

W. Kent Fletcher, ISB No. 2248
FLETCHER LAW OFFICE
1200 Overland Avenue
P.O. Box 248
Burley, Idaho 83318-0248
(208) 678-3250
(208) 878-2548 – fax
Email: wkf@pmt.org

RECEIVED

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DEPARTMENT OF
WATER RESOURCES

Attorney for Minidoka Irrigation District

**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 Nos. 1-217, 1-218, 1-4024, and 1-4025
	)	(Minidoka Power Rights)
	)	
Case No. 39576	)	Subcase Nos. 1-2068 and 1-4054
	)	(Palisades Power Rights)
	)	
	)	AFFIDAVIT OF W. KENT FLETCHER IN
	)	SUPPORT OF SWC OPPOSITION TO
	)	STATE'S AND UNITED STATES'
	)	MOTIONS FOR SUMMARY JUDGMENT
	)	

STATE OF IDAHO)
) ss.
County of Twin Falls)

W. KENT FLETCHER, being first duly sworn upon oath, deposes and hereby states as follows:

1. I am an attorney representing the Minidoka Irrigation District in the above-captioned matter. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit A** is a true and correct copy of the transcript of the deposition of Anthony Olenichak taken in this matter on September 16, 2009.

AFFIDAVIT OF W. KENT FLETCHER

3. Attached hereto as **Exhibit B** is a true and correct copy of the transcript of the deposition of Interim Director Gary Lynn Spackman taken in this matter on October 22, 2009.

4. Attached hereto as **Exhibit C** is a true and correct copy of the transcript of the deposition of David R. Tuthill, Jr. taken in this matter on October 22, 2009.

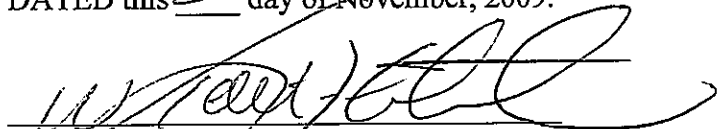
5. Attached hereto as **Exhibit D** is a true and correct copy of the transcript of the deposition of Watermaster of Water District 01, Lyle Robert Swank taken in this matter on October 22, 2009.

6. Attached hereto as **Exhibit E** is a true and correct copy of the transcript of the deposition of Richard M. Rigby (U.S. Bureau of Reclamation) taken in this matter on October 27, 2009.

7. Attached hereto as **Exhibit F** is a true and correct copy of an email from David I. Stanish, attorney for the State of Idaho, to myself and other counsel in this case identifying that the State of Idaho designated David R. Tuthill, Jr. and Interim Director Gary Spackman as the State's witnesses pursuant to I.R.C.P. 30(b)(6).

Further you affiant sayeth naught.

DATED this 2 day of November, 2009.


W. Kent Fletcher

SUBSCRIBED AND SWORN to before me this 2 day of November, 2009.



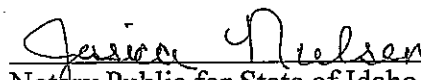

Notary Public for State of Idaho
Residing at Twin Falls, Idaho,
Commission Expires: 4/3/12

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 SRBA)
) Subcase Nos. 01-00217,
Case No. 39576) 01-00218, 01-04024, and
) 01-04025
) (Minidoka Power Right)
_____)

DEPOSITION OF ANTHONY OLENICHAK

September 16, 2009

REPORTED BY:

AMY HORSLEY, C.S.R. No. 714, R.P.R.

Notary Public

1 THE DEPOSITION OF ANTHONY OLENICHAK was
 2 taken on behalf of A&B Irrigation District,
 3 Burley Irrigation District, Milner Irrigation
 4 District, North Side Canal Company and Twin Falls
 5 Canal Company at Magic Valley Bank, 113 Main
 6 Avenue West, Second Floor Conference Room, Twin
 7 Falls, Idaho, commencing at 12:40 p.m. on
 8 Wednesday, September 16, 2009, before
 9 Amy Horsley, Certified Shorthand Reporter and
 10 Notary Public within and for the State of Idaho,
 11 in the above-entitled matter.

12 APPEARANCES:

13 For A&B Irrigation District Burley Irrigation
 14 District Milner Irrigation District North Side
 15 Canal Company and Twin Falls Canal Company:
 16 Barker Rosholt & Simpson, LLP
 17 BY: JOHN K. SIMPSON
 18 1010 West Jefferson, Suite 102
 19 P.O. Box 2139
 20 Boise, Idaho 83701-2139
 21 (208) 336-0700 Fax: (208) 344-6034
 22
 23
 24
 25

1 APPEARANCES (Cont'd)

2 For the State of Idaho:

3 DAVID I. STANISH
 4 700 West State Street, Second Floor
 5 P.O. Box 83720
 6 Boise, Idaho 83720-0010
 7 (208) 334-4549 Fax: (208) 854-8072
 8
 9

10 For the Upper Valley Water Users:

11 Rigby Andrus & Moeller, Chtd.
 12 BY: ROBERT WOOD
 13 25 North Second East
 14 P.O. Box 250
 15 Rexburg, Idaho 83440-0250
 16 (208) 356-3633 Fax: (208) 356-0768
 17

18 For the Ground Water Districts:

19 Racine Olson Nye Budge & Bailey
 20 BY: CANDICE McHUGH
 21 (By telephone)
 22 101 South Capitol Boulevard, Suite 208
 23 Boise, Idaho 83702
 24 (208) 395-0011 Fax: (208) 433-0167
 25

1 APPEARANCES (Cont'd)

2 For Idaho Power Company:

3 JAMES C. TUCKER
 4 1221 West Idaho
 5 P.O. Box 70
 6 Boise, Idaho 83707
 7 (208) 388-2200 Fax: (208) 388-6936
 8
 9

10 For American Falls Reservoir:

11 Capitol Law Group, PLLC
 12 BY: C. THOMAS ARKOOSH
 13 301 Main Street
 14 P.O. Box 32
 15 Gooding, Idaho 83330
 16 (208) 424-8872 Fax: (208) 424-8873
 17

18 For Idaho Department of Water Resources:

19 GARRICK L. BAXTER
 20 322 East Front Street
 21 P.O. Box 83720
 22 Boise, Idaho 83720-0098
 23 (208) 287-4800 Fax: (208) 287-6700
 24
 25

1 APPEARANCES (Cont'd)

2 For the U.S. Department of Justice:

3 Environment & Natural Resources Division
 4 BY: DAVE GEHLERT
 5 (By telephone)
 6 1961 Stout Street, Suite 800
 7 Denver, Colorado 80294
 8
 9
 10
 11
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EXHIBITS

1 - Affidavit of Anthony Olenichak, dated 08/17/2009	30
2 - Supplemental Decree, dated 07/10/1968	30
3 - SRBA Directors Report 01-00217, Priority Date 06/15/1909	58
4 - SRBA Directors Report 01-00218, Priority Date 07/01/1912	65
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ANTHONY OLENICHAK,
first duly sworn to tell the truth relating to
said cause, testified as follows:

EXAMINATION

QUESTIONS BY MR. SIMPSON:

Q. Sir, can you state your full name for the record.

A. Anthony Olenichak, commonly referred to as Tony Olenichak.

Q. And is it okay, Mr. Olenichak, if I refer to you as Tony?

A. Yes.

Q. Thank you. And, Tony, you were noticed for your deposition to commence here today. Do you have that understanding?

A. Yes.

Q. And that deposition was noticed pursuant to what we commonly refer to as the Minidoka power rights and the Palisades power rights; is that your understanding?

A. Yes.

Q. Okay. And those would be subcases in the SRBA identified as 01-00217, 00218, 04024 and 04025 for the Minidoka power rights; is that correct?

A. That's correct.

Q. And for the Palisades power rights, those would be 01-02068 and 04054; is that correct?

MR. BAXTER: John, again, this is Garrick Baxter for the Department of Water Resources. Just to make the record clear, I think the notice only identified Minidoka power right water right numbers on it.

Q. (BY MR. SIMPSON) Okay. But, Tony, are you capable today here to speak to the matters defined under your affidavit that you supplied to the State of Idaho?

A. Yes.

Q. Okay.

MS. McHUGH: John, this is Candice. Since we're just kind of dealing with the preliminary matters and you read those into the record, I'd just like to make a couple clarifying questions to counsel and just for the record.

In this case, my understanding is that this affidavit -- this deposition today of Mr. Olenichak is for the limited purpose of discovery relating to the State of Idaho and the Bureau of Reclamation's motions for summary

judgment in those cases that are currently pending.

Not all counsel received timely notice of the deposition; and, therefore, I would request that -- obviously, we're getting the opportunity to participate by the phone today but did not have adequate time to consider what questions may be asked and any other questions or follow-up we may have.

Therefore, I would request that the deposition remain open for any follow-up questions. And, of course, additional notice would go out at all the parties' convenience so that we can all have the opportunity to reconvene if necessary.

And I just wanted to clarify for the record that the limited purpose of this deposition is in relation to those issues raised specifically in those two pending motions.

MR. SIMPSON: Well --

MS. McHUGH: Is that everybody's understanding?

MR. SIMPSON: Well, for the record, the notice of depositions were e-mailed out to counsel on Friday, last Friday, which would have

1 been --

2 MS. McHUGH: Three business days'
3 notice of the deposition scheduled in Twin Falls.

4 MR. SIMPSON: Okay.

5 MS. McHUGH: I acknowledge that. I'm
6 just saying that three days would not normally be
7 considered adequate notice, and especially given
8 the fact that there was an agreement between the
9 State and the Surface Water Coalition entity
10 attorneys and that everybody was aware that there
11 were other parties participating in these
12 matters, have attended the settlement conference
13 relating specifically to the issues raised in the
14 summary judgment motion but were not included in
15 the discussions relating to the need to have the
16 deposition.

17 I'm just making that for the record
18 because the reality is you're there, I'm here,
19 and we didn't know -- we simply didn't have time
20 to participate in any additional discussion or
21 even know what really precipitated the need to
22 have the deposition. So that's why I made my
23 comments.

24 MR. SIMPSON: Well, from my
25 perspective, you're certainly free to notice up

1 in this deposition given the fact that we --
2 there was no adequate -- there was no even
3 courtesy to call us and see if we could have
4 the -- be adequately prepared to be able to
5 attend and to talk about these questions.

6 So I guess it's no different than a
7 deposition being taken and then, you know, not
8 being concluded that day because of
9 unavailability of the deponent for the follow-up
10 or it goes too long or whatever. I would request
11 a similar courtesy be extended to all counsel. I
12 don't think that's a problem for the record or,
13 you know, the procedure in any way.

14 I'm not anticipating that this needs to
15 happen. I'm just making that for the record now
16 in case -- I mean, I have no idea what
17 precipitated this. I don't know any of the
18 discussions that occurred between the State and
19 counsel needing to do this quickly. I'm just
20 saying I think that's a reasonable request.

21 MR. ARKOOSH: Candice, this is Tom
22 Arkoosh.

23 MS. McHUGH: Yeah.

24 MR. ARKOOSH: The purpose of the
25 deposition is to find facts, simply enough. If

1 Mr. Olenichak again for a continued deposition if
2 you'd like.

3 MS. McHUGH: Okay. Well, thank you.

4 MR. BAXTER: And, Candice, this is
5 Garrick. And that's just the one point I would
6 make. I felt uncomfortable with you saying that
7 the deposition remains open. I think at the
8 termination of this deposition here today, we'd
9 consider it closed.

10 And, again, if you wanted to notice up
11 a new deposition, that is the only appropriate
12 procedure that I'm aware of. Maybe you know of
13 something I don't, but from my standpoint, it
14 would have to be a separate deposition of Tony.

15 MS. McHUGH: Well, and I guess what I'm
16 saying is there's other issues relating to these
17 water rights. All counsel of record were not
18 provided adequate notice on these particular
19 issues. There was an agreement between the
20 State, apparently, and the Surface Water
21 Coalition entities to do this quick deposition of
22 Tony. And I think it's only fair that the other
23 parties be given an opportunity to ask any
24 follow-up questions relating to this deposition
25 on these water rights relating to the questions

1 three days was not -- actually, it was five days.
2 If it wasn't reasonable notice under the
3 circumstances, it wasn't. If it was, it was. We
4 had to get ready in the same amount of time.

5 But I don't know if -- just to leave
6 the deposition open, as I agree with Garrick, is
7 something I've never seen done, just to recess a
8 deposition unless there was some record that had
9 to be retrieved or something like that. And I
10 don't understand quite why you're not free to
11 notice up a deposition if there are other facts
12 that need to be discovered.

13 MS. McHUGH: Well, I think I am free to
14 notice up another deposition. I just don't want
15 this deposition to be viewed, I suppose -- let's
16 say the summary judgment motions aren't granted
17 and there's additional information that needs to
18 happen and this goes to trial, that relating to
19 the question relating to these issues in this
20 summary judgment, which are the historic
21 treatment of the power rights for Minidoka and
22 Palisades, that additional depositions on those
23 questions -- and even if it needs to rehash and
24 re-remind us of the deposition today, we need to
25 go forward, that this isn't the end-all to asking

Page 14 1 Tony questions on those issues on these subcases. 2 And if we want to say that that -- that 3 this deposition is open and then closed, then we 4 can reconvene on the same questions, the same 5 subcases, and then I'm fine with that. I just 6 wanted to make clear with the counsel that I 7 think all parties needed to have the opportunity 8 to be able to do that. 9 MR. ARKOOSH: Candice, looking around 10 the room, if you're looking for a stipulation 11 that the deposition be left open, I don't think 12 you're going to get it. So what I'm just 13 suggesting is we probably ought to go ahead with 14 the deposition, and then there are processes to 15 allow you to fairly obtain facts if you were 16 foreclosed in this process. That's all. 17 But I just want to suggest to you, it 18 doesn't look to me, looking around the room, 19 you're going to get a stipulation that Tony not 20 be presented this document and he signed it. 21 MR. SIMPSON: Okay. Let's proceed. 22 STANISH: John, can we go off the 23 record real quick? 24 (Discussion held off record.) 25 MR. SIMPSON: Dave, the discussion was	Page 16 1 the water district; is that correct? 2 A. Yes. 3 Q. Okay. Are you an employee of the 4 Department of Water Resources? 5 A. My check is issued through the 6 Department of Water Resources, but my position 7 only exists because of the Memorandum of 8 Understanding that the Department has with Water 9 District 1. 10 Q. So today, as you sit here, are you 11 represented by counsel? 12 A. Yes. 13 Q. And is that counsel for the water 14 district, or is that counsel for the Department 15 of Water Resources? 16 A. No, that's Garrick Baxter, counsel for 17 the Department. 18 Q. Okay. And can you briefly describe 19 your job responsibilities as a water district 20 employee? 21 A. My title is Program Manager, and I'm 22 responsible for the day-to-day operations of 23 water delivery in Water District 1. 24 Q. And when you say "water delivery," 25 that's delivery to water rights within Water
Page 15 1 that all objections other than as to form are 2 hereby reserved by acknowledgment of counsel. Is 3 that fair? 4 MR. STANISH: Yes. 5 MR. GEHLERT: Yeah, it certainly is. 6 MS. McHUGH: That's fine. 7 Q. (BY MR. SIMPSON) All right. Tony, I'm 8 here today representing Twin Falls Canal Company, 9 North Side Canal Company, A&B Irrigation 10 District, Burley Irrigation District, Milner 11 Irrigation District. And we'll be asking 12 questions on behalf of Mr. Fletcher as well, who 13 represents Minidoka Irrigation District. 14 And, Tony, today are you here as a -- 15 representing IDWR, the Idaho Department of Water 16 Resources, or are you here as an employee of the 17 water district? 18 A. I am an employee of the water district. 19 The Department of the water district has 20 requested historical information of water 21 delivery of how the water district has delivered 22 water in the past, and so I provided information 23 to the Department in their recommendations. 24 Q. Okay. So any of your participation in 25 these subcases to date has been as an employee of	Page 17 1 District 1? 2 A. Correct. 3 Q. With respect to the operations of the 4 reservoir systems within Water District 1, do you 5 have any role in regards to the delivery of water 6 to those reservoirs? 7 A. Yes. The reservoir storage rights, 8 both the water they physically store and 9 according to their water rights, is accounted for 10 by the Water District 1's water right accounting 11 program. 12 Q. What entity is responsible for storage 13 operations in the Upper Snake? 14 A. The Bureau of Reclamation is 15 responsible for the operations of the reservoirs, 16 especially during the nonirrigation season, and 17 they have to deliver water according to the water 18 rights as determined by the watermaster during 19 irrigation season or when water rights are in 20 priority. 21 Q. During the nonirrigation season, how 22 does BOR -- and that's an acronym for Bureau 23 of -- I'll just say Bureau of Reclamation, excuse 24 me. How does Bureau of Reclamation control water 25 to be stored in the reservoir system?

1 A. That would probably be better answered
2 by someone from the Bureau of Reclamation. I
3 have a general understanding, but not specific.

4 Q. Okay. Based upon your understanding,
5 how is water stored in the Upper Snake in the
6 winter operations by the Bureau?

7 A. Bureau of Reclamation tries to keep
8 their storage up as high in the system of the
9 multi-reservoir system as possible. That ensures
10 the optimization of accumulating the most amount
11 of water in the storage system for the irrigation
12 season.

13 Q. Is water stored in the Upper Snake
14 reservoirs during the nonirrigation season by
15 priority?

16 A. Not necessarily.

17 Q. Can you explain that, please?

18 A. Water District 1 and its water right
19 accounting program accounts for the accrual of
20 storage into the water storage water rights as if
21 nothing was being released through the dam.
22 However, physically, the Bureau of Reclamation
23 operates the dams to let water flow through and
24 perhaps catch water that may be credited to one
25 storage water right account but physically held

1 in another.

2 Q. So water's accounted for on paper by
3 priority but may be stored in another reservoir?

4 A. Correct.

5 Q. What is the Water District's role in
6 storing water?

7 A. To account for the water that's
8 physically available and captured to fill the
9 storage water rights and then to allocate to the
10 spaceholders.

11 Q. So as water's being stored by
12 Reclamation in the reservoir system in the Upper
13 Snake, does the water district overview
14 Reclamation's activities?

15 A. The accounting process is separate from
16 the physical activities by Bureau of Reclamation.
17 When it appears that they may not be optimizing
18 the amount of water that they store, then
19 certainly the water district would step in and
20 ask questions of the Bureau.

21 Q. When you say "ask questions," does that
22 mean that the water district has the ability to
23 influence how the Bureau stores water?

24 A. The water district has given its
25 opinion. Whether or not the Bureau of

1 Reclamation follows that opinion, I'm not sure
2 that's been the case every time.

3 Q. So the Bureau can act independent of
4 the Water District's opinions?

5 A. Yes.

6 Q. What's the Department of Water
7 Resources' role with respect to the storing of
8 water in the reservoirs in the Upper Snake?

9 A. I believe the director of the
10 Department of Water Resources has the authority
11 as to how water is administered in the state
12 according to its water rights.

13 Q. To the best of your knowledge, does the
14 director of the Department of Water Resources act
15 through the water district in a similar fashion
16 that you described for the water district in
17 communicating with the Bureau, that is, ask
18 questions through the water district, or does
19 that happen independent of the water district?

20 MR. BAXTER: I'm going to object to the
21 form of the question. I think you're asking the
22 witness for communications of the Department and
23 the BOR. You've separated out communications
24 between the water district and BOR, and I think
25 the most appropriate person to answer that

1 question would be somebody from -- would have
2 been the director, then director or current
3 director, for that individual question.

4 MR. SIMPSON: Well, I'm asking -- I'm
5 just simply asking Tony if based upon his
6 understanding --

7 MR. BAXTER: Okay.

8 MR. SIMPSON: -- does the director of
9 the Department of Water Resources channel any
10 questions regarding the storage of water in the
11 Reclamation facilities through the water
12 district, or does he communicate directly with
13 the Bureau?

14 THE WITNESS: Well, certainly he could
15 do both. The Department of -- or the director of
16 the Department of Water Resources supervises the
17 watermasters of the water districts.

18 Q. (BY MR. SIMPSON) So would you consider
19 the director your supervisor?

20 A. I would consider my supervisor Lyle
21 Swank, who is the watermaster of Water District
22 No. 1, and then his supervisor would be the
23 director of the Department of Water Resources.

24 Q. And your job title, would it also be,
25 essentially, the assistant watermaster or you're

1 the assistant to the watermaster?

2 A. The title is Program Manager. We do
3 not have a title as Assistant watermaster, but,
4 yes, I would consider myself second in command
5 behind Lyle Swank.

6 Q. Okay. Tony, would it be fair to say
7 that, based upon your experience, it would be
8 your understanding that the Department's role
9 with respect to the storage of water is that
10 water is stored by priority?

11 A. Certainly it's stored by priority in
12 our paper water right accounting, which may not
13 be the same as the physical operations used by
14 the Bureau of Reclamation.

15 Q. Tony, are you familiar with the
16 Palisades contracts that control the relationship
17 between the United States and various
18 spaceholders within Water District 1?

19 A. I am aware of those contracts, but I
20 haven't read them fully.

21 Q. Are you familiar with the Eagle Decree?

22 A. Yes.

23 Q. Okay. Earlier you indicated that the
24 Water District's role in observing how
25 Reclamation stores water is to ask questions if

1 the water district believes that the Bureau is
2 not optimizing storage. Do you recall that
3 testimony?

4 A. Yes.

5 Q. Are you a part of that process of
6 overseeing what Reclamation does in the storage
7 of water?

8 A. At times I am part of that process.

9 Q. Okay. What documents or other
10 materials or understanding do you utilize as you
11 observe how the Bureau's storing water? For
12 example, do you use the water right decrees that
13 are in existence in Water District 1?

14 A. When we are examining the physical
15 operations by the Bureau, generally we're using
16 the hydrology, the water yield, not necessarily
17 using the water rights.

18 Q. Do you use provisions or paragraphs
19 that are contained within the Eagle Decree to
20 better understand how the Bureau is storing
21 water?

22 A. In relation to keeping water as high up
23 in the system to optimize the amount captured,
24 yes, it does relate that way.

25 Q. Okay. And so the Eagle Decree forms

1 part of the basis for determining whether the
2 Bureau is optimizing storage in the reservoir
3 system?

4 MR. BAXTER: John, at this point I'm
5 going to object to the form of the question in
6 the sense that -- in the aspect of relevance.
7 Here today we're to talk about Minidoka power
8 rights, and I don't understand the relevance of
9 the policy of storing up high -- BOR's policy of
10 storing water up high to the Minidoka power water
11 rights.

12 MR. ARKOOSH: The last of that
13 objection, relevance is not a form objection;
14 it's a reserved objection.

15 MR. SIMPSON: Well, besides
16 Mr. Arkoosh's statement, Garrick, we're here
17 today in response to the motions filed by the
18 State and the United States and the affidavit
19 that Mr. Olenichak signed and the proposed
20 remarks and the original recommendation filed by
21 the Idaho Department of Water Resources.

22 Palisades has a storage right that is
23 part of this proceeding, which implicates how
24 water's stored and where it's stored. And we're
25 talking about the Palisades -- or, excuse me, the

1 Minidoka power right, which has an interface with
2 how water's stored. So I think I'm free to
3 explore this with Mr. Olenichak and discuss these
4 with him, unless you're going to instruct him not
5 to answer the question.

6 MR. BAXTER: For clarification for
7 myself, are you saying that the conditions in
8 which the BOR and the State of Idaho have
9 proposed in their summary judgment directly
10 relate to this policy of storing water?

11 MR. SIMPSON: Well, the remarks for
12 Water Right 217 and 218 have, and I'll quote,
13 "Accordingly, except as it is determined by the
14 Secretary that additional water may be passed
15 through Minidoka Dam without the loss of water
16 that could be stored," so we're talking about the
17 storage of water in the Upper Snake reservoir
18 systems.

19 So that's out of a paragraph in
20 Mr. Olenichak's affidavit. And he's testified
21 through that affidavit, and I believe I'm free to
22 ask him questions regarding what that means, in
23 part, and I'm laying a foundation for how water
24 is stored in the Upper Snake so I can understand
25 the relationship between the power rights as

1 claimed and the remarks as proposed and the
2 storage of water in the Upper Snake.

3 MR. BAXTER: Well, I believe it's
4 disingenuous to tee up a deposition that relates
5 directly to the Minidoka power rights and the
6 language proposed in the summary judgment and
7 then -- or especially in light of other outside
8 discussions that have indicated that that issue
9 of storing water up higher would be dealt with in
10 other proceedings or in a different approach or a
11 different condition.

12 And that's to my understanding. So I
13 believe it's disingenuous to come here today to
14 be prepared to talk about subordination of power
15 rights and then be discussing how water is held
16 up in further reaches of the storage system. But
17 with that being said, I am not at this point
18 going to instruct the witness not to answer the
19 question.

20 MR. SIMPSON: Well, let me just clarify
21 before you start taking exception to everything
22 your witness testifies to because your witness
23 testified to how water is stored higher in the
24 reservoir system in response to a question that I
25 had.

1 MR. BAXTER: And I didn't voice an
2 objection at that point because I figured, well,
3 let's let this go a little bit further, hoping
4 that you could tie into the relevancy of the
5 Minidoka power rights and the subordination
6 language we're talking about today. And I
7 haven't seen that yet, but like I said, at this
8 point I'm not going to instruct the witness not
9 to answer the question.

10 Q. (BY MR. SIMPSON) Okay. Tony, is it
11 the Water District's role to ensure that the
12 contracts between BOR and the spaceholder or
13 water user are followed?

14 A. No, I don't think so.

15 Q. So does the water district utilize
16 those spaceholder contracts when it overviews the
17 Bureau's storing of water in the Upper Snake?

18 A. The contracts may be useful in
19 explaining why the Bureau of Reclamation does
20 what it does.

21 Q. So to that extent, would the water
22 district utilize those provisions of the
23 contracts that explain how or why the Bureau
24 stores water?

25 A. No, I think Water District 1's role is

1 only to account for the water according to the
2 supply and the water rights.

3 Q. Does the water district overview BOR's
4 actions in storing water during the storage
5 season to ensure that the decrees are being
6 followed?

7 A. Could you repeat the question?

8 Q. Does the water district overview the
9 actions of BOR in storing water during the
10 storage season to ensure that the decrees are
11 being followed? And I'll further state that by
12 decrees I mean the Eagle Decree.

13 A. Yes.

14 Q. So would it be fair to say that the
15 Eagle Decree is integral to the administration of
16 water rights in the Upper Snake reservoir system?

17 A. What do you mean by the word
18 "integral"?

19 Q. Well, form the foundation for
20 administration of the storage rights.

21 A. The water district uses the water
22 rights decreed in the Eagle Decree to account for
23 their supply as per the operation -- the physical
24 operations by the Bureau of Reclamation during
25 the nonirrigation season.

1 Q. And, Tony, are you familiar with the
2 Eagle Decree that has an exhibit to it that
3 pertains to, for example, the winter water
4 savings agreement and other provisions of the
5 Palisades contracts?

6 A. I am aware that there are addendums
7 with portions of the contracts attached to it.

8 Q. Okay. And are you aware that, for
9 example, the winter water savings provision is
10 one of those addendums?

11 A. Yes.

12 Q. Okay. And so part of your role would
13 be -- as a water district employee would be to
14 ensure that those addendums were administered
15 properly?

16 A. Yes.

17 Q. Okay. And to ensure that the Bureau,
18 in storing water in the reservoirs in the Upper
19 Snake, was storing water consistent with those
20 addendums to the Eagle Decree?

21 MR. STANISH: John, if I may interject.
22 This is David Stanish. Can you specify which
23 Eagle Decree you're talking about? There's two
24 of them.

25 MR. SIMPSON: Okay. We'll mark this

1 one.

2 (Deposition Exhibit 1 marked.)

3 Q. (BY MR. SIMPSON) Tony, I'm going to
4 hand you what I've marked as Exhibit 1. Can you
5 identify Exhibit 1 for me, please?

6 A. Exhibit 1 is the Affidavit of Anthony
7 Olenichak signed on the 14th day of August, 2009.

8 Q. And that's the affidavit you provided
9 as a water district employee to the State of
10 Idaho; is that correct?

11 A. Yes.

12 Q. Okay. And have you provided other
13 affidavits in respect to these subcases that
14 we're here today talking about?

15 A. Yes. I think there was one earlier
16 affidavit that I provided.

17 Q. Okay.

18 (Deposition Exhibit 2 marked.)

19 Q. (BY MR. SIMPSON) I'm going to hand you
20 what has been marked as Exhibit 2 and ask you to
21 look at that and, if you can, identify it for me.

22 A. This is the Burley Irrigation District
23 v. Henry Eagle, Decree.

24 Q. And is that one of two decrees for
25 which are commonly called the Eagle Decrees, to

1 your job responsibilities be to ensure that the
2 winter water savings exhibit and the language
3 within that exhibit and described in the Eagle
4 Decree be followed?

5 A. No, that hasn't been my role.

6 Q. Would one of your responsibilities --
7 in assisting Mr. Swank, would one of your
8 responsibilities be to ensure that as water's
9 stored in the reservoir system and accounted for,
10 that that water is identified by priority?

11 A. Yes. All water that we administer to
12 is identified by priority in our water right
13 accounting.

14 Q. Mr. Olenichak, are you aware that
15 there's also an exhibit within the Eagle Decree
16 that you have as Exhibit 2 that identifies the
17 winter operations of the Minidoka power plant?

18 A. I believe there's an exhibit in there,
19 yes.

20 Q. And as you have it opened up there,
21 would you turn to page 28? And does that
22 identify the title "Winter Power Operation;
23 Minidoka Power Plant"?

24 A. No, I don't find the page 28.

25 MR. ARKOOSH: For the record, it's page

1 the best of your understanding?

2 A. To the best of my understanding.

3 Q. Okay. And if you would turn to -- on
4 Exhibit 2 towards the back, do you identify a
5 number of exhibits attached to the back of that
6 decree?

7 A. Yes.

8 Q. And are these the exhibits that we were
9 just discussing a few minutes ago that, to the
10 best of your understanding, are excerpts out of
11 contracts between the Bureau of Reclamation and
12 various spaceholders?

13 A. Yes.

14 Q. And is one -- excuse me. Is one of the
15 exhibits to Exhibit 2, does one of the exhibits
16 deal with the winter water savings provision, the
17 example we were discussing a few minutes ago?

18 A. Yes. That is the title of one of the
19 exhibits.

20 MR. BAXTER: John, do you have an extra
21 copy of that, by chance?

22 MR. SIMPSON: I don't. I just made --

23 MR. BAXTER: All right. I'll work with
24 David.

25 Q. (BY MR. SIMPSON) Okay. Would one of

1 28 of Exhibit E. The exhibits are numbered
2 differently.

3 MR. SIMPSON: They are.

4 THE WITNESS: Yes, page 28 of Exhibit E
5 is titled "Winter Power Operation; Minidoka Power
6 Plant."

7 MR. SIMPSON: Thank you, Mr. Arkoosh.

8 Q. (BY MR. SIMPSON) And would that
9 Exhibit E and paragraph 24(a) on page 28 identify
10 the operations of the Minidoka power plant during
11 the storage season?

12 A. I assume so.

13 Q. Have you on occasion had an opportunity
14 to review this Exhibit E prior to today?

15 A. I have read it once.

16 Q. Would it be the Water District's
17 responsibility to ensure that Exhibit E is
18 complied with?

19 A. Excuse me, could you ask me --

20 Q. Would it be the Water District's
21 responsibility to ensure that operations in the
22 Upper Snake relative to Exhibit E are complied
23 with?

24 A. If everything in Exhibit E was
25 contained in the water right, yes.

1 Q. Okay. Mr. Olenichak, you would agree
2 that Exhibit E is a portion or attached to the
3 Eagle Decree, correct?

4 A. Correct, is attached to the decree.

5 Q. Okay. Would you agree that the
6 provisions of the Eagle Decree, in particular
7 Exhibit E, as it relates to the operation of the
8 Minidoka power plant and the Minidoka power plant
9 right, should be reviewed to ensure that that
10 right is administered properly?

11 A. If that is the basis for
12 administration, yes.

13 Q. And is the Eagle Decree the basis for
14 administration?

15 A. I don't know the answer to that.

16 Q. Earlier didn't you state that the Eagle
17 Decree was a document utilized in administration
18 of water rights in Water District 1?

19 A. Yes, I'm aware that the water rights or
20 some of the water rights that Water District 1
21 administers may have originated from the Eagle
22 Decree, but as to the provisions in the contract
23 that are attached, I don't know that every one
24 was contained in the water right that would be
25 administered by the water district and the

1 Department of Water Resources.

2 Q. If this document contains certain
3 provisions regarding -- and conditions on how the
4 rights should be exercised, in your view, based
5 upon your responsibilities within Water District
6 1, should those conditions be reflected in a
7 water right?

8 A. That's not for me to determine. The
9 Department of Water Resources determines what's
10 in the water right, and the water district
11 administers according to those rights.

12 MR. ARKOOSH: You know, I object to the
13 answer as nonresponsive.

14 MS. McHUGH: Could we have whoever just
15 objected say the objection a little bit louder?

16 MR. ARKOOSH: I object to the answer as
17 nonresponsive. I think he was asking for the
18 witness's view.

19 MS. McHUGH: Oh, okay. Thanks.

20 Q. (BY MR. SIMPSON) Look, Tony, take a
21 moment, if you would, and we can go off the
22 record for a minute, to review paragraph 24(a) of
23 Exhibit E to the Eagle Decree. And then I'll
24 have a question or two for you.

25 (Break taken.)

1 THE WITNESS: How many pages do you
2 want me to read?

3 Q. (BY MR. SIMPSON) Actually, Tony, just
4 24(a), which would have been the bottom of page
5 28 on Exhibit E and all of page 29.

6 A. Okay.

7 Q. Historically, to the best of your
8 knowledge, has the Minidoka power right been
9 administered according to the provisions of
10 paragraph 24(a)?

11 A. In the 19 years I've worked for the
12 water district, it has not.

13 Q. So based upon your understanding, then,
14 during the storage season of each year, the
15 United States hasn't attempted to comply with
16 paragraph 24(a)?

17 A. I don't know the reasons for not
18 complying, but it mentions third-party rights
19 that we have not delivered to as the water
20 district.

21 Q. Has the United States -- would you
22 agree -- strike that. Would you agree that --
23 I'm paraphrasing now -- but paragraph 24(a)
24 addresses the concept that the United States
25 would store water in preference for that storage

1 over the generation of power at the Minidoka
2 power plant?

3 A. I don't understand your question.

4 Q. Well, you have an understanding that
5 the Bureau stores water in the Upper Snake,
6 correct?

7 A. Yes.

8 Q. Okay. And the Bureau attempts to
9 maximize or optimize storage in the Upper Snake,
10 correct?

11 A. Yes.

12 Q. And do you understand that they do that
13 at times to the detriment of generating power at
14 the Minidoka power plant?

15 A. Yes.

16 Q. Okay. And based upon your review of
17 paragraph 24(a), does paragraph 24(a) address
18 that concept that we just discussed?

19 MR. STANISH: I'm going to object. Can
20 you describe exactly which -- you just asked a
21 string of questions -- which concept exactly he's
22 supposed to be considering?

23 Q. (BY MR. SIMPSON) Well, Tony, did you
24 understand my question?

25 A. I thought the power loss, which is what

1 you're referring to, was addressed in another
2 section of the decree.

3 Q. Well, the concept we've just been
4 discussing is the concept of the Bureau storing
5 water for irrigation storage in the reservoirs in
6 the Upper Snake and preferring to do so over the
7 generation of power at Minidoka Dam. Do you
8 understand that?

9 A. Yes.

10 Q. Okay. And as a part of the
11 consequences of preferring storage over power
12 generation, there's a power loss calculation,
13 correct?

14 A. Yes.

15 Q. Okay. And do you have an understanding
16 of what that power loss calculation is intended
17 to do?

18 A. Yes, I have a basic understanding.

19 Q. Okay. Can you describe that for me?

20 A. By holding the water as high up in the
21 system in order to optimize the storage for
22 irrigation, that decreases the amount of water
23 that's run through the power plant. As a result,
24 that's less revenue that can be generated by the
25 power production, and so that lost revenue is

1 then reimbursed from the storage holders that
2 benefit from the additional storage.

3 Q. And that lost revenue, when you say
4 "reimbursed," it's reimbursed to whom?

5 A. I don't know.

6 Q. Okay. So the beneficiaries of the
7 power loss calculation, do you have an
8 understanding of who those would be?

9 A. I assume it would be the owners of the
10 Minidoka power plant.

11 Q. Would that be, in part, Burley
12 Irrigation District and Minidoka Irrigation
13 District, A&B Irrigation District?

14 A. I don't know.

15 Q. But this preference that we've talked
16 about for irrigation storage over power
17 generation, you understand that that preference
18 was created in exchange for the power loss
19 calculation that's done every year?

20 A. That's my understanding.

21 Q. Okay. And does paragraph 24(a) address
22 that?

23 A. I'm not sure if this is where it's
24 addressed in the decree or if it's addressed
25 somewhere else.

1 Q. Okay. Is it addressed here in
2 paragraph 24(a)?

3 A. Yes, it is.

4 Q. So it may be addressed somewhere else
5 in the Eagle Decree, but it's addressed in
6 Exhibit E of the Eagle Decree as well, correct?

7 A. Yes.

8 Q. Does paragraph 24(a) also address the
9 preference for irrigation storage over power
10 generation that we've just been discussing?

11 A. Yes.

12 Q. And you identified a few moments ago
13 some question regarding third-party rights. Were
14 you looking at a particular sentence with respect
15 to paragraph 24(a)?

16 A. Yes. The first sentence.

17 Q. And can you identify the particular
18 part of that sentence that you're looking at?

19 A. Well, I'll read the sentence. "The
20 United States, in its operation of American Falls
21 and Minidoka dams during the storage season of
22 each year is required to pass through enough
23 water to satisfy existing diversion rights in the
24 stretch of river down to and including Milner Dam
25 and certain power rights below Milner Dam."

1 And that last phrase, that was the one
2 I was referring to that we have -- Water District
3 No. 1, in the 19 years I've worked here, have not
4 delivered to power rights below Milner Dam.

5 Q. You haven't in the accounting program
6 or in the Water District's operations delivered
7 to power rights below Milner Dam?

8 A. Correct.

9 Q. Okay. But as you sit here, you
10 don't -- do you know if the United States has
11 operated American Falls or Minidoka Dams during
12 the storage season to satisfy existing diversion
13 rights down to and including Milner Dam and
14 certain power rights below Milner Dam?

15 A. The water that's passed through the
16 system by the Bureau of Reclamation may benefit
17 those operations below Milner Dam.

18 Q. What a particular concern to me is, is
19 existing diversion rights in the stretch of the
20 river down to and including Milner Dam, part of
21 that first sentence that you read. Do you, as
22 you sit here today, know how or if the Bureau of
23 Reclamation has operated the storage system to
24 satisfy that portion of 24(a)?

25 A. Yes, they do.

1 Q. So they recognize that as an obligation
2 they have?

3 A. Yes.

4 Q. Okay. And so that would then
5 identify that -- in the next sentence, it states,
6 "While the United States must not" -- must --
7 strike that. I'll start over.

8 "While the United States must operate
9 the American Falls and Minidoka dams so as not to
10 interfere with these third-party rights," would
11 you recognize that when they talk about
12 third-party rights, they're referring to those
13 rights identified in the first sentence that you
14 read?

15 A. I understood third-party rights to be
16 both the above and below Milner deliveries.

17 Q. So then would it be fair to say that in
18 operating Minidoka Dam and the power plant at
19 Minidoka Dam, that it must be operated in a way
20 that would comply with paragraph 24(a), in your
21 view?

22 MR. BAXTER: I'm going to object. Asks
23 for a legal conclusion.

24 MR. SIMPSON: I asked him in his view.

25 MR. BAXTER: It's still asking for a

1 legal conclusion.

2 Q. (BY MR. SIMPSON) Based upon your
3 understanding, then, Tony, that the United States
4 has operated the Minidoka Dam in compliance with
5 paragraph 24(a), have they operated the power
6 plant, in your view, to comply with paragraph
7 24(a)?

8 MR. BAXTER: Tony, I've objected to the
9 question and stated that it asks for a legal
10 conclusion, but go ahead and answer the question.

11 THE WITNESS: Yes.

12 Q. (BY MR. SIMPSON) Then, Tony, in the
13 administration of the Minidoka power plant right,
14 would the provisions of paragraph 24(a) aid the
15 administrator in ensuring that paragraph 24(a)
16 was complied with?

17 A. I don't understand your question.

18 Q. Well, then, as the administrator --
19 you've testified, I believe, that paragraph
20 24(a), the United States has complied with
21 satisfying the diversions below Minidoka Dam,
22 correct?

23 A. Yes.

24 Q. Okay. Then in administering the rights
25 at Minidoka Dam, would the administrator of the

1 Minidoka Dam power right be assisted or aided in
2 having this language of paragraph 24(a) available
3 to him or her?

4 A. In my understanding of the delivery of
5 the power rights, no.

6 Q. So you're saying that this language
7 would not aid the administrator in delivering
8 water to the Minidoka Dam power right?

9 A. That's correct.

10 Q. Would it aid the administrator in
11 making a decision whether or not to deliver water
12 to the Minidoka Dam power right or to put that
13 water in storage?

14 A. Yes.

15 Q. And that would be part of the Secretary
16 of Interior's responsibility in making those
17 decisions, correct?

18 A. Well, it would be the Bureau of
19 Reclamation.

20 Q. Okay. Tony, with respect to the
21 Minidoka power rights, how are they reflected in
22 the water district accounting program?

23 A. In the water right accounting program,
24 they are, essentially, run-of-the-river. If the
25 water is physically run through the power plant

1 and is in priority, then that amount of water is
2 attributed to filling that portion of the power
3 right. In my 19 years, it's only been done
4 during the nonirrigation season.

5 Q. So has the identification of the
6 Minidoka power rights in the water rights
7 accounting program changed during your 19 years?

8 A. Not that I'm aware of.

9 Q. Okay. So the 217 right -- the 01-217
10 and 01-218 power rights at Minidoka Dam have not
11 been identified in the accounting program other
12 than a run-of-the-river type right?

13 A. Correct.

14 Q. Okay. That is, you've never delivered
15 water to meet those power rights?

16 A. I have never been aware of a call for
17 additional water to fill those power rights.

18 Q. In the Water District 1, do you rely
19 upon a water right holder to make a call in order
20 to deliver water to them?

21 A. Only if they're physically not
22 receiving the water when our water right
23 accounting program shows it's in priority.

24 Q. Okay. If a water right is in priority,
25 do you deliver water to it?

1 A. If it's diverted.

2 Q. So you actually deliver water by
3 priority within the water district?

4 A. Not just based on priority, but also
5 amounts, period of use, applying limitations.

6 Q. Sure. Pursuant to the elements of the
7 licensed or decreed right, correct?

8 A. Correct.

9 Q. Okay. So if a licensed or decreed
10 right is in priority, is it your obligation as an
11 employee of the water district to deliver water
12 to that right?

13 A. Only if it's being called upon or being
14 used by the owner of the water right.

15 Q. And if it's being used upon by the
16 owner of the water right, do you deliver water to
17 it in priority?

18 A. Yes.

19 Q. Okay. Do you do that with or without a
20 call?

21 A. If the water is diverted by the water
22 right owner, we assume that it is a call.

23 Q. So a water right owner doesn't have to
24 physically make a delivery call in the sense as
25 we know it in conjunctive management to have

1 that they wanted to receive under their full
2 water right.

3 Q. Well, you just stated, did you not,
4 that it's your -- that it's the Water District's
5 obligation to deliver water to fill rights
6 according to the decrees or licenses?

7 A. But just because there's a water right
8 doesn't necessarily mean the owner of the water
9 right is going to divert that water or call on
10 that water, the full amount.

11 Q. So with respect to this hydropower
12 right, you're presuming that they won't be able
13 to put it to full beneficial use; thereby, they
14 have to make a call?

15 A. My understanding is, is that they only
16 utilize the power right with the water that's
17 physically available in the river at the time.
18 And if it's less than the total 2700 cfs, I'm not
19 aware of a situation where they wanted the water
20 district to shut down junior priorities in order
21 to satisfy that entire 2700 cfs.

22 Q. And that was a water district decision
23 not to deliver that water to them under their
24 water right?

25 A. Water District 1 only delivers the

1 water delivered to it; it's the obligation of the
2 water district to deliver the water to that water
3 right holder, is it not?

4 A. Correct. If the water right is in
5 priority and they're diverting water, then we
6 deliver it to it.

7 Q. Okay. So within Water District 1 where
8 you have a watermaster in place, isn't it true
9 that the watermaster distributes water according
10 to the priorities that can be filled?

11 A. Correct.

12 Q. And so then, as you've just described,
13 would a call be implicit in water district
14 distribution of water?

15 A. If it was physically being diverted at
16 the time.

17 Q. So in the sense that you just described
18 where you're not aware of the owner of the
19 Minidoka power right ever making a delivery call,
20 they, the owner of the water right, would not
21 have to expect that they'd have to make a call in
22 order for water to be delivered to it; isn't that
23 correct?

24 A. They would have to make a call if they
25 weren't receiving the physical amount of water

1 water that's physically being diverted.

2 Q. And what do you mean by physically
3 being --

4 MR. ARKOOSH: Wait a minute. I object
5 to that answer as nonresponsive. He asked
6 whether it was a water district decision, and I
7 don't think that question got answered.

8 THE WITNESS: Could you repeat the
9 question?

10 Q. (BY MR. SIMPSON) So the water -- the
11 decision not to deliver to the Minidoka power
12 right was a decision made by the water district?

13 A. No. We don't make -- Water District 1
14 doesn't make the decision not to deliver the
15 water right. We account for the water that's
16 being diverted, the amount that's run through the
17 power plant, which sometimes is less than the
18 full entitlement.

19 Q. I understand. And so if the amount
20 being delivered through the power plant -- and
21 that would be the diversion, correct?

22 A. Correct.

23 Q. -- is less than the water right, is it
24 not the Water District's obligation or duty to
25 administer to that priority date to the full

1 extent of the water right?

2 A. No. The water district doesn't force
3 the most senior rights to divert all their water
4 that they're entitled to.

5 Q. So the water district then presumes
6 that the water user doesn't need their water?

7 A. Correct.

8 Q. And do you know what that presumption
9 is based upon? Is it based upon a rule or a
10 statute?

11 A. I think it's based on the prior
12 appropriation doctrine. When a senior right
13 doesn't divert its entire right, then the amount
14 that it doesn't divert becomes available to the
15 next junior appropriator.

16 Q. So earlier when I asked you when you
17 have a watermaster in place, the watermaster
18 distributes the water according to the priorities
19 that can be filled, do you still agree with that
20 statement?

21 A. Based on the amount that's being
22 diverted or called upon.

23 Q. You described the Minidoka power right
24 as being a run-of-the-river type right; is that
25 correct?

1 A. Yes.

2 Q. Okay. And what is a run-of-the-river
3 type right? Can you describe it for me?

4 A. Yes. If the water in the river passing
5 the dam is run through the power plant, then they
6 can use it to generate power.

7 Q. And if you know, is that type of a
8 right, is that reflected in the power right for
9 01-217 or 01-218?

10 A. Could you repeat that?

11 Q. Is that condition reflected in the
12 right or decreed right for 01-217 or 01-218?

13 A. I don't know.

14 Q. Do you know if the phrase you used,
15 run-of-the-river, has its genesis in paragraph
16 24(a) of Exhibit E?

17 A. No, I don't know that that's where it
18 has its genesis.

19 MR. SIMPSON: Okay. If we can just go
20 off the record for a minute. Just take a break,
21 Tony, just for a couple minutes.

22 (Break taken.)

23 Q. (BY MR. SIMPSON) Tony, just to finish
24 up on what we were just discussing before we took
25 a break, if you considered the Minidoka power

1 rights to be run-of-the-river rights, if the
2 owner of those power rights had made a delivery
3 call, how would you have responded to that
4 delivery call?

5 A. I'm not in the position to respond to
6 that. That would have been --

7 MR. BAXTER: Actually, I'm going to
8 object to the form of the question as
9 speculative. It asks the witness to speculate as
10 to a question.

11 But with that being said, go ahead and
12 answer the question, Tony.

13 THE WITNESS: I'm not the person
14 responsible for making that decision. That would
15 go to the watermaster or the director of the
16 Department of Water Resources.

17 MR. ARKOOSH: Well, I'm going to object
18 as nonresponsive. The question was, how would
19 the witness have responded had that happened?

20 Q. (BY MR. SIMPSON) Well, in the
21 accounting program, Tony, if a delivery call was
22 made by the owner, would the accounting program
23 look to see if there's water to fulfill that
24 right?

25 A. If the Bureau increased the flow on the

1 river to 2700 cfs and the water right accounting
2 was filling that priority, it would show the
3 entire 2700 cfs going to fill that water right.

4 Q. And would that be a proper exercise of
5 the right if there were rights junior to the
6 priority of the Minidoka power right?

7 MR. BAXTER: I'm going to object. It
8 asks the witness for a legal conclusion.

9 Go ahead and answer the question, then,
10 Tony.

11 THE WITNESS: During the winter
12 operations, the Bureau is releasing water from
13 American Falls, which eventually passes through
14 the Minidoka power plant. They only do that when
15 they're confident that they will not impact the
16 storage rights, the irrigation rights. If that
17 were the case and they passed the 2700 cfs
18 downstream during the nonirrigation season, the
19 Minidoka power right would be in priority and the
20 water right accounting program would show it
21 being filled.

22 Q. (BY MR. SIMPSON) Okay. And during the
23 irrigation season, would the Minidoka power right
24 also be filled?

25 A. During the irrigation season, the

1 Minidoka power right is not in the water right
2 accounting program because the flows are
3 generally greater than 2700 cfs because of the
4 water that must be passed down to the diversions
5 between Minidoka and Milner Dam.

6 Q. Well, Tony, do you recall having your
7 deposition taken on October 6, 2008?

8 A. Yes.

9 Q. Okay. I'm going to hand you a copy of
10 your deposition and ask you to turn to page 40
11 and 41 of that deposition. I'm confused because
12 your answers seem to be in contradiction. If I
13 may, starting there what's circled and read down
14 through on page 41. Then I'll just ask you to
15 read that portion into the record as well.

16 A. Do you want me to read from this
17 question that has the --

18 Q. That's fair.

19 A. -- circle and down to --

20 Q. Through the underlined portion on page
21 41.

22 A. "QUESTION: And so that diversion for
23 the Minidoka power plant is accurately reflected
24 in the water rights accounting program?

25 "ANSWER: For the Minidoka power plant,

1 yes.

2 "QUESTION: Does the accounting program
3 accurately reflect all the hydropower uses at
4 Milner or above Milner?

5 "ANSWER: No, it does not.

6 "QUESTION: Which does it not
7 accurately reflect?

8 "ANSWER: The power plants -- Utah
9 Power, for example, at Ashton Dam -- well,
10 they're no longer Utah Power, but Ashton Dam, Gem
11 Lake Dam, all those power plants along the
12 system, the City of Idaho Falls power plants,
13 they're run-of-the-river power plants, and they
14 don't call water from junior priority diversions.

15 "QUESTION: Okay. Any other power
16 plants in the river system besides those, in your
17 view, aren't reflected in the water rights
18 accounting program?

19 "ANSWER: Minidoka power plant is the
20 only one that I'm aware of that is in the
21 program. All others are not."

22 Q. And is that testimony consistent with
23 the testimony you're providing here today?

24 A. My understanding of the delivery of the
25 power rights has greatly increased since that

1 deposition. I think if you read in other parts
2 of the deposition, there are parts where I wasn't
3 sure of how the power rights were delivered.

4 Q. So in the portion of the deposition you
5 just read into the record, you were confused, as
6 you sit here today?

7 A. No. I answered the question in that
8 deposition to the best of my knowledge at that
9 time.

10 Q. And so then you went -- is it fair to
11 say you went back into the accounting program and
12 found out that the Minidoka power right is not
13 reflected in the accounting program?

14 A. The Minidoka power right -- actually,
15 all those power rights, Ashton Dam, are reflected
16 in the program, but only the Minidoka power
17 rights are water delivered and reflected
18 specifically in the daily printouts and only
19 during the nonirrigation season. And I wasn't
20 entirely aware of that when I answered that
21 question.

22 Q. And why is it, in your view, that the
23 Minidoka power right is only reflected in the
24 accounting program for the nonirrigation season?

25 A. The way it was explained to me by Bob

1 Suter, the author of the water right accounting
2 program, that during the irrigation season
3 there's sufficient water being passed down
4 through Minidoka Dam to deliver to the diversions
5 between Minidoka and Milner to completely satisfy
6 the 2700 cfs.

7 Q. So you can satisfy the 2700 cfs rights,
8 217 and 218 rights, without delivering water
9 specifically to those rights?

10 A. The 2700 is available without having to
11 draw water away from upstream junior priorities.

12 Q. That's because water is passing through
13 the Minidoka Dam for irrigation deliveries below
14 the Minidoka Dam?

15 A. Correct.

16 Q. But in that case the 2700 rights, the
17 217-218 rights, would be satisfied, would they
18 not?

19 A. They would be satisfied with a physical
20 amount of water, not necessarily with natural
21 flow.

22 Q. Would the elements of those water
23 rights be met?

24 A. Yes.

25 Q. So, Tony, was it after the deposition

1 last October that you went back and looked into
2 this Minidoka power right and its reflection in
3 the accounting program?

4 A. Yes.

5 Q. Okay. And did you do that on your own,
6 or were you requested by someone after --

7 A. I did that on my own.

8 Q. -- the deposition? Okay. Was that
9 after you read your deposition transcript?

10 A. Well, there were several questions in
11 the deposition that I wanted to confirm my
12 answers or study further, and that was the
13 reason.

14 (Deposition Exhibit 3 marked.)

15 Q. (BY MR. SIMPSON) I'm going to hand you
16 what I've marked as Exhibit 3, Tony. Do you
17 recognize Exhibit 3?

18 And for those on the telephone, Exhibit
19 3 would be the SRBA Directors Report for
20 01-00217.

21 MR. BAXTER: John, at this point I'll
22 just make a clarification.

23 MR. SIMPSON: Sure.

24 MR. BAXTER: It's a printout from the
25 SRBA court of their database's reflection of the

1 director's report. I found at times that the
2 SRBA's Web site doesn't always -- isn't always an
3 accurate representation of what the director's
4 report is, but no objections, but just wanted to
5 have that one clarification in there.

6 MR. SIMPSON: Okay. Fair enough.

7 Just for the record, who's on the phone
8 still?

9 MS. McHUGH: Candice is.

10 MR. SIMPSON: Okay. David, are you
11 still on?

12 MS. McHUGH: Must have dropped off.

13 MR. SIMPSON: Yeah, okay.

14 Q. (BY MR. SIMPSON) Tony, I'd turn your
15 attention to this director's report from the
16 SRBA's Web site for 01-00217. And, Tony, did you
17 have any involvement in the original
18 recommendation issued by the Department of Water
19 Resources for this water right claim?

20 A. Yes.

21 Q. Okay.

22 MR. STANISH: Just for the record,
23 Dave, did you get back on the phone?

24 MR. GEHLERT: I did, thanks. Sorry, I
25 had you on mute, and I accidentally hung up

1 instead of taking it off mute.

2 Q. (BY MR. SIMPSON) Okay. And so, Tony,
3 if you would look at the priority date element
4 for 217, based upon your understanding of how the
5 BOR operates the federal reservoir system above
6 Milner, is the language under the priority
7 element for 217 consistent with that operation?

8 A. In the 19 years that I've worked for
9 the water district, yes.

10 Q. And so did you help draft this
11 language, this paragraph?

12 A. No, I did not --

13 Q. Okay.

14 A. -- help draft this.

15 Q. All right. In your own words, what
16 does historical practice mean to you?

17 A. Historic practice reflects whether or
18 not a call was ever made by the owner of the
19 water right to the watermaster.

20 Q. Okay. So an historic practice to you
21 as part of the administration team for Water
22 District 1, historic practice would mean how the
23 water right holder has exercised their right?

24 A. Yes.

25 Q. Okay. And based upon your

1 understanding, what would other purposes
2 contained in the first sentence mean, where it
3 states, "Water for power generation is incidental
4 to the rights of others to the use of water for
5 other purposes"?

6 A. Other than hydropower.

7 Q. So would that include irrigation?

8 A. Yes.

9 Q. Recharge?

10 A. Yes.

11 Q. And so the historic practice would
12 mean -- well, let me strike that. Let me ask
13 this: Would this, in your view, amount to a
14 subordination of their hydropower rights?

15 A. Yes.

16 Q. Okay. And that subordination contained
17 in that paragraph, is that different than the
18 language that we referred to earlier in paragraph
19 24(a) of Exhibit E of the Eagle Decree?

20 A. Yes.

21 Q. And so this subordination, as you view
22 it, is a subordination based upon their
23 historical exercise of their hydropower right?

24 A. Yes.

25 Q. Tony, within Water District 1, isn't

1 the river on regulation throughout the irrigation
2 season?

3 A. Yes.

4 Q. In the "Other Provisions Necessary"
5 section of Water Right Claim 217, do you see that
6 language in that paragraph?

7 A. Excuse me, which?

8 Q. Under the "Other Provisions Necessary"
9 section.

10 A. Okay.

11 Q. And in reading that, it appears to
12 refer to the Foster Decree and administration of
13 the Foster Decree; would you agree?

14 A. That's what it says.

15 Q. Okay. Based upon your understanding of
16 administration of this hydropower right, does the
17 Foster Decree lend itself to defining either the
18 administration of this right or clarifying this
19 right?

20 A. The Department added this remark for
21 clarification, yes.

22 Q. And you would agree with that
23 clarification or remark? Based upon your
24 experience of dealing with the water rights
25 accounting and your understanding of the Foster

1 Decree and the Minidoka power right, would you
2 also agree that that remark is necessary for
3 administration of this hydropower right?

4 A. In my view, it isn't necessary.

5 Q. Okay. And the last part of that
6 paragraph states that, "The delivery of water to
7 this right may be subject to the provisions for
8 winter power operation at the Minidoka power
9 plant as recognized in the Burley Irrigation
10 District v. Eagle, Supplemental Decree."

11 And I believe that's part of the
12 discussion we had earlier regarding the
13 application of the Eagle Decree. And would you
14 agree that the Eagle Decree and the provisions of
15 the Eagle Decree affect the administration of
16 this Minidoka power right?

17 A. If that determines physical operations
18 by the Bureau, yes.

19 Q. And the Department recognized the
20 applicability of the Eagle Decree to the
21 administration of this right, did they not?

22 A. Yes.

23 Q. And would you agree that that reference
24 to the Eagle Decree should be contained in this
25 Minidoka power right?

1 A. No, I don't think it's necessary.

2 Q. So no remark is necessary regarding the
3 administration of the Minidoka power right?

4 A. This particular remark I don't think is
5 necessary.

6 Q. And why is that?

7 A. Because if the remark weren't in the
8 water right, the Bureau would still have to abide
9 by its contracts.

10 Q. And would it aid the administrator of
11 the water right in reviewing how the Bureau is
12 delivering water to storage or to the Minidoka
13 power right?

14 A. Yes, it would aid them.

15 Q. Okay. So in aiding the administrator,
16 would this remark be helpful?

17 A. It would be helpful.

18 Q. Okay. So in that case you would have
19 no objection to the inclusion of that remark in
20 the recommendation for the Minidoka power right?

21 A. Correct.

22 Q. In looking at the recommendation for
23 217, does it distinguish between whether natural
24 flow or storage water is being delivered through
25 the Minidoka power plant to satisfaction of this

1 right?

2 A. It does not.

3 Q. Just identifies the source of water as
4 Snake River water, correct?

5 A. Yes.

6 Q. Then with Exhibit -- I'm going to hand
7 you Exhibit 4, Tony. And that is the SRBA's Web
8 site recommendation for 01-00218.

9 (Deposition Exhibit 4 marked.)

10 Q. (BY MR. SIMPSON) And looking, Tony, at
11 Exhibit 4, which is for Claim No. 218, would your
12 answers as to the remark in the priority element
13 be the same as what you just provided on 217?

14 A. Yes.

15 Q. And then looking down on the other
16 matters -- strike that. Looking down on the
17 section "Other Provisions Necessary for
18 Definition or Administration of this Water
19 Right," this language appears to be very similar
20 to the language provided under 217. Would you
21 look at that language?

22 A. Yes. The paragraphs seem to be
23 flipped, but, essentially, it's very similar.

24 Q. Okay. And so would your answers
25 regarding the necessity for those remarks be the

1 same as what you provided for 217?

2 A. Yes.

3 (Deposition Exhibit 5 marked.)

4 Q. (BY MR. SIMPSON) Tony, I'm going to
5 hand you now what I just marked as Exhibit 5. If
6 you would identify that, please.

7 A. It's the SRBA copy of the director's
8 report or database of the IDWR director's report
9 for Water Right 01-04024.

10 Q. Okay. And that would be the natural
11 flow right for Palisades; is that correct? No,
12 strike that. That would be another junior right
13 for the Minidoka power plant, correct?

14 A. Correct.

15 Q. With a priority date of June 16, 1927,
16 correct?

17 A. Correct.

18 Q. Okay. And, again, looking at the
19 remark under the priority date section for 04024,
20 that appears to be identical to the remark
21 contained under 217, also for the Minidoka power
22 plant?

23 A. Yes.

24 Q. Okay. Would it also be fair to say
25 that your answers with respect for the basis of

1 that remark in 0424 would be the same as your
2 answers regarding 0217 and the remark contained
3 under the priority element for that right?

4 A. Would you repeat the question?

5 Q. Well, the question is, looking at the
6 remark contained under the priority date section
7 for Claim No. 01-04024, would the basis for that
8 remark be the same basis as you've described for
9 the remark contained under 01-0217?

10 A. Yes.

11 Q. That would be based upon the historical
12 exercise by the owner of the right; is that
13 correct?

14 A. Well, there's a difference between the
15 two rights. One historically has been recognized
16 by Water District 1 because it was previously
17 decreed, but the 1-04024 was simply a beneficial
18 use claim not previously delivered by Water
19 District 1.

20 Q. Okay. So within Water District 1,
21 then, in the accounting program, the accounting
22 program would only reference either licenses,
23 decrees or permits; is that correct?

24 A. Correct.

25 Q. Okay. So if one had a beneficial use

1 right, constitutional beneficial use right, one
2 would have to get that decreed by a court before
3 the water district would administer to that
4 right, correct?

5 A. Correct.

6 Q. And so historical administration by the
7 Department -- excuse me, by the water district
8 would not be relevant to this beneficial use
9 claim because the water district has never
10 administered to that right; would that be
11 correct?

12 A. Correct.

13 Q. Okay. Again, then the reliance upon
14 that remark section under the priority date
15 pertains to only how the owner has exercised that
16 right, correct?

17 A. Yes.

18 Q. And, again, looking then down at the
19 bottom of Exhibit 5 for Claim 04024 under the
20 "Other Provisions Necessary," there's a paragraph
21 that identifies the Eagle Decree, does it not?

22 A. Yes.

23 Q. And it appears that that paragraph has
24 nearly identical language to the language
25 contained under Claim 217, does it not, regarding

1 that reference?

2 A. Yes.

3 Q. Okay.

4 MR. STANISH: If I could go off the
5 record real quick.

6 (Discussion held off record.)

7 (Deposition Exhibit 6 marked.)

8 Q. (BY MR. SIMPSON) Exhibit 6, can you
9 identify it for us, please?

10 A. This is the information from the
11 director's report through the SRBA database for
12 Water Right 1-04025.

13 Q. And that would be another junior right
14 at the Minidoka power plant, correct?

15 A. Correct.

16 Q. Okay. And it also, does it not, Tony,
17 contain the remarks under the priority date and
18 under the "Other Provisions Necessary"?

19 A. Yes.

20 Q. And are those remarks nearly identical
21 to the remarks contained in Water Right Claim
22 217?

23 A. Yes.

24 Q. Okay. And so would your answers -- if
25 you were asked the same questions for this claim

1 as to the basis for those remarks or the
2 necessity for those remarks, would those answers
3 be the same as the answers you provided for Claim
4 217?

5 A. Yes.

6 Q. Okay. And, again, this is a beneficial
7 use claim, so it would be identical to the one we
8 just talked about, the 04024, correct?

9 A. Correct.

10 Q. And that is not contained in the
11 accounting program, wouldn't be unless it were
12 decreed by the court, correct?

13 A. Correct.

14 Q. Then it would be delivered to by the
15 water district under the conditions contained in
16 the decree, correct?

17 A. Yes.

18 Q. Tony, let's turn to Exhibit 1, which
19 should be your affidavit?

20 A. Okay.

21 Q. And in your affidavit you identified
22 certain remarks for both the -- well, let's start
23 first in paragraph 4 with remarks for the
24 Minidoka power rights on page 2. Do you see that
25 language?

1 A. Yes.

2 Q. Okay. And do you know the genesis for
3 that language?

4 A. Yes.

5 Q. Where does that language come from?

6 A. It's similar to the language in the
7 contracts that are contained in the Eagle Decree.

8 Q. Okay. And similar to the language we
9 discussed earlier in paragraph 24(a) of the Eagle
10 Decree in Exhibit E?

11 A. Yes.

12 Q. Okay. And in your affidavit you state
13 that these remarks are consistent with how Water
14 District 1 has historically administered the
15 power rights. Do you see that testimony in
16 paragraph 4?

17 A. Yes.

18 Q. Okay. And when you say the remarks are
19 consistent, what do you mean by consistent?

20 A. It's a run-of-the-river operation.

21 Q. And does the run-of-the-river operation
22 condition on the Minidoka power right, as you've
23 described it, is it contained in Exhibit E,
24 paragraph 24 of the Eagle Decree?

25 A. Could you repeat the question?

1 Q. The run-of-the-river condition that
2 you've described, is it contained in paragraph
3 24(a) of Exhibit E from the Eagle Decree?

4 A. No. That's the term that's been used
5 to describe how the power right has been
6 accounted for in the water right accounting.

7 Q. Okay. So it's been accounted for -- is
8 it your testimony that it's been accounted for in
9 the accounting program as a run-of-the-river
10 right?

11 A. Yes.

12 Q. Okay. Is it identified in Exhibit E,
13 paragraph 24 of the Eagle Decree, as a
14 run-of-the-river right?

15 A. No.

16 Q. Okay. Does paragraph 24(a) of Exhibit
17 E of the Eagle Decree describe the elements or
18 conditions on the exercise of that right which
19 would lend itself to being called a
20 run-of-the-river right?

21 A. Yes.

22 Q. How is that? If you need to, let's
23 turn -- we have the Eagle Decree here. So if you
24 can maybe help me out by pointing to specific
25 sentences within paragraph 24(a) that describe a

1 run-of-the-river right.

2 A. Well, it would be the second sentence.
3 "While the United States must operate the
4 American Falls and Minidoka dams so as not to
5 interfere with these third-party rights, it will
6 be the objective of the United States in the
7 operation of both its American Falls and Minidoka
8 powerplants to curtail the release of additional
9 water from American Falls Reservoir for power
10 production at those powerplants during the
11 storage season of any year whenever operation of
12 those powerplants to the full extent of their
13 respective water rights for power production
14 would result in a loss of irrigation water
15 otherwise storable in the reservoir system."

16 Q. Okay. Do you have an understanding of
17 what storage season means in the context of the
18 Palisades contracts?

19 A. That's the period during the
20 nonirrigation season.

21 Q. So do the contracts define what storage
22 season is, as from October 1 to September 30th?

23 A. I don't know that they describe it
24 specifically.

25 Q. Does the storage season include any

1 part of the irrigation season?

2 A. In the water right accounting program,
3 the storage season can be the entire year.

4 Q. Okay. So anytime when there's the
5 ability to store water, then the storage rights
6 might be exercised?

7 A. Yes.

8 Q. And does the sentence that you just
9 read, that you describe as the basis for calling
10 these rights as run-of-the-river type rights,
11 identify the preference for storage over other
12 type of uses of water? That is, doesn't it
13 provide for a preference for storage over power
14 generation?

15 MR. BAXTER: I'm going to object. I
16 think you characterized Mr. Olenichak's testimony
17 as saying that this was the only source of --

18 MR. SIMPSON: That's fair, Garrick. I
19 mean, he cited this one sentence. I asked him to
20 identify --

21 MR. BAXTER: Right.

22 MR. SIMPSON: -- in paragraph 24(a) the
23 source of him describing this as a
24 run-of-the-river type right.

25 Are there other sentences within

1 season. Do you mean storage season? The first
2 sentence of paragraph 24(a) deals with the
3 storage season, correct?

4 A. Yes, it does.

5 Q. Okay.

6 A. I was mistaken.

7 Q. Okay. Any other sentence within that
8 paragraph?

9 A. No.

10 Q. And in the context of this right and
11 the use of the phrase run-of-the-river, would it
12 be fair to say that run-of-the-river means it
13 doesn't have the ability to call out other
14 rights? It just generates with whatever water is
15 delivered to the power plant?

16 A. That has been my understanding of the
17 delivery of the power rights.

18 Q. So then a run-of-the-river right, in
19 this case, would be subordinated to all upstream
20 rights?

21 A. Yes.

22 Q. Junior to it?

23 A. Yes.

24 Q. Okay. And does this paragraph identify
25 what types of uses of water for which this right

1 paragraph 24(a) that would lend --

2 MR. BAXTER: But I think he came into
3 this as saying -- and I don't recall his exact
4 testimony, but I don't think he said this was the
5 sole source, paragraph 28. He didn't identify
6 this as the sole source of that.

7 MR. SIMPSON: Well, I asked him if
8 paragraph 24(a) was the basis for describing this
9 power right as a run-of-the-river right.

10 MR. BAXTER: And my recollection is
11 that, and in your question to him, you just
12 characterized him as saying this was the sole
13 source, and I don't think that was his testimony.

14 MR. SIMPSON: Okay. That's fair.

15 Q. (BY MR. SIMPSON) Are there other
16 sentences within paragraph 24 that would lead you
17 to the conclusion that this is a run-of-the-river
18 type right?

19 A. Well, also the first sentence,
20 certainly during the irrigation season when
21 they're required to run water down to those
22 diversions between Minidoka and Milner.

23 Q. Okay. When you say -- let me ask you
24 the question. When you say "storage season," do
25 you mean storage -- or you said irrigation

1 would be subordinated to or junior to?

2 A. Yes.

3 Q. Okay. And what types of uses or
4 beneficial uses would this right be subordinated
5 to?

6 A. Storage and irrigation.

7 Q. Okay. Irrigation water otherwise
8 storable, correct?

9 A. Correct.

10 Q. So irrigation storage?

11 A. Yes.

12 Q. Okay. So in the context of this right
13 being subordinated or a run-of-the-river right,
14 as you've described it, it would be subordinated
15 to irrigation storage, which would be junior in
16 priority to the Minidoka power right; is that
17 correct?

18 A. I think there are some storage rights
19 that are senior to the Minidoka power right.

20 Q. Right. And those obviously wouldn't be
21 subordinated to --

22 A. Yes.

23 Q. -- because it's junior to, correct?

24 Okay. Does paragraph 24(a) describe any other
25 uses of water purposes for which this right would

1 be subordinated to or junior to -- or not junior
2 to, but a run-of-the-river right?

3 A. I don't see any.

4 Q. Okay. So going back to your paragraph
5 4 on page 2 of your affidavit where you make the
6 statement that, "These remarks are consistent
7 with the Water District 1's historical
8 administration of the power rights," we've
9 identified the remark in terms of its consistency
10 with paragraph 24(a). Are there any other
11 documents or provisions or any other bases that
12 you can identify for us that would describe
13 historical administration of this right?

14 A. Yes.

15 Q. And that would be?

16 A. The water right accounting program.

17 Q. Okay. And that's how water is
18 accounted for or administered, correct?

19 A. Correct.

20 Q. Okay. And how that water is accounted
21 for, is that an after-the-fact type of
22 accounting?

23 A. Yes.

24 Q. Tony, with respect to Water Right Nos.
25 01-00218 and 00217, has the water district

1 delivered to the right according to that.

2 Q. So then how would -- how can you make
3 the determination that the paragraph associated
4 with 217 and 218 contained in paragraph 4 of your
5 affidavit would be consistent with how the water
6 right's been administered if those provisions
7 aren't in the water rights accounting program?

8 A. This wouldn't change how we've
9 historically administered to the right.

10 Q. And so when you say "wouldn't change,"
11 are you -- moving forward, then, is it your
12 testimony that if the right were administered in
13 accordance with this remark, then there would be
14 no change from the historical administration of
15 those two rights?

16 A. If this remark had been in place, we
17 still would have administered to the power right
18 the same as we had in the past.

19 Q. Okay. So if paragraph 24 -- and would
20 you agree that paragraph 24(a) is an effective
21 provision of the Eagle Decree?

