

October 6, 2008.

6. Attached hereto as **Exhibit 4** are true and correct copies of excerpted pages of the transcript of the Deposition of Lyle Robert Swank, taken in this subcase on October 7, 2008.

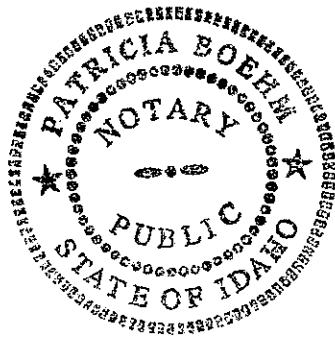
7. Attached hereto as **Exhibit 5** are true and correct copies of excerpted pages of the transcript of the Deposition of Ronald Dean Carlson, taken in this subcase on October 7, 2008.

Further your affiant sayeth naught.

DATED this 22nd day of September 2010.

Michael C. Orr
MICHAEL C. ORR

SUBSCRIBED AND SWORN to before me this 22nd day of September 2010.



Patricia Boehm
Notary Public for Idaho
Residing at: Boise
My commission expires: 2/5/16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of SEPTEMBER, 2010, I caused a true and correct copy of the foregoing to be filed with the Court and served on the following parties by the indicated methods:

Clerk of the SRBA Court 253 Third Avenue North P.O. Box 2707 Twin Falls, Idaho 83303-2707	☐ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: ddelaney@srba.state.id.us
American Falls Reservoir District No. 2 Represented by: C. Thomas Arkoosh Capitol Law Group, PLLC 301 Main St. PO Box 32 Gooding, ID 83330	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: ikeppler@capitollawgroup.net; hobdeycraig@hotmail.com
Blackfoot Irrigation Co. Fremont-Madison Irrigation United Canal Co. Represented by: Jerry R. Rigby 25 N. 2nd E. PO Box 250 Rexburg, ID 83440-0250	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: jrigby@rex-law.com
Independent Water Users of Jefferson Irrigation Dist. Montevieu Canal Co. Mud Lake Water Users Inc. Producers Irrigation Co. Represented by: Robert L. Harris 1000 Riverwalk Dr., STE 200 PO Box 50130	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: rharris@holdenlegal.com

Idaho Falls, ID 83405	
Aberdeen American Falls Bingham Ground Water District Bonneville Jefferson Ground Carey Valley Ground Water Dist. Jefferson Clark Ground Water Madison Ground Water District Magic Valley Ground Water Dist. North Snake Ground Water Dist. Represented by: Randall C. Budge 201 E. Center, STE A2 PO Box 1391 Pocatello, ID 83204-1391	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: cmm@racinelaw.net
United States of America USDI Bureau of Reclamation Represented by: US Department of Justice Environment & Natural Resources 550 W. Fort St., MSC 033 Boise, ID 83724	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: David.Gehlert@usdoj.gov
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 44449 Boise, Idaho 83720-4449	☐ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: ☒ Not Applicable
Director of IDWR PO Box 83720 Boise, ID 83720-0098	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail:


 MICHAEL C. ORR

1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
2 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS
3

4 In Re SRBA) Subcase No.

5 Case No. 39576) 01-00006

6 _____)
7
8
9
10
11
12

13 DEPOSITION OF GARY SPACKMAN

14 July 28, 2010
15
16
17
18
19

20 REPORTED BY:

21 COLLEEN P. KLINE, CSR No. 345

22 Notary Public
23
24
25

EXHIBIT NUMBER
/

THE DEPOSITION OF GARY SPACKMAN was taken on behalf of American Falls Reservoir District No. 2, at the offices of Capitol Law Group, located at 205 N. 10th Street, 4th Floor, Boise, Idaho, commencing at 9:00 a.m., on July 28, 2010, before Colleen P. Kline, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For American Falls Reservoir District No. 2:
Capitol Law Group, PLLC
BY MR. C. THOMAS ARKOOSH
MR. ISAAC D. KEPPLER
MR. CRAIG D. HOBDEY
205 North 10th Street, 4th Floor
Boise, Idaho 83702
For the State of Idaho:
Office of the Attorney General
BY MR. MICHAEL C. ORR
700 West State Street, 2nd Floor
Boise, Idaho 83720

APPEARANCES (Continued):

For United States of America and Bureau of Reclamation:
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
BY MR. DAVID W. GEHLERT (via telephonic speaker-device)
1961 Stout Street, Suite 800
Denver, Colorado 80294
For Idaho Ground Water Appropriators, Inc.:
Racine, Olson, Nye, Budge & Bailey, Chtd.
BY MS. CANDICE M. MCHUGH
101 S. Capitol Boulevard, Suite 208
Boise, Idaho 83702
For the IDWR:
Office of Attorney General
Natural Resources Division
Water Resources Section
BY MR. GARRICK L. BAXTER
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

APPEARANCES (Continued):

For the Upper Water Users:
BY MR. JERRY RIGBY (via telephonic speaker-device)
25 N. 2nd E.
P.O. Box 250
Rexburg, Idaho 83440-0250

I N D E X

TESTIMONY OF GARY SPACKMAN	PAGE
Examination by Mr. Arkoosh	6
Examination by Ms. McHugh	52
Examination by Mr. Orr	54
Further Examination by Mr. Arkoosh	73
Further Examination by Mr. Orr	87

E X H I B I T S

DESCRIPTION	PAGE
12 - Copy of Letter from State of Idaho to Mr. Rosholt, Dated 11/16/1966	39
13 - Copy of Letter to H. C. Eagle, Dated 11/23/1966	39
14 - Copy of Letter to Department of Interior to Mr. Rosholt, Dated 11/28/1966	39
15 - Copy of Memorandum to Mr. Allred from Mr. Dunn	47
16 - Copy of Hand Drawn Timeline	74

1 conclusion is that it would be characterized as
2 natural flow. I don't know that the language of
3 the Eagle Decree specifically states that it is
4 prior to May 1st. That's the logical conclusion,
5 is that it would be natural flow.

6 Q. And doesn't that same logical
7 conclusion follow if, in fact, Kenneth Dunn is
8 correct, if American Falls Reservoir fills after
9 April 30th, if Kenneth Dunn is; correct?

10 A. That's one way to interpret the
11 language, yes.

12 Q. Wouldn't it necessarily follow if
13 Kenneth Dunn is correct?

14 A. Yes.

15 MR. ARKOOSH: Gary, I think I'm done.
16 I would like to check with co-counsel here.

17 (A recess was had.)

18 Q. (BY MR. ARKOOSH) Gary, I've got one
19 final question.

20 A. Okay.

21 Q. Is any different recommendation
22 intended in the SRBA by the Department than the
23 current one pending, if you know?

24 A. As I said before, I'm not satisfied
25 with the current recommendation. And rather than

1 try to rewrite the recommendation, my inclination
2 is to change the director's recommendation to be
3 a recommendation of the exact language verbatim
4 from the Eagle Decree. Giving the Corps and the
5 parties the opportunity to work with the language
6 and the presumptions that you've referred to,
7 Mr. Arkoosh.

8 Q. So I guess that's expanded it to two
9 questions, if you'll forgive me.

10 A. Yes.

11 Q. Then that would leave us then with the
12 opportunity to have the court tell us what
13 happens prior to May 1; is that the intention?

14 A. That's correct.

15 Q. Okay.

16 A. And I want you to know, I really have
17 no -- don't feel I have any stake in this. What
18 I want is the court to give us direction as to
19 what should be done.

20 MR. ARKOOSH: Thank you, Gary. Very
21 much. Thank you for your candor, too.

22 MS. McHUGH: I have one or two
23 follow-up questions. Does it make sense for me
24 to ask them before they do?

25 MR. ARKOOSH: Jerry, are you still with

1 us?

2 MR. RIGBY: I am.

3 MR. ARKOOSH: What order do you prefer?
4 Candice wants to go ahead now. Is that okay with
5 you? Do you want to --

6 MR. ORR: I have some as well.

7 EXAMINATION

8 QUESTIONS BY MS. McHUGH:

9 Q. Good morning, Mr. Director. I'm
10 Candice McHugh, and I represent the Ground Water
11 Districts in the SRBA.

12 And following up on Mr. Arkoosh's last
13 few questions. Do you intend to instruct the
14 watermaster of Water District 1 to deliver water,
15 or account for water in Water District 1 based on
16 what you testified to here today?

17 A. I don't know what that would be.

18 Q. Do you see that what you testified
19 today in response to Mr. Arkoosh's questions as
20 being different than the historic administration
21 of Water District 1?

22 MR. ARKOOSH: I'll object to the form.
23 Let me just say for the record Candice, I'll
24 object to the form. It's ambiguous. He's
25 probably struggling with what the historic

1 administration was, just like I am.

2 THE WITNESS: Well, I'll have to say,
3 I'm not in a position right now to state how I
4 would instruct the watermaster to deliver water.
5 So if that is your question, I can't answer the
6 question right now.

7 Q. (BY MS. McHUGH) In response to
8 Mr. Arkoosh's questions regarding the
9 recommendation, you stated that you are inclined
10 to recommend the language verbatim from the Eagle
11 Decree; right?

12 A. Yes.

13 Q. Do you see that language as providing
14 different instruction to the watermaster than the
15 language under the current recommendation?

16 A. No. My reading of the current
17 recommendation is that it does not properly
18 characterize what's in the language of the Eagle
19 Decree. And as a result, it's deficient and the
20 Eagle Decree language in my opinion better
21 describes what the right of AFRD No. 2 is. Is it
22 a complete description? No.

