 9 A. Yes.
 10 Q. And can you, please, explain how the 1953
 11 Agreement was incorporated into the development of those
 12 programs?
 13 A. The 1953 Agreement led to all three reservoirs
 14 being jointly used for flood control and irrigation.
 15 Q. Anything else about the Memorandum of Agreement
 16 from 1953 that was utilized for purposes of creating the
 17 Allocations and Accounting Programs?
 18 A. Not that I recall.
 19 Q. Were any of the provisions applicable to
 20 amendment of the Memorandum of Agreement considered for
 21 purposes of creation of the Water Control Manual?
 22 A. I'm not sure what you're referring to. What
 23 amendment?
 24 Q. Okay.
 25 A. No, no.

Page 171

1 Q. Were any provisions, other than the provision
 2 that allowed for the three reservoirs to be operated as
 3 a system, considered for purposes of creation of the
 4 Allocations and Accounting Programs?
 5 A. Possibly. I would have to read the Agreement
 6 over, statement by statement, to see if any of it was
 7 included in the accounting. I'm sure there are portions
 8 of it that are, but I don't know. I would have to read
 9 it.
 10 Q. And I guess that that question is sort of
 11 problematic to me, in other words, that you do not seem
 12 to know -- let me ask you this. Before you created the
 13 Allocations and the Accounting Programs, did you review
 14 the 1953 Agreement?
 15 A. How soon before?
 16 Q. At any time?
 17 A. I think I had read portions of the '53
 18 Agreement as it related to the flood control curves,
 19 earlier; but I did not sit down and read the whole
 20 Agreement right before I did the Accounting Program.
 21 Q. Was the 1953 Agreement instrumental in the
 22 Accounting and/or Allocations Programs?
 23 A. We coordinated the accounting with the Bureau
 24 of Reclamation, and it is my recollection that we relied
 25 upon them to provide us with the storage contracted

Page 172

1 amounts.
 2 Q. Anything else?
 3 A. No.
 4 Q. At any time when you amended the Accounting and
 5 Allocations Programs, do you recall consulting the 1953
 6 Agreement?
 7 A. No.
 8 Q. I think what you said in your e-mail here is
 9 you deemed it was obsolete; is that correct?
 10 A. I can read what I said?
 11 Q. Yes, please.
 12 A. My take on this is that maybe Paragraph 7 was
 13 relevant prior to 1985 when physical fill was perhaps
 14 used to allocate water after a flood operation; but
 15 beginning in 1985, the computer accounting allowed a
 16 more precise and correct way to allocate water.
 17 With the new computer base procedures adopted
 18 in 1985, Paragraph 7 is obsolete since the amount of
 19 storage in Part A will now always equal the amount of
 20 storage in Part B for Anderson Ranch and Arrowrock.
 21 Q. Is that the underlying basis for the opinions
 22 that you have rendered in this case, that Paragraph 7 is
 23 obsolete?
 24 A. No.
 25 MR. GEHLERT: Well, I am going to object. Mr.

Page 173

1 Sutter has not rendered any opinion in this case on the
 2 provisions of Paragraph 7.
 3 I have already explained that he is not being
 4 offered as a witness to interpret the contracts. He is
 5 being offered as a witness to explain IDWR's accounting
 6 process.
 7 BY MS. MARTENS:
 8 Q. You can answer the question, Mr. Sutter. Is it
 9 a basis of your opinions in this case that Paragraph 7
 10 of the 1954 Agreement is obsolete?
 11 A. What opinions are you referring to?
 12 Q. The opinions that are rendered thus far in your
 13 Affidavit and, as I suppose the United States would
 14 argue, as supplemented by this deposition?
 15 A. No, because I made this observation. It was
 16 not relevant to my affidavit.
 17 Q. Is it your opinion, then, that the guarantee
 18 set forth in Paragraph 7 -- it is entitled "Guarantee."
 19 I guess whether or not you deem it to be a guarantee, it
 20 is entitled "Guarantee." Is it your opinion that it is
 21 obsolete?
 22 A. It's my opinion that, after 1986, it would be
 23 irrelevant because Anderson Ranch and Arrowrock always
 24 fill.
 25 Q. And I can understand, perhaps, why a party to

Page 174

1 the contract that views a provision as a guarantee might
 2 be concerned if it is deemed irrelevant or obsolete. So
 3 my question is pretty simple.
 4 I mean, if it is your opinion that it is
 5 obsolete -- "yes" or "no" -- I don't know how "relevant"
 6 goes to "obsolete." To me, "obsolete" means "invalid."
 7 Does "obsolete" mean "invalid," to you?
 8 A. Oh, no, no. Prior to the water right
 9 accounting, the watermaster had to rely on the physical
 10 contents of the reservoir; and, therefore, he may have
 11 calculated the fill of the reservoirs using individual
 12 reservoirs -- for instance, Anderson Ranch and
 13 Arrowrock.
 14 With the advent of Lucky Peak Reservoir and the
 15 three reservoirs being used as a system and the new
 16 water right accounting procedures, then that no longer
 17 applied. That's what I meant by "obsolete."
 18 Because of the new procedures, you could still
 19 say it's valid, but those two numbers would always be
 20 the same. So you wouldn't have to -- there would be no
 21 reason to even have those two there because they would
 22 always be honored.
 23 Q. So any other basis for your opinion that
 24 Paragraph 7 is obsolete?
 25 A. No.