22 MR. BAXTER: Again, I'm going to object
23 because I think it's asking him for a legal
24 conclusion as to the Eagle Decree.

25 But with that, go ahead and answer if

1 historically administered those rights consistent
2 with the entire paragraph 24(a)?

3 A. I don't know.

4 Q. Is the proposed language that you cite
5 in your affidavit in paragraph 4, is that
6 language contained within paragraph 24(a)?

7 A. Similar language.

8 Q. And so when you state that you don't
9 know if the Water District's administered these
10 power rights consistent with paragraph 24(a),
11 what's your basis for that conclusion?

12 A. My knowledge is mostly based on the
13 historical delivery using the water right
14 accounting program, and that's how it's been
15 administered by Water District 1. Whether every
16 provision listed in the contract is contained in
17 the water right accounting, I don't know.

18 Q. Okay. Is every provision in paragraph
19 24(a) contained in the water right accounting
20 program as it would apply to the Minidoka power
21 rights?

22 A. The water right accounting program only
23 looks at the water in the river at the power
24 plant and also determines whether or not the
25 priority is on and accounts for the water being

1 you understand the question, Tony.

2 THE WITNESS: Could you ask it again?

3 Q. (BY MR. SIMPSON) Well, based upon your
4 understanding of administration and accounting in
5 Water District 1, is paragraph 24(a) an effective
6 provision of the Eagle Decree associated with the
7 accounting for the Minidoka power rights?

8 A. Well, that paragraph describes how the
9 Bureau shall operate the system. Regardless of
10 how they operate, that's not going to change how
11 the right is delivered in the water right
12 accounting.

13 Q. Likewise, the proposed remark, does it
14 describe how the Bureau will operate the storage
15 of water?

16 A. Yes.

17 Q. Okay. So even this proposed remark
18 would not change how water is accounted in the
19 water rights accounting program; is that correct?

20 A. No.

21 Q. That's not correct? Okay. And why is
22 that?

23 A. Historically, in the water right
24 accounting program, the Minidoka power rights
25 were, essentially, subordinated to all uses.

1 This remark narrows the scope to only for
2 irrigation and storage, or storage for
3 irrigation.

4 Q. And the basis for having the Minidoka
5 power plant right reflected as subordinated to
6 all uses was because in the irrigation season it
7 was met with deliveries through the dam for
8 irrigation downstream?

9 A. Yes.

10 Q. Any other bases?

11 A. During the winter, during the
12 nonirrigation season, there were other water
13 rights being delivered other than storage rights,
14 but there was never a call against those junior
15 rights.

16 Q. What other rights could you identify
17 that were being delivered?

18 A. Stock water rights, mostly on the
19 Henry's Fork.

20 Q. And so to the extent that the Minidoka
21 power right wasn't being met, again, it's your
22 assertion that the Bureau never made a delivery
23 call for the curtailment of those junior stock
24 water rights to satisfy their senior Minidoka
25 power right, correct?

1 A. Correct.

2 Q. So the proposed remark would change
3 historical administration of the Minidoka power
4 rights from having those two rights subordinated
5 to all upstream uses to only irrigation storage,
6 correct?

7 A. That would be my understanding.

8 Q. Okay. And would that also, then, be
9 consistent with paragraph 24(a) of Exhibit E of
10 the Eagle Decree?

11 A. Yes.

12 Q. And paragraph 24(a) of Exhibit E also
13 contains other provisions regarding the Bureau's
14 storing of water and the operation of the Milner
15 power plant, correct?

16 A. Yes.

17 Q. And those other provisions are not
18 reflected in the proposed language; is that
19 correct?

20 A. Correct.

21 Q. And if you know, can you tell us why it
22 doesn't reflect that additional language of
23 paragraph 24(a)?

24 A. I don't know.

25 Q. Okay. If one were attempting to be

1 consistent with the Eagle Decree provisions and
2 Exhibit E of the Eagle Decree, in your opinion,
3 would it be more accurate to reflect the entire
4 language of paragraph 24(a)?

5 A. If it were consistent with the decree,
6 then it would be identical.

7 Q. So your answer to my question is yes?
8 If you were attempting to administer water
9 consistent with the Eagle Decree in Exhibit E, it
10 would be appropriate to put the entire paragraph
11 24(a) in the remark?

12 A. No, I don't think that's necessarily
13 the case.

14 Q. And why is that, then?

15 A. Because Water District 1 hasn't
16 administered to every specific thing listed in
17 the contract that may be attached to the decree.

18 Q. But my question goes to, if one were
19 going to administer consistent with the Eagle
20 Decree and Exhibit E, paragraph 24(a), one would
21 want to include the entire paragraph 24(a) in the
22 remark section for Water Rights 217 and 218,
23 correct?

24 A. If you administered according to
25 everything in the decree, then, yes, you would

1 include the language of the decree.

2 Q. I'm asking specifically regarding
3 paragraph 24(a) and the Bureau's exercise of the
4 Minidoka power plant pursuant to paragraph 24(a)
5 and the obligations under paragraph 24(a). If
6 one were going to administer consistent with the
7 Eagle Decree in that provision, one would want to
8 include that provision, that provision paragraph
9 24(a), in the remarks section for Water Right
10 Claims 217 and 218, correct?

11 A. Correct.

12 Q. Tony, with respect to these remarks in
13 paragraph 4, from your perspective, are these
14 remarks necessary to aid in the administration of
15 these rights?

16 A. Yes.

17 Q. Why so?

18 A. It clarifies the subordination.

19 Q. And in clarifying that subordination,
20 that subordination, would you agree, is an
21 exchange for the power loss calculation?

22 A. These remarks don't refer to the power
23 loss.

24 Q. Well, let's look at paragraph 24(a),
25 then. Does the power loss calculation, is it

1 contained in paragraph 24(a)?

2 A. Well, it doesn't include the
3 methodology for calculating the power loss.

4 Q. Yeah, let's maybe -- I'm not trying to
5 trick you. In the paragraph, the first full
6 paragraph, it cites to Provision C of this
7 article, which is a couple pages later. I think
8 it's the next page. If you'll read through
9 subsection C on page 30, does that identify the
10 power loss calculation?

11 A. Yes.

12 Q. Okay. So going back to page 29 where
13 Provision C of this article is identified, does
14 it identify that the subordination will continue
15 so long as the provisions of the power loss
16 calculation identified in Section C continue?

17 A. Yes.

18 Q. Okay. So, essentially, the
19 subordination is contingent upon the power loss
20 calculation continuing on in time?

21 A. Are you referring to the remarks --

22 Q. Not the remarks.

23 A. -- in the affidavit?

24 Q. Still on paragraph 24(a).

25 A. And what was the question?

1 Q. Would you agree that the subordination
2 that you've described continues as long as the
3 provisions of the power loss calculation
4 identified in Section 3 of Article 24(a) remain
5 operative?

6 A. I don't know that.

7 Q. Let's look at the language, then, right
8 above the insert. And if you'd read that and
9 then tell me if that's your understanding.

10 A. Right above the insert?

11 Q. Let me just -- so we're not pointing
12 back and forth.

13 MR. BAXTER: John, just so I'm clear,
14 are you asking for a legal interpretation of what
15 the contract says?

16 MR. SIMPSON: No, just his
17 understanding as the administrator or one of the
18 administrators of the water rights in the
19 accounting program for Water District 1, if the
20 subordination that he's identified is tied
21 directly to the power loss calculation that's
22 generated each year by the Bureau that's
23 identified in paragraph 24(a) and (c).

24 THE WITNESS: But Water District 1
25 isn't involved in the power loss calculation.

1 Q. (BY MR. SIMPSON) But you have an
2 understanding that it's part of -- part of the
3 preference for storage over power generation
4 contemplates that there will be a power loss
5 calculation completed by the Bureau each year,
6 correct?

7 A. Yes.

8 Q. Okay. And that's what's referenced
9 here that you've identified in paragraph 24(a)
10 and 24(c), correct?

11 A. Correct.

12 Q. Okay. And would you acknowledge that
13 your understanding is that those two are tied
14 together? That is, the power loss calculation
15 goes along with the preference for storage over
16 power generation?

17 A. Yes.

18 Q. So based upon that, would a cleaner or
19 more articulate way to express the subordination
20 in the proposed remark identified in paragraph 4
21 of your affidavit be to also reflect the power
22 loss calculation that's tied to the
23 subordination?

24 A. I've never been concerned with the
25 power loss calculation in the administration of

1 the water rights.

2 Q. Do you think the beneficiaries of that
3 power loss calculation would have reason to be
4 concerned that it should be identified in the
5 remarks?

6 A. I think I would be better served
7 identified in a separate contract.

8 Q. Should there be a -- should the remark,
9 although contained not only that there is this
10 subordination, but also the basis for that
11 subordination in order that it be administered
12 properly?

13 A. No, I don't think it's necessary.

14 Q. If the power loss calculation went
15 away, in your view, would the subordination go
16 away?

17 A. No, not if it's referenced in the
18 condition of the water right.

19 Q. So the subordination wouldn't go away,
20 correct?

21 A. Correct.

22 Q. Okay. So would, then, the terms of
23 Article 24 and the operation of Article 24 be
24 inconsistent with the application of this remark
25 if the power loss calculation were not satisfied?

1 MR. BAXTER: Can you repeat the
2 question, please, John?

3 Q. (BY MR. SIMPSON) Well, what I'm
4 getting at, Tony, is, basically, I think we've
5 identified, would you not agree, that the power
6 loss calculation is part and part of the
7 subordination?

8 MR. BAXTER: Again, I think you're
9 calling him to reach a legal conclusion. He's
10 already testified that it's not necessary for
11 water rights administration to have the power
12 loss. I understand your position. I think you
13 made it clear that the beneficiaries would like
14 to have that in there, but for the administration
15 of water rights, his testimony has multiple times
16 been that it wasn't necessary.

17 So I don't understand. That's why I
18 asked you to repeat the question. I'm trying to
19 understand, is there --

20 Q. (BY MR. SIMPSON) Does Water District 1
21 participate in any way in the administration of
22 the power loss calculation revenue being
23 distributed back to either the beneficiaries or
24 the power loss -- the power rates being
25 calculated for those beneficiaries of power

1 generated at Minidoka Dam?

2 A. Okay, you'll have to repeat that.

3 Q. Well, does Water District 1 in any way
4 participate in the meeting that occurs between
5 the placeholders and the interested parties, the
6 beneficiaries of the power loss or power
7 generation at Minidoka Dam and the Bureau of
8 Reclamation?

9 A. Water District 1 has been invited to
10 the annual meeting. I have participated in many
11 of those.

12 Q. You have participated?

13 A. I have participated in a couple.

14 Q. Yeah. Does Water District 1 review the
15 power loss calculations of the Bureau?

16 A. I never have reviewed it.

17 Q. Do you know if others within the water
18 district have?

19 A. I don't know.

20 Q. Turning to the bottom of paragraph 4,
21 do you see the remark, proposed remark, dealing
22 with 04024 and 04025 on page 2 of your affidavit?

23 A. Yes.

24 Q. Okay. The second paragraph is a single
25 sentence that reads, "This right carries no

1 entitlement to make a delivery call or hydropower
2 generation except as against junior hydropower
3 rights." Do you see that sentence?

4 A. Yes.

5 Q. And is the basis for that sentence, in
6 your view, the fact that those rights at this
7 point in time are still constitutional beneficial
8 use rights?

9 A. Yes.

10 MR. SIMPSON: Let's go off the record
11 for a minute, if we could.

12 (Discussion held off record.)

13 EXAMINATION

14 QUESTIONS BY MR. TUCKER:

15 Q. Mr. Olenichak, my name is Jim Tucker.
16 I represent Idaho Power Company. Can I call you
17 Tony? Is that okay?

18 A. Yes.

19 Q. Even though we're not intimately
20 involved? Or not involved. That's a bad word.

21 I don't understand this stuff near as
22 well as Mr. Simpson does, so my questions are
23 probably going to be perhaps not as well-framed.
24 If they're confusing or I leave something out or
25 you need more information, be sure to ask me.

1 A. Okay.

2 Q. And I'll be happy to try to clarify
3 what I'm getting at.

4 Just as a preliminary matter, I'm a
5 little confused as to your relationship with the
6 State of Idaho. Are you a state employee?

7 A. Water District 1 has a Memorandum of
8 Understanding with the Department of Water
9 Resources where we share in the benefits of the
10 department employees. We use their office
11 equipment. We use their vehicles.

12 But the money that's put out to pay our
13 salaries and for the use of their office
14 equipment and vehicles is reimbursed through the
15 assessments collected by Water District 1. If
16 there weren't a Memorandum of Understanding, we'd
17 be a separate entity like other water districts.

18 Q. Okay. And, again, not to go into great
19 depth, but you mentioned that Mr. Swank's
20 supervisor is the director?

21 A. Yes.

22 Q. Do you consider the director in any way
23 your supervisor? Do you answer to the director
24 at all?

25 A. Well, I answer to the watermaster, who

1 answers to the director. So if the watermaster
2 weren't available, certainly I would answer to
3 the director.

4 Q. Okay. So the director, essentially,
5 has some supervisory control over your water
6 district?

7 A. Yes.

8 Q. Is that fair? Okay. All right. I
9 understood you to say early in your deposition
10 that the process of filling the reservoirs was
11 really a function of the Bureau of Reclamation,
12 their discretion, their decision; is that
13 correct?

14 A. No.

15 Q. All right. Would you explain to me
16 what role the water district plays in the context
17 of filling the reservoirs?

18 A. When we account for the water, we
19 account as if all water that arises above the
20 point of diversion for the water right could have
21 been stored according to priority.

22 The Bureau runs its physical operations
23 different than that. So you may have water
24 physically stored in a junior reservoir rather
25 than being passed down to the senior reservoir,

1 which is what would show up in our paper water
2 right accounting.

3 Q. Okay.

4 A. And so the physical operations are
5 controlled by the Bureau of Reclamation. The
6 accrual of storage into the water right accounts
7 on paper is done by Water District 1.

8 Q. Okay. And the water right accounting,
9 the accrual of the water right accounting, where
10 the water is accounted for, what accounts it goes
11 into, has a relationship -- well, let me ask,
12 does it have a relationship to the Bureau of
13 Reclamation contracts with their spaceholders?

14 A. Yes, it has a relationship.

15 Q. There are certain spaceholders, I
16 assume, that have senior space over junior space
17 in other reservoirs, for instance?

18 A. Yes.

19 Q. Okay. So the accounting has to account
20 for that type of relationship under the Bureau
21 contracts?

22 A. Yes.

23 Q. All right. So your department has to
24 be somewhat familiar with the Bureau contracts;
25 is that correct?

1 A. No, not necessarily. When the
2 accounting program was put together initially, it
3 was done in conjunction with the Bureau of
4 Reclamation, and they monitor our accounting each
5 year to make sure it's being done according to
6 their contracts.

7 Q. All right. So the contracts are at
8 least instructive in the context of the
9 operations and filling of the reservoirs?

10 A. Correct.

11 Q. All right. Now, this paper fill versus
12 physical fill and water being stored in
13 reservoirs upstream as opposed to senior
14 reservoirs downstream, does that have any
15 relationship to what's been referred to, perhaps
16 colloquially, as the common plan?

17 A. I'm not familiar with that term.

18 Q. You don't know what the common plan is?

19 A. I don't.

20 Q. Okay. Can you -- I want to clarify one
21 thing in my mind, being somewhat -- looking at it
22 from the power side. You've used the term
23 "run-of-river" on several occasions. I'll just
24 tell you that run-of-river in the context of
25 power operations indicates to a power producer

1 that they don't have any active storage available
2 and that they just run the water in the river
3 through their plants. In other words, there's no
4 active storage with which they can regulate the
5 generation of the plant. That's from a power
6 operation standpoint and what I'm familiar with
7 on my side?

8 I get the impression that run-of-river
9 in the context of the way you have used it
10 connotes a subordination to upstream uses in the
11 context that you just take what you get and
12 nothing else, take what you get in the context of
13 you take what water comes down the river, and you
14 cannot call out water above; is that correct?

15 A. That's correct.

16 Q. Okay. And is that run-of-river, the
17 term run-of-river, defined either in Water
18 District 1 operation rules or regulations or in
19 the Department of Water Resources, that you know
20 of?

21 A. No.

22 Q. Okay. So is it just a term that Water
23 District 1 uses in that context to demonstrate or
24 connote subordination?

25 A. Yes.

1 Q. Okay. And do you know of any water
2 right where the term run-of-river has been used
3 in either a remark or as a condition of the water
4 right which would indicate that it is
5 subordinated?

6 A. No.

7 Q. Okay. Now, I'd refer you back to the
8 Eagle Decree in that paragraph 24(a) just for a
9 moment, please. In paragraph 24(a) on the
10 second -- my second page. I'm not sure if it's
11 on your second page or not, but it has an
12 indented paragraph that talks about a June 15,
13 1923, contract between the United States and
14 Idaho Power Company. Are you familiar with that
15 contract?

16 A. I'm not.

17 Q. Okay. So in the context of paragraph
18 24(a) where it talks about delivering or
19 passing -- looking at the third line in 24(a)
20 where it talks about pass through enough water to
21 satisfy existing diversion rights in the stretch
22 of the river down to and including Milner Dam and
23 certain power rights below Milner Dam, if those
24 rights that it talks about in the context of
25 power rights were defined in the 1923 contract,

1 you wouldn't be familiar with what that contract
2 provides, would you?

3 A. No, I'm not familiar.

4 Q. Okay. And I understand from your
5 testimony earlier today that Water District 1
6 administers water rights; it doesn't administer
7 contract rights. Is that correct?

8 A. That's correct.

9 Q. Are you familiar with the term "fill
10 and spill"?

11 A. Yes.

12 Q. Could you tell me what you understand
13 that term to mean?

14 A. Fill and spill to me means that you
15 fill the reservoir until it's full, and then you
16 spill whatever comes into it after that point.

17 Q. Okay. And referring you to your
18 affidavit, which is Exhibit, I believe, 1, again,
19 and under paragraph 4 where it talks about the
20 remarks for Water Rights No. 217 and 218, does
21 that -- in your view as an administrator of water
22 rights for Water District 1, do those remarks
23 define the fill-and-spill operation?

24 A. No.

25 Q. Okay. And why do they not?

1 A. The best example would be when the
2 Bureau of Reclamation releases water for flood
3 control.

4 Q. Okay. Are there other examples as to
5 why they would not be a fill-and-spill operation?

6 A. Well, I'm sure there's more reasons
7 that the Bureau has to not capture every drop of
8 water that comes in above the reservoir, not dry
9 up the river.

10 Q. What role would Water District 1 play
11 in the determination that is going to be made,
12 under this paragraph, determination made by the
13 secretary that additional water may be passed
14 through Minidoka Dam without the loss of water
15 that could be stored in the reservoir system?
16 What would be your role? What would be Water
17 District 1's role?

18 A. Each year we get an explanation of the
19 winter releases anticipated by the Bureau, and
20 the reasons for those releases are evaluated by
21 Water District 1, which would include the amount
22 of carryover or water in the reservoir system at
23 the end of the year and the typical runoff we get
24 from various percentage snowpacks, which would be
25 the water supply for the following year to fill

1 the reservoirs. Those are the type of things we
2 evaluate.

3 Q. Okay. You evaluate those. Having
4 evaluated those in a given year, what would you
5 then do with that information?

6 A. If the winter operations presented to
7 us from the Bureau seem to be appropriate amounts
8 based on those evaluations, there wouldn't be any
9 further discussions. It would only be if we
10 found some inconsistencies or our data didn't
11 agree with their assessment. Then the process is
12 to take that to the Committee of Nine and meet
13 with the Bureau to discuss what those operations
14 are going to be.

15 Q. When you say "inconsistency," now
16 you're looking at -- are you looking at forecast
17 projections, for instance, and those kind of
18 things?

19 A. Yes.

20 Q. Okay. So if the Bureau came to you and
21 said, "This is the way we are going to operate
22 this year with respect to the fill of the
23 reservoir system based upon our forecast
24 projections," and your forecast projections were
25 somewhat different, you'd have a dialogue with

Page 102 1 the Bureau and try to reconcile those 2 projections, and if you couldn't, you'd have 3 further discussions with them? 4 A. Yes. 5 Q. All right. This particular remark, 6 again, referring to Exhibit 1, seems to indicate 7 to me that the director -- or not the director -- 8 the secretary is going to have discretion to 9 operate the system without having those immediate 10 discussions with Water District 1 Advisory 11 Committee, which I assume would be the Committee 12 of Nine. 13 And I'll read you the provision that 14 makes me think that. It says, "To the extent 15 that it is practical to do so, the Watermaster 16 and the water supervisor will be informed in 17 advance of any plans for the release of water in 18 excess of the foregoing limitation." 19 Now, that indicates to me that the 20 secretary can release water if it's not practical 21 to advise you and tell you later what he did; is 22 that correct? 23 A. Correct. 24 Q. What occurs or what role would the 25 district or the water district play if that	Page 104 1 operation for which we disagreed and didn't 2 consult with us, the net result of that would be 3 the placeholders would be shorted water, and at 4 that time the Bureau of Reclamation would have a 5 contractual issue with the placeholders. 6 Q. (BY MR. TUCKER) Would they have an 7 issue with the Department of Water Resources over 8 the exercise of their water right? 9 A. Yes, I think they would. 10 Q. Under this provision? What I'm getting 11 at -- and I'm not trying to hide the ball. I'm 12 trying to get at, how much discretion does the 13 secretary have here in the operation of their 14 reservoirs, the Bureau of Reclamation reservoirs? 15 MR. BAXTER: And I'm going to object in 16 the sense that you're asking the witness to 17 provide a legal conclusion here. I think the 18 provision says what it says. He's identified the 19 process in which his expectation would be to 20 resolve any disputes. But, again, the question 21 that you're raising is a policy decision between 22 the Department, the director and the State of 23 Idaho at the certain time that that issue arises, 24 and I don't think he can forecast as to what you 25 have --
Page 103 1 occurred, if the secretary exercised his 2 discretion, released water and advised you later 3 of the releases? 4 MR. BAXTER: I'm going to object. 5 Q. (BY MR. TUCKER) And perhaps you 6 disagreed with him. 7 Let me finish the question, Counsel. 8 MR. BAXTER: Okay. 9 Q. (BY MR. TUCKER) And perhaps you 10 disagreed. 11 Now you can object. 12 MR. BAXTER: I'm going to object. You 13 were asking the witness to speculate as to what 14 would happen in the future, and these type of 15 actions you were asking him to speculate on would 16 probably be decisions not being made by him, but 17 the director of the Department of Water 18 Resources. 19 And so I don't think it's appropriate 20 that this witness go into that particular area of 21 questioning. It's not within the scope of his 22 job to make those types of decisions. But with 23 that, I'll indicate to the witness he can answer 24 the question. 25 THE WITNESS: If they did a reservoir	Page 105 1 MR. ARKOOSH: Is your objection it's a 2 legal conclusion? I mean, you're going on 3 explaining what maybe the answer might be in your 4 mind, which is called a speaking objection, and 5 it leads the witness to color his answer. So if 6 it's a legal conclusion objection, just say that. 7 MR. BAXTER: I was trying -- Mr. Tucker 8 said that he's not trying to hide the ball. I 9 equally am not trying to hide the ball here. I'm 10 just trying to outline for him that when he's 11 asking this witness to provide a legal 12 conclusion, it has significant implications. And 13 so if you want me to just make my objections -- 14 MR. ARKOOSH: I do. 15 MR. BAXTER: Okay. In that sense, 16 then, I'll start objecting to everything, then. 17 MR. ARKOOSH: Okay. 18 MR. TUCKER: Is he going to answer? 19 THE WITNESS: Could you ask the 20 question again? 21 Q. (BY MR. TUCKER) Or do you remember 22 the -- I'm not sure I can remember the question. 23 Let me perhaps rephrase the question. And I 24 don't want to mischaracterize your testimony 25 here, so if I say something that is not what you

1 testified to, please say so.

2 But my understanding from your prior
3 testimony was that the contracts between the
4 Bureau of Reclamation and its spaceholders are
5 instructive, was the word I used when I wrote it
6 down, to Water District 1, but they're not
7 necessary for administration of the right?

8 MR. BAXTER: Objection.

9 Q. (BY MR. TUCKER) They don't need --
10 just a minute. They don't need to be included in
11 the water right?

12 MR. BAXTER: Objection; I believe
13 you're mischaracterizing his prior testimony.

14 Q. (BY MR. TUCKER) All right. Is it
15 necessary for Water District 1 or the Department
16 of Water Resources -- let me leave out the
17 Department of Water Resources. Is it necessary
18 for Water District 1 in the administration of
19 water rights to have reference to or inclusion of
20 portions of contracts in the water right for
21 purposes of administration?

22 A. No.

23 Q. Okay. Is it necessary for Water
24 District 1 to understand the Bureau of
25 Reclamation contracts with its spaceholders for

1 the purposes of administration of the Bureau of
2 Reclamation's water rights?

3 A. No.

4 Q. Okay. Then getting back to my question
5 about the secretary's determination under this
6 provision to release water or pass water, if he's
7 passing water in a manner which he believes is
8 required under a contract with a spaceholder,
9 does that have any bearing upon Water District
10 1's administration of his water right?

11 MR. BAXTER: I'm going to object. It
12 asks the witness for a legal conclusion. It also
13 assumes facts not in evidence. You're asking him
14 about a contract, which we have not identified
15 any contract that even says anything like that,
16 that I've seen yet.

17 MR. TUCKER: Fine, Counsel.

18 MR. BAXTER: Go ahead and answer the
19 question, Tony.

20 THE WITNESS: Water District 1 only
21 delivers water to water rights. It does not
22 deliver water to contracts.

23 Q. (BY MR. TUCKER) Okay. So in the
24 dialogue that Water District 1 would have with
25 the director, either during a storage season or

1 after a storage season, would the contracts be
2 relevant to the way that the secretary operated
3 the reservoir system?

4 MR. BAXTER: I'm going to object. It
5 calls for a legal conclusion.

6 THE WITNESS: Are you asking me, can
7 the secretary operate the reservoirs according to
8 the contracts?

9 Q. (BY MR. TUCKER) I'm not asking you
10 that. Is it relevant to Water District 1 if the
11 secretary operated the reservoir system according
12 to his contracts?

13 A. Water District 1 accounts for the water
14 as if all the water could be stored. If the
15 secretary chooses to dump all that water, for
16 whatever reason, then the role Water District 1
17 plays is it only allocates to the contract
18 holders what water is physically remaining.

19 Q. Okay. Okay, let me ask a couple other
20 questions. I'm a little confused by -- you've
21 made reference to the fact that Water Right 217
22 and 218 are run-of-river water rights; is that
23 correct?

24 A. That's correct.

25 Q. Okay. And you've indicated earlier

1 that run-of-river in the context of the way Water
2 District 1 looks at it means, essentially, they
3 are subordinated; is that correct?

4 A. That's correct.

5 Q. Okay. I was a little confused as your
6 testimony proceeded as to the extent of the
7 subordination for these two water rights. Are
8 these two water rights subordinated to all
9 upstream uses under the provisions that you have
10 now that are now articulated or indicated in your
11 affidavit, Exhibit 1?

12 A. In paragraph 4 of Exhibit 1, the remark
13 subordinates only to irrigation storage.

14 Q. All right. So would that, in your
15 mind, be a more limited subordination than
16 subordinated to all upstream water rights?

17 A. Yes.

18 Q. Now, you've indicated that -- and this
19 is where I get a little confused because you've
20 indicated that that language that is now in
21 Exhibit 1 under 217 and 218 is consistent with
22 the historical administration of those water
23 rights; is that correct?

24 A. That's correct.

25 Q. But I thought you testified also

1 earlier that the historical administration of
2 those -- in the historical administration of
3 those water rights, those water rights had been
4 considered to be subordinate to all upstream
5 uses?

6 A. That's correct.

7 Q. So, I mean, do you believe that to be
8 consistent? Previously, as I understand it,
9 Water District 1 had administered those water
10 rights as run-of-river subordinate to all
11 upstream uses, and I think you indicated that
12 would include junior water rights including
13 recharge and whatever water rights might be
14 upstream, and now the new language that's being
15 proposed subordinates those in a more limited
16 fashion only to irrigation storage; is that
17 correct?

18 A. That's correct.

19 Q. How is there a consistency there? That
20 seems inconsistent to me.

21 A. The consistency is that we subordinated
22 to irrigation storage. In the water right
23 accounting program we've used over the past 19
24 years that I've been here, it doesn't separate
25 out the storage irrigation from all other uses,

1 whether they be stock water, recharge, whatever.
2 That determination, that issue, has never been
3 brought up until now.

4 And so historically in the water right
5 accounting program, we have subordinated all
6 uses. In the settlement of this water right,
7 this is the condition that was agreed upon based
8 on the language in the previous decree, which is
9 consistent with how we've been delivering water.

10 Q. So with that limited subordination,
11 these two water rights, 217 and 218, would still
12 have the ability, the right, I might say, to make
13 a call, is that correct, against some water
14 rights upstream?

15 A. I think that would be the case.

16 Q. Whereas before they did not have that
17 right, in your view, in Water District 1's view?

18 A. I didn't say they didn't have the
19 right. They've just never made the call. The
20 issue was never determined.

21 Q. Historically, though, these water
22 rights have been administered by Water District 1
23 as subordinate to all upstream uses?

24 A. We've never had an instance where the
25 Bureau has objected to the delivery of junior

1 rights ahead of their power right.

2 MR. TUCKER: Would you mark this,
3 please, as an exhibit?

4 (Deposition Exhibit 7 marked.)

5 MR. TUCKER: I apologize, Counsel. I
6 don't have another copy of this.

7 Q. (BY MR. TUCKER) Mr. Olenichak, they're
8 handing you what's been marked as -- is it
9 Exhibit 8? -- which I'll represent to you was
10 Exhibit B to the supplemental director's report
11 regarding subcases 1-217, 1-218, 1-2064, 1-2068,
12 1-4024, 1-4025, and 1-4054, which is dated April
13 10, 2008, which was submitted by Director Tuthill
14 to the SRBA court. Are you familiar with that
15 affidavit?

16 A. Yes.

17 Q. Okay. And I'd ask you, just there's a
18 paragraph -- I don't know the paragraph; I think
19 it's down there on paragraph 4 -- that talks
20 about the administration of these rights, the
21 historical administration of these rights.

22 A. Paragraph 8.

23 Q. Paragraph 8? Would you read that in
24 the record, please?

25 A. "Historically, Water District 1 has

1 administered the power elements of the Bureau of
2 Reclamation's water rights 1-217, 1-218, 1-2064,
3 1-2068, 1-4024, 1-4025 and 1-4054 as subordinate
4 to irrigation and all other junior water uses
5 except hydropower."

6 Q. Okay. Thank you. Are you familiar
7 with -- in your capacity as a representative of
8 Water District 1, are you familiar with the terms
9 "abandonment" and "forfeiture"?

10 A. Yes.

11 Q. And would -- and if you know -- and I'm
12 not asking you for a legal conclusion. If you
13 don't know the answer to this, just say you don't
14 know the answer. If you know, does a water right
15 user's historical uses of his water right have
16 any bearing upon abandonment and forfeiture?

17 MR. BAXTER: I am going to object. It
18 calls for a legal conclusion. Go ahead and
19 answer the question.

20 THE WITNESS: Could you repeat the
21 question, please?

22 Q. (BY MR. TUCKER) Does a water right
23 user's historical use of his water right, is that
24 historical use an element or have bearing upon
25 an abandonment and forfeiture determination?

1 A. Yes.

2 Q. Okay. As a representative of Water
3 District 1, do you know of any consideration
4 given by the water district in the prior
5 administration of the Minidoka power rights,
6 those other power rights that you referred to in
7 your affidavit, Exhibit 8, as to whether or not
8 those power rights had been abandoned or
9 forfeited?

10 MR. BAXTER: Again, I think it calls
11 for a legal conclusion.

12 MR. TUCKER: I'm asking if it were ever
13 considered, to his knowledge.

14 THE WITNESS: I have no knowledge of
15 that being considered.

16 MR. TUCKER: Okay. Well, I could
17 probably go on, but I'm going to defer and allow
18 counsel to go forward. Thank you.

19 EXAMINATION
20 QUESTIONS BY MR. ARKOOSH:

21 Q. Mr. Olenichak, my name is Tom Arkoosh.
22 We've met before. We've sat in depositions
23 before.

24 MS. McHUGH: Could I have you move --
25 oh, David, you're probably going to say the same

1 thing I am. Go ahead.

2 MR. GEHLERT: Yeah, I was just going to
3 ask if you could move closer to the phone, Tom.
4 I'm having a hard time hearing you.

5 MR. ARKOOSH: That was intentional.

6 MS. McHUGH: We've got to keep an ear
7 on you.

8 Q. (BY MR. ARKOOSH) Mr. Olenichak, as I
9 understood what you told Mr. Simpson, the
10 watermaster's job is to account and to allocate;
11 is that correct?

12 MR. BAXTER: Objection; leading.

13 MR. ARKOOSH: It is leading. It's very
14 leading. It's intentionally leading.

15 MR. BAXTER: Maybe you can rephrase the
16 question so that it's not?

17 MR. ARKOOSH: No.

18 THE WITNESS: Ask the question again,
19 please.

20 Q. (BY MR. ARKOOSH) My understanding of
21 what you told Mr. Simpson was that the district's
22 job, the watermaster's job, was to account for
23 water and to allocate; is that correct?

24 A. That's one of his responsibilities,
25 yes.

1 Q. And that's the primary function, at
2 least in the subject matter we're visiting about
3 today; is that correct?

4 MR. BAXTER: Objection; leading.

5 THE WITNESS: Yes.

6 Q. (BY MR. ARKOOSH) Okay. And the
7 accounting is an after-the-fact accounting; is
8 that correct?

9 MR. BAXTER: Objection; leading.

10 THE WITNESS: Yes.

11 Q. (BY MR. ARKOOSH) Okay. Then the
12 allocation, is that after the fact as well?

13 A. Well, the allocation during the
14 irrigation season is on a real-time basis based
15 on projections of the accounting.

16 Q. Okay. So you can get water into
17 people's diversions when they need it?

18 A. Yes.

19 Q. The rules for this allocation come from
20 what?

21 A. Which rules are you referring to?

22 Q. Well, how do you decide who to allocate
23 water to?

24 A. Based on prior appropriation doctrine
25 and the water rights.

1 Q. The water rights come from -- as I
2 understood you, decrees was one, and licenses was
3 one. Are there other ways to get water rights?

4 A. Permits. The water rights are on
5 record with the Department of Water Resources.

6 Q. Okay. Is the Eagle Decree one of those
7 water rights on record with the Department of
8 Water Resources?

9 A. The Eagle Decree is the basis of water
10 rights there on the list of the water rights in
11 the Department of Water Resources.

12 Q. I don't quite understand your answer.
13 Could you elaborate by the word "basis"?

14 A. The water right program is limited to
15 the location of the point of diversion, the
16 amounts of the water right, the period of use of
17 the water right. All those things may be
18 described in the decree. Other things like we've
19 talked about today, like the addendums to the
20 decree, those aren't specifically listed in the
21 water rights and wouldn't be in the water right
22 accounting.

23 Q. But it's this decree, this Eagle
24 Decree -- Henry Eagle was a watermaster, right?

25 A. Yes.

1 Q. And so it was binding on the
2 watermaster; is that correct?

3 MR. BAXTER: Objection; calls for a
4 legal conclusion.

5 Q. (BY MR. ARKOOSH) I just want your
6 view. If you ever think I'm asking you for a
7 legal conclusion, remember, I'm just looking for
8 your view as a person who administers water in
9 your position in the Department. Will you bear
10 that in mind?

11 A. Yeah.

12 MR. BAXTER: Mr. Arkoosh, Mr. Olenichak
13 is appearing here today as an employee of the
14 water district and a representative of the State
15 of Idaho. His questions here today are colored
16 by that role in which he's coming in.

17 MR. ARKOOSH: You and I agree. That's
18 what I'm looking for.

19 Q. (BY MR. ARKOOSH) I want you to answer
20 as you would perform that role. So the question
21 to you is whether the Eagle Decree is binding on
22 District 1.

23 MR. BAXTER: Objection; calls for a
24 legal conclusion.

25 Q. (BY MR. ARKOOSH) Okay. And I don't

1 want your legal opinion. I want to know what you
2 understand.

3 MR. BAXTER: The only way for him to
4 answer that is by giving a legal conclusion.

5 MR. ARKOOSH: Okay. You've made your
6 objection. Go ahead.

7 THE WITNESS: The water rights that we
8 administer come from the Eagle Decree.

9 Q. (BY MR. ARKOOSH) Okay.

10 A. My role is to take -- look at the point
11 of diversion, the priority dates, the amounts,
12 the available water in the river each day and
13 deliver to those rights if they're being called
14 upon or diverted by the water right owner.

15 Q. So as I'm understanding your answer, if
16 it's not an element of a water right, it doesn't
17 wind up in the accounting program; is that
18 correct?

19 MR. BAXTER: Objection; leading.

20 THE WITNESS: No, that's not correct.

21 Q. (BY MR. ARKOOSH) Okay. Are there
22 parts of the Eagle Decree that have not wound up
23 in the water accounting program?

24 A. Yes. Every bit of language in the
25 Eagle Decree is not contained in the water right

1 accounting.

2 Q. Conceptually. Are there concepts in
3 the Eagle Decree that have not wound up in the
4 water accounting program?

5 MR. BAXTER: Objection; I think it's
6 asking for speculation on the witness's part. He
7 can't understand everything that's in the Eagle
8 Decree.

9 Q. (BY MR. ARKOOSH) You can answer the
10 question.

11 A. Yes.

12 Q. Okay. Could you just give me a general
13 example of the kind of a concept that's in the
14 Eagle Decree that did not wind up in the
15 accounting program?

16 A. Yes. There was one we talked about
17 this morning about the delivery to the water
18 rights below Milner.

19 Q. Okay. Let's look at Exhibit 2 quickly,
20 if we can. And I believe that's the Eagle
21 Decree, if my memory serves me.

22 A. Okay.

23 Q. And let's look at page 19 of the decree
24 itself, which is the front part of the exhibit.
25 Look at paragraph 4. I'm going to read that.

1 It says, "That the contracts entered
2 into between various of the parties Plaintiff and
3 the United States of America, Bureau of
4 Reclamation, as the same have been amended and
5 modified, in connection with the Palisades
6 project and other projects, were intended to be,
7 and are, binding upon all persons claiming rights
8 to the use of the waters of the Snake River and
9 its tributaries, above Milner Dam, and constitute
10 a common plan for the administration of the Snake
11 River."

12 Do you see that language?

13 A. Yes.

14 Q. Okay. Does District 1 agree with that?

15 MR. BAXTER: Objection; asking for a
16 legal conclusion with regards to interpretation
17 of the decree.

18 THE WITNESS: I don't think Water
19 District 1 has an opinion on that.

20 Q. (BY MR. ARKOOSH) Okay. Does Water
21 District 1 allocate water in accordance with this
22 paragraph?

23 A. I don't know what the paragraph means.

24 Q. Okay. I noticed that you told counsel
25 earlier you didn't have any idea what the word

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1 "common plan" was when he talked about that 2 earlier. You recall that? 3 A. Yes. 4 Q. So is this the first time you became 5 aware that that's in the Eagle Decree? 6 A. Yes. 7 Q. Okay. But it says, "These contracts 8 are binding upon all persons claiming rights to 9 the use of water in the Snake River." Do you see 10 that? 11 A. Yes. 12 Q. Do you agree or disagree with that? 13 MR. BAXTER: Objection; again, the 14 witness is asking -- or Mr. Arkoosh is asking the 15 witness to make a legal conclusion about a 16 paragraph he's already identified and says it's 17 the first time he's seen. I don't think it's 18 relevant to the proceeding as well. 19 Q. (BY MR. ARKOOSH) Okay. Do you agree 20 or disagree that these contracts are binding upon 21 all persons claiming the rights to use the water 22 in the Snake River? 23 A. If that's an element of the water 24 right, I would agree. 25 Q. Is it an element of the water right?	1 elements of the decree go in the accounting 2 program. If this refers to elements of the 3 decree, it would go in the accounting program, 4 but my question was, is this binding? 5 MR. BAXTER: Objection; your earlier 6 statements mischaracterize the witness's previous 7 testimony. It also asks for a legal conclusion. 8 MR. ARKOOSH: Okay. 9 THE WITNESS: I don't know. 10 Q. (BY MR. ARKOOSH) Okay. Fair enough. 11 So in your experience with the district, you 12 don't know if administration has been done in 13 accord with paragraph -- is it 4? -- paragraph 4 14 of the Eagle Decree; is that right? 15 A. That's correct. 16 Q. Okay. And then paragraph 5 goes on to 17 say that certain portions of all of these 18 Palisade contracts are hereby ratified, confirmed 19 and approved; is that correct? 20 MR. BAXTER: Objection; leading. 21 Objection; your characterization of everything 22 that's in the contracts, as you've introduced the 23 sentence, assumes facts not yet in evidence. 24 THE WITNESS: Could you repeat the 25 question?
Page 123	Page 125
1 MR. BAXTER: Objection; calls for a 2 legal conclusion on behalf of the witness here 3 today. Again, I don't know why we're asking the 4 witness here today to interpret this decree. 5 THE WITNESS: As I've said earlier, we 6 don't deliver to the contracts. We deliver to 7 the elements of the water right. 8 Q. (BY MR. ARKOOSH) I know that, but 9 that's a clear evasion of the question. 10 MR. BAXTER: I object to your -- 11 Q. (BY MR. ARKOOSH) Is it an element -- 12 MR. BAXTER: Excuse me, Mr. Arkoosh. I 13 object to your characterization of his answer as 14 evasion. I don't believe so. He's trying his 15 best to answer the questions that you're asking. 16 Q. (BY MR. ARKOOSH) Are the portions of 17 these contracts referred to in the Eagle Decree 18 elements of a contract? 19 MR. BAXTER: Objection; asks the 20 witness for -- 21 MR. ARKOOSH: Excuse me. Let me 22 restate the question. Then you can state your 23 objection. 24 Q. (BY MR. ARKOOSH) Elements of a decree. 25 As I understood your answer, you said all	1 Q. (BY MR. ARKOOSH) Is that what it says? 2 It says it's hereby ratified, confirmed and 3 approved? 4 A. Yes, it says that. 5 Q. Okay. Do you have any reason to 6 believe that it isn't ratified, affirmed or 7 approved? 8 A. No. 9 Q. Okay. Do you have any reason to 10 believe that water should not be allocated or 11 administered -- and I use those 12 interchangeably -- water should not be allocated 13 or administered in accord with the dictates of 14 the Eagle Decree? 15 MR. BAXTER: Objection; again, calls 16 for a legal conclusion. 17 THE WITNESS: Please repeat. 18 Q. (BY MR. ARKOOSH) I'm going to preface 19 the question. Isn't your job to administer and 20 allocate water or in part what you do? Is that 21 in part what you do? 22 A. Yes. 23 Q. You help Lyle Swank do that, don't you? 24 A. Yes. 25 Q. And you're the program manager --

1 A. Yes.

2 Q. -- isn't that right? So I guess I'm
3 asking you, do you do it in accordance with the
4 Eagle Decree or not do it in accordance with the
5 Eagle Decree, or are there chosen parts of the
6 Eagle Decree that you do it in accordance with?

7 MR. BAXTER: Objection; ambiguous and
8 confusing. Do you do it? I don't understand
9 what "it" is.

10 Q. (BY MR. ARKOOSH) Do you understand
11 what I'm asking you?

12 A. I'd like to answer.

13 Q. Yeah, go ahead. I'd like to hear the
14 answer.

15 A. Just please repeat what you asked me.

16 Q. Sure. Do you do your administration
17 and allocation of water in accordance with the
18 Eagle Decree? Do you feel bound to do it in
19 accordance with the Eagle Decree?

20 MR. BAXTER: Objection; compound
21 question.

22 THE WITNESS: I do it in accordance
23 with the water right accounting program that was
24 developed by the Department of the Water
25 Resources and the watermasters of Water District

1 1, and I assume they incorporated the elements
2 they needed to from the decrees. When there's an
3 objection to that, that objection goes to the
4 watermaster or the director of the Department of
5 Water Resources to see if we're doing it
6 incorrectly.

7 Q. (BY MR. ARKOOSH) So you're really in
8 no position to opine whether the Eagle Decree is
9 binding or whether there's a -- if there's a
10 conflict between the Eagle Decree and the
11 accounting program, which should control; is that
12 right?

13 MR. BAXTER: Objection; again, calls
14 for a legal conclusion. Go ahead and answer.

15 THE WITNESS: The water rights in the
16 water right accounting are based on the decree.

17 Q. (BY MR. ARKOOSH) On the Eagle Decree?

18 A. On the Eagle Decree and all other
19 decrees.

20 Q. Okay. So then I'm assuming from that
21 answer, then, that those ratified and confirmed
22 portions of the contracts that have become part
23 of that decree are incorporated in the accounting
24 program, if you know?

25 A. No, some of those provisions may not be

1 necessary in the day-to-day administration and
2 allocation of water, which then they would not be
3 in the water right accounting program.

4 Q. Okay. And, for instance, that would be
5 this power right we're talking to, which you said
6 is a run-of-the-river right that can't be called
7 out; is that right?

8 A. Yes.

9 Q. Okay. If you are wrong and it is not a
10 run-of-the-river right but a callable right, it
11 should be in the accounting program; is that
12 correct?

13 MR. BAXTER: Objection; leading.
14 Objection; speculation on behalf of the witness.

15 THE WITNESS: Answer?

16 MR. BAXTER: Go ahead and answer.

17 THE WITNESS: The power right is in the
18 accounting program. I've described it as a
19 run-of-the-river, and the amount of water that
20 goes through the power plant that's in the river
21 goes towards that right.

22 I've never been in a situation where
23 the Bureau of Reclamation has called up and said,
24 "We've decided not to fill the reservoirs," or,
25 "We would like you to shut off that diversion for

1 recharge so we can increase the amount in the
2 river through our Minidoka power plant to get our
3 full 2700 cfs."

4 If that situation arose, it wouldn't be
5 up to me to make the decision as to whether or
6 not they could do that. It would be up to the
7 watermaster and Department of Water Resources.

8 Q. Right. But your accounting program
9 doesn't allocate; it only accounts for the water
10 that actually went through, isn't that right, as
11 to that right?

12 A. Yes.

13 MR. BAXTER: Objection; leading.

14 Q. (BY MR. ARKOOSH) Which is different
15 than a right that one would be able to call up?
16 It's handled in a different manner?

17 MR. BAXTER: Objection; leading.

18 THE WITNESS: No, it's not handled in a
19 different manner. It's handled in the same
20 manner in that if a senior right is diverting
21 less than its full entitlement, we assume that it
22 doesn't require its full entitlement.

23 Q. (BY MR. ARKOOSH) Well, this right, the
24 historical use is governed by what was in the
25 river, not by the capacity to call?

MR. BAXTER: Objection; is that a question --

MR. ARKOOSH: Yes.

MR. BAXTER: -- or is that a statement?

MR. ARKOOSH: It's a question.

MR. BAXTER: Again, I think it assumes -- Mr. Arkoosh, can you rephrase that as a question?

Q. (BY MR. ARKOOSH) Can you answer the question?

A. Could you repeat it?

Q. Yeah. The historical use of this particular right is dictated by how much water was in the river, not by the capacity to call?

MR. BAXTER: Objection; leading.

THE WITNESS: My understanding is they didn't have the right to call for additional water other than what was in the river.

Q. (BY MR. ARKOOSH) So it wouldn't matter if it called or didn't call; it just got what was in the river. Is that right?

MR. BAXTER: Objection; leading.

Objection --

THE WITNESS: It would matter. If they made the call, then the watermaster or the

difference.

Q. (BY MR. ARKOOSH) I know, and it doesn't answer my question. Well, historical administration, you administer, right? The water user doesn't administer; isn't that correct?

MR. BAXTER: Objection; leading.

THE WITNESS: That's correct.

Q. (BY MR. ARKOOSH) The water user uses; isn't that correct?

A. Yes.

Q. Okay. Insofar as Exhibit E to the Eagle Decree is ratified and confirmed and binding on all parties, Mr. Simpson's question to you whether or not there would be payments for this foregone power concerning -- let me restate this question.

Does that change your opinion knowing now that Exhibit E is binding and confirmed and the watermaster is a party to the Eagle Decree? Does that change your opinion regarding the relevance of the power loss payments in administration of water by the district?

A. No.

Q. Okay. In Exhibit 2, which is the Eagle Decree, if you would look at page 29 of Exhibit

director would have to make the decision to curtail someone.

Q. (BY MR. ARKOOSH) But we're trying to describe this right as a run-of-the-river right. Isn't that exactly what the decision has been made?

MR. BAXTER: Objection; leading. Objection; I think you're asking the witness to speculate on something that has not and did not happen here.

Q. (BY MR. ARKOOSH) Go ahead.

A. In historical delivery, there has never been a call.

Q. I understand that, but I also understand it's been treated as a run-of-the-river right?

MR. BAXTER: Objection; leading, assuming that was a question.

THE WITNESS: Yes.

Q. (BY MR. ARKOOSH) Even in your affidavit, you don't refer to historical use; you refer to historical administration. Isn't that correct?

MR. BAXTER: Objection; leading.

THE WITNESS: I don't see the

E, about a fourth of the way down the page, in paragraph 24(a), it says, "Accordingly." Do you see that language there? Have you found that?

A. Yes.

Q. Okay. "Accordingly, except as it is determined by the Secretary that additional water may be passed through American Falls and Minidoka dams without the loss of water that could be stored for irrigation in the reservoir system, the United States has, during each storage season," et cetera.

Wasn't this a subordination to water that could be stored for irrigation?

MR. BAXTER: Objection; calls for a legal conclusion.

THE WITNESS: Yes, I think that was the conclusion made in trying to settle this.

Q. (BY MR. ARKOOSH) And then in the proposal, which is Exhibit -- you have to help me there, Tony. I don't know.

A. Exhibit 1.

Q. Okay. In Exhibit 1, if you would look in the proposal for Rights 217 and 218, it says loss of water that could have been stored in the reservoir system and never once mentions the word

1 "irrigation." Isn't that right?

2 MR. BAXTER: Objection; leading.

3 THE WITNESS: That's right.

4 Q. (BY MR. ARKOOSH) It would seem to
5 me -- and I'm going to tell you what I conclude
6 from this language, and I want you to tell me why
7 I'm wrong. It would seem to me that in the
8 language adopted by the decree that is binding on
9 everybody who uses water, the limitation of
10 storage against which the right could not call
11 was to irrigation storage, but the limitation in
12 the new language is -- it's -- I'm sorry, I'm
13 stating that wrong.

14 The subordination in the old language
15 was just to irrigation storage. The
16 subordination in the new language appears to be
17 to every use for which water could be stored.
18 Tell me why I'm wrong.

19 MR. BAXTER: Objection; calls for a
20 legal conclusion.

21 THE WITNESS: That's how it's been
22 administered historically. We didn't separate
23 out storage for irrigation or storage for any
24 other use.

25 Q. (BY MR. ARKOOSH) And tell me how the

1 new language changes that in any way.

2 A. Well, in the new language, as you say,
3 is reservoir -- or water stored in the reservoir,
4 not just for irrigation.

5 Q. Right. And that's how you've always
6 administered it; isn't that correct?

7 A. Yes.

8 Q. So how does it change how you
9 administered it in any way?

10 Forget that question for a minute. Let
11 me rephrase it. Is the change in the language
12 from what the decreed language is in order to
13 make the language comport with how you've
14 administered the right?

15 A. Yes.

16 Q. Is that what we're doing? Okay. All
17 right. Do you know through -- have you learned
18 through these discussions in which you were
19 involved why you can deviate from decreed rights
20 and do that?

21 MR. BAXTER: Objection; Mr. Arkoosh is
22 asking for or assuming, I guess, facts not in
23 evidence. You were talking about discussions,
24 which we haven't had any information regarding
25 any discussions in this particular -- submitted

1 into the record yet.

2 MR. ARKOOSH: Is the objection facts
3 not in evidence? Is that the objection?

4 MR. BAXTER: Yes, it is.

5 Q. (BY MR. ARKOOSH) Okay. You can go
6 ahead and answer the question.

7 A. My knowledge increases every day with
8 every discussion.

9 Q. Okay.

10 A. I'm constantly learning.

11 Q. But do you know why -- well, do you
12 agree in your job in administering water this
13 remark is somehow necessary?

14 MR. STANISH: Could you clarify which
15 remark you're talking about?

16 MR. ARKOOSH: I'm sorry, the new remark
17 that's proposed in the summary judgment.

18 THE WITNESS: When a water right owner
19 makes a call to the watermaster for his water
20 when he feels he's not getting it and he should
21 be, then the watermaster needs something to refer
22 to, to see if that is the case. This remark, I
23 think, will help clarify that.

24 Q. (BY MR. ARKOOSH) Any other reasons
25 concerning the necessity of this proposed remark?

1 A. I don't know of any others.

2 Q. Okay. But this isn't callable water.
3 So if you eliminate that reason, is there any
4 reason to have this proposed remark?

5 MR. BAXTER: Objection --

6 THE WITNESS: Without the remark --

7 MR. BAXTER: Tony, let me finish the
8 objection first.

9 THE WITNESS: Okay.

10 MR. BAXTER: The basis of the question
11 started with a conclusion that this is not
12 callable water. I don't know that that has been
13 the basis for which Mr. --

14 MR. ARKOOSH: Don't make a speaking
15 objection. Don't tell a witness what to say.

16 MR. BAXTER: I'm not telling the
17 witness what to say. I'm providing for you that
18 you've based a question here on something that --

19 MR. ARKOOSH: Your objection is to the
20 form?

21 MR. BAXTER: Yes.

22 MR. ARKOOSH: Okay.

23 MR. BAXTER: Mr. Arkoosh, please let me
24 finish my objection. I'm not trying to
25 spoon-feed the witness. I'm trying to make a

1 proper record of objections based upon improper
2 questions.

3 MR. ARKOOSH: Okay. Your objection is
4 to the form?

5 MR. BAXTER: Yes.

6 MR. ARKOOSH: Okay.

7 MR. BAXTER: Mr. Arkoosh, I'm not
8 finished making my basis here. Again, it assumes
9 facts not yet submitted, not in evidence. Now,
10 based upon that, you're then asking the witness
11 to make a legal conclusion, and I also object on
12 that basis.

13 Q. (BY MR. ARKOOSH) Okay. "Without the
14 remark" was the start of your answer, Tony?

15 Without the remark, what?

16 A. Could you repeat the question?

17 Q. Yeah. Maybe not. This is not callable
18 water. So taking that reason away, what's the
19 necessity of this remark?

20 MR. BAXTER: I restate -- re-raise my
21 previous objections.

22 THE WITNESS: I think without the
23 remark someone could jump to the conclusion that
24 it is callable water.

25 Q. (BY MR. ARKOOSH) Well, according to

1 the Eagle Decree, it probably is callable water
2 if you're subordinated only to storage loss for
3 irrigation. Would you agree with that?

4 MR. BAXTER: Objection; leading.
5 Objection; asks for a legal conclusion.

6 THE WITNESS: Yes.

7 Q. (BY MR. ARKOOSH) So what we're doing,
8 really, is rather than explaining the right,
9 we're changing the right?

10 MR. BAXTER: Objection; leading.

11 THE WITNESS: I think it's a
12 clarification because it's not just the storage
13 water that you could call against, but also other
14 natural flow rights.

15 Q. (BY MR. ARKOOSH) I don't disagree with
16 that, but what we're doing is we're making the
17 right fit how it has been administered --

18 MR. BAXTER: Objection; the question
19 has been asked and answered.

20 Q. (BY MR. ARKOOSH) -- versus what the
21 Eagle Decree says, and so the language is a
22 material change in the right?

23 MR. BAXTER: Objection; I think the
24 question has been asked and answered.

25 Q. (BY MR. ARKOOSH) It's a yes, no or "I

1 don't know." Is the language a material change
2 in the right?

3 MR. BAXTER: Objection; calls for a
4 legal conclusion.

5 THE WITNESS: No, I don't think it is.

6 Q. (BY MR. ARKOOSH) Okay. The language
7 has, right at the start of it on Exhibit 1 in the
8 first line, it says, "While the United States has
9 the privilege," and in the Eagle Decree it talks
10 about rights and then the privilege to have it
11 delivered. Does this word "privilege" mean the
12 same thing as a right in this context, or do you
13 know?

14 A. I don't know.

15 MR. BAXTER: Objection; calls for a
16 legal conclusion.

17 Q. (BY MR. ARKOOSH) Have you been trying
18 to give me legal conclusions, Tony? Do you feel
19 qualified to do that?

20 MR. BAXTER: Mr. Arkoosh, are you
21 trying to make fun of the process we have here?
22 Earlier you asked me to simply state my
23 objections on the record, and I am doing that
24 now.

25 Q. (BY MR. ARKOOSH) Okay. Are you trying

1 to give me legal conclusions?

2 MR. BAXTER: Mr. Arkoosh.

3 MR. ARKOOSH: What?

4 MR. BAXTER: I don't appreciate your
5 flippant approach to this matter.

6 MR. ARKOOSH: Are you going to let him
7 answer the question? If you have an objection,
8 state it. Otherwise, I'd like an answer for the
9 record.

10 MR. BAXTER: Go ahead and answer, Tony.

11 Q. (BY MR. ARKOOSH) Tony, are you trying
12 to give me legal conclusions here? Do you
13 understand my questions?

14 A. No, I don't.

15 Q. Okay. You're not trying to give me a
16 legal conclusion, are you, here as we have these
17 questions and answers?

18 MR. BAXTER: Again, Mr. Arkoosh, I
19 think simply asking him about, is he trying to
20 give you a legal conclusion, is itself asking for
21 a legal conclusion.

22 MR. ARKOOSH: Okay.

23 THE WITNESS: My expertise is how Water
24 District 1 divides up the water and administers
25 the water rights.

1 Q. (BY MR. ARKOOSH) And have you
2 understood the context in which I've asked these
3 questions is to obtain an answer from you based
4 upon administrator of water, as I stated when we
5 started?

6 A. I don't know what the purpose is that
7 you're asking the questions for, but I'll try to
8 answer how Water District 1 administers the
9 water.

10 Q. That's fair enough. And is that what
11 you've been trying to do?

12 A. Yes.

13 MR. ARKOOSH: Okay. I don't have any
14 further questions. Thank you.

15 MR. BAXTER: Want a break? We've been
16 going for a while.

17 THE WITNESS: I'd just as soon get it
18 over with.

19 MR. BAXTER: Okay. Actually, I need a
20 rest-room break.

21 MR. GEHLERT: This is Dave. I'm going
22 to step away for about five minutes as well.

23 MR. BAXTER: Okay. Let's take a five-
24 minute break.

25 (Break taken.)

EXAMINATION

QUESTIONS BY MS. McHUGH:

1 Q. For the record, my name is Candice
2 McHugh, and I represent the Ground Water
3 Districts in this matter.

4 Tony, I just wanted to have a couple
5 quick follow-up questions based on, I believe,
6 your testimony in response to some questions from
7 John Simpson. Do you recall the line of
8 questioning relating to the Bureau and using the
9 2700 cfs to fill the water right during the
10 nonirrigation season?

11 A. What was the question?

12 Q. Oh, I mean, do you remember that line
13 of questioning when you were talking to John
14 Simpson?

15 A. Not specifically, no.

16 Q. Okay. All right. Well, let me -- if
17 the Bureau were to change its practice during the
18 nonirrigation season -- I'm just wanting my
19 question to point to the nonirrigation season --
20 would the water right in the sense that this
21 water right was now going to be treated as being
22 able to make a delivery call, it was demanding
23 water from, let's say, junior storage users so
24
25

1 that it wouldn't be accumulating storage, if it
2 changed that practice, would the water right then
3 be -- would that change how the Water District 1
4 accounting has historically accounted for that
5 water right during the nonirrigation season?

6 MR. BAXTER: I am going to object in
7 the sense that this is speculation, but go ahead
8 and answer the question, Tony.

9 THE WITNESS: No, there wouldn't be
10 anything changed in the water right accounting
11 program. The 2700 is still there. What would
12 change would be the physical operations.

13 Q. (BY MS. McHUGH) Okay. And can you
14 expand on what the physical operations, what you
15 mean by that?

16 A. Well, right now the Bureau of
17 Reclamation during the nonirrigation season
18 limits releases from American Falls Dam, which
19 eventually make its way through the Minidoka
20 power plant to store water upstream under those
21 junior rights. If they decided to run the full
22 2700 cfs throughout the entire winter, that would
23 be less water that would go to fill those junior
24 rights, but --

25 Q. And that would -- okay, go ahead.

1 A. Either way, though, the 2700 cfs would
2 be accounted for in the accounting whether they
3 chose not to utilize the full 2700 cfs or not.

4 Q. Do you know whether or not that change
5 would result in a physical fill -- the reservoirs
6 not physically filling as often as they have
7 historically?

8 MR. BAXTER: I'm going to object again;
9 speculation.

10 THE WITNESS: Yes, in limited water
11 supplies. If you don't have enough water to fill
12 the reservoir system and you choose to run more
13 water past American Falls Dam than you otherwise
14 would have, you would end up with less water in
15 the upstream reservoirs.

16 Q. (BY MS. McHUGH) And that would affect
17 the junior storage placeholders; is that correct?

18 A. Well, it would affect anyone that's
19 junior to the Minidoka power right, potentially.

20 Q. Okay.

21 A. I mean, it's more likely to affect the
22 most junior user, but depending on your water
23 supply, if it were so short, it may affect even
24 the person that's second in line or third in line
25 or wherever depending on the water supply.

1 Q. Do you also know whether or not that
2 would affect the amount of water available for
3 renting and leasing from the rental pool? Do you
4 have an idea about that?

5 A. I can't say. It might influence the
6 people that otherwise would have rented or would
7 have made their water available for rent.

8 Q. Okay. Now, you also provided some
9 testimony that during the irrigation season --
10 and what I mean by the irrigation season, Tony,
11 as I understand, there's an overlap between the
12 storage season and the irrigation season. I'm
13 going to talk about the irrigation season for
14 those that actually run the water for irrigation
15 purposes, generally the March time frame to the
16 end of October time frame.

17 Did I understand you to say that,
18 essentially, during the irrigation season the
19 reason the Minidoka power right is not part of
20 the Water District 1 accounting is because
21 there's actual demand downstream from Minidoka
22 that allows that water right to be filled?

23 A. That's correct.

24 Q. Okay. And are some of those people
25 downstream from Minidoka, is that including Twin

1 A. Lake Walcott during the nonirrigation
2 season could be storing water.

3 Q. Okay. Any other users that would take
4 water during the nonirrigation season?

5 A. In the past I'm not sure if there have
6 been, but potentially there could be any
7 diversion. The Minidoka canal diversions, BID,
8 MID. I can't remember for sure if there's any
9 small pump diversions in between Neeley and
10 Minidoka, but there may be. So there's the
11 potential for someone to divert water.

12 Q. Do MID and BID rights allow them to
13 divert water year-round?

14 A. Not their natural flow rights.

15 Q. When you say "not their natural flow
16 rights," meaning that they can be delivered
17 storage water?

18 A. They could be delivered storage water,
19 or they could have the water resource board
20 recharge right assigned to them.

21 Q. Okay. And how do you define natural
22 flow?

23 A. Natural flow is the sum of gains in our
24 river reaches. We have 39 reaches in the Water
25 District 1 program, and each day we calculate the

1 Falls and North Side Canal Company's senior water
2 right of 3400 cfs?

3 A. It would be any diversion between
4 Minidoka power plant and Milner Dam.

5 Q. And does that include the Twin Falls
6 and North Side Canal Company's water rights, do
7 you know?

8 A. It would include them, yes.

9 MS. McHUGH: Okay. That's all my
10 questions. Nothing further at this time,
11 although I will restate my objection about, you
12 know, wanting to reserve the right to re-call the
13 witness for additional depositions relating to
14 the issues in this case. Thank you.

15 EXAMINATION

16 QUESTIONS BY MR. GEHLERT:

17 Q. Okay. Mr. Olenichak, this is David
18 Gehlert on behalf of the United States. Candice
19 actually asked some of the questions that I was
20 going to ask, but in responding to her, you
21 mentioned that during the nonirrigation season
22 water released from American Falls makes its way
23 through the Minidoka power plant. Are there
24 intervening diversions between the American Falls
25 Reservoir and Minidoka?

1 gain in each of those reaches, and that would be
2 the natural flow.

3 Q. And with respect to the Minidoka power
4 right, how do you determine the natural flow that
5 might be available to that right?

6 A. In the water right accounting, each of
7 the 39 reaches at the end of the reach has the
8 total available natural flow listed in the
9 program for each day, and so the amount available
10 to the Minidoka power plant would be the natural
11 flow or the sum of the reach gains at Minidoka.
12 And so we do calculate that number each day.

13 The amount that's credited towards
14 filling that right, though, is simply the actual
15 amount of water that's running through the Snake
16 River at Minidoka on those nonirrigation days.

17 Q. Understood. And so the water that's
18 available as done as a calculation, is that
19 different than a gauge reading?

20 A. That's possible because you could have
21 a mixture of storage water and natural flow
22 passing Snake River at Minidoka, and we segregate
23 those out in the water right accounting program.

24 Q. Okay. When you mentioned Snake River
25 at Minidoka, I take it that's a gauge?

1 A. Yes, a USGS gauge we use at the end of
2 our reach.

3 Q. And where is that physically located?

4 A. Just below -- it's on the Snake River
5 just downstream from Minidoka Dam.

6 Q. Okay. And is there a gauge upstream of
7 Minidoka Dam?

8 A. The next upstream gauge is Snake River
9 at Neeley, which is located just downstream from
10 American Falls Dam.

11 Q. And just a couple of final points of
12 clarification. There was a lot of use of the
13 term run-of-the-river right. To your knowledge,
14 is that a defined term or a term that's defined
15 by statute or case law?

16 A. Not that I'm aware of. That's just the
17 term that's always been used to describe the
18 delivery to the power rights in my experience
19 working with the water district.

20 Q. Right. And your experience has been
21 that Reclamation has not made a call on behalf of
22 the Minidoka power rights, correct?

23 A. That's correct.

24 Q. But I think you said that that doesn't
25 mean that Reclamation does not or would not have

1 A. No.

2 Q. Has anyone else in Water District No. 1
3 ever made a delivery call on behalf of those
4 power rights?

5 A. No.

6 Q. Just a couple more questions. Are you
7 familiar with the Foster Decree?

8 A. Vaguely.

9 Q. Well, to the extent that you are, are
10 all portions of that decree and remarks therein
11 necessary for the administration of the Minidoka
12 power rights in particular?

13 MR. ARKOOSH: I'll object to
14 foundation.

15 THE WITNESS: No.

16 Q. (BY MR. STANISH) And are you familiar
17 with the Woodville Decree?

18 A. Vaguely.

19 Q. Same question. Are all portions and
20 remarks set forth in the Woodville Decree
21 necessary for the administration of the Minidoka
22 power rights?

23 MR. ARKOOSH: Same objection to
24 foundation.

25 THE WITNESS: No, I don't think so.

1 an ability to make a call, simply that they have
2 not done so?

3 A. That's correct.

4 MR. GEHLERT: Great. I have no further
5 questions. Thank you very much.

EXAMINATION

QUESTIONS BY MR. STANISH:

8 Q. For the record, this is David Stanish
9 for the State of Idaho. I just have a couple
10 questions for you, Tony. First, was the
11 accounting system developed with the knowledge of
12 the Bureau of Reclamation?

13 A. Yes.

14 Q. And has the Bureau of Reclamation ever
15 objected to the way that the Minidoka power
16 rights have been accounted for by the water
17 district?

18 A. No.

19 Q. And has the Bureau ever made a delivery
20 call for the Minidoka power rights?

21 A. No.

22 Q. Has anyone else in Water District No. 1
23 ever objected to the way that the Minidoka power
24 rights have been accounted for in the accounting
25 system?

1 Q. (BY MR. STANISH) And the Eagle
2 Decrees, you are familiar with them?

3 A. Yes.

4 Q. Now, are all portions and remarks set
5 forth in those Eagle Decrees necessary for the
6 administration of the Minidoka power rights?

7 MR. ARKOOSH: Same objection;
8 foundation.

9 THE WITNESS: No, I don't think so.

10 Q. (BY MR. STANISH) Tony, have you read
11 the Eagle Decrees?

12 A. Yes.

13 Q. Okay. A couple questions on the power
14 loss provision. Does the water district
15 calculate power loss figures?

16 A. No.

17 Q. Does the accounting program account for
18 or include any reference to the power loss
19 calculations?

20 A. No.

21 Q. Has anyone in Water District No. 1 ever
22 requested the water district to make those
23 calculations or include them in the accounting
24 system?

25 A. Not to my knowledge.

1 Q. Is it necessary for the administration
2 of the Minidoka power rights to include a power
3 loss reference?

4 A. No, I don't think so.

5 Q. To the extent that there are any
6 third-party senior rights downstream of Minidoka,
7 is it necessary to reference those in a remark in
8 the Minidoka power rights water descriptions?

9 MR. SIMPSON: Objection; foundation.

10 MR. ARKOOSH: I'll join.

11 THE WITNESS: Could you repeat the
12 question?

13 Q. (BY MR. STANISH) Sure. Let's turn to
14 the contract within 24(a).

15 A. Okay.

16 Q. In that first sentence, does it
17 reference existing diversion rights in the
18 stretch of river downstream and including Milner
19 Dam and certain power rights below Milner Dam?
20 Do you see that provision?

21 A. Yes.

22 Q. Are there rights downstream of Milner
23 Dam or downstream of Minidoka? Let me rephrase
24 that. Are there any water rights downstream of
25 Minidoka Dam?

1 A. Yes.

2 Q. Is it necessary to reference those
3 downstream rights in the Minidoka power rights
4 water descriptions in order for you to administer
5 the Minidoka power rights?

6 MR. ARKOOSH: Object to foundation.

7 THE WITNESS: No, I don't think so.

8 MR. STANISH: That's all I have.

9 MR. BAXTER: No questions from me.

10 FURTHER EXAMINATION
11 QUESTIONS BY MR. SIMPSON:

12 Q. I have a couple follow-up. Tony, with
13 respect to the paragraph 24 that you just
14 testified regarding, if, in respect to the
15 exercise of the Minidoka power rights vis-a-vis
16 storage in the reservoir system, third-party
17 rights were being injured, would that be a matter
18 of concern to the water district?

19 A. Yes.

20 Q. Okay. And so if there's a limitation
21 on the exercise of the Minidoka power right and
22 that limitation involved the protection of
23 third-party rights below the Minidoka power
24 right, would that be something of concern, or
25 would the water district want to have an

1 understanding of that in terms of administering
2 the Minidoka right?

3 A. Water District 1 administers the right
4 according to the priorities and the amounts. If
5 there was some reason the Minidoka power -- the
6 delivery of Minidoka power would interfere with
7 that, then, yes, there should be a provision that
8 documents why that would be allowed.

9 Q. Okay. So if that documentation were
10 required to be in a decree or if it wasn't in the
11 decree, then it couldn't be in the accounting
12 program, right? If it's not in the Minidoka
13 power right, then it can't be included in the
14 accounting program?

15 A. The water right would be included in
16 the accounting.

17 Q. Exactly. In the accounting program,
18 correct?

19 A. In the accounting program, if decreed.

20 Q. If decreed. But if that decree did not
21 contain the provision which included the
22 protection of those third-party rights, how would
23 that provision then be included in the accounting
24 program to allow the water district to ensure
25 that third-party rights would not be impaired or

1 impacted?

2 A. I think the protection's implied. If
3 they have a senior right to the power plant, then
4 it's the watermaster's job to make sure that
5 water gets to those --

6 Q. Okay.

7 A. -- senior downstream rights.

8 Q. But if there are other rights who are
9 protected by the language of paragraph 24(a) that
10 are not senior, through the exercise of the
11 Minidoka power right vis-a-vis storing of water
12 in the reservoir system, is there another way in
13 which that condition or that provision would
14 appear in the Minidoka -- or in the accounting
15 program, excuse me, but for being included in the
16 Minidoka power right decree?

17 A. If the power right were subordinate to
18 junior users, then, yes, there would be a
19 necessity to have a remark.

20 Q. So if that remark in paragraph 24(a)
21 that Mr. Stanish referred to provided a
22 protection to third parties, and you identified
23 that sentence earlier today in your testimony,
24 would that remark then be necessary as a part of
25 the Minidoka power right decree to effectively

1 administer the Minidoka power right vis-a-vis
2 those third-party rights?