23 And I think in the questions that I
24 answered for Mr. Arkoosh, I think there are some
25 significant interpretations that need to be

Page 54 1 determined by a court. And some of what 2 Mr. Arkoosh has given me, I think is legitimate. 3 I think the historical delivery of water is a 4 legitimate factor as well. 5 Q. Are you aware of how the water right 6 has been historically delivered and accounted 7 for? 8 A. I have had some discussions. And I 9 know that at some point in time, I think Tony 10 Olenichak has explained to me how the water has 11 been delivered. And I think in my discussions 12 with Mr. Arkoosh, he has explained those 13 deliveries as well, at least in recent years. 14 MS. McHUGH: I have no further 15 questions. 16 THE WITNESS: Okay. 17 MR. BAXTER: I would like to take a 18 break, if we could, and spend some time talking 19 to my client. Thank you. 20 (A recess was had.) 21 MR. ORR: Back on the record. 22 EXAMINATION 23 QUESTIONS BY MR. ORR: 24 Q. Gary, as you know, I'm Deputy AG 25 representing the State of Idaho in this matter.	Page 56 1 Q. (BY MR. ORR) Okay. It seems to me 2 what Tony is talking about there is a 3 characterization of one issue that could arise in 4 the course of trying to resolve the matters in 5 dispute in this litigation. It's not necessarily 6 the only issue that we're faced with. Would you 7 agree with that statement? 8 A. Well, yes. In fact, as I recall my 9 answer to Mr. Arkoosh's question, as he read 10 these two alternatives to me, I guess I deferred 11 what I had said. I'm not sure this is really the 12 issue. But I suppose within the larger 13 boundaries of what needs to be considered, the 14 question of whether the language was included to 15 protect upstream junior users, or to protect AFRD 16 No. 2 would be a sub-part of it. 17 Q. I think I understand your answer. What 18 I'm getting at is, as I read it, that's not 19 necessarily the definitive statement of the issue 20 that has to be decided by the court? 21 A. No. And that's why I did not respond 22 very directly to Mr. Arkoosh's question, because 23 I didn't -- I understood the alternatives posed 24 to some degree, but didn't necessarily understand 25 the context of those issues in the larger
Page 55 1 A few points of clarification. The 2 first thing I would like to ask you about goes 3 back to a question Mr. Arkoosh asked, regarding 4 page 26, line 21, Tony Olenichak's memo. I think 5 it's the bold face passage regarding the purpose 6 of the 1954 contract. 7 A. Now, are you referring to his 8 deposition now? I thought that was page 26, line 9 21. 10 Q. I believe so, yeah. Right. And what 11 he's talking about is a memo there. And in the 12 memo of the passage, he's referring to in bold 13 face. That's why I mentioned that. 14 A. So what do you want me to refer to? 15 Q. The deposition page 26, line 21. 16 A. Okay. 17 Q. That language that's being referred to 18 there, I think Mr. Arkoosh characterized that as 19 the issue, or characterization of the issue here 20 in this case. And it seems to me, and I want to 21 run this by you. 22 MR. ARKOOSH: So as not to interrupt 23 your question. I'll object as to that 24 characterization as compared to the record. So 25 go ahead and ask your question.	Page 57 1 boundaries of what needs to be considered. 2 Q. Okay. Thanks. I think we got there. 3 A. Yeah. 4 Q. My next point, I would like to go to 5 the language of the Eagle Decree. And we can 6 either look at that in the Notice of Deposition, 7 State of Idaho, or if you have a copy of the 8 Eagle Decree, itself, there. Myself I'm looking 9 at the Notice of Deposition, State of Idaho on 10 page 2. 11 A. That's the easiest reference for me. 12 Q. I believe that is Exhibit 1 to Tony 13 Olenichak's deposition. 14 A. I found it. 15 Q. And there was some discussion referring 16 to language about halfway down in that paragraph 17 on page 2 of the block, quote, on page 2 of the 18 Notice of Deposition. And the language I'm 19 referring to specifically is "all water diverted 20 by American Falls Reservoir District No. 2 within 21 the maximum 1,700 cubic feet per second during 22 the year prior to the initial storage draft on 23 American Falls Reservoir after the reservoir 24 finally fills in that year, shall be considered 25 natural flow under water license number 13154."

Bates #	DocDate	Description
IOAG00000001	9/14/1949	Letter from Ernest MacFarland, Chair of Senate Committee on Interior & Insular Affairs, to Senator O'Mahoney re: Subcommittee Report on Legislation on Palisades Dam & Reservoir Project, Northside Pumping Division and Disposition of Reserved Space in American Falls Reservoir.
IOAG00000005	9/29/1949	US Senate Report No. 1116 re: Legislation on Palisades Dam & Reservoir Project, Northside Pumping Division and Disposition of Reserved Space in American Falls Reservoir
IOAG00000014	7/17/1950	Letter from F. J. Lawton, Director, Bureau of the Budget, Executive Office of the President, to Secretary of Interior re: Palisades Dam Project
IOAG00000024	10/8/1943	Memorandum for USBR Regional Director from E.H. Neal re: Water Right from Snake River for American Falls Reservoir Dist. #2
IOAG00000027	8/5/1968	Status Report - Workings of Palisades Water Savings Agreements
IOAG00000036	3/13/1989	Letter from John W. Keyes III, USBR Regional Director, to Alan D. Jensen. P.E., re: Documents Relating to Authorization of Palisades Dam and Reservoir (Project Authorization)
IOAG00000039	4/11/1957	Letter from E.G. Nielsen, Commissioner of Reclamation, to the Secretary of Interior re: Inter-Bureau Agreement on Water Supply for Michaud Division, Fort Hall Indian Reservation from American Falls & Palisades Reservoirs - Minidoka & Palisades Projects
IOAG00000042	2/21/1934	Letter from Lynn Crandall, USGS District Engineer to Dr. Elwood Mead, Commissioner of Reclamation re: Comments on Proposal to Construct a Government Power Plant at American Falls
IOAG00000045	1/31/1960	Table Entitled Existing and Proposed Holdings of American Falls, Jackson Lake and Palisades Reservoir Space, Minidoka-Palisades Projects.
IOAG00000048	10/1/1946	Water Supply for Palisades Reservoir Project - Project Planning Report 1-5.17-1 - A General Plan For The Elimination Of Winter Diversions, Coordinated Operation of Reservoirs, and Development of New Land (United States Dept of the Interior, Bureau of Reclamation)
IOAG000000273	11/27/1950	House Document No. 721 - A Report on the North Side Pumping Division of the Minidoka Project, Idaho, Pursuant to Public Law 864 (81st Congress, 2d Session) (Government Printing Office)
IOAG000000330	12/12/1941	House Document No. 457 - Report on the Palisades Dam Projects Near Idaho Falls, Idaho - Letter from the Secretary of the Interior Transmitting a Letter from the Commissioner of the Bureau of Reclamation Submitting the Engineering and Economic Report on the Palisades Dam Projects on the South Fork of the Snake River Near Idaho Falls, Idaho (77th Congress, 1st Session) (Government Printing Office)
IOAG000000359	11/27/1950	House Document No. 720 - Palisades Dam and Reservoir Project in Idaho - A Supplemental Report on Allocation & Repayment of Costs of the Palisades Dam & Reservoir Project Pursuant to Public Law 864 (81st Congress, 2d Session)
IOAG000000415	1/1/1935	Hoyt, W.G. - Water Utilization in the Snake River Basin - USGS Water Supply Paper 657
IOAG000000841	6/21/1937	Letter from B.E. Stoutemyer, USBR District Counsel, to R.W. Faris, Idaho State Commissioner of Reclamation re: Twin Falls Hydropower Site Expansion

EXHIBIT NUMBER

2

Bates #	DocDate	Description
IOAG00000845	3/12/1936	Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935
IOAG00000849	2/21/1934	Letter from Lynn Crandall, USGS District Engineer to Dr. Wlwood Mead, Commissioner of Reclamation Mead re: Comments on Proposal to Construct a Government Power Plant at American Falls
IOAG00000852	2/21/1934	Letter from Lynn Crandall, USGS District Engineer to Dr. Wlwood Mead, Commissioner of Reclamation Mead re: Comments on Proposal to Construct a Government Power Plant at American Falls
IOAG00000855	8/1/1941	Excerpted Pages of Report on Palisades Dam Project, Corrections by E.B. Debler
IOAG00000896	9/17/1943	Letter from H.W. Bashore, Commissioner of Reclamation, to Congressman Dworshak re: Construction of Palisades Reservoir
IOAG00000898	12/9/1941	Letter from Harold L. Ickes, Secretary of Interior Ickes, to the President of the United States Senate re: Reclamation Report on the Palisades Project
IOAG00000900	8/20/1940	Letter from Lynn Crandall, USGS District Engineer, to S. O. Harper, Chief Engineer, U.S. Bureau of Reclamation re: Grand Valley Reservoir
IOAG00000903	8/16/1940	Letter from S.O. Harper, Chief Engineer, U.S. Bureau of Reclamation, to Lynn Crandall, USGS District Engineer re: Grand Valley Reservoir
IOAG00000905	6/1/1935	Report on Upper Snake River Storage Investigations, Volume I, Snake River Above Idaho Falls (U.S. Dep't of the Interior, Bureau of Reclamation)
IOAG00001060	8/1/1939	Report on Upper Snake River (South Fork) Storage Investigations - Project Investigations Report No. 34 (U.S. Dep't of the Interior, Bureau of Reclamation)
IOAG00001227	10/11/1940	Letter from S.O. Harper, Chief Engineer, Bureau of Reclamation, to Lynn Crandall, USGS District Engineer re: Comments on Report on Grand Valley Reservoir
IOAG00001230	9/25/1940	Letter from Lynn Crandall, USGS District Engineer, to S.O. Harper, Chief Engineer, Bureau of Reclamation, re: Report on Grand Valley Reservoir
IOAG00001236	9/25/1940	Letter from Lynn Crandall, USGS District Engineer, to S.O. Harper, Chief Engineer, Bureau of Reclamation, re: Report on Grand Valley Reservoir
IOAG00001241	8/1/1940	Report on Upper Snake River (South Fork) Storage Investigations, Grand Valley Reservoir, Project Investigations Report No. 34-A (U.S. Dep't of the Interior, Bureau of Reclamation)
IOAG00001367	9/8/1939	Letter from Lynn Crandall, USGS District Engineer, to B.E. Stoutemyer, USBR District Counsel re: Water Problems on the Snake River
IOAG00001375	9/8/1939	Letter from Lynn Crandall, USGS District Engineer, to B.E. Stoutemyer, USBR District Counsel re: Water Problems on the Snake River
IOAG00001383	9/8/1939	Letter from Lynn Crandall, USGS District Engineer, to B.E. Stoutemyer, USBR District Counsel re: Water Problems on the Snake River
IOAG00001392	6/24/1949	Letter from Michael W. Straus, Commissioner of Reclamation, to the Secretary of the Interior re: Supplemental Report on Palisades Dam and Reservoir Project