Page 175

1 Q. Were you told by anybody that they deemed those
 2 provisions obsolete or invalid?
 3 A. No.
 4 Q. Any other portion of the 1954 contract that you
 5 reviewed with respect to creation of your affidavit in
 6 this case?
 7 A. No.
 8 MR. GEHLERT: Tara, if this is a good point --
 9 it has been an hour -- why don't we take a break?
 10 MS. MARTENS: Okay. If you could, as part of
 11 the break, review that report.
 12 THE WITNESS: I will do that.
 13 MS. MARTENS: Thank you.
 14 (Recess.)
 15 BY MS. MARTENS:
 16 Q. Mr. Sutter, I understand that you have now had
 17 an opportunity to review the Boise River Flood Control
 18 Management Study that you conducted in 1974; is that
 19 correct?
 20 A. Yes. Could I clarify a remark that I had made
 21 earlier?
 22 Q. Yes.
 23 A. After thinking about it, I think maybe I used
 24 the word "obsolete" in a manner that was misunderstood.
 25 Could I have the court reporter read back the part where

Page 176

1 I said that we honor both Paragraph A and B, I mean, in
 2 Paragraph 7 of that 1954 Agreement?
 3 MS. MARTENS: If you know what he is referring
 4 to, can you find that, please?
 5 (Whereupon, the proceedings found at page 173,
 6 line 25, through page 174, line 22, were read back by
 7 the court reporter.)
 8 THE WITNESS: I think the reasons those two
 9 paragraphs, A and B, were put in is that, prior to Lucky
 10 Peak, if there were a flood operation and they failed to
 11 refill, the irrigators would lose that storage in
 12 Anderson Ranch or Arrowrock.
 13 So that language was put in so that, with Lucky
 14 Peak in place, if Anderson Ranch and Arrowrock weren't
 15 physically full, they wouldn't suffer that failure to
 16 fill.
 17 So with the new procedures -- so there were --
 18 it was a number calculated by Paragraph A and Paragraph
 19 B, which was the initial fill, or the total fill, and
 20 the actual fill. That language was put in there to make
 21 the irrigators whole.
 22 With the new procedures, we protect the
 23 irrigators 100 percent of the time so they are always
 24 full, by taking the failure to fill at Lucky Peak.
 25 So you could say we still honored those

Page 177 1 contract provisions. They are still valid. But since 2 the number that you would calculate under A would be 3 exactly the same as B, it doesn't come into play ever. 4 So we have protected the irrigators. 5 BY MS. MARTENS: 6 Q. Were you involved in the negotiation of the 7 contracts in 1954? 8 A. I was not. 9 Q. Are you going to be rendering opinions as to 10 the bases for the inclusion of Paragraph 7? 11 A. No. 12 Q. And your understanding of what Paragraph 7 is 13 meant to mean -- where does that understanding come 14 from? What is the basis of the understanding you just 15 articulated? 16 A. My understanding there is my opinion, based on 17 my knowledge, of the current way that the reservoir 18 system is filled and my knowledge of, probably, how it 19 was done prior to the construction of Lucky Peak. 20 Q. Again, you are not going to be rendering 21 opinions as to the meaning of Paragraph 7; is that 22 correct? 23 A. I'm explaining my statement in the memo. 24 Q. And that changes from your earlier testimony 25 how?	Page 179 1 Lower Boise River. 2 Q. And who raised that issue? 3 A. As I recall, it was a very relevant issue. In 4 the '70s, there were articles in the paper. Fishermen, 5 Fish and Game, and other wildlife people had raised 6 concerns. 7 I think the City had concerns with water 8 quality. It was just of general concern to the 9 community. 10 Q. Did the Governor ask the Department of Water 11 Resources to review that issue? 12 A. Not that I recall. 13 Q. Did Mr. Robertson ask you to review that 14 particular issue? 15 A. I would assume so. 16 Q. Let me ask you what you did to evaluate that 17 issue. 18 A. I didn't evaluate it. I just discussed it in 19 general. 20 Q. And is the discussion on page 37 that 21 discussion? 22 A. Yes. 23 Q. That was a horrible question. 24 A. Yes, it is. 25 Q. I apologize for that. Understand that I have
Page 178 1 A. That clarifies my earlier testimony in that, 2 possibly, when I used the word "obsolete," I meant that 3 somehow -- that it was taken as somehow we have looked 4 at those provisions in the contract and somehow we're 5 not honoring them. 6 Q. But you did not consider them in any respect 7 with regard to the Accounting and Allocations Programs 8 you created; is that correct? 9 A. I did not. 10 Q. All right. Back to the Boise River Flood 11 Control Management Study that was produced by the Bureau 12 of Reclamation, have you had an opportunity to review 13 this study during the break? 14 A. Yes, I have. 15 Q. And I had asked you a question earlier today 16 during the deposition with regard to whether or not you 17 were asked to review minimum streamflows in the Boise 18 River as a part of this particular study. I believe 19 your response was you would have to take a look at the 20 report. Do you now have an answer to that question? 21 A. As a part of this study, we gave an overall 22 description of the Boise River and other problems 23 besides flood control. 24 So there is a description on page 37 of a low 25 flow problem, or concern, during the wintertime in the	Page 180 1 not had an opportunity to review that provision. What 2 did your discussion entail? 3 A. It describes the low flow problem, that there's 4 a statement here that I think summarizes our intent. 5 Q. And what statement is that? 6 A. "This report includes potential solutions to 7 the problem of low flows only insofar as changes in 8 flood control operations may tend to alleviate the 9 problem." 10 Q. Anything else? 11 A. No. 12 Q. Did you recommend that a minimum streamflow 13 water component of a water right be sought with respect 14 to Lucky Peak? 15 A. No. 16 Q. Was any discussion had of attempting to do so 17 at that time that you recall? 18 A. In this report? 19 Q. Yes. 20 A. No. 21 Q. And during the period of your study, was that 22 recommended? 23 A. Not in this report. 24 Q. As a part of your study, was it recommended and 25 just not reported?