3 A. To protect the third-party junior
4 rights, yes. Senior rights, I don't think it
5 would be necessary.

6 Q. Fair enough. So then for those types
7 of provisions that are contained in the Eagle
8 Decree with specific reference to the exercise of
9 the Minidoka power right, and by the exercise of
10 the Minidoka power right you bring in the concept
11 of storing water -- preferring the storage of
12 water in the reservoir system over the exercise
13 of the Minidoka power right, if there's
14 third-party impacts that are referenced in
15 paragraph 24(a), they should be included in the
16 remark section of the Minidoka power decree;
17 would you agree?

18 A. No.

19 Q. And why not? How else would they be
20 protected?

21 A. You used the word "impacts." The
22 impacts may not be of concern to Water District
23 1. The main purpose of Water District 1 is to
24 divide up the natural flow deliveries each day.
25 And if the Bureau chooses to store water rather

1 than to run it through the power plant, then
2 that, to me, should be a contractual issue rather
3 than an actual water distribution issue.

4 Q. So if the Bureau mismanages the system,
5 mismanages how water should or shouldn't be
6 stored relative to the Minidoka power right
7 relative to other water rights in the water
8 district, are you saying that the water district
9 does not have any say in that? Just a minute.

10 MR. BAXTER: Is that the end of the
11 question?

12 MR. SIMPSON: Yeah.

13 MR. BAXTER: Okay. I'm going to
14 object; asks for a legal conclusion.

15 MR. SIMPSON: Okay.

16 MR. BAXTER: Also calls for speculation
17 on behalf of the witness.

18 THE WITNESS: The water district each
19 day determines the allocation to the water rights
20 depending on the water that's there and who's
21 actually physically diverting the water. If they
22 choose not to divert the water, then I don't
23 think it's up to Water District 1 to penalize
24 them for not doing that.

25 Q. (BY MR. SIMPSON) Okay. Just so I'm

1 clear on where the water district's obligation
2 begins, so when the Bureau decides to store
3 water, that's in their sole discretion to store
4 water?

5 MR. BAXTER: Again, asks for a legal
6 conclusion. Object. Go ahead.

7 Q. (BY MR. SIMPSON) Well, okay. In the
8 recommended remark, it states, "Accordingly,
9 except as determined by the Secretary that
10 additional water may be passed through Minidoka
11 Dam without the loss of water that could be
12 stored in the reservoir system."

13 So is that the secretary's sole
14 determination? So the secretary determines --
15 Bureau of Reclamation determines, you know, how
16 much water to pass or store, correct?

17 A. Yes.

18 Q. And if they implement their actions in
19 a manner which allows more water to pass than
20 could be stored, that's not a water district
21 issue?

22 A. That's correct, because that's what
23 happens each year.

24 Q. Okay. And if they allow more water to
25 be stored to the detriment of third-party rights,

1 third-party water rights, is that a water
2 district issue?

3 A. Yes.

4 Q. Okay. So in paragraph 24 where it
5 identifies third parties, those diversions
6 downstream from Minidoka Dam, if those diversions
7 are water rights, then that's a water district
8 issue; if they're not water rights, then it's not
9 a water district issue. Would that be correct?

10 A. Yes.

11 Q. Okay. If they're simply a contractual
12 agreement between the Bureau of Reclamation and
13 the water district, is that not a water district
14 concern?

15 A. Between the Bureau of Reclamation and
16 the contract holders?

17 Q. Yes.

18 A. I don't think it's a water district
19 concern.

20 Q. Okay. So in this language, again, on
21 paragraph 4 of page 2 of your affidavit where it
22 states that the passing of water would result in
23 a loss of water otherwise storable in the
24 reservoir system, would that be storable for
25 project purposes, irrigation storage, power

1 production, however we want to phrase the --
 2 Pocatello contract and those other contracts,
 3 I'll say mitigation water. Those are authorized
 4 purposes? Those are the authorized purposes
 5 identified in that language consistent with
 6 historical administration?

7 MR. BAXTER: I'm going to object. I
 8 think it -- lack of foundation as to whatever the
 9 listing of uses identified, beneficial uses in
 10 the contracts. I don't think we've had any
 11 contracts identified that list -- I think you've
 12 characterized it as the Pocatello and other uses.

13 MR. SIMPSON: Okay.

14 MR. BAXTER: Go ahead and answer the
 15 question.

16 Q. (BY MR. SIMPSON) If you understand
 17 what I'm saying, when water -- it says the loss
 18 of water otherwise storable. Storable for the
 19 purposes identified in the contracts; would you
 20 agree with that?

21 A. No. Water District 1 keeps track of
 22 the storable water by assuming they would shut
 23 the dam to zero. That's our paper accounting.
 24 If they choose to do otherwise, then there's a
 25 loss of storable water.

1 identified in the water rights for either
 2 American Falls, Palisades, Jackson or the other
 3 federal reservoirs in the Upper Snake?

4 A. You have to ask me again. You're
 5 losing me.

6 Q. Well, the purposes, then, are
 7 identified in the water rights associated with
 8 the various reservoirs, federal reservoirs, in
 9 the Upper Snake?

10 A. Yes.

11 Q. Okay.

12 MR. STANISH: Your reporter has got to
 13 go.

14 MR. SIMPSON: Okay. That's good. One
 15 other thing is we've identified that there was
 16 not an Exhibit 7, so Exhibit 8 will be renumbered
 17 as Exhibit 7 in the deposition.

18 MR. BAXTER: Sounds good.

19
 20 (Deposition adjourned at 5:05 p.m.)
 21 (Signature requested.)
 22
 23
 24
 25

1 Q. And, again, I guess I'm trying to go to
 2 the next step, Tony, and that is, I understand,
 3 the loss of water that is otherwise storable for
 4 the purposes identified in the contracts with the
 5 spaceholders?

6 A. I don't know if I can identify every
 7 reason why the Bureau would choose to release
 8 water.

9 Q. Okay. The water -- let me try again.
 10 The water stored is only available to meet the
 11 contract purposes, right?

12 A. No. The water right accounting keeps
 13 track of the storable water in the water right
 14 itself for the entire reservoir.

15 Q. Right. And the water stored in those
 16 reservoirs are pursuant to the spaceholder
 17 contracts between Reclamation and the
 18 spaceholders?

19 A. No. I think the water right's stored
 20 based on the license issued for the reservoir.

21 Q. Okay. So the reservoirs identify the
 22 purposes of the stored water?

23 A. Yes.

24 Q. Okay. And so the purposes for that
 25 stored water would be limited to those purposes

Exhibit B

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 Nos. 01-00217, 01-00218
) 01-04024, and 01-04025
) (Minidoka Power Right)
)
) Subcase Nos. 01-02068 and
) 01-04054
_____) (Palisades Power Rights)

DEPOSITION OF GARY LYNN SPACKMAN
OCTOBER 22, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

Page 2	Page 4
1 THE DEPOSITION OF GARY LYNN SPACKMAN, was 2 taken on behalf of A & B Irrigation District, 3 Burley Irrigation District, Milner Irrigation 4 District, North Side Canal Company, and Twin Falls 5 Canal Company, at the offices of Barker, Rosholt & 6 Simpson, 1010 West Jefferson, Suite 110, Boise, 7 Idaho, commencing at 8:22 a.m., October 22, 2009, 8 before Jeff LaMar, Certified Shorthand Reporter 9 and Notary Public within and for the State of 10 Idaho, in the above-entitled matter. 11 APPEARANCES: 12 For A & B Irrigation District, Burley Irrigation 13 District, Milner Irrigation District, North Side 14 Canal Company, and Twin Falls Canal Company: 15 BARKER, ROSHALT & SIMPSON LLP 16 BY MR. JOHN K. SIMPSON 17 1010 West Jefferson, Suite 102 18 P.O. Box 2139 19 Boise, Idaho 83701-2139 20 For American Falls Reservoir District No. 2: 21 CAPITOL LAW GROUP PLLC 22 BY MR. C. THOMAS ARKOOSH 23 301 Main Street 24 P.O. Box 32 25 Gooding, Idaho 83330	1 APPEARANCES (Continued): 2 3 For State of Idaho: 4 OFFICE OF ATTORNEY GENERAL 5 BY MR. DAVID I. STANISH 6 700 West State Street, 2nd Floor 7 P.O. Box 83720 8 Boise, Idaho 83720-0010 9 For Idaho Power Co.: 10 BROWNSTEIN HYATT FARBER SCHRECK 11 BY MR. JAMES S. LOCHHEAD 12 818 Colorado Avenue, Suite 306 13 P.O. Box 357 14 Glenwood Springs, Colorado 81602-0357 15 For Minidoka Irrigation District: 16 FLETCHER LAW OFFICE 17 BY MR. W. KENT FLETCHER 18 P.O. Box 248 19 Burley, Idaho 83318 20 For Falls Irrigation District: 21 LING LAW OFFICE 22 BY MR. ROGER D. LING 23 615 H. Street 24 PO Box 250 25 Rupert, Idaho 83350-0396
Page 3	Page 5
1 APPEARANCES (Continued): 2 3 For Bureau of Reclamation: 4 (Present Telephonically) 5 UNITED STATES DEPARTMENT OF JUSTICE 6 ENVIRONMENT & NATURAL RESOURCES DIVISION 7 NATURAL RESOURCES SECTION 8 BY MR. DAVE GEHLERT 9 1961 Stout Street, Suite 800 10 Denver, Colorado 80294 11 For Idaho Groundwater Appropriators, Inc.: 12 RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD. 13 BY MS. CANDICE M. McHUGH 14 101 Capitol Boulevard, Suite 208 15 Boise, Idaho 83702 16 For Idaho Department of Water Resources: 17 OFFICE OF ATTORNEY GENERAL 18 BY MR. CHRIS M. BROMLEY 19 322 East Front Street 20 P.O. Box 83720 21 Boise, Idaho 83720-0098 22 /// 23 /// 24 /// 25 ///	1 INDEX 2 3 TESTIMONY OF GARY LYNN SPACKMAN PAGE 4 Examination by Mr. Simpson 5,105 5 Examination by Mr. Arkoosh 70 6 Examination by Mr. Lochhead 82 7 Examination by Mr. Ling 86 8 Examination by Mr. Fletcher 92 9 Examination by Ms. McHugh 99 10 Examination by Mr. Bromley 104 11 12 EXHIBITS 13 8 - Amended Notice of Taking Deposition 9 14 Duces Tecum of Gary Spackman, Director 15 of the Idaho Department of Water 16 Resources 17 9 - United States' Motion for Summary 45 18 Judgment 19 10 - Language pertaining to water rights 54 20 11 - Red-line language pertaining to water 66 21 rights 22 12 - Supplemental Director's Report 82 23 Regarding Subcase Nos. 1-217, 1-218, 24 1-2064, 1-2068, 1-4024, 1-4025, and 25 1-4054

I N D E X (Continued)

UNANSWERED QUESTIONS

PAGE LINE

90 3

is that correct?

A. Well, interim and provisional.

MR. GEHLERT: I'm sorry to interrupt. If you could have the witness move the phone closer to him. I'm having a hard time hearing.

THE WITNESS: I'll try to speak up.

MR. GEHLERT: Thank you.

Q. (BY MR. SIMPSON): I guess for the record, Mr. Spackman, my name is John Simpson. And I'm here today representing a number of surface water irrigation entities above Milner Dam.

And on the phone we also have Mr. Dave Gehlert for the Department of Justice, so that you know.

And I'm going to hand you what we'll have marked as the next exhibit -- and that will be Exhibit 8 -- and just ask you to identify that exhibit, if you would.

A. This appears to be -- or is titled Amended Notice of Taking Deposition Duces Tecum of Gary Spackman, Director of the Idaho Department of Water Resources.

Q. And, Mr. Spackman --

Let's go ahead and mark that if we

GARY LYNN SPACKMAN,
first duly sworn to tell the truth relating to
said cause, testified as follows:

EXAMINATION

BY MR. SIMPSON:

Q. Sir, can you state your full name for
the record and spell your last name, please.

A. Yes. Gary Lynn Spackman,
S-p-a-c-k-m-a-n.

Q. And, Mr. Spackman, you're here today
for what purpose? Do you have an understanding of
why you're here?

A. Well, I am here to be deposed, and I
understand that the nature of the deposition is
related to some possible proposed conditions for
water rights under consideration in the Snake
River Basin Adjudication.

Q. And your present employment is what,
Mr. Spackman?

A. I have been asked to be, by the
governor, the interim director of the Department
of Water Resources.

Q. So today you're here being deposed as
the director of the Department of Water Resources;

could.

(Exhibit 8 marked.)

Q. (BY MR. SIMPSON): And your appearance
here today, Mr. Spackman, as I identified earlier,
is it on behalf of the Department of Water
Resources, or are you being proffered as a witness
on behalf of any other party to this subcase?

A. No, I'm appearing on behalf of the
Idaho Department of Water Resources as the interim
director.

Q. Okay. In response to that Notice of
Deposition, Exhibit No. 8, did you bring any
documents with you today?

A. I do have some documents with me
today.

Q. Okay. And are those contained in the
notebook that you have in front of you?

A. They are.

There's also a -- I also have an
accordion file with some additional documents
contained therein.

Q. Could you just quickly identify what's
in the expando file that you have brought with
you.

A. Sure. I have a supplemental

1 director's report regarding subcases, and then it
2 lists a number of water rights that I assume are
3 the subject of this particular deposition. I have
4 a -- these are a little out of order.

5 I have some documents that are either
6 the motion for summary judgment or supporting
7 documentation from the United States of America.
8 I have a motion for partial summary judgment that
9 was filed by the State of Idaho and supporting
10 documentation. I am not sure the memorandum
11 supporting is there. I think that's here.

12 I have some personal notes here. And
13 then I have copies of two decrees. And the
14 decrees are Burley Irrigation District versus
15 Henry Eagle, and the other decree is
16 Aberdeen-Springfield Canal Company versus Henry
17 Eagle.

18 Those are the documents that I brought
19 with me today in this book. This is a repeat.
20 This is the supplemental director's report. I do
21 have a summary document here of provisions that I
22 think are perhaps being discussed today as well.

23 Q. So, Mr. Spackman, the notebook that
24 contains the two decrees, are those what are
25 commonly called the Eagle decrees?

1 A. That's my understanding.

2 Q. Okay. And you've had an opportunity
3 to review those in the past?

4 A. I did.

5 Q. And the documents you identified that
6 you brought with you, have you also had an
7 opportunity to review those and you're familiar
8 with those documents?

9 A. I have. I've not read them in their
10 entirety. And I have not read the decrees in
11 their entirety. I've reviewed portions.

12 Q. Okay. Mr. Spackman, in the
13 administration of water rights in a water
14 district, is IDWR and the watermaster bound by
15 prior decrees?

16 A. Yes.

17 Q. Is the Department and the watermaster
18 bound by existing licenses and permits within that
19 water district?

20 A. Well, the watermaster is obligated to
21 deliver water according to the licenses and
22 permits that have been issued within the district.

23 Q. And that delivery of water by the
24 watermaster within the water district, is that
25 done by priority of those decrees, licenses, and

1 permits?

2 A. Yes.

3 Q. If a claim to water is based upon a
4 constitutional beneficial use of that water, will
5 the water district administer to that claim?

6 A. It will.

7 Q. Are there any circumstances in which
8 it won't?

9 A. My understanding of the law,
10 Mr. Simpson, is that when in times of shortage the
11 watermaster is delivering the rights within the
12 water district, regardless of the priority of the
13 claimed beneficial-use water right.

14 If it is not decreed by a court, the
15 water right, regardless of its priority, is
16 delivered after all decreed, licensed, and
17 permitted water rights.

18 Q. Once the constitutional beneficial-use
19 claim is adjudicated, will it be administered like
20 any other decreed rights?

21 A. Yes.

22 Q. From your perspective, is the fact
23 that a claim to the right to use water is based
24 upon the constitutional basis, would that then be
25 the basis for subordinating that right at the time

1 of decree?

2 A. If I could rephrase the question,
3 you're asking if the reason for subordination
4 would be that it is a constitutional claim?

5 Q. Yes.

6 A. I would not think that would be a
7 basis for subordination.

8 Q. Would the administration of that right
9 in times of shortage, that constitutional
10 beneficial-use claim and the administration of
11 that claim in times of shortage, be the basis for
12 subordinating that right at the time of decree?

13 A. No.

14 Q. Mr. Spackman, I'm going to hand you
15 what has been marked as Exhibit No. 6.

16 And Exhibit No. 6 -- I'll just
17 identify it for the record -- is the director's
18 report for 01-04025. And that is one of the power
19 rights at Minidoka Dam. And this particular claim
20 has a priority date of May 7th, 1942.

21 Do you see that under the priority
22 date element?

23 A. Yes, uh-huh.

24 Q. Do you see the paragraph below the
25 priority date?

1 A. I do.

2 Q. Take a moment to review that
3 paragraph, if you would.

4 A. Okay.

5 (Reviews.)

6 I've read the language.

7 Q. If you can, can you explain for us the
8 basis for that paragraph under the priority date
9 element?

10 A. Well, as I read the paragraph, it
11 states that the -- that the holder of the right
12 would exercise the right according to historical
13 practices for the use of power, and that it is
14 incidental to the rights of others for the use of
15 water for other purposes.

16 So there would be, I guess -- I want
17 to separate it, but perhaps it's not separable.
18 It certainly does refer to a historical practice.

19 Q. Okay. And the basis for this claim,
20 is it a decreed right or is it a beneficial-use
21 claim? Can you identify that on the document?

22 A. Well, I am looking for the basis of
23 the claim. Yeah, it's at the bottom.

24 "Explanatory material: Basis of Claim -
25 Beneficial Use."

1 Q. Okay. So based upon your
2 understanding of Water District 1 regulation, is
3 Water District 1 on regulation throughout the
4 year?

5 A. I believe that it is.

6 Q. Okay. So with respect to this right,
7 would the historic practice of this right be such
8 as not to recognize it in times of regulation
9 because it is a constitutional beneficial-use
10 claim?

11 A. Well, because it is a beneficial-use
12 claim, certainly under the law it would be
13 delivered last after all of the water rights are
14 delivered. I'm not sure I answered your question,
15 Mr. Simpson.

16 Q. So to the extent that the district's
17 on regulation, this right would be delivered after
18 all the other rights within the district because
19 it is a constitutional-use claim and has not been
20 adjudicated?

21 A. It would be.

22 Q. From your perspective, does that fact
23 that it is a constitutional-use claim provide the
24 basis for subordinating this right from a
25 historical practices perspective?

1 A. No.

2 Q. Okay. What does "historical
3 practices" mean to you? Does that mean how one
4 has exercised their right?

5 A. I think that could be part of the
6 historical practice.

7 Q. Okay. Are there other parts of the
8 historical practice, in your mind?

9 A. I think there are other parts. And
10 the other part of this is at least hinted at in
11 the language, and that is that the use, not only
12 in what's been done, but in the intent, has been
13 incidental to the rights of others to the use of
14 water for other purposes. So there is that
15 language at least in the -- in the condition.

16 And so beyond just the delivery of the
17 beneficial-use right in the scheme of water right
18 deliveries, I think beyond that there is a
19 reference to an intent regarding the delivery,
20 that it's been incidental to the rights of others
21 for the use of water credit purposes.

22 Q. And do you have an understanding of
23 what this right is incidental to? What other
24 rights is that language referring to?

25 A. I -- Mr. Simpson, I'm only aware in

1 the documents that were presented and discussed
2 that there are references and documents that
3 discuss the incidental use of the rights for
4 hydropower that are held by the United States of
5 America and Bureau of Reclamation, and quotations
6 from various individuals about the intent that
7 these uses would be incidental to, the other uses.

8 And those other uses, as I understood
9 it, were uses by the Bureau of Reclamation
10 referred to in the documents themselves.

11 Q. Okay. And by referring to "the
12 documents," are you referring to the supplemental
13 director's report that you brought with you today?

14 A. There was information contained in the
15 supplemental director's report. I believe there
16 was also a 1968 report that was written by I think
17 someone from the Bureau of Reclamation that was an
18 attachment to their motion for summary judgment as
19 well that referred to the operations of the Bureau
20 facilities and the relationship of hydropower
21 generated from the facilities to the uses -- the
22 Reclamation uses that were developed.

23 Q. Okay. Are you referring to the
24 preference for irrigation storage in the federal
25 reservoir systems and that preference over power

1 generation at Minidoka Dam?

2 A. Yes, I think that's probably what the
3 documentation discussed.

4 Q. Okay.

5 A. Yeah.

6 Q. So with respect to this incidental
7 language that you've cited to in the priority
8 element for 01-04025, in your view, is that what
9 the incidental language is referring to, that
10 priority of irrigation storage over power
11 generation at Minidoka?

12 A. Mr. Simpson, I don't know whether
13 that -- whether that's the sole use that would be
14 referred to in the condition and in the language,
15 but certainly that's a primary one.

16 Q. As you sit here today, do you recall
17 any other uses that were identified in those
18 documents?

19 A. Well, if you're referring to all of
20 the documents that I have reviewed, I know that
21 there's language at least in some of the decrees
22 that referred to other irrigation rights and other
23 hydropower rights. But I don't think that the
24 incidental language refers to those particular
25 rights.

1 Q. Then at the bottom of this exhibit,
2 Mr. Spackman, under the "Other Provisions
3 Necessary for Definition/Administration of this
4 Water Right," do you see the cite there to the
5 Eagle decrees?

6 A. I do.

7 Q. And so this recommendation by the
8 Department identified that this particular claim
9 for water would be subject to the Eagle decree
10 provisions?

11 A. As I read this language, it says it
12 "...may be subject to the provisions for winter
13 power operation...as recognized." So it doesn't
14 appear to be mandatory language. It appears to me
15 to be language that would cross-reference to the
16 Eagle decrees and possible provisions contained
17 therein for winter power operation.

18 Q. Okay. Are you familiar with the
19 winter power operations at Minidoka Dam and the
20 references in the Eagle decree and storage
21 contracts in the Upper Snake?

22 A. I will have to admit that I am not
23 familiar with the power operations at Minidoka
24 Dam.

25 Q. Okay.

1 A. I have read some of the provisions in
2 the Eagle decrees relating to the operation, the
3 power operation of Minidoka Dam, within the Eagle
4 decrees.

5 Q. Okay. From your perspective, is it
6 important that those prior decrees are referenced,
7 in particular to this right, to the extent that it
8 would govern the administration or definition of
9 this right?

10 A. I think it is important for water
11 rights to refer or cross-reference to decrees and
12 perhaps obligations of parties to put people on
13 notice, as well as to define, to the extent it's
14 necessary for administration of water, what's
15 required for the watermaster to administer those
16 rights.

17 Q. And, Mr. Spackman, would that be
18 because the prior decrees, or in this case a prior
19 decree for a particular right, would identify the
20 elements of a particular water right and the
21 conditions for which it's administered and
22 delivered to?

23 A. Yes.

24 Q. And would the prior decree also
25 identify, then, the parties that are bound by that

1 prior decree and the obligations of the
2 watermaster within that water district to deliver
3 water pursuant to that decree?

4 A. Yes.

5 Q. If you would look at Exhibit 2 in that
6 notebook, Mr. Spackman.

7 That, I believe, is one of the decrees
8 in the Eagle decree, the Burley Irrigation
9 District versus Henry Eagle; is that correct?

10 A. Yes, that is the case heading or
11 title.

12 Q. Okay. And Henry Eagle was the
13 watermaster for Water District 1 at that time?

14 A. It identifies him as the watermaster,
15 yes.

16 Q. Okay. And as watermaster, is then
17 this decree binding upon the water district in
18 this case, "this case" being the Eagle decree?

19 A. It is.

20 Q. Okay. Would this decree also, then,
21 be binding upon the State of Idaho?

22 A. Well, based on the relationship that
23 presently exists between the watermaster, water
24 districts, and the Idaho Department of Water
25 Resources, certainly the watermaster takes

1 direction from the Idaho Department of Water
2 Resources. And the Department would adhere to the
3 provisions of the decree in giving direction to
4 the watermaster for the administration of water
5 rights.

6 Q. Does the Department feel bound by
7 prior adjudications or decrees between water users
8 and the watermaster?

9 A. Yes.

10 Q. Mr. Spackman, if you can quickly
11 summarize the Department's role in the Snake River
12 Basin Adjudication, please.

13 A. Mr. Simpson, not having actually ever
14 worked in the adjudication itself, I can probably
15 slip up in various areas. But my understanding is
16 that the Department of Water Resources is not a
17 party in the Snake River Basin Adjudication.

18 The Department of Water Resources is
19 an advisor to the Court, and the Department of
20 Water Resources prepares recommendations for the
21 Court's consideration following its investigations
22 of claims that have been filed by various
23 claimants and holders of water rights within --
24 within the boundaries of the Snake River Basin
25 Adjudication.

1 Q. So the Department submits
2 recommendations, director's reports to the Court
3 for consideration by the Court and parties; is
4 that correct?

5 A. It does.

6 Q. Okay. And do those recommendations
7 represent the Department's view of how a
8 particular claim should be decreed?

9 A. Yes.

10 Q. Under what circumstances would a
11 recommendation, then, change in the Department's
12 view?

13 A. In the process of claims review, the
14 director's reports are filed with the Court.
15 Those recommendations are made public through a
16 process that's defined. Claimants and other
17 interested entities or persons have an opportunity
18 to object to those recommendations. And then if
19 objections are filed, then there are negotiations
20 that occur.

21 And I think there in the Snake River
22 Basin Adjudication, there have been significant
23 attempts to settle the objections or, maybe even
24 informally, to settle disagreements regarding
25 those recommendations.

1 And based on those discussions,
2 then -- so I think even before the objection
3 period, there may be an opportunity for
4 adjustments to the recommendations to satisfy
5 potential objectors.

6 If that doesn't happen, then the more
7 formal objections are filed, and the parties start
8 down the road of litigating the subcase. And as
9 in all litigation, I assume that there are
10 opportunities for mediation and negotiation.

11 Q. And so if the Department becomes aware
12 of new facts or law that would adjust their
13 thinking or their perspective on a recommendation,
14 would the Department then be under an obligation
15 to amend its director's report?

16 A. Yes.

17 Q. Gary, somewhere in that notebook is
18 also another exhibit that would identify claim
19 01-217.

20 A. I have it.

21 Q. Do you have that there in front of
22 you?

23 A. It's identified as Exhibit No. 3.

24 Q. Okay. And take a moment to look at
25 Exhibit No. 3, if you would.

1 A. (Reviews.)

2 I've reviewed the document.

3 Q. And under the priority date, that
4 element also contains the paragraph we previously
5 discussed with respect to one of the other
6 Minidoka power right claims; correct?

7 A. Yes.

8 Q. And can you identify the basis for
9 this claim for 01-217?

10 A. Yes. On the second page, near the
11 bottom of the printed material, it says -- excuse
12 me, "Explanatory Material: Basis of Claim -
13 Decreed."

14 Q. So as opposed to the prior claim we
15 were discussing, the '25 claim, this 01-217 is a
16 decreed right, is it not?

17 A. Yes.

18 Q. So if you can, can you identify the
19 basis for the inclusion of this paragraph in the
20 priority date element for 01-217?

21 A. I'm not sure I understand the
22 question. Can I identify the basis?

23 Q. Right. We had an earlier discussion
24 about constitutional beneficial-use claims, and we
25 discussed the fact that the 4025 claim was a

1 constitutional beneficial-use claim, and you've
2 identified that 217 is not -- it was a decreed
3 right.

4 So my question is, given that this is
5 a previously-decreed right, can you identify the
6 basis for this language being recommended by the
7 Department?

8 A. Well, Mr. Simpson, I do not have a
9 copy, nor have I reviewed the original decree that
10 authorized this -- this particular water right.
11 So I cannot tell you whether any of this language
12 was contained therein in that particular decree.
13 So I have not reviewed that particular language.

14 And all I can speak to is that this
15 condition or the language that follows the
16 priority date refers to the historic practice for
17 the use of water, and that that historic practice
18 is incidental to the rights of others to the use
19 of water for other purposes.

20 Q. So would you agree that the basis for
21 that paragraph is the historical practices remark,
22 that is, the exercise of that right forms the
23 basis for that paragraph?

24 A. I think both the exercise of the water
25 right and, as I explained before, the intent that

1 at least is demonstrated in the documents that we
2 previously discussed by the Bureau of Reclamation,
3 that the use be incidental.

4 Q. That the use of water for power
5 generation at Minidoka Dam be incidental to
6 irrigation storage in the federal reservoir
7 systems above Milner Dam; correct?

8 A. Well, I don't know whether it
9 specifically talks about irrigation storage or
10 whether it talks about the Reclamation projects
11 and the use of water for Reclamation. And I don't
12 recall that specific language, but certainly it --
13 that intent is described in those documents.

14 Q. And this recommendation also
15 identifies in the "Other Provisions Necessary" the
16 reference to the Eagle decree, does it not?

17 A. It does at the bottom of the first
18 page. The language refers to Burley Irrigation
19 District versus Eagle and then the
20 Aberdeen-Springfield Canal Company versus Eagle
21 decree.

22 Q. And are you aware that the Eagle
23 decree was a supplemental decree to the Foster
24 decree, the Woodville decree and the Rexburg
25 decree?

1 A. I am aware that it is -- that both
2 decrees were supplemental decrees supplementing
3 previous decrees issued by courts of the state.

4 Q. Can you, Mr. Spackman, identify for me
5 any circumstances for which this right would not
6 be subject to the provisions of the Eagle decree?

7 A. Mr. Simpson, I guess my question is if
8 we talk about the Eagle decree, or the two Eagle
9 decrees, I guess the question that I have in
10 response -- and maybe you can answer this -- is --
11 and I'm not asking questions. I'm just trying to
12 clarify what the four corners of the document are
13 that you're referring to.

14 Q. Well, I'm referring to what has been
15 marked as Exhibit 2, which is the Burley
16 Irrigation/Eagle decree.

17 A. Okay.

18 Q. And I would ask my question not only
19 with respect to that supplemental decree, but
20 also, then, the Aberdeen-Springfield case that was
21 brought against the watermaster as well, which is
22 commonly referred to as also the Eagle decree.

23 A. And you're asking about who was bound
24 by the decree?

25 Q. Well, this provision identifies that

1 the administration of this right "may be" subject
2 to the provisions of the winter power operations.

3 A. Right.

4 Q. And my question is, can you identify
5 for me circumstances for which this right would
6 not be subject to the provisions of the Eagle
7 decree, and in particular the winter power
8 operations at Minidoka Dam?

9 MR. BROMLEY: Objection. Calls for a legal
10 conclusion.

11 MR. SIMPSON: I'm not asking for a legal
12 conclusion, even though he is an attorney. Just
13 his understanding.

14 MR. BROMLEY: Just noting, John.

15 THE WITNESS: Well, Mr. Simpson, I know
16 that both decrees refer by reference to sample
17 language that is taken from contracts executed
18 between the Bureau of Reclamation and water users.

19 And in both decrees there's language
20 that -- if I can find it -- I'm more familiar, I
21 guess, with the Aberdeen-Springfield. But I'm
22 looking here in the Burley Irrigation District
23 language.

24 Q. (BY MR. SIMPSON): Gary, are you
25 looking for the winter power operation provision?

1 A. No. I'm not looking for that
2 specifically. I'm actually looking for the
3 language that just precedes the signature page by
4 the district judge in this case. It would be on
5 page 20. And I guess I would be looking at
6 paragraph 6.

7 It says, "That the pertinent
8 paragraphs of the contract entered into by the
9 United States of America, Bureau of Reclamation,
10 and the Minidoka Irrigation District, the contents
11 of which paragraphs were confirmed by all other
12 parties Plaintiff in amendatory and supplemental
13 contracts" -- so certainly they were confirmed by
14 all other parties plaintiff -- "a copy of which"
15 and I still have -- it says they are "...hereby
16 ratified, confirmed, and approved."

17 So it appears to me that the contracts
18 were approved and -- ratified, confirmed, and
19 approved by the Court. To the extent that these
20 paragraphs and the language in the contracts is
21 necessary for administration of water, I'm not
22 sure.

23 The Court, at least to me -- and
24 again, I'm venturing, I guess, into interpreting
25 this language, which I'm not sure I should be

1 doing. But I think there's a question about what
2 it means when the Court ratifies, confirms, and
3 approves the language, and who is bound by that
4 ratification, confirmation, and approval.

5 Q. If you'd refer back to page 19 --

6 A. Okay.

7 Q. -- Mr. Spackman, paragraph 4 at the
8 top of the page.

9 A. Okay.

10 Q. Does that provide you some insight as
11 to in the administration of the Eagle decree what
12 the intent was with respect to the parties being
13 bound by the Eagle decree?

14 MR. BROMLEY: Objection. Calls for a legal
15 conclusion.

16 THE WITNESS: Mr. Simpson, it refers to the
17 "parties Plaintiff and United States of America,"
18 who I understand was not a party to this -- these
19 supplemental decrees, "and contracts between -- as
20 the same have been amended and modified, are
21 intended to be and are binding upon all persons
22 claiming rights to the use of the waters of the
23 Snake River and constitutes common plan for
24 administration of the Snake River."

25 And it looks to me like the Court is

1 saying the contracts are ratified, they're
2 confirmed. I don't know that -- again, it's a
3 question out there. I don't know whether the
4 Court can bind the Bureau if it's not a party.
5 But I guess the question to me is whether these
6 provisions bind the watermaster at all.

7 This is a reference, in my opinion, to
8 contracts between the parties and the obligations
9 between those parties. And I'm not sure in the
10 decree that it -- I'm just raising the question.
11 I'm not sure the watermaster is bound by any of
12 those contractual provisions.

13 Q. (BY MR. SIMPSON): Even if they're
14 contained within the decree that's entered by the
15 Court?

16 A. Well, they're confirmed, they're
17 included, and by reference made a part thereof. I
18 don't know whether -- in that language whether the
19 Court is saying all of the provisions of all of
20 these contracts the watermaster is bound to
21 administer. I would question whether that
22 reference imposes that level of imposition on the
23 watermaster and in the performance of his duties.

24 Q. With respect to the language there in
25 that paragraph that says, quote, "binding upon all

1 persons claiming rights to the use of the waters
2 of the Snake River and its tributaries, above
3 Milner Dam," would you agree that that language
4 would include more than just those parties that
5 are contract holders with the Bureau of
6 Reclamation?

7 MR. BROMLEY: Objection. Calls for a legal
8 conclusion.

9 Q. (BY MR. SIMPSON): Well, Mr. Spackman,
10 let me ask you this question: Are there users of
11 the water above Milner Dam that are not contract
12 holders?

13 A. Yes.

14 Q. Okay. And those would be natural-flow
15 right, live-flow water right holders? Would that
16 be one group?

17 A. If the natural-flow water right
18 holders did not hold contracts for storage with
19 the Bureau of Reclamation, then they might qualify
20 as a group.

21 Q. Okay.

22 A. Not being a party to the contracts
23 with the Bureau.

24 Q. Right. Apart and distinct from that
25 first group being contract holders; correct?

1 A. Yes.

2 Q. Okay. And would this language that I
3 just quoted identify a broader group, then, in
4 that case than just simply contract holders?

5 A. Well, the language appears to bind
6 those right holders. I don't know whether they
7 were included as parties to this particular
8 supplemental action or not. So I guess I don't
9 know whether they're bound or not.

10 The language appears to bind -- as I
11 read it, it says it's "...binding upon all persons
12 claiming rights to the use of water in the Snake
13 River and its tributaries, above Milner Dam."

14 Q. Do you have an understanding of what
15 constitutes the "common plan" as it's described in
16 that paragraph?

17 A. I'm not prepared to interpret that
18 language.

19 Q. Mr. Spackman, my original question was
20 whether or not you could identify circumstances
21 where the exercise of the Minidoka power right
22 would not be subject to the Eagle decrees, if you
23 recall that original question, and then we looked
24 at the Eagle decree itself.

25 Are you able to identify or form any

1 circumstances in which the exercise of the
2 Minidoka power rights would not be subject to the
3 provisions of the Eagle decree? And again, my
4 question goes to the fact that the language
5 identifies the word "may," "may be subject," and
6 I'm trying to identify if there are circumstances
7 for which you can identify for which the power
8 right could be exercised outside of consideration
9 of the Eagle decree.

10 MR. STANISH: Could you repeat the
11 question?

12 MR. SIMPSON: Well, I'm asking Mr. Spackman
13 if he can identify circumstances in which the
14 exercise of the Minidoka power right would not be
15 subject to the provisions of the Eagle decree,
16 given the language in the remark.

17 THE WITNESS: Well, as an initial
18 statement, Mr. Simpson, I would say that the
19 exercise of the right is subject to the Eagle
20 decree.

21 So then the question I would ask is
22 what are the -- what is necessary for -- when we
23 talk about the exercise of -- and I hope I'm not
24 paraphrasing, but the exercise of the decree.
25 Now, am I properly referring to your question or

1 have I mutated?

2 Q. (BY MR. SIMPSON): No, I think you've
3 answered it.

4 A. Okay. So in exercising the decree --
5 and I don't know who will be exercising.

6 I'm assuming you're talking about the
7 watermaster in the administration of the water
8 rights?

9 Q. Well, it's both the watermaster and
10 the water right holder.

11 The water right holder would exercise
12 the right; correct?

13 A. Okay. So the water right holder would
14 exercise the water right administered by the
15 watermaster?

16 Q. Correct.

17 A. Okay.

18 Q. So in the exercise and administration
19 of the Minidoka power right, is it correct to
20 state that that exercise and administration would
21 be subject to the provisions of the Eagle decree?

22 A. It would be subject to the provisions
23 of the Eagle decree, to the extent that those
24 provisions are necessary for the administration of
25 water.

1 Q. And so to the extent that those
2 provisions govern the exercise of the Minidoka
3 power right, they should be included in the decree
4 to aid the watermaster in administering the water
5 right and identify the terms or conditions for
6 which the water right holder exercises the water
7 right; correct?

8 A. They -- the conditions of the decree
9 should be included to the extent that they're
10 necessary for the watermaster to administer those
11 rights.

12 Q. And so to that extent, should this
13 reference to the Eagle decree be provided in the
14 ultimate recommendation for this water right to
15 ensure that it is exercised in a manner consistent
16 with the Eagle decree and those previous decrees?

17 A. The reference to the Eagle decrees is
18 necessary. The question I have is whether the
19 language needs to be mandatory or permissive as
20 we've distinguished previously in the discussion.

21 Q. Uh-huh.

22 A. The language, at least right now,
23 appears to be discretionary. It has a "may"
24 describer, not a "shall." It's not mandatory in
25 nature. So it appears to me to be a

1 cross-reference to the decrees themselves and the
2 provisions within the decrees.

3 Q. Okay. So can you identify for me,
4 then, any circumstances with respect to the
5 exercise of the Minidoka power rights that there
6 shouldn't be a preference for irrigation storage
7 in the federal reservoirs?

8 A. Mr. Simpson, I am familiar with sample
9 language from at least one of the contracts, and
10 there may be -- and it may actually be two
11 contracts. And I believe this is contained in
12 Exhibit E -- I know it's Exhibit E, at least in
13 the Aberdeen-Springfield. I would have to check
14 to see if that exhibit reference is the same in
15 the Burley Irrigation District.

16 Q. And, Gary, I think you're referring to
17 paragraph 24(a) of Exhibit E?

18 A. Yes. The reference to paragraph 24(a)
19 is familiar to me. Let me see if I can find it.

20 Yes, this is on page 28 of Exhibit 2.
21 And -- which is the Burley Irrigation District
22 versus Eagle decree. And it begins just
23 underneath the title "Winter Power Operation;
24 Minidoka Powerplant."

25 Q. And so with respect to this

1 paragraph 24(a) that we're referring to, this
2 would be the provisions out of the Eagle decree
3 that would govern the exercise of the Minidoka
4 power right and the administration of the Minidoka
5 power right, would it not?

6 A. Well, again, Mr. Simpson, I'll go back
7 to my original reading of the decree itself and
8 what the Court said. And it -- I don't know
9 whether this provision is binding at all on the
10 watermaster or the Department because of the
11 language that references to this contractual
12 language.

13 So the Court says that this language
14 or the contractual obligations of the parties are
15 confirmed. When I say "parties," I'm talking
16 about the parties plaintiff, water right holders,
17 and the Bureau of Reclamation. It's at least
18 saying that those obligations are intact and that
19 it recognizes those obligations.

20 Now, I don't know that these
21 provisions are necessary for the administration of
22 water. I don't know the answer to that, because
23 I'm not sure that these documents are binding on
24 the watermaster or the Department at all.

25 Q. Do you have an understanding of

1 whether the right's been exercised in a manner
2 consistent with these documents that are described
3 in Exhibit 2?

4 A. Well, I at least have some peripheral
5 knowledge, and it's secondhand. I have not myself
6 dealt with the -- or administered the water rights
7 themselves. So it's only in information that's
8 been conveyed to me about the operation.

9 And it's my understanding that these
10 provisions may have been followed, at least with
11 respect to the way in which the determination is
12 made whether water should be stored in the -- in
13 the project reservoirs or whether it should be
14 delivered downstream for purposes of power
15 generation.

16 So I at least have some secondhand
17 knowledge that the provisions of this contract
18 have at least been followed in principal for the
19 delivery of water.

20 Now, I have no knowledge about certain
21 provisions in here related to compensation for
22 foregone hydropower production. I have no
23 knowledge about those computations or what money
24 or remuneration has been paid. I know that the
25 watermaster has at least provided some information

1 for those purposes.

2 Q. Based upon the presence of this
3 provision identifying the Eagle decree, in
4 reference to the Eagle decree, is it the
5 Department's position that that reference and
6 consideration of the provisions of the Eagle
7 decree are necessary in either the definition or
8 administration of this right?

9 A. What reference are you referring to?

10 Q. The reference we've been talking about
11 on water right 217, the reference that identifies
12 "The delivery of this water to this right may be
13 subject to provisions for winter power operations
14 at the Minidoka Power Plant as recognized in the
15 Burley Irrigation District versus Eagle
16 supplemental decree."

17 Is it the Department's view that this
18 reference to the Eagle decree is necessary to
19 either define or administer this water right?

20 A. Mr. Simpson, if I look at the entire
21 recommendations for water right 01-217 -- this is
22 Exhibit 3 -- the reference to the decree is a
23 reference that, in my opinion, was based on the
24 recommendations that are here and the
25 recommendation for the language following the

1 priority date, the way in which those rights were
2 to be administered through historical practices,
3 and through the intent of incidental use for the
4 Reclamation projects.

5 Or I could recharacterize it and say
6 the subordination of the use of water for power
7 here would then make the reference to the Eagle
8 decrees not mandatory, but one of cross-reference;
9 in other words, saying these rights are
10 subordinated to these other uses, but there are
11 other provisions, contractual provisions within
12 the Eagle decree, that may be -- that may bind the
13 parties in some way. That's the way I read this
14 recommendation.

15 Q. So I'm trying to understand your
16 statement.

17 Are you saying that the language under
18 the priority date, the paragraph that we've talked
19 about before, is premised upon the contractual
20 relationships that are identified in the Eagle
21 decree?

22 A. Well, I don't know the answer to the
23 question, because I don't know whether it's
24 premised upon it or not. What -- the way I just
25 read this language as it's presented to me, I was

1 not part of the development of these -- this
2 language, and I don't know what was behind it.

3 But as I read it, it appears to me
4 that the language directly below the priority date
5 would then establish the subordination of the
6 hydropower uses for this right at Minidoka. It
7 would establish if those rights are subordinated
8 to other uses, as described there, because of
9 historical practice and because of an intent that
10 the rights -- that the rights would be incidental
11 to the rights of others and that the -- that now
12 the language under "Other Provisions Necessary for
13 Definition/Administration" is a reference to the
14 Eagle decrees and the contractual provisions.

15 And the statement is that the -- for
16 definition and possible administration that there
17 may be provisions in there that may be important.
18 That's all I can say.

19 Q. Okay. You've called this a
20 subordination, the paragraph in the priority date
21 element?

22 A. Yeah.

23 Q. Is it a full subordination, from your
24 perspective?

25 A. Well, it's not full subordination,

1 because there is language that says "The
2 appropriator shall not make a delivery call for
3 hydropower generation, except as against junior
4 hydropower rights."

5 Q. Is it subordination as against all
6 other rights junior to this priority date but for
7 junior hydropower?

8 A. Well, that's the way I read the
9 language.

10 Q. So would that be the way you would
11 administer that right if it were decreed that way?

12 MR. STANISH: Calls for speculation.

13 THE WITNESS: Mr. Simpson, I want to say
14 yes. I guess as I reflect on how the rights are
15 administered year-round in Water District 01 and
16 the fact that storage is impounded in the upstream
17 reservoirs, based on forecasting of snowpack,
18 rainfall, carryover storage, that there has to be
19 at least in this some view of the historical
20 practice of the exercise of water rights for
21 storage in upstream reservoirs and for other uses
22 in the subordination.

23 So I guess to me there probably is
24 some qualifier in this because of the "historical
25 practice" language.

1 Q. In the exercise of this right, would
2 the United States have the ability to call out
3 other junior rights with this language in the
4 priority element?

5 A. It says that there would be at least
6 one class of junior rights that they could call
7 out.

8 Q. Junior hydropower?

9 A. Right.

10 Q. Other than junior hydropower, would
11 the United States have the ability to make a call
12 or request administration as against juniors?

13 A. My understanding of this language is
14 that they would not have that ability.

15 Q. Okay. Mr. Spackman, I think in your
16 notebook there with the exhibits it also, then,
17 has maybe Exhibit 6 or 7, the affidavit of --
18 well -- the United States' motion.

19 MR. BROMLEY: This is 7.

20 THE WITNESS: Go ahead.

21 MR. SIMPSON: Maybe it does not.

22 We can go off the record for just a
23 minute.

24 (Recess.)

25 (Exhibit 9 marked.)

MR. SIMPSON: Back on the record.

Q. Mr. Spackman, before we took a short break, we were discussing provisions of the Eagle decree.

And if the Eagle decree is not referenced in the decree for water right 217, from your perspective, would future administration of that right be subject to consideration of the Eagle decree?

MR. STANISH: Calls for a legal conclusion.

Q. (BY MR. SIMPSON): Well, you, as the director, have a duty to administer water --

A. Right.

Q. -- within the basins of the Snake River within the state; right?

A. Uh-huh.

Q. So in administering this water right, 01-217, if the ultimate decree in the Snake River Basin Adjudication does not contain either a reference or a cite to the Eagle decree as being applicable to the administration of this right, would those provisions still be considered by the Department in the administration of 217?

A. Well, at least with respect to my general understanding of what the Snake River

Basin Adjudication is attempting to accomplish. I would assume, at least to begin with, that the elements necessary for administration of the water rights would be contained within the decrees that are issued by the Snake River Basin Adjudication and provisions of previous decrees would be superseded by the decrees of the Snake River Basin Adjudication.

Q. So as the recommendation now stands -- that is, the Department's recommendation -- for water right 01-217, the Department has identified that the exercise of that right may be subject to provisions of the Eagle decrees; correct?

A. Yes.

Q. So the Department's identified that the Eagle decree and provisions of the Eagle decree need to be considered in future administration by the Department of Water Resources?

MR. STANISH: Objection. The question misstates the facts in the record.

Q. (BY MR. SIMPSON): If I've misstated it in any way that you don't understand, Mr. Spackman, just let me know.

A. Well, the way the recommendation is

stated, it says, "The delivery of water to this right may be subject to the provisions for winter power operation at Minidoka Power Plant." And because it says "The delivery of water to this right may be subject to the provisions of winter power operation," it -- it at least talks about the delivery of water and links it to the Burley Irrigation -- well, the two Eagle decrees.

Q. So this recommendation still would link the two Eagle decrees to the exercise of this right?

MR. STANISH: Objection. Again, it misstates the record in that --

MR. SIMPSON: I'm asking for his opinion.

MR. STANISH: Can I finish?

I'll just finish my objection in that it misstates the record in that the remark in question only references the Minidoka winter power operations remark of those decrees.

Q. (BY MR. SIMPSON): Is the winter power operations part of the exercise of this right?

A. Well, certainly the winter power operation would be part of the exercise of this water right.

Q. Okay. And then would the provisions

of the Eagle decree that reference the winter power operations be tied to the exercise of this right pursuant to the Department's recommendation as it stands at this point?

A. And if I qualify my response by saying that the water is exercised by the water right holder who is bound by the contract, it -- delivery of water and the exercise of this right will be subject to the provisions in the Burley Irrigation District and Aberdeen-Springfield Canal Company decrees.

Q. And the Department of Water Resources and the watermaster would at least overview the exercise of this water right, would they not?

A. It is the responsibility of the watermaster to administer the water right and deliver that water according to the decrees of the Court.

Q. So if it's that duty of the watermaster and the Department, then having this reference as they administer this water right, that reference to the Eagle decree, this recommendation identifies the necessity of that recommendation as a part of the packet of information available to the watermaster and the

1 Department in administering the right; correct?

2 A. I guess I would say no, because I'm
3 uncertain.

4 And so I'll go back to the language
5 again. It says, "The delivery of water to this
6 right may be subject to the provisions for winter
7 power operation at the Minidoka plant as
8 recognized in the Burley Irrigation."

9 So I guess I'm uncertain as to whether
10 this language would be a cross-reference because,
11 again, it's -- the term "may" is there, whether
12 this is a cross-reference so that the obligations
13 of the parties -- and when I say "the parties,"
14 I'm talking about the parties to the contracts.
15 That would be the holder of the water right or --
16 I shouldn't say that. Yeah, I would. The Bureau
17 of Reclamation holds the water right and the
18 obligations in the exercise of that right to those
19 with whom the Bureau of Reclamation contracted.

20 I mean there is a reference to this,
21 and it may be -- I mean it could be limited just
22 to a reference of the obligations of those parties
23 as among themselves, and that the delivery of
24 water and the exercise of that right may be
25 subject to those provisions.

1 Now, whether the delivery of water and
2 the reference here also binds the watermaster to
3 certain provisions that are contained therein but
4 not contained in the four corners of this
5 recommendation, I guess I can't speak to that.

6 Q. Well, I'm not asking whether or not
7 the watermaster's bound with the insertion of this
8 language in the other provisions necessary.

9 I'm asking whether or not the language
10 that's in this present remark that references the
11 Eagle decree, and perhaps the exercise of this
12 right, was deemed by the Department necessary to
13 either define or aid in the administration of that
14 right to ensure that the right is exercised
15 properly?

16 A. My answer is yes, I think the language
17 was included in there -- in the recommendations,
18 and intentionally included, to ensure that those
19 provisions and the confirmation of the contractual
20 provisions were made clear to the parties in that
21 the obligations under those contracts could affect
22 the delivery of that water during winter power
23 operations.

24 Q. Mr. Spackman, let's look at
25 Exhibit No. 9. And if you could identify

1 Exhibit No. 9 for us, please.

2 A. I have a document that's been marked
3 as Exhibit 9. The title of this document is
4 "United States' Motion for Summary Judgment." And
5 it's for the District Court of the Fifth Judicial
6 District in the Snake River Basin Adjudication.

7 Q. And that document has two attachments
8 to it, does it not?

9 A. Yes.

10 Q. And Attachment B identifies remarks
11 for the Minidoka and Palisades power rights?

12 A. Yes.

13 Q. And in the pile of documents you
14 brought today, you identified, I believe, this
15 document that I'm handing to you, which is certain
16 language.

17 Do you see that language? And could
18 you compare it to the language in Attachment B.

19 A. (Reviews.)

20 Q. Does it look like the same language?

21 A. Well, my cursory review shows that
22 there is some identical verbatim language, so it
23 appears that they are identical in places. The
24 two documents contain other language that is not
25 identical.

1 Q. Okay. Then with respect to Exhibit 9
2 and this language that's identified in
3 Attachment B, did you have any involvement in
4 discussing this language with anyone outside of
5 the Department of Water Resources?

6 A. I have discussed this -- this language
7 with deputy attorney generals, and those are the
8 only individuals that I've discussed this language
9 with.

10 Q. Okay. And with respect to the
11 document you brought with you today -- let me back
12 up for a moment.

13 We've been discussing today the
14 Department's recommendation.

15 A. Right.

16 Q. And that recommendation is still the
17 Department's existing document that it has before
18 the SRBA court; correct?

19 A. I believe that is correct, yes.

20 Q. Okay. And since that time, are you
21 aware that there's been some ongoing discussions
22 regarding the objections filed in these various
23 subcases, 217, 218, 2064, 2068, 4024, 4025, and
24 4054? Are you aware of those objections?

25 A. I am aware that there were objections

1 filed to the recommendations on these water
2 rights.

3 Q. And are you aware that both the United
4 States and the State of Idaho have filed motions
5 for summary judgment on proposing certain language
6 as a matter of law for the Court to consider with
7 respect to 217, 218, and the other subcases I just
8 identified?

9 A. I am aware that there are motions for
10 summary judgment or partial summary judgment filed
11 by the State of Idaho and by the United States of
12 America Bureau of Reclamation, and that they're --
13 in those documents there is inclusion of at least
14 language that appears to be similar to the
15 language in Exhibit 9 and the other document that
16 you were referring to, Mr. Simpson.

17 MR. SIMPSON: Okay. Let's go ahead and
18 mark this other document as Exhibit 10.

19 (Exhibit 10 marked.)

20 Q. (BY MR. SIMPSON): And this is a
21 document that you brought with you today,
22 Mr. Spackman.

23 And can you identify the source of
24 that document?

25 A. As I recall, I received this document

1 from Garrick Baxter, deputy attorney general, who
2 has detailed work for the Idaho Department of
3 Water Resources. And it was presented to me,
4 along with a number of other documents.

5 Q. Okay. Did Mr. Baxter tell you or
6 explain to you whether or not this is the proposed
7 language in any of the motions that were filed in
8 this case?

9 A. I don't know that I can link between
10 this document and the actual language that was
11 proposed. So I can't speak without a review
12 whether this language represents the language that
13 was proposed in the motions for summary judgment.

14 Q. And you brought with you today, I'm
15 going to hand you this document. If you could
16 identify it for us.

17 A. What you've handed me is a Memorandum
18 in Support of the State of Idaho's Motion for
19 Partial Summary Judgment. And again, this appears
20 to be a subcase in the Snake River Basin
21 Adjudication for Minidoka power rights and
22 Palisades power rights.

23 Q. Okay. And does it contain language
24 similar, if not identical, to what's been marked
25 as Exhibit 10?

1 A. Mr. Simpson, I've compared the
2 language in Exhibit 10 and the language that's
3 contained in section 2, margin heading A, Minidoka
4 power rights, and B, Palisades power rights, and
5 that's contained on pages 3 through 5 of the
6 Memorandum in Support of the State of Idaho's
7 Motion for Partial Summary Judgment. Not having
8 compared every word, but again, comparing the
9 documents in a cursory fashion, the language
10 appears to be identical.

11 Q. Okay. Mr. Spackman, with respect to
12 the language in Exhibit 10, did you have any
13 involvement in the drafting of that language?

14 A. I did not.

15 Q. Okay. Is that language recommended by
16 the Department of Water Resources in these
17 subcases?

18 A. Mr. Simpson, I can't tell you whether
19 this language has actually been incorporated into
20 an official recommendation to the Court. All I
21 can tell you is that I know that it's contained in
22 a memorandum in support of a motion for summary
23 judgment before the Court at the present time.

24 Q. That was filed by the State of Idaho;
25 correct?

1 A. Yes.

2 Q. Okay.

3 A. I have read the -- the supplemental
4 director's report as well as looking -- and it
5 certainly was not included in that supplemental
6 director's report. And also based on our
7 discussions of Exhibit 3, I'm not aware that the
8 Department itself has recommended this language.
9 But I don't know.

10 Q. All right. So then with respect to
11 this supplemental director's report, 706 report
12 that was filed by the Department of Water
13 Resources on April 10th, 2008, is this director's
14 report applicable to the language that's contained
15 in Exhibit 10, or does it address different
16 language?

17 A. It addresses different language.

18 Q. Okay.

19 A. In fact, if I could just clarify, it
20 appears to me that these recommendations are --
21 well, maybe I better back up -- back off.

22 They seem to have more similarity to
23 the recommendations that were previously reviewed.

24 Q. The now pending director's
25 recommendations before the SRBA?

1 A. Yes.

2 Q. Under the language contained in
3 Exhibit 10 for the Minidoka Power Plant rights 217
4 and 218, does that remark under those rights
5 contain any reference to the Eagle decree?

6 A. I do not find a direct reference to
7 the Eagle decree.

8 Q. Does the remark identify any
9 subordination, from your perspective? That is,
10 subordination of the exercise of these rights
11 vis-à-vis other rights within the waters above
12 Milner.

13 MR. FLETCHER: You're referring to
14 Exhibit 10?

15 MR. SIMPSON: Yes.

16 THE WITNESS: And your question is whether
17 the language contains any direct reference to
18 other water rights authorizing diversion of water
19 from the Snake River above Milner?

20 Q. (BY MR. SIMPSON): Any reference to a
21 limitation on the exercise of this right vis-à-vis
22 other rights for the waters of the Snake River
23 above Milner.

24 A. Well, yes, I think there is a
25 reference to other water rights in the language.

1 Q. Is there a reference to a
2 subordination?

3 A. There is, at least as I read it,
4 some -- an element of subordination in the
5 language. It doesn't say "subordination."

6 Q. If you were to compare this language
7 to the language we've been discussing in the
8 director's recommendation under 217 under the
9 priority element, is the subordination or the
10 reference to the other water rights that you
11 identified in that language, the proposed remark
12 language, in Exhibit 10 the same as the
13 subordination that you described earlier in the
14 director's recommendation for 217?

15 A. No, I don't read it as being the same.

16 Q. Okay. So if there was a limitation on
17 the exercise of either water right 217 or 218
18 under the proposed remark, it would be a different
19 limitation as what's described in the director's
20 recommendation for 217 or 218?

21 A. Okay. Would you restate the question
22 again?

23 Q. Okay. What I'm asking you to do,
24 Mr. Spackman, is compare the language that you
25 have before you in Exhibit 10 for the remark for

1 water rights 01-217 and 01-218, and in comparing
2 that language that you've identified that there is
3 a limitation or relationship between the exercise
4 of those rights and other rights, is that
5 limitation or condition for exercise the same
6 limitation or condition as to what you described
7 in the director's report for water right 01-217?

8 A. No, it is not.

9 Q. And in what ways, Mr. Spackman, from
10 your perspective, is this limitation different?

11 A. Well, as I read the recommendation --
12 that would be the language in Exhibit No. 3 -- it
13 states that the exercise of the right shall be
14 conducted in a manner that recognizes historical
15 practice, and that generation incidental to the
16 rights of others to the use of water for other
17 purposes.

18 And then the additional language, "The
19 appropriator shall not make a delivery call for
20 hydropower generation except as against junior
21 hydropower rights." I cannot find similar
22 language in this document, Exhibit 10.

23 Q. From your perspective as director of
24 the Department of Water Resources, then, would the
25 exercise of 217 vary, depending upon which

1 language was applicable, either the proposed
2 remark, as you have in Exhibit 10, or the language
3 that's contained within the director's
4 recommendation that's now pending?

5 A. Well, I'm not sure, Mr. Simpson,
6 whether there would be a variation or not. And
7 the reason that I say that is because the -- the
8 conditions, at least that are proposed here for
9 these water rights, the 01-217 and 218 -- let me
10 look at it again.

11 Well, certainly if we were talking
12 about wintertime operation, I'm not sure factually
13 there would be a departure or a difference between
14 the two, because it may be that other rights that
15 would be -- let me look at this -- other rights
16 that would be junior to these hydropower rights
17 might not be diverting water anyway.

18 Now, there is no -- as I read the
19 language, there is no reference in this language
20 to -- necessarily to wintertime operation, as I
21 read the language in Exhibit 10.

22 Q. Okay.

23 A. So there is a possibility of
24 departure.

25 Q. If there are junior rights, junior in

1 priority to 217 or 218 that would divert in the
2 wintertime in the nonirrigation season --

3 A. Uh-huh.

4 Q. -- would the language under the
5 proposed remark in Exhibit 10 allow Reclamation to
6 make a call on those to prevent the delivery of
7 the water under those rights?

8 MR. BROMLEY: Calls for speculation.

9 THE WITNESS: I think there is a
10 possibility of that.

11 Q. (BY MR. SIMPSON): Okay. And I think
12 as we discussed previously with respect to
13 Exhibit 3 and the language under Exhibit 3, that
14 ability to make a call would not exist under that
15 language; was that your conclusion?

16 A. That is my conclusion, reading the
17 language in Exhibit 3.

18 Q. Okay. Based upon your experience,
19 Mr. Spackman, when you look at the language in
20 Exhibit 10 and it uses the phrase "water otherwise
21 storable in the reservoir system," do you see that
22 language?

23 A. I do.

24 Q. Based upon your experience --

25 A. No, wait a minute. Okay. I saw two

1 reservoir system."

2 Q. Okay. And would "otherwise storable"
3 be the storing of water pursuant to those federal
4 contracts that we've talked about before?

5 MR. STANISH: Objection. Calls for a legal
6 conclusion.

7 THE WITNESS: No, I think it would be
8 storage and impoundment of water pursuant to water
9 rights that are held for storage of water. And
10 I'm assuming that those rights are held by the
11 Bureau of Reclamation.

12 Q. (BY MR. SIMPSON): Okay.

13 A. There are contracts, but the contracts
14 are not what authorizes the storage.

15 Q. All right. From your perspective as
16 director in looking at this proposed remark for
17 217 and 218, does this remark that's proposed
18 further define the water right?

19 A. You're talking about the language in
20 Exhibit 10?

21 Q. Yes, sir, in Exhibit 10, the first
22 language for rights 01-217 and 218.

23 A. I guess I would -- I guess my response
24 is I would not say that it further defines the
25 right.

1 references to "reservoir system."

2 You're looking at the one up above
3 about the third to halfway through the page?

4 Q. Correct, sir.

5 A. So -- so the operative phrase is
6 "...whenever operation of Minidoka Power Plant to
7 the full extent of those water rights for power
8 production would result in loss of water otherwise
9 storable in the reservoir system."

10 Q. Right. That's what I'm referring to.

11 A. Okay.

12 Q. What does "water otherwise storable"
13 mean to you as director?

14 MR. STANISH: Objection. Calls for a legal
15 conclusion.

16 THE WITNESS: The way I would interpret
17 this language is that based on the forecasts that
18 are made regarding the possibility of filling the
19 reservoirs in the Snake River system, that based
20 on those predictions, if there were a
21 determination that sending water downstream for
22 power generation would result in loss of water
23 that could be stored in those reservoirs, that
24 would -- that would be how I would interpret the
25 words "loss of water otherwise storable in the

1 Q. From your perspective as director,
2 does it provide any additional information for the
3 administration of the right?

4 A. There certainly is additional detail
5 in the language for how the right should be
6 administered than the other language.

7 Q. For the how the right should be
8 administered or for how the right should be
9 exercised?

10 A. Well, as I read this language, there
11 probably are both components in the language.

12 Q. Okay.

13 A. But given its location or at least its
14 prospective location and its relationship to
15 priority date, I would interpret the language at
16 least as being directed towards administration.

17 Q. Okay. Let's turn back to Exhibit 2,
18 then, Mr. Director. Under paragraph 24, I think
19 we were looking at --

20 A. Exhibit 2.

21 Q. -- page 28. And that is the winter
22 power operation Minidoka Power Plant.

23 A. My confusion, Mr. Simpson, is I'm
24 looking at this pagination, and it appears it's
25 page 28 of Exhibit E; is that correct?

1 Q. That's correct.
 2 A. Because there are other page numbers
 3 that aren't consistent.
 4 MR. BROMLEY: There you go.
 5 THE WITNESS: But I think I have the place
 6 where you're referring to.
 7 MR. STANISH: Is it all right if we give
 8 him a sticky so he knows where it is?
 9 Q. (BY MR. SIMPSON): You may be
 10 referring to that once or twice.
 11 A. Okay.
 12 Q. And so I'm going to hand you,
 13 Mr. Spackman, a document that I would like to mark
 14 as the next exhibit.
 15 That would be No. 11.
 16 (Exhibit 11 marked.)
 17 Q. (BY MR. SIMPSON): And I'll just
 18 explain to you that this was an effort that was
 19 made to take part of paragraph 24 of Exhibit 2 and
 20 then compare it with the proposed remark from
 21 Exhibit 10 that we've been discussing and compare
 22 it through striking out portions of
 23 paragraph 24(a) of Exhibit 2 and what language was
 24 inserted to arrive at, if you will, the language
 25 in Exhibit 10.

1 So if you could take a moment and look
 2 at Exhibit 11 and compare it both to the proposed
 3 language that we've been looking at on Exhibit 10,
 4 the first paragraph that addresses rights 217 and
 5 218, and then compare it also to paragraph 24(a)
 6 of Exhibit 2 to see if you can identify for me the
 7 effort that was made that this language is
 8 consistent before being stricken out with
 9 paragraph 24(a), and then consistent with the
 10 language that's contained in Exhibit 10. That was
 11 kind of long and winded.
 12 Do you understand to any degree what I
 13 just tried to explain?
 14 A. I think I understand the task you've
 15 given me.
 16 Q. Excellent.
 17 A. Mr. Simpson, it may be an
 18 insurmountable one for me.
 19 Q. Okay. Well, why don't we first say
 20 compare the language in Exhibit 11 to the language
 21 in paragraph 24(a), and let me know if that's
 22 similar but for the language that's bolded and
 23 underlined twice.
 24 MR. STANISH: Just for the record, can you
 25 identify which party or counsel prepared this

1 document?
 2 MR. SIMPSON: Counsel did.
 3 MR. STANISH: Yourself?
 4 MR. SIMPSON: I prepared it along with
 5 other counsel.
 6 THE WITNESS: (Reviews.)
 7 MR. BROMLEY: Can we go off the record for
 8 a minute, John?
 9 MR. SIMPSON: Yeah.
 10 (Discussion.)
 11 Q. (BY MR. SIMPSON): So, Mr. Spackman,
 12 based upon your cursory review of Exhibit 11 and
 13 comparing that to paragraph 24(a) of Exhibit E of
 14 the Eagle decree for the Burley Irrigation
 15 District versus Henry Eagle, which is Exhibit 2,
 16 and comparing it to the proposed remark contained
 17 in Exhibit 10, there appears to be similarities;
 18 correct?
 19 A. Correct.
 20 Q. Okay. And it appears that, in part,
 21 the genesis for the language, both in Exhibit 11
 22 and Exhibit 10, is paragraph 24(a) of Exhibit E of
 23 the Henry Eagle decree; correct?
 24 A. Yes.
 25 Q. Okay. So then would it be fair to say

1 that your statement regarding the language
 2 contained in the proposed remark for Exhibit 10
 3 and the aid for either administration or the
 4 exercise of the right would also be applicable to
 5 the language in paragraph 24(a) of Exhibit E of
 6 the Henry Eagle decree?
 7 A. Okay. I'm not sure I understood that
 8 question.
 9 Q. Okay. In your earlier testimony you
 10 identified that the proposed remark that's
 11 identified in Exhibit 10 --
 12 A. Okay.
 13 Q. -- had perhaps, I'll say paraphrasing,
 14 perhaps relevance to either the exercise or
 15 administration of those rights 217 and 218.
 16 Do you recall that testimony?
 17 A. Yes.
 18 Q. And then would also the language in
 19 paragraph 24(a) of Exhibit E of the Henry Eagle
 20 decree also have that same relevance concerning
 21 administration and/or administration of those
 22 rights to 217 and 218?
 23 A. Yes, it would, to the extent that
 24 language is incorporated into the decree.
 25 MR. SIMPSON: Okay. That's all the

1 questions I have. Thank you, Mr. Spackman. I'll
2 turn it over to others.

3 MR. ARKOOSH: I just have a couple.

4 MR. STANISH: Do you guys have an estimate
5 of how long?

6 MR. ARKOOSH: Yeah, it will be pretty
7 quick, I think.

8
9 EXAMINATION

10 BY MR. ARKOOSH:

11 Q. Mr. Spackman, would you turn to
12 Exhibit 2, please.

13 A. Yes.

14 Q. Paragraph 4, page 19.

15 MR. GEHLERT: Hello?

16 MR. SIMPSON: We're still here.

17 MR. GEHLERT: Okay. Great. I thought you
18 guys hung up on me.

19 MR. ARKOOSH: No, David. I hit the mute
20 button with my notebook.

21 MR. GEHLERT: Oh, no problem.

22 THE WITNESS: Paragraph 4, page what?

23 Q. (BY MR. ARKOOSH): 19.

24 A. I'm in the wrong place. I have two
25 page 19s within -- I have a page 19 of 20 and then

1 I have a page 19. And I assume you're referring
2 to page 19 that just precedes the signature page
3 by the district judge.

4 Q. Yes, sir.

5 A. Paragraph 4.

6 Q. Let's look at the signature page by
7 the district judge first, which is page 20.

8 A. Okay.

9 Q. Paragraph 6 says -- and you read this
10 language before -- referring to the amendatory and
11 supplemental contracts, quote, "a copy of which
12 pertinent paragraphs is attached hereto as
13 Exhibit E and by this reference a part hereof as
14 those set forth herein, is hereby ratified,
15 confirmed, and approved"; correct?

16 A. Yes.

17 Q. So that Exhibit E language is
18 incorporated as though he wrote it out and signed
19 it, correct, when it says "incorporated herein"?

20 A. Wait a minute.

21 Q. It says "made a part hereof."

22 A. Yeah, I didn't see "incorporated
23 herein." It says it is "a part hereof."

24 Q. Okay. So clearly it's the judge's
25 intent rather than write it out above his

1 signature, he's just appended it and said it's
2 part of this decree; correct?

3 MR. STANISH: Calls for speculation.

4 THE WITNESS: It does say it's "a part
5 hereof." I don't know what that means.

6 Q. (BY MR. ARKOOSH): Okay. Let's go to
7 paragraph 4, then, if we can.

8 A. Okay.

9 Q. And that language reads, "That the
10 contracts entered into between various of the
11 parties Plaintiff and the United States, Bureau of
12 Reclamation, as the same have been amended and
13 modified in connection with the Palisades projects
14 and other projects, were intended to be, and are,
15 binding upon all persons claiming right to the use
16 of water in the Snake River and its tributaries."

17 Is that correctly read?

18 A. Yes.

19 Q. Who would that exclude, in your view?

20 MR. BROMLEY: Calls for a legal conclusion.

21 Q. (BY MR. ARKOOSH): That would have
22 relevance to the use of the water.

23 A. Well, I don't -- I don't see that
24 there are any water users that are excluded in
25 this language who claim rights to use of water of

1 the Snake River and its tributaries above Milner
2 Dam.

3 Q. Okay. Why wouldn't, then, these
4 contracts direct the watermaster on how to
5 administer water as they are made a part of,
6 ratified, and approved as a part of this decree?

7 A. Mr. Arkoosh, I think there are many
8 matters of contract, and I have confronted those
9 in my work with the Department over a long period
10 of time, that we simply don't include in the water
11 rights because they're not necessary for the
12 administration.

13 And so I recognize that the
14 watermaster is bound with respect to the
15 provisions in these documents that are necessary
16 for that administration. But there are certain
17 contractual obligations that people take upon
18 themselves that the Department doesn't include.
19 And I'm talking about on the administrative side.
20 And I'm assuming the same would be true when these
21 kinds of references are made to contracts.

22 Q. Well, if a judge takes a contract and
23 then adjudicates that that contract binds
24 everybody using the water, is there a reason why
25 the terms that are incorporated in that contract

1 would not be binding? Let me rephrase the
2 question.

3 A. Okay.

4 Q. Is it your view that paragraph 4 is
5 not binding on everybody who uses the water of the
6 Snake River and the watermaster is because the
7 judge didn't have the power to do it? it's
8 ambiguous? the judge didn't intend to do it? What
9 is your view of why, when he says those are
10 binding upon all people using the water of the
11 Snake River, it may not be binding upon all people
12 using the water of the Snake River?

13 MR. BROMLEY: Calls for a legal conclusion.

14 MR. STANISH: As well as speculation.

15 THE WITNESS: I just read the language,
16 Mr. Arkoosh, that's there. I have been told that
17 these decrees did not include all right holders in
18 the Snake River; in other words, the proceeding
19 itself was not all-inclusive.

20 Q. (BY MR. ARKOOSH): Can we stop there
21 for just a minute before you get to the rest of
22 your answer?

23 A. Yes.

24 Q. So maybe one of the reasons is that
25 maybe the Court didn't have power to bind people

1 the language itself?

2 A. Okay.

3 Q. Is that fair?

4 A. Sure.

5 Q. Okay. Are there any other reasons?

6 A. I can't think of any.

7 Q. Okay. Exhibit 3, the Department's
8 recommendation, suggests what you call a
9 subordination as a result of historical practices
10 that have evolved from actual acts and intent.

11 Since 1968 when Exhibit 2 was signed
12 by Judge Ward, what practices, what historical
13 practices have changed to cause the Department to
14 suggest -- I'm not talking about the intent now --
15 to cause the Department to suggest the language in
16 Exhibit 3, if you know?