Bates #	DocDate	Description
IOAG00001395	6/12/1946	Letter from Oscar L. Chapman, Acting Secretary of the Interior, to Walter B. Sheppard re: The Palisades Project, Idaho
IOAG00001398	12/9/1941	Letter from Harold L. Ickes, Secretary of the Interior, to the Speaker of the House of Representatives re: Reclamation Report on the Palisades Project
IOAG00001400	6/17/1952	Memorandum from Michael W. Straus, Commissioner of Reclamation, to Oscar L. Chapman, Secretary of the Interior re: Repayment and water savings contracts - Minidoka and Palisades projects
IOAG00001405	12/6/1951	Memo from G.W. Lineweaver, Acting Commissioner of Reclamation, to Secretary of the Interior re: Extension for Completion of Palisades Water Savings Agreements
IOAG00001407	12/1/1960	Technical Record of Design and Construction, Palisades Dam and Power Plant (Part I, Introduction) (U.S. Dept of the Interior, Bureau of Reclamation)
IOAG00001444	10/15/1934	Supplementary Water for Irrigation in Idaho, with Particular Reference to Boise and Snake River Valleys (Revised)
IOAG00001471	6/21/1937	Letter from B.E. Stoutemyer, USBR District Counsel, to R.W. Faris, Idaho State Commissioner of Reclamation re: Twin Falls License Stipulation
IOAG00001475	1/1/1960	Table Entitled Existing and Proposed Holdings of American Falls, Jackson Lake and Palisades Reservoir Space, Minidoka - Palisades Projects
IOAG00001478	12/31/1936	Water Distribution and Hydrometric Work, Water District No. 36, 1936 (Lynn Crandall, Watermaster)
IOAG00001508	6/15/2010	Letter from C. Tom Arkoosh to Gary Spackman, Director of Idaho Department of Water Resources re: American Falls Reservoir District No. 2
IOAG00001524	6/14/1937	Letters Between Dana Templin, Superintendent, Minidoka Project, and S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Water Delivery Under Secretary of the Interior's Instructions
IOAG00001526	4/6/1936	Draft Letter from Superintendent of Minidoka Project to Lynn Crandall, Watermaster, and R.W. Faris, Idaho State Commissioner of Reclamation re: Secretary of the Interior Instructions for Delivery of Water Under Permit no. 15134
IOAG00001529	6/15/1937	Letter from Lynn Crandall, Watermaster, to S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Water Delivery Under Secretary of the Interior's Instructions
IOAG00001531	4/6/1936	Letter from John C. Page, Acting Commissioner of Reclamation, to E.B. Darlington, Superintendent of Minidoka Project re: Instructions for Delivering Water Under Permit 15134
IOAG00001534	2/4/1936	Letter from B.E. Stoutemyer, USBR District Counsel, to P.T. Sutphen, Secretary of American Falls Reservoir District No. 2 re: Delivery of Water Under Permit 15134
IOAG00001538	6/14/1937	Letters Between Dana Templin, Superintendent, Minidoka Project, and S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Water Delivery Under Secretary of the Interior's Instructions
IOAG00001540	6/15/1937	Letter from Lynn Crandall, Watermaster, to S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Delivery of Water Under Secretary of the Interior's Instructions
IOAG00001542	4/6/1936	Letter from Superintendent of Minidoka Project to Lynn Crandall, Watermaster and R.W. Faris, Idaho State Commissioner of Reclamation re: Delivery of Water Under Secretary of the Interior's Instructions

Bates #	DocDate	Description
IOAG00001545	4/6/1936	Letter from John C. Page, Acting Commissioner of Reclamation, to E.B. Darlington, Superintendent of Minidoka Project re: Instructions for Delivering Water Under Permit 15134
IOAG00001548	2/4/1936	Letter from B.E. Stoutemyer, USBR District Counsel, to P.T. Sutphen, Secretary of American Falls Reservoir District No. 2 re: Delivery of Water Under Permit 15134
IOAG00001552	6/25/1929	Woodville Decree
IOAG00001587	3/30/1921	License and Certificate of Water Right, Water License No. 15134
IOAG00001646	8/1/1945	Idaho Reclamation News
IOAG00001650	1/1/1947	Idaho Reclamation News
IOAG00001654	1/1/1948	Idaho Reclamation News
IOAG00001658	3/1/1948	Idaho Reclamation News
IOAG00001662	10/1/1949	Idaho Reclamation News
IOAG00001666	10/1/1952	Idaho Reclamation News
IOAG00001670	10/1/1954	Idaho Reclamation News
IOAG00001674	5/10/2010	IDWR E-mails re: American Falls Reservoir District No. 2 Natural Historical Flow Records
IOAG00001679	2/17/2010	Memorandum from Tony Olenichak, Water District #1, to Garrick Baxter and IDWR Legal Staff re: Historical Documentation for AFRD2 Water Right
IOAG00001683	8/8/1949	The Palisades Dam & Reservoir Project - Hearings Before A Subcommittee on Irrigation & Reclamation of the Committee on Public Lands, House of Representatives and a Special Subcommittee of Committee on Interior & Insular Affairs - HR 5506 (81st Congress, 1st Session) (Government Printing Office)
IOAG00001813	8/5/1968	Status Report - Workings of Palisades Water Savings Agreement (U.S. Bureau of Reclamation)
IOAG00001823	6/28/2010	Idaho Department of Water Resource's Backfile for Water Right No. 01-2064

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

In Re SRBA)
Case No. 39576) Subcase No. 1-6
_____)

COPY

DEPOSITION OF ANTHONY OLENICHAK

OCTOBER 6, 2008

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

EXHIBIT NUMBER

3

M & M Court
Reporting
Service, Inc.

Since 1970

Registered Professional Reporters

SOUTHERN
1-800-234-9611

■ BOISE, ID
208-345-9611

■ TWIN FALLS, ID
208-734-1700

■ POCATELLO, ID
208-232-5581

■ ONTARIO, OR
541-881-1700

NORTHERN
1-800-879-1700

■ COEUR D'ALENE, ID
208-765-1700

■ SPOKANE, WA
509-455-4515

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

In Re SRBA)
Case No. 39576) Subcase No. 1-6

DEPOSITION OF ANTHONY OLENICHAK
OCTOBER 6, 2008

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

APPEARANCES (Continued):

For American Falls Reservoir District No. 2:

CAPITOL LAW GROUP PLLC
BY MR. C. THOMAS ARKOOSH
P.O. Box 32
Gooding, Idaho 83330

For Bureau of Reclamation:

UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
NATURAL RESOURCES SECTION
BY MR. DAVE GEHLERT

1961 Stout Street, Suite 800
g Denver, Colorado 80294

For Idaho Groundwater Appropriators, Inc.:

RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
BY MR. RANDALL C. BUDGE
101 Capitol Boulevard, Suite 208
Boise, Idaho 83702

For Idaho Department of Water Resources:

OFFICE OF ATTORNEY GENERAL
BY MR. GARRICK L. BAXTER
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

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 the offices of the Department of
6 Water Resources, 900 North Skyline, Suite A, Idaho
7 Falls, Idaho, commencing at 1:09 p.m., October 6,
8 2008, before Jeff LaMar, Certified Shorthand
9 Reporter and Notary Public within and for the
10 State of Idaho, in the above-entitled matter.

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, ROSHALT & SIMPSON LLP
17 BY MR. JOHN K. SIMPSON
18 113 Main Avenue West, Suite 303
19 P.O. Box 485
20 Twin Falls, Idaho 83303-0485
21 For Minidoka Irrigation District:
22 FLETCHER LAW OFFICE
23 BY MR. W. KENT FLETCHER
24 P.O. Box 248
25 Burley, Idaho 83318

APPEARANCES (Continued):

For State of Idaho:

OFFICE OF ATTORNEY GENERAL
BY MR. DAVID I. STANISH
700 West State Street, 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0010

Also Present:

Ronald Dean Carlson

INDEX

1	TESTIMONY OF ANTHONY OLENICHAK	PAGE
2	Examination by Mr. Simpson	6
3	Examination by Mr. Fletcher	52,133
4	Examination by Mr. Arkoosh	79,135
5	Examination by Mr. Gehlert	107
6	Examination by Mr. Budge	113

EXHIBITS

7	1 - Amended Notice Taking Deposition Duces Tecum of Anthony Olenichak	7
8	2 - Affidavit of Anthony Olenichak	52
9	3 - American Falls Reservoir District No. 2 document related to Eagle decree	84
10	4 - Watermaster Handbook	100
11	5 - Hand-drawn diagram	102

ANTHONY OLENICHAK,

first duly sworn to tell the truth relating to
said cause, testified as follows:

EXAMINATION

BY MR. SIMPSON:

Q. Can you identify yourself, please, and
spell your last name for the record.

A. My name is Anthony Olenichak. I'm
commonly referred to as Tony Olenichak. Last name
is spelled O-l-e-n-i-c-h-a-k.

Q. And may I call you Tony?

A. Yes.

Q. Thank you.

Tony, you're here today to provide
deposition in what matter, if you know?

A. There was a list of subcases attached
to the affidavit.

Q. Okay.

A. And I supposed most questions were
going to be directed towards the affidavit that I
completed.

Q. Okay. And you provided an affidavit
in this matter on behalf of the ground water
districts; is that correct?

A. Well, I provided it at the request of
Candice McHugh.

Q. And do you have an understanding that
she's counsel for the ground water districts or
IGWA?

A. Yes.

Q. Tony, I'm handing you what appears to
be an amended notice, if you'd like to review that
for a moment.

A. (Reviews.)

Okay.

Q. Is that an amended notice for your
deposition here today?

A. Yes.

MR. SIMPSON: Okay. Let's go ahead and
mark that as Exhibit 1.

(Exhibit 1 marked.)

Q. (BY MR. SIMPSON): And, Tony, you've
had an opportunity to review that Notice of
Deposition prior to today; is that right?

A. Yes.

Q. And in accordance with that Notice of
Deposition, did you provide any documents or bring
any records or documents with you today?

A. No.

Q. On the second page of that notice, it
describes that you were requested to bring forward
any items or documents related to your affidavit
that you generated or signed on August 21st of
2008.