Page 185 1 chart?" 2 Answer: "I am agreeing with her conclusion 3 that, in 1989, '93, and '99, Anderson and Arrowrock 4 filled to 100 percent." 5 Question: "So your agreement with her 6 conclusions does not extend to 1978, 1976, 1975, or 7 1972; is that correct?" 8 "Correct." 9 "Is there any other portion of Mary Mellema's 10 Affidavit of November 13, 2007, with which you agree 11 with her conclusion?" 12 Your answer was, "Once more?" 13 Question: "Let me read your statement." 14 Answer: "Okay." 15 Question: "'The same conclusion was reached by 16 Mary Mellema in her affidavit dated November 13, 2007.'" 17 Answer: "I was referring to this table here of 18 the 100-percent fill." 19 Question: "That is the only portion of your 20 affidavit that I see you reference Mary Mellema's 21 Affidavit. 22 "Now, is there another portion of your 23 affidavit where you agree with the conclusions of Mary 24 Mellema's Affidavit?" 25 You said, "Let me check."	Page 187 1 It was very short. We didn't start the accounting, I 2 think, until June. The information was not in the 3 report where Mary could have included that year. 4 But in going back to the actual accounting, I 5 think there was a slight failure to fill due to flood 6 control. 7 Q. Any other year that she failed to note in this 8 chart that you could determine from the records? 9 A. Again, I only looked at 1986 on and -- no. 10 Q. So from 1986 through the present time, her 11 chart is correct, with the exception of her omission of 12 1986? 13 A. Correct. 14 Q. And your opinions regarding her conclusions do 15 not extend any earlier in time? 16 A. Her interpretation of the watermaster report is 17 correct. If you look -- her 100-percent fill of 18 Anderson Ranch is correct, by the data that she 19 provided. 20 I cannot verify those numbers because I do not 21 know how the watermaster calculated those numbers in 22 those years. 23 Q. So you are not affirming her conclusions for 24 any year prior to 1989 on her chart? 25 A. I would affirm her conclusions based on the
Page 186 1 You did so and answered, "No." 2 That is the end of the testimony. Is that 3 still correct? 4 A. With reference to her table, prior to 1989, 5 those exact numbers -- I did look at those based on the 6 watermaster report. I could not verify those numbers 7 because I have no way to know how the watermaster 8 accounted for those. 9 What I was referring to there, by looking at 10 '89, '93, and '99 -- those numbers were derived using 11 the new procedures. I did go in and was able to look at 12 the exact calculation methods for those. So those 13 numbers I can verify. 14 The previous numbers -- I have no way to know 15 how the watermaster got those but I can say -- it's very 16 simple to say that Mary Mellema has calculated those 17 numbers correctly from the watermaster report. 18 I can't speak to how those numbers were 19 calculated by the watermaster. That's what I was 20 referring to there. 21 Q. All right. But you did disagree with her 22 conclusion in this chart by omitting 1986; is that 23 correct? 24 A. Yes. 1986 was a partial year. If you look at 25 the 1986 watermaster report, it was a transition year.	Page 188 1 information that she has included in her affidavit. 2 Q. But did you independently review 3 any documentation to substantiate, for example, whether 4 there might have been another year that she did not 5 include in her chart? 6 A. I did not. I did not. 7 Q. For example, you would not know whether or not 8 1974 should be included in the chart? 9 A. I do not, no. 10 Q. During the course of your initial deposition, 11 we discussed several changes that had been made to the 12 Accounting and Allocations Programs since the time that 13 you created them. Do you recall those discussions? 14 A. Yes. 15 Q. My understanding is that Weimin Li made 16 modifications to the Allocations and Accounting 17 Programs; is that correct? 18 A. Yes. 19 Q. And Pam Pace made modifications? 20 A. Yes. 21 Q. And Liz Cresto made modifications? 22 A. I'm not aware of any modifications that she 23 made. 24 Q. And Cheryl Kramer, a part-time employee, had 25 made modifications?

Page 189

1 A. Yes.

2 Q. Are you aware of any other modifications made

3 by any other individuals?

4 A. Possibly, Sheryl Howe.

5 Q. Anybody else?

6 A. No.

7 Q. Are you consulted with respect to those

8 modifications?

9 A. While I was the head of the Hydrology Section,

10 I would have been consulted with major modifications but

11 probably not minor modifications.

12 Q. And since that time, you would not have been

13 consulted --

14 A. No.

15 Q. -- in any respect?

16 A. No.

17 Q. And you would agree with me that, as I go

18 through and note modifications, not all modifications

19 provide for the individual that made the change?

20 A. Correct.

21 Q. It also appears, as I go through the records,

22 beginning in 1995, others were in charge of the Water

23 Right Accounting and Allocations Systems, rather than

24 you; is that correct?

25 A. Yes.

Page 190

1 Q. And those individuals that were in charge of

2 the Water Right Accounting and Allocations Systems

3 included Sheryl Howe?

4 A. Yes.

5 Q. Pamela Pace?

6 A. Yes.

7 Q. And Liz Cresto?

8 A. Yes.

9 Q. Anybody else who you are aware of that, between

10 the time of 1995 and 2008, has been in charge of that

11 system -- those systems?

12 A. No.

13 Q. Was there any policy or procedure after 1995

14 that you would be consulted with respect to any

15 modifications to those systems?

16 A. No.

17 Q. Is there any formal system in place regarding

18 modifications to the system?

19 A. No.

20 Q. Is there any policy or procedure or rule that

21 prevents those persons who are in charge of the Water

22 Right Accounting and Allocations Systems from making

23 modifications to the program?

24 A. No.

25 Q. And I do not want to put words your mouth, but

Page 191

1 I have notes here that you testified that the system is

2 a dynamic tool.

3 A. Yes.

4 Q. Would you characterize the program as, quote,

5 "hardwired," end quote?

6 A. What is your definition of "hardwired"?

7 Q. I don't know. You can tell me if you have a

8 definition of "hardwired."

9 A. You know, people will say, "Oh, it's hardwired;

10 it's a black box." I don't go along with that because

11 it's just a tool. It's like a desk calculator. You

12 punch in the numbers or whatever. No, it is not

13 hardwired.

14 Q. It can be changed at any time?

15 A. Yes, if you are smart enough.

16 Don't write that down.

17 Q. As part of our review during your last

18 deposition, you testified related to a print-out which

19 depicted the Allocations Program; is that correct? We

20 had several different versions and so forth. It was all

21 an Allocations Program and not an Accounting Program;

22 correct?

23 A. Yes. I had an example of the output from the

24 Allocations Program.

25 Q. And even, actually, a print-out of the program,

Page 192

1 itself?

2 A. Yes.

3 Q. But you did not provide any copies of the

4 Accounting Program?

5 A. I did not.

6 Q. Were you asked to produce the print-out of the

7 Accounting Program?

8 A. No.

9 Q. And you have not done so?

10 A. I have not.

11 MR. GEHLERT: I assume that is publicly

12 available through IDWR, as the Allocations Program is?

13 THE WITNESS: Yes.

14 BY MS. MARTENS:

15 Q. We had a discussion, also -- well, not "we"

16 but Mr. Campbell and you had a discussion during your

17 initial deposition about natural flow that is passed

18 through the system during flood control operations. Do

19 you recall that exchange?