17 A. I do not.

18 Q. Okay. You described the process of
19 recommendations and how it's promulgated to the
20 public and then it goes to a hearing and all
21 through this process there's efforts to settle.

22 What is IDWR's position regarding the
23 inclusion of a remark that wasn't promulgated to
24 the public and is not the result of a settlement
25 among all parties who participated, such as

1 that wasn't before it? Is that some of your
2 thinking?

3 A. It may not have brought those people
4 who it's binding in front of it, and as a result
5 it didn't have jurisdiction over them at the time.

6 Q. Okay. Any other reasons?

7 A. Not for purposes of binding the
8 persons claiming the rights.

9 Q. Okay. So if that reason were not
10 applicable, would you believe that everyone using
11 the water of the Snake would be bound by these
12 contracts?

13 MR. STANISH: Calls for a legal conclusion.

14 THE WITNESS: Well, I'm not even sure in
15 reading the language whether the Court is saying
16 that all persons claiming rights are bound by all
17 the terms of each of the individual contracts or
18 whether this reference is one to saying parties
19 have contracted, and there are contracts, and I
20 recognize the validity of those contracts.

21 But does it create some third-party
22 obligation by issuing this decree on somebody
23 else? I don't know the answer to that.

24 Q. (BY MR. ARKOOSH): May I summarize
25 your answer by saying you find some ambiguity in

1 Exhibit 10?

2 MR. STANISH: I'm going to object to that
3 as calls for speculation.

4 THE WITNESS: Well, the best I can do,
5 Mr. Arkoosh, is presume that your statements are
6 correct. I don't know, honestly, what the process
7 has been for the presentation of the language in
8 Exhibit 10.

9 Q. (BY MR. ARKOOSH): Accept the
10 representations in the question, and then answer
11 the question that way.

12 A. The best that I can tell you is that
13 I -- well, let me tell you two things.

14 Just personally as a director -- and I
15 hope I operate this way -- I'm a believer in full
16 disclosure. So I want that to happen. And that's
17 just a philosophical thing.

18 But I recognize in these subcases that
19 are ongoing that there are negotiations that
20 occur, and I frankly am not aware that there is a
21 process for -- or what the process is for possible
22 redistribution of that information to the general
23 public as a whole.

24 So I -- I guess I don't know what the
25 detailed process is for these negotiations. But

1 I'm assuming, based on what you're telling me,
2 that it is not.

3 Q. I'll represent to you that it's not
4 been re-advertised?

5 A. Yeah. And so your question is what's
6 my take on that?

7 Q. What's your view as the director of
8 the Department?

9 A. Well, I guess I'll just say generally
10 I'm in favor of the broader public knowing what's
11 happening and having an opportunity to
12 participate.

13 Q. Let me visit with you about a little
14 problem that I can't get straight in my mind.

15 A. Okay.

16 Q. The State of Idaho has brought a
17 motion for summary judgment to promulgate remark
18 in a decree that has not been advertised by you as
19 the director of the Department of Water Resources.
20 You are the head of an executive agency of the
21 State of Idaho in charge of developing
22 recommendations.

23 A. Uh-huh.

24 Q. Do you believe that if the State of
25 Idaho is going to posit or advance or advocate a

1 guess the only distinction that I would draw is
2 that I know that there has been some separation
3 because of our role in the SRBA as -- and when I
4 say "our," I'm referring to the Department of
5 Water Resources -- as an advisor to the Court, not
6 as a party.

7 And I recognize that there's been some
8 separation between the Department's role there and
9 the more general State of Idaho and various
10 agencies that are there.

11 Q. Finally, when you use permissive
12 language -- and by "you" I mean the Department --
13 in the recommendation in Exhibit 3, when referring
14 to the Eagle decree, rather than mandatory
15 language, is it a fair summary of what you said,
16 you find it unclear regarding what's intended by
17 that language? Or was it clear to you what's
18 intended by using permissive language?

19 A. No, it is not clear to me what's
20 intended.

21 Q. Do you think, then, that this
22 language, rather than really advance
23 administration and be necessary for the
24 administration, does not advance the
25 administration and should be made clearer?

1 recommendation in a decree, that you as the
2 director should advertise that so everybody
3 affected would have an opportunity to participate
4 in what's going on in the main branch of the
5 Snake?

6 MR. STANISH: Calls for a legal conclusion
7 as well as being speculative.

8 THE WITNESS: Mr. Arkoosh, I don't know
9 whether I have some legal obligation to do that or
10 not. There are processes that are defined
11 statutorily. So I guess I would say I don't know
12 whether I have an obligation to do that. I
13 certainly have a preference in administering --
14 and when the questions are asked of me, do we tell
15 people or do we not tell people, I hope I can
16 consistently say we will attempt to do that. And
17 I think that would carry through in the SRBA as
18 well as in other operations.

19 Q. (BY MR. ARKOOSH): Do you distinguish
20 your agency from something called "the State of
21 Idaho"?

22 A. Well, that is an interesting question
23 because I -- I don't distinguish my agency from
24 the State of Idaho. We are an entity within the
25 executive branch of the State of Idaho. And I

1 MR. STANISH: Objection. Vague as to what
2 reference you're talking about.

3 THE WITNESS: Well, because it is
4 permissive, Mr. Arkoosh, I have always viewed the
5 inclusion of that permissive language as at least
6 indicating that the language is included for the
7 benefit of others who may have an interest in this
8 water right or the exercise of it, but may not be,
9 and often is not, a directive to the watermaster
10 or the Department in the administration of those
11 rights. In other words, it's a marker, it's a
12 benchmark for others to look at and say "This may
13 be -- you need to look at the provisions of the
14 contract or the decree to determine what the
15 respective rights of the parties are." But
16 perhaps not binding the water -- the Department or
17 the watermaster in the administration of it.

18 Q. (BY MR. ARKOOSH): Do you think that
19 could be made clearer in a remark?

20 A. Yes.

21 MR. ARKOOSH: That's all I have.

22 THE WITNESS: Okay.

23 ///

24 ///

25 ///

EXAMINATION

BY MR. LOCHHEAD:

Q. Mr. Spackman, my name is Jim Lochhead for Idaho Power. I just have a couple of questions.

I wonder if you could pull the supplemental director's report. I don't know which exhibit that is.

A. Is it marked as an exhibit here?

MR. SIMPSON: I don't think it's been marked.

MR. LOCHHEAD: Well, then, why don't we go ahead and mark it.

(Exhibit 12 marked.)

Q. (BY MR. LOCHHEAD): If you could turn to page 1, and there's a heading called "Summary of the Issue." And there is proposed remark language there.

Could you compare that with the proposed remark language in Exhibit 3, which is the director's report, and tell me if that appears to be the same language.

A. Mr. Lochhead, the language in the two documents appear to be identical.

Q. Okay. And then could you turn to

page 3 of Exhibit 12. And I'm just going to read the paragraph that's at the bottom of page 3 and carries over to the top of page 4. And it states, "Generally, the goal of the Department in the adjudication is to ensure that the significant historical practices of a basin are reflected either in the elements of water rights or in a general provision for that basin. This ensures that administration in the basin will continue to operate as it has historically operated. Where changes in the long-term historical practice of basin would negatively affect other water rights in the basin, it is necessary for the proper administration of the water rights in that basin for the practice to be reflected in the water rights or a general provision so that administration in the basin can continue to operate as it has historically operated. The historical subordination practices remark is included in the recommendations for these seven water rights because the remark is necessary for the clarification and future administration of the water rights in Basin 01."

Does that paragraph reflect the current policy of the Department?

A. As far as I know, that is correct.

Q. So based on that statement, the supplemental report, and the proposed remark language, then it would be your position that the remark reflects historical practices in the basin?

A. Yes.

Q. To your knowledge, were historical practices considered in the development of the proposed remark language that's in Exhibit 10?

MR. BROMLEY: Objection. Calls for speculation.

THE WITNESS: I do not know.

Q. (BY MR. LOCHHEAD): Would it be appropriate from the Department's perspective for you to have knowledge of that?

A. Yes.

Q. Could you turn to Exhibit B of the supplemental director's report, which is Exhibit 12. It's an affidavit of Tony Olenichak.

MR. FLETCHER: It's on that one over there.

MR. SIMPSON: Yeah, this is the document.

THE WITNESS: So it's not included in Exhibit 12, but it's an attachment to the supplemental director's report.

MR. LOCHHEAD: Mine is all marked up. Do

we have a clean copy?

THE WITNESS: Do you want to remark one?

MR. ARKOOSH: Let's go off the record.

MR. SIMPSON: Yeah.

(Recess.)

MR. LOCHHEAD: For the record, we have a new Exhibit 12, which is the supplemental director's report with all of the exhibits attached.

Q. And, Mr. Spackman, if you could turn to Exhibit B of Exhibit 12. And that should be, I believe, an affidavit of Tony Olenichak.

A. I have it in front of me.

Q. And could you turn to page 2. And take a look at paragraph 8, which states, "Historically, Water District No. 1 has administered the power elements of the Bureau of Reclamation's water right Nos. 1-217, 1-218, 1-2064, 1-2068, 1-4024, 1-4025, and 1-4054 as subordinate to irrigation and all other junior water uses except hydropower."

Does that statement accurately reflect your understanding of the historic administration in Water District 1?

A. I have no reason to contradict this

1 statement. So it's consistent with my
2 understanding of the operations.

3 MR. LOCHHEAD: Okay. That's all I have.

4
5 EXAMINATION

6 BY MR. LING:

7 Q. My name is Roger Ling, representing
8 A & B Irrigation District and others, as well as
9 Falls Irrigation District.

10 But, Mr. Spackman, I want to ask you a
11 little more on this historical practice.

12 Is this something that the Department
13 has developed on their own, if you know, or is it
14 statutory in some way?

15 A. I am unaware of a statutory provision
16 that refers to the term "historical practice."

17 Q. Had you ever applied the historical
18 practice in any of the issues that you have
19 addressed as an employee of Idaho Department of
20 Water Resources?

21 A. Yes.

22 Q. And in what manner?

23 A. Well, a very good example of the
24 historical practices in an area is rotation of the
25 delivery of water to various users who each have a

1 about his knowledge of an instance.

2 Q. (BY MR. LING): If you're confused,
3 I'll repeat it; otherwise, you can answer the
4 question.

5 A. Well, there's one particular
6 historical practice that's been adopted, even in
7 the SRBA, that, in my opinion -- and again, I'd
8 have to go back and look at the decrees that
9 authorized the water rights. At least in my
10 opinion it comes to mind that historical practice
11 contradicted the provisions of the decree.

12 Q. And in that case, was it a situation
13 where every decree holder agreed to proceed in a
14 different manner than what the decrees may
15 provide?

16 A. It's my understanding that there was a
17 settlement through negotiation that these
18 historical practices would continue.

19 Q. Again, did that, to your knowledge, in
20 the example you have or at any other time, find
21 that an historical practice actually changed the
22 priority or other rights under the decree?

23 A. I don't recall that that historical
24 practice changed the priority dates, but --

25 Q. And do you know whether or not it was

1 water right, but they rotate the delivery of water
2 among themselves to maximize the use of water in
3 the area. It's a --

4 Q. And you find that type of rotation
5 sometimes in a decree, do you not?

6 A. Yes.

7 Q. Okay. When you talk about historical
8 practices, are you talking about historical
9 practices of the Department or are you talking
10 about historical practices of the water users or
11 is it another group of people that you are
12 referring to that created an historical practice?

13 A. My interpretation would be it would be
14 the historical practices of the water users.

15 Q. Okay. So they would have to knowingly
16 know what was doing, what was being done to become
17 a historical practice; right?

18 A. One would assume that they would have
19 knowledge of that historical practice.

20 Q. Do you have an opinion or have you
21 seen it applied in such a manner that historical
22 practice can actually alter a decree?

23 MR. STANISH: I'm going to object that
24 there are two questions there. First you asked
25 him about his opinion, and then you're asking

1 incorporated into a recommendation from the
2 director in the Snake River Basin Adjudication?

3 A. Well, I don't know that it was
4 incorporated into a recommendation. And the
5 particular practice that I'm referring to is the
6 rotation credits in the Big Lost River Basin that,
7 I think, became a general provision in that
8 particular area.

9 Q. Do you have any knowledge of how or if
10 historical practices have ever imposed a condition
11 upon somebody's water right without his consent?

12 A. I don't have direct knowledge of that.

13 Q. It's my understanding you had no input
14 into the original recommendation for the
15 hydropower water rights that we're talking about
16 today?

17 A. I did not participate.

18 Q. Okay. And did you have any input into
19 the supplemental report, Exhibit 12?

20 A. I did not.

21 Q. You indicated that you had had some
22 discussion with deputy attorney generals, and
23 there are a lot of those gentlemen around in
24 representing different agencies.

25 Have you discussed this case with a

1 deputy attorney general other than those assigned
2 to the Department of Water Resources?

3 A. Yes.

4 Q. And what was the purpose of that
5 discussion?

6 MR. STANISH: Objection. I'm going to
7 object as a matter of attorney-client privilege
8 and direct the witness not to respond as to the
9 nature of communications between himself and
10 another attorney.

11 MR. FLETCHER: Can we go off the record for
12 a second on that issue?

13 (Discussion.)

14 MR. FLETCHER: The question I posed to the
15 two attorneys general that are sitting here, in
16 the adjudication the Department is not to
17 participate other than to make recommendations.

18 In this case, as an example, the State
19 has filed a motion for summary judgment,
20 independent of the Department. The witness has
21 testified that he has talked to attorneys general
22 other than those assigned to the Department.

23 And as I understand the attorney
24 general, it's the position of the attorney general
25 that any communication between any attorney

1 general and the director is subject to the
2 attorney-client privilege.

3 Is that an accurate statement?

4 MR. STANISH: As it pertains to this
5 particular deposition, I'd say yes.

6 MR. FLETCHER: And you're directing this
7 witness to not testify as to any communications
8 that he's had between any attorney general outside
9 of attorneys general assigned to the Idaho
10 Department of Water Resources?

11 MR. STANISH: That's correct.

12 MR. ARKOOSH: Based upon the representation
13 of the witness by those other attorneys general
14 outside the Department? Is that the source of the
15 privilege?

16 MR. STANISH: I'm sorry. I don't
17 understand.

18 MR. ARKOOSH: Do attorneys general outside
19 the Department's attorney general represent this
20 witness? Is that the basis of the privilege?
21 What's the basis of the privilege?

22 MR. STANISH: The attorney general's office
23 represents all State agencies, including its
24 employees and executives. To the extent that
25 Mr. Spackman is an employee of the State of Idaho,

1 the attorney general's office, communications
2 between those two are privileged. That's the
3 basis of the objection.

4 MR. LING: Let me ask another question.

5 Q. May I, as a result of the objection
6 filed by one of your attorneys, assume that the
7 discussion, you had discussion with some deputy
8 attorney general outside of those representing the
9 Department in regard to the issues we're talking
10 about today?

11 A. Yes.

12 MR. LING: Okay. That's all I have. Thank
13 you.

14 MR. FLETCHER: Do you want me to go?

15 MS. McHUGH: Yeah, that's fine.

16 MR. FLETCHER: I just have a very few
17 questions.

18 EXAMINATION

19 BY MR. FLETCHER:

20 Q. I'd like to follow up with that last
21 comment.

22 Are there any firewalls built in that
23 you're aware of between communications between the
24 director of the Department of Water Resources, for
25

1 example, and the attorneys representing the State
2 of Idaho otherwise?

3 A. I'm unaware of those.

4 Q. Okay. So as far as you know, the
5 attorneys for the State -- for example, in this
6 case they filed a motion for summary judgment --
7 those attorneys are free to talk to you about any
8 issue pending in the adjudication, even though
9 you're not entitled to affirmatively assert
10 positions in the adjudication?

11 MR. STANISH: Calls for a legal conclusion.

12 THE WITNESS: Mr. Fletcher, I don't know
13 whether they're free to discuss those matters with
14 me.

15 Q. (BY MR. FLETCHER): You just know they
16 have?

17 A. They have.

18 Q. Okay. And can you name the other
19 attorneys general that you've talked to that have
20 not been assigned to the Department?

21 A. I've discussed the matter with
22 Mr. David Stanish.

23 Q. Okay. Any other attorney?

24 A. No.

25 Q. Okay. Getting back to your example on

1 the historical practices on the rotation credit in
2 the Big Lost River Valley, in that case it was the
3 water users that wanted the rotation credit as
4 part of the water right and the Department was
5 resisting that initially; isn't that correct?

6 A. I don't recall what the circumstances
7 were.

8 Q. Okay.

9 A. What I recall is that -- and again,
10 without being able to go through the whole decree,
11 that the rotation credit, at least, was not
12 expressly recognized or fully recognized in a
13 previous decree.

14 Q. And you don't recall the Department's
15 initial recommendation in those cases pertaining
16 to whether a rotation credit should exist?

17 A. I do not.

18 Q. Okay. And the issue I want to talk to
19 you about briefly is getting back to this issue of
20 the interest of the Department versus the interest
21 of the State.

22 In response to earlier questions I
23 think you indicated that you thought the interest
24 of the Department was the interest of the State;
25 is that a fair statement?

1 A. I don't remember making that
2 statement.

3 Q. Okay. Well, I guess a better way to
4 phrase this would be how, in your opinion or in
5 your experience as director, is the interest of
6 the Department different than the interest of the
7 State in this litigation?

8 A. Oh, in this litigation?

9 Q. Yes.

10 MR. STANISH: Objection. Calls for
11 speculation.

12 THE WITNESS: Well, with respect to this
13 litigation -- and when you say "this litigation,"
14 I'm assuming that you are referring to the
15 subcases that we are referring to.

16 Q. (BY MR. FLETCHER): Yes, the matter
17 we're here today talking about.

18 A. And I'm not sure that I can
19 distinguish between the interests of the
20 Department and the interests of the State.

21 Q. Are you aware of the fact that the
22 state designated you as their witness under
23 Rule 30 of the Idaho Rules of Civil Procedure, one
24 of their witnesses?

25 A. I'm not aware that that specific

1 designation was made.

2 Q. As director of the Department, do you
3 support the summary judgment that's been filed by
4 the State in this action?

5 A. Well, the -- the language, in my
6 opinion, adds complexity to the administration of
7 water rights. And as a director and as someone
8 that's in charge of assisting watermasters in the
9 administration of water rights, I -- I am looking
10 for simplicity.

11 Now, it seems to me -- and I'm giving
12 you a long answer. I'm sorry. It seems to me
13 that it's much easier to administer a
14 subordination condition as opposed to the
15 conditions proposed.

16 But if a party comes forward and says
17 this is the condition that I would like to have on
18 my water right and the Department looks at it and
19 says this can be administered, given the language
20 that's there, and I think what is written can be
21 administered, then I'm supportive of the language.
22 If it's something that cannot be administered,
23 then I would not be supportive. So I would be
24 supportive.

25 Q. So you've reviewed the language;

1 correct?

2 A. Yes.

3 Q. And I'm talking about the language
4 that's in the Lost River summary judgment.

5 A. Yeah. And that would be what's
6 contained in Exhibit 10.

7 Q. Right.

8 A. Yeah.

9 Q. And you support that language?

10 A. Yes, I think it can be administered,
11 the water rights can be administered.

12 Q. Okay. So what is your position
13 concerning the recommendation the Department made?
14 Do you support that language?

15 A. Frankly, I would have been happy with
16 that language. And as is the case often, I think,
17 I would support original language from the
18 Department proposed because it would be simpler to
19 administer and at least, in my opinion, would
20 reflect the historic practices that have occurred.

21 Q. So you support both versions?

22 A. I'm willing to support the second
23 language as a negotiated settlement to the -- the
24 case.

25 Q. Which language more accurately

1 represents the water right, in your opinion? The
2 Department's recommendation or the summary
3 judgment language?

4 A. What most closely represents what?

5 Q. The water right that should be
6 recommended.

7 A. I don't know that I can answer that
8 question. And the reason is because as we
9 discussed in earlier testimony, after the
10 Department makes recommendations -- and as I
11 recall Mr. Simpson pointing out, there's
12 additional information that the Department of
13 Water Resources receives, and consequently through
14 the process. Those recommendations are often
15 amended, given that additional information which
16 were given.

17 Q. So as of today, is it your position
18 that the recommendation that's before the Court,
19 the recommendation the Department made, is still
20 the recommendation of the Department?

21 A. The original recommendation --

22 Q. That's Exhibit --

23 A. 3?

24 Q. -- 3, I think it is.

25 A. Well, without further information, I

1 understanding that when the Department makes
2 recommendations or takes positions in the SRBA
3 that you're doing so in furtherance of your
4 statutory duties contained in Idaho Code?

5 A. Yes.

6 Q. And part of those statutory duties is
7 to equally guard all water right interests,
8 including junior users or those water users who
9 may not have been parties to prior decrees, for
10 example; would you agree with that?

11 A. Yes.

12 Q. Would you also agree that it's the
13 director's duty in the SRBA to include
14 administrative conditions that may be required
15 because there are additional water users now
16 involved in the SRBA that were not involved in
17 prior decrees?

18 MR. STANISH: Calls for a legal conclusion.

19 THE WITNESS: Generally, yes.

20 Q. (BY MS. McHUGH): Would you agree that
21 part of the director's duty and the Department's
22 duty in the SRBA is to consider how the water
23 rights would be ultimately administered throughout
24 the entire basin, and not just as they had been
25 administered among water users on one given

1 have the supplemental recommendation which
2 contains that identical language. And it appears
3 to be the recommendation that's pending before the
4 Court at the present time.

5 Q. Have you as director contemplated
6 filing an amended recommendation?

7 A. I have not.

8 MR. STANISH: Calls for speculation.

9 THE WITNESS: I have not.

10 Q. (BY MR. FLETCHER): Do you believe
11 that it's necessary if you want to incorporate the
12 language of the summary judgment that you issue a
13 new recommendation to provide notice?

14 MR. STANISH: Calls for a legal conclusion.

15 THE WITNESS: I don't know whether that's
16 necessary or not, Mr. Fletcher.

17 MR. FLETCHER: I don't have any other
18 questions.

19 MS. McHUGH: I have a couple questions.

20
21 EXAMINATION

22 BY MS. McHUGH:

23 Q. This is Candice McHugh on behalf of
24 ground water districts.

25 Director Spackman, is it your

1 stream?

2 MR. STANISH: Calls for a legal conclusion.

3 THE WITNESS: I guess my response is that
4 that answer probably depends on the facts of the
5 given situation.

6 Q. (BY MS. McHUGH): And certain facts
7 could include historic practices?

8 A. Yes.

9 Q. And could they also include either
10 water user agreements or water user practices in
11 addition to historic administrative practice?

12 A. Yes.

13 Q. Is part of the Department's
14 consideration in recommending conditions on water
15 rights also for practical reasons such as how it
16 could actually be administered or, for example, in
17 Basin 01, the fact that you had, you know, 50
18 years of administrative history there to rely on?

19 A. And so the question is what?

20 Q. So the question is, is part of the
21 basis for some of your administrative conditions
22 on water rights also for practical reasons to
23 include the fact that you have, like in Basin 01,
24 50 years of administrative history in order to
25 capture that in the water rights and for the

1 adjudication?

2 A. I'm not sure that I would describe
3 that as administration for practical reasons. I
4 guess I'd go back to the phrases that were used
5 earlier, and that would be historical practice and
6 the intent of the parties.

7 Q. How do you determine whether or not a
8 condition is -- I think you used the word
9 "administrable"?

10 A. Maybe I can use examples. Rather than
11 using the SRBA as an example, I will use examples
12 from the administrative consideration of proposals
13 before the Department of Water Resources.

14 And at least as a hearing officer and
15 as a person who has processed water rights for the
16 Department, there are often agreements that
17 parties sign. And those parties will bring them
18 to the Department and ask that those agreements be
19 incorporated in decisions of the Department of
20 Water Resources.

21 And sometimes the parties want those
22 agreements incorporated verbatim. And I have seen
23 in those proposed conditions the -- certain
24 triggers attempted to be built in where the
25 Department would then commit itself to large

1 A. I would interpret the language to be,
2 although I think it's more difficult for
3 administration than the other language that was
4 recommended. It is, in my opinion, language that
5 we could use for the administration of water
6 rights.

7 MS. McHUGH: Nothing further.

8 MR. STANISH: I don't have anything. David
9 might.

10 MR. BROMLEY: Let's ask David first.

11 MR. SIMPSON: Dave?

12 MR. GEHLERT: Yes.

13 MR. SIMPSON: Do you have any questions?

14 MR. GEHLERT: No, I don't.

15 MR. BROMLEY: Just a couple follow up.

EXAMINATION

18 BY MR. BROMLEY:

19 Q. Chris Bromley, deputy attorney general
20 on behalf of the Department of Water Resources.

21 Director, are you aware if in
22 processing recommendations or looking at
23 settlements in the SRBA of other parties coming to
24 the Department to propose language that gauge the
25 Department's interest?

1 study -- ground water studies, the dedication of a
2 quarter to half of its staff to try to resolve
3 some local ground water interference problems.

4 I've seen provisions in those
5 contracts for fixing fences, cessation of kicking
6 dogs, and even have a supervisor who used to say
7 that we got contractual provisions for the
8 cessation of marital interference.

9 So I guess what I say is I look at
10 those proposals and say what is it that the --
11 what is it and where are our boundaries in
12 determining when the Department will no longer go
13 beyond the limitation in enforcing the provisions
14 of that contract.

15 And I'm not sure that I can tell you
16 where that boundary is. But there certainly are
17 those that are outside of, there are certainly
18 those that are inside, and there are certainly
19 those that I look very hard at, look askance at,
20 and say "Do we -- can we really be in the middle
21 of that? Do we have the resources to do it? And
22 do we have any business in that arena?"

23 Q. And the provision provided in the
24 State's motion for summary judgment, that
25 language, in your opinion, is administrable?

1 A. That gauged the Department's interest?

2 Q. And whether the language that's being
3 proposed would be administrable or if the
4 Department would be in agreement to sign, say, a
5 standard form five?

6 A. Oh, I -- I think that -- I think that
7 happens all the time in discussions. And -- so I
8 guess the answer is yes, Mr. Bromley.

9 MR. BROMLEY: Okay. Thank you. Nothing
10 further.

FURTHER EXAMINATION

13 BY MR. SIMPSON:

14 Q. One follow-up to the question
15 Mr. Bromley presented to you, Mr. Spackman.

16 When those other parties come to
17 gauge, as he described it, the Department's
18 interest, are those communications confidential?

19 A. I'm not aware that they are.

20 MR. SIMPSON: Okay. That's all I have.

21 MR. LING: Nothing further.

22 THE WITNESS: Okay. Thanks.

23 (Deposition concluded at 11:29 a.m.)

24 (Signature requested.)

25 -oOo-

Exhibit C

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 Nos. 01-00217, 01-00218
) 01-04024, and 01-04025
) (Minidoka Power Right)
)
) Subcase Nos. 01-02068 and
) 01-04054
_____) (Palisades Power Rights)

RULE 30(B)(6) DEPOSITION OF THE STATE OF IDAHO

TESTIMONY OF DAVID R. TUTHILL, JR.

and

DEPOSITION OF DAVID R. TUTHILL, JR.

OCTOBER 22, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 THE RULE 30(B)(6) DEPOSITION OF THE STATE OF
2 IDAHO, TESTIMONY OF DAVID R. TUTHILL, JR., AND THE
3 DEPOSITION OF DAVID R. TUTHILL, JR., was taken on
4 behalf of American Falls Reservoir District No. 2,
5 at the offices of Barker, Rosholt & Simpson,
6 1010 West Jefferson, Suite 110, Boise, Idaho,
7 commencing at 12:04 p.m., October 22, 2009, before
8 Jeff LaMar, Certified Shorthand Reporter and
9 Notary Public within and for the State of Idaho,
10 in the above-entitled matter.

11 APPEARANCES:

12 For A & B Irrigation District, Burley Irrigation
13 District, Milner Irrigation District, North Side
14 Canal Company, and Twin Falls Canal Company:
15 BARKER, ROSHALT & SIMPSON LLP
16 BY MR. JOHN K. SIMPSON
17 1010 West Jefferson, Suite 102
18 P.O. Box 2139
19 Boise, Idaho 83701-2139
20 For American Falls Reservoir District No. 2:
21 CAPITOL LAW GROUP PLLC
22 BY MR. C. THOMAS ARKOOSH
23 301 Main Street
24 P.O. Box 32
25 Gooding, Idaho 83330

1 APPEARANCES (Continued):
2
3 For Bureau of Reclamation:
4 (Present Telephonically)
5 UNITED STATES DEPARTMENT OF JUSTICE
6 ENVIRONMENT & NATURAL RESOURCES DIVISION
7 NATURAL RESOURCES SECTION
8 BY MR. DAVE GEHLERT
9 1961 Stout Street, Suite 800
10 Denver, Colorado 80294
11 For Idaho Groundwater Appropriators, Inc.:
12 RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
13 BY MS. CANDICE M. McHUGH
14 101 Capitol Boulevard, Suite 208
15 Boise, Idaho 83702
16 For Idaho Department of Water Resources:
17 OFFICE OF ATTORNEY GENERAL
18 BY MR. CHRIS M. BROMLEY
19 322 East Front Street
20 P.O. Box 83720
21 Boise, Idaho 83720-0098
22 ///
23 ///
24 ///
25 ///

1 APPEARANCES (Continued):

2
3 For State of Idaho:
4 OFFICE OF ATTORNEY GENERAL
5 BY MR. DAVID I. STANISH
6 700 West State Street, 2nd Floor
7 P.O. Box 83720
8 Boise, Idaho 83720-0010
9 For Idaho Power Co.:
10 BROWNSTEIN HYATT FARBER SCHRECK
11 BY MR. JAMES S. LOCHHEAD
12 818 Colorado Avenue, Suite 306
13 P.O. Box 357
14 Glenwood Springs, Colorado 81602-0357
15 For Minidoka Irrigation District:
16 FLETCHER LAW OFFICE
17 BY MR. W. KENT FLETCHER
18 P.O. Box 248
19 Burley, Idaho 83318
20 For Falls Irrigation District:
21 LING LAW OFFICE
22 BY MR. ROGER D. LING
23 615 H. Street
24 PO Box 250
25 Rupert, Idaho 83350-0396

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Exhibit 13, please.

A. I would add one thing, that it is current as of June of 2009. Since then I have formed a private consulting company. That's not on this resumé.

Q. What's your company?

A. Idaho Water Engineering, LLC.

Q. And do you do consulting work, as indicated in the name of the company?

A. Yes.

Q. Okay. And how long does your resumé indicate you were with the Idaho Department of Water Resources?

A. 33 1/2 years.

Q. Okay. And you left there as director; is that correct?

A. Correct.

Q. And when was that?

A. That was June 30, 2009.

Q. Okay. And would you look at Exhibit 13, please.

Can you describe what that is.

A. It's the amended notice of taking deposition of the State of Idaho.

Q. And are you here as the designated

(Exhibit 13 marked.)

DAVID R. TUTHILL, JR.,
first duly sworn to tell the truth relating to
said cause, testified as follows:

EXAMINATION

BY MR. ARKOOSH:

Q. Would you state your name, please.

A. David R. Tuthill, Jr.

Q. And did you bring a resumé or a CV,
David?

A. Yes, I did.

Q. How would you like me to address you?

A. Dave is fine.

MR. ARKOOSH: Okay. Can we have this
marked.

(Exhibit 14 marked.)

Q. (BY MR. ARKOOSH): Dave, I'm going to
hand you what's been marked as Exhibit 14.

Can you describe that, please.

A. This is my resumé.

Q. And is it current as of today?

A. It is.

Q. Okay. And then if you'd look at

witness for the State of Idaho?

A. Yes. At least one of the designated
witnesses, correct.

Q. Who are the other designated
witnesses?

A. I know that Gary Spackman is one. And
I don't know of all. I just saw Lyle Swank.

Q. Okay.

A. My guess is he's one. I don't know
all of the witnesses.

Q. Now, that's the amended notice. And
you were given, I think, initially the original
notice.

Would you look at the list of issues
and see if they're the same.

Let me ask you this: Have you seen
the original notice?

A. I have seen it, yes.

Q. Okay.

A. At first glance, it appears to be the
same.

Q. And are you here to testify on those
issues?

A. Yes.

Q. Okay. What did you do in preparation

1 for this deposition?

2 A. I read some of the documents -- reread
3 some of the documents and familiarized somewhat
4 with some of the documents and discussed this
5 deposition with -- with legal counsel. In fact, I
6 would be discussing with Mr. Stanish and very
7 briefly with -- in a session with other legal
8 counsel from the Department of Water Resources.

9 Q. Who was that?

10 A. That would be Mr. Bromley and
11 Mr. Baxter.

12 Q. Okay. Let me ask this question very
13 generally: Why you? Do you have a contract with
14 them? Or why are you here, David, in response to
15 a request that somebody talk for the State of
16 Idaho?

17 A. Well, this issue of the subordination
18 conditions for hydropower is an issue that I
19 addressed in my role -- my previous roles with the
20 agency. I was the primary -- I was the signatory
21 of an amended director's report. And so I oversaw
22 the creation of that amended director's report.

23 I was involved in the preliminary
24 discussions about the predecessor condition, which
25 was applied to the hydropower right on diversion

1 dam on the Boise River. I was directly involved
2 with that. So I have, in my view, as much
3 involvement with these conditions as most people
4 on behalf of the agency.

5 Q. Are you under contract with the State
6 to testify here today?

7 A. I am.

8 Q. Okay. Is there a written contract?

9 A. A written contract is being prepared.

10 Q. Okay. So you're being remunerated for
11 your time?

12 A. I am.

13 Q. Okay.

14 A. And my first -- and that began as of
15 Monday of this week, as I began to review this
16 issue.

17 Q. Okay. You are here for the State of
18 Idaho, you're not here speaking for IDWR?

19 A. Correct.

20 Q. Do you distinguish the two?

21 A. Yes.

22 Q. How?

23 A. Well, in the context of the Snake
24 River Basin Adjudication, the agency, IDWR, is a
25 technical expert for the Court and prepares

1 recommendations for the Court and provides
2 information to the Court regarding its -- not only
3 its recommendations, but also in follow-up to
4 those recommendations, it might have objections.

5 So in my understanding, the role of
6 IDWR is to be the technical expert of the Court.
7 It's not a party to the SRBA. It has a specific
8 role.

9 The role of the State of Idaho goes
10 beyond that. The State of Idaho can be a party to
11 the specific subject cases, and has a role in the
12 resolution of objections that goes beyond that of
13 the agency.

14 Q. Can an entity named the State of Idaho
15 and the agency IDWR, can they have conflicting
16 positions?

17 A. It is possible, yes.

18 Q. What was discussed between you and
19 counsel for IDWR?

20 MR. STANISH: I'm going to object again.
21 Attorney-client privileged information.
22 Continuing objection to any questions revolving
23 around or regarding the substance of
24 communications made between Mr. Tuthill and any
25 deputy attorney general for the State of Idaho.

1 MR. ARKOOSH: Are you instructing him not
2 to answer?

3 MR. STANISH: I'm instructing him not to
4 answer.

5 Q. (BY MR. ARKOOSH): Are you represented
6 by counsel for IDWR? Let me rephrase that
7 question.

8 Are you represented by counsel, you,
9 David Tuthill, represented by counsel in this
10 action?

11 A. No.

12 Q. So how would it be, at least as you
13 understand it, that you would have an
14 attorney-client relationship giving rise to
15 privileged communications? Do you know?

16 A. I don't know.

17 Q. You're here, I think, as an expert; is
18 that right?

19 A. That's my understanding.

20 Q. Okay.

21 MR. ARKOOSH: Do you want to maintain the
22 objection?

23 MR. STANISH: I'm maintaining the
24 objection.

25 Q. (BY MR. ARKOOSH): Are you willing to

1 obey his direction not to answer because he's not
2 your lawyer, or will you answer the question?

3 A. I'm here on behalf of the State of
4 Idaho.

5 Q. Okay.

6 A. Mr. Stanish is the attorney
7 representing the State of Idaho. I'm here at the
8 request of the State of Idaho. So yes, I'm
9 willing to obey that.

10 Q. Okay.

11 MR. FLETCHER: For the record, can we
12 clarify. It's your position that communications
13 between attorneys and witnesses that are not
14 employees of the Department are protected by
15 attorney-client privilege?

16 I'm not asking you. I'm asking the
17 attorney that made the objection.

18 MR. STANISH: In this deposition
19 Mr. Tuthill is appearing on behalf of the State of
20 Idaho. To the extent there are communications
21 between the State of Idaho as represented by
22 Mr. Tuthill and the State's attorneys, being those
23 deputy attorney generals under the Idaho attorney
24 general, those communications are, in fact,
25 privileged.

1 MR. FLETCHER: Do you have any citation or
2 authority for that, that a witness, not an
3 employee is covered by attorney-client privilege?

4 MR. STANISH: He's a representative of the
5 State in this case.

6 MR. FLETCHER: So any person you designate
7 as a witness is covered by attorney-client
8 privilege?

9 MR. STANISH: That's not the question right
10 now. The question is he's here acting on behalf
11 of the State of Idaho. And in that circumstance,
12 he is protected by attorney-client privilege.

13 MR. ARKOOSH: Let me suggest to you, David,
14 that communications between consulting experts and
15 lawyers are not privileged. I'll just suggest
16 that to you.

17 And I want to suggest one other thing:
18 These objections are going to lead to motions to
19 compel, which are going to delay the schedule, and
20 it's a decision you make yourself.

21 MR. STANISH: That's fine, Tom. But he's
22 not a consulting expert in this situation. He's
23 representing the State of Idaho, as per your
24 deposition request.

25 MR. ARKOOSH: Maybe I misunderstood.

1 Q. You're not employed by the State, but
2 you have a contract with the State to provide
3 evidence in this case; is that correct?

4 A. A contract is being prepared.

5 Q. And -- yeah. Okay. Let's move on.

6 Will you be filing an affidavit in
7 this summary judgment, David?

8 A. I don't know.

9 Q. Has that been discussed?

10 A. No.

11 Q. Okay. As part of your engagement,
12 were you engaged merely to respond to our request
13 that a person knowledgeable be designated to speak
14 on behalf of the State, or have you been also
15 engaged to formulate opinions?

16 A. It's my understanding that I am
17 speaking as a person knowledgeable about this
18 issue.

19 MR. ARKOOSH: Okay.

20 (Exhibit 15 marked.)

21 Q. (BY MR. ARKOOSH): David, will you
22 look at Exhibit 15, please.

23 Would you take a minute and read that.

24 MR. BROMLEY: Tom, what is it?

25 MR. ARKOOSH: They'll give you a copy.

1 Q. David, who is Ronald Carlson?

2 A. Well, at the time of this affidavit,
3 he was the watermaster of Water District 01.

4 Q. And on the face of the affidavit, it
5 was signed in November of '88; is that right?

6 A. Yes.

7 Q. And when did he cease to be the
8 watermaster of District 1?

9 A. A couple of years ago.

10 Q. Do you agree with what he says in this
11 affidavit?

12 A. In general, I agree. There are some
13 exceptions.

14 Q. Do you want to elaborate on that,
15 please?

16 A. Thinking in terms of hydropower, if --
17 if water is flowing through a hydropower system
18 that -- and if the hydropower right is a junior
19 right, then the -- even though the right is
20 junior, the gate won't be shut.

21 Q. You're going to have to elaborate
22 further on that so I understand.

23 A. All right.

24 Q. That's an exception to what statement
25 in the affidavit?

1 A. It says in item 6, "Pursuant to
2 Section 42-607, it is my duty in years of scarcity
3 of water to close all headgates, ditches, or other
4 diversions against those claiming any
5 unadjudicated right."

6 Q. So if the hydropower water happens to
7 be there for a different purpose flowing through a
8 turbine, you're not going to disturb it just
9 because it happens to be there for another
10 purpose; is that what you're saying?

11 A. Correct.

12 Q. Okay. Any other exceptions that you
13 would take to that affidavit?

14 A. Not that I can think of right offhand.

15 Q. Okay. Do you recall the call that was
16 made in '05 and you finished your stay at the
17 Department administering that call in the surface
18 water case?

19 A. Yes.

20 Q. Okay. Ron Carlson gave testimony in a
21 deposition, as I recall. And I don't know whether
22 you've reviewed that.

23 But you're aware that he was deposed
24 and was a witness in that call; correct?

25 A. Correct.

1 Q. He made some statements in his
2 deposition I want to read to you. This might be a
3 little more elaborate than I want it to be. But I
4 want to see if you -- well, I'll tell you what
5 I'll do. Let's just mark those, and I'll let you
6 review those like you did those, and it will save
7 a lot of time.

8 A. Okay.

9 MS. McHUGH: I'll just object to relevance.

10 (Discussion.)

11 (Exhibits 16 and 17 marked.)

12 THE WITNESS: Okay.

13 Q. (BY MR. ARKOOSH): Do you agree or
14 disagree with what Ron testified to?

15 A. I --

16 MR. STANISH: Objection. Vague. It's
17 three pages of documents. It would be helpful if
18 you could point out exactly what you're talking
19 about.

20 Q. (BY MR. ARKOOSH): Can you answer the
21 question? Are you able to?

22 A. I agree in part with his premise.

23 Q. Okay.

24 A. I agree to the extent of surface water
25 deliveries not requiring calls.

1 Q. Okay.

2 A. One of the complexities in the SRBA is
3 that it has, in many cases for the first time,
4 included ground water in the delivery. And for
5 the ground water aspect, the system is different
6 from what Ron describes.

7 Q. Any other things you care to disagree
8 with?

9 A. That's the only thing I saw offhand.

10 Q. Okay. Is that still the policy of the
11 State of Idaho as far as you know and are here to
12 testify to?

13 A. To deliver water without the need for
14 a call?

15 Q. Yes.

16 A. Is what you're referring -- yes, in
17 general, the water district will deliver water
18 without a need for a formal call, as I understand
19 the central premise to the document that you
20 handed out.

21 Q. Okay.

22 MR. BROMLEY: Okay. Tom, if I could just
23 interject quickly. I just wanted to confirm that
24 the Exhibit 16 that you're talking about, this is
25 a transcript from a deposition of Ron Carlson

1 taken in the Surface Water Coalition call in his
2 capacity as a retained expert for the ground water
3 users or in his capacity as watermaster for the
4 Water District 01?

5 MR. ARKOOSH: Yes, and I don't know the
6 capacity.

7 MR. BROMLEY: Okay.

8 MR. ARKOOSH: I would have to review the
9 whole deposition. Rather than ask a series of
10 questions, I just thought this would be a lot
11 quicker.

12 MR. BROMLEY: Well, Tom, all I wanted to
13 get on the record is whether or not we knew that
14 this deposition was taken as a witness retained
15 for IGWA or in his capacity as watermaster.

16 MR. SIMPSON: If I may, Tom. It was in the
17 Clear Springs delivery call case.

18 MR. BROMLEY: Okay.

19 MR. SIMPSON: And he was an expert retained
20 by the ground water district, in which he was
21 asked questions regarding his experience as
22 watermaster in Water District 01.

23 MR. BROMLEY: Okay. I was just curious.

24 MR. SIMPSON: Okay.

25 MR. BROMLEY: Because we did multiple

depositions of Ron, some in his capacity as watermaster and some as expert.

MR. SIMPSON: And we all enjoyed it.

MR. FLETCHER: But he always said the same thing every time.

MR. BROMLEY: Absolutely.

Q. (BY MR. ARKOOSH): Look at the question starting at line 6 on Exhibit 17. I'll represent that's from the same deposition, that question and answer.

A. (Reviews.)

Okay.

Q. Do you agree or disagree with that?

A. I would say that the local ground water board use in Idaho administration today is not central to -- to the administration of ground or surface water. The local ground water board was used a few times many years ago. It was found to not be an effective administrative tool and is, to my knowledge, no longer used.

Q. Do you agree with the statement that when you have a watermaster there's a process for distribution in place?

A. Again, with my concern about the other information, I -- I see the addition of ground

decree.

So a prior decree is a fundamental input in making a determination of a water right for a director's report. But it is not the final and absolute factor in each case.

Q. Okay. And is there a water rights accounting program in Water District 1?

A. Yes.

Q. And could you describe for me for what that's used.

A. The Water District 01 accounting program is used to administer the delivery of water in the Upper Snake system. It is run on a daily time-step basis, and provides input for the watermaster in making deliveries and provides input for the accounting of water deliveries, and for the distinct -- for distinguishing between natural flow and storage. So it is central to the operation of Water District 01.

Q. Where does the State get the inputs for the accounting program? Where do those come from?

A. Well, in the early days, the watermaster for the Upper Snake system had a very challenging job, in that many water distribution

water as adding more administrative process than what Ron Carlson is stating here.

Q. Okay. Why is the position of the State of Idaho regarding prior decrees in making recommendations in the SRBA?

A. A prior decree is an important factor in making a recommendation.

Q. If there's been no change in events between the prior decree, no change in circumstances between the prior decree and the time of recommendation, does your answer change, or is it still a factor?

MR. STANISH: Calls for speculation.

THE WITNESS: There are many situations where -- we have as an agency where the agency has not made a recommendation that is exactly like the prior decree, for a variety of reasons.

Q. (BY MR. ARKOOSH): What can those reasons be?

A. One reason might be that the prior decree is inaccurately stated, given all of the other information available to the agency. Another reason might be that it's inadequately stated in a prior decree. Another reason might be that a water right is overstated in a prior

factors were not straightforward. And in the early days my understanding is there was a lot of art in addition to the science in water delivery in the Upper Snake.

When the Department took a more active role in water distribution in Water District 01 -- and I believe this was in 1977 -- when Ron Carlson was appointed as the watermaster and when Bob Sutter developed the initial accounting program, many determinations were made which clarified and made of record delivery decisions in the accounting system and in Water Delivery (sic) 01.

Q. What informs a delivery decision? Where do you learn where to deliver water?

A. Back when the accounting program was developed, it was a process of Bob Sutter and Ron Carlson going through the water rights and the delivery processes and developing a FORTRAN program that would emulate the proper water delivery decisions.

Over the years, that program has been updated and corrected and modified. But that program still provides the basis for the accounting program that we use today.

Q. When you say "water rights," do you

1 mean the decrees and licenses and -- just decrees
2 and licenses and permits? Is that what you're
3 talking about?

4 A. Well, back in 1977, we had decrees,
5 licenses, permits. We also had -- when I say
6 "we," I'm speaking in terms of the agency. The
7 agency also had received notices of claims for
8 water diversions in the Upper Snake. And I don't
9 know if the statutory claim notices were
10 incorporated in the water accounting system or
11 not.

12 Q. My understanding is that if it's a
13 beneficial-use claim, it would not be incorporated
14 because if there were scarcity, it wouldn't be
15 administered; is that right?

16 A. Over the years the law evolved to the
17 point where -- in the early days my understanding
18 is there really wasn't a requirement to have a
19 recorded water right, to the point where the law
20 identified that a water right would be required
21 for each diversion. And how that was treated by
22 the accounting system, I don't know.

23 Q. Okay. What's the policy of the State
24 if there's a conflict between a decree and what is
25 actually in the accounting program? Which

1 controls?

2 MR. STANISH: Calls for speculation.

3 Proceed.

4 Q. (BY MR. ARKOOSH): Let me tell you so
5 you know, David. Unless he specifically tells you
6 not to answer the question, he's just making a
7 record.

8 A. Thank you.

9 The decrees are used as guidelines in
10 informing the accounting system. But many times
11 the decrees are unclear, so interpretation is
12 required. So certainly the decrees inform the
13 accounting system.

14 That was true before the Snake River
15 Basin Adjudication, and the agency anticipates
16 that the Snake River Basin Adjudication will be,
17 in some cases, correcting water rights. That is
18 anticipated. And the accounting system will
19 reflect those corrected water rights when the SRBA
20 determinations are completed.

21 Q. Would you look at Exhibit 2, please,
22 and tell me if you recognize what that is?

23 A. I do recognize it, yes.

24 Q. It's one of the two Eagle decrees;
25 correct?

1 A. Correct.

2 Q. And it's the Burley Irrigation
3 District/Eagle decree?

4 A. Correct.

5 Q. On the first page of Exhibit 2,
6 paragraph 2 says, "That the parties hereinafter
7 named have the right to divert, use for irrigation
8 or other purposes, the waters of the Snake River.
9 The amounts with the priority dates listed, which
10 water shall be appurtenant to the lands described
11 therein."

12 Do you see that language?

13 A. Yes.

14 Q. What's the policy of the State
15 regarding the effect of that language and those
16 named rights?

17 MR. STANISH: That calls for a legal
18 conclusion.

19 THE WITNESS: This -- this decree is one
20 aspect that's used to inform the agency in its
21 distribution of water.

22 Q. (BY MR. ARKOOSH): In what way? What
23 do you mean by "inform"?

24 A. Provide guidance for the water
25 district based on the water rights.

1 Q. Well, that language I just read you
2 adjudicates water to those rights in places of
3 diversion named in there, does it not?

4 A. Yes.

5 Q. Okay. And then let's look at the end
6 of it on page 19, David. And look, if you would,
7 please, look at page 19. Actually, look at
8 page 20, if you would, first. Read paragraph 6,
9 if you would.

10 A. "That the pertinent paragraphs of the
11 contract entered into by the United States of
12 America, Bureau of Reclamation, and the Minidoka
13 Irrigation District, the contents of which
14 paragraphs were confirmed by all other parties
15 Plaintiff in amendatory and supplemental
16 contracts, a copy of which pertinent paragraphs is
17 attached hereto as Exhibit E and by this reference
18 made a part hereof as though set out in full
19 herein, is hereby ratified, confirmed, and
20 approved."

21 Q. Okay. And so that indicates that the
22 contracts identified in the exhibits are as though
23 they were set out in the decree, does it not?

24 A. Yes.

25 MR. STANISH: Calls for a legal conclusion.

1 Q. (BY MR. ARKOOSH): Look at paragraph 4
2 on the prior page, if you would. And if you would
3 read that as well, please.

4 A. "That the contracts entered into
5 between the various parties Plaintiff and the
6 United States of America, Bureau of Reclamation,
7 as the same have been amended and modified, in
8 connection with the Palisades project and other
9 projects, were intended to be and are binding upon
10 all persons claiming rights to the use of the
11 waters of the Snake River and its tributaries,
12 above Milner Dam, and constitute a common plan for
13 the administration of the Snake River."

14 Q. Is it the State's position that
15 language is ambiguous or clear?

16 MR. STANISH: Calls for a legal conclusion.

17 THE WITNESS: I would say that the language
18 is here. And in terms of ambiguity or clarity,
19 this is taken in context with many other issues.
20 So I would say this is guidance information by a
21 court decision that was made in the Eagle case.

22 Q. (BY MR. ARKOOSH): Well, is there any
23 ambiguity in the language that the contracts
24 referred to are binding upon all persons claiming
25 rights to the use of water in the Snake River and

1 its tributaries?

2 MR. STANISH: Calls for a legal conclusion.

3 Q. (BY MR. ARKOOSH): Do you find any
4 ambiguity in that?

5 MR. STANISH: Calls for a legal conclusion.

6 THE WITNESS: In terms of ambiguity, as far
7 as clarity for informing the director's report,
8 this is one element that provides information.

9 Q. (BY MR. ARKOOSH): Okay. You put it
10 in a context I'm not requiring. I just want you
11 to look at the phrase and tell me whether you find
12 it ambiguous.

13 MR. STANISH: Calls for a legal conclusion.
14 I'll also object as it being vague and ambiguous
15 as to what.

16 THE WITNESS: To the narrow extent that
17 this item 4 is part of a decree as a part of the
18 Snake River Basin Adjudication, the statement is
19 clearly written.

20 Q. (BY MR. ARKOOSH): Do you know, David,
21 what the common plan is referred to in that
22 paragraph?

23 A. I -- I have not heard that before
24 seeing it this week, as I looked at the document.

25 Q. Are you aware what the genesis of the

1 Eagle decree was, why it happened? Do you know
2 some of the history of it?

3 A. Only that that's in this decree.

4 Q. Okay. Let me ask you this: The
5 watermaster at the time of District 1, Basin 1,
6 Henry Eagle, was the named party defendant in the
7 Eagle decrees, was he not?

8 A. Yes.

9 Q. So is the watermaster bound in his
10 successors?

11 MR. STANISH: Calls for a legal question.

12 MR. ARKOOSH: Well, let me rephrase the
13 question.

14 Q. Is it the position of the State of
15 Idaho that the watermaster is or is not bound?

16 MR. STANISH: Still calls for a legal
17 conclusion.

18 THE WITNESS: Well, we recognize that --
19 the State, in my experience, has been involved
20 over time with many old decrees. In some cases
21 the watermaster is mentioned, other cases not.
22 And these old decrees are -- can involve the
23 watermaster, but in many cases they're not
24 general, basinwide decrees. So that's one issue.

25 Another issue is that Mr. Eagle, I

1 think, was the watermaster before we initiated
2 this more formal association between the agency
3 that Ron Carlson and -- and the water district,
4 where the watermaster since 1977 has been a
5 Department employee.

6 As far as the watermaster having been
7 bound, this particular decree does include
8 Mr. Eagle. So I would anticipate that he was
9 bound.

10 Q. (BY MR. ARKOOSH): Is the State of
11 Idaho's position the State of Idaho is or is not
12 bound by this decree?

13 MR. STANISH: Calls for a legal conclusion.

14 THE WITNESS: In terms of being bound by
15 any of the existing decrees that were not general,
16 basinwide adjudications, my experience has been
17 that the State looks at these individual decrees
18 as part of the whole, and these decrees are
19 subject to review and not fully sufficient among
20 themselves. So in terms of your question about
21 being bound, I don't have an answer to that.

22 Q. (BY MR. ARKOOSH): Okay. Fair enough.
23 If you'd look at Exhibit E to Exhibit 2. And go
24 to page 28, if you would, please.

25 Are you familiar with the "Winter

1 Power Operation; Minidoka Powerplant" language?
2 Have you reviewed that?

3 A. Yes.

4 Q. Okay. In the first sentence it
5 indicates that this language is effective during
6 the "...operation of American Falls and Minidoka
7 Dams during the storage season"; is that correct?

8 A. Yes.

9 Q. Okay. And then it goes on -- and I'm
10 just going to paraphrase it, although that might
11 be a dangerous thing to do. But it goes on on the
12 next page and talks about the release of water
13 from American Falls for power production at these
14 power plants during the storage season of any year
15 whenever operation of these power plants, to the
16 full extent of their respective water rights for
17 power production, would result in loss of
18 irrigation water otherwise storable to the
19 reservoir system.

20 Do you see that?

21 A. Yes.

22 Q. Does the State of Idaho have a
23 position on what this language means?

24 MR. STANISH: Calls for a legal conclusion.

25 THE WITNESS: Yes.

1 Q. (BY MR. ARKOOSH): Could you tell me
2 generally what that is?

3 MR. STANISH: Calls for a legal conclusion.

4 THE WITNESS: Yes. My understanding of
5 this language is that this refers to the
6 production of power at the Minidoka Power Plant
7 during times -- during the winter when storage
8 could occur upstream. And it refers to that
9 tension between providing water for hydropower and
10 storing water.

11 Q. (BY MR. ARKOOSH): For irrigation
12 water?

13 A. For -- irrigation was mentioned here,
14 but we know that upstream storage has irrigation
15 and other uses as well.

16 Q. I know. But I want to limit the
17 answer to what this language talked about limiting
18 the power production for. It mentions irrigation
19 water is the only thing I see. If you see some
20 more in there, tell me.

21 A. No, this particular document says
22 "irrigation water."

23 Q. Okay. And then down further there's
24 an indented paragraph, and it talks about limit
25 releasing through the dams as follows. And it

1 talks about "...to meet existing diversion rights
2 in the reach of the river through Milner Dam and
3 power rights required to be recognized under the
4 provisions of the contract of June 15th, 2003,"
5 et cetera.

6 Do you see that language?

7 A. Yes.

8 Q. And so that, at least on the face of
9 this structure, indicates that even though water's
10 being held back for irrigation purposes, there
11 will be water released to meet other purposes,
12 even though it could have been stored for
13 irrigation purposes; is that right?

14 MR. STANISH: Objection. There's no
15 question there, and it calls for a legal
16 conclusion.

17 THE WITNESS: This whole section does
18 provide for the release of water for storage as
19 compared with storing -- releasing water for
20 power, as compared with storing it up above, yes.

21 Q. (BY MR. ARKOOSH): Right. And then it
22 says notwithstanding that, notwithstanding you
23 could store some water for irrigation purposes,
24 there's some things you have to release for, and
25 it talks about those in the indented paragraph;

1 isn't that correct?

2 MR. STANISH: Calls for a legal conclusion.

3 THE WITNESS: Yes, that's my understanding.

4 Q. (BY MR. ARKOOSH): Okay. And then
5 later in this -- I don't know if you read the
6 whole thing through, but there's a quid pro quo
7 for keeping that water upstream, is there not, in
8 terms of power-loss payments? Is that correct?

9 MR. STANISH: Calls for a legal conclusion.

10 THE WITNESS: My only understanding of that
11 is just having reviewed this document.

12 Q. (BY MR. ARKOOSH): But somebody gets
13 paid for having their water held back, isn't that
14 right, essentially?

15 MR. STANISH: Calls for a legal conclusion.

16 THE WITNESS: There is an agreement there
17 that -- that's my understanding.

18 Q. (BY MR. ARKOOSH): Okay. I'm not
19 asking you if you know how it works, and you don't
20 know the history of why they were doing this.

21 But there was a quid pro quo for
22 holding that water back, if you know?

23 MR. STANISH: Calls for a legal conclusion.

24 THE WITNESS: Well, my only understanding
25 is based on what this document says.

Q. (BY MR. ARKOOSH): Okay. Let me show you what's been marked as Exhibit 12. That's the supplemental director's report, and it's signed by you; is that correct?

A. Correct.

Q. How was that developed?

A. I was the lead on this. It was developed with staffing participation. And I was involved in the development of this document.

Q. Okay. The second page there is, toward the bottom of the page, what's called the historic practices remark.

Do you see that?

A. Correct.

Q. How was that developed?

A. The genesis of this remark in the SRBA came from the diversion dam on the Boise River. As we were reviewing the -- the hydropower right at that diversion dam, we were knowledgeable that that hydropower right had, in our knowledge -- to our knowledge, never been used to call upstream water down.

And we devised this condition to address the historic practice on the Boise River. That condition having been developed and applied

Q. Exhibit 2.

A. -- is not a clearcut and complete subordination.

Q. In fact, it's only to store for irrigation on its face; isn't that correct?

A. It -- yes, this reflects a much different scenario where there are major irrigation rights downstream that bring water down during the nonstorage season.

So during the storage season, this (indicating) is a more explicit depiction of what happens -- what has happened historically to the power plant.

MR. FLETCHER: Excuse me, Tom.

For the record, when you say "this," can we clarify what document we're talking about?

THE WITNESS: Page 28 of Exhibit 2, paragraph 24.

MR. FLETCHER: And that's what you're claiming is a more historical -- what --

THE WITNESS: My understanding is that it more closely provides the historic practice more closely. Now, that's not to say that word for word this is exactly what has happened. But we became aware over time that the historic practice

when -- on the Boise River, when this issue came up in the Upper Snake Basin, we applied the same condition, to other power systems that we understood at the time had been operated without making any call of upstream water.

Q. The current director just gave his deposition prior to you, and he said that a fair generalization of what this is is a subordination.

With the exception of the last sentence, there's an exception to the subordination; is that a fair statement?

A. That's the way I look at it, yes.

Q. Okay. Is that subordination different in Exhibit 12 than what's provided for in Exhibit -- I think the last one we looked at, David, the Exhibit E to the contract was in Exhibit 2.

Is the historic practices condition different than Exhibit E?

A. Yes.

Q. In what ways? Do you know?

A. Well, this historic practices condition is an explicit and complete subordination. And the actual operation, as described by Exhibit 2 --

at Minidoka was different from the absolute subordination that we had described in the Boise Basin. And that led to the amended -- the supplemental director's report.

Q. (BY MR. ARKOOSH): Well, the supplemental director's report, with the exception of the last sentence where it wasn't subordinated to junior upstream power rights, is an absolute subordination; isn't that right?

A. That was the -- the before recommendation. That's correct.

Q. Okay. There's a third recommendation that we'll deal with here momentarily. Okay? Or a third process.

But Exhibit E only applies to winter storage; isn't that right?

A. Correct.

Q. And that's because in the summertime the plant receives water because of water flowing through for other purposes; isn't that correct?

A. That's correct.

Q. Okay. You named one reason that the supplemental report, Exhibit 12, was adopted, and that is because no water had ever been called upstream; is that correct?

1 A. That was our understanding at the
2 time.

3 Q. Okay. In what circumstance operating
4 the system pursuant to the Eagle decree would
5 water have been called upstream to fill those
6 power rights?

7 MR. STANISH: Calls for speculation and
8 calls for a legal conclusion.

9 THE WITNESS: Well, in my understanding,
10 the actual operation of this power plant at
11 Minidoka is that to the extent that there's an
12 assessment that the storage water is going to fill
13 upstream, that water could be used to optimize
14 power, hydropower, even though the storage right
15 had not yet been filled.

16 Q. (BY MR. ARKOOSH): Okay. But my
17 question was, I'm trying to imagine a scenario
18 where the BOR or actually the beneficial owners of
19 that right, the people that got the benefit of the
20 power-loss payments, during the storage season
21 would call on water when they had, by the terms of
22 the deal and the terms of the Eagle decree, agreed
23 that their water would stay upstream? What's a
24 circumstance you think that they would have called
25 on water?

1 Minidoka during the storage season?

2 A. It's not really properly stated a
3 call.

4 Q. Okay.

5 A. And I would go to Ron Carlson's
6 perspective here; it's an operational process that
7 doesn't require a call. It's a consideration and
8 an operational technique that doesn't require a
9 call.

10 Q. Then taking what you just said, David,
11 even if there was a circumstance where somebody
12 during the storage season tried to ignore the
13 whole deal where they agreed the water be held
14 upstream and called for water, it wouldn't be
15 necessary, would it, as long as there's a
16 watermaster to administer the water?

17 MR. STANISH: Calls for speculation.

18 THE WITNESS: What wouldn't be necessary?

19 Q. (BY MR. ARKOOSH): To make a call.
20 It's an operational function, is it not?

21 A. The operational function would not
22 require a call, is what you're saying?

23 Q. Yes.

24 A. I agree with that. In this situation
25 a call would not be required.

1 MR. STANISH: Calls for a legal conclusion,
2 calls for speculation, and assumes facts not in
3 the record.

4 THE WITNESS: Well, if we have a good -- if
5 the state has a good water year and the reservoirs
6 are not yet full and the flow in the river at
7 Minidoka is less than 2700 cubic feet per second,
8 my understanding now is that there have been
9 historic times when an assessment would be made
10 that -- that this 2700 cfs could be satisfied and
11 still provide for the full storage during the
12 irrigation -- during the storage season of the
13 upstream reservoirs.

14 So that weighing of the desire to
15 create hydropower, as compared with the desire to
16 create storage, has been historically -- it's my
17 understanding -- assessed, so there's been an
18 optimization of the power while still filling the
19 storage rights.

20 That's different from my understanding
21 of what's happened in the Boise Basin, where that,
22 to my understanding, has not occurred.

23 Q. (BY MR. ARKOOSH): Okay. So are you
24 trying to describe a circumstance when there would
25 be a call for water by the power rights at

1 Q. Would you look at page 3. And the
2 very last sentence, it reads, "Generally, the goal
3 of the Department in the adjudication is to ensure
4 that the significant historical practices of a
5 basin are reflected either in the elements of
6 water rights or in a general provision for that
7 basin."

8 Do you see that? Page 3, last
9 sentence.

10 A. Yes, correct.

11 Q. Did you actually write that sentence?

12 A. This was written under my guidance.

13 Q. Okay. Is that still the policy of the
14 State of Idaho?

15 A. Yes.

16 Q. Okay. And from where does that policy
17 originate? Do you know?

18 A. It has been a policy that has been
19 reflected throughout the SRBA. I can give you
20 some examples.

21 Q. No. Well, go ahead and give me
22 examples.

23 A. One example is in the Big Lost River
24 Basin, where the historic practice there was to
25 have storage credits. That's the only place in

1 the world that I'm aware of where storage credits
2 have happened. And the agency made
3 recommendations in accordance with storage credits
4 because that was the historic practice.

5 Q. And that's because the water users
6 wanted that; isn't that right? Or do you recall?

7 A. I wasn't involved at that time. Later
8 on it was a real question of whether they wanted
9 it or not. But originally, that was -- that was
10 the recommendation that was made. And we've had
11 other examples as well.

12 Q. Are there any other historic
13 practices?

14 A. One is on the Boise River Basin. The
15 historic practice has been that for some of the
16 decreed rights, they start out at 100 percent, and
17 then they are reduced to 75 percent, and later to
18 60 percent. There was a court order that
19 initiated that. It's not -- it wasn't finally
20 decreed.

21 There was an order that was not
22 overturned. It wasn't actually finally decreed.
23 But we maintained that historic practice in our
24 recommendation.

25 Q. Any others?

1 district it's an operational process where you
2 wouldn't normally make a call; isn't that correct?

3 A. Yes.

4 Q. And during the storage season these
5 particular power rights had, by contract, agreed
6 to leave their water upstream rather than call for
7 it; isn't that correct?

8 MR. STANISH: Calls for a legal conclusion.

9 THE WITNESS: Well, at the time this was
10 written, this was -- this did reflect our
11 understanding.

12 Q. (BY MR. ARKOOSH): Okay. But today we
13 know it's incorrect; isn't that right?

14 MR. STANISH: Calls for a legal conclusion.

15 THE WITNESS: Today we're aware of more
16 process that has occurred. I'm not sure that
17 Mr. Olenichak knew about it or was responsible for
18 it, but we understand that there has been a
19 determination to optimize the use of water in the
20 basin by satisfying, to the extent possible, the
21 water rights at Minidoka.

22 Q. (BY MR. ARKOOSH): The next sentence,
23 "Changing the operation of the water system to
24 allow these power water rights to be able to make
25 calls on junior water users would be a change in

1 A. Those are two examples.

2 Q. Okay. Any others of which you're
3 aware, as you sit here today?

4 A. I would have to think about it some.

5 Q. Okay. Fair enough. Page 5, please.
6 Do you see a paragraph on page 5 starting with the
7 words "Tony Olenichak"? I'm going to read that.
8 "Tony Olenichak is the Program Manager for Water
9 District No. 1 and oversees the day-to-day
10 operations of the water district. Mr. Olenichak
11 is also a Deputy Watermaster for Water District 1.
12 Mr. Olenichak has worked for Water District 1 for
13 over 17 years and is personally familiar with the
14 administration of water rights in Water
15 District 1. Historically, Water District 1 has
16 administered the power elements of the BOR's water
17 right Nos. 1-217, 1-218, 1-2064, 1-2068, 1-4024,
18 1-4025, and 1-4054 as subordinate to irrigation
19 and all other junior water users except
20 hydropower. Despite numerous opportunities to
21 make calls against junior users, Mr. Olenichak is
22 not aware of a single instance when the BOR has
23 made a call for water under these power rights
24 against junior water users."

25 Now, we just discussed that in a water

1 how the basin water system is historically
2 operated."

3 That's incorrect? At least we now
4 know it's incorrect; isn't that right?

5 A. Well, it depends on how we interpret
6 "make calls."

7 Q. Would you explain, please.

8 A. As we've discussed, we're not talking
9 about making calls here. We're talking about
10 operating -- or optimizing the operation of the
11 Upper Snake system.

12 Q. Okay.

13 A. This sentence talks about being able
14 to make calls, and that really is not directly to
15 the point on how the system has been operated.
16 That, we do know.

17 Q. The final sentence, "This change would
18 have significant negative impact on junior
19 upstream water users."

20 Do you see that language?

21 A. Yes.

22 Q. Okay. This last sentence assumes that
23 unless the remark suggested in the report, the
24 historic practices remark, is put into the decree,
25 there will be a change in how the system's

1 operated.

2 With that background, can you describe
3 for me how there's been a change since 1968 when
4 the Eagle decree was signed by Judge Ward and the
5 time that the SRBA started? What changed in the
6 system vis-à-vis these water rights?

7 A. Well, I would say that we know more
8 today than we did in 2008 about how the system has
9 been operated. We know more -- we knew more in
10 2008 than we knew before.

11 So the generic condition that we
12 applied to these water rights for subordination,
13 we know today didn't really accurately reflect how
14 these power rights had been operated.

15 Q. Okay. My question, though, David,
16 was, is there an identifiable change in the
17 operation of the system vis-à-vis these power
18 rights between 1968 when the Eagle decree was
19 signed and the commencement of the Snake River
20 Basin Adjudication, or at least the time the
21 claims were made?

22 A. I'm not aware of any.

23 Q. Okay. Is there any other reason,
24 other than the belief that no calls were made, not
25 to administer these water rights in accord with

1 the language in Exhibit E? Are there other
2 reasons for that?

3 MR. STANISH: Calls for a legal conclusion.

4 THE WITNESS: Well, this report was
5 prepared in the context of, in general, looking at
6 a hydropower right with a priority date senior to
7 upstream rights and being concerned about the
8 ability of that hydropower right to make calls on
9 upstream juniors. That was the context of the
10 report that was prepared.

11 Since that preparation has been made,
12 we have learned that there are -- there are some
13 more sophisticated considerations involving the
14 Minidoka hydropower rights that we were really not
15 aware of when this report was prepared.

16 So in my perspective, the new -- newly
17 proposed conditions protect upstream juniors
18 sufficiently from calls by downstream senior
19 hydropower rights. So while the operation hasn't
20 changed, to my knowledge, our understanding of the
21 operation has been enhanced.

22 Q. (BY MR. ARKOOSH): Absent Exhibit E,
23 where there was a deal where you can hold our
24 water back for irrigation storage, if a senior
25 power right is in priority, why shouldn't it be

1 serviced? Is there a reason?

2 MR. STANISH: Assumes facts not in the
3 record.

4 THE WITNESS: Let's take -- if I could
5 answer it in the context of the Boise River Basin.
6 There absolutely is a reason, because if the
7 diversion dam hydropower right were allowed to
8 operate under its priority date, which is around
9 the turn of the century, then it would be senior
10 to Lucky Peak, at least, and perhaps other
11 structures -- I'm not sure, but at least to Lucky
12 Peak.

13 So Lucky Peak would be able to fill
14 only if that downstream hydropower right were
15 fully satisfied. That's not the way it's been
16 operated. That hasn't been the historic practice.
17 And because of the desire of the agency to reflect
18 historic practice in the recommendations, a
19 subordination condition was recommended.

20 In the case of the Minidoka Power
21 Plant, the same concerns exist. The evolution of
22 the subordination remarks in Idaho, throughout the
23 state in their various forms, that evolution has
24 been based on the concern that a downstream senior
25 hydropower right could be very damaging to the

1 potential for development upstream. That was the
2 basis for the original recommendation, and it is
3 also the basis for the newly proposed
4 recommendation.

5 Q. (BY MR. ARKOOSH): Isn't it also true
6 that a senior downstream irrigation right could
7 have the exact same effect as the water runs
8 through the canals?

9 A. No. Because the senior downstream
10 irrigation right is only on during the irrigation
11 season. The hydropower right being on in the
12 wintertime can have a very damaging effect.

13 Q. Prior to the construction of
14 Palisades, if there wasn't anywhere to put that
15 water, it wouldn't make any difference, would it?

16 A. There are many reservoirs upstream
17 other than Palisades that are junior to these
18 rights.

19 Q. Let me rephrase the question.

20 If there wasn't anywhere to put that
21 water, it wouldn't make any difference, would it?
22 Let's look at it that way. Let's look at that
23 hypothetical.

24 A. There may be a time in the future
25 where storage is anticipated.

1 Q. So is there some legal principle here
2 espoused by the State of Idaho where a senior
3 water right user loses appropriated water based
4 upon somebody, say, digging a new reservoir? Do
5 you fill that reservoir?

6 MR. STANISH: Calls for a legal conclusion.

7 THE WITNESS: The concept of subordinating
8 hydropower rights is well-founded in Idaho water
9 law, yes.

10 Q. (BY MR. ARKOOSH): Okay. Even
11 though --

12 A. There is a concept.

13 Q. Even though it's appropriated water?

14 A. Yes.

15 Q. Even though it has a senior water
16 right?

17 MR. STANISH: Calls for a legal conclusion.

18 THE WITNESS: The -- that concept of
19 subordination is well-founded.

20 Now, each hydropower right is
21 different, is unique. And just how the
22 subordination is reflected is unique.

23 The State felt that back in the early
24 '80s -- I recall very clearly that the State felt
25 that the hydropower rights of Swan Falls were

1 only to allow retention of water for irrigation
2 purposes and not other purposes?