Do you see that reference on the
second page of the notice?

A. Yes.

Q. Did you bring any documents or records
that you relied upon in making that affidavit
dated August 21st of 2008?

A. I didn't rely upon any documents when
I made the affidavit.

Q. Okay. Then what did you rely upon
when you provided that affidavit to Ms. McHugh?

A. Based on my experience working for
Water District 1 for the past 18 years.

Q. Okay. And based upon that experience,
you were able to provide that affidavit and any of
the hydrologic or factual information contained
therein?

A. Yes.

Q. Tony, do you recall providing a
deposition -- your deposition in I believe it was
2005 in the Surface Water Coalition delivery call

1 Q. And do you have a time frame with
2 respect to that description in terms of is it
3 after June 1st or after June 15th or --

4 A. It depends on the year. In some years
5 where we have very poor snowpack, high-water
6 rights, 1921 -- or I should say 1939 rights may
7 not even get filled the entire season.

8 Flood years, 1997, you may fill those
9 rights all the way into July. It varies depending
10 on the water supply and the year.

11 Q. Do you have an understanding of
12 whether the Department of Water Resources has a
13 policy that recognizes different sources of water
14 for the Snake River?

15 A. I don't understand the question.

16 Q. Well, with respect to water rights and
17 identification of water rights and the elements of
18 a water right, do you have an understanding of
19 whether the Department of Water Resources would
20 segregate the Snake River into different sources
21 of water, that is, reach gains versus
22 precipitation versus spring runoff or other
23 sources of water?

24 A. The water that the water district
25 delivers in the water right accounting is the

1 source of the water listed on the water right.

2 Q. Did you assist in the development of
3 the water right recommendations for the Department
4 of Water Resources within the water district?

5 A. Occasionally the adjudication staff
6 will come to me for historical deliveries
7 administration, yes.

8 Q. So did you have input into the
9 recommendations for the water rights within
10 basin 1?

11 A. With some of the water rights, yes.

12 Q. Okay. For any of the water rights
13 listed on Attachment A of your affidavit, did you
14 have input into those recommendations?

15 A. I think so on some of them.

16 Q. Okay. Which ones?

17 A. I don't recall specifically. I know I
18 did on 1-6. The other numbers, I can't remember
19 for sure.

20 Q. Okay. Did you disagree with any of
21 the ultimate recommendations that were filed by
22 the Department with the Snake River Basin
23 Adjudication court with respect to the basin 01
24 recommendations?

25 A. I don't think I've reviewed each one.

1 I have not found one that I have objected to.

2 Q. Okay. So for any participation you
3 had in the recommendations filed by the
4 Department, you ultimately agreed with the
5 recommendation made by the Department?

6 A. With respect to 1-6, I think there was
7 one addition that I suggested that I don't think
8 was in the recommendation.

9 Q. Okay. Do you recall what that
10 additional recommendation was?

11 A. Yes. That was to add the sentence
12 that the right should not be delivered prior to
13 May 1st unless the American Falls storage account
14 was full.

15 Q. If I can see those pages, Tony.
16 Thanks.

17 Tony, are water rights above Blackfoot
18 curtailed in order to deliver water below
19 Blackfoot to senior natural-flow rights?

20 A. It's possible.

21 Q. So you could have a right junior to
22 1900 above Blackfoot that would be curtailed in
23 order to deliver water below Blackfoot; correct?

24 A. Correct.

25 MR. SIMPSON: That's all the questions I

1 have. Thank you.

2 Kent, do you want to move up here, or
3 do you want to --

4 MR. FLETCHER: I'll sit here. It may be
5 helpful.

6 Is there a copy of your affidavit
7 handy so you can look at it as I ask you about it?

8 MR. BAXTER: We can get one.

9 THE WITNESS: I can grab it. I'll be right
10 back.

11 (Recess.)

12 (Exhibit 2 marked.)

13

14 EXAMINATION

15 BY MR. FLETCHER:

16 Q. Tony, I'm Kent Fletcher. I'm here
17 today representing Minidoka Irrigation District.
18 Just to clarify a couple things for

19 the record before I get into my list of questions,
20 there's a teacup chart that's published showing
21 reservoir levels, and I think it's published at
22 least once a week.

23 Are you familiar with what I'm talking
24 about?

25 A. Yes.

1 rights are shown in your accounting system under
2 the existing priority dates and under their
3 existing diversion amounts, you would simply track
4 them in that program as they're diverted; correct?

5 A. Yes.

6 Q. Okay. When -- I wanted to jump back
7 to that statement you made earlier that you feel
8 the cutoff date for a high-water right under your
9 terminology is 1916.

10 When this affidavit was sent to you
11 and that 1916 date wasn't in there, did that
12 trouble you?

13 A. No, because, like I also said, it can
14 vary depending on where you're at in the basin.
15 In Willow Creek anything junior to an 1885
16 priority would be a high-water right.

17 1916, that's generally what I hear
18 mostly from water users in the Upper Snake. And
19 so that's kind of the priority I've adopted as the
20 general definition of a high-water right.

21 Q. But in this case you knew all these
22 water rights were out of the Snake River, didn't
23 you?

24 A. All these in No. 12, yes.

25 Q. Well, you didn't know that the ones on

1 the attachment were on the Snake River?

2 A. I didn't know that the subcase
3 referred to the water rights in my affidavit.

4 Q. Okay. So I don't want to beat this
5 into the ground, but your affidavit is only
6 addressing the water rights in paragraph 12?

7 A. Yes.

8 Q. Only those water rights?

9 A. Yes.

10 Q. And you have no intention to address
11 any of the other water rights listed on Exhibit A
12 to your affidavit?

13 A. Correct.

14 Q. Okay. I see. I see. The Exhibit A
15 was attached simply because it's part of the
16 pleading in this case; is that correct? That's
17 the caption of the case?

18 A. I thought the purpose of my affidavit
19 was for these rights she listed in the affidavit
20 only.

21 MR. FLETCHER: Okay. I don't think I have
22 any other questions. Thanks.

23 MR. ARKOOSH: I have a few. Would you like
24 to break or would you like to proceed?

25 THE WITNESS: I'm fine. I want to

1 continue.

2

3

EXAMINATION

4 BY MR. ARKOOSH:

5 Q. I'm Tom Arkoosh for American Falls
6 Reservoir District No. 2, Mr. Olenichak. And I
7 wanted to visit with you, more than anything,
8 about some of the questions that have been asked
9 here previously.

10 Mr. Fletcher asked you whether you
11 believe that these rights -- these rights, as I
12 now understand it, listed in Exhibit 12 are the
13 only rights you're addressing -- need some
14 notation, and you said no.

15 Do you know whether the Department has
16 a policy or whether the Department believes those
17 rights need a notation?

18 A. I don't know what the Department
19 thinks.

20 Q. Okay. You have not discussed that
21 with anybody --

22 A. I have not.

23 Q. -- in the Department?

24 Mr. Simpson talked to you about

25 allocated storage and unallocated storage and

1 natural-flow rights, if I recall.

2 Do you recall that discussion?

3 A. Yes.

4 Q. And you said you were aware of the 1-6
5 right and had participated in the recommendation
6 to the SRBA court for the 1-6 right.

7 Do you recall that?

8 A. Yes.

9 Q. And you said you were familiar with
10 the Eagle decree when you talked to Mr. Fletcher.

11 Do you recall that?

12 A. Yes.

13 Q. And so the 1-6 right is described in
14 Eagle decree; is that correct?

15 A. Correct.

16 Q. Okay. And I'll paraphrase -- or I've
17 got it here as part of the record. I can read it.
18 But would you generally agree with me that what
19 the 1-6 right has in its description is the
20 benefit of the following language? It says that
21 "All water diverted by American Falls Reservoir
22 District No. 2 within the maximum of 1700 cubic
23 feet per second during the year prior to the
24 initial storage draft on American Falls Reservoir
25 after the storage finally fills in that year shall

1 be considered natural flow." Do you recall that
 2 language?
 3 A. Yes.
 4 Q. Okay. And do you understand what that
 5 language means?
 6 A. Yes.
 7 Q. Okay. Could you paraphrase what it
 8 means, because it is a fairly convoluted sentence?
 9 Is it possible for you to paraphrase that?
 10 A. Yes. Prior to when American Falls
 11 Reservoir storage account fills, the 1700 cfs
 12 right is split half to American Falls Reservoir
 13 District No. 2 and half to the American Falls
 14 storage account.
 15 Once the American Falls Reservoir
 16 storage account fills, then the 850 cfs is no
 17 longer required by American Falls storage holders,
 18 and the American Falls Reservoir District No. 2
 19 can start diverting 1700 cfs of natural flow until
 20 the initial draft of American Falls Reservoir or
 21 the 1921 priority gets cut.
 22 Q. Okay. So let me paraphrase it a
 23 different way and see if I'm saying the same
 24 thing.
 25 The 1700 is split until we learn

1 whether the reservoir fills for a last time
 2 during -- whether the reservoir fills for the
 3 year. And then if the reservoir does fill for the
 4 year, everything taken prior to that fill by
 5 American Falls Reservoir District No. 2 is natural
 6 flow and not storage water; is that correct?
 7 A. That is not how I read it.
 8 Q. Okay. It says -- the language says
 9 all water taken -- that's a paraphrase --
 10 "...prior to the initial storage draft on American
 11 Falls Reservoir after the reservoir finally
 12 fills."
 13 So there's a draft that -- there's a
 14 day of fill, and then there's a draft after that
 15 day?
 16 A. That's correct.
 17 Q. All right. Those two events. It
 18 says, "...shall be considered natural flow"; is
 19 that correct?
 20 A. Yes.
 21 Q. Okay. So everything it takes prior to
 22 the final fill shall be considered natural flow;
 23 is that correct?
 24 A. No, it does not say that.
 25 Q. So you're going to have to go through