20 A. Yes, I do.

21 Q. It is not really accounted for in any respect?

22 MR. GEHLERT: Do you want to review your

23 testimony on that?

24 BY MS. MARTENS:

25 Q. I am not trying to put words in your mouth.

Page 197

1 Q. And that is, I thought you testified earlier
2 that you did not believe the Accounting Program was
3 relevant because you did not produce the same print-out
4 out of the program, itself, that you did for the
5 Allocations Program.

6 So you did believe that the Accounting Program
7 and procedures were relevant?

8 A. I did not use any of the Accounting Program
9 calculations or I didn't refer to it in my affidavit.
10 By "accounting," I meant accounting in the Allocations
11 Program.

12 Q. Go ahead. I am sorry. The question that I had
13 asked was what you were told was relevant, for purposes
14 of this case, and that you utilized to render your
15 opinions that are set forth in your affidavit.

16 A. It was my perception that what was relevant in
17 this case were the procedures used to account for the
18 storage-water fill in the Allocations Program for Lucky
19 Peak Reservoir.

20 Q. Anything else?

21 A. In particular, the accounting of the fill of
22 the stream maintenance account in a flood control
23 situation.

24 Q. Anything else?

25 A. The only other thing would be how that

Page 198

1 accounting also affected Anderson Ranch and Arrowrock.

2 Q. Anything else?

3 A. Just, in general, the water right accounting
4 procedure that the Department and the watermaster used
5 to account for water throughout the irrigation year.

6 Q. You may recall this document. We took a look
7 at it for a little bit during the prior session of your
8 deposition; it is Exhibit No. 32. Did you review that
9 data prior to the execution of your affidavit?

10 A. Yes, during.

11 Q. During, okay. Can you explain to me why it is
12 dated in March when you signed your affidavit in
13 February?

14 A. Oh, I was asked to -- I did not realize, at the
15 time, that I would have to produce all of the documents
16 that I used. So I went back after the fact and gathered
17 up most of the documents that I turned in. So in
18 printing these off, the dates are probably after the
19 affidavit.

20 Q. Understood. Thank you for that clarification.
21 I am jumping around a little, and I apologize. It is
22 sort of what has to happen at the conclusion of these
23 things.

24 A. That's fine.

25 MS. MARTENS: We can go off the record.

Page 199

1 Did you want to take a break?

2 MR. GEHLERT: Yes. Actually, I thought you
3 were taking an informal break. I'm sorry.

4 MS. MARTENS: A break is fine.

5 MR. GEHLERT: I just want to talk to Bob about
6 schedules.

7 (Recess.)

8 MS. MARTENS: So I think that David would like
9 on the record that we discussed some documents that were
10 just recently produced and the potential for this
11 deposition spilling over, time-wise.

12 I have represented that, from Pioneer
13 Irrigation District's and Settlers Irrigation District's
14 perspectives, we would agree not to reschedule any
15 deposition of Mr. Sutter until such time as there has
16 been a decision rendered by the court on the pending
17 motions for summary judgment.

18 Q. Mr. Sutter, I would like you, again, to refer
19 to Deposition Exhibit No. 27, which is your affidavit.
20 I am having difficulty with Paragraph No. 2 and it
21 corresponding to a statement made in the Reply Brief.
22 If you could, simply explain this to me.

23 "As Mr. Sutter explains, the accounting for the
24 project reservoir water rights is done by IDWR, in
25 conjunction with the Boise River Watermaster, pursuant

Page 200

1 to two computer programs administered by the IDWR.

2 "One, the Accounting Program, accounts for the
3 water rights of the three reservoirs. The second, the
4 Allocations Program, allocates storage within each
5 reservoir to the various spaceholders."

6 Assuming that is an accurate statement, it is
7 referred to Paragraph 2 of your affidavit?

8 MR. GEHLERT: That is the text that she just
9 read to you.

10 THE WITNESS: Okay.

11 BY MS. MARTENS:

12 Q. I guess what I am not understanding is the,
13 "...allocates storage within each reservoir to the
14 various spaceholders." Am I missing something?

15 A. I don't think so.

16 Q. I just wanted to make sure that that was not
17 in there somewhere and I was missing it. Thank you.

18 In Paragraph 6, you refer to low to moderate
19 run-off. There is a corresponding statement within the
20 brief that indicates, quote, "In 'normal'" -- and
21 "normal" is within quotes -- "years where there are no
22 flood control operations, water is allocated
23 proportionally according to the contracts, and the
24 specific contractual provisions the irrigation entities
25 have raised here do not come into play."