3 A. I don't know that.

4 Q. Okay. Let me represent to you that it
5 has. So if you, under this remark in Exhibit 3 --
6 and we'll get to the State's remark in a minute.

7 If you subordinate it to all upstream
8 uses, that's a change, is it not?

9 MR. STANISH: Calls for speculation and
10 assumes facts not in the record.

11 THE WITNESS: I would disagree with those
12 facts. I would expect that the City of
13 Pocatello's 50,000 acre-feet in Palisades would
14 have been protected relative to this hydropower
15 right, in addition to the irrigation rights. So
16 I -- I would have concern about that factual
17 premise that you just represented.

18 Q. (BY MR. ARKOOSH): Any other rights
19 that you can identify?

20 A. That's just one, and that's just -- I
21 haven't taken a look at that issue. But I would
22 be very surprised if that were not the case, that
23 there are -- that this right was filled, even
24 though there was a downstream senior hydropower
25 right.

1 subordinated. But the Supreme Court found
2 differently.

3 Q. (BY MR. ARKOOSH): So this concept,
4 it's a concept of imposing subordination on the
5 water right, not from changes in operation or
6 really historical use, but what you're doing is
7 you're just at some point making a decision -- the
8 point now is the SRBA -- that these rights will be
9 subordinated?

10 A. No.

11 MR. STANISH: Calls for a legal conclusion.

12 THE WITNESS: No, the SRBA reflects
13 historic practice.

14 Q. (BY MR. ARKOOSH): Okay.

15 A. And to the extent of the use of
16 hydropower with respect to other upstream uses,
17 the intent of the SRBA has been to reflect
18 historic practice, to include describing the
19 subordination aspect.

20 Q. Well, I thought we agreed that the
21 historic practice with this right, at least to
22 your knowledge, hadn't changed since the passage
23 of the Eagle decree in '68? Has it changed?

24 A. To my knowledge, it has not.

25 Q. And hasn't the historic practice been

1 Q. So if it made no difference to the
2 operation of the system, though, it wouldn't
3 matter though, would it?

4 MR. STANISH: Calls for a legal conclusion.

5 THE WITNESS: Well --

6 Q. (BY MR. ARKOOSH): Let me rephrase the
7 question.

8 If the 50,000 were stored without
9 expense to the hydro right, it wouldn't matter
10 whether it's junior or senior?

11 MR. STANISH: Calls for a legal conclusion.

12 THE WITNESS: Knowing that the 50,000
13 acre-feet were not fully filled in some years when
14 winter storage was limited, I would expect that
15 there were times when the City of Pocatello right
16 was being filled when the hydropower right was not
17 being filled. So it did make a difference.

18 Q. (BY MR. ARKOOSH): During the storage
19 season?

20 A. During the storage season.

21 Q. Okay. Well, maybe the hydropower
22 right was being filled because the water was being
23 retained and there were power credits, so you
24 would have to make a change in accounting, not the
25 movement of water, isn't that correct?

MR. STANISH: Calls for speculation.

THE WITNESS: I don't know.

Q. (BY MR. ARKOOSH): Okay. I'm getting the sense you don't understand the power-loss part of it, but if the water should have run through the power plant, according to the formula, as I understand it, you get credit for it, and then the power is reduced and those beneficial users of that right get an adjustment in their power rate.

But I'm sensing that you're not the guy to ask?

A. That's correct.

Q. Okay. Let's look at Exhibit 10, please.

MR. STANISH: What is Exhibit 10?

Q. (BY MR. ARKOOSH): That's Exhibit 9, David.

MR. FLETCHER: Which exhibit are we looking at?

MR. ARKOOSH: Off the record.

(Recess.)

MR. ARKOOSH: Back on the record.

Q. Let's go back for just a minute before we go on to Exhibit 10, David, and look at Exhibit 3. In Exhibit 3, part of the provisions

in the IDWR supplemental report under the part labeled "Other Provisions Necessary for Definition/Administration of this Right" is the last sentence that says, "The delivery of water to this right may be subject to the provisions for winter power operation at the Minidoka Power Plant as recognized in the Burley Irrigation District versus Eagle supplemental decree and the Aberdeen-Springfield Canal Company versus Eagle supplemental decree."

What's the purpose of that language?

A. These decrees do provide a lot of information relative to the delivery of hydropower flows. And when this director's report was created, the determination was made that it would be helpful to refer to these decrees through these hydropower rights.

Q. Helpful in what way?

A. To bring into account the language that's provided in these -- in the Eagle decrees.

Q. Would that be the Exhibit 2/Exhibit E language we looked at --

A. Yes.

Q. -- regarding winter power operation?

A. Yes.

Q. And that language, however, held back water that was storable for irrigation only.

And as I understand the proposal by IDWR, that's a full subordination, with the exception of junior upstream power rights; is that correct?

A. Yes.

Q. All right. Let's look at Exhibit 10, then.

What's Exhibit 10, the language in Exhibit 10?

A. Okay. This is the language that's now proposed.

Q. Where did that come from? Do you know?

A. There's a filing with the Court from the State and from the -- it is augmented by a filing from the federal government, which proposed this new language.

Q. Where did this language come from? Do you know?

A. This language, it's my understanding, it was developed through the objection resolution process in discussions between the federal government and the State of Idaho as substitute

language for the provisions that had been -- for the substitute language for the conditions that had been recommended by the agency.

Q. Did you have any part in the development of this language?

A. I reviewed the language when it was created. I wasn't actively involved in the discussions, but as director reviewed the language after it was created.

Q. What does this language do that is different than the IDWR remark?

A. This language does provide some opportunity to explicitly allow for storage upstream from the Minidoka Power Plant while the power plant is -- let me rephrase that.

It allows the power plant to run at 2700 cfs before the storage is completely full upstream.

Q. How is this language different than the Eagle decree language in Exhibit E?

A. In many ways it's the same. I would say it's effectively the same as the language in the Eagle decree, except for it's addressed -- it's directed specifically to Minidoka, whereas the Eagle decree does incorporate American Falls

1 in the language as well.

2 Q. And why was that, that it was just
3 limited to Minidoka?

4 A. Well, American Falls' water rights
5 have a different track, a different course. They
6 have other issues.

7 Q. The 217 and 218 rights are not part of
8 the American Falls; is that correct?

9 A. That's correct.

10 Q. Okay. As distinguished from the Eagle
11 decree, doesn't the proposal in Exhibit 10 also
12 allow storage for any purpose?

13 A. Yes. It does not limit to storage for
14 irrigation.

15 Q. Why?

16 A. In my view, this is a reflection of
17 the actual case, that storage in upstream
18 reservoirs has been broader than just for
19 irrigation. Storage has been for other uses as
20 well, in Palisades, for example.

21 Q. And what other uses are those?

22 A. For example, the municipal use at --

23 Q. The Pocatello right?

24 A. -- the City of Pocatello.

25 Q. And that's a mitigation right;

1 correct?

2 A. Well, it's been used for many things.
3 The original acquisition, I believe, was intended
4 to be a mitigation right.

5 Q. Okay. And what other uses
6 historically, other than irrigation and storage?

7 A. I haven't looked at that. This
8 language does broaden beyond irrigation, but there
9 are many uses upstream from Minidoka. And I
10 haven't looked to identify specific ones.

11 Q. If it turns out to be the case that
12 there has been no change since 1968 until the
13 start of the SRBA and the accounting for the
14 storage of this water for irrigation purposes and
15 the credits, and in fact the water was not stored
16 for other purposes, would the State's position
17 change?

18 MR. STANISH: Calls for speculation.

19 THE WITNESS: I don't know.

20 Q. (BY MR. ARKOOSH): Why wouldn't it? I
21 mean why wouldn't it change, if there are other
22 reasons it's tied to historic practices?

23 MR. STANISH: Still calls for speculation.

24 THE WITNESS: Yes, the agreed-upon
25 condition here is, in my view, a condition that's

1 agreed upon by the state and the federal
2 government based on all the considerations above.
3 The contract -- the contracts that exist provide
4 considerations. The Eagle decrees provide
5 considerations. There are many other existing
6 considerations that -- that would be important to
7 look at relative to the SRBA outcome. So I don't
8 know what the -- what the difference would be if,
9 as you suggest, perhaps there had been no changes.

10 Q. Well, this is not an SS-5 where
11 everybody that's a party has agreed to this
12 certainly, is it?

13 A. That's correct.

14 Q. And the people, like some of the
15 parties in this room, who get the benefit of the
16 power-loss credits, if the historic practice is
17 changed such that they no longer get benefit for
18 that or that changes to a lesser amount, they're
19 going to be hurt even though they don't agree;
20 isn't that right?

21 MR. STANISH: Calls for speculation and
22 assumes facts not in the record.

23 Q. (BY MR. ARKOOSH): Isn't that one of
24 the considerations you were visiting about in the
25 SRBA?

1 A. The SRBA considerations encompass a
2 variety of considerations. And impacts on others
3 are some of the considerations.

4 Q. Does the State take the position
5 absent a change in historical practice that a
6 senior right can be subordinated somehow?

7 MR. STANISH: Calls for a legal conclusion.

8 THE WITNESS: No. And I'll use as an
9 example the Boise River diversion. There hasn't
10 been a change in historical practice. But the
11 right is subordinate because of historical
12 practice, in my understanding that has been the
13 practice.

14 Q. (BY MR. ARKOOSH): Okay. But if the
15 historical practice was to administer the right as
16 though it were not subordinated and that doesn't
17 change, is it the position of the State of Idaho
18 that right then can be subordinated for some
19 reason?

20 MR. STANISH: Calls for speculation and
21 calls for a legal conclusion as well.

22 THE WITNESS: The intent has been to
23 reflect historic practice.

24 Q. (BY MR. ARKOOSH): Can historic
25 practice, as you call it, in a basin administered

1 by a watermaster change somebody's water right?

2 MR. STANISH: Calls for speculation and a
3 legal conclusion.

4 THE WITNESS: Can it change somebody's
5 water right? The intent is to reflect the water
6 rights, not to change them through the
7 adjudication process. The intent is to properly
8 reflect the water rights.

9 Q. (BY MR. ARKOOSH): Okay. That's a
10 fair answer.

11 Is it the position of the State of
12 Idaho that watermasters improperly constituted
13 water districts, exercise exclusive power under
14 Idaho Code 42-601, et seq., to distribute water
15 among appropriators?

16 MR. STANISH: Calls for a legal conclusion.

17 THE WITNESS: Well, they don't have
18 exclusive power, in my view. The watermasters
19 operate at the -- based on the authority of the
20 water districts. And the water districts operate
21 based on the authority of the Department of Water
22 Resources. They're created by the agency. So
23 there's a broader context. So they don't have
24 exclusive authority.

25 Q. (BY MR. ARKOOSH): Actually, it was at

1 your direction when you were the director;
2 correct?

3 A. Correct.

4 Q. But that power is exclusive, is it
5 not? The Department and the water district ran
6 Basin 1?

7 A. That's correct.

8 Q. Does the State agree that because the
9 watermaster is a ministerial officer he's
10 authorized to distribute water only in compliance
11 with applicable decrees or licenses?

12 MR. STANISH: Calls for a legal conclusion.

13 THE WITNESS: It's -- a delivery is based
14 on the understanding of the watermaster of those
15 applicable decrees and licenses. And that
16 understanding is based on -- in some cases it's
17 not crystal clear. That's one benefit of the
18 Snake River Basin Adjudication. But it is based
19 on the understanding of those licenses and
20 decrees, yes.

21 Q. (BY MR. ARKOOSH): Okay. Is it the
22 State's position that the holders of water rights
23 are entitled to presume that the watermaster is
24 delivering water to them in compliance with the
25 priorities expressed in the governing decrees and

1 licenses?

2 MR. STANISH: Calls for a legal conclusion.

3 THE WITNESS: Yes.

4 Q. (BY MR. ARKOOSH): If water is
5 actually delivered and put to beneficial use under
6 an exchange agreement, would it be the case that
7 interference with that by the watermaster in the
8 exercise of a decreed right by failure to fill a
9 right in accord with that decreed priority not
10 establish any grounds or abandonment or
11 forfeiture?

12 MR. STANISH: Calls for a legal conclusion.

13 THE WITNESS: Could you explain that one,
14 please?

15 Q. (BY MR. ARKOOSH): Yeah, let me
16 rephrase that. Let me rephrase it in the context
17 we're talking about.

18 Under the BOR contract, as adopted by
19 the Eagle decree, that power right was held during
20 the storage season up above, put to a beneficial
21 use, and that process does not constitute
22 abandonment or forfeiture?

23 MR. STANISH: Calls for a legal conclusion.

24 THE WITNESS: If there's an exchange, then
25 the exchange does not give rise to abandonment or

1 forfeiture. If that's what you're asking, I would
2 agree with that.

3 Q. (BY MR. ARKOOSH): Okay. And a water
4 right would not be lost through adverse possession
5 for prescription when the water was distributed by
6 a duly appointed or elected watermaster during the
7 season?

8 A. I agree.

9 Q. Okay.

10 MR. STANISH: Calls for a legal conclusion.

11 Q. (BY MR. ARKOOSH): So would you agree
12 with me if the practice was between the time of
13 the Eagle decree in '68 and the time of the SRBA,
14 this water was not stored for any other reason
15 than irrigation storage, that there would be no
16 reason to subordinate the water to all upstream
17 uses today?

18 MR. STANISH: Calls for a legal conclusion.

19 THE WITNESS: Well, I don't know. This --
20 these Eagle decrees are two decrees that were not
21 basinwide adjudications. They were not general
22 adjudications to which all parties were -- or all
23 water users are parties.

24 So I wouldn't say that categorically.

25 I would say that these decrees inform the process,

1 but they don't provide absolute guidelines.

2 Q. (BY MR. ARKOOSH): So in that
3 hypothetical, you don't have an answer,
4 notwithstanding what the historic practice is? I
5 mean the State may well take the position that
6 notwithstanding the historic practice, "We'll
7 change it to subordinate this to all upstream
8 uses"?

9 MR. STANISH: Calls for a legal conclusion
10 and speculation.

11 THE WITNESS: Well, the reflection that is
12 in these documents is one reflection of the
13 practices. But there are many other reflections
14 as well; for example, what the accounting system
15 shows, what the -- what other contracts show.

16 So by itself, this -- this reflection
17 of the right doesn't fully describe the right --
18 this Eagle decree reflection doesn't fully
19 describe the right.

20 Your question, as I understand it, is
21 if it can be shown that only irrigation was
22 affected, then should this reflection of the
23 condition to date include only irrigation? And I
24 don't know. Perhaps so. I don't know.

25 Q. (BY MR. ARKOOSH): Well, let me ask

1 practices had some traction, what if the historic
2 practice hadn't changed? And I still get an
3 equivocal answer, but I can't get what the theory
4 is or why it wouldn't just remain in accordance
5 with the Eagle decree. Does that question make
6 sense to you? You say there are other factors,
7 but what would change a person's water right where
8 there's a watermaster if the historic practice had
9 not changed? Is there anything you can think of?

10 MR. STANISH: Calls for speculation and a
11 legal conclusion.

12 Q. (BY MR. ARKOOSH): And I want you to
13 speak for the State of Idaho. That's why you're
14 here.

15 A. Yes. And we've already established --
16 or I've already mentioned the fact that there are
17 nonirrigation rights that are stored in Palisades
18 Reservoir. And you are asking me to make an
19 assessment -- an assumption that what if there
20 were no nonirrigation rights.

21 Q. I'm asking you a hypothetical,
22 because, as we sit here, we know we don't agree to
23 the facts. But making that assumption, the
24 historic practices is not a reason for a change.

25 Is there another reason?

1 the question a different way, David.

2 If this right was scrupulously
3 administered, or at least we thought it was, with
4 the watermaster in accordance with the dictates of
5 the Eagle decree, wouldn't the proper comment to
6 these water rights be continued administration in
7 accordance with the Eagle decree if you're going
8 to put any comment at all?

9 MR. STANISH: Calls for speculation and a
10 legal conclusion.

11 THE WITNESS: The Eagle decree is one
12 factor that informs administration. There are
13 other factors as well.

14 Q. (BY MR. ARKOOSH): Well, here's where
15 I'm struggling: I came to this deposition
16 thinking, having read your report and having read
17 the federal government's briefing and the State's
18 briefing, that what we were doing was trying to
19 fashion a remark that reflected how we did that.
20 And I struggled with the notion we've got a
21 watermaster so I know it's not forfeiture
22 abandonment, adverse procession, prescription,
23 estoppel, a waiver because we have a watermaster.
24 I struggled with that.

25 But that issue aside, then if historic

1 MR. STANISH: Calls for speculation and a
2 legal conclusion.

3 THE WITNESS: Another reason is there might
4 be parties that weren't party to the original
5 decree that provide information that is -- that
6 outweighs the information that's provided in the
7 decree. And we've had that happen many times.

8 Q. (BY MR. ARKOOSH): Okay. Are there
9 other reasons that you can think of?

10 A. What reasons might those be?

11 Q. Well, no.

12 A. Or --

13 Q. Are there other reasons, other than
14 maybe somebody is not bound by the Eagle decree?

15 A. Oh.

16 MR. STANISH: Again, calls for a legal
17 conclusion as well as speculation.

18 THE WITNESS: Well, my expectation is that
19 the practice that has occurred is that these
20 storage rights have not called on upstream junior
21 wintertime water rights at all. There are many,
22 many with many different kinds of uses of water
23 rights upstream from Minidoka Power Plant. So I'm
24 struggling with your hypothetical to say what if
25 only irrigation was involved.

1 Q. (BY MR. ARKOOSH): But if they got
2 full priority payment under the power loss, why
3 would they be calling? They can't get any more
4 payment than that, can they?

5 MR. STANISH: Assumes facts not in the
6 record.

7 THE WITNESS: Well, I identified one, and
8 that's what's in Palisades. But I'm thinking of
9 the many, many other water rights that are
10 nonirrigation season water rights upstream from
11 Minidoka in the Upper Snake system.

12 And we -- we could look at the system,
13 query it, and find many, many water rights that
14 have never been historically delivered, that have
15 never been called by these power plants, and one
16 questions -- well, historic practice has been that
17 they haven't requested that those rights be
18 delivered.

19 Q. (BY MR. ARKOOSH): Okay. If
20 power-loss payments were made as though 2700 feet
21 ran through the power plant every day of the
22 season, or whenever it was in priority, why would
23 one call? What's to call? They're getting the
24 full benefit of the right, are they not?

25 MR. STANISH: Calls for speculation, legal

1 conclusion, and assumes facts not in the record.

2 THE WITNESS: I can't speak to that issue.
3 I don't know.

4 Q. (BY MR. ARKOOSH): Okay.
5 Incidentally, if there are other rights than
6 irrigation rights that are going to become
7 superior to this power right and they take the
8 water during the storage season, is there any
9 provision made that those other people that are
10 not irrigation entities pay the power loss on
11 those rights?

12 MR. STANISH: Calls for speculation and a
13 legal conclusion.

14 Q. (BY MR. ARKOOSH): Or do you know?

15 A. I don't know.

16 (Exhibit 18 marked.)

17 MR. STANISH: Could we get copies of this,
18 please?

19 MR. ARKOOSH: Give me one, too, as well,
20 would you, please. I gave you mine.

21 MR. BROMLEY: Are we off the record?

22 MR. ARKOOSH: We're off the record.

23 (Discussion.)

24 Q. (BY MR. ARKOOSH): Have you had a
25 chance to review it?

1 A. Yes.

2 Q. In Exhibit 18, one of the IDWR AGs,
3 Chris Bromley, writes that "The other decrees that
4 the Department has relied upon were brought by
5 water users against the watermaster."

6 Is that similar with the Eagle decree,
7 brought by water users against the watermaster?

8 A. That is what was done there, that's
9 correct.

10 Q. Okay. And so it says, "The Department
11 feels it is bound by those decrees."

12 Is that the position of the State as
13 well?

14 MR. STANISH: Calls for a legal conclusion.

15 THE WITNESS: That's -- that would not be
16 my understanding of the position.

17 Q. (BY MR. ARKOOSH): So is there a
18 conflict between the State and the IDWR position?

19 A. On this particular issue, I believe
20 there is.

21 Q. Okay. Then, David, it is my
22 understanding that you were the -- I guess would
23 "proponent" be the fair word of Exhibit 12, which
24 I think is the supplemental report? Is that
25 right?

1 A. That is correct. Well, I don't know
2 if that's Exhibit 12. But I was the primary
3 person behind that report and did sign that
4 report.

5 Q. And that was based upon historical
6 practices that we've since learned weren't quite
7 accurately perceived, there was more knowledge
8 gained?

9 A. In the Minidoka case, yes.

10 Q. And now you are the witness here to
11 propound Exhibit 10, which is now the State's
12 remark upon which it asks for summary judgment; is
13 that correct?

14 A. That is correct.

15 Q. And that remark is different than the
16 other remark propounded by you previously; is that
17 correct?

18 A. Yes. And the new remark was -- I was
19 familiar with it when I was director. I was aware
20 of the discussions that were taking place, and
21 approved of the use of the new remark as a
22 replacement to the previous remark.

23 Q. So as director of IDWR, you approved
24 of the current remark as a replacement to the
25 prior remark; is that right? Is that what you

1 just said?

2 A. Yes, that's correct.

3 Q. Was it promulgated as a remark?

4 A. It was promulgated as a document that

5 was sent to the Court as a replacement. That's my

6 understanding.

7 Q. Okay. It's never been promulgated,

8 though, as recommendations? Remarks are generally

9 promulgated; is that correct?

10 A. That's correct.

11 Q. So if IDWR looked at that and approved

12 of it, why wasn't it that IDWR just promulgated it

13 as a proposed remark through the process?

14 A. I don't know why it took this course.

15 I don't know.

16 Q. Do you think the proper thing to do,

17 based upon your experience as director of IDWR, is

18 have an amended recommended report or a second

19 supplemental report?

20 MR. STANISH: Calls for a legal conclusion.

21 THE WITNESS: I -- there are so many

22 different courses of action that take place in

23 various steps of the SRBA that I really can't

24 answer that with the information I have.

25 Q. (BY MR. ARKOOSH): Do you think it's

1 version than the old version.

2 This is before the SRBA court.

3 There's an opportunity for input, in my

4 understanding. There's an opportunity for various

5 perspective on this. In my capacity as director,

6 I was aware of the process and found the new

7 reflection to be better than the initial

8 reflection. And the adequacy of this new

9 reflection is subject to review by the Court.

10 Q. (BY MR. ARKOOSH): Now, I'm asking you

11 as the person most knowledgeable for the State of

12 Idaho what the State of Idaho thinks about this.

13 If nothing has happened -- it's a

14 hypothetical question. If nothing has happened

15 since the passage of the Eagle decree in '68 and

16 administration has been in accordance with the

17 Eagle decree, would a remark that says "Continue

18 to administer this in accordance with the Eagle

19 decree" be all that's necessary for

20 administration?

21 MR. STANISH: Calls for speculation, a

22 legal conclusion, and assumes facts not in the

23 record.

24 THE WITNESS: My response is no, that would

25 not be adequate.

1 fair for the State to say "I want this remark" and

2 the IDWR to say "I want this remark," but not

3 promulgate it to those other people who might be

4 affected publicly?

5 A. My understanding is there is an

6 opportunity. And that opportunity is reflected in

7 this deposition today, as an example.

8 Q. Well, people that don't know that this

9 remark was out there wouldn't be at this

10 deposition today, would they?

11 A. Well, the -- I really can't opine on

12 this particular process and whether it's

13 appropriate.

14 Q. If, in fact, nothing has changed since

15 the Eagle decree, and these water rights were, in

16 fact, administered in accordance with the Eagle

17 decree, would it be sufficient for administration

18 if any remark is necessary to say to administer

19 this in accordance with the Eagle decree?

20 MR. STANISH: Calls for a legal conclusion,

21 and that's a compound question.

22 THE WITNESS: Well, in this case the -- the

23 assessment was made between the State and the

24 federal government that a reflection of this

25 subordination remark is better stated in the new

1 Q. (BY MR. ARKOOSH): And why?

2 MR. STANISH: Same objections.

3 THE WITNESS: I think a more explicit

4 description of the extent of subordination is

5 appropriate on a hydropower right. More explicit

6 information is required than merely that it be

7 administered under the provisions of the former

8 decree.

9 Q. (BY MR. ARKOOSH): And that's based

10 upon your belief that the rights should be

11 subordinated to uses other than irrigation?

12 A. That -- my belief that the right is

13 that -- the subordination should reflect a --

14 reflect historic practice or some -- subordination

15 should be based on some other element.

16 But it's -- subordination is an

17 important enough concept that it should be

18 described explicitly for each hydropower right in

19 whatever form it comes.

20 Q. But, David, my hypothetical was

21 historic practice hasn't changed, and it was done

22 in accordance with the dictates of the Eagle

23 decree historically?

24 A. But the --

25 MR. STANISH: Calls for speculation, legal

1 conclusion, and assumes facts not in the record.

2 THE WITNESS: The historic practice is not
3 adequately stated by just referring to the Eagle
4 decree, in my view.

5 Q. (BY MR. ARKOOSH): So why wouldn't you
6 just pull the language out of the Eagle decree,
7 then, without changing it and use that for the
8 remark?

9 MR. STANISH: Same objections.

10 Q. (BY MR. ARKOOSH): That's pretty
11 explicit, don't you think?

12 MR. STANISH: Same objections.

13 MR. ARKOOSH: Excuse me. That's a compound
14 question.

15 Q. The first question was, why wouldn't
16 you just pull it out and put it in the decree?

17 MR. STANISH: Same objections.

18 THE WITNESS: It is very common that
19 conditions that were in previous decrees are
20 rewritten to some extent to make them more
21 relevant to present and future delivery, and these
22 conditions I think matched that.

23 These conditions for Minidoka and
24 Palisades have been modified to some extent to
25 better reflect the understanding of these

1 today, or are you just reciting that you've been
2 retained as a possible expert by the State in this
3 matter to give testimony as an expert at some
4 future proceeding if it takes place?

5 A. I'm -- I have no expectation of being
6 in future proceedings. My role today is to
7 provide the deposition based on my knowledge of
8 this -- of this action both today and in the past,
9 but I don't know what will be in the future.

10 Q. Okay. In your view, does your
11 testimony today rise to the level of an expert?
12 Are you providing expert testimony opinions, or
13 are you just providing factual information?

14 A. I really don't know how to answer
15 that. I have expertise in this area, but my
16 responses are based on my understanding of the
17 historic activities relative to these water rights
18 and based on the status of the case.

19 Q. Okay. Well, you provided a number of
20 answers to questions regarding the Eagle decree.

21 Do you recall that testimony?

22 A. Yes.

23 Q. Okay. Is it fair to say you don't
24 have an understanding regarding what I think
25 Mr. Arkoosh described as the power-loss

1 conditions, in my view.

2 MR. ARKOOSH: Okay. All right. Thank you.

3 THE WITNESS: You're welcome.

4 EXAMINATION

5 BY MR. SIMPSON:

6 Q. David, at the beginning of your
7 testimony, you identified, I believe, that you
8 were here as an expert retained by the State; is
9 that correct?
10

11 A. Yes.

12 Q. Okay. And you're providing testimony
13 today.

14 On what matters are you providing
15 expert testimony on?

16 A. My role today is a bit different from
17 that of a normal expert because I was serving as
18 the director when many of these matters were moved
19 forward. So in that sense, I have a combined
20 role, perhaps, in representing the State here
21 today as the agency person who was responsible at
22 the time when many of these actions were taken,
23 but recognizing that I no longer work for the
24 State.

25 Q. So are you offering expert testimony

1 calculation?

2 A. That's correct.

3 Q. Okay. Do you have an understanding of
4 how the Minidoka power right or rights have
5 historically been subordinated?

6 A. No. I don't have firsthand knowledge
7 of that.

8 Q. Okay. Have you reviewed any of the
9 accounting programs for the Water District 1 to
10 identify how the Minidoka power rights are
11 reflected in the accounting program?

12 A. No.

13 Q. Have you talked to anyone from Water
14 District 1 to gain an understanding?

15 A. No.

16 Q. Do you have an understanding of the
17 winter water savings provision and how it's
18 reflected in the Eagle decree?

19 A. I have reviewed the Eagle decrees. I
20 have reviewed the subordination condition as
21 originally represented and through the director's
22 report and as now proposed. So my understanding
23 is based on those reviews. But --

24 Q. Just more generally, have you applied
25 any of the other provisions of the Eagle decree,

1 such as the winter water savings agreement, or
2 have you reviewed how it's been applied?

3 MR. STANISH: Objection. John, I think the
4 issue of what exactly a winter water savings
5 provision is is a little vague to me in terms of
6 this line of questioning.

7 Can you identify it more specifically?

8 MR. SIMPSON: If Dave understands my
9 question, he can answer if he understands. If
10 not, then I can go ahead and explain it.

11 THE WITNESS: Are you referring to the
12 winter water savings relative to the canals
13 getting certain considerations if they stopped
14 delivery during the wintertime and how those
15 provisions apply to this power?

16 Q. (BY MR. SIMPSON): That's correct.
17 And do you have an understanding of how that's
18 accounted for in the Upper Snake?

19 A. I know of the winter water savings
20 provision. I -- I'm not familiar enough to
21 provide deposition on how that's accounted for.

22 Q. Okay. You identified in a number of
23 questions from Mr. Arkoosh that there would be a
24 number of rights in the nonirrigation season that
25 would be affected by the application or

1 nonapplication of a subordination to the Minidoka
2 power right.

3 Do you recall that testimony?

4 A. So could you state that again, please?

5 Q. Well, do you recall giving some
6 testimony that -- and I'm paraphrasing, so correct
7 me if I don't catch it correctly -- that the
8 exercise of the Minidoka power right, if it wasn't
9 accurately reflected based upon historical
10 practices, that it could affect a number of rights
11 being exercised in the nonirrigation season?

12 A. Correct.

13 Q. And have you undertaken any effort to
14 identify what rights those would be?

15 A. No.

16 Q. Okay. But you're certain that there
17 are a number of those rights? Hundreds of them?

18 A. I would expect that there are many
19 rights. I can't give you a count.

20 Q. Okay. And those would be in the
21 nonirrigation or in the storage season; correct?

22 A. Yes, uh-huh.

23 Q. And those wouldn't be irrigation
24 rights; correct?

25 A. It might be irrigation storage from

1 other facilities, non-Bureau facilities, for
2 example. Smaller storage facilities.

3 Q. Private facilities, you mean?

4 A. Yes. Yes.

5 Q. Such as -- can you identify those?

6 A. No. Just --

7 Q. Okay.

8 A. -- small 2 and 5, 10-acre, 100-acre
9 facilities.

10 Q. Okay. And you know those exist up
11 there? You've identified those before, or is this
12 just kind of speculation on your part?

13 A. I have not gone through the effort to
14 look at them. But just knowing the history of
15 water development throughout the State, I
16 anticipate that one would be able to find many
17 water rights upstream from Minidoka --

18 Q. Okay.

19 A. -- in the winter.

20 Q. So one classification you would expect
21 to identify would be private storage rights;
22 correct?

23 A. Correct.

24 Q. Okay. What other rights in the
25 nonirrigation season?

1 A. Industrial uses?

2 Q. Out of the main Snake.

3 A. Or out of the Snake or tributaries or
4 ground water, because we know that ground water
5 and surface water are interrelated.

6 Q. Okay. So you're contemplating perhaps
7 that the Bureau could have made a conjunctive
8 management call at some point in the past --

9 MR. STANISH: Calls --

10 MR. SIMPSON: This is his testimony.

11 Q. -- in the past by identifying
12 industrial users who take ground water?

13 MR. STANISH: Still calls for speculation
14 and a legal conclusion.

15 THE WITNESS: I just -- my testimony is
16 that there are many of those uses upstream,
17 whether from the Snake, from the tributaries, from
18 ground water, that would be junior to these power
19 plants.

20 Q. (BY MR. SIMPSON): Okay. So we've
21 identified private storage, industrial.

22 Any other uses that you could
23 identify?

24 A. Commercial.

25 Q. Commercial. Others?

1 A. And storage of all of the above.

2 Storage for stock water, municipal uses.

3 Q. So from your perspective, then, the
4 historical practices provision, either in the
5 director's -- well, let's look at first the
6 original director's report, contemplated that
7 Reclamation could have made a conjunctive
8 management call against any of those uses you
9 identified?

10 A. Conjunctive management for the ground
11 water or an explicit -- or explicit direction to
12 the watermaster on the others.

13 Q. Okay. Did you undertake that kind of
14 a historical practices review associated with all
15 rights above Milner?

16 A. The review was initially made relative
17 to the diversion dam on the Boise.

18 Q. I understand. But my question really
19 goes to did you look at any other rights when you
20 applied this historic practices concept, other
21 than hydropower?

22 A. No.

23 Q. How come?

24 A. Because historically the State has
25 subordinated hydropower since -- hydropower rights

1 since the 1920s or 1930s, the State has
2 subordinated to upstream uses hydropower, but not
3 other uses. So hydropower is unique relative to
4 subordination.

5 Q. So the historical practices concept
6 that's being applied in this subcase that you've
7 explained today is specific only to hydropower?

8 A. That's correct. Well, the historic
9 practice related to subordination is specific to
10 hydropower. But the historic practice relative to
11 diversions and water uses is not specific to
12 hydropower. And the examples that I gave are
13 those in the Big Lost and the Boise where historic
14 practices are different from the norm for water
15 delivery in most parts of the state.

16 Q. So did you go through and review
17 Reclamation's practice of storing water and how
18 they stored water and their operational practice
19 vis-à-vis storage in the storage season to
20 determine whether from a historical perspective
21 there should be a historical practice remark
22 associated with those storage rights?

23 A. At the time we made the assessment on
24 these -- on these conditions, I don't recall that
25 we made that kind of an assessment. The

1 recommendations were made by a lack of
2 understanding any kind of a call for delivery
3 during the wintertime for these rights. Now --

4 Q. If you know, has Reclamation made a
5 call for storage in the wintertime?

6 A. To my knowledge, no.

7 Q. Getting back to identifying those
8 rights that would, in essence, benefit from the
9 historic practice remark put on a power right at
10 the Minidoka Dam, those rights, could those be
11 identified? Could you go through and identify
12 those for us?

13 A. I could identify some of them today,
14 but the practice has been for hydropower rights to
15 subordinate also in the future.

16 Q. I understand that that's your
17 statement.

18 But what I'm asking is, could you go
19 through and identify those rights upstream from
20 Milner Dam that benefit from the 19-, I believe,
21 09 hydropower right being subordinated?

22 A. Yes.

23 MR. SIMPSON: Okay. If that's something he
24 could do in representing the State on this issue
25 in his testimony, I'd appreciate it.

1 MR. STANISH: You want him to do that right
2 now?

3 MR. SIMPSON: No. He can provide the data
4 to us.

5 Q. You've identified that from your
6 perspective in looking at the proposed remark that
7 it addresses water storage for other purposes than
8 simply irrigation.

9 Do you recall that testimony?

10 A. Yes.

11 Q. And are those other purposes, would
12 those be identified by the contracts between the
13 Bureau of Reclamation and the individual space
14 holder entity?

15 A. Some would be identified by contract.
16 I'm not sure that all of them would be identified
17 by contract.

18 Q. What other uses or what other purposes
19 could water be stored for if it's not stored for a
20 purpose identified under a contract between the
21 Bureau of Reclamation, who runs the storage
22 facilities, and the individual space holders?

23 A. Well, I'm not certain as we're
24 speaking if it's limited to the Bureau storage
25 facilities. So I would want to consider whether

1 non-Bureau storage facilities would be included as
2 well.

3 Q. Let's look at Exhibit 10. And if
4 you'll look on the first paragraph for 217 and
5 218, if you'd look at the last sentence. I'll
6 read it. A "'Reservoir System' shall mean all
7 Federal reservoirs on the Snake River and its
8 tributaries down to and including Lake Walcott."

9 A. Yes. So the reservoir system, as
10 described in this particular condition, would just
11 include those federal reservoirs.

12 Q. Right.

13 A. So in that case, I would say yes, they
14 should be identifiable by contract.

15 Q. So only the uses identified by
16 contract would be those uses for which this remark
17 would be applicable to; correct?

18 MR. STANISH: Calls for a legal conclusion.

19 THE WITNESS: I -- I'm not sure what -- I
20 haven't dealt with the contracts from the federal
21 entities. I don't know if the contracts in every
22 case explicitly identify the uses. I don't know.

23 Q. (BY MR. SIMPSON): Assuming for the
24 moment that the contracts do identify the uses,
25 would those uses be the storable water as

(Exhibit 19 marked.)

2 Q. (BY MR. SIMPSON): So, David, in
3 looking at Exhibit 19, do you recognize
4 Exhibit 19?

5 A. Yes.

6 Q. Okay. And that's a claim for storage
7 at what facility?

8 A. I'm not seeing it explicitly here. I
9 believe it's for American Falls, but I don't see
10 it explicitly.

11 Q. How about if I tell you it's for
12 Palisades?

13 A. Okay.

14 Q. All right. So if you look at
15 Exhibit 19 and you go down to the "Purpose and
16 Period of Use," does it identify the purposes of
17 that storage?

18 A. Yes. This is -- it says irrigation
19 storage, 1.2 million acre-feet; irrigation from
20 storage, 1.2 million acre-feet; power storage, the
21 same; and power storage from the same.

22 Q. Okay. So with each of these
23 reservoirs in the Upper Snake, they identify,
24 through the water right additionally, the purposes
25 for which water can be stored; correct?

1 identified under this remark?

2 A. To the extent this condition only
3 refers to the federal reservoirs and if the
4 contracts do show all the uses, then it would
5 stand to reason that those nonirrigation uses
6 would be identified.

7 Q. Yeah. And those uses also would be
8 reflected in the storage rights for each of the
9 reservoirs; correct?

10 A. They should.

11 MR. STANISH: Calls for a legal conclusion.

12 Q. (BY MR. SIMPSON): In your experience
13 as director, so we're not asking you for a legal
14 conclusion, your review of a water right and the
15 water rights for storage rights in the Upper Snake
16 identify the purposes for which that storage is
17 held; correct?

18 A. That's correct.

19 Q. Okay. Have you reviewed the storage
20 rights for American Falls and Palisades before?

21 A. I have. I haven't looked at them
22 recently for this particular issue. I wouldn't be
23 able to recite what those uses are.

24 MR. SIMPSON: Let's go ahead and mark this
25 as the next exhibit.

1 A. That's correct.

2 Q. All right. And so if water were
3 stored in those reservoirs for a purpose not
4 identified under a water right, that would be --
5 what? -- an illegal diversion, in your view?

6 A. Well, it would be incorrect. It would
7 be giving rise to the need to make a correction to
8 that water right.

9 Q. To that storage. Well, not to the
10 water right, but to the action of storing water
11 for a purpose not authorized under the water
12 right; correct?

13 A. That's correct.

14 Q. From your perspective, can water be
15 stored in a reservoir for which a purpose hasn't
16 been identified in the water right?

17 A. The proper technique is to modify the
18 water right if storage is intended for a use other
19 than what is identified.

20 Now, to the extent this is a water
21 right for Palisades, and to the extent -- well, if
22 there are no provisions on the water right for
23 purposes other than storage and power, then to the
24 extent there would be uses desired for other uses,
25 the water right -- either the water right should

1 be changed or the uses should not occur.

2 MR. SIMPSON: Let's mark this as
3 Exhibit 20.

4 (Exhibit 20 marked.)

5 Q. (BY MR. SIMPSON): Dave, do you
6 recognize Exhibit 20?

7 A. Yes.

8 Q. And what is Exhibit 20?

9 A. This is a picture of a -- or it's a
10 copy of the license to the U.S. Bureau of
11 Reclamation for water right 01-2068, which is a
12 Palisades water right.

13 Q. All right. And when you compare the
14 water right license that we have here in
15 Exhibit 20 and compare that to the recommendation
16 that is Exhibit 19, can you identify for me what
17 the basis is for the inclusion of the
18 subordination in the water right recommendation?

19 A. The basis is that the license is a
20 reflection of the water right, which is prima
21 facie evidence of the right, but which is not
22 always totally complete.

23 And the basis here is -- for the
24 subordination recommendation is historic practice
25 relative to the power generation aspect.

1 Q. Okay. So then would it be your
2 opinion that post March 1973 the historic
3 practices relative to the Palisades right 2068 are
4 such that there should be this inclusion of a
5 subordination provision?

6 A. Yes.

7 Q. Okay. So that historic practice that
8 you had referred to in this case would have
9 occurred between 1973 and 1987?

10 A. Yes.

11 Q. And basically, that would reflect that
12 the Bureau of Reclamation never made a call on
13 junior right holders in the storage season in the
14 nonirrigation season upstream from Palisades
15 Reservoir?

16 A. Yes. And of course, most of the area
17 upstream from Palisades is in Wyoming.

18 Q. Right. So then did you go into
19 Wyoming and identify whether there would be rights
20 that would be -- let me use your term -- have a
21 damaging effect on those rights if that
22 subordination language was not placed on that
23 right?

24 A. Well, our -- the conditions of
25 approval relative to Idaho water rights are just

1 relative to uses within Idaho.

2 Q. Okay.

3 A. So not -- much, but not all of the
4 upstream portion from Palisades is within Wyoming.

5 Q. Right. So upstream from Palisades to
6 the Wyoming border, did you undertake a review of
7 what junior rights to 1973 would be impacted or
8 affected, damaged, if this subordination provision
9 was not placed upon this right?

10 A. No.

11 Q. Okay. Do you know if anyone within
12 the Department at your direction did that?

13 A. No.

14 Q. Did you request someone within the
15 Department undertake that action?

16 A. No.

17 Q. So then can you describe for me again
18 the basis for inclusion of that subordination
19 provision, or was it just by policy that you put
20 that provision, that subordination provision on
21 that right?

22 A. There was an expectation that the
23 historic practice had been as stated in this
24 general provision. That general provision is
25 based on the understanding of historic practice,

1 the expectation of historic practice.

2 Q. So in this case the historic practice
3 was more of an expectation that the Bureau had not
4 called for water from juniors upstream from
5 Palisades?

6 A. Yes, by extension. That's what we had
7 seen in all the other reservoirs that had
8 hydropower. So there was an expectation that
9 Palisades would be no different.

10 Q. As you sit here today, do you have any
11 facts that then would change that you have nothing
12 more than an expectation that they operated that
13 way?

14 A. My -- my estimation is that the facts
15 would be consistent with that expectation.

16 Q. But again, you haven't reviewed the
17 water rights accounting program or water
18 deliveries or the Bureau's operations in the Upper
19 Snake; isn't that correct?

20 A. That's correct.

21 Q. Okay. You would agree, would you not,
22 that as of 1973 there wasn't a subordination on
23 the right identified as 2068?

24 A. Yes.

25 Q. Okay. And would you also look at

1 Exhibit 20, 2068, and about just not quite halfway
2 down the page the line starts with "Subject,
3 however."

4 Do you see that line there?

5 A. Okay.

6 Q. And it states, "Subject, however, to
7 the condition that no more than 1,400,000
8 acre-feet of water be stored at any one time."

9 A. Yes.

10 Q. Do you see that statement?

11 A. Uh-huh.

12 Q. So would you agree with me that that
13 identifies the volume limitation or the capacity
14 of Palisades storage at any one time?

15 A. Yes.

16 Q. Okay. So in this water right in
17 particular, and in storage rights they identify
18 the amount of water that could be stored at any
19 one time in a reservoir?

20 A. Yes.

21 Q. Doesn't necessarily identify how much
22 water could be stored in Palisades over a storage
23 season; correct?

24 A. Correct.

25 Q. Okay. Because you could have a

1 release and then you could refill that space,
2 which would amount to a total amount greater than
3 1.4 million acre-feet, but at any one time you
4 can't store more than 1.4 million acre-feet?

5 A. Well, there are many limitations to
6 what you just said in terms of during an
7 individual year, whether you can refill a
8 reservoir under that same priority date. There
9 are many limitations that exist.

10 Q. But on this water right it says "at
11 any one time" you can't store more than
12 1.4 million acre-feet; correct?

13 A. That's -- that's a limitation.

14 Q. Okay.

15 A. There are others as well.

16 Q. What others do you see on this
17 license, identified for the license?

18 A. Well, I just wanted to clarify that
19 that doesn't mean that you can store and then
20 empty out and then refill. There's also a
21 limitation of the amount of water that can
22 actually be diverted to storage during a given
23 year under this license.

24 Q. Yeah, I'm looking at this license.

25 A. Yes.

1 Q. And with respect to the capacity or
2 volume identified on this license --

3 A. Uh-huh.

4 Q. -- this license identifies that no
5 more than 1.4 million acre-feet of water be stored
6 at any one time; correct?

7 A. Correct.

8 Q. Okay.

9 A. I would, if I could, please, just go
10 on to say that later in that same sentence the
11 license says "...that the amount of water so
12 stored and to which such right is entitled and
13 confirmed is for the purpose aforesaid and is
14 limited to the amount which can actually be
15 beneficially used and stored and shall not exceed
16 1.2 million acre-feet per year."

17 So it's acceptable to have 1.4 million
18 in the reservoir, but the amount stored in a given
19 year is limited to 1.2 million acre-feet.

20 Q. So would it be your opinion that if
21 water is then released from the reservoir for
22 flood control that it can't be refilled?

23 MR. STANISH: Objection. Calls for a legal
24 conclusion.

25 THE WITNESS: Well, what we're discussing

1 is on the face of the license. That's what you
2 wanted to limit this to.

3 Q. (BY MR. SIMPSON): Right.

4 A. And that's why I mentioned there are
5 many other considerations beyond what's on the
6 face of the license in the filling of a reservoir.

7 Q. Okay. And you brought up the
8 additional language "shall not exceed 1.2 million
9 acre-feet per year."

10 A. Yes. So I just didn't want to leave
11 it with the understanding that 1.4 million is only
12 a total capacity. There are also restrictions on
13 the actual fill. There's a restriction within the
14 license, but that's just one consideration.

15 MR. SIMPSON: If you'd turn again to
16 Exhibit No. 10, please, David.

17 You know, to allow others a chance,
18 I'm going to forego the balance of my questions
19 because you need to leave in about 20 minutes or
20 so.

21 THE WITNESS: Thank you.

22 MR. SIMPSON: So I'll defer.

23 MR. LOCHHEAD: You don't want to go on?

24 MR. SIMPSON: No.

25 MR. STANISH: Appreciate it.

EXAMINATION

BY MR. LOCHHEAD:

Q. Mr. Tuthill, I'm Jim Lochhead on behalf of Idaho Power. I'm going to try and be quick here, so if I summarize some of your testimony as I understand it, please correct me.

Could you look at Exhibit 12, which is the supplemental director's report, and attached to that as an Exhibit B --

A. Bravo?

Q. Bravo, correct.

A. Okay.

Q. And if you could turn to page 2 of that. And this is an affidavit of Tony Olenichak.

And look at paragraph 8 of that and tell me whether you agree with that statement.

A. That is my understanding, yes, I agree.

Q. And this paragraph formed, in part, the basis of your report; is that correct?

A. Yes.

Q. Does that statement reflect what's been termed I think what you testified earlier as a complete subordination as reflected in the proposed remark in this report?

incorrect?

A. No. Since this time we have -- I have and we have become aware of the fact that there has been a systematic approach by the Bureau of Reclamation to optimize the hydropower use relative to storage water so that storage -- so that the hydropower use has been used at times when storage has been senior but not filled to the extent that storage was expected to fill at some point during the season.

So to that extent, we have become aware that there has been a limitation on the hydropower use through optimizing storage in the system.

Q. Would that be a complete subordination?

A. That would not be complete subordination. And that is what has given rise to the newly proposed condition.

Q. How is that consistent with the paragraph in Mr. Olenichak's affidavit that you previously agreed was correct?

A. I think that's -- that is correct as he understood it and I understood it at the time. But since then, it has been our understanding --

A. Yes.

Q. Turning to the report itself, page 6. And I'll just read part of this. It's the first full paragraph, and it's talking about Bureau of Reclamation objection to the proposed remark. It says, "In its objections to six of these water rights, the BOR suggests that it has not been the historical practice in Water District No. 1 to treat these power rights as subordinate to other water rights in Basin 01. The BOR states the remark under the priority date seeks to subordinate this water right to all past, present, and future nonhydropower water rights on the basis of historical practice. Because this water right has never been historically used or administered under such a limitation, the remark is without factual or legal basis."

And then you go on to say, "The BOR's statement is simply incorrect. As the affidavit of Mr. Olenichak explains, it has been the long-term practice of Water District 1 to treat these seven water rights as subordinate to junior nonhydropower uses."

So is it still your belief that the Bureau of Reclamation recitation of the history is

or it's been mine. I haven't talked with Mr. Olenichak about this. But it is my understanding that there has been this operation within the Bureau's capability, which they do operate the reservoirs during the wintertime.

And I believe that Mr. Olenichak's statement was factual when he wrote it. And that was used as a basis of this report.

But since then, our understanding has grown by the Bureau describing that, you know, if we look at the record, we'll see that they were diverting 2700 cfs for hydropower when storage had not been completed for the reservoirs.

Q. So based on the information, you now know that Mr. Olenichak's statement is incorrect?

A. It's not -- it's not fully correct.

Q. Okay. Can you identify the information that came to you that caused you to change your mind about this historic operation?

A. It's secondhand word from Mr. Olenichak that -- that this was the case. And when the negotiation was taking place between the State and the federal government, I learned secondhand that this had been the case. And it's just been my secondhand understanding from him

1 that yes, that does -- that the records do reflect
2 a preference to the hydropower at this location as
3 compared with the Bureau storage.

4 Q. Did he inform you what information he
5 based his statements on?

6 A. No, I haven't talked with him
7 directly.

8 Q. Looking at --

9 A. That's secondhand.

10 Q. -- Exhibit 10, which is the proposed
11 language, I believe you'd earlier testified that
12 the word "storable," as used in here, is intended,
13 in your view, to reflect the limitations that are
14 contained within the water rights to the storage
15 reservoirs and the contracts under which water is
16 stored; is that correct?

17 A. Could you refer me to the page that
18 you're looking at?

19 Q. Sure. I'm looking at page 1 of
20 Exhibit 10, the proposed language by the State and
21 the United States in these cases under the
22 "Priority Date" section. And it references the
23 use of both the word "storable" and the word
24 "store," and it talks -- I'll just read it.
25 "Whenever operation of a Minidoka Power Plant to

1 the full extent of these water rights for power
2 production would result in loss of water otherwise
3 storable in the reservoir system." And it goes on
4 to talk about a secretarial determination that
5 "Accordingly, except as it is determined by the
6 Secretary that additional water may be passed
7 through Minidoka Dam without the loss of water
8 that could be stored in the reservoir system, the
9 United States would limit the release of water
10 through Minidoka Dam."

11 And my question is, that word
12 "storable" and the secretary's determination, I
13 take it from your previous testimony is limited by
14 the decrees and the contracts for those reservoirs
15 to the purposes and amounts of water that could be
16 stored under those water rights?

17 A. That is correct, although it is my
18 understanding that -- that the City of Palisades
19 does have 50,000 acre-feet of water that it has
20 acquired, and the purpose of that water is, by my
21 understanding, not explicitly irrigation.

22 Q. That would be the City of Pocatello?

23 A. The City of Pocatello.

24 And I don't know why the water right
25 doesn't show other uses. But that is a question

1 mark that arises to me.

2 Q. Okay.

3 A. So yes, relative to the uses for
4 reservoir, they are supposed to be limited to
5 those uses that are approved through the water
6 right. There is perhaps some modification that's
7 needed in some way here. I don't know. It gives
8 rise to that question.

9 Q. And when this language talks about
10 water being passed, I take it that is water that
11 is storable but which the secretary determines to
12 pass through because he's made a determination
13 that the system will fill; does that --

14 A. That's my understanding.

15 Q. -- reflect your interpretation?

16 A. Yes.

17 Q. You had talked about in the context of
18 the license for the Palisades and the limitations
19 on the amount of water that could be stored.

20 Is that storable water that's passed,
21 is that accounted as a part of the fill, or not?

22 A. I don't know how it's accounted.

23 Q. Does the State have a position as to
24 how that water is accounted?

25 A. Mr. Olenichak could answer that on how

1 it's accounted, but I don't know how it is
2 accounted.

3 Q. But in terms of your position
4 representing the State, you don't know?

5 A. I don't know.

6 Q. Has the State ever, to your knowledge,
7 ever made any determination about accounting of
8 bypassed water in storage reservoirs as against a
9 fill?

10 A. This is an issue that is -- it's a
11 complex issue, and it's a topic of discussion
12 often. I haven't been central enough to that
13 discussion to really provide comment at this
14 point. Mr. Olenichak would be more aware than I.
15 Mr. Swank, who I saw come today, I presume he's
16 going to be deposed today, would have more
17 information about that.

18 Q. So that, I take it, would be an open
19 question with respect to this proposed language?

20 A. Correct.

21 MR. LOCHHEAD: Okay. That's all.

22 EXAMINATION

23 BY MR. LING:

24 Q. Mr. Tuthill, as you know, I'm Roger
25

1 Ling representing Falls Irrigation District in
2 this proceeding and co-counsel for others in the
3 Surface Water Coalition.

4 I understand that you gave some
5 testimony as to what you appeared to have personal
6 knowledge of, but I know that you weren't around
7 when those things occurred.

8 Is it a fact a hearsay that you were
9 testifying to, that somebody told you that's what
10 happened?

11 A. What are you specifically referring
12 to, Mr. Ling?

13 Q. The Swan Falls agreement. You weren't
14 here when the Swan Falls litigation took place,
15 were you?

16 A. I was, sir.

17 Q. You were here?

18 A. I started on January 1st, 1976.

19 Q. You evidently weren't very aware,
20 then, that that suit was brought not by the State
21 to force subordination but by individual pumpers?

22 A. It was Mr. John Peavy, sir.

23 Q. Well, that group, yes, many of them,
24 but he was one of them. So it really wasn't the
25 State.

1 And in fact, Idaho Power took the
2 position that their rights were subordinated, did
3 they not?

4 A. That was my understanding.

5 Q. Well, okay. That isn't what you'd
6 said earlier. You indicated that the State had
7 came in on the white horse and tried to force
8 subordination there.

9 A. I'm sorry, I didn't convey that
10 properly. What I tried to convey is that we in
11 the State felt that the rights were subordinated.
12 Now, it wasn't our case.

13 Q. Right.

14 A. But as an employee within the State,
15 we felt that. We were watching with interest, but
16 I didn't mean to imply that it was the State that
17 took the case.

18 Q. The other area I wanted to get into is
19 historical practices. And I guess I'm not really
20 sure.

21 Is it your opinion that an historical
22 practice by one person creates a factor to allow
23 you to change a water right or is it by consensus
24 of all people involved? Or I guess what is it, in
25 your mind?

1 A. Well, we, the agency, has historically
2 looked at the water rights in a basin in the
3 context of historical practice. I did provide a
4 couple of examples where recommendations were made
5 based only historical practice, not on water
6 rights practice anywhere else in the state, to my
7 knowledge, or anywhere else anywhere.

8 Q. But you're not answering my question.

9 If I steal water from my neighbor for
10 20 years, that's an historical practice on my
11 part, isn't it? Isn't it?

12 A. Yes.

13 MR. STANISH: Calls for speculation.

14 Q. (BY MR. LING): You wouldn't consider
15 that a factor, certainly, in determining whether
16 or not I had a water right, would you?

17 A. That is correct. That would be a more
18 limited historical practice than what I'm speaking
19 of.

20 Q. Okay. That's what I'm trying to get
21 at.

22 What definition are you using to
23 describe the historical practice you think gives
24 you guidance on how to recommend a water right?

25 A. Well, it -- I would say it's on a

1 basin-by-basin basis.

2 Q. Uh-huh.

3 A. And that's how the implementation of
4 historic practice has been applied in the SRBA, in
5 my view. And in Basin 63, I mentioned it, a
6 couple of the cases, that appeared to be
7 applicable in these cases as well.

8 Q. Basin 01?

9 A. Correct.

10 Q. What you have observed, do you believe
11 that if the Department had a particular practice
12 that it follows, that that is important for you to
13 determine the elements of a water right without
14 regard to whether or not the owner of the water
15 right consented to that practice?

16 MR. STANISH: That calls for speculation.

17 MR. LING: Objection to your objection.
18 That doesn't call. I'm asking his opinion. And
19 if you want to testify, we'll have you sworn
20 later. Okay.

21 MR. STANISH: I could make an objection.

22 MR. LING: I know.

23 THE WITNESS: In the Big Lost Basin, we as
24 an agency determined that historical practice was
25 the rotation of water from -- from -- for those

1 storage holders instead of -- if they chose to not
2 use their storage water on a piece of land, they
3 historically had rotated that into the reservoir,
4 had stored that.

5 So they basically converted a
6 natural-flow right into a storage right, which is,
7 to my knowledge, the only place in the world that
8 has been done.

9 That was deemed to be an historic
10 practice. It -- the water rights were recommended
11 based on that. Not everybody agreed with that.

12 So to answer your question, in some
13 cases an historic practice was recommended, even
14 though there wasn't universal agreement.

15 Q. (BY MR. LING): Thank you.

16 You're aware, are you not, of the
17 Supreme Court decision on ownership of water
18 rights between the federal government and the
19 individual landowners or water users and the fact
20 there's a beneficial use ownership and a legal
21 ownership, facilities and water rights?

22 A. Yes, sir.

23 Q. Did you consider any of those issues
24 in looking at these storage rights involving power
25 for the Bureau of Reclamation?

1 A. That would not surprise me.

2 Q. Then you talked about agreements that
3 were entered between the State and the Bureau.

4 Did it ever occur to you or anyone
5 else that perhaps the space holders ought to be
6 consulted on what was going to be done in regard
7 to these power rights?

8 A. Because this is a case before the SRBA
9 court, at that point the way the agency normally
10 looks at it is those that are interested in that
11 subcase are involved and are participating. And
12 in this case the Surface Water Coalition is
13 involved in the subcase, so there's opportunity
14 for promulgation of information through the
15 subcase.

16 Q. So what you did is, if you can answer
17 it for the State, it appears the State decided to
18 come to an agreement with the Bureau of
19 Reclamation, but recognizing there are equitable
20 owners in those water rights did not bother to go
21 to them to get their concurrence because they
22 could bring it up in the SRBA?

23 A. I would -- I would agree that this
24 is -- that the review of this -- of these new
25 conditions would be part of the SRBA process, yes.

1 A. Well, my recollection is that that
2 case had not been decided by the time we made the
3 recommendation on the Boise. And I don't know --
4 I don't think it had been decided by the time we
5 made the recommendation initially in '01. That
6 was before --

7 Q. It had been made by the time you made
8 the supplemental report?

9 A. It had been made by that time, by
10 2008. And --

11 Q. You did not discuss that in your
12 supplemental report?

13 A. No, it's not discussed. I don't
14 recall that it was explicitly considered.

15 Q. You are aware of some, if not all, of
16 the provisions in the Palisades repayment
17 contracts that the Bureau has with space holders?

18 A. I really am not that acquainted with
19 those.

20 Q. Well, let me ask you this: Would it
21 surprise you to know that in that contract the
22 Bureau recognizes the right of the individual
23 space holders to bring action to enforce or
24 establish any of the water rights involved in that
25 contract?

1 Q. You indicated that, I believe, it was
2 your opinion that ground water boards were not in
3 vogue anymore and probably not going to be used.

4 Who made that decision, other than
5 you?

6 A. Well, my experience with ground water
7 boards has been that Mr. Higginson tried them and
8 determined that they didn't work because the
9 solutions of ground water boards came to the court
10 as de novo. And I remember him saying that he
11 would not use local ground water boards anymore
12 when he was director. That's my experience.

13 Q. And that you base primarily on what he
14 told you then about them?

15 A. Yes.

16 Q. Is there anything in the Eagle decree
17 that provides you a factor to make a
18 recommendation that the decreed rights for power
19 at Minidoka should be subordinated?

20 A. Well, the -- the condition that has
21 been derived from the Eagle decree and that has
22 been found to be acceptable to the State and the
23 federal government and to the agency is derived
24 right from the Eagle decrees. So yes, what is in
25 the Eagle decree becomes a primary factor in that

1 subordination.

2 Q. Well, the Eagle decree provides
3 subordination only for storage for irrigation,
4 does it not?

5 A. Yes.

6 Q. You have gone beyond that, have you
7 not?

8 A. This condition goes beyond that.

9 Q. So it's not within the decree, you're
10 changing the decree by adding additional
11 subordination?

12 MR. STANISH: Calls for a legal conclusion.

13 THE WITNESS: The --

14 Q. (BY MR. LING): Is your answer "yes"?

15 THE WITNESS: The basis of this is the
16 Eagle decree, but there are some differences.

17 Q. (BY MR. LING): Let's go on the basis
18 of the Eagle decree.

19 Are you familiar with what the Bureau
20 agreed to when they constructed their Reclamation
21 projects in southern Idaho under the Reclamation
22 Act? Are you familiar with the Reclamation Act,
23 may be the better question, of 1902 as amended and
24 supplemented?

25 A. I have not studied that specifically.

1 Q. Let me give you as a premise that the
2 Reclamation Act provides very specifically that in
3 a Reclamation project sponsored and constructed by
4 the Bureau of Reclamation one of the essential
5 parts of that project is hydropower generation.
6 And hydropower generation is necessary to make the
7 project feasible or it wouldn't be authorized by
8 Congress, it gives it a power source for those
9 portions of the project that require power to
10 irrigate with, and it provides revenues to help
11 pay for the projects.

12 Are those factors that you would
13 consider when you start looking at the power right
14 and subordinating it?

15 MR. STANISH: Assumes facts not in the
16 record.

17 Q. (BY MR. LING): You can answer that
18 "yes" or "no."

19 MR. STANISH: I objected. He can answer.

20 THE WITNESS: Those are not explicitly
21 factors that we looked at -- that I know were
22 looked at.

23 Now, as far as drafting this
24 condition, this condition was drafted between the
25 State and the Bureau of Reclamation, which

1 operates directly under the -- under the
2 Reclamation Act. So I anticipate that those
3 factors were looked at by the Bureau of
4 Reclamation. But I guess I would have to answer
5 by saying I don't know.

6 Q. (BY MR. LING): And we'll find out
7 later from somebody from the Bureau of
8 Reclamation, I guess, that would know more.

9 There's nothing in the Eagle decree
10 that is ambiguous or unclear, is there?

11 MR. STANISH: Calls for a legal conclusion.

12 Q. (BY MR. LING): In your opinion.

13 A. Well, one ambiguity is whether the use
14 should be restricted to just irrigation, because
15 I -- I don't know when the City of Pocatello
16 purchased their water, but they have a use other
17 than irrigation.

18 Q. Let me stop right there. Let's talk
19 about that.

20 Are you familiar with how that
21 provision was enacted and how Pocatello got 50,000
22 acre-feet of water for storage?

23 A. No.

24 Q. It was because of the potential
25 effects that their pumping had on irrigation

1 rights in the surface water system, Portneuf and
2 Snake River, and that was given to the City of
3 Pocatello to supplement those irrigation rights
4 that they may have affected, not that they've ever
5 done it, but there's a provision that the
6 watermaster had to make that determination as to
7 how much the Portneuf was reduced in flow as a
8 result of their pumping, and they would use that,
9 then, to provide water for irrigation. So that
10 was an irrigation right. It was not used for them
11 to pump it to the city and put it in their water
12 tanks and run it out to the people.

13 MS. McHUGH: Objection. Argumentative.

14 Q. (BY MR. LING): You weren't aware of
15 that?

16 MR. STANISH: Assumes facts not in the
17 record.

18 MR. LING: Either he's aware of it or not.

19 THE WITNESS: I am not that aware of the
20 background.

21 Q. (BY MR. LING): Okay. And it wouldn't
22 surprise you if that was the case, would it?

23 A. Well, I -- the -- I don't know. That
24 could be the case.

25 MR. STANISH: Could I go off the record for

1 a minute?

2 (Discussion.)

3 Q. (BY MR. LING): I have a particular
4 question to ask you, and it can be answered yes or
5 no. I want you to consider it closely.

6 You have mentioned several reasons why
7 you think subordination is part of the factors
8 that ought to be imposed on the power rights
9 because of the historical practices and whatnot.

10 That, in fact, became an issue when
11 the State and you and your Department sought to
12 get water for recharge, did it not?

13 MR. BROMLEY: Objection. Calls for
14 speculation and calls for a legal conclusion.

15 MR. LING: Yes or no. He can answer that
16 yes or no.

17 MR. BROMLEY: Mr. Ling, I just lodged an
18 objection. I realize he can answer it.

19 MR. LING: What's the basis of the
20 objection?

21 MR. BROMLEY: I said speculation and calls
22 for a legal conclusion.

23 MR. LING: If he knows.

24 THE WITNESS: The answer is no, it didn't
25 come from that, Mr. Ling. In my experience with

1 that I know of, and you have not identified any
2 others, that subordination does affect.

3 MR. STANISH: Objection. Argumentative.

4 Q. (BY MR. LING): Can you name one other
5 junior right that you were worried about
6 protecting?

7 MR. STANISH: Calls for a legal conclusion.

8 MR. BROMLEY: Objection. Asked and
9 answered.

10 MR. LING: I asked him if he could name it.

11 Q. Go ahead.

12 A. When I look upstream, I look at all
13 these many water rights. And you mentioned
14 recharge. That's one. But there are many other
15 kinds of water rights that are -- would be
16 affected.

17 Q. My question is, though, you haven't
18 been able to name one, have you?

19 A. We have small reservoirs.

20 Q. I understand that.

21 A. Many.

22 Q. But you haven't named what right it
23 is. That's getting into the broad spectrum. I
24 want to know specifics.

25 MR. BROMLEY: Objection. Asked and

1 the agency for -- ever since at least the early
2 '80s, and maybe before -- actually, what
3 heightened this was the -- was the Supreme Court
4 decision on Swan Falls.

5 And when I -- and I was a member of
6 the agency. We looked carefully at the initial
7 filing by Mr. Peavy with the -- he filed a
8 complaint with the PUC that went to the District
9 Court, which found, as you recall, that the Swan
10 Falls was subordinated.

11 When the Supreme Court said Swan Falls
12 was not subordinated, that heightened the
13 awareness of the subordination condition on all
14 power rights and emphasized what had been a policy
15 since the 1930s by the agency to subordinate
16 hydropower rights because of the potential for
17 impact upstream. So it really didn't have
18 anything to do with recharge.

19 Q. (BY MR. LING): Well, I apologize for
20 making what I thought may have very well have been
21 in your mind, because today you were given ample
22 opportunity to explain what junior right would be
23 curtailed if you did not have this subordination
24 in the decree. And you never once mentioned
25 recharge. And yet that is really the only right

1 answered.

2 THE WITNESS: And Mr. Simpson asked that I
3 make a list, and if the State wants me to do that,
4 I can. And I would just look at a computer
5 printout of what's junior upstream.

6 Q. (BY MR. LING): My last question is --
7 I'm not sure it's a question -- is the fact that
8 there is a power-loss provision in the Palisades
9 contract.

10 And are you familiar with that?

11 A. I have not been directly familiar. I
12 have heard of it, but I really don't know about
13 it.

14 Q. And were you aware that the
15 watermaster of Water District 1 was involved in
16 helping the Bureau make those power-loss
17 calculations each year?

18 A. No.

19 Q. Were you aware that the purpose of
20 making the calculation was to make the space
21 holders who benefited from the subordination to
22 storage for irrigation pay for that lost
23 generation?

24 MR. STANISH: Argumentative.

25 THE WITNESS: I wasn't familiar with that.

1 But from what -- from what I understand, the
2 condition, as presently proposed, wouldn't
3 adversely affect that. That's not my
4 understanding.

5 Q. (BY MR. LING): But it would not
6 provide that whoever benefits by having the water
7 right subordinated to all other uses would have to
8 pay anything to get that subordination?

9 A. Mr. Ling, I think that the way that --
10 my understanding of the way the conditions are
11 proposed is the only rights that are going to be
12 subordinated, based on this, to other uses are the
13 junior rights that -- the statutory rights, 4024
14 and 4025. There is no such general subordination
15 for 217 and 218 that's proposed.

16 Q. But the subordination in the latter,
17 more junior power rights, what's your basis for
18 putting subordination in those rights?

19 A. The same basis.

20 Q. Historical practices?

21 A. That's correct, sir.

22 Q. But again, if those rights are being
23 subordinated for other uses, then, of course,
24 there could be more power lost?

25 A. Right.

1 MR. STANISH: Calls for speculation.

2 THE WITNESS: I was of the understanding
3 that the power loss only applied to the first
4 three uses. But that might be incorrect.

5 MR. LING: Okay. I have no further
6 questions.

7 EXAMINATION

8 BY MR. FLETCHER:

9 Q. Mr. Tuthill, I appreciate you staying
10 on just a little while longer, and I wish your
11 daughter good luck today in her track meet.

12 A. Thank you.

13 Q. Two of the rights -- and you just
14 mentioned those, 1-4024 and 1-4025 -- are
15 constitutional beneficial-use claims.

16 You understand that; correct?

17 A. Yes.

18 Q. Okay. Would the Department enforce a
19 call made by the holder of a constitutional
20 beneficial-use claim?

21 MR. STANISH: Calls for speculation and a
22 legal conclusion.

23 THE WITNESS: No, not if the rights
24 remained as such. But of course, they could be
25

1 ripened into other types of rights for
2 supplemental adjudication, but not -- a call made
3 by a constitutional right as such would not really
4 give rise to a call.

5 Q. (BY MR. FLETCHER): So how can the
6 fact that these rights have not made a call be the
7 basis for a historical practice, if they can't
8 make a call?

9 A. Well, there would -- had there been an
10 intent to have delivery under these rights, the
11 water right holders could have asked for a summary
12 supplemental adjudication for these rights had
13 that been the intent of the water right holder.
14 That wasn't done. So there really has been no
15 delivery to provide to these rights.

16 Q. Okay. So it's the State's position
17 that the water holders of a constitutional
18 beneficial-use claim would have to have some kind
19 of supplemental adjudication prior to the general
20 adjudication taking place or else those rights are
21 going to be subordinated to all junior rights?

22 MR. BROMLEY: Calls for a legal conclusion.

23 THE WITNESS: In this particular case with
24 hydropower, the historic practice appears to have
25 been that the -- there was -- for the first 2700

1 cfs, there was regulation of the system to address
2 this, as has been defined in this proposed
3 condition.

4 But for flows above that, I know of no
5 modification to the historic practice to just let
6 those flows be available only when they happen to
7 be available.

8 MR. ARKOOSH: I want to object to the
9 answer as nonresponsive. The question was, is
10 whether the supplemental adjudication was
11 necessary or you got your rights subordinated, I
12 think was the question. And I don't think that
13 was answered.

14 Q. (BY MR. FLETCHER): Well, my question
15 was, are you telling me that it's the policy of
16 the State of Idaho that a constitutional
17 beneficial-use claim had to have a supplemental
18 adjudication prior to the commencement of the
19 general adjudication -- let me rephrase that. I
20 think I misstated that.

21 Are you telling me that a
22 constitutional beneficial-use claim had to have a
23 supplemental adjudication of its water right prior
24 to the commencement of the general adjudication or
25 else that water right is subordinated to all other

1 water rights?
 2 A. No.
 3 MR. STANISH: Calls for a legal conclusion.
 4 THE WITNESS: That's not the policy.
 5 Q. (BY MR. FLETCHER): But that's the
 6 position of the State in this case dealing with
 7 these two beneficial-use hydropower rights; is
 8 that correct?
 9 MR. STANISH: Calls for a legal conclusion.
 10 Q. (BY MR. FLETCHER): You are the
 11 State's witness. We keep getting these
 12 objections. But I understand you're designated to
 13 be the State's witness. We can ask you the
 14 State's position.
 15 A. Because these are hydropower rights,
 16 and because they are situated as they are, then
 17 they come under the question of has there been --
 18 what has been the action of these rights relative
 19 to subordination. So that is what gave rise to
 20 the addition of these conditions, is that the
 21 historic practice was to -- that these rights were
 22 subordinated.
 23 Q. Well, let me put it a different way.
 24 The fact that these folks haven't made a call for
 25 1-4024 or 1-4025 is not particularly relevant,

1 since they were constitutional beneficial-use
 2 claims; isn't that true?
 3 MR. STANISH: Calls for a legal conclusion.
 4 THE WITNESS: On one hand, that's true. On
 5 the other hand, they could have been ripened had
 6 the water right holders desired to do so.
 7 Q. (BY MR. FLETCHER): Is it the position
 8 of the State of Idaho that if a water right has no
 9 history of making a call, the water right is
 10 subordinated to junior users?
 11 MR. STANISH: Calls for a legal conclusion.
 12 THE WITNESS: No, that's not the position.
 13 Q. (BY MR. FLETCHER): Okay. So that's
 14 not the basis of this recommendation?
 15 A. For this hydropower right, to the
 16 extent there has been no historic delivery based
 17 on the hydropower right, that is the basis. But
 18 that doesn't apply to nonhydropower rights.
 19 Q. So it's only hydropower rights that
 20 this theory applies to?
 21 A. Correct.
 22 Q. And is there anything in the law that
 23 would justify doing that with just hydropower
 24 rights that you're aware of?
 25 MR. STANISH: Calls for a legal conclusion.