1 your paraphrase again.
 2 Why is it not considered natural flow?
 3 A. Because it's 850 cfs until American
 4 Falls Reservoir District -- or American Falls
 5 storage right fills. And then the second part of
 6 the sentence that you're reading says that between
 7 the time when it fills and when you first start
 8 drafting water from American Falls, that 1921
 9 priority would be in priority, then American Falls
 10 Reservoir District is entitled to the full 1700
 11 cfs, not just the half of the right, or the 850
 12 cfs.
 13 MR. BAXTER: Just real quick, I have a
 14 question how this relates to the high-flow issue
 15 we're here to talk about today.
 16 MR. ARKOOSH: We talked about allocated and
 17 unallocated storage. That's what I'm trying to
 18 get to.
 19 MR. BAXTER: There's allocated storage and
 20 how that's calculated for --
 21 MR. ARKOOSH: Do you object to the
 22 question?
 23 MR. BAXTER: I'm just trying to understand
 24 the line of questioning here.
 25 MR. ARKOOSH: Well, enter an objection and

1 then let me get on with it.
 2 MR. BAXTER: Okay. I object to relevancy
 3 of the line of questioning here.
 4 MR. ARKOOSH: Okay.
 5 Q. So I'm going to put the language in
 6 front of you. I don't have an extra copy.
 7 Would that be all right if I put the
 8 language in of you?
 9 A. Sure.
 10 MR. ARKOOSH: Can I mark this as an
 11 exhibit?
 12 Can I mark yours as Exhibit 3?
 13 MR. SIMPSON: You can mark your own.
 14 MR. ARKOOSH: I'll mark mine as Exhibit 3
 15 and give yours back.
 16 Let's mark that.
 17 (Exhibit 3 marked.)
 18 MR. ARKOOSH: Actually, I want to just use
 19 this.
 20 Do you mind, Counsel, if I stand with
 21 your witness here?
 22 Q. Is this the language marked as
 23 Exhibit 3 that we were discussing?
 24 A. Yes.
 25 Q. Okay. Now, do you agree it says that

1 "All water diverted prior to the initial storage
2 draft after the reservoir finally fills shall be
3 considered natural flow"? Does it provide that?

4 A. No. I think you need to read the
5 entire portion of that sentence.

6 Q. Okay.

7 A. It says, "All water diverted by
8 American Falls Reservoir District No. 2 within the
9 maximum of 1700 cubic feet per second during the
10 year prior to the initial storage draft on
11 American Falls after the reservoir finally fills
12 in that year shall be considered as natural flow
13 under license No. 15134."

14 Q. So the language that you added to it
15 just says that you can't draft more than
16 1700 cubic feet a second at any time; is that
17 correct?

18 A. No. What it does is it distinguishes
19 between the time where you have a right to 850
20 cfs; that between the time that American Falls
21 finally fills and the initial storage draft, you
22 have a right of 1700 cfs.

23 Q. Say that last part again.

24 A. Between the time that the American
25 Falls Reservoir fills until the initial storage

1 A. July 15th.

2 Q. So in that scenario, when would
3 American Falls have drafted -- had they drafted
4 1700 cubic foot a second the entire time prior to
5 July 15th, when would they have drafted natural
6 flow?

7 A. To fill the American Falls storage
8 right?

9 Q. No. When would -- if they had drafted
10 hypothetically 1700 cubic foot the entire time
11 from the time they commenced drafting water until
12 July 15th, what portion of that drafted water
13 would have been natural flow?

14 A. None would be natural flow. The draft
15 is all storage water.

16 Q. I mean, the diversion of water in
17 that.

18 A. I got lost in your question.

19 Q. If they diverted 1700 cubic feet of
20 water from the time they first started diverting
21 until July 15th, what portion of that diversion
22 would have been natural flow?

23 A. I see. 850 cfs would be natural flow
24 until July 1st when American Falls Reservoir
25 filled. And then on July 15th, assuming that was

1 draft along the reservoir, you have a right of
2 1700 cfs.

3 Q. But the initial storage draft on the
4 reservoir -- oh, I see how you're reading that.
5 Okay.

6 So how do you account for the phrase
7 "all water diverted"?

8 A. "All water diverted by American Falls
9 Reservoir District No. 2," that's their diversion,
10 "within a maximum of 1700 cfs" --

11 Q. Okay.

12 A. -- "would be natural flow between that
13 time when the reservoir finally fills and the
14 initial storage draft on the reservoir."

15 Q. Well, it says that "During the year
16 prior to the initial storage draft" -- is that
17 correct? -- "shall be considered natural flow."
18 Maybe we can diagram it because I'm not
19 understanding your position. And maybe I'll just
20 do that on a piece of paper I'll mark.

21 Could you provide me a hypothetical
22 date of final fill?

23 A. July 1st.

24 Q. Okay. And a date of initial storage
25 draft after final fill?

1 the day we started drafting and the 1921 priority
2 was cut would be the 1700 cfs from July 1st to
3 July 15th.

4 Q. And what about the 850 cfs drafted
5 prior to July 1 that was not natural flow?

6 A. That wasn't drafted. That was accrued
7 to the American Falls storage account.

8 Q. Well, what if it wasn't -- what if it
9 wasn't accrued? What if it was used?

10 A. No, it would be accruing. While we're
11 filling the 1921 priority date at the American
12 Falls Reservoir storage account and not be full,
13 it would be accruing all the way until that
14 July 1st date.

15 Q. But what if they had used the 17-?
16 What if they had actually diverted 1700 cubic
17 feet?

18 A. Then 850 cfs prior to July 1st would
19 be storage water, and 850 cfs would be natural
20 flow.

21 Q. And so once we had the final draft
22 after final fill, it says all water diverted prior
23 to that time becomes natural flow, does it not?

24 A. It does not say that.

25 Q. It doesn't say that. Okay. It says,

1 "...shall be considered as natural flow under
2 water right No. 15130."

3 Doesn't it say that?

4 A. Yes. That refers to the 1700 cfs
5 between the fill of American Falls Reservoir and
6 the initial storage draft.

7 Q. Well, doesn't that final phrase, "be
8 considered natural flow," refer to all water
9 diverted, the first part of that phrase in the
10 sentence?

11 A. It's all water diverted between the
12 date that American Falls fills and the first
13 storage draft occurs, up to a maximum of 1700 cfs.

14 Q. All water diverted during the year
15 prior to initial storage draft.

16 MR. BAXTER: Mr. Arkoosh, I think at this
17 point --

18 MR. ARKOOSH: Enter an objection. Don't
19 interrupt the deposition, please.

20 MR. BAXTER: I'm going to object to the
21 repetitive nature. He's asked and answered the
22 question; I've counted now four times.

23 MR. ARKOOSH: Okay.

24 MR. BAXTER: I understand you've made your
25 point with regard to you have interpreted it a

1 particular way. He's stated the way he's
2 interpreted that language now.

3 MR. ARKOOSH: All right.

4 Q. Now let's get back to the question.
5 He's entered his objection.

6 It's all water diverted during the
7 year; isn't that correct?

8 A. No. It's all water diverted by
9 American Falls Reservoir District within the
10 maximum of 1700 cubic feet per second during the
11 year prior to the initial storage draft on
12 American Falls after the reservoir finally fills
13 in that year.

14 Q. Okay. All right. I see your point.

15 Do you consider -- evidently, because
16 your limitation is to paragraph 12, 1-6 is not
17 considered a high-water right?

18 A. 1-6 is not considered a high-water
19 right in the affidavit.

20 Q. Okay. Now, you talked to Mr. Fletcher
21 about these rights possibly could be expanded, and
22 I didn't understand the discussion.

23 Can you explain what that meant?

24 A. I thought by his question he was
25 asking if there were any additional rights to

1 what's currently in the water right accounting
2 program, would that constitute an enlargement.
3 And I think that would.

4 Q. So what you were talking about, if the
5 rights in paragraph 12 were put into the
6 accounting program, it would constitute an
7 enlargement? Is that what you were talking about?

8 A. Could you repeat the question?

9 Q. Well, maybe you could -- maybe you
10 could help me again. If you could repeat your
11 answer.

12 A. Anything that's not currently in the
13 accounting program that is added to it potentially
14 could be an enlargement.

15 Q. Okay. And what could be added to it
16 in the context of your answer, added to the
17 accounting program?

18 A. Any additional water right that's not
19 currently being delivered.

20 Q. Are the water rights in paragraph 12
21 in the accounting program?

22 A. No.

23 Q. So in the context of your answer, is
24 that what you were talking about?

25 A. Yes.

1 Q. Okay. So after the final fill of
2 American Falls Reservoir District No. 2, is there
3 unallocated storage in American Falls District
4 Reservoir No. 2 in most years?

5 A. Not -- not after we make our
6 allocations to the space holders.

7 Q. When is that done?

8 A. After we've reached the day of maximum
9 reservoir contents.

10 Q. So if the date of maximum reservoir
11 contents -- assume that's a fill of the American
12 Falls Reservoir. Okay? And then you would
13 allocate all of the storage in the American Falls
14 Reservoir -- in American Falls Reservoir; is that
15 correct?

16 A. We allocate the physical contents in
17 the reservoirs if it exceeds the accrual on paper.

18 Q. When is that done?

19 A. After the day we reach maximum
20 reservoir contents.

21 Q. So is any of that unallocated storage
22 allocated to upstream storage?

23 A. It would be allocated to unfilled
24 storage accounts.

25 Q. Could that be upstream storage?

1 A. Yes.

2 Q. Okay. So if -- you understand my view
3 of how the American Falls right works isn't
4 that -- let me explain it to you.

5 My view of how the American Falls
6 Reservoir District No. 2 right works is that if
7 the reservoir fills, everything used prior to the
8 date of fill is, in fact, natural low. So that
9 when it fills, 100 percent of American Falls
10 Reservoir District No. 2 space belongs to American
11 Falls Reservoir District No. 2.

12 But that's not how you all are doing
13 it, is it?

14 A. I don't understand the question.

15 Q. Okay. American Falls Reservoir
16 District No. 2 has approximately 400,000-acre feet
17 of space in American Falls Reservoir; is that
18 correct?

19 A. I don't know.

20 Q. Well, okay. Accept that it's got
21 approximately 400 (sic) acre-feet of space.

22 If that space, when American Falls
23 Reservoir is full, is not all allocated to the
24 American Falls Reservoir District No. 2, to whom
25 is some of it allocated? Do you know?

1 A. If American Falls Reservoir is full,
2 the account is full, then American Falls Reservoir
3 District No. 2 will get allocated 100 percent of
4 its storage allocation, minus evaporation losses.