Page 205 1 Q. Okay. 2 A. And that would be the second sentence in 3 Paragraph 8, "The Accounting Program tracks the amount 4 of natural flow stored during the refill phase of a 5 flood operation as 'unaccounted for' storage." 6 Q. With no associated water right; correct? 7 A. Correct. 8 Q. And I think that we already discussed -- 9 correct me if I am wrong here -- that with respect to 10 your term "ideally" in the sentence that provides, "At 11 the end of a flood operation, ideally the amount of 12 'unaccounted for' storage will be equal to the amount of 13 storage released for flood control so that the amount of 14 water stored physically in the reservoirs will be equal 15 to the paper fill, which is 100 percent of the storage 16 right..." 17 That occurred in the years you reviewed? In 18 the ten years, you reviewed six times -- the goal was 19 accomplished, in other words, six times? 20 A. Yes. 21 Q. Six out of ten times; correct? 22 A. Yes. 23 Q. Thank you. Again, I am sorry to keep doing 24 this to you. Excuse me for not fully understanding what 25 is being said here.	Page 207 1 A. Yes. 2 MR. GEHLERT: Well, let me just offer a 3 clarifying objection. Mr. Sutter never used the term 4 "unfailingly." 5 BY MS. MARTENS: 6 Q. If you were to have used the term 7 "unfailingly" -- that is fine. I will agree with that 8 clarification that I am reading from a brief. 9 Now, is that true, though, with respect to 10 1986? 11 A. 1986? 12 Q. Yes. 13 A. Yes, it is. 14 Q. So in 1986 the United States met its 15 obligations to Arrowrock and Anderson Ranch spaceholders 16 without having to rely on water from the Streamflow 17 Maintenance account? 18 A. They are totally unrelated. 19 MR. GEHLERT: Do you want to look at the 20 watermaster report for 1986? 21 THE WITNESS: Anderson Ranch and Arrowrock 22 filled 100 percent. I can look. 23 MR. GEHLERT: Take a second to confirm your 24 memory. 25
Page 206 1 This refers to your Paragraph No. 9 -- or that 2 is what it is in reference to. It states, "As noted 3 above, the Arrowrock and Anderson Ranch water rights 4 were already filled on paper prior to the operation of 5 the Allocations Program and remain full throughout the 6 process." 7 Can you please explain that statement to me? 8 A. I think that refers to the situation in which 9 the unaccounted-for storage does not equal the flood 10 release. So there is a -- we call it a failure to 11 refill or a shortfall and how that shortfall is handled. 12 All three reservoirs in a flood operation fill 13 to their maximum amount. This includes Arrowrock and 14 Anderson Ranch. Water rights are completely full. 15 Q. The next sentence states, "That explains why 16 the United States has unfailingly met its contractual 17 obligations to the Arrowrock and Anderson Ranch 18 spaceholders without having to rely on water from the 19 Streamflow Maintenance account." 20 Given that statement -- you have indicated 21 "unfailingly." It is fair, isn't it, for me to 22 understand that you have only reviewed the years 1986 to 23 the present; correct? 24 A. Yes. 25 Q. So "unfailingly" since 1986; correct?	Page 208 1 BY MS. MARTENS: 2 Q. And recognize, please, that the full statement 3 is, "...the United States has unfailingly met its 4 contractual obligations to the Arrowrock and Anderson 5 Ranch spaceholders without having to rely on water from 6 the Streamflow Maintenance account." 7 A. I don't feel qualified to interpret the 8 contracts of the Bureau of Reclamation. 9 Q. So you do not know whether or not it met its 10 contractual obligations to those spaceholders without 11 having to rely on water from the Streamflow Maintenance 12 account? 13 A. I'm not sure what all of their contractual 14 obligations are. 15 Q. If you look at 1986, the data that you 16 provided, would it make sense that it could have -- or 17 it did? 18 A. In 1986, the contracts -- all of the 19 spaceholders in Anderson Ranch and Arrowrock filled to 20 100 percent. 21 Q. And how about Lucky Peak? 22 A. I think it failed to fill by a slight amount. 23 Q. And how much do you think that that slight 24 amount of failure to fill might have been? You are free 25 to review the record.

17 (Pages 205 to 208)

Page 221

1 A. Yes.

2 Q. At one point in the modifications, you changed

3 the term "account" to "entitlement" I know that we have

4 spent some time on the definition of "entitlement"

5 already in your deposition.

6 It is kind of a two-part question, and I know

7 that your counsel might object to it as being compound.

8 I hope it will help you understand what I am trying to

9 get from you.

10 First of all, why did you change the term

11 "account" to "entitlement"? Second of all, what do you

12 mean by the term "entitlement"?

13 A. As I recall, Mr. Gehlert and I had some

14 discussion over what term to use. He was asking the

15 same question of me. It was hard to find the exact,

16 correct word so that it wouldn't be confused with

17 something else.

18 I think I first used the word "account," but

19 then there's the Accounting Program. Are we dealing

20 with the Allocations Program?

21 We have contractual amounts that are in

22 contracts but, yet, there are other entities that have

23 space in reservoirs that are not accounts or contracts.

24 I thought about using the word "spaceholder,"

25 but some people really aren't spaceholders. It's just

Page 222

1 hard to know what to use.

2 I came down to the word "entitlement" as

3 meaning, if you take the total space in any of the

4 reservoirs, after that space has filled, that water that

5 accrues to that space is allocated to various canal

6 companies, uses, whatever.

7 So I finally just used the word "entitlement"

8 as sort of the most general term I could use.

9 Q. Is "entitlement" a term that you have used

10 throughout your nearly forty years with the Department

11 of Water Resources? Was that a term you used, or did

12 you develop that term for this litigation?

13 A. I developed that term for this litigation. I

14 am not sure that I really had a term that I used

15 previously. I probably just put "user." I think, if

16 you look at the program, it may say "user."

17 Q. So if I refer back to the time period when you

18 were developing the Allocations Program, for example,

19 you would not have used the term "entitlement" at that

20 time?

21 A. Probably not.

22 Q. "User" was a more commonly-used term by you at

23 that period of time?

24 A. Yes, or "diversion."

25 Q. Any other term you recall using? I know there

Page 223

1 might be things you cannot come up with now, but are

2 there terms that would usually be synonymous with how

3 you are using "entitlement" in this case?

4 A. I think in my computer programs I used the

5 words "user" and "diversion," neither one of which is

6 totally, legally correct.

7 Q. If you refer to Paragraph 7 in Exhibit No. 27,

8 which is the final version of your affidavit, you

9 testify there, "It is logical that the system will fill

10 completely in any year in which there is a system flood

11 control operation because the criteria for flood

12 releases are based on the presence of insufficient space

13 in the system to capture the forecasted runoff." Do you

14 see that sentence?

15 A. Yes.

16 Q. That sentence is missing up until the very last

17 iteration of your affidavit. Can you tell me -- again,

18 this will be compound -- first, why it was added; and,

19 second of all, what you mean by that statement?

20 A. I think that that third statement was added in

21 that paragraph because, in my previous draft -- I had

22 submitted that to Mr. Gehlert to review -- I had made

23 the statement that, in all of the years since 1986, all

24 three reservoirs have always filled.

25 As I recall, he asked me if, in my opinion,

Page 224

1 there would ever be an instance in which you would have

2 a flood operation and they wouldn't fill. So in order

3 to clarify that or expand on it, I added that sentence.

4 By adding that sentence, I say it's logical.

5 The flood control rule curves are designed on a

6 statistical basis of past runoff. In my professional

7 opinion, any time that you would have an instance where

8 the forecasted runoff would dictate a flood release, it

9 would be 99.99999 percent sure that you would have

10 enough natural flow in the Boise River to fill all three

11 reservoirs.

12 Q. So it would be either a highly unlikely

13 statistic or an error in forecasting for there to be a

14 flood control release and the reservoirs not initially

15 fill? Is that a correct understanding?