1 THE WITNESS: This type of subordination is
 2 limited to hydropower rights.
 3 Q. (BY MR. FLETCHER): Is there any
 4 statute in Idaho that would allow that, that
 5 you're aware of?
 6 MR. STANISH: Calls for a legal condition.
 7 THE WITNESS: The statutes do provide for
 8 the right of the State to limit hydropower rights,
 9 and so does the constitution.
 10 Q. (BY MR. FLETCHER): Even after they're
 11 decreed or established?
 12 A. Well, these rights weren't decreed
 13 that we're speaking of. And they were created
 14 only through beneficial use. And my understanding
 15 of the statutes is that there is cognizance of the
 16 need for subordination. That's a statutory
 17 premise. And it's also a constitutional
 18 provision.
 19 Q. As director, was it your position that
 20 a prior decree must be referenced in the SRBA
 21 decree in order for a prior decree to be
 22 considered in administration?
 23 A. No.
 24 Q. So if the SRBA decree does not mention
 25 a prior decree, for the purposes of administering,

1 you would still look behind the SRBA decree?
 2 MR. STANISH: Calls for a legal conclusion.
 3 THE WITNESS: If we would -- we would not
 4 typically look behind the existing decree. The
 5 basis -- or the elements of the decree are
 6 intended to be brought forward into the SRBA. To
 7 the extent there's no reference back to the
 8 earlier decree, then that's the extent of our
 9 look.
 10 Q. (BY MR. FLETCHER): Okay. Maybe you
 11 misunderstood my first question.
 12 My question was, if the SRBA decree
 13 does not make my reference to a prior decree, as
 14 director was it your position that you only look
 15 at the SRBA decree?
 16 A. Yes.
 17 Q. Okay. And is that the State's
 18 position now?
 19 MR. STANISH: Calls for a legal conclusion.
 20 THE WITNESS: I --
 21 MR. FLETCHER: How does that call for a
 22 legal conclusion?
 23 Q. Anyway.
 24 A. That is my understanding.
 25 Q. Okay. So any terms of the Eagle

1 decree that are not in the SRBA partial decree
2 will no longer be part of the administration of
3 the water right?

4 A. In general, I believe that is the
5 case.

6 Q. Okay. And also, I know we talked
7 about this right at Palisades of Pocatello's, but
8 do you have any information that the rights of
9 Pocatello are other than irrigation and storage
10 for irrigation? I mean do you know of anything
11 that would show they're something different than
12 that?

13 A. The City of Pocatello uses water for
14 municipal purposes. I don't know that their
15 storage has been classified as anything else.

16 Q. When you were at the Department and
17 made the recommendation on the water right, you
18 did reference the Eagle decree in the
19 recommendation; correct?

20 A. Correct, yes.

21 Q. And now the Eagle decree is not
22 mentioned in this new language that's being
23 proposed by the Bureau and the State; correct?

24 A. Correct.

25 Q. Do you believe that the Eagle decree

1 should be referenced in these water rights?

2 A. No.

3 Q. So you don't believe that it's
4 important to reference the prior decrees in the
5 new water right?

6 A. In my view, what has been brought
7 forward from the Eagle decree is what was intended
8 to be referenced.

9 Q. Okay.

10 A. The remaining portions -- and there's
11 a lot more in the Eagle decree. That remaining
12 portion is largely stated in contracts. It's a
13 restatement of contracts, in my read of the
14 decrees.

15 And what else would need to be brought
16 forward could be. If there's something that needs
17 to be brought forward in the more -- in the SRBA
18 decree, then a party could propose that that be
19 done. But I don't know of something else other
20 than what's been brought forward that would need
21 to be.

22 Q. As far as the Palisades rights, do you
23 know of any water rights that exist upstream from
24 Palisades that could be called out by those water
25 rights?

1 A. No.

2 MR. FLETCHER: I don't have any further
3 questions.

4 EXAMINATION

5 BY MS. McHUGH:

6 Q. Just a question for clarification.

7 When Mr. Fletcher asked you whether or
8 not you believe the Eagle decree should be
9 referenced in these water rights, were you
10 answering in context of just these two remarks?

11 A. Yes.

12 Q. So to the extent that what is being
13 sought currently is a motion more partial summary
14 judgment, if there's a need to reference the Eagle
15 decree for other conditions, that could happen?

16 A. Yes. And I intended to say that if
17 there's something more that needs to be brought
18 out, that could be done. I don't see this issue
19 as limiting those elements that should be brought
20 forward from the Eagle decree. This is just
21 specifically, in my view, on the subordination of
22 the power rights.

23 MS. McHUGH: Okay. I don't have anything
24 further.
25

1 MR. STANISH: Dave, are you still there?

2 MR. GEHLERT: I am still there. I
3 appreciate the opportunity to ask a question, but
4 I won't impose further on Dave Tuthill's time.

5 MR. BROMLEY: Just a couple minutes, only
6 because my name has been brought up.

7 EXAMINATION

8 BY MR. BROMLEY:

9 Q. Mr. Tuthill, if you could turn to
10 Exhibit 18.

11 Do you have any context as to what
12 this e-mail was put together for?

13 A. There have been many questions about
14 separate streams in Basin 37, the Big Wood Basin.
15 And my read of this e-mail is it's explicitly
16 directed to Basin 37, Big Wood.

17 Q. And are any of the attorney's present
18 today included on that e-mail?

19 MR. FLETCHER: Besides you?

20 MR. BROMLEY: Besides me. Good point.

21 THE WITNESS: I don't see any. I don't see
22 any.

23 Q. (BY MR. BROMLEY): Do you have any
24 understanding if this e-mail was advanced after a
25

1 settlement conference to try and promote
2 settlement in Basin 37?

3 A. I know this is an issue on Basin 37,
4 and I would expect it would be just that.

5 Q. And do you have any understanding if
6 the clients represented by counsel that are listed
7 on this e-mail, if they were successors in
8 interest to parties to the Frost decree?

9 A. Yes, they would be.

10 Q. And do you have any knowledge if the
11 decrees cited at the bottom of the e-mail were
12 supplemental to the Frost decree or not
13 supplemental to the Frost decree?

14 A. That part, I don't know. I would -- I
15 don't know.

16 Q. And I think you stated that the SRBA
17 sort of moves on a basin-by-basin basis, and this
18 has no basis for hydropower rights in Basin 01?

19 A. That would be my assessment.

20 MR. BROMLEY: Okay. Nothing further.
21 Thank you.

22 MR. STANISH: I have no questions.

23 (Deposition concluded at 3:23 p.m.)

24 (Signature requested.)

25 -oOo-

Exhibit D

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 Nos. 01-00217, 01-00218
) 01-04024, and 01-04025
) (Minidoka Power Right)
)
) Subcase Nos. 01-02068 and
) 01-04054
_____) (Palisades Power Rights)

DEPOSITION OF LYLE ROBERT SWANK
OCTOBER 22, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 THE DEPOSITION OF LYLE ROBERT SWANK, was
 2 taken on behalf of A & B Irrigation District,
 3 Burley Irrigation District, Milner Irrigation
 4 District, North Side Canal Company, and Twin Falls
 5 Canal Company, at the offices of Barker, Rosholt &
 6 Simpson, 1010 West Jefferson, Suite 110, Boise,
 7 Idaho, commencing at 3:41 p.m., October 22, 2009,
 8 before Jeff LaMar, Certified Shorthand Reporter
 9 and Notary Public within and for the State of
 10 Idaho, in the above-entitled matter.

11 APPEARANCES:

12 For A & B Irrigation District, Burley Irrigation
 13 District, Milner Irrigation District, North Side
 14 Canal Company, and Twin Falls Canal Company:
 15 BARKER, ROSHALT & SIMPSON LLP
 16 BY MR. JOHN K. SIMPSON
 17 1010 West Jefferson, Suite 102
 18 P.O. Box 2139
 19 Boise, Idaho 83701-2139
 20 For American Falls Reservoir District No. 2:
 21 CAPITOL LAW GROUP PLLC
 22 BY MR. C. THOMAS ARKOOSH
 23 301 Main Street
 24 P.O. Box 32
 25 Gooding, Idaho 83330

1 APPEARANCES (Continued):

2
 3 For State of Idaho:

4 OFFICE OF ATTORNEY GENERAL
 5 BY MR. DAVID I. STANISH
 6 700 West State Street, 2nd Floor
 7 P.O. Box 83720
 8 Boise, Idaho 83720-0010

9 For Idaho Power Co.:

10 BROWNSTEIN HYATT FARBER SCHRECK
 11 BY MR. JAMES S. LOCHHEAD
 12 818 Colorado Avenue, Suite 306
 13 P.O. Box 357
 14 Glenwood Springs, Colorado 81602-0357

15 For Minidoka Irrigation District:

16 FLETCHER LAW OFFICE
 17 BY MR. W. KENT FLETCHER
 18 P.O. Box 248
 19 Burley, Idaho 83318

20 For Falls Irrigation District:

21 LING LAW OFFICE
 22 BY MR. ROGER D. LING
 23 615 H. Street
 24 PO Box 250
 25 Rupert, Idaho 83350-0396

1 APPEARANCES (Continued):

2
 3 For Bureau of Reclamation:
 4 (Present Telephonically)
 5 UNITED STATES DEPARTMENT OF JUSTICE
 6 ENVIRONMENT & NATURAL RESOURCES DIVISION
 7 NATURAL RESOURCES SECTION
 8 BY MR. DAVE GEHLERT
 9 1961 Stout Street, Suite 800
 10 Denver, Colorado 80294
 11 For Idaho Groundwater Appropriators, Inc.:
 12 RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
 13 BY MS. CANDICE M. McHUGH
 14 101 Capitol Boulevard, Suite 208
 15 Boise, Idaho 83702
 16 For Idaho Department of Water Resources:
 17 OFFICE OF ATTORNEY GENERAL
 18 BY MR. CHRIS M. BROMLEY
 19 322 East Front Street
 20 P.O. Box 83720
 21 Boise, Idaho 83720-0098
 22 ///
 23 ///
 24 ///
 25 ///

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18 Idaho, 1978	

1 LYLE ROBERT SWANK,
2 first duly sworn to tell the truth relating to
3 said cause, testified as follows:

4 EXAMINATION

5 BY MR. SIMPSON:

6 Q. Can you state your full name for the
7 record, please.

8 A. Yes. Lyle Robert Swank.

9 Q. And, Mr. Swank, is it all right if I
10 refer to you as Lyle?

11 A. Sure. That would be fine.

12 Q. And, Lyle, I represent a number of
13 surface water irrigation entities who have claims
14 to water out at the Snake River above Milner Dam
15 and storage rights or storage contracts with the
16 Bureau of Reclamation, as you well know. You know
17 those entities. So I'm going to ask you a few
18 questions to follow up on the deposition of Tony
19 Olenichak who gave his deposition about a month
20 ago.

21 And you're aware of that, are you not?

22 A. Yes.

23 Q. Okay. And are you aware that this
24 deposition is being given pursuant to a notice of
25

1 the water and distribution properly, but usually
2 the users are represented by frequently some other
3 counsel.

4 Q. Okay.

5 A. I'm not a lawyer.

6 Q. And you referenced a part of your
7 duties or the majority of your duties are to
8 deliver water within Water District 1.

9 And do you deliver that water by
10 priority?

11 A. Yes.

12 Q. Pursuant to previous decrees or
13 licenses?

14 A. That's correct.

15 Q. And with respect to the subcases that
16 we've identified here today, subcases 1-217, 218,
17 2064, 2068, 4024, 4025, and 4054, have you been a
18 part of discussions with water users with respect
19 to those subcases?

20 A. I don't recall that I have been in
21 discussions with water users.

22 Q. Okay. Have you been in discussions
23 with any other entities or parties?

24 A. I have participated in a
25 teleconference call with the director of the

1 your deposition? And I'm going to hand you that
2 notice.

3 Have you seen that before? And I'll
4 let you know, Lyle, that that is an amended
5 notice. So do you see that there? Have you seen
6 that amended notice?

7 A. Yes, I have.

8 MR. SIMPSON: Okay. So let's go ahead and
9 mark that, then, if we can, the next number in our
10 wonderful trail.

11 (Exhibit 21 marked.)

12 Q. (BY MR. SIMPSON): I'm going to hand
13 you what has been marked as Exhibit 21 and ask you
14 to identify that, please.

15 A. Yes. This is the Amended Notice of
16 Deposition of Lyle Swank, Watermaster District 1.

17 Q. Okay. And, Lyle, who are you here
18 today representing?

19 A. As watermaster for Water District 1.

20 Q. Okay. So as a part of your duties as
21 watermaster for Water District 1, do you represent
22 the water users within that water district?

23 A. I would say distribute water to the
24 users of the district. As far as representing
25 them, you know, I try to represent their use of

1 Department of Water Resources.

2 Q. Okay. And "the director" meaning
3 Director Spackman?

4 A. At least some of these water rights,
5 they were discussed with Director Tuthill.

6 Q. Okay. Former Director Tuthill?

7 A. Former Director Tuthill.

8 Q. Okay. And have you had any
9 discussions with Former Director Tuthill since he
10 retired with respect to these subcases?

11 A. Not in respect to these, no.

12 Q. Okay. Any other individuals or
13 parties that you've had discussions regarding
14 these subcases with?

15 A. I did have some discussion with Tony
16 Olenichak from my office.

17 Q. Okay. And was that prior to his
18 deposition that was taken last month or post
19 deposition?

20 A. It was post.

21 Q. Okay. And what was the nature of
22 those discussions?

23 A. I'm Tony's supervisor. I asked him in
24 a general sense, you know, how things went when he
25 was being deposed, and just wanted to understand

1 what his role had been.

2 Q. With respect to your duties to deliver
3 water pursuant to prior decrees, in your
4 experience has water been delivered inconsistent
5 with the decrees that are identified in Water
6 District 1?

7 A. Not that I'm aware of.

8 Q. Okay. Do you deliver water to
9 constitutional beneficial-use claims within Water
10 District 1?

11 A. Only when all other water rights are
12 being filled.

13 Q. Lyle, isn't it true that in Water
14 District 1 a water user who holds a decreed right
15 doesn't have to make a call in order to receive
16 their right, that is, to have their right
17 delivered?

18 A. They can use water if all other prior
19 rights are being filled.

20 Q. Okay. My question -- I think you're
21 still thinking about the constitutional use -- but
22 within the water district, is it a requirement
23 that a water user make a delivery call in order to
24 receive their water?

25 A. No.

1 Q. It's an automatic duty that the
2 watermaster carries out in the delivery of water;
3 correct?

4 A. Yes.

5 Q. And is the river above Milner Dam
6 essentially on regulation throughout the year?

7 A. Yes.

8 Q. So when I use the word "regulation,"
9 that's administration --

10 A. That's correct.

11 Q. -- from your perspective?

12 A. Yes.

13 Q. When the river's on regulation, then,
14 Lyle, is it the watermaster's obligation to ensure
15 that water right holders are, in fact, using the
16 water beneficially that's being delivered to them?

17 A. Could you repeat that, please?

18 Q. Yeah. When the river's on regulation
19 and you're delivering water to fulfill water
20 rights, is it the watermaster's obligation to
21 ensure that the water that's being delivered is
22 being beneficially used?

23 A. No. We -- it's usually assumed that
24 if they're diverting a right, they're putting it
25 to beneficial use.

1 Q. Lyle, do you have an understanding of
2 the Eagle decrees?

3 A. As clarification, there's more than
4 one Eagle decree.

5 Q. Correct. Do you have a general
6 understanding of the two Eagle decrees, the
7 Aberdeen-Springfield Eagle decree and the Burley
8 Irrigation Eagle decree?

9 A. Yes.

10 Q. Okay.

11 A. I have some knowledge of them.

12 Q. All right. Do you administer water
13 and deliver water pursuant to those decrees?

14 A. Yes.

15 Q. And during your tenure as watermaster,
16 have you delivered water pursuant to those
17 decrees?

18 A. Yes.

19 Q. Okay. And prior to being the
20 watermaster, you were the assistant watermaster
21 since 1978, '77?

22 A. 1978 is correct.

23 Q. Okay. And during that time that you
24 were the assistant watermaster in Water
25 District 1, based upon your knowledge, were rights

1 delivered in Water District 1 pursuant to the
2 Eagle decree and other decrees applicable in the
3 Upper Snake?

4 A. Yes.

5 Q. Based upon your understanding of
6 deliveries in the Upper Snake, has there ever been
7 a time from 1978 to the present when the Eagle
8 decrees were not honored?

9 A. Not that I'm aware of.

10 Q. Lyle, during the storage season, the
11 nonirrigation season, the Bureau of Reclamation
12 has the primary responsibility regarding
13 operations of storing water in the Upper Snake; is
14 that correct?

15 A. That is correct.

16 Q. And one of your functions as
17 watermaster is to overview Reclamation's
18 activities of storing water?

19 A. Yes, I agree with that.

20 Q. Okay. And during your tenure with the
21 water district from 1978 to the present, have you
22 ever had occurrence to question Reclamation's
23 operation of the storage system vis-à-vis the
24 generation of power at the Minidoka site?

25 A. No, I have not.

Q. Okay. So from your perspective, Reclamation's balance, if you will, between generating power at the Minidoka Power Dam and storing water in the Upper Snake reservoirs pursuant to the Eagle decree has always been in compliance with the Eagle decree?

A. Yes. The Bureau of Reclamation chooses how much of their water they want to -- to run through their turbine, that's correct.

Q. And it's part of your responsibility to account for the water that is stored, identifying and ensuring that the priorities relative to the reservoirs, that is, the seniormost reservoir storage right is filled first and then so on and so forth down through the priorities for storage?

A. That's correct.

Q. Okay. Lyle, is water that is utilized through the Minidoka Power Plant for power generation during the storage season, is that storable water?

A. Usually the Bureau of Reclamation generates power with water that does flow through Minidoka.

Q. So it's water that is otherwise stored

that that 350 plus any gains in that reach between American Falls Dam and Minidoka Dam would constitute natural flow?

A. Yes.

Q. Okay. And then if there's water in addition to 350 cfs that pass through American Falls, is that sometimes called natural flow or is that always classified as storable water?

A. During the winter months, if there is more than 350 cfs, usually there is -- we're filling or having natural flow go through the -- through American Falls and Minidoka.

Q. So there are times when the natural flow passing through American Falls is greater than the 350 cfs release?

A. Yes.

Q. Okay. Water that appears in the reach below Minidoka Dam, either water that's released through Minidoka Dam or appears in the reach below Minidoka Dam, is that in any circumstance called storable water?

A. Yes. There are times when storage does go through that reach of the river.

Q. During the storage season, are there any circumstances in which that water that's

that they generate within the storage season?

A. You know, it can be either natural flow or storage.

Q. Okay. And so how do you distinguish whether that's natural flow or it's storable water there?

A. We utilize a tool that's called our "water right accounting program." And that helps the watermaster to distinguish between how much water is available to various rights and how much of that water is natural flow and storage.

Q. Okay. So are there occasions where Reclamation, when they're generating at Minidoka Dam, is generating solely with natural flow during the storage season?

A. Yes. During the winter months, the storage season, they frequently have a minimum flow or a minimum release at American Falls Reservoir. And they will generate power with that at Minidoka, plus all the gains between there.

Q. Okay. So would it be fair to say that that minimum release at American Falls typically is about 350 cfs? Is that correct?

A. Yes.

Q. Okay. Would it then be fair to say

released through Minidoka Dam or appears in the reach below Minidoka Dam down to Milner would be called storable water?

A. If there's -- if we're storing water and trying to fill the reservoirs, there's usually not storage water going past Minidoka. But occasionally the Bureau does have flood-control operations or other things that may move storage past Minidoka.

Q. If it's moved past Minidoka and so it's in the reach below Minidoka, in what reservoir, then, could it be stored in in order for it to be called storable water?

A. Well, according to our water right accounting program, if there's storage that goes past Minidoka, we usually ask the Bureau of Reclamation to specify if that's -- whose storage that is.

Q. Okay. But then at that point below Minidoka Dam is it called natural flow, since it can't be stored in any reservoir?

A. Yes, it would be natural flow below that point.

Q. Okay. And for example, this fall I believe Reclamation intends to begin releases of

1 1500 cfs through Minidoka Dam; correct?

2 A. I believe they're looking at 1500 cfs
3 at Neeley.

4 Q. Okay. And that would or would not
5 equate to 1500 cfs at Minidoka Dam?

6 A. Probably have at least 1500 at
7 Minidoka Dam.

8 Q. Right. So that's another example
9 where not 350 would be passing Neeley, as we
10 described earlier, but 1500 would be passing
11 Neeley, plus the gain in the reach from Neeley
12 down to Minidoka --

13 A. That's correct.

14 Q. -- that would add to the natural flow?

15 A. That's correct.

16 Q. Okay. So that water that is released
17 or passes through Minidoka Dam, would, this fall,
18 be called natural flow; correct?

19 A. Yes.

20 Q. A few moments ago, Lyle, I asked you
21 if you were familiar with the two Eagle decrees,
22 and I believe you answered yes?

23 A. Yes.

24 Q. Okay.

25 A. I have some familiarity with them.

1 Q. Okay. And so then are you familiar
2 with the power-loss calculation that's part of
3 paragraph 24(a) of Exhibit E of the Eagle decrees?

4 A. I'm somewhat familiar with it.

5 Q. All right. So when you say
6 "familiar," you're familiar with the fact that the
7 Bureau of Reclamation foregoes power generation at
8 Minidoka Dam to store water in the reservoir
9 systems in the Upper Snake?

10 A. That's correct.

11 Q. Okay. And in exchange for that
12 preference for irrigation storage, is there any
13 reimbursement provided?

14 A. Yes, there is a calculation that
15 calculates essentially the power loss, and there's
16 a committee that does that calculation.

17 Q. And so that power loss is the lost
18 generation at Minidoka Dam?

19 A. That's correct.

20 Q. That's foregone in exchange for
21 storing water in the reservoirs above Minidoka
22 Dam?

23 A. Yes.

24 Q. Okay. And once that power loss is
25 calculated, what's the effect of calculating that

1 power loss? What happens next?

2 A. It -- it shows how much water was
3 stored in upstream reservoirs, such as American
4 Falls, Palisades, and Island Park.

5 Q. Okay. So then who benefits from that
6 additional storage? Those space holders in those
7 reservoirs?

8 A. The space holders would benefit from
9 the standpoint of additional storable water held
10 in their reservoirs upstream.

11 Q. Okay. So in exchange for that benefit
12 received, do those space holders reimburse
13 Reclamation for power loss?

14 A. Yes. There is a calculation that
15 shows the kilowatt hours generated times the mil
16 rate to essentially get a dollar equivalent.

17 Q. And so that lost generation revenue is
18 then reimbursed to Reclamation, and that lost
19 revenue accrues to the benefit of those preferred
20 power rate holders or power users?

21 A. I know the space holders do pay as
22 part of their operation and maintenance costs for
23 that additional storage water from the foregone
24 power generation. I am not familiar with the
25 calculation after that point.

1 Q. Okay. You don't know where that money
2 goes and who benefits from that?

3 A. I do not.

4 Q. Okay. Are you aware that that
5 calculation and that exchange of storage for
6 power-loss calculation is part of the Eagle
7 decree?

8 A. Yes, it is.

9 Q. Okay. And do you have an
10 understanding that it was an agreed-to compromise
11 by Reclamation and the space holders?

12 A. Yeah, I don't know the origin. I just
13 know it is mentioned in the Eagle decree.

14 Q. Okay. And that it's part of the
15 ongoing reconciliation of the water district at
16 the end of the year, that is, there's meetings
17 with the Bureau of Reclamation to reconcile that
18 power-loss calculation?

19 A. I wouldn't say it's an ongoing meeting
20 of the water district. The watermaster does serve
21 on that committee.

22 Q. So you do serve on it, then?

23 A. Yes, I do.

24 Q. Okay. And so you meet, along with
25 other space holders in the water district, that

committee meets with the Bureau of Reclamation to reconcile that power-loss calculation?

A. Yes.

Q. Okay. And is that power-loss calculation part of the reconciliation, if you will, of the water district's operations for that particular year?

A. No, not -- I would not say it's part of the water district's operations. The watermaster does help participate in the calculation of that number.

Q. Is there any reference to the power-loss calculation and the water stored in the Upper Snake relative to that exchange in the black books for the water district?

A. I believe some of the hydrologic numbers in our annual book, or the black book, are used to make that calculation.

Q. And that's part of your participation?

A. Yes, it is.

MR. SIMPSON: Mark this as Exhibit 22, please.

(Exhibit 22 marked.)

Q. (BY MR. SIMPSON): And, Lyle, I'm going to hand you what has been marked as

A. Yes.

Q. Okay. And these books aren't created simultaneous with the particular water year, that is, this book that I have in my hand is from 1978, but it typically takes the water district a number of years to actually get the book out into publication; correct?

A. Yes. We are backlogged somewhat at this point.

Q. So these numbers are essentially after the fact in terms of water's already been stored, allocated, and delivered for a particular year, and it takes some period of time, one or two or three years, for the water district then to get this information out to the individual water user; correct?

A. That's correct.

Q. Okay. And the particular sentence that I want you to look at, Lyle, is on page 15. And you do have in front of you, I think, Exhibit 22, which is, looks to be, a three-page excerpt out of the 1978 black book; correct?

A. That's true.

Q. All right. And on page 17, the first full paragraph --

Exhibit 22.

And, yes, I do have copies.

That's the black book, the infamous black book?

A. Yes.

Q. Lyle, I'll just ask you to take a moment and look through the excerpt of what I'll represent to you is the black book for 1978. And once you have completed your review, I'll ask you a few questions.

A. (Reviews.)

Okay.

Q. Let me have that. I'll take the black book. If you would, when I use the term "black book," can you just identify for the record what the black book is.

A. It's a common term for an annual summary of hydrologic data from Water District 1. And it's named the black book apparently because of the color of the cover.

Q. Not because of what it represents; right?

So these black books are created for each year for the water district's operations; correct?

A. Repeat the page number, please.

MS. McHUGH: John, I think you mean page 15.

Q. (BY MR. SIMPSON): Page 15. Excuse me. I misstated.

On page 15 of the 1978 black book, the first full paragraph, the last sentence states, "These provisions became administrable under state water law when the contracts were included as part of the district court decrees in 1968 and 1969."

Do you see that statement?

A. I do.

Q. And can you identify for us what that sentence refers to, that is does the sentence identify those provisions of the Palisades contracts that were included as part of the Eagle decrees that were entered in 1968 and 1969?

A. Yes. It does appear to reference the Eagle decree. But it references them by decrees in years.

Q. Okay. And you're aware that those two Eagle decrees that you described earlier were entered as judicial decrees in the time frame 1968 and 1969?

A. That's my understanding.

1 Q. Right. So it would be your
2 understanding that this sentence refers to those
3 decrees?

4 A. That would be my conclusion, yes.

5 Q. And this would, would it not, form
6 part of the basis for your understanding that the
7 water district administers rights pursuant to
8 those decrees that were entered?

9 A. That's correct.

10 Q. And that's what this reference
11 identifies?

12 A. Yes.

13 MR. SIMPSON: Okay. I can just go off the
14 record for a minute. I think I'm done.

15 (Recess.)

16 MR. SIMPSON: Back on the record.

17 Q. Lyle, if you could open that notebook
18 up to Exhibit 3, if you would, please.

19 And I'll ask you, have you seen that
20 director's recommendation before for claim 01-217?

21 A. Yes, I have.

22 Q. Okay. And earlier in your testimony
23 you indicated that the water rights that you've
24 delivered in Water District 1 during your tenure
25 as an employee for the water district had been

1 delivered pursuant to the Eagle decree; correct?

2 A. Yes.

3 Q. And if you would look down into the
4 element identified as "Other Provisions Necessary
5 for Definition/Administration of this Right," do
6 you see the reference to the Burley Irrigation
7 District versus the Eagle supplemental decree at
8 the bottom of that first page?

9 A. Yes.

10 Q. And then at the top of the second page
11 is the Aberdeen-Springfield Canal versus Eagle
12 Supplemental Decree?

13 A. Yes.

14 Q. So those represent the two references
15 to the Eagle decrees that you've identified, do
16 they not?

17 A. That's true.

18 Q. All right. Based upon your experience
19 as watermaster in Water District 1 and delivering
20 rights pursuant to those Eagle decrees, would it
21 be beneficial to you in your continued
22 administration to have that reference to the Eagle
23 decrees as a part of administering this right?

24 A. I don't know if it would be necessary,
25 but it may be explanatory.

1 Q. Okay. And do you have an
2 understanding that if a reference to the Eagle
3 decree is not contained in a subsequent decree,
4 that that Eagle decree would not be administered
5 to vis-à-vis this particular right?

6 A. I believe it would still be
7 administrable.

8 Q. The right would be administrable;
9 right?

10 A. Yes.

11 Q. But would it be administered pursuant
12 to the Eagle decree and the provisions of the
13 Eagle decree? Do you have an understanding?

14 MR. BROMLEY: Calls for a legal conclusion.

15 Q. (BY MR. SIMPSON): I guess it looks
16 like you're looking at me to ask a question, so
17 I'll try to just think one up for you. I know you
18 too well.

19 So you've testified that you've
20 administered the water rights pursuant to the
21 Eagle decree.

22 So have you, in reviewing the exercise
23 of right 217, reviewed the exercise of that right
24 and, if necessary, administered that right
25 pursuant to the Eagle decree historically?

1 A. This water right of 2500 cfs is in our
2 water right accounting program.

3 Q. Uh-huh.

4 A. So, you know, again, that's a program
5 we use to show whether that water right is in
6 effect and how much of that water right is being
7 put to beneficial use.

8 Q. Whether it's a deliverable water
9 right; correct?

10 A. That's correct.

11 Q. Okay. And so is it the intent of your
12 water right's accounting program to identify those
13 rights as they appear in prior decrees?

14 A. Yes. Our water right accounting
15 program does use several different decrees, and
16 they are all combined into this water right
17 accounting -- water right accounting program that
18 we use for water distribution.

19 Q. All right. But it's the intent that
20 when the water right accounting program references
21 a prior decreed right or a licensed right that it
22 accurately reflects the elements and conditions of
23 that decree or license; correct?

24 A. Our water right accounting program
25 does include elements of the decree, specifically

1 they include the quantities, the priority dates,
2 period of use, and place of use as far as what
3 reach of the river. So it does include those
4 elements.

5 Q. All right. And if there were any
6 conditions on the exercise of that right or any
7 other terms or provisions which would govern the
8 exercise or administration of that right, would
9 your water right accounting program contain those?

10 A. Some do have boundaries on elements of
11 the decree, such as quantities for a per acre-foot
12 limitation on a particular water right, and some
13 have limitations on the period of use.

14 Q. Okay. So if there's, for example,
15 limitations on the period of use, those would be
16 reflected in the accounting program as well as on
17 the decree?

18 A. Yes.

19 Q. So the genesis of that condition, the
20 period-of-use limitation, would be a decree or a
21 license, wherever that language originated from?

22 A. Could you repeat that, please?

23 Q. Well, the period-of-use limitation
24 that you identified, that language, if it's
25 contained in the water rights accounting program,

1 would originate or have its genesis from either
2 the decree or license that created that right;
3 correct?

4 A. That's usually the case.

5 Q. Okay. And so in this case where the
6 director's recommendation is that there's a
7 reference to the Eagle decree and the provisions
8 of the Eagle decree as they would be applicable to
9 the 217 power right at Minidoka, would those aid
10 you in the administration of that right? That is,
11 if there was some winter power operations that it
12 identifies, a condition for that operation in the
13 Eagle decree, wouldn't that aid you in the
14 administration of that right?

15 A. Yeah, I believe the sentence says that
16 "The delivery of water to this right may be
17 subject to the provisions for winter power
18 operation at Minidoka Power Plant," is the
19 language that it has in it.

20 Q. Right. And so to the extent that
21 there's winter operation terms or conditions in
22 the Eagle decree, those terms or conditions on the
23 operation of the Minidoka power right, would those
24 aid you in administering those rights or
25 overseeing the exercise of those rights?

1 A. It may aid you at times, yes.

2 Q. Okay. When those provisions are in
3 effect; correct?

4 A. Yes.

5 Q. So if those provisions are effective,
6 then at certain times of the year you as the
7 watermaster would gain additional knowledge, and
8 those provisions would aid you in administering or
9 overseeing the exercise of those rights?

10 A. Yes, if there are limitations, it may
11 help to clarify that.

12 Q. Okay. I'd ask you to turn to
13 Exhibit 2. And Exhibit 2 is the Burley Irrigation
14 District/Eagle decree. And if you'd turn to
15 Exhibit E, still in Exhibit 2. We've got it
16 marked. Good job. Saved a half hour. And you're
17 looking at paragraph 24(a) at the bottom of
18 page 28 of Exhibit E of the Eagle decree.

19 A. (Reviews.)

20 Okay.

21 Q. All right. And the heading under that
22 section is "Winter Power Operation; Minidoka
23 Powerplant"; correct?

24 A. Yes.

25 Q. Okay. And if you simply looked at the

1 first four lines of paragraph 24(a), does it
2 identify a condition or limitation in the
3 operation of Minidoka Dam?

4 A. I don't know if that's a limitation.
5 It does say it's passing water to existing
6 diversion rights.

7 Q. Right. So does it not state that the
8 United States, in the operation of Minidoka Dam
9 during the season storage season, is required to
10 pass water to satisfy existing diversion rights in
11 the stretch down below Minidoka Dam down to Milner
12 Dam?

13 A. Yes.

14 Q. Okay. So that would limit the
15 exercise of the storage of water in the Upper
16 Snake, would it not?

17 A. When those existing downstream rights
18 are in priority, they would get water before a
19 more junior storage right upstream.

20 Q. Right. So if there are rights below
21 Minidoka Dam during the storage season,
22 Reclamation would have an obligation to operate
23 Minidoka Dam under that limitation identified --

24 A. Yes.

25 Q. -- in paragraph 24(a)?

1 Okay. And then in the second sentence
2 there, it identifies that limitation, and then
3 qualifies it again, does it not, where it states,
4 "The United States must operate the American Falls
5 and Minidoka Dams so as not to interfere with
6 these third-party rights. It will be the
7 objective of the United States," and then it goes
8 on for the balance of that statement?

9 A. Yes.

10 Q. And that balance identifies that
11 relationship between storing water in the Upper
12 Snake and generating power at Minidoka Dam, does
13 it not?

14 A. That's correct.

15 Q. And that's kind of your understanding
16 of how Reclamation's operated their reservoir
17 system in the storage season with respect to this
18 competition between storing water or generating
19 power at Minidoka Dam; would that be right?

20 A. Yes.

21 Q. Okay. And then if you go on down
22 through that paragraph, down to the lines just
23 above the indent, it does talk about limiting the
24 release of water through those dams as follows.

25 There's additional limitations in that

1 paragraph, is there not?

2 A. Yes.

3 Q. Okay. So this paragraph 24(a)
4 identifies limitations or conditions for which
5 Reclamation would exercise this water right we've
6 been talking about, claim 217, for power
7 generation?

8 A. Yes.

9 Q. Okay. So reviewing that
10 paragraph 24(a), in your opinion having that
11 paragraph 24(a) referenced or having the Eagle
12 decree referenced, would that aid you in your
13 overview of the exercise of that right and perhaps
14 even in the administration of that right?

15 A. Well, I believe that's a decision for
16 the Bureau of Reclamation to make, as to whether
17 or not they are exercising that right or not.

18 Q. Right. Reclamation exercises the
19 right --

20 A. Yes.

21 Q. -- and you as watermaster have the
22 responsibility to overview their exercise of their
23 power right there at Minidoka; correct?

24 A. Yes. We account for the distribution
25 of water, including to the Bureau of Reclamation's

1 rights.

2 Q. Right. So you do, to a certain
3 extent, overview how they're storing water, how
4 they're releasing water for power generation at
5 Minidoka pursuant to this paragraph and the
6 conditions contained in the Eagle decree?

7 A. I don't know if we overview it. We
8 certainly do monitor it.

9 Q. Okay. I'll accept your word "monitor"
10 as a substitute for "overview."

11 A. Okay.

12 Q. Okay. So otherwise replacing the word
13 "overview" with the word "monitor," that's your
14 obligation as the watermaster, to overview
15 Reclamation's storing of water and releasing of
16 water for power generation at Minidoka Dam
17 pursuant to the paragraph that you've been
18 reading, paragraph 24(a)?

19 A. Yes.

20 Q. And you would ensure that if there are
21 those third-party rights that are in priority
22 identified or those other interests identified in
23 that paragraph, that to ensure that their rights
24 are protected, that's part of your responsibility
25 within the water district; correct?

1 A. Yes, it is.

2 MR. SIMPSON: Okay. That's all the
3 questions I have. Thank you.

4 MR. ARKOOSH: I have no questions.

5 EXAMINATION

6 BY MR. LOCHHEAD:

7 Q. I'm Jim Lochhead representing Idaho
8 Power. Just a couple of questions.

9 You were just talking with Mr. Simpson
10 about the third-party rights that are referenced
11 in paragraph 24(a) of Exhibit E of the Eagle
12 decree and expressing your position as monitoring
13 the decision of the Bureau of Reclamation as to
14 whether or not to exercise its power right at
15 Minidoka.

16 If third-party rights, as contained in
17 the Eagle decree, are not referenced in the decree
18 that you administer, how do those third parties
19 enforce those rights?

20 A. If there are other water rights -- for
21 instance, right now this time of year there are
22 some people with water rights besides just
23 American Falls and the power right that are
24 diverting water under their existing rights. I

1 don't know if that got to your question or not.

2 Q. How do they enforce those rights?

3 A. We do have gauge readings and gauge
4 readers and data collection devices that tells us
5 on a near realtime basis what the diversions are
6 at different diversion points up and down the
7 river.

8 Q. And then you deliver water pursuant to
9 those rights?

10 A. That's correct.

11 Q. And if those persons aren't getting
12 the water to which they feel they're entitled,
13 what do they do?

14 A. Usually they call our office.

15 Q. And then you make a determination as
16 to whether they're entitled to that water that
17 they're calling for?

18 A. Yes. We do a calculation of what the
19 natural flow is and the storage water rights that
20 they've got and determine -- make a determination
21 whether or not they're within their rights or not.

22 Q. And when you make that determination,
23 what do you look to, what information do you look
24 to?

25 A. We use our -- one of our main tools,

1 information you would look to as the administrator
2 to determine whether or not you're going to
3 deliver water to that person?

4 A. We do look at the water rights in the
5 decrees on occasion. For the most part, the
6 elements that we've extracted out of the water
7 right decrees are the primary elements that guide
8 us in making a determination of whether the water
9 right is in priority or not.

10 Q. Well, my question was whether if a
11 third-party right is not reflected in the SRBA
12 decree that's issued, would you continue to look
13 at that going forward?

14 MR. BROMLEY: Same objection.

15 THE WITNESS: Yeah, we would look at that
16 if that was -- helped us to provide any
17 clarification.

18 Q. (BY MR. LOCHHEAD): Even if it's not
19 in the decree?

20 A. I don't understand your question.

21 Q. Well, if a third-party right is not
22 referenced in the decree and somebody's asking you
23 to deliver water pursuant to that right, on what
24 basis would you deliver water or not deliver water
25 to that right?

1 our water right accounting program, to determine
2 the natural flow and storage at different points
3 up and down the river. And from that we calculate
4 whether or not their water right is in priority or
5 not.

6 Q. And upon what information is that
7 accounting program based?

8 A. It is based upon the USGS and our data
9 collection and the Bureau of Reclamation's
10 Hydromet data.

11 Q. Is it based on decrees and water
12 rights?

13 A. Yes.

14 Q. And so you would look to what's in a
15 decree to determine the extent and nature of the
16 right?

17 A. Yes, we do look in the decrees for the
18 different elements of the water rights.

19 Q. So if the third-party rights that are
20 referenced in the Eagle decree are not likewise
21 referenced in the decree that's issued by the SRBA
22 court, would you still consider those to be
23 enforceable rights?

24 MR. BROMLEY: Calls for a legal conclusion.

25 Q. (BY MR. LOCHHEAD): Is that

1 A. Right now, there are a number of
2 different decrees up and down the Snake River
3 adjudication, at least part of it is designed to
4 bring those different decrees and at least the
5 elements of those decrees into a common -- into a
6 water right accounting program to help make the
7 calculation for the watermaster and staff.

8 Q. And you previously testified that the
9 water right accounting is based on the decrees, in
10 part?

11 A. Yes.

12 Q. If a water user feels that the
13 accounting program doesn't accurately reflect the
14 decrees, what kind of recourse does that person
15 have?

16 A. Usually the right holder will call our
17 office and, I guess, ask or say that they would
18 like to exercise their water right. And we'll
19 make our calculation or determination if their
20 right is in priority or not.

21 Q. And to do that, you would look at the
22 decree?

23 A. Sometimes we do. Usually the
24 questions we get are more based upon the elements
25 of the right, you know, what natural flow is

1 available at different points, what storage is
2 remaining, those types of things is usually the
3 questions we get.

4 Q. When you account for water and monitor
5 the activities of the Bureau of Reclamation, are
6 you keeping track of water as it is being stored
7 in the reservoirs?

8 A. Yes, we do.

9 Q. And are you accounting for that water
10 on a volumetric basis in terms of the quantity?

11 A. Yes.

12 Q. And are you accounting for that in
13 terms of the purpose for which the water is being
14 stored?

15 A. No, not necessarily. We do -- the
16 purpose has to be a beneficial use in order for it
17 to be part of our water right accounting program.
18 But if we're storing water, for example, in
19 Palisades Reservoir, it may have storage from an
20 irrigation right or it may have -- for example,
21 City of Pocatello, which does not have the same
22 irrigation beneficial-use element. So we're just
23 storing according to that right. We're not
24 looking at beneficial use of what that storage may
25 end up going toward.

1 Q. So is that accounting made
2 subsequently after the fill has occurred, or when
3 does that accounting occur?

4 A. During the storage season we just
5 account for how much storage has accumulated in
6 the different space holder rights.

7 Q. When the Bureau makes a decision about
8 whether or not to store water and exercise its
9 power right at Minidoka, do you account for that
10 water as storable water?

11 A. We do keep track of the storable water
12 at Minidoka.

13 Q. And so then is that accounted as
14 against the volumetric limitation of a particular
15 structure?

16 A. Yes.

17 MR. LOCHHEAD: I think that's all I have.

18 EXAMINATION

19 BY MR. LING:

20 Q. Lyle, just following up on that couple
21 questions.

22 If the Bureau decides that it is not
23 going to exercise its 2500 cfs at Minidoka and
24 prefers to have that water stored, do you
25

1 determine whose reservoir it goes into, or it just
2 gets into the system, storage system in one of the
3 Bureau reservoirs?

4 A. Usually it goes into one of the
5 reservoir storage accounts. There are times when
6 it's storable water and the determination of
7 whether or not it goes to a particular reservoir
8 is determined later on.

9 Q. Okay. And your experience when you're
10 doing that, if the Bureau elects not to have the
11 2500 cfs under that first 217 right limited for
12 power production and it is going to storage, have
13 you ever had a situation where a junior right
14 preceded to divert from the river and deny a 2500
15 storage in the reservoir?

16 A. I can't think of an instance where
17 that happened. I don't recall an instance where
18 that happened.

19 Q. And would that still be a 1909 right
20 that was being stored now as it was for power, or
21 would it take the priority of one of the
22 reservoirs for storage?

23 A. The reservoir storage right, Minidoka,
24 I believe, has a 1909 priority date.

25 Q. Yeah, but if they don't want to store

1 it in Minidoka, instead they say "I'm not going to
2 generate any power, but I want it to go into
3 American Falls because I'm concerned it may not
4 fill," is that a 1909 right that's going into
5 American Falls?

6 A. No, that would be the priority date of
7 the -- well, it would be held in the reservoir
8 with the more junior priority date. And if the
9 1909, for example, water right did not fill --
10 well, I don't think that's ever happened, but
11 there may be some case where you exchange that
12 storage upstream to other reservoirs.

13 Q. And I guess what I'm trying to
14 understand and visualize in my own mind, if it's a
15 1909 power right that's going to be stored in
16 American Falls and somebody with a junior to the
17 1995 but senior to American Falls wants to divert
18 water out of the river -- and let's assume it was
19 only part of that 2500 -- would you curtail that
20 junior based upon the power right, or would you
21 have to look at the storage right to curtail a
22 junior? Would it not be junior -- if you follow
23 me. My hypothetical, the reservoir right would
24 not be junior. And I just don't realize how you
25 do that.

1 A. Well, my understanding is that it's
2 historically been operated so that you do deliver
3 to the irrigation right as if the power right is
4 subordinate to the other right.

5 Q. Even in the wintertime? I'm talking
6 about in the storage season when there's no
7 irrigation occurring.

8 A. That's correct.

9 Q. Okay. And to your knowledge, there's
10 never been a diversion by a junior right that
11 denies the storage of the 2500 cfs?

12 A. You know, I'm not sure I can recall a
13 situation.

14 Q. What would happen if there was an
15 attempt to exercise the Water Resource Board
16 recharge right when the Bureau was seeking to fill
17 the reservoir with the 2500? Would they be able
18 to exercise that right?

19 MR. BROMLEY: Objection. Calls for
20 speculation.

21 THE WITNESS: The -- the water district
22 accounting would recognize that water right. And
23 if it did not -- if it -- strike that and go to --
24 if all other nonhydropower rights were being
25 filled, we likely would have the water board's

1 usually is listed as a different beneficial use.
2 So I would say recharge is a separate beneficial
3 use than an irrigation right.

4 Q. And then getting back to my question.
5 I don't mean to put you on the spot. But what
6 would you look at to allow you to allow a recharge
7 right to be exercised when the water available has
8 not filled the reservoirs?

9 A. Yeah, if -- if the -- if the power
10 right is subordinate to other uses, it likely
11 would be filling other rights, even if the power
12 generation is not running at its capacity.

13 Q. But in this case under the Eagle
14 decree it's not subordinate to other uses, only to
15 the storage of water for irrigation is the only
16 thing that's subordinate under the Eagle decree?
17 That's all you have at this time, isn't it?

18 A. The Eagle decree is in effect. The
19 board does have a recharge right that's in a
20 permit status. So the watermaster does look at
21 both decrees, licenses, and permits.

22 MR. LING: No further questions.

23 ///

24 ///

25 ///

1 right be filled also, if there was sufficient
2 water supplies.

3 Q. (BY MR. LING): But not in lieu of one
4 of those senior rights, in other words, they
5 wouldn't be able to take it and reduce the amount
6 of water that the reservoir would be entitled to
7 receive or the power right?

8 A. There are times when we would allow
9 them to divert water in lieu of the power right.

10 Q. And even though it didn't have the
11 priority?

12 A. Well, in your example of the water
13 board having, say, a 1980 priority right, there
14 are times when I suspect that right will be
15 utilized, even if the 1909 right for power
16 generation is not being fully utilized.

17 Q. And what's the basis for that? Do you
18 know?

19 A. Well, my understanding is power rights
20 are subordinate to irrigation because of the need
21 to retain water or conserve water in the Upper
22 Snake River.

23 Q. And do you consider the recharge and
24 irrigation right?

25 A. You know, I think that recharge

EXAMINATION

2 BY MR. FLETCHER:

3 Q. Let me follow up with what Roger is
4 saying there, just to clarify this.

5 Right now we're talking about today,
6 not what may happen down the road in the
7 adjudication.

8 As to the two senior rights at
9 Minidoka, which there's not much of an issue on
10 concerning the Eagle decree, they're subordinated
11 to storage for irrigation; correct?

12 A. Yes.

13 Q. And to your knowledge, are they
14 subordinated to anything else right now, based
15 upon the Eagle decree?

16 A. It's -- not in the Eagle decree, no.

17 Q. Okay. So if the water board came to
18 you and said "We want you to fill our 1980
19 recharge right," and you knew that the earlier
20 power right at Minidoka needed water, are you
21 saying you're already treating that senior power
22 right at Minidoka as being subordinated?

23 MR. STANISH: Calls for a legal conclusion.

24 Q. (BY MR. FLETCHER): No, I'm asking you
25 what you're actually doing in your job as

1 watermaster.

2 MR. STANISH: Same objection.

3 THE WITNESS: You know, we are utilizing
4 our water right accounting program to show whether
5 or not we're filling those rights or not. That's
6 one of our main tools that we use.

7 Q. (BY MR. FLETCHER): That's not my
8 question, Lyle.

9 My question is, are you already
10 treating all power rights as being subordinated to
11 all other uses?

12 A. My understanding is if these earlier
13 rights of a 1909 priority are subordinate, I guess
14 I would presume that the same is true of later
15 priority rights also.

16 Q. Okay. Are you treating the -- okay.
17 I'm going to be specific -- the water right 1-217
18 and 1-218, those are the senior rights at Minidoka
19 that are subordinate to storage for irrigation
20 under the Eagle decree, are you treating those as
21 being subordinate to recharge today?

22 A. Yes.

23 Q. And on what basis are you doing that?

24 A. I would say the Eagle decree says you
25 try to keep that water upstream in the existing

1 Q. Has someone told you that you should
2 treat all power rights as being subordinate to all
3 other uses except junior power rights?

4 A. No. I believe that was the same
5 understanding that Ron Carlson had in the same
6 situation that arose in the 1990s.

7 MR. ARKOOSH: You know, I object to the
8 answer as nonresponsive.

9 The question was, had someone told you
10 to do that?

11 THE WITNESS: Well, part of my
12 understanding of water rights is from learning
13 from Ron Carlson. And so I guess maybe that was
14 part of the training that I got at that time.

15 Q. (BY MR. FLETCHER): And Ron Carlson
16 told you that power rights were subordinate to all
17 other uses except junior power rights?

18 A. Yes.

19 Q. And it's your belief that that's how
20 the accounting program deals with power rights?

21 A. Yes.

22 Q. Do you record power rights in the
23 accounting program?

24 A. Yeah. They are listed in our water
25 right accounting program, yes.

1 reservoir, in the upstream, harder to fill
2 reservoir rights.

3 Q. What does that have to do with
4 recharge?

5 A. Recharge is not listed in the Eagle
6 decree.

7 Q. That's my point. So how can it be
8 subordinated to recharge?

9 A. Well, it does have a permit. My
10 understanding is the power generation rights are
11 subordinate to upstream, nonpower generation uses.

12 Q. So you're treating these rights not
13 only as being subordinate to storage for
14 irrigation, but you're treating them as being
15 subordinated to all other rights other than junior
16 power rights?

17 A. That's my understanding.

18 Q. And is that the way your program runs?

19 A. Yes.

20 Q. And the basis for you doing that is
21 what?

22 A. That's my understanding of the
23 Department of Water Resources' position on power
24 generation, and the board's position on the zero
25 flow past Milner.

1 Q. Okay. Now, do you get into disputes
2 between junior users and senior users on the
3 river?

4 A. Occasionally.

5 Q. And when those disputes occur, you
6 don't go through a formal administrative hearing
7 process, do you?

8 A. Usually the more junior right is
9 either shut off or is charged storage water.

10 Q. Okay. And if someone from the Bureau,
11 for example, were to call you on 1-217 and say "We
12 want that right delivered," what would you do?

13 A. Well, my understanding, in that
14 situation if they had a different understanding of
15 whether that right was subordinate to myself, I
16 would probably talk to the director and find out
17 his interpretation of that water right situation.

18 Q. And then you'd follow the director's
19 direction, if you were uncertain about it?

20 A. Yes.

21 Q. Okay. I guess the director is your
22 supervisor, fair to say, or what would you
23 consider him?

24 A. I would say the director has oversight
25 responsibilities of all the water districts in the

1 state.

2 Q. Okay. Now, two of the power rights at
3 Minidoka that we've been talking about are
4 constitutional beneficial-use claims.

5 If a water user with a beneficial-use
6 claim calls you and says "I want this water right
7 delivered," what do you do?

8 A. I would assume it's subordinate just
9 like other power rights.

10 Q. Okay. Well, let's say it's not a
11 power right. Let's say it's a constitutional
12 beneficial irrigation claim.

13 A. Okay. And right now we're filling
14 existing storage rights, other constitutional
15 beneficial uses probably would not be getting any
16 water because a senior storage right is diverting
17 all the available supplies.

18 Q. Yeah. Do you administer to
19 constitutional beneficial-use claims?

20 A. We do not have them in our water right
21 accounting program.

22 Q. Okay. And so they're not in your
23 program and so you don't have any priority dates
24 listed for constitutional beneficial-use claims;
25 is that correct?

1 A. That's correct.

2 Q. And so if someone called you and
3 wanted delivery of one of those, you don't have
4 any record of it; correct?

5 A. That's correct.

6 Q. So what do you do?

7 A. If there are more than one water right
8 that's not being delivered -- for instance, two
9 constitutional use rights -- frequently you'd get
10 a supplemental decree between those conflicting
11 individual rights.

12 Q. But let's say there's not a
13 supplemental decree to establish rights.

14 Because once there's a decree, you
15 don't have a problem, the decree tells you what to
16 do; correct?

17 A. That's correct.

18 Q. If there's no decree, you don't have
19 any way to administer the right; isn't that right?

20 A. Correct.

21 Q. I mean a decreed license or permit.

22 A. Correct.

23 Q. So it's only if there's more water
24 than is required to fill every other right in the
25 river that someone can take out a beneficial-use

1 claim; correct?

2 A. Correct.

3 Q. Okay. Do you keep a record of
4 beneficial-use claims as they're diverted?

5 A. Only if they're at existing
6 established points of diversion. For example, a
7 canal could be diverting up to their maximum
8 beneficial use decreed right, and if they have a
9 beneficial use for an additional cfs, we would
10 have a record of that. Other locations it may be
11 just a beneficial use when, say, an intermittent
12 tributary is flowing.

13 Q. Okay. So, for example, do you keep
14 track of the diversions that go through the power
15 plant at Minidoka?

16 A. We keep track of the water at
17 Minidoka, Snake near Minidoka, USGS gauging
18 station, and from that the amount of water -- you
19 presume the water is being utilized for power
20 generation if water is available.

21 Q. Okay. So if, for example, more than
22 2700 cfs is going through the power plant -- and
23 I'm going to represent to you that's the total of
24 the two senior rights -- would that mean that the
25 two junior rights were being utilized to generate

1 power?

2 A. Yeah, I don't think you would know
3 that from our -- from our records.

4 Q. Well, what water would be used to
5 generate power above 2700 besides that? I mean it
6 would have to be under these water rights,
7 wouldn't it?

8 A. You know, they -- they may or may not
9 have filed a beneficial use for something above
10 that.

11 Q. Well, that's what these two water
12 rights that I'm talking about --

13 A. Yes.

14 Q. -- 1-4024 --

15 A. Yes.

16 Q. -- and 1-4025 are beneficial-use
17 claims.

18 A. Yes.

19 Q. I mean you're aware of those claims?

20 A. Yes.

21 Q. And so there are times they divert
22 more than the 2700?

23 A. Yes.

24 Q. Okay. I mean I don't think that's in
25 dispute, is it?

1 A. You know, I'm not an expert on the
2 power -- on the flow that it takes to go through
3 the power plants. But if they have available
4 capacity, I presume they would use it at times.

5 Q. Okay. Do you have Exhibit 10 there
6 handy?

7 I'm going to represent to you that
8 this is language that has been proposed by the
9 State and the Bureau of Reclamation to replace
10 recommendations made by the director on the water
11 rights that we're talking about here today.

12 Have you seen this language before?

13 A. Yes, I have.

14 Q. Okay. Up there at the top of the page
15 where it talks about water rights 1-217 and 1-218,
16 that first paragraph under "Priority Date," and
17 also the language under "Other Provisions
18 Necessary," do you consider that language to be a
19 full subordination of these water rights to all
20 other uses except for junior power?

21 A. Yes, in my opinion, that would
22 reaffirm the subordination of the power rights.

23 Q. To what? Subordination to what?

24 A. To all other upstream rights other
25 than power generation.

1 Q. Okay. Where do you see that language?

2 A. Well, it's not listed like that. It's
3 not listed with those words. But it does say
4 "This decree does not alter, amend, or modify the
5 contracts entered into by the various federal
6 contractors."

7 Q. Do you know of any contract that
8 subordinates these power rights to anything other
9 than storage for irrigation?

10 A. No.

11 Q. Okay. So I'm trying to figure out
12 where you're coming up with the fact that this
13 language would subordinate to all other uses.

14 A. You know, it just says "The United
15 States will limit the release of water through
16 Minidoka Dam." So it looks like the United States
17 is the one that's limiting their use. It's
18 choosing to not exercise their full 2700 cfs.

19 Q. Well, if you'd finish out that
20 sentence you're stating, it says, "...when these
21 water rights for power production would result in
22 loss of water otherwise storable in the reservoir
23 system."

24 A. Uh-huh.

25 Q. Isn't that how they would be limiting

1 their use of this power right?

2 A. Yes, that's what this says.

3 Q. Okay. Now, if this language were
4 adopted by the Court, would you have to change the
5 accounting program?

6 A. No, I don't believe so.

7 Q. You would still interpret this as
8 being a full subordination to all other uses
9 except for power?

10 A. Yes.

11 Q. Okay. Well, let's look down under the
12 second part down there under water rights 1-4024
13 and 1-4025. Okay? And look down in the second
14 paragraph under "Priority Date." It's on the
15 first page.

16 A. Okay.

17 Q. Do you see it says "This right" --

18 A. I do see it.

19 Q. Huh?

20 A. I do see where you're pointing to.

21 Q. Okay. And it says, "This right
22 carries no entitlement to make a delivery call for
23 hydropower generation, except as against junior
24 hydropower rights."

25 Do you see that language?

1 A. Yes, I do.

2 Q. Now, isn't that different wording than
3 that contained on the two water rights above?

4 A. It is different wording.

5 Q. Now, would you interpret the wording
6 under 1-4024 and 1-4025 to be a full
7 subordination, except for as to junior power
8 rights?

9 A. I would say that one has stronger
10 language than the other. But to me, they both
11 indicate subordination.

12 Q. So to you, they mean the same thing?

13 A. That's correct.

14 Q. If I applied for a water right in,
15 say, 2001 and I obtained that right, a right to
16 divert water for irrigation from the Snake River,
17 once I obtained that right, do I have to do
18 anything with that right in order for you to
19 administer to it; or once the Department issues
20 that license, do you automatically administer to
21 it?

22 A. Yes, we would -- once it was decreed
23 or licensed, we would include that water right in
24 our existing water right accounting database.

25 Q. Okay. So somehow you get ahold of the

1 information? Is it through the Department you get
2 that information, or does the water right holder
3 bring it to you?

4 A. Could be either one. Usually the
5 Department has the best historical records, so
6 usually it comes from that direction.

7 Q. And when that occurs, then you do
8 change your program to account for that water
9 right?

10 A. That's correct.

11 Q. So if I walked in there with a water
12 right with these recommendations on it, I guess
13 what you're saying today is it would be your
14 interpretation you wouldn't make any changes to
15 the accounting program for these two water rights?

16 A. That's correct.

17 Q. Several times today we talked about
18 the City of Pocatello's storage right at
19 Palisades.

20 Do you know of any use that's decreed
21 or licensed for that right other than storage for
22 irrigation and irrigation?

23 A. Could you repeat that question,
24 please?

25 Q. Okay. Well, let me frame it a little

1 whatever's been used has been used for rental;
2 right?

3 A. Well, my -- my history's a little hazy
4 on that. But they did use part of their storage
5 in the 1960s and '70s to compensate for some water
6 that they were pumping, as I understand it.

7 Q. To mitigate for the pumping?

8 A. I don't know if that was the reason.

9 Q. Okay. But doesn't the contract
10 require that?

11 A. Well, I'm not familiar with that
12 contract.

13 Q. You haven't read it?

14 A. I have read it, but it's been years
15 ago.

16 Q. Okay. And as watermaster, don't you
17 have a duty under that contract to determine how
18 much water they're pumping and then take some of
19 their storage to mitigate for that?

20 A. Yeah. If it was called into question,
21 I would try to research it further, that's
22 correct.

23 Q. So you don't believe that's ever been
24 called into question?

25 A. I'm not --

1 better.

2 The City of Pocatello's storage right
3 at Palisades is held through the Bureau of
4 Reclamation; correct?

5 A. That's correct.

6 Q. And do you know of any license,
7 permit, or decree that authorizes uses of water
8 out of Palisades except for storage for
9 irrigation, irrigation, and power?

10 A. Well, the City of Pocatello does have
11 a right to a certain percentage of storage water
12 just like other users. You know, to date that --
13 that -- you know, their use has not been I guess
14 precisely determined as to what they're using it
15 for.

16 Q. Well, as it stands right now, their
17 right is only for storage for irrigation and/or
18 irrigation; correct?

19 A. Yes.

20 Q. And the only part of that right
21 they've used is storage for irrigation; correct?

22 A. They have rented that water out.

23 Q. They've rented water. But the City of
24 Pocatello's use of the water, other than renting
25 it -- they've only stored the water, and then

1 Q. I guess we called the wrong guy.

2 A. Maybe I'm the wrong person.

3 Q. Consider this a call. How does a
4 water right become subordinated to junior uses, to
5 your knowledge, an existing decreed water right?

6 A. In the Eagle decree, I think it's
7 clear that the Bureau of Reclamation agreed to
8 subordinate to upstream storage for their Minidoka
9 Power Plant.

10 Q. So that's one way is through a decree?

11 A. That's one way.

12 Q. Do you know any other way?

13 A. Yes, there are some water rights where
14 that is specifically listed under the conditions
15 of the water right or the permit.

16 Q. And once a water right decree is
17 issued, do you know of any way that the water
18 right, then, after the decree is issued it somehow
19 becomes subordinated?

20 A. No, I don't know if there's a
21 situation that's ever -- where that's ever
22 happened.

23 Q. That was going to be my next question,
24 if you had any examples of that, of where a decree
25 has been issued, there's no subordination language

1 in it or it's limited subordination, and somehow
2 after the decree is issued the subordination
3 changes, the right becomes more subordinated, or
4 it becomes subordinated to something else, do you
5 know of any example of that?

6 A. There may be some times where there's
7 some clarification needed in order to make sure
8 that that does -- where it's being interpreted
9 correctly. But I can't think of an example right
10 now.

11 Q. Okay. As a watermaster, are you
12 currently administering any water rights that have
13 been partially decreed in the SRBA?

14 A. Yes. There are some basins who are in
15 the district.

16 Q. Okay. To administer those water
17 rights, do you look at anything other than the
18 partial decree that was issued in the SRBA?

19 A. Well, certainly we want to extract
20 elements of the water rights. If there's a
21 question on -- if there's a question during the
22 delivery, then we try to look to some of those
23 partial decrees to help give us clarification.

24 Q. Now, from what you testified to
25 earlier, you're supposed to look at those partial

1 anything other than the SRBA decree to update the
2 program when those partial decrees are entered?

3 A. That would be a question for Tony.

4 Q. So you don't know if he does?

5 A. I haven't -- I haven't been watching
6 him when he's been updating those elements.

7 Q. As watermaster, if a water user comes
8 to you with some kind of dispute and says "Here's
9 my SRBA decree, but here's my old decree dating
10 back to 1920" -- and it's not mentioned in the
11 SRBA decree -- okay? -- and he says "I want you to
12 take into account what this 1920 decree says,"
13 what are you going to do as watermaster?

14 A. Well, there are a lot of old decrees
15 out there. And I guess my hope is that the
16 adjudication would bring some clarity and some
17 streamlining of the process to where you don't
18 have to read through a book of old decrees to
19 understand an existing water right.

20 Q. You haven't discussed a policy on that
21 with the Department? You don't have a policy on
22 whether or not you look behind the SRBA decree?

23 A. No, I have not.

24 MR. FLETCHER: I don't have anything else.

25 ///

1 decrees, right, and administer to them?

2 A. Right.

3 Q. And I think you testified you do your
4 best to get that language in your accounting
5 program, correct, whatever that decree says?

6 A. We certainly try to get the elements
7 that are pertinent into the water right accounting
8 program.

9 Q. Yeah, my question is, do you look
10 behind that SRBA decree while you're doing that,
11 like previous decrees or other things, when you
12 enter that new information in your program; or do
13 you just rely upon what the SRBA decree says?

14 A. Most of my experience has been just
15 people wondering when a certain decree is in
16 effect and which elements of those water rights
17 are being filled.

18 Q. Okay. And are you involved directly
19 with the entry of data into the computer program?

20 A. I'm not.

21 Q. Okay. Do you know who does that work
22 at your office?

23 A. Tony Olenichak in our office is --
24 usually heads that, any changes or updates.

25 Q. Okay. Do you know if Tony looks at

1 EXAMINATION

2 BY MS. McHUGH:

3 Q. This is Candice McHugh, the ground
4 water districts.

5 At the risk of beating a dead horse
6 here, perhaps, I have a question on the --

7 MR. BROMLEY: Are you insinuating that
8 Lyle's a dead horse?

9 MS. McHUGH: No, I'm not.

10 MR. FLETCHER: She's talking about me.

11 Q. (BY MS. McHUGH): We've been talking
12 about a lot of questions on Exhibit 10 for the
13 language for 217 and 218.

14 First of all, Lyle, were you at all
15 involved in the development of that language?

16 A. No. I believe this language came from
17 the Department of Water Resources.

18 Q. Okay. And are you familiar with what
19 the current director's interpretation might be of
20 that language?

21 A. I haven't discussed it with the
22 current director.

23 MR. ARKOOSH: Is that no, you don't know
24 what his --

25 THE WITNESS: I have not discussed it with

1 the current director.

2 MR. ARKOOSH: So you don't know what his
3 view of the language is? She asked you if you
4 knew what the view of the language was. You said
5 you haven't discussed it with him.

6 So you don't know what his views would
7 be?

8 THE WITNESS: I don't know.

9 Q. (BY MS. McHUGH): So when you answered
10 the questions to Mr. Fletcher that you believe
11 this to be full subordination, that was just your
12 answer today looking at the language; is that
13 correct?

14 A. That's correct.

15 Q. Okay. And just to kind of put into
16 context, the Minidoka Power Plant, is it upstream
17 from Milner Dam?

18 A. Yes, it is.

19 Q. And during the irrigation season, for
20 example, would you believe that there would be
21 2700 cfs going past Minidoka?

22 A. Yes. During the bulk of the
23 irrigation season, there's more than 2700 cfs
24 going past Minidoka.

25 Q. And can you explain why?

1 A. It's driven by the irrigation demand
2 that's between Minidoka and Milner.

3 Q. Okay. By the senior downstream
4 irrigation rights of Twin Falls and North Side
5 Canal Company?

6 A. That's correct.

7 Q. Which equal 3,000 cfs?

8 A. Well, there are more water rights than
9 3,000 below Minidoka.

10 Q. But during the bulk of the irrigation
11 season, there's a fairly constant demand for
12 3,000 cfs below Minidoka?

13 A. Yeah, I believe Twin Falls has a right
14 for 3,000 cfs and North Side Canal has a right for
15 400 cfs that's all a 1900 priority date.

16 Q. So during the irrigation season, the
17 water right Nos. 217 and 218 would be filled;
18 would you agree with that?

19 A. Yes.

20 Q. For the nonirrigation season, could
21 you explain to me how you've treated the 2700 cfs
22 at Minidoka Dam?

23 A. Yes. You know, if the -- because the
24 reservoirs operate as a system, we try to keep
25 storage high up in the system. You can always run

1 it down later. And you can exchange it.

2 So we try to retain the storage in an
3 upstream reservoir when it's a reservoir that's
4 difficult to fill. If that means Minidoka Power
5 Plant is diverting less than 2700 cfs, that is
6 acceptable, based upon the power-loss provisions
7 of the Bureau's contracts.

8 Q. And is it your understanding that
9 that's how the Bureau has operated its reservoir
10 system historically?

11 A. Yes.

12 Q. So when this language says that it's
13 the objective of the Bureau to operate the
14 Minidoka Power Plant to limit the exercise for
15 power production and to essentially enhance the
16 storage of water in the reservoir system, do you
17 see that as consistent with what has happened
18 historically?

19 A. In my view, that is consistent.

20 MS. McHUGH: Okay. I don't have any
21 further questions.

22 MR. ARKOOSH: I do have a couple.

23 MR. BROMLEY: Do you have any questions?

24 MR. STANISH: I had a couple.

25 MR. ARKOOSH: I'm sorry.

EXAMINATION

2 BY MR. STANISH:

3 Q. Lyle, can you turn to Exhibit --

4 MR. FLETCHER: Objection. That calls for a
5 legal conclusion. No. I had to do that.

6 MR. LOCHHEAD: I was just waiting for that.

7 Q. (BY MR. STANISH): -- Exhibit 3, the
8 director's report, 01-217. Near the bottom in the
9 "Other Provisions Necessary" section, the sentence
10 starting "The delivery of water to this right,"
11 can you read that. No, to the bottom.

12 A. "The delivery of water to this right
13 may be subject to the provisions for winter power
14 operations at the Minidoka Power Plant as
15 recognized in the Burley Irrigation District
16 versus Eagle Supplemental Decree and
17 Aberdeen-Springfield Canal Company versus Eagle
18 Supplemental Decree."

19 Q. In this provision when it refers to
20 "the provisions for winter power operation at the
21 Minidoka Power plant as recognized in those
22 decrees," what's your understanding of what
23 provisions of those decrees it is referring to?

24 A. It is referring to the power-loss
25 calculation at Minidoka Power Plant.

1 Q. So in Exhibit No. 2 before that, which
2 article do you believe that's referring to, or
3 exhibit? I'll refer you to Exhibit E.

4 A. Okay.

5 MR. ARKOOSH: It's where the sticker is.

6 MR. FLETCHER: Make him look.

7 Q. (BY MR. STANISH): Okay. If I
8 represent to you that page 28 of Exhibit E --
9 what's the first title you see there?

10 A. "Winter Power Operation; Minidoka
11 Powerplant."

12 Q. And if you flip through, you see
13 24(a), (b), (c), and (d), and (e), (f), and (g).

14 A. Yes.

15 Q. So is it your understanding that the
16 winter power operations provision referred to in
17 the director's report refers to all of those
18 articles, articles 24(a) through (g)?

19 A. Yes, it does refer to those same
20 provisions, those same footnoted portions.

21 Q. Have you read all of those provisions,
22 24(a) through (g)?

23 A. Not just now, but I have read -- I
24 have read them earlier.

25 Q. And is it your opinion that all of

1 those provisions include elements related to a
2 water right that are necessary for your
3 administration of these Minidoka water rights?

4 A. The administration of these water
5 rights is, I guess -- in my view, the shortened
6 proposed language is a shortened version that
7 includes some of those same concepts.

8 Q. And the proposed language includes all
9 of what is necessary for administration within the
10 winter power operations provisions?

11 A. That's correct.

12 Q. One more question: As a watermaster,
13 has there ever been an instance where you have
14 forced a water right holder to divert over their
15 objection?

16 A. No.

17 MR. STANISH: That's all I have.

18 MR. ARKOOSH: David might want to ask
19 questions.

20 MR. STANISH: Dave?

21 MR. GEHLERT: No questions here.

22 MR. ARKOOSH: I just have a couple.

23 ///

24 ///

25 ///

EXAMINATION

2 BY MR. ARKOOSH:

3 Q. You came to work in 1978; is that
4 correct?

5 A. Yes.

6 Q. That's the same year the accounting
7 program went online; is that right?

8 A. Yes.

9 Q. I'm going to make an assumption that
10 this right was only subordinated to irrigation
11 storage, the 217/218 Minidoka right, initially in
12 the storage program; is that correct?

13 A. Yes, that's correct.

14 Q. And at some point later on somebody
15 decided to make a change, even though the decree
16 didn't change, and subordinate it to all upstream
17 rights except junior power rights; is that right?

18 MR. STANISH: Calls for speculation.

19 THE WITNESS: Could you rephrase that,
20 please?

21 Q. (BY MR. ARKOOSH): At some point later
22 on there was a change made to the accounting
23 program to subordinate 217 and 218 to all upstream
24 storage, except for junior power use; is that
25 right?

1 A. Yeah, I'm not positive if that's -- I
2 don't know if that's right or not.

3 Q. How is it today? Does it subordinate
4 power rights to all upstream producers?

5 A. You know, the power, at least at
6 Minidoka, my understanding is that it doesn't --
7 doesn't drive water past the Minidoka Power Plant
8 when that right is in priority.

9 Q. That's miles from answering my
10 question.

11 A. Okay.

12 Q. If I understood what you told
13 Mr. Fletcher, the accounting program subordinates
14 those two rights to all upstream uses except
15 junior power uses?