5 Q. Even though it had used -- even though
6 it had diverted water that prior to the date of
7 final fill that would have been labeled storage
8 water?

9 A. Yes. According to the decreed right,
10 if you divert it outside priority or you diverted
11 an amount over what's described in the decree, it
12 would be charged as storage and would come out of
13 your American Falls storage allocation.

14 Q. But when it filled, would it be
15 replaced?

16 A. No. The only time it would be
17 replaced is if we were spilling excess water past
18 Milner. At that time any storage diverted by
19 American Falls Reservoir District No. 2 would be
20 written off.

21 Q. Okay. So who would get to have the
22 unallocated storage in that space?

23 A. The unallocated storage that resides
24 in American Falls would be allocated to upstream
25 reservoir accounts that were unfilled.

1 Q. Those -- okay. And some of those
2 would even be junior upstream reservoir accounts
3 that hadn't filled; is that right?

4 A. Yes. But American Falls would be
5 full, so we couldn't allocate more than
6 100 percent.

7 Q. Why did you propose with the 1-6 right
8 that American Falls Reservoir District No. 2 not
9 be allowed to draft -- to divert water prior to
10 May 1st?

11 A. It can divert water prior to May 1st,
12 according to the decree. But it should be charged
13 to storage.

14 Q. And that proposal of yours was made
15 why?

16 A. To reflect the language in the decree.

17 Q. To reflect the language in the decree
18 or your interpretation of the language in the
19 decree?

20 A. Well, it would be my interpretation of
21 the language in the decree. I felt the decree was
22 not written very clearly.

23 Q. So your recommendation was discussed
24 and rejected?

25 A. I thought it was accepted.

1 Q. Well, I just thought you told
2 Mr. Fletcher that that language was -- your
3 proposal was rejected.

4 A. Well, my -- I think my initial
5 proposal was accepted. And then I later realized
6 after the recommendation came out that I left off
7 a sentence for the provision that the right not be
8 delivered until May 1st unless American Falls
9 Reservoir District was full.

10 The recommendation came out where the
11 period of use began on March 15th, I believe. And
12 that would allow American Falls Reservoir District
13 No. 2 under the recommendation to divert 850 cfs
14 prior to May 1st prior to the reservoir filling.

15 Q. Mr. Simpson discussed with you the
16 definitions in the Watermaster's Handbook.

17 Do you recall that?

18 A. Yes.

19 Q. I'm going to represent to you that in
20 the Watermaster Handbook it provides in a
21 definition that -- of diversion that a diversion
22 is the structure to which water is removed from a
23 water source.

24 Are you familiar with that definition?

25 A. I'm not familiar with it, but I would

1 agree with it.

2 Q. Okay. So when they use the word
3 "source," that in these decrees the word "source,"
4 as Mr. Fletcher and you discussed, would refer to
5 the Snake River; is that correct?

6 A. Yes.

7 Q. Okay. But you've used the word
8 "source" in paragraph 10. You said, "The source
9 of supply for high-water rights on the Snake River
10 consists primarily of snowmelt and spring runoff."

11 So you're using the word "source" in a
12 different way, I'm assuming?

13 A. Yes.

14 Q. You're using the word "source" as
15 where the water originates, and the diversion
16 definition uses the word "source" as where the
17 diversion is on a water course; is that correct?

18 A. In my definition, I was referring to
19 the water in the Snake River as being comprised
20 mostly of snowmelt during the times we were
21 filling those high-water rights.

22 Q. But the -- the river or the diversion
23 structure doesn't know where the molecules of
24 water comes from and doesn't segregate the
25 molecules of water, does it?

1 support some argument that she was making. And I
2 provided that affidavit.

3 Q. There has been an argument made here
4 that "Absent a remark that limits whatever rights
5 we're talking about as high-water rights to a
6 particular season of use, there will be a
7 possibility of expansion of those rights."

8 Are you familiar with that argument?

9 A. Yes.

10 Q. Do you agree with that argument?

11 A. No.

12 Q. Okay. And why is it you don't agree
13 with that argument?

14 A. Historically, when the Department has
15 issued water rights, they issue them for the full
16 irrigation season. And the administration, if
17 there was sufficient water in the system to fill
18 those water rights, we would. If there wasn't,
19 then we wouldn't.

20 They were not based on historically
21 looking at each day that that water right was
22 historically filled and restricting the period of
23 use to those days. We have not done that.

24 Q. Okay. And so that comes back to
25 Mr. Fletcher's point that you administer water in

1 A. No.

2 Q. And the accounting program doesn't
3 know and doesn't segregate molecules of water?

4 A. It only segregates natural flow in
5 storage.

6 Q. Okay. So you've come to the
7 conclusion in paragraph 10 based upon empirical
8 observation?

9 A. Yes.

10 Q. Okay. And what happens in
11 paragraph 10 has absolutely nothing to do with
12 administration of water?

13 A. That's correct.

14 Q. So what is the purpose of this whole
15 exercise?

16 A. I don't know.

17 Q. Well, you had a reason to sign this
18 and provide this affidavit, but you don't know
19 what you were doing or why?

20 A. The Department asked us to assist
21 water users in the adjudication in providing them
22 with information, historical data, and anything to
23 help them sort out the decree of the water rights.

24 I assumed that when Candice contacted
25 me and had these questions, that that would

1 priority, and if you're entitled to water in
2 priority, your water will be there, and if you're
3 not entitled, it won't be there; is that correct?

4 A. That's correct.

5 Q. Okay. So everybody's adequately
6 protected by administration in priority?

7 A. Yes.

8 Q. And that comes back again as well to
9 Mr. Simpson's point, is that if water rights have
10 a common source, administration of priority
11 adequately protects everybody's interest?

12 A. Yes.

13 MR. ARKOOSH: Can we take a small break,
14 please?

15 (Recess.)

16 (Exhibit 4 marked.)

17 Q. (BY MR. ARKOOSH): Mr. Olenichak, I've
18 handed you what's been marked as Exhibit 4.

19 Do you recognize that?

20 A. Yes.

21 Q. And what is that?

22 A. It's a Watermaster Handbook. I
23 believe it was put together by Tim Luke and a few
24 other people in the IDWR office.

25 Q. Who are "a few other people"? Did

1 Mr. Carlson participate in that?
 2 A. I don't know if he did or not.
 3 Q. Who is Mr. Carlson?
 4 A. Ron Carlson was the watermaster of
 5 Water District 1 for most of the 18 years I worked
 6 for the water district.
 7 Q. Okay. Is Exhibit 4, the purpose of
 8 Exhibit 4, for the governance of watermasters in
 9 the state?
 10 A. I think the purpose is just a general
 11 directory for watermasters in the state.
 12 Q. Okay. So it would apply to the
 13 watermaster in 01 as well as other watermasters in
 14 the state; is that correct?
 15 A. Correct.
 16 Q. Okay. Would you confirm the
 17 definition of "diversion" that I indicated to you
 18 and read that into the record, please?
 19 A. Do you know which page it's on?
 20 Q. It's in the "d's," and the definition
 21 is towards the front.
 22 MR. SIMPSON: Page 2.
 23 THE WITNESS: "Diversion is the structure
 24 through which water is removed from the water
 25 source. It also refers to the act of removing

1 correct?
 2 A. That's correct.
 3 Q. And then it shows a total of 1700
 4 acre-feet diversion between July 1 and July 15th;
 5 is that correct?
 6 A. 1700 cfs.
 7 Q. Okay.
 8 A. You said acre-foot.
 9 Q. Cfs; is that correct?
 10 A. Yes.
 11 Q. Okay. And in your reading of the
 12 right, if there is a final fill on July 1, the
 13 800 -- the water taken in the what was labeled the
 14 storage diversion of 850 acre-feet would remain
 15 storage; is that correct?
 16 A. That's correct.
 17 Q. And so when final fill comes, that
 18 storage would be subtracted from American Falls'
 19 storage right even though the reservoir was full;
 20 is that correct?
 21 A. That's correct.
 22 Q. Okay. So there would be -- if you'll
 23 pardon the colloquialism -- a hole in American
 24 Falls' storage even though American Falls
 25 Reservoir is full; is that correct?

1 water for a specific purpose. A diversion
 2 structure, particularly on the natural channel,
 3 may also include a check structure in the
 4 channel."
 5 Q. That's page 2; is that correct?
 6 A. Correct.
 7 Q. And would you read the definition of
 8 "source" on page 4?
 9 A. "Source is the water body at the point
 10 of diversion. Examples are Salmon River, Squaw
 11 Creek, spring, ground water, et cetera."
 12 Q. And that definition differs from the
 13 way you use the word "source" in paragraph 10?
 14 A. Yes.
 15 Q. Okay. I'm going to show you what I've
 16 marked as Exhibit 5.
 17 (Exhibit 5 marked.)
 18 Q. (BY MR. ARKOOSH): Exhibit 5, I will
 19 represent, is the diagram I drew to illustrate our
 20 discussion earlier about the 1-6 right; is that
 21 correct?
 22 A. Yes.
 23 Q. Okay. And Exhibit 5 shows a diversion
 24 of 850 cfs of natural flow prior to July 1 and 850
 25 acre-feet of storage prior to July 1; is that

1 A. Well, there would be a portion of the
 2 physical storage in American Falls Reservoir that
 3 would belong to a space holder of some other
 4 reservoir.
 5 Q. Okay. That would be unallocated
 6 storage that you would allocate on the date of
 7 allocation?
 8 A. Not necessarily. We do pass down
 9 Palisades storage that could be physically held in
 10 American Falls. It could be unallocated storage.
 11 It would be Palisades storage. It could be Island
 12 Park storage.
 13 Q. But it would go to a junior user,
 14 would it not?
 15 A. It would go to whoever it was
 16 allocated to.
 17 Q. But that would be a junior user, by
 18 definition?
 19 A. Yes.
 20 Q. Okay. So by reading the right the way
 21 you're reading it, the -- even though American
 22 Falls Reservoir District No. 2 space at American
 23 Falls Reservoir filled, part of that fill would go
 24 to a junior user?
 25 A. No. American Falls Reservoir District

1 No. 2 would receive 100 percent of their
2 allocation. But they would have also used storage
3 if they exceeded their priority right of natural
4 flow.