16 A. Yes. And I can't imagine an error in

17 forecasting that would be that great because the Boise

18 River -- there's only -- there's less than a million

19 acre-feet of storage in the system.

20 Q. Referring back to 1989 and the 126,000

21 acre-feet shortage, was there an error that year that

22 resulted in such a significant shortage?

23 A. I believe there was a forecasting error, yes.

24 Q. Do you recall that year and what happened?

25 A. Not specifically, except that the forecast was

Page 225

1 in error and they released too much water and could not
2 refill.
3 Q. Do you know whether, in 1989, the reservoirs
4 initially filled?
5 A. On paper?
6 Q. Yes.
7 A. Oh, yes, they did.
8 Q. I suppose you do not want me to go through
9 where you took a comma out, do you? I have a very
10 thorough paralegal.
11 A. Sure. Show me.
12 MR. GEHLERT: We had great debates about the
13 proper grammar.
14 THE WITNESS: I still want that comma in there.
15 BY MS. MARTENS:
16 Q. Referring to Paragraph No. 9 -- and this might
17 have something to do with learning that a year had been
18 left out -- well, I do not want to put words into your
19 mouth, but I am just curious.
20 In one of your drafts, you included a sentence
21 that stated, quote, "This is consistent with the table
22 at the end of Paragraph 5 in the Affidavit of Mary
23 Mellema dated November 13, 2007."
24 Eventually, by the time you were done, you
25 changed your testimony or opinion to state, quote, "The

Page 226

1 same conclusion was reached by Mary Mellema in her
2 affidavit dated November 13, 2007."
3 So, again, my first question to you is: Why
4 was it changed? Second of all, is it because, you know,
5 it was not based upon the same data?
6 A. It's --
7 Q. It is Paragraph No. 9.
8 A. On the original, though?
9 Q. Yes. I can find that for you.
10 A. Yes.
11 Q. It would be the iteration that was attached as
12 the February 8th draft.
13 A. Yes. Okay. I think the concern here was that
14 the table -- when I originally put that statement in
15 there, I was referring to the right half of that table.
16 I think, after discussing this with Mr. Gehlert, I did
17 not -- I had a bit of a problem with the left half of
18 her table.
19 So in order to clarify that, I just made it a
20 general statement about agreeing with her conclusion,
21 which was the 100 percent, rather than saying, "I agree
22 with the right half of the table," because I didn't like
23 her title for the left half.
24 Q. Right. We talked about that.
25 A. I think that's why I did that.

Page 227

1 Q. Also, it is missing data for 1986; correct?
2 A. I hadn't even considered that. I don't think I
3 thought about that when I did that.
4 Q. See what happens when I assume? I assumed you
5 changed it because '86 was not there.
6 A. No.
7 Q. You changed it because you agree with the right
8 half of the column of Paragraph No. 5's table set forth
9 in her affidavit, but you do not agree with the title of
10 the second column?
11 A. Yes.
12 Q. And you do not agree with the designation of
13 years, in the sense that at least one year is left out;
14 and you also did not evaluate those earlier years?
15 A. There may be additional years. I did not go
16 through those years. So I wanted to be specific on
17 that. I think that's what happened there.
18 Q. As part of amendments that you made to your
19 affidavit -- and I am referring specifically to
20 Paragraph No. 9 -- you added the last four paragraphs.
21 We have already talked about the very last sentence and
22 why you made the changes to that.
23 I am curious as to what caused you to add the
24 portion of Paragraph No. 9 that reads, quote, "The
25 Allocations Program therefore allocates a full supply of

Page 228

1 storage to all individual entitlements in Arrowrock and
2 Anderson Ranch reservoirs.
3 "From 1986 through 2007, there have been ten
4 years for which system flood control releases were made.
5 I have examined these years and in all cases, Arrowrock
6 and Anderson Ranch entitlements received 100 percent
7 allocation."
8 Again, my question, after reading all of that,
9 was: Do you recall why you added that information?
10 A. It was earlier --
11 Q. Yes. It was not present in your February 7,
12 2008, draft. It will be somewhat confusing to you, so I
13 will try to help you if I can. If you will, go to your
14 draft on page 5. When you changed your draft, at some
15 point you started adding a lot more paragraphs.
16 You will see within parentheses "(or allocated
17 space)." Do you see that on page 5 of that particular
18 draft?
19 A. Oh, yes.
20 Q. That is where your Paragraph 9 ended at that
21 time.
22 A. I know I added more paragraphs because I
23 thought I had put too much in each paragraph. So I
24 added more to make it more readable.
25 Yes. I think -- yes. I think that following

Page 237

1 EXAMINATION
2 BY MR. FARRIS:
3 Q. Good afternoon, Mr. Sutter. My name is Bryce
4 Farris, and I represent Nampa and Meridian Irrigation
5 Districts. I just have a few questions. I want to try
6 to clarify some of the points that you have made in the
7 past few days.
8 You have said a few times that Anderson Ranch
9 and Arrowrock reservoirs always fill. How many years
10 did you go back to look at that?
11 A. I believe I said Anderson Ranch and Arrowrock
12 always fill when there's a flood control operation.
13 Q. So are there years that Anderson Ranch and
14 Arrowrock have not filled that you looked at?
15 A. I did not look at those years but, yes, there
16 are many years in which Anderson Ranch, in particular,
17 does not fill.
18 Q. So --
19 A. I'm not sure about Arrowrock.
20 Q. But for purposes of your affidavit, you looked
21 at 1986 to 2007?
22 A. I looked at the flood control years during that
23 period.
24 Q. You did not look at all years?
25 A. No.

Page 238

1 Q. You looked at --
2 A. I just looked at the years to determine whether
3 or not there was a flood control operation.
4 Q. And if there was a flood control operation,
5 then you went back. So your statement that Anderson
6 Ranch and Arrowrock always fill is conditioned upon the
7 fact that it is a flood control year?
8 A. Yes.
9 Q. During a flood control year?
10 A. Yes.
11 Q. Is that right?
12 A. Yes.
13 Q. And in your note, Exhibit 33, you have listed
14 ten years. Those are the years that Lucky Peak did not
15 fill?
16 A. Those ten years are years in which there was a
17 flood control operation.
18 Q. So between 1986 and 2007, those are the ten
19 years that there was a flood control operation?
20 A. Correct.
21 Q. And so Arrowrock and Anderson Ranch filled
22 those ten years?
23 A. And Lucky Peak.
24 Q. And Lucky Peak filled those ten years?
25 A. On paper.