16 A. Yeah, I don't think that the water
17 right accounting program subordinates it. It just
18 merely accounts for the water as either natural
19 flow or storage.

20 Q. When you run the accounting program,
21 as it accounts for things, does it subordinate
22 those two power rights to all upstream uses except
23 junior power uses, or does it subordinate those
24 power rights to irrigation storage only? Which
25 way?

1 A. Just the irrigation rights upstream
2 are deducted from the remaining natural flow.
3 So -- so I'm not -- so if there's remaining
4 natural flow at Minidoka, it would show that those
5 water rights are being utilized.

6 Q. So I don't understand. I thought you
7 told Mr. Fletcher that the accounting program
8 reflected that?

9 A. I don't -- I don't remember saying the
10 accounting program did that.

11 Q. What reflects that? Something you
12 said reflected that. Let me rephrase it.

13 Are these two rights today treated as
14 subordinate to all upstream uses except junior
15 power uses?

16 A. Yes, that's my understanding.

17 Q. Is it written that way in the
18 accounting program?

19 A. I don't believe the water right
20 accounting program, you know, has a clause or a
21 loop that indicates whether or not it's
22 subordinate or not.

23 Q. So how do you decide, then, whether
24 it's been subordinated or not when you run the
25 accounting program?

1 A. Well, that may be a better question
2 for somebody that's in the hydrology section of
3 the Department of Water Resources, rather than for
4 myself as to how the accounting program -- what it
5 does and whether or not it does that.

6 Q. When was the perception changed from
7 these rights being -- I don't know if
8 "subordinated" is the right word, but these rights
9 allowing upstream irrigation storage out of
10 priority, and now these rights being subordinated
11 to all uses except upstream junior power uses?
12 When did that occur? Do you know? When was that
13 change made?

14 A. I don't believe there was ever any
15 change in the storage rights.

16 Q. When was the treatment made, the
17 change in the treatment from what's in the Eagle
18 decree to full subordination? Do you know?

19 A. I don't know.

20 Q. Has it always been treated fully
21 subordinated, these rights, as long as you've been
22 there?

23 A. You know, we've -- as long as I've
24 been there, we've always used the water right
25 accounting program. I can't give you anything

1 that tells you whether or not the accounting
2 program ever said it was subordinate or not.

3 Q. I'm asking a question that's different
4 than that.

5 Have these rights always been treated
6 as fully subordinated to all upstream uses as long
7 as you've been there since 1978?

8 A. To the best of my knowledge, they have
9 been.

10 Q. Okay. And you don't know whether the
11 accounting program reflects how they're treated,
12 although you said they were in the accounting
13 program?

14 A. The water rights are in the accounting
15 program. There's nothing in the accounting
16 program that I'm aware of that says whether or not
17 a particular water right is subordinate or not, as
18 far as listing in the accounting program.

19 Q. If BOR was dissatisfied with how you
20 were administering the rights -- for instance, if
21 you took some water and used it and they felt that
22 their 217 and 218 rights were in priority and they
23 called on those rights to either run them through
24 the plant or store them to their benefit for power
25 loss -- how would you respond to that call?

1 A. Well, I know the previous director
2 viewed that those water rights were subordinate.
3 I haven't talked to the existing director.

4 Q. So you'd say no to the call?

5 A. I would try and get information from
6 the director as to what his interpretation was.

7 Q. Well, previously you said no; right?

8 A. Could you repeat that question,
9 please?

10 Q. Previously you would have said no, is
11 that correct, under the old director?

12 A. I would have said that they were
13 subordinate under the old director.

14 Q. In fact, some water was taken for
15 recharge, and there was a complaint made by BOR;
16 isn't that right?

17 A. I don't know about a complaint. The
18 Bureau did question that.

19 Q. And the response was "We're going to
20 go ahead and take the water"; correct?

21 A. We did do recharge under the previous
22 director, that's true.

23 Q. And your view of the world is that
24 under this remark for which the State has moved
25 for summary judgment, that wouldn't change?

1 A. That's correct.
 2 MR. ARKOOSH: Okay. I have nothing
 3 further.
 4 MR. SIMPSON: You don't have anything?
 5 MR. BROMLEY: No.
 6 MR. SIMPSON: I do.
 7 MR. BROMLEY: Digging into his black back.
 8 MR. SIMPSON: Yeah, too much time to read.

9
 10 FURTHER EXAMINATION

11 BY MR. SIMPSON:
 12 Q. Lyle, I'm going to hand you the 1978
 13 black book again.
 14 A. Okay.
 15 Q. And I'm going to ask you if table 48
 16 identifies the rights that the water district
 17 delivered to? And I just put that --
 18 A. Yes.
 19 Q. It does?
 20 A. Yes.
 21 Q. So it delivers to those rights
 22 identified in 48?
 23 A. (No audible response.)
 24 Q. Okay. Then let's go back to the next
 25 sticky I've identified.

1 And it appears to me like in table 48
 2 of the 1978 black book it identifies the Minidoka
 3 power rights, the 2500 and the 200 cfs right?
 4 A. Yes, it does.
 5 Q. Okay. So then we go back up to
 6 page 13 of the black book, and that section is
 7 identified as "Right Allocation." And the bottom
 8 paragraph under "Right Allocation" starts with
 9 "Power rights."
 10 If you'd like to take a moment and
 11 review that.
 12 A. (Reviews.)
 13 Okay.
 14 Q. All right. So that identifies how
 15 power rights are allocated within the Water
 16 District I in 1978; correct?
 17 A. That's correct.
 18 Q. And this sentence says, "In this
 19 manner a power right may limit the distribution of
 20 natural flow at and above the point of diversion
 21 of flow through a power plant."
 22 That's what that sentence states on
 23 page 13; correct?
 24 A. Uh-huh.
 25 Q. So to you would that mean that that

1 right --
 2 MR. FLETCHER: He didn't answer, John.
 3 MR. ARKOOSH: You need to answer.
 4 Q. (BY MR. SIMPSON): Instead of going
 5 "uh-huh," "yes" or "no" would help. So if you'd
 6 like to look at that sentence again that starts
 7 with "In that manner."

8 So would a fair reading of that
 9 sentence that you just read mean that if that
 10 power right was in priority, that power right
 11 could limit the diversion of natural flow above
 12 that power right, above the dam for which that
 13 power right is attached?

14 A. Yeah. I believe that is what this
 15 sentence says, yes.

16 Q. Okay. So would it be fair to say in
 17 1978 that with the Minidoka power rights, the 2500
 18 and 200 cfs rights identified in table 48, that
 19 those were being delivered to in the manner
 20 described on page 13 of the 1978 black book?

21 A. You know, it -- it appears that that
 22 was how they were delivering it and accounting for
 23 it at that time.

24 Q. Okay. So at least as of 1978 -- which
 25 would have been about the first year of the

1 accounting program?
 2 A. Yes.
 3 Q. -- that the Minidoka power rights, the
 4 two that we're referring, the two senior power
 5 rights, were not only part of the water rights
 6 accounting program, but were being delivered to in
 7 priority; correct?
 8 A. That's correct.
 9 MR. SIMPSON: Okay. No further questions.
 10 MS. McHUGH: Can I read that sentence?
 11 MR. STANISH: Yeah. Could I see that? Can
 12 I see that?
 13 MR. SIMPSON: Sure.
 14 MS. McHUGH: I'll let you. Go ahead.
 15 MR. FLETCHER: Which tag are we talking
 16 about?
 17 MS. McHUGH: Page 13.
 18 MR. STANISH: Could we go off the record.
 19 (Discussion.)
 20 MR. STANISH: Back on the record. This is
 21 David Stanish.

22 FURTHER EXAMINATION

23 BY MR. STANISH:
 24 Q. Lyle, going back to this black book,

1 and turn your attention to table 48. And
2 Mr. Simpson previously pointed out the two water
3 rights in question here, Minidoka 01-217 and
4 01-218.

5 This table, what does it show you?

6 A. It's a listing of the water rights
7 that is in the watermaster's database.

8 Q. And the "cfs" column, what does that
9 tell you?

10 A. That is the amount that the water
11 right could be exercised up to.

12 Q. Is there anywhere in this table or
13 anywhere else in this black book that you're aware
14 of that tells you that those particular water
15 rights were filled to their capacity?

16 A. Not that I'm aware of.

17 MR. STANISH: Okay. That's all I have.

18 MR. SIMPSON: We're done. Thanks.

19 (Deposition concluded at 5:45 p.m.)

20 (Signature requested.)

21 -oOo-
22
23
24
25

Exhibit E

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 Nos. 01-00217, 01-00218
) 01-04024, and 01-04025
) (Minidoka Power Right)
)
) Subcase Nos. 01-02068 and
) 01-04054
_____) (Palisades Power Rights)

30(B)(6) DEPOSITION OF THE BUREAU OF RECLAMATION

TESTIMONY OF RICHARD M. RIGBY

OCTOBER 27, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 THE 30(B)(6)DEPOSITION OF THE BUREAU OF
2 RECLAMATION, TESTIMONY OF RICHARD M. RIGBY, was
3 taken on behalf of A & B Irrigation District,
4 Burley Irrigation District, Milner Irrigation
5 District, North Side Canal Company, and Twin Falls
6 Canal Company, at the offices of Barker, Rosholt &
7 Simpson, 1010 West Jefferson, Suite 110, Boise,
8 Idaho, commencing at 9:11 a.m., October 27, 2009,
9 before Jeff LaMar, Certified Shorthand Reporter
10 and Notary Public within and for the State of
11 Idaho, in the above-entitled matter.

APPEARANCES:

12
13 For A & B Irrigation District, Burley Irrigation
14 District, Milner Irrigation District, North Side
15 Canal Company, and Twin Falls Canal Company:
16 BARKER, ROSHALT & SIMPSON LLP
17 BY MR. JOHN K. SIMPSON
18 1010 West Jefferson, Suite 102
19 P.O. Box 2139
20 Boise, Idaho 83701-2139
21 For Idaho Groundwater Appropriators, Inc.:
22 RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
23 BY MS. CANDICE M. McHUGH
24 101 Capitol Boulevard, Suite 208
25 Boise, Idaho 83702

APPEARANCES (Continued):

1
2
3 For Bureau of Reclamation:
4 UNITED STATES DEPARTMENT OF JUSTICE
5 ENVIRONMENT & NATURAL RESOURCES DIVISION
6 NATURAL RESOURCES SECTION
7 BY MR. DAVE GEHLERT
8 1961 Stout Street, Suite 800
9 Denver, Colorado 80294
10 For State of Idaho:
11 OFFICE OF ATTORNEY GENERAL
12 BY MR. DAVID I. STANISH
13 700 West State Street, 2nd Floor
14 P.O. Box 83720
15 Boise, Idaho 83720-0010
16 For Idaho Power Co.:
17 IDAHO POWER LEGAL DEPARTMENT
18 BY MR. JAMES C. TUCKER
19 1221 West Idaho Street
20 P.O. Box 70
21 Boise, Idaho 83707:

22 ///
23 ///
24 ///
25 ///

APPEARANCES (Continued):

1
2 For American Falls Reservoir District No. 2:
3 CAPITOL LAW GROUP PLLC
4 BY MR. C. THOMAS ARKOOSH
5 301 Main Street
6 P.O. Box 32
7 Gooding, Idaho 83330
8 For Falls Irrigation District:
9 LING LAW OFFICE
10 BY MR. ROGER D. LING
11 615 H. Street
12 P.O. Box 250
13 Rupert, Idaho 83350-0396
14
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EXHIBITS

12 23 - Amended Notice of Taking Deposition of	6
13 the Bureau of Reclamation	
14 24 - Various letters between W. Burpee and	19
15 J. Rosholt	
16 25 - Letter from J. McDonald to M. Wilkins,	48
17 dated 09/04/2008	
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1 RICHARD M. RIGBY,
2 first duly sworn to tell the truth relating to
3 said cause, testified as follows:

4
5 EXAMINATION
6 BY MR. SIMPSON:

7 Q. Sir, will you state your full name for
8 the record.

9 A. Richard M. Rigby.

10 Q. And, Mr. Rigby, my name is John
11 Simpson, and I'm here today representing a number
12 of surface irrigation entities in connection with
13 the SRBA adjudication of rights commonly referred
14 to as the Minidoka power rights and the Palisades
15 power rights.

16 And, Mr. Rigby, I'm going to hand you
17 what we'll mark as the next exhibit, 23, for you
18 to look at.

19 (Exhibit 23 marked.)

20 Q. (BY MR. SIMPSON): Mr. Rigby, let me
21 know when you've had a chance to fully review that
22 document.

23 A. (Reviews.)

24 Okay.

25 Q. Mr. Rigby, have you seen that document

1 of repayment, contracts, water rights, water
2 acquisition for Endangered Species Act and various
3 other water-policy-type issues in Idaho.

4 Q. So would it be fair to say that you're
5 familiar with the reservoir system above Milner
6 Dam?

7 A. I believe so.

8 Q. Are there any matters identified in
9 that Exhibit No. 23 that you do not feel competent
10 to respond to?

11 A. Well, I guess when we get into the
12 questions, I'll know better. But I'm not sure I
13 understand exactly what is intended with all of
14 the questions.

15 Q. Okay. Fair enough. Before your
16 deposition, I handed you a number of documents
17 that were United States filings in this matter of
18 which I'll refer to as 217, 218, the water rights
19 for Minidoka power at the Minidoka Dam, the two
20 senior rights.

21 And have you had a chance to review
22 those documents?

23 A. I have.

24 Q. All right. And could you just briefly
25 identify those for everybody in the room.

1 before?

2 A. Yes, I have.

3 Q. Okay. And --

4 A. Actually, let me rephrase that. I saw
5 the earlier version.

6 Q. Okay.

7 A. The one that had the October 23rd date
8 on it.

9 Q. All right.

10 A. So this is the first time I've seen
11 this one.

12 Q. Okay. So if your counsel has another
13 version, an amended version of the Notice of
14 Deposition, he hasn't shared that with you?

15 A. I saw the earlier version.

16 Q. Okay. And are you today being offered
17 as a witness on behalf of the United States Bureau
18 of Reclamation in response to this notice?

19 A. Yes, I am.

20 Q. Mr. Rigby, if you could just briefly
21 detail your work experience.

22 A. I've been employed with the Bureau of
23 Reclamation since 1972. I've been employed in the
24 Pacific Northwest region, the regional office here
25 in Boise, since 1978. I've worked in the fields

1 A. Well, the first document is United
2 States Motion for Summary Judgment.

3 The second document is the United
4 States Memorandum in Support of Motion for Summary
5 Judgment.

6 And the third one is the Affidavit of
7 David A. Jarvis.

8 Q. And have you seen those documents
9 before today?

10 A. Yes, sir.

11 Q. Okay. And with respect to the
12 affidavit of David Jarvis, there are a number of
13 documents attached to that affidavit, are there
14 not?

15 A. I believe there are two exhibits, if I
16 saw that correctly: The first one is a 1968
17 document -- August 5, 1968, document entitled
18 "Status Report: Workings of Palisades Water
19 Savings Agreement; and the second document is the
20 contract between the United States of America and
21 the Aberdeen-Springfield Canal Company, contract
22 14-06-W-24, dated October 22nd, 1952.

23 Q. And would it be fair to say,
24 Mr. Rigby, that the contract that's attached to
25 Mr. Jarvis' affidavit is attached as an example of

1 the contracts entered into between the Bureau of
2 Reclamation and various space holders in the Upper
3 Snake?

4 A. It is.

5 Q. Okay. Generally speaking, are the
6 provisions in that contract similar, if not
7 identical, to the other provisions with space
8 holders, to the best of your recollection?

9 A. Well, all of the contracts obviously
10 are not perfectly identical. There were various
11 forms of contract, I think four or five -- I do
12 not recall exactly -- depending on the specific
13 circumstances involved.

14 But as far as the water rights
15 administration, I believe that the contract
16 provisions that are common to all those contracts
17 are identical.

18 Q. Okay. And before today, have you had
19 a chance to review the status report that you
20 described as one of the documents attached to the
21 affidavit?

22 A. Yes, I have.

23 Q. Okay. And this document identifies
24 that as a part of the construction of Palisades
25 and the feasibility studies for Palisades there

1 were a number of negotiations between Reclamation
2 and water users?

3 A. That's correct.

4 Q. Okay. And do you recall specifically
5 on page 2 of this status report, the middle
6 paragraph, it identifies that those negotiations
7 were lengthy in nature and the intent of those
8 negotiations were an effort to try to maximize
9 conservation of water in the system above Milner
10 Dam?

11 A. Well, I can't describe the exact
12 purpose. I'm not sure I would say it exactly the
13 way you said it. The purpose was to improve the
14 reliability of the storage reservoirs so that the
15 storage reservoirs would be more effective, more
16 efficient in storing water.

17 Q. Okay. And part of that efficiency was
18 to enhance the reliability of Palisades Reservoir?

19 A. That's correct.

20 Q. And as a result of those negotiations,
21 a number of agreements were reached with space
22 holders in the reservoir system above Milner?

23 A. That's correct.

24 Q. And are those agreements part of the
25 exhibits that were attached to the Eagle decree?

1 A. Some of them were, if not all of them,
2 yes. Some of them, I think.

3 Q. And in order to aid you to answer that
4 question, I'm going to hand you Exhibit 2, which
5 is the Burley Irrigation District versus Henry
6 Eagle.

7 A. Okay.

8 Q. It's one of the two Eagle decrees;
9 correct? There were two stipulated decrees?

10 A. That's correct.

11 Q. Okay. And if you need to refer to
12 that document, do so, please.

13 MR. TUCKER: What's the date of that one?

14 MR. SIMPSON: July 10th, 1968.

15 Q. Was one of the agreements which was
16 negotiated and referenced in this status report
17 we've been discussing concerning the curtailment
18 of power at Minidoka Dam?

19 A. Correct, it was.

20 Q. And that is included as one of the
21 exhibits to the Eagle decree?

22 A. That's true.

23 Q. Okay. And on page 4, Mr. Rigby, of
24 the status report, it identifies that there were
25 resolutions providing assurances that the water

1 users would agree to the water savings provisions
2 to satisfy the conditions for the authorization of
3 Palisades.

4 Do you see that reference? The first
5 full paragraph on page 4.

6 A. Yes, I see that.

7 Q. Okay. And those water savings
8 provisions included the curtailment of power at
9 Minidoka Dam?

10 A. They did.

11 Q. Okay. And it included other
12 provisions, including the winter water savings
13 agreement and other provisions that are reflected
14 in the exhibits to the Eagle decree; correct?

15 A. That's correct.

16 Q. Okay. And from your perspective, were
17 those assurances that the United States, the
18 Bureau of Reclamation, was trying to obtain from
19 the water users?

20 A. Yes. Yes.

21 Q. As well as the water users wanted
22 everyone within what was then called Water
23 District 36 to provide assurances that they would
24 abide by those provisions or those agreements as
25 well; correct?

1 A. Well, I can only speak for
2 Reclamation. And I think Reclamation wanted to
3 make sure that these were binding agreements, that
4 they would be honored.

5 Q. And would that be binding not only
6 upon the water users, but then ultimately upon the
7 watermasters in delivering the water?

8 A. Well, the contracts were between
9 Reclamation and the water users. Ultimately, the
10 Eagle decree was between -- was a State
11 administration, State adjudication, that
12 Reclamation was not a party to. So I don't think
13 I can speak to the exact responsibility of the
14 watermaster in this area.

15 Q. If you'd look down on page 4 a little
16 bit, the last full paragraph there, it identifies
17 that "Additional savings by the curtailment of
18 winter water diversions." And it identifies north
19 and south side Twin Falls Canal diversions.

20 Do you see that reference?

21 A. I see that.

22 Q. And the third sentence in that
23 paragraph states, "Although this water saving is
24 exercised only at the option of the two companies,
25 winter diversions have been substantially reduced

1 companies have not diverted water since
2 approximately this time. And to my knowledge,
3 they did not make claims for winter water
4 diversions in the SRBA.

5 Q. But at this time the right would still
6 exist unless --

7 A. The contract's still the same.

8 Q. All right. And if you'd look at
9 paragraph 24(a) of Exhibit E of the Eagle decree,
10 which would be Exhibit 2, Deposition Exhibit 2.

11 A. Okay. 24(a)?

12 Q. Yes, sir. And are you familiar with
13 this paragraph 24(a)?

14 A. Yes.

15 Q. Are those rights, as we've just
16 discussed, the water savings provisions identified
17 for North Side and Twin Falls Canal Companies, are
18 those part of the third-party rights referred to
19 in paragraph 24(a)?

20 A. Yes, to my knowledge, they are.

21 Q. Okay. And has Reclamation identified
22 any of the other third-party rights which would be
23 affected by the operation of paragraph 24(a)?

24 A. I'm not aware of other third-party
25 rights.

1 each winter."

2 Do you see that reference?

3 A. I see that.

4 Q. So that was at the option of Twin
5 Falls and North Side Canal Companies, they could
6 reduce or eliminate their winter diversions in
7 exchange for winter water savings preference in
8 Palisades Reservoir; would that be fair?

9 A. I believe that some of the winter
10 water savings that was achieved through this
11 proposal was in American Falls. But it is what it
12 is. So we --

13 Q. All right.

14 A. In the system.

15 Q. You're correct.

16 A. Yeah.

17 Q. In the reservoirs above Milner Dam,
18 there was an exchange by not diverting in the
19 winter, winter diversions, those canal companies
20 had the option of retaining storage or having
21 storage in the reservoirs above Milner?

22 A. Correct.

23 Q. If you know, is that an option that
24 still exists today?

25 A. To my knowledge, the two canal

1 Q. Then if you'd turn to page 5, Rich, of
2 the status report. And I know I'm going back and
3 forth between the status report and Eagle decree.

4 A. All right.

5 Q. And in the second full paragraph, it
6 identifies, does it not, how the water saved by
7 the curtailment of winter diversions is credited?

8 A. Well, the language says what it says,
9 and it does describe the crediting, yes.

10 Q. Okay. To the best of your knowledge,
11 is that how water is still accounted for today?

12 A. Well, I guess -- I think the result is
13 the same. There are two provisions, to my
14 knowledge, that are administered separately: One
15 is the curtailment of winter diversions, and the
16 second one is the priority fill of reservoir space
17 that belongs to certain space holders, that the
18 space holders have agreed to curtail their
19 diversions.

20 Q. And when you say "administered
21 separately," what do you --

22 A. Well, this phrase talks about a -- it
23 appears to me to be somewhat of an exchange
24 because it says, "The water saved by curtailing
25 water -- winter diversions is credited to the

company's space in the reservoir." And I don't dispute that that's the case.

It may be -- and that's probably a good way of looking at it. The contracts, to my understanding, did not identify a specific exchange. They said, "You will curtail your winter diversions, and you will receive priority storage in the reservoir system."

Q. Okay. So in essence, the effect is the same, it's perhaps the language or how it's accounted for?

A. Yes, I agree.

Q. Okay. Then on page 6 of that same document, the status report, it identifies in the fourth paragraph, starting with "It was recognized in the negotiations," and that paragraph discusses, does it not, the requirement that the arrangements or agreements be referenced in the court decrees which ultimately were identified as the Eagle decrees; correct?

A. Correct.

Q. Okay. And was this requirement or this necessity of attaching these exhibits or referencing these provisions in the Eagle decree, was that done at the joint assistance of not only

the water users, but also Reclamation?

A. Well, John Simpson -- not John Simpson. John Rosholt has said that the field solicitor was involved in that. I have no basis to disagree with that. Certainly these contracts changed the way business was to be done in the reservoir system.

And I'm sure Reclamation felt it necessary that there be no questions that this could be accomplished. Winter priority -- winter water savings, space in reservoirs, you know, those types of things, other space holders could have arguably perceived that they were affected by those provisions. And I'm sure that the United States wanted to resolve all possible objections at the time the contracts were executed.

MR. SIMPSON: Let's go ahead and mark this group of documents as the next exhibit.

(Exhibit 24 marked.)

Q. (BY MR. SIMPSON): Do you want to take just a few minutes, Rich, and go off the record? And if you can review those.

A. Okay.

(Recess.)

MR. SIMPSON: Back on.

Q. Mr. Rigby, you've had a chance to review the series of letters contained in Exhibit 24?

A. I have.

Q. And do those letters generally describe correspondence back and forth between Reclamation and counsel for a number of the water users relative to the drafting of the Eagle decree and what provisions should or shouldn't be contained in the Eagle decree and the basis for some of that discussion?

A. They -- yes, they do describe -- they are a series of letters between Bill Burpee, the field solicitor, and John Rosholt.

Q. And to the best of your understanding, Mr. Rosholt at that time represented a number of the Lower Valley irrigation entities below American Falls in relationship to the negotiations on certain provisions relative to the Palisades project; is that correct?

A. That's my understanding.

Q. Okay. And were you aware that Reclamation was involved in at least reviewing drafts of the Complaint for the court decree for the Eagle decree?

A. I accept that.

Q. Okay.

A. I'm not personally aware of that, but I accept that.

Q. All right. And the documents reference that review by Reclamation?

A. That's correct.

Q. Okay. And did Mr. Burpee in a number of these correspondence identify certain provisions or arrangements that should be considered a part of the Eagle decree?

A. He did.

Q. Okay. And in particular, Mr. Rigby, in looking at the September 6th, 1967 letter from Mr. Burpee to Mr. Rosholt on the second page -- it's the second-to-the-last letter in that group, on the second page where Mr. Burpee identifies that "Paragraph XVII could be expanded to include appropriate references."

Do you see that paragraph?

A. I see that, yes.

Q. And Mr. Burpee then identifies, quote, "All these arrangements are an integral part of the overall understanding among the water users on the river."

1 Do you see that statement within that
2 paragraph?

3 A. I see that, yes.

4 Q. So was it Reclamation's position, to
5 the best of your knowledge, that it was important
6 that the Eagle decree contain these provisions
7 that were negotiated between the water users and
8 Reclamation so that those provisions would be
9 binding upon the water users and Reclamation could
10 enforce those provisions upon the water users?

11 A. Well, I know that Reclamation wanted
12 those provisions addressed in the decree that
13 involved all the water users. I can't say
14 precisely the motive behind that as to whether,
15 you know, the contracts themselves were
16 administrable and were binding between the
17 parties. I think the issue was more to make sure
18 that other parties, third parties, did not
19 interfere with the administration.

20 Q. Third parties, meaning parties who
21 were not parties to the space-holder contracts?

22 A. Well, parties, perhaps, that didn't
23 get preferred reservoir space, you know, that
24 didn't enjoy some of the benefits that were
25 conveyed through the contracts.

1 A. Well, I don't -- maybe I didn't read
2 that. I didn't read it to say that there was a
3 longstanding disagreement. There had been -- that
4 provision had been -- was addressed in the
5 contracts and it was resolved in the Palisades --
6 in the Palisades contracts in the Eagle decree.

7 Q. Uh-huh.

8 A. And this is another place where I
9 think the United States wanted to make sure
10 everybody knew what the deal was for American
11 Falls Reservoir District No. 2.

12 Q. And when you use the word "everybody,"
13 are you --

14 A. The parties to the decree.

15 Q. In reviewing that letter, Mr. Rigby --
16 again, the November 28th, 1966 letter -- are there
17 any statements contained in that letter which you
18 would disagree with in terms of the purposes, if
19 there are such identified in that letter?

20 A. Well, I have to say that in order
21 to -- I would need to really study this letter to
22 understand it. Because I have a broad
23 understanding of the issues involved, but I'm not
24 sure that I -- I guess you're going to have to ask
25 the question again, John.

1 Q. In essence, to ensure that those
2 provisions were then binding, not only upon the
3 contracting parties, but other parties as well?

4 A. Well, I don't -- I don't know that
5 they were not intended to be binding. But from my
6 perspective, the main concern would have been to
7 avoid claims subsequent to the contracts that
8 these contracts have affected somebody else's
9 rights. They wanted to make sure that all of
10 those potential complaints were resolved.

11 Q. And one example, would it not, have
12 been in the November 28th, 1966 letter from
13 Mr. Burpee to Mr. Rosholt that identified the
14 longstanding disagreement as to the relationship
15 between Milner/Gooding and the Bureau of
16 Reclamation?

17 A. The letter talks about the
18 relationship -- or the contract with the
19 Milner/Gooding Canal and the water right for the
20 canal.

21 Q. Right. And doesn't the letter also
22 identify that one of the purposes of the Palisades
23 contracts was to resolve the longstanding
24 disagreement concerning water deliveries to the
25 Milner/Gooding Canal?

1 Q. Okay. Well, this letter identifies
2 the position or statements of Mr. Burpee, the
3 field solicitor, on behalf of the United States
4 Department of Interior relative to the Palisades
5 contracts and including certain provisions of the
6 Palisades contracts in the Eagle decree; correct?

7 A. It talks about the water supply for
8 the Milner/Gooding Canal, the American Falls
9 Reservoir District No. 2, I believe.

10 Q. Okay.

11 A. And it says that those -- that
12 American Falls Reservoir District No. 2 should be
13 a party to the decree.

14 Q. And does it not state that one of the
15 reasons to include Reservoir No. 2 in the
16 adjudication or in that decree was to bring to
17 rest the longstanding disagreement as to the
18 relationship between the district's natural-flow
19 rights and rights to store water in the American
20 Falls Reservoir?

21 A. That's what it says.

22 Q. Okay. And then on the second page of
23 that letter, it also identifies that in
24 Mr. Burpee's view that "...one of the principal
25 purposes of the adjudication is to formalize in a

1 final decree fashion the water rights protection
2 agreed to in the Palisades contracts"; is that
3 correct also?

4 A. That's what it says.

5 Q. As you sit here today, would you
6 disagree with either of those statements
7 identified by Mr. Burpee in the letter?

8 A. I'm not in a position to disagree with
9 Mr. Burpee. He was there at the time. Frankly, I
10 had not been aware that that issue was in dispute
11 at that time. I thought it had been resolved by
12 then.

13 Q. So your hesitancy when I'm asking
14 these questions relative to those positions was
15 because you thought that dispute had been resolved
16 long before the entry of the Eagle decrees?

17 A. Yes, at least with AFRD No. 2.

18 Q. Mr. Rigby, would it be fair to say
19 that based upon this correspondence, that
20 Reclamation did have some opportunity at the very
21 minimum to comment on what should or shouldn't be
22 included in the draft complaint for the Eagle
23 decrees in terms of the suggestions they offered?

24 A. It certainly appears that Reclamation
25 was involved in the specific portions of the

1 Irrigation District decree which is identified as
2 Exhibit 2, do those paragraphs identify the
3 concerns that were raised by Mr. Burpee in the
4 letters that we've just reviewed, that is, to
5 ensure that the provisions and agreements that
6 were negotiated are binding upon all parties such
7 as identified in the language of paragraph 4, and
8 that those provisions of the negotiated agreements
9 are ratified and included in the Eagle decree?

10 A. Mr. Simpson, can you help me? I
11 cannot -- where does it say "Exhibit 2"?

12 Q. Exhibit 2 is --

13 A. All right.

14 Q. Deposition Exhibit 2.

15 A. All right. That is the Eagle decree?

16 Q. That we've identified.

17 A. All right. I'm sorry. You're going
18 to have to start over again.

19 Q. Too many exhibits.

20 A. I apologize about that.

21 Q. In looking at paragraph 4 on page 19
22 and paragraph 6 on page 20 of the Burley
23 Irrigation District/Eagle decree that you have
24 before you, does that language reflect the
25 concerns identified by Mr. Burpee in the letters

1 decree.

2 Q. And that, would it not be consistent
3 with the paragraph we were referring to in the
4 status report on page 6 describing the
5 negotiations and then the inclusions of those
6 provisions from the negotiations in the ultimate
7 decrees for the Palisades contracts and the
8 additional uses identified and decreed?

9 A. Yes.

10 Q. Mr. Rigby, if you could turn to
11 Exhibit 2, which is the Eagle decree that you have
12 in front of you.

13 A. Yes. Okay.

14 Q. If you could turn back to the
15 beginning of the decree. And I'd refer you to
16 page 19 and page 20.

17 A. Okay.

18 Q. And if you'd take an opportunity to
19 review paragraph 4 on page 19 and then paragraph 6
20 on page 20.

21 A. Okay.

22 (Reviews.)

23 Okay.

24 Q. In looking at paragraph 4 on page 19
25 and paragraph 6 on page 20 of the Burley

1 that we've just been discussing, which are
2 attached as Exhibit 24?

3 A. Well, I have to assume so. I -- I
4 haven't had time to double-check each and every
5 reference. And I don't know that that's necessary
6 for this proceeding, but I believe that we have to
7 assume yes.

8 Q. Well, Mr. Burpee identified that one
9 concern he had was that those provisions be
10 binding upon all parties.

11 A. Correct.

12 Q. And that's identified in paragraph 4
13 on page 19; correct?

14 A. Correct.

15 Q. And then Mr. Burpee also identified
16 that those provisions needed to be a part of the
17 ultimate court decree, the Eagle decree, those
18 provisions that were negotiated to conserve water
19 and including, but not limited to, the curtailment
20 of power water at Minidoka Dam be included in the
21 Eagle decree in order for those provisions to be
22 binding.

23 And would you agree that paragraph 6
24 identifies that those provisions, including the
25 power operations at Minidoka Dam which is

1 identified as Exhibit E to the Eagle decree, were
2 ratified, thereby addressing Mr. Burpee's
3 concerns?

4 A. They were ratified, and I believe that
5 they addressed Mr. Burpee's concerns.

6 Q. Okay. Mr. Rigby, referring back now
7 simply to the status report, which is attached to
8 Mr. Jarvis' affidavit, does this report, in your
9 view, accurately describe the history of events
10 and agreements concerning the authorization of the
11 Palisades project?

12 A. In summary manner, yes.

13 Q. Okay. And before Palisades was
14 constructed, was there an adequate supply of water
15 for the reservoir?

16 A. For which reservoir?

17 Q. For Palisades.

18 A. Before it was constructed?

19 Q. Pursuant to the planning studies, was
20 there an adequate water supply for the reservoir?

21 A. The initial planning studies
22 identified a fairly small firm yield that would be
23 achieved with the construction of Palisades
24 Reservoir.

25 Q. And so the arrangements were

1 necessary -- the arrangements, meaning the
2 provisions that were agreed to, the winter water
3 savings, the power operations provision, and the
4 other provisions contained in the exhibits to the
5 Eagle decree -- were necessary in order to create
6 this adequate water supply for Palisades?

7 A. Yes. The Reclamation, and I believe
8 even the congress looked into the matter and said
9 "This isn't good enough. You know, the
10 existing -- the way the system currently operates
11 is not adequate to provide the appropriate
12 benefits to the construction of a new reservoir,
13 and things must change in order to improve the
14 storable water supply that can be provided in
15 Palisades Reservoir."

16 Q. And so that then led to Reclamation
17 going out and entering into negotiations in order
18 to secure that water supply?

19 A. That's right.

20 Q. And with respect to these operations,
21 what are the project purposes for which those
22 operations were to be maximized for?

23 A. I would broadly say for storage of
24 water.

25 Q. And do those provisions identify

1 specifically the storage of water for irrigation?

2 A. I believe the contracts refer to
3 storage of water for irrigation.

4 Q. Okay.

5 A. I need to make sure we don't -- we're
6 not here defining the authorization of Palisades
7 Reservoir. The congressional authorization is
8 what it is.

9 (Mr. Arkoosh leaves the proceedings.)

10 Q. (BY MR. SIMPSON): Certainly. So with
11 respect to project purposes, there was the purpose
12 for storage behind the reservoirs.

13 Any other purposes identified?

14 A. Well, I'm aware that hydropower was a
15 purpose and flood control, and I believe fish and
16 wildlife.

17 Q. Okay. Fish and wildlife relative to
18 the Palisades project; correct?

19 A. Correct.

20 Q. And do you know if flood control was
21 connected to each of the reservoirs in the Upper
22 Snake or to specific ones?

23 A. Flood control is only purposes of
24 Jackson and Palisades Reservoirs at the current
25 time.

1 Q. And at the time Palisades was being
2 considered, American Falls and Jackson were
3 already constructed; correct?

4 A. Correct.

5 Q. And those reservoirs and the storage
6 of water in those reservoirs were subject of
7 various space holder and other contractual
8 obligations; correct?

9 A. I'm sorry. I got distracted.

10 Q. That's all right. And the storage of
11 water behind those reservoirs were subject to
12 existing space-holder contracts and other
13 contractual obligations throughout the system;
14 correct?

15 A. Yeah, there were -- most of the water
16 in those reservoirs was already contracted.

17 Q. Okay. And in looking at
18 paragraph 24(a) of Exhibit 2, which is the
19 deposition exhibit that is the Eagle decree, would
20 it be fair to say that that paragraph 24(a)
21 identifies that there were preexisting contractual
22 obligations for the storage and bypassing of water
23 for power generation and other rights both at
24 Minidoka and downstream of Minidoka?

25 A. I don't think I would say that. I

1 would not agree with that.

2 Q. And why not?

3 A. The article talks about the exercise
4 of the right of the United States to hydropower
5 generation at Minidoka Dam and the bypass of water
6 under natural-flow rights that belong to the Twin
7 Falls and North Side Canal Companies.

8 Q. So from your perspective, the only
9 rights that might affect the winter power
10 operations at Minidoka Power Plant pursuant to
11 paragraph 24(a) were the natural-flow rights of
12 Twin Falls and North Side Canal Companies?

13 A. I believe so.

14 Q. Okay. So when paragraph 24(a)
15 identifies at the bottom of the first paragraph on
16 page 28 that states "While the United States must
17 operate the American Falls and Minidoka Dams so as
18 not to interfere with these third-party rights,"
19 from your perspective, Mr. Rigby, the third-party
20 rights identified there are who?

21 A. They are the same rights that are
22 addressed in the indented paragraph on page 29.
23 Well, I guess that's the power company. Sorry.
24 That's the power right.

25 It's the Twin Falls and North Side

1 Canal Company rights.

2 Q. Okay. So in the indented paragraph on
3 page 29, the first sentence, in part, reads, "To
4 the amount of water required to provide flows
5 below Minidoka Dam sufficient to meet existing
6 diversion rights in the reach of the river through
7 Milner Dam"?

8 A. Correct.

9 Q. And that's what you're referring to?

10 A. That's what I'm referring to.

11 Q. Mr. Rigby, I have a couple general
12 questions that I'd like to ask you so that I have
13 an understanding of Reclamation's operations, and
14 specifically then I can go back to
15 paragraph 24(a).

16 During the storage season, how does
17 Reclamation determine whether to store water or
18 pass it through the reservoir system?

19 A. It reviews the carryover in the
20 reservoirs, the snowpack, comparable water years,
21 and attempts to release water -- to limit release
22 of water through the system to the amount that
23 assures a high probability of filling the
24 reservoirs.

25 Q. So for example, this year, with the

1 extensive carryover that's in the system at the
2 end of the irrigation season, Reclamation looks at
3 that amount of carryover and makes a determination
4 on where to start the releases through the
5 reservoir?

6 A. Correct.

7 Q. Okay. And this year, for example,
8 you've started at 1500 cfs?

9 A. That's correct.

10 Q. And in other years, depending upon
11 carryover, the amount of carryover that's in the
12 system, that number could either go up or down?

13 A. That's correct.

14 Q. And if, for example, this year with
15 using 1500 cfs and Reclamation makes the
16 determination that it's not going to store that
17 water and it will pass that water, then that water
18 would be utilized at Minidoka Dam for power
19 purposes; correct?

20 A. I believe so.

21 Q. Okay. So in Reclamation's view, then,
22 once it makes a determination that based upon
23 those projections you just described that water's
24 not necessary for storage, then it looks to
25 satisfy the power right at Minidoka Dam?

1 A. That's correct.

2 Q. Okay. And in Reclamation's view, that
3 water that's passed or not stored, is that natural
4 flow?

5 A. That is northerly flow.

6 Q. Okay. So if it passes the water, then
7 it's doing so to satisfy its power right, to the
8 extent the water being released isn't in excess of
9 the rights?

10 A. That's right.

11 Q. Okay. With respect to that decision
12 to store or release water, what obligations does
13 Reclamation have to the space holders within the
14 system?

15 A. Well, I guess its primary obligation
16 commitment is to attempt to maximize storage, to
17 store as much water as practical in the
18 reservoirs.

19 Q. And that would be done so giving
20 consideration also, then, to maximize power
21 generation?

22 A. Well, obviously there's -- Reclamation
23 has some -- some districts have preference power.
24 They have the right to receive power from
25 Reclamation projects. And we have a general

responsibility to use the resource in a manner that creates the most benefits across the board.

Q. Attempts to optimize both storage and power?

A. That's correct.

Q. Okay. And with respect to the power generation at Minidoka Dam, those users with preferred power uses gave up that right in exchange to allow Reclamation to store water in the Upper Snake; correct?

A. Well, at the time the Palisades contracts were negotiated and this provision was adopted, the Burley and Minidoka Irrigation District had a right to the power profits in Minidoka Dam, and there had been a long -- this was a long controversy over how Reclamation would operate the Minidoka Power Plant.

And it was particularly Burley's assertion that we were obligated to release as much water as possible through the power plant to generate as much as possible in the wintertime to maximize the profits that they might receive.

And the problem with that was it really impacted the ability to store water, and it created big problems in the drought of the '30s

was being done to store water upstream.

Q. Okay. And ultimately did that calculation accrue back essentially to hold harmless, as you described, Burley and Minidoka from the act of storing that water?

A. I think the intent was to reimburse the power plant for those losses.

Q. Okay. Which in turn would go to the benefit of those preferred power users?

A. That was the line, the discussion, I'm sure.

Q. And so that was part of the negotiations particular to Burley and Minidoka, for example, that if there were those users that relied upon that preferred power and received some benefit from the generation of power, they would give up that right, if you will, in exchange to allow Reclamation to store the water to the benefit of the Palisades Reservoir?

A. To my knowledge, there was nothing about this that had to do with their use of power. To my knowledge, it was all about the power profits that they were in line to receive.

Q. So in your mind, it didn't affect the rate that they had to pay for their use of power

because there was a lot of storable water that went downstream. And there had been lawsuits and, you know, longstanding controversy over that issue.

So I think as a practical matter from a pragmatic standpoint, Reclamation believed it was necessary to protect the rights of the power plant, and so there was the subordination provision was negotiated in the form that it is currently.

Q. And in exchange for that subordination that you've just described, those preferred power users received indirectly some benefit back, did they not?

A. The Burley and Minidoka Irrigation District -- the power plant received some benefits --

Q. Okay.

A. -- because of the payment of the winter power -- the power savings, power loss -- I can't remember the term right now. Winter power loss.

Q. Okay. There was a calculation?

A. There was a calculation as to what might have been generated that was being used --

on the project itself?

A. There may have been an impact on rates. But to my knowledge, that was not part of the consideration.

Q. So with respect to Reclamation's obligations to those space holders or those water users who expected to profit from power generation that you've just described, would it be fair to say that Reclamation continued to have the obligation to try to maximize power generation limited by its obligation to storing as much water as was feasible in the Upper Snake?

A. Yeah, we continue, and have had an obligation and responsibility to make the best use of the resource.

Q. Okay. Best use of the resource for the authorized purposes under the Reclamation contracts?

A. For all of the purposes of the project.

Q. Right. And those are identified in the water-right claims filed by Reclamation, are they not?

A. That's correct.

Q. Are there any purposes for the use of

1 that water that, in your view, are not identified
2 in the claims for water filed in the adjudication
3 by Reclamation?

4 A. I'm not sure I understand your
5 question.

6 Q. Well, Reclamation filed adjudication
7 claims for the storing of water, did they not, in
8 the adjudication?

9 A. Yes, we did.

10 Q. And those identified the purposes of
11 use for that water to be stored; correct?

12 A. Correct.

13 Q. Okay. And those purposes of use are
14 identical to the authorized purposes for the
15 space-holder contracts for each of the individual
16 reservoirs for which those claims were filed;
17 correct?

18 A. I'll accept that.

19 Q. So based upon the acceptance of that
20 fact, then, would it be a reasonable conclusion
21 that the purposes of use identified in the claims
22 filed in the adjudication identify the authorized
23 purposes for which that water could be used?

24 A. Well, the claims reflect the
25 authorized purposes. Whether they -- whether the

1 contracted is about 22,000 acre -- 23,000
2 acre-feet of space that Reclamation purchased
3 back.

4 Q. Okay. And would it be fair to say
5 that that uncontracted storage space that
6 Reclamation purchased back is available for use
7 only by Reclamation?

8 A. It's been dedicated to flow
9 augmentation.

10 Q. So indirectly, Reclamation controls
11 how it's to be used?

12 A. I guess.

13 Q. Okay. Mr. Rigby, to your knowledge,
14 has Reclamation ever been prevented from operating
15 the reservoir system, that is, storing water in a
16 manner to fulfill its contract obligations?

17 A. I'm not sure I understand.

18 Q. I suspected that when you looked at me
19 that way. We just discussed previously how
20 Reclamation makes decisions to whether to store
21 water or pass water.

22 A. Uh-huh.

23 Q. And that's a decision that Reclamation
24 makes; correct?

25 A. Correct.

1 contracts describe all of the authorized purposes
2 or address all of the authorized purposes, I'm not
3 sure that they do. I believe the contracts really
4 talk about storage of water and the preference
5 power contracts, you know, as well. But -- so I'm
6 not sure that the contracts address all of the
7 project purposes.

8 Q. But you indicated that the water-right
9 claims would?

10 A. I believe they do.

11 Q. Okay. Can water be stored in one of
12 those reservoirs in the Upper Snake, one of the
13 federal reservoirs in the Upper Snake, without a
14 contract?

15 A. We have -- the water can be stored
16 under the water rights.

17 Q. Okay. Reclamation has certain space
18 in the Upper Snake reservoirs that it's
19 contracted; correct?

20 A. Correct.

21 Q. And then there's a small amount of
22 space in the Upper Snake reservoirs for which
23 Reclamation either hasn't entered into contracts
24 or purchased those contracts back; correct?

25 A. Actually, the only space that's not

1 Q. And they don't seek input from any
2 other entities, state agencies or individual water
3 users; is that correct?

4 A. Well, we -- we consult with the
5 advisory -- with the Committee of Nine, there's
6 the storage subcommittee of the Committee of Nine
7 that we talk to. We've had conversations with the
8 State in the past about storage.

9 So we do accept input from others.
10 Ultimately, Reclamation has to make the decision.

11 Q. Okay. That's fair. Then based upon
12 that decision-making process, has Reclamation ever
13 been prevented from operating the reservoir
14 system -- that is, the storing of water -- in a
15 manner that it deems appropriate?

16 A. I don't believe -- I believe not.

17 Q. In a manner which would not fulfill
18 its contractual obligations?

19 A. I believe that we've been able to make
20 those decisions and do that.

21 Q. Okay. Have you been able to make
22 those decisions in a manner which would fulfill
23 the obligations identified in the Eagle decree,
24 that is, those exhibits that we've discussed that
25 are attached to the Eagle decree regarding winter

1 water savings, power operations at Minidoka Dam,
2 and those other principles identified in the
3 negotiations between the water users and
4 Reclamation?

5 A. I'm not sure what you're asking. I
6 mean I'm not sure that in every case every space
7 holder has complied with the winter water savings
8 provisions and has not diverted water for 150
9 days.

10 But I believe that Reclamation has
11 been able to store the water that it wants to
12 store and intends to store in the system.

13 MR. SIMPSON: Let's go ahead and take a
14 break for a few minutes.

15 (Recess.)

16 MR. SIMPSON: Back on the record.

17 Q. Mr. Rigby, before we broke for a
18 break, we were talking about Reclamation's
19 exercise of its water rights in the reservoir
20 system.

21 And with respect to the exhibits to
22 the Eagle decree -- and we discussed paragraph 24,
23 Exhibit E and the other exhibits to the Eagle
24 decree -- from your perspective, are those
25 provisions still enforceable today?

1 A. They are.

2 Q. Okay. And has Reclamation enforced
3 those provisions and exercised those provisions of
4 the Eagle decree in its exercise of its storage
5 rights?

6 A. Let me just make sure we don't --
7 we're using the term the "Eagle decree" broadly.
8 Reclamation's instrument is the contracts with the
9 space holders, and we have those contracts. And
10 so our perspective is that we are abiding by the
11 contracts.

12 Q. Okay.

13 A. And I believe the answer is yes, we
14 have complied with those contracts, and in a
15 general sense, everybody has.

16 Q. And with respect to those contracts, a
17 number of those provisions in those contracts are
18 identified in the Eagle decree as well?

19 A. They are.

20 Q. Okay. And so whether I'm talking
21 about the Palisades contracts or the Eagle decree,
22 specifically I'm referring to those exhibits to
23 the Eagle decree that are contractual provisions.

24 A. Those provisions. I understand.

25 Q. And so those provisions, has

1 Reclamation continued to exercise those provisions
2 and enforce those provisions, if you will, as it
3 exercises its storage and power rights in the
4 reservoir system?

5 A. Yes, sir.

6 Q. Okay. And it's done so as between
7 Reclamation's exercise of those rights and junior
8 rights on the river; correct? I mean I'll give
9 you a specific example, Rich. I'll just jump to
10 it.

11 A. Yeah, you'll need to do that because
12 I'm not tracking.

13 MR. STANISH: I'll mark the next exhibit,
14 which will be 25, I believe.

15 (Exhibit 25 marked.)

16 MR. SIMPSON: I'll go out and make more
17 copies of this and give Rich a chance to look at
18 it.

19 (Recess.)

20 MR. SIMPSON: Let's go ahead.

21 Q. Mr. Rigby, you've had a chance to look
22 at Exhibit No. 25?

23 A. Yes, sir.

24 Q. Do you recognize that document?

25 A. I do.

1 Q. And can you describe briefly that
2 document for me.

3 A. Well, this document was a letter sent
4 by Reclamation to the Committee of Nine with
5 copies to various individuals that articulated
6 Reclamation's position about fall recharge in the
7 2008 fall -- fall '08.

8 It basically said that -- that water
9 that bypassed -- that was passed through the
10 Minidoka Power Plant as an exercise of
11 Reclamation's natural-flow rights at Minidoka
12 would, from Reclamation's perspective, be natural
13 flow in the river. In other words, Reclamation's
14 claim to that water exists until it passes through
15 the Minidoka Power Plant. At that time
16 Reclamation has no further claim on that water.

17 Q. Okay. And so this document references
18 Reclamation exercising its rights, either storage
19 or power rights, at Minidoka Dam and the other
20 reservoirs vis-à-vis other uses on the river?

21 A. Storage and power, yes.

22 Q. Okay. And does this document also
23 identify that those other uses are to be exercised
24 only after Reclamation exercises its rights for
25 power generation at Minidoka?

A. This is Reclamation's understanding: Reclamation -- let's make sure we understand. Reclamation does not administer the water rights on the Snake River. We -- Section 8 of the Reclamation Act of '02 basically says that Reclamation fits into the State priority system. So this is an expression of Reclamation's view of how the river would be administered.

Q. And how Reclamation intends to exercise their rights in terms of storing of water or generating of power at Minidoka?

A. Correct.

Q. Okay. And how they would exercise those rights vis-à-vis other rights, and in this case the exercise of fall recharge?

A. Yes, that's the other right that's identified.

Q. Okay. And with respect to that fall recharge, if it were to occur above Minidoka Dam, above the power plant, is it Reclamation's perspective in this letter that that recharge would occur only after the storage rights and the power rights were satisfied?

A. Well, I believe the letter says that recharge above Minidoka -- or above American Falls

one district was not off for the full period or, you know, just a couple passing comments being made.

Q. Okay. So if an entity is going to take advantage, if you will, of the winter water savings agreement, they have an obligation to turn off for 150 days?

A. They have an obligation to comply with the contract. And the contract specifies -- well, it says what it says.

Q. Okay. And if an entity does not cease diversions of natural flow into their canal system, are they subject to forfeiture of that winter water savings?

A. Reclamation -- I don't think we have made -- have developed a policy on that because we haven't had to make that decision. But that is a possibility.

Q. Now, this document is identified as a September 4th, 2008 document.

Mr. Rigby, relative to Reclamation's position today, would it be similar, if not identical, to the position identified in this document and the facts that you've testified to here today?

would have to come from stored water because the natural-flow rights to -- the board's -- the Water Resources board's natural-flow rights would not be in priority against Reclamation's storage rights.

Q. Or their power right?

A. Or the power right, either one, yes. Both.

Q. Okay. And then with respect to any fall recharge activities, would it be fair to say that it could only be accomplished with storage water?

A. If it's above American Falls, that is correct.

Q. Okay. And would another consideration in looking at fall recharge also be the winter water savings provisions?

A. It would be.

Q. Okay. And before we broke, you made a passing reference that perhaps there are those up there in the reservoir system who haven't turned off for 150 days.

Do you recall that?

A. Yes. My memory -- I have a recollection of one or two times in my career in the region where the assertion has been made that

A. I believe it would be the same.

Q. Okay. With respect to Reclamation's operation and exercise of their storage and power rights in relationship to the provisions that we've been talking about, the provisions of the Palisades contracts that are also contained in the Eagle decree, have conditions changed whereby the provisions are no longer exercised by Reclamation?

A. The contracts are still valid.

Q. Okay. Are there any factual circumstances for which you believe that the contracts or those provisions that are identified in the contracts or in the Eagle decree should not continue to be followed?

A. We haven't -- there's no need to amend the contracts or change those.

Q. Or to change those provisions?

A. Correct.

Q. So therefore, would it be fair to say that Reclamation intends to honor those compromises that were identified in the status report and memorialized in the provisions we've been discussing in the future?

A. It does.

Q. And so wouldn't it be fair to say that

1 those compromises and the necessity that those
2 compromises be included in the Eagle decree would
3 still exist today for the necessity of putting
4 those into the SRBA decrees?

5 MR. GEHLERT: I'm going to object that it
6 calls for a legal conclusion.

7 But you can answer.

8 THE WITNESS: I believe, as I stated
9 earlier, that the main -- Reclamation's main
10 objective in the Eagle decree was to make sure
11 that all of the possible objections to the changes
12 that -- fairly significant changes that were
13 implemented through those contracts were
14 addressed, that all objections were resolved and
15 addressed at the time that the contracts were
16 entered into so that we weren't faced with the
17 possibility that five years after contract
18 execution, for example, a space holder that didn't
19 have preferred space might say "Well, I'm being
20 injured. My rights are being injured by virtue of
21 the implementation of this contract."

22 So I think, frankly, that many of the
23 provisions in the decree, that purpose has been
24 resolved. And I'm -- and I believe that some of
25 those provisions are frankly -- I don't think that

1 they are necessary in the SRBA.

2 Q. (BY MR. SIMPSON): Well, would it be
3 fair to say that it would be Reclamation's intent
4 to ensure that those changes in operations
5 continue into the future?

6 A. I believe we certainly have that
7 objective, and that's why the contracts are
8 written the way they are.

9 Q. All right. And that's why, isn't it,
10 that Mr. Burpee insisted that certain of those
11 compromises be referred to and be included and
12 hence be binding upon parties, third parties?

13 A. I believe that the risk was that third
14 parties might be able to assert a claim of injury
15 or damages if -- through the implementation of
16 those proceedings. And so that's -- he wanted to
17 resolve that.

18 Q. Okay. So wouldn't it be fair, then,
19 that to ensure that those issues don't arise in
20 the future, that those provisions continue to be a
21 part of the operations in the Upper Snake?

22 A. Well, that's a matter that the
23 attorneys are going to have to sort out. My
24 perspective is that there's a very -- that the
25 provisions that have been administered for the

1 last 30, 40 years now, I guess, and so it's now
2 self-executing, if you will. We're doing it. We
3 know what it is. It would be a change to go back
4 to what it was before. This is the new status
5 quo.

6 Q. And part of that, the status quo,
7 includes those provisions that were referenced in
8 the Eagle decree?

9 A. Certainly does.

10 Q. And so from your perspective, given
11 that those provisions are part of the status quo,
12 there's a question in your mind as to whether or
13 not they need to be included in a subsequent
14 decree?

15 A. Well, I'll defer to the lawyers on
16 that issue. I think that many of the provisions
17 do not need to be included.

18 Q. And even if they're not included, that
19 doesn't mean necessarily that operations don't
20 include those considerations?

21 A. Absolutely. I believe that those
22 provisions are still in the contracts. They are
23 still enforceable, if you will, and will be part
24 of the plan from now on, whether they're in the
25 decree or not.

1 Q. So when you say "enforceable,"
2 enforceable as between Reclamation and whom?

3 A. And the contracting entities.

4 Q. Okay. But in terms of as enforceable
5 as between Reclamation and third parties, the
6 contracts wouldn't control, would they not?

7 A. Well, I'm not sure what third parties
8 might do that would change those things, those
9 provisions.

10 Q. Well, let's use Exhibit 25 as an
11 example, the fall recharge. And the exercise of
12 Reclamation's rights -- that is, storing of water
13 and generating of power at Minidoka Dam --
14 Reclamation identified its priority for
15 undertaking those actions vis-à-vis any fall
16 recharge program, did it not in this letter?

17 A. It did.

18 Q. Okay. And that fall recharge is not
19 identified anywhere in the Palisades contracts, is
20 it?

21 A. It is not.

22 Q. And so that matter of the exercise of
23 your storage and power rights vis-à-vis other
24 third-party water rights or permits or licenses is
25 a matter of administration or state law, is it

1 not?

2 MR. GEHLERT: I'm going to object. It
3 calls for a legal conclusion.

4 You can answer, Rich.

5 THE WITNESS: You better --

6 Q. (BY MR. SIMPSON): Well, if that
7 relationship of Reclamation's exercise of its
8 power rights and storage rights vis-à-vis other
9 rights such as a fall recharge permit or license
10 is not subject to the provisions of the Palisades
11 contracts, then it would be subject to the
12 exercise of those rights under state law?

13 MR. GEHLERT: Same objection.

14 THE WITNESS: Well, you made the statement
15 earlier that fall recharge was not addressed in
16 the Eagle decree. It isn't. So the question I
17 guess in my mind is what does -- how does the
18 Eagle decree affect fall recharge? I don't know
19 the answer. I don't know that it does.

20 Clearly, Reclamation has concerns
21 about how the State administers water. And
22 there's tension. There will be tension forever
23 because we have different needs and different
24 objectives.

25 But I'm not sure it's a bad tension,

1 because it's through that -- the give and take and
2 the need to work together that forces us to come
3 to accommodations and make good decisions, I
4 believe.

5 So I don't think we're ever going to
6 get away from having to work with each other and
7 talk with each other and make sure that things are
8 done in an appropriate way. And -- but I don't
9 think that -- I don't see how including the
10 specific provisions of the Eagle decree solves
11 those kinds of problems.

12 Q. (BY MR. SIMPSON): From Reclamation's
13 perspective, did having those provisions of the
14 Palisades contract a part of the Eagle decree
15 ensure that the State enforced rights pursuant to
16 those provisions?

17 A. It did. And there are clearly
18 certainly parts of the Eagle decree that need to
19 be reflected in the SRBA.

20 Q. And does BOR have concerns of how the
21 State would administer those provisions of the
22 Eagle decree that we've been discussing here
23 today?

24 A. We -- we certainly have our views
25 and -- about how we'd like to see those things

1 accomplished.

2 Q. Then short of including those
3 provisions of the Eagle decree that identify the
4 Palisades contracts or those provisions out of the
5 Palisades contracts that were identified in the
6 Eagle decree and bringing those forward in the
7 SRBA decree, how would you propose that
8 Reclamation be assured that those provisions can
9 continue to be followed?

10 A. We have the contracts.

11 Q. Anything else besides the contracts?

12 A. I don't think so. Let me just use an
13 example. One of the things that was included in
14 the Eagle decree was the provision where there was
15 an exchange of space between American Falls and
16 Jackson. A third party could have perceived that
17 they were injured by that exchange.

18 But I believe the time for claiming
19 injury is over, and I believe that any injury
20 claims were resolved through the Eagle decree. So
21 I don't think those specific provisions, for
22 example, are necessary in the SRBA. And I think
23 there are other ones.

24 Now, for example, the priority dates
25 of the reservoirs that invokes the winter water

1 savings provisions, those need to be in the
2 decree.

3 Q. So you identified third-party claims
4 that might arise out of the temporary exchange of
5 water; correct?

6 A. Right.

7 Q. And so would it be your perspective in
8 looking at those provisions of the Eagle decree
9 that those provisions were binding and Reclamation
10 was concerned about having those provisions
11 binding upon third parties that were in existence
12 at that time of the Eagle decree and anybody that
13 came onto the system thereafter?

14 A. Well, the contracts were between
15 Reclamation and specific space holders. The
16 concern was not that other parties had to agree to
17 that, but that other parties couldn't object to
18 that.

19 Q. Right.

20 A. That they had to accept that as part
21 of the status quo.

22 Q. Okay. And is it your perspective that
23 because third parties, whether those third parties
24 were identified at the time of the Eagle decree or
25 came into existence after the Eagle decree, that

1 they, through the exercise of those provisions,
2 are now bound by them?

3 A. I believe so.

4 Q. Okay. And hence, it's no longer
5 necessary, then, to include that provision in a
6 subsequent decree?

7 A. That would be my perspective.

8 Q. Mr. Rigby, along those lines, if we
9 can again look at Deposition Exhibit 2, which is
10 the Burley Irrigation.

11 A. Okay.

12 Q. And still staying with
13 paragraph 24(a).

14 And would it be your testimony that
15 BOR still operates the Minidoka Power Plant
16 consistent with paragraph 24(a)?

17 A. Yes, sir. To the -- with the
18 exception of the other rights, the third-party
19 rights and the power company.

20 Q. Okay. With the exception of the
21 indented portion of --

22 A. Yes.

23 Q. -- paragraph 24(a) on page 29?

24 A. Correct.

25 Q. Okay. And why is that so?

1 A. Because the Twin Falls and North Side
2 rights are not being exercised, I guess there's a
3 question of whether they exist anymore.

4 And it's our position that the 1923
5 contract, the contract rights to secondary storage
6 available to Idaho Power Company, was resolved
7 in -- with the reconstruction of American Falls
8 Dam.

9 Q. So with respect to the first sentence,
10 first part of that sentence in the indented
11 portion of page 29, Mr. Rigby -- and we discussed
12 this earlier -- that states, "To the amount of
13 water required to provide flows below Minidoka Dam
14 sufficient to meet existing diversion rights in
15 the reach of the river through Milner Dam."

16 To you, does that simply identify
17 water rights, or does that include any contractual
18 rights between Reclamation and any diverters
19 downstream from Minidoka Dam?

20 A. To me, the phrase "existing diversion
21 rights" refers to water rights.

22 MR. SIMPSON: Okay. Mark this as the next
23 exhibit, if we could.

24 (Exhibit 26 marked.)

25 (Recess.)

1 MR. SIMPSON: Back on the record.

2 Q. Mr. Rigby, I handed you what has been
3 marked as Exhibit 26. And if you could identify
4 that for the record.

5 A. The document is a stipulation between
6 the United States Bureau of Reclamation and
7 counsel for Twin Falls Canal Company and North
8 Side Canal Company, dated December 28th, 1955.

9 Q. Okay. And this identifies a
10 resolution of a conflict between the canal
11 companies and Reclamation that they reached this
12 stipulation, is it not?

13 A. That is correct.

14 Q. And it identifies, does it not, that
15 Reclamation agrees to operate the Minidoka project
16 in terms of storing of water in the reservoir
17 system in a manner that would not impair the canal
18 company's ability to refill certain space in
19 American Falls; correct?

20 A. Well, I believe what it did, it
21 limited the exercise of the water right that was
22 filed by the United States on November 21st, 1955,
23 to the express paragraph on the second page.

24 Q. Okay. So that Reclamation would not
25 exercise this use for water, the 240 cfs of water,

1 to the detriment of the rights of Twin Falls and
2 North Side Canal Company?

3 A. I believe so.

4 Q. Okay. And does it not also
5 acknowledge by the parties -- that is, the canal
6 companies and Reclamation -- that Twin Falls and
7 North Side Canal Companies have at times prior to
8 the date of that stipulation used storage water
9 early in the year and for early demand, and
10 subsequently that water would be considered
11 natural flow?

12 A. Well, I believe -- the document says
13 what it says. My reading of the document is that
14 the companies had those rights and that they had
15 the right to use that water and that the parties
16 agreed that -- that when American Falls filled,
17 the water would be -- and that such use didn't
18 diminish or affect the right, it would be natural
19 flow.

20 Q. Okay. And it identifies that refill
21 had previously occurred to the benefit of North
22 Side and Twin Falls Canal Company?

23 A. Correct.

24 Q. Okay. And that the Bureau of
25 Reclamation recognized that that had occurred,

1 that there was refilling of some space in American
2 Falls in prior years?

3 A. Yes, Reclamation knew that was taking
4 place.

5 Q. So would it be fair, Mr. Rigby, to
6 summarize this stipulation that there were years
7 prior to this stipulation where the demand for
8 water by Twin Falls and North Side prior to the
9 fill in the system exceeded their natural-flow
10 rights so they utilized storage to supplement the
11 natural flow?

12 A. I'm sorry.

13 Q. So would it be fair to summarize this
14 document as the fact that in years prior to the
15 stipulation the parties recognized that
16 early-season demand was such that the natural flow
17 in the river was not satisfactory to meet the
18 demands of North Side and Twin Falls Canal
19 Company, and that those companies then asked or
20 requested the release of storage water to
21 supplement their natural flow in the early part of
22 the irrigation season?

23 A. Yes.

24 Q. And in those circumstances where that
25 occurred, then subsequent to that event that if

1 paragraph 24(a). And just above the indented
2 portion that we've been talking about on page 29
3 of paragraph 24(a), about halfway down through
4 that paragraph at the top of the page it starts
5 out "Accordingly."

6 A. Uh-huh.

7 Q. "Accordingly, except as it is
8 determined by the Secretary that additional water
9 may be passed through American Falls and Minidoka
10 Dams without the loss of water that could be
11 stored for irrigation in the reservoir system."

12 Do you see that language?

13 A. Uh-huh.

14 Q. It specifically identifies the storage
15 for irrigation in that remark, does it not?

16 A. Yes, sir.

17 Q. Okay. And so with respect to the
18 ongoing implementation of paragraph 24(a), would
19 it continue to be Reclamation's position that it
20 would operate the system for maximizing storage
21 for irrigation and then subsequently maximizing
22 for power generation, consistent with this
23 language?

24 A. Well, we have treated the power
25 company's rights to roughly 40- or 50,000 --

1 there was refill in the system which did occur
2 that that refill would fill the storage space of
3 those entities?

4 A. Correct.

5 Q. During the storage season if
6 Reclamation was exercising its right to store
7 water and generate power, would this stipulation
8 between the United States and the canal companies
9 be an agreement that Reclamation would consider in
10 its exercise of the storage and power rights?

11 A. Well, I kind of think we're making a
12 lot out of this stipulation. This stipulation, to
13 my knowledge, addressed a specific water right for
14 240 cfs. And I think we're going to have to
15 address the issue of refill. I know that
16 currently if the reservoirs fill, prior use of
17 water is deemed natural flow, even if it was
18 storage at the time of delivery.

19 Q. And when you say that the prior use of
20 storage is deemed natural flow, is that pursuant
21 to your understanding of how it's considered in
22 the accounting program for the Upper Snake?

23 A. Yes, the State's administration of the
24 water rights.

25 Q. Okay. Mr. Rigby, one last question on

1 Whatever it is, Jim, 45,000 acre-feet.

2 MR. TUCKER: About 45-, a little less than
3 45-.

4 THE WITNESS: -- 44,000-and-change as part
5 of the storage system. We have not attempted to
6 distinguish between water stored under a contract
7 for irrigation as opposed to another contract.

8 Q. (BY MR. SIMPSON): Okay. So moving
9 forward, you would simply rely upon the purposes
10 for those contracts in giving those contract
11 purposes preference in terms of storing for those
12 purposes over the generation of power at Minidoka?

13 A. I'm not sure -- we treat all the
14 contracts for storage. We just store water. We
15 haven't tried to parse it out and say that this
16 contract's ahead of that one, except for the
17 winter water savings provisions and those kinds of
18 issues.

19 Q. For example, the Idaho Power spaces in
20 American Falls?

21 A. Yes.

22 Q. So essentially, this provision that
23 talks about the loss of water that could be stored
24 for irrigation really discusses the loss of water
25 that could be stored for irrigation in Palisades

1 primarily?

2 A. Well, are you asking about the
3 Pocatello contract?

4 Q. No. But we can talk about it, if
5 you'd like.

6 A. We store water in the reservoirs. So
7 we've got 1,672,590 acre-feet of space in American
8 Falls, 872,000 in Jackson, and 1.2 million in
9 Palisades. We treat all of that storage as the
10 same for storing the water.

11 Well, point -- for diversions and
12 deliveries, then we deal with the contracts and
13 address the contracts.

14 Q. Okay. So Reclamation in its
15 operations hasn't historically made the
16 distinction that's identified in paragraph 24(a)?

17 A. I'm not sure what that distinction is,
18 but we have not made a distinction.

19 Q. The distinction that identifies
20 storage for irrigation.

21 A. The words "site storage for
22 irrigation."

23 Q. Okay. Mr. Rigby, if Reclamation
24 releases water pursuant to operational
25 constraints, does that subsequent fill of space

1 A. It does subsequently fill.

2 Q. And does that subsequent fill of that
3 space occur at the priority of the original right?

4 A. Well, we're talking about the State
5 administration of the water rights. So this is
6 not something -- this is not a Reclamation action.
7 This is a State action. And I have to say it's
8 for the State or the people to ask that, or I can
9 give you my understanding.

10 Q. Please do.

11 A. The water that is exercised of the
12 natural-flow right at Minidoka Power Plant is not
13 stored water, storable water. All the rest of the
14 water that enters the system is treated by the
15 State as storable water and counts against the
16 water rights, the storage water rights. An
17 example is flood-control releases at Palisades
18 where water is purposefully released from the
19 reservoir under the State's accounting process,
20 they count that water as against the water right.

21 And so when the reservoir finally
22 ultimately fills for that season, it is with water
23 that's junior to the other rights in the system.

24 Q. So then subsequent to a flood-control
25 release, an operational decision by Reclamation to

1 occur at a different priority date?

2 MR. GEHLERT: Rich, before you answer, I'm
3 going to object on the grounds that that calls for
4 a legal conclusion. But you can go ahead and
5 answer.

6 THE WITNESS: I'm not sure -- we're going
7 to have -- you're going to have to dumb it down a
8 little bit, isolate it a little bit. I need to --

9 Q. (BY MR. SIMPSON): Well, Reclamation
10 determines how much water they're going to store;
11 correct?

12 A. Correct.

13 Q. And so if there's a decision during
14 the storage season that Reclamation's not going to
15 store that water, then it passes through as
16 natural flow through the Minidoka Power Plant;
17 correct?

18 A. Right. Okay. I think I understand.

19 Q. Okay. And then if Reclamation stores
20 water and then subsequent to that storing of water
21 through operational decisions by Reclamation it
22 releases water out of storage, it increases the
23 water passing through the reservoir system, does
24 that space subsequently fill if there's water
25 available?

1 release water during the storage season out of the
2 reservoir system, and Reclamation commences to
3 refill that space, has Reclamation ever been
4 informed by the State that it could not fill at
5 the rate that it desires?

6 A. It is -- to my knowledge, no.

7 Q. Have rights junior to the storage
8 rights of Reclamation ever been honored?

9 A. I -- I'm sure they have.

10 (Ms. McHugh leaves the proceedings.)

11 Q. (BY MR. SIMPSON): Okay. Does
12 Reclamation agree with that administration?

13 A. If I were in charge, we would probably
14 do it differently. But we have to work with the
15 State system. It -- it's not ideal from our
16 perspective, but it has worked. We have managed
17 to operate the reservoirs pretty well and, I
18 think, fill them as well as we could.

19 Q. Right. Have there been times where
20 that State administration has precluded the
21 storage of some water in the system?

22 A. Well, there was an occasion in 2005,
23 which -- tell me which one it was.

24 Q. I think 2006.

25 A. -- 2006 where there was some recharge

1 that took place in the spring. And the director
2 wrote to Twin Falls and North Side Canal
3 Company -- or Senator Coiner, I believe, and said,
4 "You asked me about your power rights at Milner.
5 Well, the water that was used for recharge was
6 senior to your right. The only party impacted by
7 that use of water was Reclamation." And there was
8 about 70,000 acre-feet recharged that spring.

9 Q. Did Reclamation object to the use of
10 that water for recharge over the storing of water?

11 A. No, I don't believe that we did. And
12 I need to say that at the time that was taking
13 place, we didn't know whether that would affect
14 our ability to fill the reservoirs or not. I have
15 no way of knowing that.

16 Q. After the fact --

17 A. After the fact we can look at it and
18 see that it did.

19 Q. Would that history of 2006 possibly
20 influence Reclamation's response if those
21 circumstances were to arise again?