5 Q. In any one year, if they had 400
6 acre-feet -- 400,000 acre-feet of storage space,
7 they only received 400,000 acre-feet labeled
8 storage because you won't change the label back to
9 natural flow if the reservoir fills; is that
10 correct?

11 A. Only with the exception of when we're
12 spilling excess water past Milner.

13 Q. Forgetting about that exception, was
14 the statement otherwise correct?

15 A. Yes.

16 Q. And that water then would go to a
17 junior user?

18 A. If there were additional storage
19 available above the 100 percent in American Falls,
20 that storage would go to an unfilled junior
21 account.

22 Q. Can you think of other examples where
23 water is taken from a senior user and given to a
24 junior user?

25 MR. BAXTER: I'm going to object. I think

1 it mischaracterizes his existing testimony.

2 THE WITNESS: I don't think it's taken from
3 a senior user. If you're referring to the
4 American Falls space holders as senior users, they
5 got allocated 100 percent. There was additional
6 water in addition to the accrual to that reservoir
7 that went to fill unfilled space.

8 Q. (BY MR. ARKOOSH): Well, say that like
9 this year there was approximately 60,000 acre-feet
10 that District 1 has labeled storage for American
11 Falls Reservoir District No. 2 that was diverted
12 prior to the last fill of the reservoir and then
13 the reservoir filled up, so American Falls
14 Reservoir has its full capacity of, say, 4 million
15 acre-feet plus 60,000.

16 So what you've done is you've created
17 4 million acre-feet of storage plus 60,000
18 acre-feet of storage and given that extra 60,000
19 to a junior user; isn't that correct?

20 A. No, we don't create anything. We just
21 measure the water that's in the system. And we
22 divide it up according to priority of the water
23 right. Once the right has reached its volume
24 limitation, it can't receive any more water. And
25 then it would go to the next priority in line,

1 which may be a junior priority.

2 MR. ARKOOSH: Okay. I have no further
3 questions.

5 EXAMINATION

6 BY MR. GEHLERT:

7 Q. Mr. Olenichak, I'm David Gehlert I
8 represent the United States, in particular the
9 Bureau of Reclamation, in these subcases. I
10 appreciate your patience today, and I have really
11 just a few questions for you. I wanted to follow
12 up on a couple of points that you had addressed
13 earlier.

14 I understood you to say that the water
15 rights listed in the paragraph 12 of your
16 affidavit are not in the accounting system?

17 A. That's correct.

18 Q. Are there other water rights that are
19 not in the accounting program?

20 A. Other beneficial-use rights? Yes.
21 There are no beneficial-use rights in the water
22 right accounting program.

23 Q. And what do you consider to be a
24 beneficial-use right?

25 A. A right that is not decreed,

1 permitted, or licensed.

2 Q. But it's a right because it has been
3 being used?

4 A. That's how you establish a
5 beneficial-use right.

6 Q. And I thought I understood you to say
7 that Lake Walcott fills almost every year; is that
8 correct?

9 A. That's correct.

10 Q. When -- and I also understood you to
11 say that there's a distinction between filling on
12 paper and filling physically when we're talking
13 about a storage reservoir?

14 A. Correct.

15 Q. When you say it fills almost every
16 year, were you talking about it filling on paper,
17 physically, or both?

18 A. Lake Walcott?

19 Q. Yes.

20 A. Yes, both.

21 Q. Okay. And you considered it to be
22 filled under the 1909 right?

23 A. Yes.

24 Q. And you mentioned that it fills up to
25 approximately 90,000 acre-feet?

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

In Re SRBA)
Case No. 39576) Subcase No. 1-6
_____)

COPY

DEPOSITION OF LYLE ROBERT SWANK

OCTOBER 8, 2008

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

EXHIBIT NUMBER

M & M Court
Reporting
Service, Inc.

Since 1970
Registered Professional Reporters

SOUTHERN
1-800-234-9611

■ BOISE, ID 208-345-9611
■ TWIN FALLS, ID 208-734-1700
■ POCATELLO, ID 208-232-5581
■ ONTARIO, OR 541-881-1700

NORTHERN
1-800-879-1700

■ COEUR D'ALENE, ID 208-765-1700
■ SPOKANE, WA 509-455-4515

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

In Re SREA)
Case No. 39576) Subcase No. 1-6

DEPOSITION OF LYLE ROBERT SWANK
OCTOBER 8, 2008

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

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 Idaho Groundwater Appropriators, Inc.:
11 RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
12 BY MR. RANDALL C. BUDGE
13 101 Capitol Boulevard, Suite 208
14 Boise, Idaho 83702
15 For Idaho Department of Water Resources:
16 OFFICE OF ATTORNEY GENERAL
17 BY MR. GARRICK L. BAXTER
18 322 East Front Street
19 P.O. Box 83720
20 Boise, Idaho 83720-0098
21 ///
22 ///
23 ///
24 ///
25 ///

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 the Department of
6 Water Resources, 900 North Skyline, Suite A, Idaho
7 Falls, Idaho, commencing at 8:11 a.m., October 8,
8 2008, before Jeff LaMar, Certified Shorthand
9 Reporter and Notary Public within and for the
10 State of Idaho, in the above-entitled matter.

11 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
18 113 Main Avenue West, Suite 303
19 P.O. Box 485
20 Twin Falls, Idaho 83303-0485
21 For American Falls Reservoir District No. 2:
22 CAPITOL LAW GROUP PLLC
23 BY MR. C. THOMAS ARKOOSH
24 P.O. Box 32
25 Gooding, Idaho 83330

APPEARANCES (Continued):

1
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 Mud Lake water users:
10 HOLDEN, KIDWELL, HAHN & CRAPO P.L.L.C.
11 BY MR. ROBERT L. HARRIS
12 1000 Riverwalk Drive, Suite 200
13 P.O. Box 50130
14 Idaho Falls, Idaho 83405
15 Also Present:
16 Ronald Dean Carlson
17 James Cefalo
18
19
20
21
22
23
24
25

INDEX

1	TESTIMONY OF LYLE ROBERT SWANK	PAGE
4	Examination by Mr. Simpson	6,95
5	Examination by Mr. Arkoosh	46,77,99
6	Examination by Mr. Gehlert	75
7	Examination by Mr. Budge	78
8	Examination by Mr. Baxter	96

EXHIBITS

11	9 - E-mails produced to T. Olenichak	48
12	10 - Hand-drawn diagram	54
13	11 - Water Right License for Water Right	75
14	No. 01-2061	

UNANSWERED QUESTIONS

17	PAGE	LINE
18	102	5
19	102	13

LYLE ROBERT SWANK,

first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

BY MR. SIMPSON:

Q. Can you please state your full name and spell your last name for the record, please.

A. Yes. Lyle Robert Swank, S-w-a-n-k.

Q. And, Lyle, your working address is where?

A. 900 North Skyline, Idaho Falls, Idaho 83402.

Q. And your present responsibilities, job responsibilities, are what, sir?

A. I'm the watermaster for Water District No. 1, and also eastern regional manager for Idaho Department of Water Resources.

Q. Okay. And how long have you been employed by the Department of Water Resources?

A. It's over 30 years now.

Q. Since the mid-'70s?

A. Since '78.

Q. '78. And for that length of time, have you also been employed by the water district?

A. Yes, I have.

Q. Okay. And, Lyle, you've had your deposition taken before; correct?

A. I have.

Q. Okay. So you understand the process. And do you understand that your deposition today is being taken with respect to SRBA claims that were filed by a number of surface water entities below American Falls?

A. Yes, I do understand.

Q. And objections were then filed by the ground water districts through IGWA?

A. That is my understanding.

Q. Okay. And are you further aware that there were a number of summary judgment motions filed and affidavits attached to those motions for summary judgment?

A. Yes.

Q. Okay. And are you further aware that one of the affidavits was filed on behalf of an employee of the Department, Tony Olenichak?

A. I did -- I did know that Tony Olenichak had an affidavit, and I did see that.

Q. Okay. And did you see that before it was signed by Tony?

A. I believe so. That's been several months ago. It's common practice for Tony to show me the memos that he's preparing before they're sent out.

Q. And so pursuant to the normal practice, you would have reviewed that affidavit and approved it going out in the form that it did?

A. Yes. I give Tony some latitude, but I did approve it.

Q. And have you reviewed any of the other affidavits or filings in the proceeding that we're here today on, such as have you reviewed Mr. Carlson's affidavit?

A. Yes, I did.

Q. Okay. Have you reviewed the briefing associated with the summary judgment motions?

A. If I could see a copy of that, I might be able to tell you whether I've seen that or not.

MR. ARKOOSH: Do you want it?

MR. SIMPSON: Sure.

MR. ARKOOSH: Did you want the motion?

MR. SIMPSON: The motion or the briefing. Either one is fine.

MR. BAXTER: Do you want him to start with the claimant motion for summary judgment filed by

1 Q. Okay. Lyle, have you been involved in
2 the review of permits in the context of licensing
3 of water rights, that is, the examination for
4 beneficial use?

5 A. I've had fairly little involvement in
6 that step of the licensing process.

7 Q. Okay. So you haven't been engaged in
8 actually issuing licenses and putting conditions
9 on licenses?

10 A. Not throughout most of my career.

11 Q. Okay. Did you have any participation,
12 Lyle, on behalf of the Department in the review of
13 claims and ultimate recommendations of claims in
14 basin 01?

15 A. Again, I had very little input into
16 that stage. I may have been called upon at times
17 to -- when I had more field responsibilities, to
18 provide information as to whether there was a
19 water right in a particular location or a pump in
20 a certain location that's being claimed.

21 Q. So you did not have an opportunity to
22 review the IDWR recommendations for the basin 01
23 claims before they were submitted to the SRBA
24 court?

25 A. I believe that most of that review was

1 What did you do regarding
2 recommendations that went into the SRBA?

3 A. Well, the adjudication agents
4 occasionally would talk to the water district
5 staff about their knowledge of some of the water
6 rights within the district. In some cases the
7 district staff have some more familiarity than
8 some of water right adjudication agents. So it
9 was just trying to have a more complete
10 understanding of the water rights and how they're
11 being delivered.

12 Q. So that's how you would have
13 interfaced with these folks; they would come to
14 you and ask how is this actually being done?