Page 239

1 Q. On paper? Okay. But there were some of the
2 years that they filled on paper but did not physically
3 fill, due to miscalculations or errors?
4 A. I'm not sure about the physical. I just looked
5 at the paper. Anderson Ranch and Arrowrock always fill
6 on paper -- and Lucky Peak.
7 Q. Take the year -- I think it was '89 that you
8 were talking about --
9 A. Right.
10 Q. -- where there was a shortfall of 126,000
11 acre-feet. That year Lucky Peak filled on paper, is
12 that right?
13 A. Yes.
14 Q. But it didn't fill -- I use the term
15 "physically," but maybe that is not the right term. It
16 didn't --
17 A. I think the term here -- if you look at the
18 second column in my notes, I called it a failure to fill
19 due to flood control.
20 MS. MARTENS: Is that helpful?
21 MR. FARRIS: Yes.
22 THE WITNESS: In four of those years -- let's
23 see -- one, two, three -- in four of those years, there
24 was a failure to fill due to flood control. So in four
25 out of the ten years, there was a failure to fill due to

Page 240

1 flood control. In the other six, it filled completely
2 on paper, again, the second time.
3 BY MR. FARRIS:
4 Q. Right. Are you familiar with the term
5 "carry-over"?
6 A. Yes.
7 Q. What is your understanding of the term
8 "carry-over"?
9 A. There can be two types of carry-over.
10 Carry-over is water that, at the end of the irrigation
11 season, still -- there is storage water that still
12 remains in the reservoirs. In some of the reservoirs,
13 that carry-over stays with the individual entitlement.
14 For instance, in Arrowrock, it does not. So in
15 Lucky Peak and Anderson Ranch, individual entitlements
16 have carry-over water that they can then use the
17 following year. Arrowrock, itself, retains its water
18 but it is not -- it loses its identity, as far as
19 entitlement.
20 Q. Where exactly are you getting this
21 understanding from? Is this from a contract, or did
22 someone tell you this?
23 A. I guess the Director of the Department of Water
24 Resources told me this.
25 Q. Do you know which Director and when?

Page 253

1 to be a shortfall, that different users have to share
 2 proportionally?
 3 A. Okay.
 4 Q. Let's try, if we can, to stick with 2006, 2007.
 5 When would you have made that determination, if there
 6 was going to be a shortfall?
 7 A. Okay. There was no flood control operation in
 8 2007. So we're not talking about a shortfall, like we
 9 have used it in the affidavit, the difference between
 10 the storage and unaccounted-for space.
 11 There, if you were to use the word "shortfall,"
 12 it would be Lucky Peak failed to refill. So I would
 13 think that April 1st, or shortly after, with no flood
 14 release -- I'm not sure when the last day of fill was in
 15 2007.
 16 Whenever that occurred, then you would have the
 17 figure to Lucky Peak. You would put that into the
 18 Allocations Program, and it would take whatever the new
 19 fill was in Lucky Peak.
 20 And everybody then -- the 60,000 wouldn't come
 21 into play, and everybody would receive a proportional
 22 amount of that new fill based on their entitlement.
 23 Whatever that entitlement was that was
 24 calculated for the stream maintenance account would be
 25 added on to any remaining carry-over that they had after

Page 254

1 their use during the winter to come up with a new
 2 number. I'm not sure what that was in 2007.
 3 I don't have that. No, I don't.
 4 Q. But in a situation where you are describing, at
 5 the end of Paragraph 10, where there is a shortfall --
 6 A. That's a flood operation. That's totally
 7 different.
 8 Q. If there is a shortfall like that, then that
 9 60,000 acre-feet that you say -- it comes off the top
 10 first?
 11 A. Right.
 12 Q. When does that come off the top of the
 13 Streamflow Maintenance entitlement? What part of the
 14 year?
 15 A. On the last day of unaccounted-for storage
 16 fill, you would compute a shortfall. Let's say a
 17 shortfall did occur. Okay. Then that shortfall is
 18 subtracted from the total space in Lucky Peak.
 19 That number is put into the Allocations
 20 Program. It allocates water to all of the users first,
 21 100 percent, including 42,000 of the stream maintenance
 22 water, the 102,000 minus 60,000.
 23 Q. Can I stop you there?
 24 A. Okay.
 25 Q. Including the 50,000 Fish and Game that you

Page 255

1 talked about?
 2 A. Yes, yes.
 3 Q. So you have the two accounts?
 4 A. Yes.
 5 Q. The 60,000 comes off of the account that we
 6 have described as the 102,000?
 7 A. That's the end result, depending upon the
 8 magnitude of the new fill, of the new fill in Lucky
 9 Peak. If that new fill results in a deficit less than
 10 60,000, everybody gets 100 percent first -- that 50,000,
 11 the 40,000, all of the irrigators.
 12 If there's any left over, that is put back in
 13 the Streamflow Maintenance account, the Bureau of
 14 Reclamation's Streamflow Maintenance account.
 15 Q. So if there is more than 60,000 -- if there is
 16 a shortfall of more than 60,000 and you proportionally
 17 take or however you want to say it --
 18 A. Either way. You could proportionally reduce
 19 everybody's account or you could only give them -- they
 20 suffer that deficit.
 21 Q. But if there is more -- if there is more than
 22 the 60,000 and that suffering of deficit, that goes to
 23 both the Fish and Game account and this other account?
 24 A. And 40,000, yes.
 25 Q. So the remaining 40,000 of the other Streamflow

Page 256

1 Maintenance account?
 2 A. Yes.
 3 Q. You treat them as two separate accounts and
 4 take them down proportionally?
 5 A. Yes.
 6 Q. So in a situation where you have them
 7 completely filled and the carry-over is wiped out, how
 8 do you reconcile that with the Streamflow Maintenance
 9 account?
 10 A. If there is a flood control operation, all of
 11 the accounts fill to 100 percent initially. So
 12 carry-over doesn't become an issue. Everybody has 100
 13 percent.
 14 If there's a shortfall, then it goes back to
 15 this special calculation where the 60,000 is considered
 16 like a separate reservoir. It's separate. Everybody
 17 left shares proportionally.
 18 So the Streamflow Maintenance account -- if you
 19 are talking about the Bureau of Reclamation's stream
 20 maintenance account, it would show 42,000.
 21 Let's say that the rest of the -- what it does
 22 is it computes the percent. Let's say that the
 23 shortfall was greater than 60,000 and there was a
 24 10-percent deficit or a 90-percent fill of the rest of
 25 the space.