22 A. It's hard to say that it would,
23 because the -- what we really depend on to fill
24 the reservoirs is mother nature, and we assume
25 normal precipitation for the subsequent period.

1 a technical sense. The question is, when
2 Reclamation makes its operating decision, would we
3 have been able to identify that and make an
4 adjustment in American Falls? And our views on
5 that is that it's pretty hard to say that we would
6 make an adjustment.

7 Q. You mean an adjustment based upon that
8 water being diverted for recharge?

9 A. Correct.

10 Q. But I guess my question goes to if
11 that water hadn't been diverted for recharge,
12 Reclamation either could have used it for
13 additional storage or for generation of power at
14 Minidoka; correct?

15 A. Probably.

16 Q. Okay. Mr. Rigby, these two senior
17 power rights at Minidoka, the 217 and 218 rights,
18 were those decreed as a part of the Foster decree
19 originally?

20 A. I don't know.

21 Q. Do you know if the United States was a
22 party to the Foster decree?

23 A. I'm afraid I don't know that either.
24 I do believe that the rights were listed as being
25 decreed.

1 And that's -- it's really the driver, and it
2 overwhelms other uses, like recharge.

3 It's always possible to go back after
4 the fact and see what might have happened, but the
5 problem is our ability to make these kinds of
6 judgments is just not -- we just don't have that
7 much -- that good of a crystal ball.

8 Q. At the time of that occurrence that
9 water was not delivered into storage but then was
10 allowed for recharge, could that water have been
11 utilized at the Minidoka Power Plant?

12 A. I don't believe that that water would
13 have been used at the Minidoka Power Plant. I
14 believe that the deliveries, the releases that we
15 were making out of American Falls would have --
16 would not have changed.

17 Q. Are you saying that the 2700 cfs right
18 at Minidoka was satisfied?

19 A. I don't know whether it was satisfied
20 or not. It may have been.

21 Q. If it was not satisfied, then that
22 water, if it had not been diverted for recharge,
23 would have been available for the Minidoka right;
24 correct?

25 A. Well, it would have been available on

1 Q. In the Foster decree?

2 A. I don't know that.

3 Q. Okay. I'm just going to hand to you
4 what I'll represent to you is a copy of the Foster
5 decree, and you can take as much time to look at
6 it as you'd like. And I've just identified a page
7 in that decree.

8 A. Well, it does appear to reference the
9 217 and 218 water rights that you mentioned.
10 December 14th, 1909, for 2500 second-feet and
11 July 1st, 1912, for 200 second-feet.

12 Q. And it identifies that those are being
13 decreed to the defendant?

14 A. Secretary of the Interior.

15 Q. Okay. So by identifying that the
16 Secretary of Interior, the defendant in that case,
17 does that identify for you that they were a party
18 to that Foster decree?

19 MR. GEHLERT: Objection. Calls for a legal
20 conclusion.

21 THE WITNESS: I accept what you say. I
22 don't have any basis to make a decision on that.

23 Q. (BY MR. SIMPSON): Okay. Rich, if we
24 could, let's turn to Exhibit 9, I believe?

25 A. I'm going to have a hard time doing

1 that, John. I got 7.

2 Q. That notebook goes up to 7. Let's
3 see.

4 And for the record, Rich, I believe
5 that's the United States' Motion for Summary
6 Judgment, is it not?

7 A. Yes.

8 Q. Okay. And if you'd turn to
9 Attachment B to Exhibit 9.

10 That's the proposed remarks submitted
11 by the United States, are they not?

12 A. They are.

13 Q. Okay. And that's for water rights 217
14 and 218, 4024 and 4025 for the Minidoka Power
15 Plant, and then for Palisades 2068 and 4054;
16 correct?

17 A. Correct.

18 Q. In looking at the proposed remark for
19 217 and 218 at the top of that page, Mr. Rigby,
20 are you familiar with this language?

21 A. Yes, sir.

22 Q. Okay. Were you involved in the
23 process of negotiating this language?

24 A. Yes.

25 Q. With respect to this language,

1 may be passed through the Minidoka Dam without the
2 loss of water."

3 Do you see that statement?

4 A. I see that.

5 Q. And we had a discussion a little while
6 ago about the language in paragraph 24(a) that
7 references loss of water for irrigation?

8 A. Uh-huh.

9 Q. And that term "irrigation" is not
10 included in this proposed remark; correct?

11 A. Correct.

12 Q. Okay. And the basis for not including
13 that phrase or that term "irrigation" is because
14 from your perspective Reclamation stores all the
15 water without regard to whether it's through
16 contract for irrigation as opposed to hydropower
17 or for other project purposes?

18 A. That's correct.

19 Q. Okay. This language talks about a
20 determination by the Secretary.

21 Who will make that determination?

22 A. The Bureau of Reclamation.

23 Q. Okay. And when would that
24 determination be made?

25 A. On a continuing basis.

1 generally, does this language fall out of
2 paragraph 24(a) of the Palisades contracts?

3 A. It does.

4 Q. Okay. And there's certain language
5 that was contained in or is contained in
6 paragraph 24(a) which was not brought forward into
7 this proposed remark; is that correct?

8 A. That's correct.

9 Q. And the reason for that exclusion of
10 that language out of paragraph 24(a) was what,
11 Mr. Rigby?

12 A. Well, I believe our brief explained
13 that the rights of Twin Falls and North Side had
14 not been -- were not being used and not been
15 claimed.

16 Q. Okay. Any other reason?

17 A. What I said about the power -- the '23
18 contract with the power company.

19 Q. All right. And about halfway down
20 through this language, it identifies a statement
21 that starts out "Accordingly."

22 Do you see that?

23 A. Uh-huh.

24 Q. "Accordingly, except as it may be
25 determined by the Secretary that additional water

1 Q. Okay. And historically has
2 Reclamation documented that determination, or is
3 it an ongoing review by Reclamation employees?

4 A. It's an ongoing review.

5 Q. Okay.

6 A. It happens every day all the time, and
7 we just watch it on a regular basis. There isn't
8 a specific document.

9 Q. Okay. So, for example, like this year
10 starting out at a 1500 cfs release to begin the
11 storage season, there's not a document that
12 identifies how Reclamation came up with or
13 identified the 1500 cfs release?

14 A. I don't know that for sure. I don't
15 know whether the operators, you know, did some
16 work or anything like that. They may have. But
17 there's not an official record type document.

18 Q. And that determination is then
19 communicated to whom once Reclamation identifies
20 what the releases will be? To the Committee of
21 Nine advisory committee or to other water users?

22 A. To various parties. I'm sure the
23 watermaster is informed. I know that Idaho Power
24 is informed. There's regular conversations with
25 the power company about those kinds of issues.

1 And I know we have regular meetings with the
2 Committee of Nine and scheduled meetings with the
3 storage committee, subcommittee.

4 Q. Okay. Will there be the development
5 or has there been the development of any criteria
6 for which that determination will be made?

7 A. I think the criteria is fairly
8 straightforward. What's the content of the
9 reservoirs, what are the inflows that we expect,
10 and what are the -- what are the -- how are --
11 what are the risks at the present time.

12 Q. Okay. And in making that
13 determination, will the Secretary -- and I think
14 you've identified that Reclamation makes that
15 determination -- will Reclamation, moving forward,
16 be bound by those provisions of the Eagle decree
17 that are also contractual provisions in the
18 Palisades contracts?

19 A. Continue to be bound by the contracts.

20 Q. And in the first sentence where it
21 says "...the United States has the privilege to
22 use 2700 cfs," I think that we just referred back
23 to the Foster decree where it's a decreed right.

24 A. Uh-huh.

25 Q. And so in Reclamation's view where it

1 uses the word "privilege," does Reclamation view
2 that as being a right, a water right?

3 A. We view that as a water right.

4 Q. Okay. And in the sentence above the
5 sentence we've been referring to, it talks about
6 "...water otherwise storable in the reservoir
7 system."

8 Do you see that portion of the
9 statement, Mr. Rigby?

10 A. I do.

11 Q. And does that refer to water that
12 could otherwise be stored pursuant to the storage
13 claims made by Reclamation in the SRBA, that is,
14 the existing storage rights?

15 A. You know, I don't know that it
16 refers -- that the reference is specific to water
17 rights. I think it's basically to storable water.

18 Q. Okay. But that water could only be
19 stored and could only be identified as storable if
20 there's a storage right attached to it; correct?

21 A. It is stored under a water right, yes.

22 Q. And then in looking at the last
23 sentence under 04024 and 04025 --

24 A. Uh-huh.

25 Q. -- part B of this proposed remark for

1 Minidoka power rights, this sentence states, "This
2 right carries no entitlement to make a delivery
3 call for hydropower generation except as against
4 junior hydropower rights."

5 Do you see that statement?

6 A. I see it.

7 Q. In your view, is this a full
8 subordination to all other rights junior to the
9 priority date for those two rights except as to
10 other junior hydropower?

11 A. I -- it speaks for itself. It says
12 what it says.

13 Q. Is that language, that statement
14 different than the language that's contained under
15 the proposed remark for 217 and 218?

16 A. Yes, it is.

17 Q. Would, in your view, the exercise of
18 those remarks be different?

19 A. Yes.

20 Q. Okay. So if you'll assume with me for
21 a moment that the language under the '24 and '25
22 rights are a full subordination -- that is, the
23 only water rights that those could call out would
24 be junior hydropower rights -- would the exercise
25 of 217 and 218 be limited in the same fashion,

1 that is, they could not call out or prevent the
2 diversions for any other junior rights except for
3 junior hydropower rights?

4 A. No. We believe that 217 and 218 are
5 not subordinated to anything except upstream
6 storage as addressed and provided for in the
7 remark.

8 Q. So the exercise or the limit to the
9 exercise of 217 and 218 would be different in
10 Reclamation's mind than the exercise of the '24
11 and '25 rights?

12 A. Correct.

13 Q. If those four rights were administered
14 in an identical fashion, full subordination, as
15 I've expressed to you, would that conflict with
16 Reclamation's view of how this remark would be
17 exercised or administered?

18 A. Well, I believe I understand your
19 question.

20 You're asking if 217 and 218 were
21 subordinated to other rights --

22 Q. Uh-huh.

23 A. -- would it be consistent with this
24 language? The answer is no.

25 Q. And, Mr. Rigby, with respect to the

1 sentence that we've referred to under '24 and '25,
2 if you can explain your basis for Reclamation's
3 inclusion for that language in those two rights.

4 A. Well, we have the right, the ability,
5 to voluntarily subordinate a water right. And it
6 was a question of evaluating the risks, if you
7 will, the -- of going to court on those rights and
8 the practical application of a subordination, what
9 it really would mean. And we determined that that
10 was an acceptable outcome for Reclamation.

11 Q. Would that outcome, as you've
12 expressed it, potentially affect those entities
13 such as you've previously identified, Minidoka
14 Irrigation District and Burley Irrigation
15 District, in the generation and revenue from power
16 production?

17 A. It would not.

18 Q. And why is that?

19 A. Well, the question was about the
20 revenue and generation. They no longer have
21 rights to the power profits at Minidoka Dam.

22 Maybe you're asking about the reserve
23 power customers. And in order -- first of all,
24 the rate that those districts pay is called a
25 southern Idaho rate. That incorporated Palisades,

1 subordination provision.

2 Q. So the inclusion of that provision was
3 consideration of the litigation risks plus the
4 hydrologic effects?

5 A. Correct.

6 Q. Okay. And it would balancing those
7 effects versus the potential impact on preferred
8 power users?

9 A. Well, the hydrologic effects includes
10 that effect on preferred power users.

11 Q. Okay. Then, Mr. Rigby, referring down
12 to the Palisades power plant rights, the 2068
13 right in particular, I'm looking at the last
14 portion of that paragraph A that starts out with
15 "...and no such release shall be made that will
16 preclude the later delivery of water."

17 Do you see that reference --

18 A. I do.

19 Q. -- and the balance of that paragraph?

20 Is that language consistent with the
21 Eagle decree language describing the exchange of
22 water between reservoirs?

23 A. It's not inconsistent with it.

24 Q. So there's been some modification of
25 that language?

1 Minidoka, Black Canyon, Boise diversion, and Arrow
2 Rock and maybe there's -- I mean Anderson Ranch
3 and maybe some others. I don't know offhand.

4 But I've looked at it, and the
5 Minidoka Power Plant generation constitutes about
6 10.5 percent of that right -- I mean of that rate.
7 So 10.5 percent of the revenues or the generation
8 that makes up the total southern Idaho generation
9 is generated at Minidoka Power Plant.

10 We asked our operators, "Would
11 recharge upstream affect your decisions at
12 Minidoka, at American Falls?"

13 And the answer was, "I don't think so.
14 I just don't believe that they would affect those
15 decisions," because the only time those junior
16 rights are being exercised is when there's surplus
17 water in the river.

18 So we really make our decisions -- and
19 I think I kind of alluded to that earlier, that
20 the decisions are driven by other things that are
21 bigger and have more effect on us, like the
22 weather and what other irrigators are doing in
23 diversions and things like that. So we just don't
24 believe that it's likely that we would have an
25 occasion to notice an impact from that

1 A. No, I don't believe so.

2 Q. Okay. Explain.

3 A. I don't believe it gets to that issue,
4 the issue that you raised.

5 The exchange of water between
6 reservoirs was a contract deal where certain
7 parties that held American Falls space were
8 provided Jackson space, and in return for American
9 Falls. So there was a switch.

10 Q. All right.

11 A. This clause basically says -- and I'm
12 sure you know that the contracts provide that the
13 reservoirs will be treated as a system. And --
14 but we'll attempt to keep the water stored as high
15 as possible.

16 Well, the possibility -- I can only
17 assume. But I'm assuming that some space holders
18 said, "Well, gosh, we don't want you to err on the
19 side of keeping the water low in American Falls to
20 the extent that we can't get our water delivered
21 when we're sitting above American Falls."

22 So this clause just says we won't let
23 that happen. All the diverters that are above
24 American Falls, we'll keep enough water stored in
25 those upper reservoirs to be able to let them

1 divert their stored water.

2 Q. Right. Because of some of those
3 diverters were upgradient from American Falls, are
4 spacers in American Falls?

5 A. Correct.

6 Q. The only way they can receive their
7 water is release from Palisades?

8 A. That's correct.

9 Q. So that provision we've been talking
10 about identified as paragraph I'll say 2A of the
11 Palisades Power Plant for 2068, the proposed
12 remark doesn't provide rights not granted in the
13 Eagle decree or referenced in the exhibits
14 thereto?

15 A. Correct.

16 MR. SIMPSON: That's all the questions I
17 have. Thank you, Rich.

18 MR. GEHLERT: Probably a good time to break
19 for lunch, then.

20 MR. LING: Pretty good timing for some of
21 us.

22 MR. GEHLERT: Yeah.

23 THE WITNESS: Wrapped it up right at 12:00.

24 (Lunch recess.)

25 (Ms. McHugh present.)

1 EXAMINATION

2 BY MR. LING:

3 Q. Mr. Rigby, my name is Roger Ling.
4 And you are the same Mr. Rigby that
5 testified earlier in the deposition?

6 A. Yes.

7 Q. I have a few questions, and I'll try
8 to be brief and not cover things that have already
9 been covered, but there are some issues that I am
10 unsure about.

11 Number one, you're familiar with the
12 Reclamation Act of 1902 and as supplemented and
13 amended, are you not?

14 A. I am.

15 Q. And that is kind of the federal
16 legislation that controls and directs the Bureau
17 of Reclamation in many respects, doesn't it?

18 A. It does.

19 Q. All right. In my dealings with the
20 Bureau of Reclamation, at one time I remember when
21 the Bureau of Reclamation was pursuing a policy of
22 saying that they had a partnership with the water
23 users and space holders within Reclamation
24 projects.

25 Do you recall that?

1 A. I don't recall exactly that term, but
2 that's a very familiar concept.

3 Q. And as far as you know, that's still
4 generally the way they look at things?

5 A. Sure.

6 Q. In the Reclamation Act, I believe --
7 and I don't have the act with me, but I
8 understand, as I recall reading it, there's a
9 particular provision which says that reserve
10 power -- and I think you referred to as a
11 preference power, but it's actually reserve
12 power -- is an incidental part of many Reclamation
13 projects because of the necessity of providing
14 power in order to make the project feasible.

15 Do you agree with that in a general
16 statement?

17 A. I do.

18 Q. And the Minidoka project is one of
19 those such projects, is it not?

20 A. It is.

21 Q. And just so we understand the Minidoka
22 project, the original project was called "the
23 Minidoka project," and it consisted of the north
24 side gravity division and the south side pumping
25 division of the Minidoka project. And that was

1 then taken over in operation and management by
2 Minidoka Irrigation District for the north side
3 and Burley Irrigation District for the south side.

4 And Burley Irrigation District had a
5 large need for electrical power because they had
6 to pump all their water; isn't that correct?

7 A. That's correct.

8 Q. And they still do that?

9 A. They do.

10 Q. You had indicated that one of the
11 considerations for the lost power revenue
12 provision in the Palisades contract was because of
13 the profits, incidental profits that would come to
14 Burley and Minidoka Irrigation Districts under
15 their original contracts.

16 And in fact, there has been no profit
17 paid to them for, at least in my time, since 1964,
18 has there?

19 A. I don't remember the exact dates.
20 It's about that time, and I believe it was in the
21 '60s that a contract was negotiated with Burley.
22 And basically, the United States bought out
23 Burley's rights.

24 Q. Bought out Burley, Minidoka never
25 entered into such a contract, and actually there

1 was some litigation over that, and I think
2 Minidoka was found that there was no revenue to be
3 shared with them?

4 A. That's correct.

5 Q. But at the same time, both those
6 projects were entitled to reserve power?

7 A. Yes, sir.

8 Q. And another entity I represent, Falls
9 Irrigation District, it is also a part of a
10 Reclamation project, and it's referred to as the
11 Michaud Flats project; is that right?

12 A. That's right.

13 Q. And that project, as operated and
14 maintained by Falls Irrigation District, also
15 relies entirely upon electrical power to deliver
16 water for the lands within that project; is that
17 correct?

18 A. I'm not that familiar. I accept your
19 premise.

20 Q. And they have deep well pumps, and
21 they also have a pumping plant out at the
22 reservoir?

23 A. Uh-huh.

24 Q. And I guess the reason I wanted to
25 clarify that is because those entities all have

1 A. Actually, we reviewed it with our
2 water -- with our reservoir operation people, and
3 we asked them the question, "Would you be able
4 to -- do you think we would change the operation
5 of American Falls Dam" -- which basically governs
6 what's available at Minidoka. "Do you think we
7 would change the operation of American Falls Dam
8 if these rights were subordinated?"

9 And the answer was "No, we don't think
10 so."

11 Q. And did they give you that opinion
12 based upon those other water rights that now exist
13 and are being exercised, or did they take into
14 consideration as well the significant
15 appropriation of water for recharge?

16 A. They took into account the current
17 operations, current conditions.

18 Q. Well, I have here -- and I won't
19 introduce it. You're familiar with the Bureau's
20 status report they do -- I don't know whether they
21 still do it, but I think they had copies for many
22 years, water management status report for the
23 Minidoka project. And in that many years they
24 reported what the power loss was just on the 2700
25 cfs being generated --

1 Palisades contracts, and they each have a
2 provision in their contracts which I think is in
3 the general contract that we referred to here
4 today that's the one that's attached to the
5 decree, and there's another one attached to an
6 affidavit that indicates that they are entitled to
7 receive power based upon a rate that is
8 established by the generation of Reclamation and
9 power from its facilities within an area, which is
10 I think you referred to as southern Idaho power
11 pool.

12 And that rate for them to pump is
13 based upon the cost of production, is it not?

14 A. It is.

15 Q. So anytime you can reduce the cost of
16 production, it makes a substantial savings to
17 those entities in receiving their reserve power?

18 A. Yes.

19 Q. You indicated that you had, in
20 entering into the stipulation, reviewed with that
21 division of your northwest power division of the
22 Bureau of Reclamation that the power people did
23 not feel that a subordination of the junior power
24 rights at Minidoka was going to affect any power
25 rates significantly; is that --

1 A. Correct.

2 Q. -- in the first six generations?

3 A. Correct.

4 Q. I have one from 1981, for instance,
5 that shows that the power loss that year, just for
6 the 2700 cfs for the six units, was \$27,079. Now,
7 that power loss is power loss that was paid by
8 those space holders who benefited from this
9 increased storage by curtailing the Minidoka Power
10 Plant, at least the 2700 cfs.

11 That seems to me to be something more
12 than an insignificant thing to say that you are
13 not going to see any difference, unless you're
14 referring to maybe only the 2700 would be the only
15 curtailment and you still have the other water
16 rights exercisable?

17 A. I'm having a hard time following.

18 Q. Okay. The power loss is based on the
19 two earlier rights, 1909 and 217 and 218, and
20 2700 cfs was the amount of water available under
21 those rights for generation of power?

22 A. Correct.

23 Q. In 1981 there was a loss, based on the
24 average, of \$27,000 that had to be paid by those
25 entities in order to compensate for the loss of

1 power production.

2 A. Okay.

3 Q. Now, we know that the other water
4 rights for Minidoka are substantially more than
5 2700; right?

6 A. Correct.

7 Q. So if you look at those, and the
8 stipulation says those other rights other than 217
9 and 218 can be subordinated and will be
10 subordinated to all lawful uses above Milner, then
11 they generally will not in the wintertime be
12 receiving water for generating, will they?

13 A. Well, that's where I think we differ,
14 Mr. Ling. The only time the junior water rights
15 at Minidoka are generating, use water during the
16 wintertime, is when there's surplus water in the
17 system; in other words, there's ample water to
18 fill the reservoirs and there's extra water to
19 release downstream.

20 Q. Uh-huh.

21 A. Now, let's just deal with recharge.
22 Recharge can take place in the fall, and it can
23 take place in the spring. It's probably not going
24 to take place in the dead of winter when it's cold
25 and canals are frozen up.

1 I guess the question is, does our
2 ability to affect that upstream recharge hinge
3 upon whether those junior water rights for power
4 are subordinated? And we think we've got
5 reservoir rights that are much larger and
6 controlling, and we've got the 2700 cfs rights
7 that are not subordinated, and we believe that
8 provides adequate protection for the United States
9 to be able to make sure that the recharge efforts
10 don't overwhelm the system and start controlling
11 the reservoir operations.

12 Q. Did you consider in entering into the
13 stipulation that you were going to subordinate
14 those junior rights at Minidoka, at least only to
15 those rights that are in existence today?

16 A. I think we looked at all possible
17 options.

18 Q. But did you speculate that recharge
19 may in fact occur below American Falls but above
20 Minidoka?

21 A. We've thought about that.

22 Q. There's been a project planned for
23 that, has there not, where they pump it out of the
24 Minidoka pool onto the north side for recharge?

25 A. Well, I don't know whether a project's

1 Recharge that takes place above
2 American Falls is going to have to be done in the
3 fall with stored water, because the board's
4 recharge right is not in priority.

5 The question that was posed to our
6 operators was if that -- I'm kind of making --
7 simplifying it a little bit here just to try to
8 make a point, but "Will you change your operations
9 at American Falls if there's recharge taking place
10 above when the 20- -- when more than 2700 cfs is
11 going through the Minidoka Power Plant?"

12 And the answer was no.

13 Now, I understand that you can -- we
14 can model it, we can use arithmetic to show that,
15 you know, that that's much less water in the
16 system. The fact is, the decisions we make are
17 based on factors that overwhelm the amount of
18 water that would be diverted for recharge.

19 Q. And assuming that analysis is correct,
20 you have one unknown, and that is, you don't know
21 in the future what recharge ultimately will demand
22 from the system, do you?

23 A. We don't know. We do know that we
24 have an ongoing obligation to protect all of the
25 operations.

1 been planned or not. There's been a project
2 that's been conceived that's been talked about.

3 Q. Well, "conceived" may be a better
4 word.

5 A. Yeah.

6 Q. It certainly is not in what we
7 normally think of as a formal planning stage?

8 A. Right.

9 Q. But it certainly has been one of those
10 plans conceived to be a possible recharge program?

11 A. Correct.

12 Q. And you didn't consider that in your
13 consideration, did you?

14 A. We -- I think that it was a broader
15 question, will those kinds of operations affect
16 the releases at American Falls.

17 Q. Did you or anybody else, to your
18 knowledge, at the Bureau of Reclamation make a
19 calculation as to the extent, if any, of the
20 reduced power production as a result of the
21 subordination of those junior rights?

22 A. I don't think it's possible to do
23 that.

24 Q. Did you make any provision that
25 should, in fact, that subordination cause power

1 production to be lost at Minidoka that otherwise
2 would not be lost, a provision by which the lost
3 power would be compensated for?

4 A. We did not. We addressed that
5 question in the negotiations that took place prior
6 to our entering our proposed remark.

7 Q. Uh-huh.

8 A. And the expectation was if parties
9 felt aggrieved by that, they could bring that
10 issue up and ask people to include that.

11 Q. So it's your position that
12 notwithstanding the stipulation, which you're
13 saying you were willing to agree to this and our
14 partial decree on our Minidoka junior rights, that
15 somebody will have the opportunity to come in and
16 challenge that, other than through the summary
17 judgment proceedings that we're now involved in?

18 A. No, no. That's not what I said.

19 Q. Okay. What did you mean by that?

20 A. Well, you participated in meetings in
21 Twin Falls at the court where these -- this issue
22 was discussed. I believe the Special Master asked
23 that there be an attempt to negotiate this issue.

24 And it was Reclamation's expectation
25 that parties that felt aggrieved by that, the very

1 issue you're raising, would have the opportunity
2 to raise that and address that in those meetings.

3 Q. But are you saying that those meetings
4 will continue, notwithstanding the fact that
5 there's a summary judgment stipulation?

6 A. I'm talking about what happened in the
7 past.

8 Q. But in fact, in those meetings nobody
9 really understood power loss, did they?

10 A. You were there, Mr. Ling.

11 Q. Okay. Well, I'll express to you that
12 my impression was that really nobody quite
13 understood what power loss was and who was paying
14 for that power loss.

15 And do you have a different
16 impression?

17 A. A little bit. I think that the power
18 loss, if I understand what you're talking about,
19 only addresses 2700 cfs.

20 Q. Okay. And pursuant to the contract?

21 A. Right.

22 Q. And the decree?

23 A. Right.

24 Q. So I guess is it fair to say, then,
25 that the Bureau did not anticipate that it would

1 negotiate a fee for the subordination of junior
2 power rights to cover lost power generation?

3 A. We didn't feel it was incumbent on us
4 to raise that issue.

5 Q. In view of our objections to your
6 summary judgment, do you today feel that perhaps
7 we're raising that issue?

8 A. Well, I think it's a different forum
9 now. We were in negotiations before. Now we're,
10 you know, in the courts.

11 Q. Well, that is not the question. The
12 question is, did you think that we are indicating
13 that we're raising that issue in this proceeding
14 that we're involved with today on summary
15 judgment?

16 A. What you've said is what you've said.
17 I don't disagree with it.

18 Q. Are you familiar with the Minidoka
19 Power Plant feasibility report that was published
20 in March of 1981?

21 A. Barely.

22 Q. Okay. And again, without taking a lot
23 of time to go through that on what the provisions
24 are, I'll ask you, do you recall that at the time
25 that feasibility report was entered there was a

1 provision which indicated that the production of
2 power, hydropower, at Reclamation projects in
3 southern Idaho was consistent with the Idaho state
4 water plan because of the substantial needs for
5 additional power in southern Idaho?

6 A. I'm not that familiar with the report.

7 Q. Okay. Mr. Jarvis prepared an
8 affidavit in this case.

9 Did you contribute anything to that
10 affidavit?

11 A. I did not.

12 Q. It was interesting to me in the
13 affidavit as a side line that the contract they
14 elected to attach to it was the
15 Aberdeen-Springfield Canal Company Palisades
16 contract.

17 And that is not a Reclamation project,
18 is it?

19 A. It's a Reclamation contract, but it's
20 not -- the Aberdeen-Springfield project -- canal
21 was not constructed by Reclamation.

22 Q. It's a Carey Act project?

23 A. Yes.

24 Q. Do you know any reason why they would
25 choose that contract rather than a contract for

1 such Falls Irrigation District which would put the
2 power rate forum directly before the court?

3 A. I have -- I can't say why not. Our --
4 I think our expectation was that the contracts
5 were very similar.

6 Q. But you do not sell power as a reserve
7 power to Aberdeen-Springfield Canal Company, do
8 you?

9 A. No, I do not.

10 Q. When I say "you," Bureau of
11 Reclamation.

12 A. But I'm not sure there's a provision
13 about a sale of power in the Palisades contract
14 with Falls Irrigation District. I don't know
15 whether there is or not.

16 Q. Well, there is. And I'll represent to
17 you that in the Falls there has a provision, which
18 happens to be Article 27, that's power for
19 irrigation pumping, and it has a formula for
20 determining the rate.

21 A. Okay.

22 Q. And I think in my experience you'll
23 find that in all of the Reclamation project
24 contracts that have power from the Reclamation
25 project itself, including A & B Irrigation

1 District and Burley Irrigation District
2 specifically.

3 And do you have any reason to question
4 that?

5 A. I don't have any reason to question
6 it.

7 Q. For instance, the Falls Irrigation
8 District, I'll just read a portion of this. It
9 says, "The power and energy so set aside or
10 provided in lieu thereof will be furnished to
11 electric pumping plants and such other points as
12 are agreed on between the United States district
13 at rates per kilowatt hour to govern for
14 irrigational pumping on Federal Reclamation
15 projects as to powering an entity from the
16 Palisades Power Plant and interconnect the plants
17 as these are established from time by the
18 Secretary pursuant to the Federal Reclamation
19 law."

20 Now, that's pretty standard language,
21 is it not, for those contracts, to your knowledge?

22 A. To my knowledge, yes.

23 Q. Do you know what the total capacity of
24 the Minidoka Power Plant is today? And capacity,
25 both in kilowatt hours and in flows.

1 A. I do not know the power plant capacity
2 in terms of kilowatt hours, kilowatts. I believe
3 if we totaled the rights up, it's 2700, plus 825,
4 plus 5,010. I believe those are the numbers.

5 Q. I think that's pretty accurate.

6 And so we know that at least 8,000 cfs
7 can be used there, and you only get power loss
8 paid for 2700 loss?

9 A. One thing we need to remember is that
10 the -- during the irrigation season, we are
11 generating electricity through that plant with all
12 of the irrigation deliveries that are being made.

13 Q. Right. No question about that. And
14 we have a much larger debt to pay because of that
15 new plant, don't we? I mean we don't --

16 A. The United States does, yes.

17 Q. The United States does?

18 A. Yes.

19 Q. And you still -- I say "you," the
20 Bureau of Reclamation still operates the Minidoka
21 plant; correct?

22 A. Correct.

23 Q. Did you just deliver power to
24 Bonneville power administration for their
25 marketing, except for the reserve power? And the

1 reserve power is actually reserved and distributed
2 to the Minidoka project divisions that need power;
3 is that correct?

4 A. Essentially correct.

5 Q. When the efforts were made to provide
6 a water supply to be constructed or proposed to be
7 constructed at Palisades Reservoir and Dam, we
8 talked about the winter power savings. And the
9 other issue was the 2700 cfs as an early priority
10 for generating power at Minidoka.

11 At that time there were other rights
12 besides those two power rights in existence, were
13 they not, for Minidoka power project, Minidoka
14 power?

15 A. Yes.

16 Q. Do you --

17 A. Well, let me rephrase. To my
18 recollection, the two rights -- the two junior
19 rights were decreed rights.

20 Q. Yes.

21 A. And as I recall from what I've seen,
22 the other two rights are called beneficial-use
23 claims in the SRBA.

24 Q. But certainly Bureau of Reclamation
25 knew that those were claims and notice had been

1 given to the State that you were going to be
 2 making a claim on those, had it not?
 3 A. I don't know.
 4 Q. You don't know?
 5 A. I don't know.
 6 Q. Well, it certainly wasn't a surprise
 7 to them when you were negotiating the Palisades
 8 contract that they had other claims to flows for
 9 power production at Minidoka?
 10 A. Certainly knew what we were
 11 generating, that's for sure.
 12 Q. Do you have any explanation as to why
 13 you did not address those power rights in
 14 negotiating the Palisades contract?
 15 A. I do not, no.
 16 Q. To your knowledge, has the Bureau of
 17 Reclamation ever made a demand upon a watermaster
 18 to deliver project power that had been decreed for
 19 the Minidoka project?
 20 A. Project power?
 21 Q. Project power water rights, a demand
 22 for delivery under their power rights.
 23 A. I'm not aware of that ever happening.
 24 Q. Are you aware that the Bureau of
 25 Reclamation has ever made a demand for the

1 delivery of water under a water right held by the
 2 Bureau of Reclamation for irrigation?
 3 A. In Idaho?
 4 Q. Yes.
 5 A. Well, the closest thing that came to
 6 that was our intervention in the Surface Water
 7 Coalition call.
 8 Q. And that was after Surface Water
 9 Coalition had made demands?
 10 A. Correct.
 11 Q. But the Bureau had never made a demand
 12 before, but the water still was being administered
 13 by the State according to the decrees, was it not?
 14 A. To my knowledge, yes.
 15 Q. Okay. There's talk about the
 16 historical use that has -- and that's not
 17 necessarily the exact term, but they're talking
 18 about to justify the fact that power rights had
 19 been subordinated.
 20 To your knowledge, has there ever been
 21 a contract or anything in writing that recognized
 22 that you had agreed to subordination of anything
 23 other than the 2700 cfs?
 24 A. That was the extent of the
 25 subordination.

1 Q. And did the Bureau of Reclamation have
 2 knowledge that other power rights were not being
 3 delivered, other than the ones that you agreed to
 4 subordinate, during the term of when those power
 5 rights were obtained and today?
 6 A. During the -- our discussions with the
 7 State leading up to our suggested remarks, we
 8 reviewed in some detail how the State was
 9 administering the power rights.
 10 Q. And that is the first time it had
 11 really come to your attention that, in fact, there
 12 was a de facto type subordination that had been
 13 occurring?
 14 A. We -- actually, we had expected and
 15 believed that that was the case before then. And
 16 what we found out during the discussions with the
 17 State is that the rights to the 2700 cfs at
 18 Minidoka had not been subordinated and were not
 19 being treated as subordinated by the State.
 20 Q. And would that then result in the
 21 power losses through the years being actually just
 22 a lack of water and not subordination?
 23 A. Well, I think that's what it's all
 24 about. It's more about the water and the water
 25 supply than it is the water right provisions.

1 Q. Okay. So if I'm following you
 2 correctly, then, you're saying that the State said
 3 that the 2700 had never been subordinated, even
 4 though it provided for it in the contract?
 5 A. Well, let me -- subordinated to other
 6 rights.
 7 Q. Oh.
 8 A. Reclamation clearly -- Reclamation
 9 voluntarily and for compensation subordinated it's
 10 2700 cfs rights to upstream storage.
 11 Q. For irrigation?
 12 A. For irrigation.
 13 But that was the only subordination
 14 that took place.
 15 Q. Okay. And to your knowledge, there
 16 has never been any subordination to the other
 17 junior rights?
 18 A. That's correct.
 19 Q. And there's never been a subordination
 20 of the 2700 for anything other than storage for
 21 irrigation?
 22 A. That's correct.
 23 Q. Then do you have any personal
 24 knowledge of what this historical practice they're
 25 referring to is that would cause them to believe

1 that there had been, in fact, subordination to
2 other users?

3 A. I can't explain it. I don't know.

4 Q. So is it fair to say, then, in
5 negotiating a settlement with the State and making
6 your recommendation to the Special Master that you
7 were not considering that there's any historical
8 operation that caused you to want to subordinate;
9 is that right?

10 A. That's correct.

11 Q. And in fact, you opposed any
12 subordination earlier on in these proceedings, had
13 you not?

14 A. Yeah, we disagreed with the director's
15 report in that respect.

16 Q. Would you agree that to this point it
17 would appear to be a position by the State that
18 historical practices can in fact change a water
19 right?

20 A. I -- I don't -- I can't address that.
21 I don't know.

22 Q. You didn't ever stop and think about
23 that?

24 A. Well, I've thought about a lot of
25 things. But I'm under oath here to tell the

1 truth.

2 Q. Okay. And I appreciate that. You
3 recognize that the Palisades contracts have a
4 provision by which the contractee, or the space
5 holder we often refer to, has the authority under
6 that contract to pursue the enforcement of water
7 rights that were relied upon by that entity within
8 that contract?

9 A. That's correct.

10 Q. Did your consideration in entering
11 into the stipulation with the State take into
12 consideration the fact that the space holders had
13 an interest in those rights as well?

14 A. Well, the interest that the space
15 holders have in water rights and the rights
16 considered or contemplated in that clause that you
17 referred to are the rights to divert water for
18 irrigation.

19 Q. Where did you get that interpretation?

20 A. I can't tell you how. Oh, the -- I
21 believe there was a court case years ago where
22 Burley claimed that they had an interest or they
23 were the beneficial owner of the water rights for
24 power at Minidoka. And the decision was that
25 those rights were in the name of the United

1 States.

2 Q. But the contract doesn't define it
3 that way, does it?

4 A. The contract says what it says.

5 Q. Okay. Do you know any part of any
6 contract that says that, in fact, that
7 shareholders have or space holders, in this
8 instance, do not have any legal rights that they
9 are entitled to enforce under that provision of
10 their contract?

11 A. I'm not -- sorry.

12 Q. Okay. Let me restate it.

13 Do you believe that the provision
14 which recognizes the right of space holders to
15 enforce and protect rights is limited by any
16 document to rights for irrigation, other than your
17 court decree?

18 A. I can't -- I don't know.

19 Q. You're not familiar with any written
20 document that says you're going to enforce these
21 water rights so long as they're water rights for
22 irrigation?

23 A. Well, I wouldn't describe it that way.
24 And as I said, there is some indication that
25 irrigation entities do not have an interest in the

1 power rights.

2 Q. And do you recall the name of the
3 case?

4 A. I do not.

5 Q. Was that a case involving the
6 subordination of the right to other uses,
7 preventing therefore the generation of power?

8 A. I believe actually that issue was part
9 of the case, but I -- I'm not certain.

10 Q. Okay. Let me refresh your memory
11 about a case, and perhaps this is the one you're
12 thinking of, a case in which Burley Irrigation
13 District or Minidoka Irrigation District felt that
14 they had the right to determine what was going to
15 be done with the profits under the power rights
16 that the Bureau held.

17 A. I believe the case arose out of a
18 conflict to where the United States had made some
19 special arrangements with Minidoka Irrigation
20 District.

21 Q. Okay.

22 A. I believe that was it.

23 Q. I'm just about done, but let me go
24 real quick to make sure I don't forget something
25 to kick myself all over time for not mentioning.

1 We've kind of jumped around, and I apologize for
2 that.

3 Oh, another interesting thing within
4 the Palisades contracts is the source of power for
5 certain Reclamation projects. And we'll call them
6 divisions of the Minidoka project, and then I
7 think you called the Palisades a project,
8 Palisades project in which there were divisions
9 under that.

10 And in those contracts, some of them
11 refer to receiving their power, reserve power
12 under the Minidoka plant, and others provide
13 reserve power out of the Palisades plant, power
14 plant.

15 Are you familiar with those?

16 A. Actually, I'm not. I'm sorry.

17 Q. Okay. There's discussion in some of
18 the language that we talked about is talking about
19 releasing of stored water for power production.

20 And can you define to me what the
21 difference between that is and natural flow?

22 A. I would need something to refer to to
23 see what the provision was for that. I'm not --
24 it's not --

25 Q. Let me just ask you. Release storage

1 for power production means what to you?

2 A. Well, I don't know that I can
3 elaborate on the words themselves.

4 Q. I'll ask you yes or no. Does it mean
5 to you, if you're talking about a release of
6 stored water for power production, that the water
7 has been caught, contained in a reservoir for
8 storage, and now they're releasing it to generate
9 power with?

10 A. Yes, that probably would be the case.

11 Q. And in a natural-flow situation,
12 although it may flow through the reservoir, it
13 normally has not been maintained in the reservoir
14 as stored water, but it is allowed to flow through
15 as natural flow; is that --

16 A. That would be the construct, yes.

17 MR. LING: Okay. I think that's all I
18 have. Thank you.

19 THE WITNESS: Thank you.

20 MR. LING: Yes.

21 MS. McHUGH: Sure.

22 EXAMINATION

23 BY MS. McHUGH:

24 Q. Good afternoon, Mr. Rigby. I'm

1 Candice McHugh representing the ground water
2 districts. And I just wanted to follow up on some
3 questions by Mr. Simpson relating to Exhibit 25,
4 which I think was a Bureau letter regarding
5 late-season recharge.

6 A. Uh-huh.

7 Q. Does the Bureau believe that its water
8 rights preclude the use of storage water for
9 recharge purposes?

10 A. We -- no, we have not made that
11 determination, have not addressed that question.

12 Q. Has that been part of discussions at
13 the Bureau?

14 A. We've had discussions.

15 Q. And there hasn't been a decision made?

16 A. There's not a decision made.

17 Q. But it's in the process of being made?

18 A. Not necessarily.

19 Q. Does the Bureau believe its water
20 rights preclude the use of storage water for
21 mitigation purposes?

22 A. That decision has not been made.

23 Q. And is that part of discussions?

24 A. I suppose that's been discussed.

25 Q. And do you expect that a decision

1 would be made on that?

2 A. I do not.

3 Q. Does the Bureau have a position on the
4 use of its projects for recharge purposes?

5 A. We have not made a formal
6 determination about that.

7 Q. Is that part of an ongoing discussion?

8 A. The discussions have taken place, but
9 there's no decision that's targeted.

10 Q. Okay. And you're not expecting to
11 make a decision?

12 A. Not in the near future, at least.

13 Q. Do you believe it would be helpful to
14 add purposes such as recharge and mitigation to
15 your water rights, or would the Bureau object to
16 that if that were --

17 A. I think we would be very concerned
18 about that. At least initially, we'd want to look
19 very carefully at that.

20 Q. How would that decision be made at the
21 Bureau?

22 A. In consultation with the Department of
23 Justice and the field solicitor's office.

24 Q. And who would be the decision-maker at
25 the Bureau?

1 A. Probably the regional director.
 2 Q. And his name is?
 3 A. Bill McDonald.
 4 Q. I believe in response to a question by
 5 Mr. Simpson you said that the Bureau had an
 6 opinion on what parts of the Eagle decree that
 7 should be included in the SRBA.
 8 Do you remember that line of
 9 questioning, generally?
 10 A. Generally.
 11 Q. Okay. And one of them was
 12 specifically you believed that priority dates
 13 relating to the winter water savings contracts,
 14 that something along that line needed to be
 15 included in the decree?
 16 A. Yes.
 17 Q. Has the Bureau made a final decision
 18 on all the different elements or provisions from
 19 the Eagle decree that should be included in the
 20 SRBA?
 21 A. I believe that we're pursuing all of
 22 the issues that we think are necessary to be in
 23 the decree.
 24 Q. And you're pursuing them in these
 25 subcases?

1 A. Separate subcases.
 2 Q. Okay. What do you mean by "separate
 3 subcases"?
 4 A. Well, they're not all in the same
 5 place. They're addressed in various places in the
 6 SRBA.
 7 Q. So in addition to these historic
 8 practices subcases that are interpreting the Eagle
 9 decree, you think there's other subcases that may
 10 also --
 11 A. There's a question about what the
 12 priority date for the reservoir fill is. That's
 13 an issue that's being addressed in a separate
 14 area.
 15 Q. Okay. Is there any documentation that
 16 the Bureau has on what issues or what elements of
 17 the Eagle decree it believes should be included in
 18 the SRBA?
 19 A. I don't believe there is.
 20 Q. Just so I'm clear, when you said the
 21 priority dates for -- did you mean refill or
 22 second fill?
 23 A. The reservoir storage rights, the
 24 first -- the only rights that we've got.
 25 Q. And when you said there was separate

1 subcases where the priority dates -- I didn't hear
 2 the answer clearly.
 3 A. I may have misspoken.
 4 Q. Okay.
 5 A. I don't know that there were separate
 6 subcases.
 7 Q. Okay.
 8 A. Each of these discrete issues is being
 9 pursued in its own forum.
 10 Q. Okay. Following up on a couple
 11 questions by Mr. Ling. He asked you some
 12 questions about the Bureau demanding water to fill
 13 its power right at Minidoka.
 14 What is your understanding of when the
 15 power rights at Minidoka are not filled?
 16 A. Well, there probably is more than one
 17 answer to that question.
 18 Q. Uh-huh.
 19 A. At one level, when less than 2700 cfs
 20 is going through the power plant. But then we've
 21 got to ask ourselves why, and assuming we're --
 22 you know, we're storing the additional water, then
 23 those rights are still being met, satisfied at
 24 least.
 25 Q. And what is your understanding of when

1 less than 2700 cfs is going through the power
 2 plant, generally? Is that during the irrigation
 3 season or during the nonirrigation season?
 4 A. During the storage season.
 5 Q. And to you, the storage season means?
 6 A. October 1 through -- it's defined in
 7 the contracts. It's the springtime.
 8 Q. To your knowledge, the Minidoka Power
 9 Plant, have all of the water rights for Minidoka
 10 Power Plant ever been fully utilized all at one
 11 time? Do you know?
 12 A. I don't know for a fact. I assume
 13 yes.
 14 Q. Do you believe the Bureau has
 15 documentation that would answer that question?
 16 A. I would expect so.
 17 Q. And what kind of documentation would
 18 you expect there to be?
 19 A. Well, it would be flow records.
 20 MS. McHUGH: I don't have any further
 21 questions. Thank you.
 22 THE WITNESS: Thank you.
 23 MR. STANISH: Do you want to go last?
 24 MR. TUCKER: Do you want to go?
 25 MR. STANISH: I just got a couple.

1 MR. TUCKER: I don't care.

2 EXAMINATION

3 BY MR. STANISH:

4 Q. This is David Stanish, for the record.

5 Rich, I just had a couple questions
6 about the power-loss provisions of the Palisades
7 contracts.

8 Who were the beneficiaries of those
9 payments in 1968 and '69?

10 A. Well, it's actually the Minidoka Power
11 Plant that is the beneficiary of those payments.

12 Q. Okay. And where did the money go at
13 that point in time?

14 A. Well, the -- the money goes to the
15 United States. And I'm afraid I don't know enough
16 about the accounting system to give you a direct
17 answer. The concept is it's supposed to go to the
18 power plant, to the -- to offset the costs
19 associated with the power plant.

20 Q. And those members of the reserve power
21 pool that benefit in some way from these payments,
22 who does that include?

23 A. There's -- I -- there's a number --
24 there are a number of irrigation districts
25

1 throughout the state of Idaho that are in the
2 southern Idaho pool.

3 Q. Uh-huh.

4 A. They include, I believe, Black Canyon,
5 you know, in the Boise Basin as well as in the
6 Upper Snake area. And the number 11 sticks in my
7 mind, but -- I think that's the number, but I may
8 be wrong on that. 11 districts.

9 Q. It's more than just the Minidoka
10 Irrigation project?

11 A. Yes, it is.

12 Q. Okay. A question Mr. Ling just asked,
13 I just want to clear it up for the record. You
14 said something different to Mr. Simpson.

15 He asked whether it was your
16 understanding that there had been no subordination
17 to anything other than storage for irrigation.
18 And I believe you said yes.

19 A. I don't think I meant to say yes.

20 Q. What did you mean to say?

21 A. Well, we better make sure we got the
22 question right.

23 Q. Okay. When you're talking about
24 subordination of the 2700 cfs historically, was it
25 to storage in the reservoir system in general or

1 storage or reservation storage of water for a
2 specific purposes?

3 A. We've considered it to be storage,
4 period.

5 Q. Okay.

6 A. We have not tried to separate out the
7 purposes, if you will.

8 Q. Okay. That's what I was looking for.

9 A. Yeah.

10 Q. Okay. I believe Ms. McHugh just asked
11 you a question of what your understanding of what
12 the term "storage season" meant.

13 And what was your answer to that?

14 A. It's in the contracts. The contracts
15 define the storage season.

16 Q. So is it your understanding that the
17 limitation that you're posing on summary judgment
18 would only apply during those times as specified
19 in the contract?

20 A. Well, that's the only time it makes a
21 difference, to my knowledge, because in the --
22 during the irrigation season, the downstream water
23 rights are pulling more than that amount of water
24 through the power plant.

25 Q. Uh-huh. But you are aware that

1 sometimes during the, quote/unquote, "irrigation
2 season" there is storage accruing to the
3 reservoirs?

4 A. Yes.

5 Q. And you believe that would continue to
6 occur?

7 A. Let's make sure I understand. Could
8 we start over again? During the storage season?

9 Q. Right. Or during the irrigation
10 season.

11 A. During the irrigation season? During
12 the irrigation season, at the tail end of the
13 season and sometimes -- and at the beginning of
14 the season, there may be -- the reservoirs may be
15 in priority.

16 MR. STANISH: Okay. I think that's all I
17 have. Thank you.

18 MR. TUCKER: Could we take five minutes?

19 THE WITNESS: Okay.

20 (Recess.)

21 EXAMINATION

22 BY MR. TUCKER:

23 Q. My name is Jim Tucker, for the record,
24 here for Idaho Power Company.
25

1 Mr. Rigby -- Rich, if I can call you

2 Rich, if you don't mind?

3 A. I don't mind.

4 Q. I've got a few questions. Again, as
5 Mr. Ling said, I will try not to go over plowed
6 ground, so to speak, and be quick as I can.

7 Just for clarification for my purposes
8 and the record, you indicated that you've been in
9 the northwest division since 1978.

10 Have you spent all your time in Boise?

11 A. Yes.

12 Q. I wasn't clear on what your position
13 is with the Bureau of Reclamation.

14 A. Well, my title is special assistant to
15 the regional director.

16 Q. Okay. So in that context you answer
17 to --

18 A. Bill McDonald.

19 Q. -- Bill McDonald?

20 Okay. I'm going to start by referring
21 you to the status report that's part of
22 Mr. Jarvis' affidavit, I think Exhibit A. I just
23 had a couple of questions about that.

24 A. Okay.

25 Q. First of all, beginning on page 2,

1 you've testified here today that there were
2 various measures which you believe to be
3 necessary, I guess, for definition of these water
4 rights that we're talking about today.

5 And I notice on page 2 that there's, I
6 think, nine measures that are referred to there
7 that, as I read this document, were, at least at
8 the time of the Palisades authorization, the
9 Bureau thought was necessary to have resolved
10 before Palisades could go forward; is that
11 correct?

12 A. Well, I kind of think, Jim, that
13 these -- this really identifies the universe
14 that -- of the compromise. For example, if you'll
15 look at item 6, that's talking about the
16 distribution of American Falls' space. It was
17 uncontracted storage in American Falls.

18 Q. All right.

19 A. And part of the deal was who gets that
20 extra space, that uncontracted space. So I look
21 at the nine items that are listed as sort of
22 bracketing the entire compromise that was made at
23 the time.

24 Q. Okay. Do you know or can you tell me
25 which of those nine items that are identified in

1 that paragraph are referenced or were part of the
2 Eagle decree?

3 A. Well, I can tell you probably some
4 that were, maybe. I'll try to.

5 Q. Okay.

6 A. No. 1, elimination of winter water
7 use.

8 No. 2, the curtailment of the use of
9 water for power at Minidoka Dam.

10 3 is the coordinated operation of the
11 reservoir system, and I don't know the answer to
12 that. I don't know that it's in there.

13 Q. Okay.

14 A. Uniform storage holdover provisions, I
15 don't know that that's in there.

16 Permitted exchange of contract storage
17 rights between American Falls and Jackson, that is
18 in the decree.

19 6, we've talked about.

20 7, the recognition of existing rights
21 to the diversions made during periods of flood
22 flow, that's in the Eagle decree.

23 And 8, the commitment of Palisades
24 users to allow the reservoir to be pooled with the
25 next 300,000 acre-feet of storage added to the

1 system, I don't know the answer to that one, and
2 where that is today.

3 Q. Okay.

4 A. And 9, the clarification of storage
5 and diversion rights in connection with American
6 Falls Reservoir, to my knowledge, that is the
7 AFRD 2 issue, and that is in the decree.

8 Q. Okay. Okay. Now, when you at
9 Reclamation and others at Reclamation looked at
10 the Eagle decree, which I assume at some point in
11 time, some portion of time you looked at the Eagle
12 decree to determine what should be included in
13 these water rights we're talking about today from
14 that decree, did you look at anything in addition
15 to these nine items, or did you look at the Eagle
16 decree? Or how did you go through that process?

17 A. Well, this is just about the power
18 rights, the hydropower rights.

19 Q. Right.

20 A. Separately Reclamation has looked at
21 its contracts and all of its water rights and so
22 on and so forth in an attempt to make sure that
23 things match up, that the water rights and the
24 contracts and the authorizations all match up.

25 Q. Okay. So by that am I to understand

1 that there are provisions of the Eagle decree that
2 you will seek to have placed in other water rights
3 at Reclamation?

4 A. We are pursuing, for example, the
5 priority dates of the reservoir storage rights.
6 Those are -- we think those are necessary to be in
7 the decree.

8 Q. Okay. Maybe this was asked by someone
9 else: Do you have a list anywhere of things that
10 you believe need to be transposed from the Eagle
11 decree into other decrees?

12 A. I don't have a list. I know people
13 have worked on it. I haven't worked on it. I
14 don't believe there's a list.

15 Q. Do you have an understanding yourself
16 as to what either Reclamation believes or you
17 yourself believe should be transposed from the
18 Eagle decree into other decrees?

19 A. My understanding that it's being done.
20 I don't have personal knowledge of exactly what.

21 Q. Okay. Now, if I could take you to
22 page 6 of this same report, status report.
23 Mr. Simpson asked you some questions about the
24 paragraph which is immediately below the last
25 paragraph. It begins with "It was recognized in

1 Q. Okay. If I misstate anything, please
2 correct me, because I don't want to misstate.

3 A. Well, the thing that I struggle with
4 is the concept of bind. And I realize those are
5 in -- but to me it's not just -- the space holders
6 were bound by the contracts.

7 Q. Right.

8 A. The issue was what about third
9 parties' interests in the separate contracts.

10 Q. Okay.

11 A. So to me that's the -- I don't look at
12 it personally as binding people. The other people
13 I look at it as making sure they didn't have
14 objections that weren't expressed.

15 Q. Okay. I understand when you were
16 testifying your understanding was you were
17 attempting to flush out these objections.

18 A. Yes.

19 Q. So that they wouldn't come up later;
20 is that correct?

21 A. Yes.

22 Q. Okay. And in that context you not
23 only wanted to make sure you were flushing out
24 third-party objections to the administration that
25 you were putting together through those contracts,

1 the negotiations."

2 A. Okay.

3 Q. And I guess when I'm referring to this
4 report, I should know what exhibit it is for the
5 record, but I don't.

6 MR. SIMPSON: It's not an exhibit.

7 MR. TUCKER: It's not an exhibit?

8 MR. SIMPSON: No.

9 MR. TUCKER: Okay.

10 Q. At any rate, this status report is an
11 attachment to Mr. Jarvis' affidavit, which is part
12 of your motion for summary judgment, and it's
13 Attachment A to that affidavit.

14 Now, I believe you testified in
15 response to Mr. Simpson's questions that the
16 proceeding that resulted in the Eagle decree --
17 and we looked at some letters from Mr. Burpee --
18 was, to your understanding, necessary for the
19 purposes of binding, making sure people were bound
20 to those contracts at that time so that there
21 wouldn't be third party or intercontract disputes
22 when you were trying to essentially resolve the
23 administration of how Palisades was going to be
24 worked into the system; is that correct?

25 A. That's essentially correct.

1 but also other contract holders who might object
2 to someone else's contract; is that fair?

3 A. Yes, I think so. Yes.

4 Q. Okay. Do you have an understanding
5 yourself of what happens to the Eagle decree after
6 subsequent decrees are entered in this court, the
7 SRBA court, with respect to these various water
8 rights?

9 MR. GEHLERT: I'll object. It calls for a
10 legal conclusion.

11 MR. TUCKER: Yeah, it does call. I'm
12 asking for his understanding.

13 THE WITNESS: Well, I don't have an
14 understanding.

15 Q. (BY MR. TUCKER): You don't know?

16 A. No.

17 Q. Okay. You testified that, again, in
18 your view, that the provisions of the Eagle decree
19 perhaps are not necessary to move forward into
20 this decree because they've essentially set the
21 status quo, and that we're now operating under
22 that status quo; is that --

23 A. That's correct.

24 Q. Is that a correct representation?

25 A. That's correct.

1 Q. If it were the case -- and I'll give
2 you a hypothetical -- if it were the case that by
3 not transposing the provisions of the Eagle decree
4 into this decree, that the people that Reclamation
5 sought to bind in that previous proceeding were
6 not then bound, would your view be different?

7 A. I'd have to have a better
8 understanding. I would need to talk that through,
9 and it's kind of a hypothetical question. And
10 I -- the answer is maybe.

11 Q. Okay. I jumped off course here. But
12 referring back to the paragraph here that we've
13 talked about, the second to last paragraph on
14 page 6 of Exhibit A to Mr. Jarvis' affidavit, as I
15 read that paragraph, one of the other
16 considerations for the Eagle decree was to ensure
17 that the distribution or administration of water
18 in the state was essentially inconsistent with
19 those contracts that you had negotiated and placed
20 in the Eagle decree.

21 Do you agree with that?

22 A. You know, I don't think I do. Let
23 me -- I -- I think the -- as I said earlier, the
24 Section 8 of the Reclamation Act of 1902 basically
25 puts administration of water rights in the hands

1 of the State.

2 That's a very important provision for
3 Reclamation. We understand it's there, and we
4 understand we have to live by it.

5 We certainly want and expect the State
6 to treat Reclamation fairly, as they do other
7 holders of water rights. But I don't think
8 Reclamation has attempted to tell the State how to
9 do its business.

10 Now, with respect to the storage
11 reservoirs and the specific operations, that's
12 where we had to get those issues resolved. For
13 example, you know, the best one, I keep going back
14 to it, is the winter water savings clauses that
15 gave preference storage to the people that
16 participated. Those kinds of things affected the
17 State's administration, and we wanted to make sure
18 that was there.

19 Q. Okay. Is that --

20 A. That's it.

21 Q. Okay. I missed the last series of
22 depositions, but I was present at Mr. Olenichak's
23 question, and I asked this question there because
24 I don't quite, and still don't understand. And he
25 wasn't much help. I asked him whether he knew

1 under the Eagle decree what the common plan was.
2 And he professed not to have heard of the common
3 plan, and I don't have any reason not to believe
4 that.

5 But can you explain to me under the
6 Eagle decree what the common plan is?

7 A. I think I can.

8 Q. Wonderful.

9 A. But I have to say in jest that I'm a
10 little chagrined to say that it looks like Bill
11 Burpee was the guy that came up with the term.

12 Q. It's a Reclamation term.

13 A. Thanks so much.

14 MR. STANISH: Argumentative.

15 THE WITNESS: But the common plan or the
16 elements of the plan, it's not a mysterious black
17 box, it's just what was contemplated in the
18 contracts. And I think we already went through it
19 with the nine elements.

20 Q. (BY MR. TUCKER): The nine elements?

21 A. That, to me, is the common plan.

22 Q. Is there anything in addition to those
23 nine elements that you would consider, that
24 Reclamation would consider as part of the common
25 plan?

1 A. I don't think so.

2 Q. Okay. And the common plan, again, in
3 my, you know, simplistic characterization was a
4 plan or methodology for operating the Snake
5 reservoirs I want to say in unison, that's not
6 correct, but collectively?

7 A. As a unit, yes.

8 Q. Okay. Going back to, again, the
9 paragraph on page 6, and I'll read to you what, at
10 least in my view, gives the indication that there
11 was some at least desire to have the Eagle decree,
12 or at least part of the reason for Eagle decree
13 was to ensure that the State administered in a
14 manner consistent with the common plan.

15 That paragraph reads -- and I'll start
16 from the beginning -- "It was recognized in the
17 negotiations that led to the water savings and
18 exchange arrangements necessary for the
19 construction of Palisades Reservoir that those
20 arrangements would require adjustments in the
21 court decrees that govern the distribution of
22 water."

23 Now, I'm assuming the distribution of
24 water is the same as the administration of water.
25 So as I read that paragraph, again, in my view,

1 one of reasons for the Eagle decree was to
2 solidify, bind the State, so to speak, that the
3 water would be administered consistent with the
4 common plan.

5 Now, after reading that, do you still
6 have a different view of that?

7 A. I haven't read anything in what I've
8 read that says that Reclamation had concerns or
9 issues with respect to how the State would
10 administer water rights, except the specific
11 things that we've talked about already.

12 Q. Okay. And maybe we're talking past
13 each other here. I'm not trying to get you to say
14 or indicate that Reclamation had a dispute with
15 the State. It's a matter of integrating the
16 common plan into the administration of the Snake
17 River.

18 A. And I have seen -- I just haven't seen
19 anything -- and I've read a fair amount -- that
20 says that Reclamation was trying to lock in
21 administration, water rights administration, or
22 anything like that. I just haven't seen any
23 discussion on that.

24 Q. Yeah. Okay. Well, being unable to
25 convince you of that, I'll move on.

1 Now, in one question Mr. Simpson
2 asked, I think he asked you about the project's
3 authorization, and you, as I saw it, kind of put
4 up a stop sign and said "It is what it is, and
5 we're not here to redefine the project
6 authorizations." And I don't say that we are.

7 But by that I take it that there's no
8 intent by the Bureau of Reclamation or the United
9 States through the SRBA and their claims in the
10 SRBA to in any way change the project's
11 authorization?

12 A. That's correct.

13 Q. And in fact, I would, you know, ask
14 whether or not it's your view that the SRBA could
15 change the project authorization?

16 A. Well, I don't -- I think we'd have a
17 real problem if that were the case.

18 Q. And if we could look at this
19 paragraph 24, which I'm sure you knew I would get
20 to.

21 A. Okay.

22 Q. I understand from your testimony here
23 today that -- I'll give you a chance to get it.
24 I'm sorry.

25 A. It's okay. All right.

1 Q. I understand from your testimony here
2 earlier today that you interpret the language of
3 the first sentence, third line, I think, at least
4 on my version, where it talks about "...pass
5 through enough water to satisfy existing diversion
6 rights," in your view those are diversion rights
7 of the Twin Falls North Side Canal Company?

8 A. Yes, sir.

9 Q. Which I understand you've indicated
10 you do not believe they're claimed in the SRBA?

11 A. Correct.

12 Q. And for that reason it was concluded
13 by Reclamation not to include that phrase in the
14 negotiated language which is now in 217, 218?

15 A. Correct.

16 Q. Okay. Right below that it talks about
17 includes, it has an "and," and it says,
18 "...certain power rights below Milner Dam."

19 And that, as I understand it in your
20 view, reflects an intent or at least refers to the
21 1923 contract --

22 A. Correct.

23 Q. -- between Idaho Power and the Bureau
24 of Reclamation?

25 A. Yes.

1 Q. And my understanding, again, is that
2 the reason that was not included in the remark
3 that is being currently proposed to the Court is
4 because in the view of Reclamation that 1923
5 contract was changed in the 1976 rebuild of
6 American Falls Dam?

7 A. Correct.

8 Q. Okay. Now, for the record, just to
9 make things clear, you understand, I'm sure, and
10 would acknowledge that Idaho Power Company and the
11 Bureau of Reclamation, United States, have a
12 dispute with respect to that issue pending right
13 now in a federal court in Washington, D.C.?

14 A. That's correct.

15 Q. Okay. And while I understand the
16 position of the United States, you understand the
17 position of Idaho Power, that that contract is in
18 fact still fully enforceable, so we have our
19 disagreement about that issue?

20 A. We do.

21 Q. Okay. Now, if the federal court
22 determines that Idaho Power is right as opposed to
23 Reclamation is right, would your opinion change
24 that whether or not that reference or a reference
25 to that '23 contract may be necessary in these

1 particular water rights?

2 A. Well, I think -- I guess I don't know,
3 because in all cases what this remark is
4 attempting to do is describe the water rights at
5 Minidoka.

6 Now, if there's an obligation upstream
7 to deliver water past Minidoka, that's -- that can
8 exist independent of the power right at Minidoka.

9 Frankly, if there are natural-flow
10 diversionary rights below Minidoka that are prior
11 in time to the Minidoka right, they can exist
12 independent of that and still be honored. So I --
13 so I guess the answer is I don't know.

14 Q. Okay. I'm not quite as well organized
15 as Mr. Simpson is here.

16 Would you agree with me, again looking
17 at paragraph 24, article 24, whatever it is in the
18 Eagle decree that deals with these particular
19 power rights, that the diversion rights that are
20 referenced, which we talked about that made
21 reference to Twin Falls North Side, and the power
22 rights, which references the 1923 contract, in the
23 context of this paragraph, a part of the
24 definition of what additional water is?

25 A. Yeah, I think so, if I understand your

1 reasonable, safe -- reasonable security that the
2 reservoir is going to fill, and then add to that
3 additional releases to the power company," in
4 other words, make -- you know, reduce the
5 likelihood of fill. So that is the whole story.

6 Q. But that's kind of the underlying
7 premise?

8 A. Yeah.

9 Q. And I understand there's tension
10 there.

11 A. Yeah.

12 Q. There's no question there's tension in
13 this whole -- you know, tension in the whole room
14 here.

15 A. Yeah.

16 Q. Okay. But that is the additional --
17 at least the historic premise of those --

18 A. That is right.

19 Q. -- in that context?

20 A. Yes, that is right.

21 Q. Yes?

22 A. Yes.

23 Q. Okay. You spoke to Mr. Simpson about
24 what storable water is. And I understand what
25 you're saying, because obviously Idaho Power does

1 question correctly.

2 Q. Well, if you need me to clarify it --

3 A. Please do.

4 Q. -- ask me to clarify.

5 A. Please do.

6 Q. As I read this paragraph, what this
7 paragraph is saying is there are certain
8 responsibilities or obligations that the Bureau
9 has under contract.

10 A. Right.

11 Q. And that it's the secretary's
12 discretion with respect to the release of
13 additional water, is the water over and above
14 that --

15 A. Right.

16 Q. -- those underlying responsibilities?

17 A. Well, the implication to that is that
18 in a year when the obligations, shall we call
19 them, the companies' asserted rights at Twin Falls
20 are not being met under the '23 contract, is by
21 definition a year when Reclamation is concerned
22 that the reservoirs may not fill.

23 So what that, in a sense, is doing is
24 saying "Okay, Reclamation, you set the level of
25 flows that you believe were necessary to provide a

1 have a primary storage right of around 45,000
2 acre-feet in American Falls.

3 A. Right.

4 Q. And we believe, anyway, the company
5 believes it's on par with other irrigation storage
6 within the reservoir.

7 A. So does Reclamation.

8 Q. I appreciate that. Storable water,
9 though, in the context of this remark is intended
10 to be storable water in Reclamation reservoirs.

11 And I guess I take that from the
12 definition of reservoir system below --

13 A. I believe so.

14 Q. Okay. If you'd give me just two
15 seconds here.

16 A. Yeah.

17 Q. As you interpret the proposed
18 provision for water rights 217 and 218, and the
19 reference in that provision where it says
20 "Accordingly, except as determined by the
21 Secretary," in your view as a representative of
22 Bureau of Reclamation, does that place sole
23 discretion with the Secretary of Interior with
24 regard to making that determination of whether or
25 not additional water is available?

1 A. I think this whole discretion is in
2 how to operate the reservoirs.

3 Q. And that's left with the Secretary of
4 Interior?

5 A. Somebody has to be responsible. And
6 that's the Secretary.

7 MR. TUCKER: Okay. I think I'm finished.
8 Thank you.

9 THE WITNESS: Thank you.
10 (Discussion.)

11 MR. GEHLERT: Let me just ask a couple of
12 clarifying questions.

13 MR. TUCKER: This is going to open a whole
14 rebuttal.

15 MR. SIMPSON: Do you want to be done?

16 MR. GEHLERT: I've got an hour and a half.

17 MR. SIMPSON: We'll be done by 6:00.

18 EXAMINATION

19 BY MR. GEHLERT:

20 Q. David Gehlert on behalf of Reclamation
21 asking a question of my own witness just for
22 clarification sake.

23 Mr. Tucker asked you a number of
24 questions about the reference to this common plan.
25

1 A. Okay.

2 Q. Just to make the record clear, this
3 concept of the common plan, we're not pulling it
4 out of the air. Page 19 of that document.

5 A. Thank you. All right.

6 Q. I'm going to read the paragraph 4 of
7 that, which was part of the 1968 decree signed by
8 Judge Ward. "That the contracts entered into
9 between various of the parties Plaintiff and the
10 United States of America, Bureau of Reclamation,
11 as the same have been amended and modified in
12 connection with the Palisades project and other
13 projects, were intended to be, and are, binding
14 upon all persons claiming rights to the use of
15 waters of the Snake River and its tributaries,
16 above Milner Dam, and constitute a common plan for
17 the administration of the Snake River."

18 That's in the Eagle decree?

19 A. That's what it says.

20 MR. TUCKER: Okay. That's it. Okay.

21 (Deposition concluded at 2:22 p.m.)

22 (Signature requested.)

23 -oOo-
24
25

1 Is the term "common plan" a term that
2 is used in your office?

3 A. No, it's not. It's a term of art that
4 was used there, and it's -- that's really the only
5 reference that I've seen to it.

6 Q. What does Reclamation rely on for
7 guidance in making decisions about how to operate
8 the reservoirs?

9 A. The contracts, but mainly the data,
10 the reservoir carryover, the system flows, and
11 things like that.

12 MR. GEHLERT: That's it.

13 MR. TUCKER: I have a follow-up.

14 MR. GEHLERT: I knew I let the genie out of
15 the box.
16

17 FURTHER EXAMINATION

18 BY MR. TUCKER:

19 Q. Mr. Rigby, Rich, Mr. Simpson asked you
20 or referred you to the Eagle decree, which I guess
21 is Exhibit 2 --

22 A. Uh-huh.

23 Q. -- and to paragraphs 4 and 5 of the
24 Eagle decree. I don't know if you want to look at
25 those again. You certainly can if you'd like.

Exhibit F

Travis Thompson

From: Kent Fletcher [wkf@pmt.org]
Sent: Monday, November 02, 2009 10:23 AM
To: Travis Thompson
Subject: [Fwd: Deposition of State of Idaho]

----- Original Message -----

Subject: Deposition of State of Idaho

Date: Thu, 15 Oct 2009 08:33:26 -0600

From: Stanish, David <david.stanish@ag.idaho.gov>

To: Travis Thompson <tl@idahowaters.com>, Baxter, Garrick <garrick.baxter@idwr.idaho.gov>, John Simpson <jks@idahowaters.com>, Candice M. McHugh <cmm@racinelaw.net>, Gehlert, David (ENRD) <David.Gehlert@usdoj.gov>, <tarkoosh@capitolawgroup.net>, Becky J. Harvey <bjh@racinelaw.net>, Williams, Ray <Raymond.Williams@idwr.idaho.gov>, <SarahK@white-jankowski.com>, <jo.beeman@beemanlaw.com>, Jerry Rigby <jerry.rigby@gmail.com>, <rharris@holdenlegal.com>, Kent Fletcher <wkf@pmt.org>

This communication and its attachments are confidential and/or privileged. If you have received this communication in error, please immediately read the "NOTICE" appended below.

All:

Please take notice, the State of Idaho has designated David R. Tuthill Jr., former IDWR Director, and Gary Spackman, interim IDWR Director, as deponents for the State of Idaho in the Minidoka and Palisades power right subcases pursuant to IRCP 30(b)(6). Mr. Tuthill will be prepared to answer questions regarding the director's reports, supplemental director's reports, and remarks pending on summary judgment, all of which were considered during Mr. Tuthill's tenure as IDWR Director. Questions related to the future administration of water rights should be directed to Mr. Spackman.

In order to accommodate the schedules of the several deponents of the State and IDWR, I propose the following:

Depositions (in Boise):

Thursday 22 at 9:00am - David Tuthill
Thursday 22 at 1:30pm - Lyle Swank
Friday 23 at 9:00am - Gary Spackman
Tuesday 27 at 9:00am - Rich Rigby

Amendments to Briefing Schedule:

November 3 - Response briefs due, served by email
November 10 - Reply briefs due, served by email

Due to the time restraints before us, I will assume that the parties do not have any objections to this proposal unless I hear otherwise this morning.

Sincerely,

David I. Stanish
Deputy Attorney General

Natural Resources Division
Office of Attorney General
700 West State Street
Joe R. Williams Building, Second Floor
P.O. Box 83720
Boise, Idaho 83720

Phone: (208) 334-4549
Facsimile: (208) 854-8072
Email: david.stanish@ag.idaho.gov

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