Page 257

1 Then it simply takes 90 percent of everybody's
 2 entitlement and gives them that. So everybody would get
 3 90 percent. Now, the stream maintenance account doesn't
 4 have the 102,000. It says 40,000, so they would get
 5 36,000.
 6 Q. Okay.
 7 A. I know I didn't answer your question.
 8 Q. I don't know if you did.
 9 A. I'm not relating to it.
 10 Q. I am trying to figure out if you have got a
 11 situation where you carry over -- is there a situation,
 12 I guess, that the carry-over for the Streamflow
 13 Maintenance account is wiped out?
 14 A. Yes.
 15 Q. Tell me how that --
 16 A. In any flood operation, it's wiped out.
 17 Q. Can you explain that to me? Maybe I don't --
 18 I'm not following you.
 19 A. I will just walk you through an example. Let's
 20 say, on November 1st of a certain year, we start
 21 releasing water for a flow down the Boise River. I
 22 think there are 250 cfs or 200.
 23 That water comes out of the stream maintenance
 24 account. It comes out from their carry-over or their
 25 fill from the previous year. Let's say, on February

Page 258

1 1st, we get a forecast and there's a lot of snow and we
 2 start releasing water for flood control. Okay?
 3 It's a 100-percent chance that sometime in
 4 January, February, or March all of the reservoirs will
 5 fill to 100 percent. Carry-over is zeroed out because
 6 they're full. Everybody got 100 percent.
 7 So carry-over becomes irrelevant, including the
 8 stream maintenance account. We have flood water going
 9 down the river. They are not using water anymore. It's
 10 full.
 11 Q. In that situation, they would then use -- they
 12 would then -- when you reconcile it later in the year,
 13 the first half, then they would have water to be able to
 14 use beginning October 31st of the following year?
 15 A. 100 percent, yes.
 16 Q. I understand.
 17 A. That little bit they used in November and
 18 December was replaced with flood water.
 19 Q. I understand.
 20 A. So you don't get charged for it.
 21 MR. FARRIS: I think that is all I have.
 22 MS. MARTENS: Do you have anything, David?
 23 MR. GEHLERT: Did you want to mark that e-mail
 24 we provided, or are you going to ask questions about it?
 25 MS. MARTENS: You know, I felt like I needed to

Page 259

1 listen. It looks pretty complicated to me. I think I
 2 need to compare it with the chart. You probably want,
 3 at least, a copy. I need a copy of it. He wants this
 4 back; right?
 5 MR. GEHLERT: Why don't we have him identify it
 6 and mark it as an exhibit, and then you can do what you
 7 want with it?
 8 MS. MARTENS: Do you want to keep a copy,
 9 though, before I marked one for an exhibit?
 10 THE WITNESS: I can make another copy.
 11 MS. MARTENS: Off of your computer?
 12 THE WITNESS: Yes.
 13 MS. MARTENS: We will mark as Deposition
 14 Exhibit No. 39 an e-mail that was produced this
 15 afternoon by Mr. Sutter as being responsive to our
 16 request at the last session of his deposition.
 17 (Deposition Exhibit No. 39 was marked for
 18 identification by the court reporter.)
 19
 20 FURTHER EXAMINATION
 21 BY MS. MARTENS:
 22 Q. We still have a few minutes. I just have some
 23 clean-up questions. Have you reviewed any documents
 24 between the sessions of our depositions that you had not
 25 reviewed prior?

Page 260

1 A. Just the e-mails that I was copying. I went
 2 through all of my e-mails and made copies. So I
 3 reviewed those. I think there was one other reference I
 4 made to something I had cleared up. I can't recall.
 5 Q. With respect to determining what constituted a
 6 flood control year in your analysis, what standard did
 7 you utilize?
 8 A. Okay. First, I looked at Exhibit --
 9 MR. GEHLERT: It looks like it's 32.
 10 THE WITNESS: Exhibit 32.
 11 BY MS. MARTENS:
 12 Q. Thank you. Okay.
 13 A. I looked at the discharge at Glenwood Bridge.
 14 In general, when I saw discharges -- it depends on the
 15 month. But during the wintertime, if it was greater
 16 than 300 or 400 cfs, I viewed that as a flood discharge.
 17 During irrigation season, if it was the early irrigation
 18 season, if it was more than 2,000 --
 19 Q. And can --
 20 A. Then I also -- to make sure, I looked into the
 21 watermaster report. The watermaster gives a little
 22 description of the year at the beginning of every
 23 report. I just kind of looked at that to make sure that
 24 he talked about flood releases.
 25 Q. Did you look at the watermaster report summary

COPY

CERTIFICATE OF WITNESS

I, ROBERT J. SUTTER, depose and say the following:

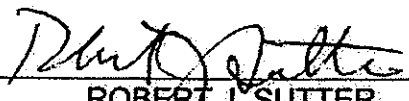
That I am the witness in the foregoing transcript of my deposition
consisting of pages 144 through 262;

That I have read said deposition transcript and that I know the contents
thereof;

That the questions contained therein were propounded to me; and

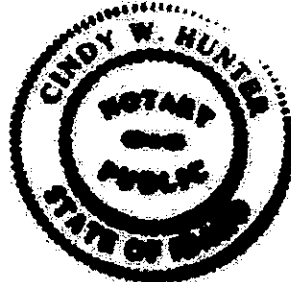
That the answers contained therein are true and correct except for
any changes that I may have listed on the Change Sheet attached hereto.

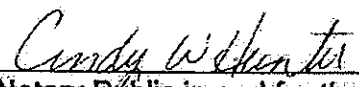
DATED AND SIGNED this 13 day of May 2008.


ROBERT J. SUTTER

SUBSCRIBED AND SWORN to before me this 13 day of

May 2008.




Notary Public in and for the
County of Ada

My commission expires:

April 21, 2014