15 A. Yeah. And I would say primarily Tony
16 Olenichak was delegated most of that
17 responsibility. But...

18 Q. Tony gave his deposition yesterday.
19 Are you aware of that? Or two days
20 ago.

21 A. Monday. Yes, I was.

22 Q. And you told Mr. Simpson that you were
23 aware that at some level that he was involved in
24 the process?

25 A. Yes.

1 delegated to the appropriate staff.

2 Q. Okay. And that wouldn't have included
3 you?

4 A. It wouldn't include me to any
5 significant extent, I don't think.

6 Q. You didn't -- you didn't in any way
7 approve or disapprove those recommendations that
8 went out?

9 A. I did not.

10 Q. Okay. Lyle, from a watermaster's
11 perspective, is the duty of water associated with
12 a particular right determined by the user's
13 ability to put that water to beneficial use for
14 the irrigation demand?

15 A. Yes.

16 MR. SIMPSON: That's all the questions I
17 have. Thank you.

18
19 EXAMINATION

20 BY MR. ARKOOSH:

21 Q. Lyle, my name is Tom Arkoosh. I
22 represent American Falls Reservoir District No. 2.
23 I didn't get much of a clear sense of your
24 participation in these recommendations. I did
25 understand you weren't much involved.

1 (Exhibit 9 marked.)

2 Q. (BY MR. ARKOOSH): I've shown you
3 what's been marked as Deposition Exhibit 9, which
4 are the e-mails and drafts that were provided us
5 by the Department's counsel in fulfillment of an
6 agreement to provide those materials that
7 Mr. Olenichak traded with counsel for IGWA.

8 Have you seen that material before?

9 MR. BAXTER: Take all the time, Lyle, you
10 need to review that.

11 THE WITNESS: Yeah.

12 (Reviews.)

13 MR. ARKOOSH: Off the record.

14 (Recess.)

15 Q. (BY MR. ARKOOSH): Do you recognize
16 some or all of the materials in Exhibit 9?

17 A. Yes. I -- Tony's e-mail, I may or may
18 not have seen a draft or this. I'm not certain.
19 But I remember seeing something similar to this.

20 Q. Tony testified that his place in this
21 process merely was to provide technical
22 information.

23 As his boss, do you agree with that
24 statement?

25 A. Yes.

1 Q. His participation in no way reflects a
2 desire on the part of the district to advance this
3 theory of administration by flood water right?
4 A. Could you repeat that, please?
5 Q. Yes.
6 MR. BUDGE: Theory of -- I'll object to the
7 form of the question, unless you clarify what you
8 mean by "this theory of flood water rights."
9 MR. ARKOOSH: I'll restate the question.
10 Q. The district is not being a proponent
11 of the theory advanced by IGWA in this matter, are
12 you?
13 A. We are not.
14 Q. Okay. And if I understood your
15 answers to Mr. Simpson, the Department -- excuse
16 me, the district -- or maybe the Department, but
17 the district administers water rights when and how
18 it finds the water at a headgate in priority; is
19 that correct?
20 A. That's correct.
21 Q. Okay. Did you work on the
22 recommendation for the American Falls Reservoir
23 District No. 2 1-6 right?
24 A. No. I delegated that to Tony.
25 Q. Okay. I have a few brief questions to

1 ask you about that. We have Exhibit 4. I believe
2 it is -- excuse me -- Exhibit 3, which is a
3 description of that right from the Eagle decree.
4 Are you familiar with that language?
5 A. (Reviews.)
6 Yes, I am.
7 Q. Would you read the last sentence of
8 the first paragraph, please, commencing with the
9 word "Nothing"?
10 A. "Nothing"? "Nothing herein shall
11 prevent American Falls Reservoir District No. 2
12 from diverting water under said license prior to
13 May 1 of a given irrigation season but all such
14 diversions shall be charged as storage in the
15 event the reservoir is not full on April 30th of
16 that season or does not fill after April 30 of
17 that season."
18 Q. And if the reservoir fills on -- is
19 full on April 30th or fills after April 30th, what
20 happens to that water that was initially charged
21 to storage?
22 A. If American Falls is full on
23 April 30th, then the -- as I understand this,
24 American Falls Reservoir District No. 2 would be
25 entitled to the 1700 cfs of water after that date.

1 Q. As storage or natural flow?
2 A. As natural flow after April 30th.
3 Q. And the only condition stated in that
4 sentence is the filling of the American Falls
5 Reservoir; is that correct?
6 A. That's correct within that sentence,
7 not that paragraph.
8 Q. Correct. But that sentence -- well,
9 let me back up.
10 To paraphrase what Mr. Olenichak said
11 and I believe what Mr. Carlson said, is setting
12 back the clock or transmuting what was storage
13 into natural flow under the 1-6 right requires
14 that the system fill and there be a spill over
15 Milner, not that just the American Falls Reservoir
16 fills. I think that in part that accurately
17 reflects what I'm told by them.
18 As to that last sentence, is that
19 correct or incorrect? Does it require a system
20 fill to transmute the pre May 1 storage to natural
21 flow?
22 A. Yeah, I'm not certain that you can --
23 that that last line captures the entire intent of
24 that full paragraph.
25 Q. That's a fair enough answer.

1 So in that last line, however, you
2 don't find any reference to "system fill" or
3 "spill over Milner"?
4 A. It does not.
5 Q. In fact, in that entire water right,
6 one finds no reference to "system fill" or "spill
7 over Milner"?
8 A. That's correct.
9 Q. When does, if it does, American Falls
10 Reservoir generally fill during the season? What
11 part of the season would it have its fill?
12 A. Yeah, it depends a lot on the water
13 held over at the end of the previous year, and it
14 depends on the rate of fill from upstream American
15 Falls Reservoir and the releases from American
16 Falls Reservoir. All those things considered,
17 it's probably most common for it to fill during
18 April and May, sometimes June.
19 Q. Do you know what time it filled this
20 year?
21 A. I do not recall that date.
22 Q. Generally when it fills, American
23 Falls Reservoir District No. 2 is diverting water;
24 is that correct?
25 A. Yes.

1 Q. And it would be diverting water in
2 excess of 850 cfs almost always when there's a
3 fill?

4 A. That would be fairly common.

5 Q. Okay. So the date of final fill and
6 the first draw from storage subsequent to the date
7 of final fill by No. 2 would be instantaneous; is
8 that correct?

9 A. Could you repeat that, please?

10 Q. Yes.

11 The date of final fill of American
12 Falls Reservoir -- let's just -- June 1 -- let's
13 just pick an arbitrary date, which is not an
14 unreasonable date, April 15th, which would not be
15 an unreasonable date -- and the first draft by
16 American Falls Reservoir District No. 2 by
17 diversion out of its storage account would be
18 instantaneous in almost -- if not all years,
19 almost all years?

20 A. Yes. Well, I would say when American
21 Falls is filled at the time that Reservoir
22 District 2 is diverting water, on those years
23 Reservoir District 2 does -- receives a benefit of
24 that available water as soon as American Falls is
25 finished filling

1 fill and initial draft on storage are
2 instantaneous.

3 Is that an accurate representation of
4 what generally happens every year because almost
5 always American Falls is drafting more than
6 850 cubic feet a second?

7 A. Yeah, I would state it just slightly
8 different, that if the water right is filled,
9 available water supply goes to the next
10 appropriator in line. And certainly this example
11 is at least one of the conditions that does
12 happen.

13 Q. Okay. Well, is it your opinion, then,
14 that there has to be water spilling over Milner in
15 order to -- under the first sentence of the 1-6
16 paragraph in Exhibit 3, that there has to be water
17 spilling over Milner for the storage taken prior
18 to final fill?

19 A. Not necessarily.

20 Q. Okay. Do you know that that's done
21 today, that we -- in 1-6 we do not get credit, it
22 remains always storage? Once storage, it always
23 remains storage unless there's spill over Milner,
24 even though there's a fill at American Falls?

25 A. Well, the watermaster and the water

1 (Exhibit 10 marked.)

2 MR. BAXTER: Tom, could I get a copy of
3 this?

4 MR. ARKOOSH: He's going to draw on it a
5 little more, and then we can make a copy.

6 MR. BAXTER: Okay.

7 Q. (BY MR. ARKOOSH): I'm going to show
8 you what is a copy of Mr. Olenichak's No. 5, and
9 we've marked it as No. 10. And I've made -- in a
10 marker I denoted May 1, which was not on his
11 original.

12 A. Uh-huh.

13 Q. Mr. Olenichak and I denoted -- he
14 testified we have 850 natural flow and 850 storage
15 up to date of final fill, and we picked an
16 arbitrary date of July 1. He indicated that the
17 look back to change storage to natural flow under
18 the first sentence of the 1-6 water right was from
19 the initial storage draft, which we arbitrarily
20 picked as July 15th, back only to the date of
21 final fill.

22 Okay?

23 A. Uh-huh.

24 Q. But I'm going to make another line
25 there to reflect your testimony that date of final

1 right accounting program doesn't have the ability
2 to go back and relabel or recharacterize storage
3 that's accrued or gone past the system.

4 Q. Is that the problem here? Is that why
5 we can't get credit for that storage -- if it's
6 labeled storage prior to the final fill, the water
7 right requires when there's a final fill you go
8 back and call it --

9 MR. STANISH: I'm going to object to
10 relevancy to the high-water issue.

11 MR. ARKOOSH: Okay.

12 Q. -- go back and call it natural flow?
13 Is the reason that's not happening is because the
14 program doesn't have the capacity to relabel the
15 water?

16 A. Well, I don't think it's a program
17 limitation. To some extent it's maybe a fairness
18 issue. If a canal's been using a certain amount
19 of natural flow and somebody goes back and says,
20 you know, "Upon further review, we've gone back
21 and changed that previous month to where you've
22 got a different amount of storage," then I think
23 we've got some other people that would have a
24 problem with it.

25 Q. You told Mr. Simpson that the

1 watermaster's job was to deliver available water
2 to water rights in the district; is that correct?

3 A. That's correct.

4 Q. So you have to do that dispassionately
5 in accordance with the water right; is that
6 correct?

7 A. Correct.

8 Q. So you really don't want to be the
9 arbiter of what you think is fair, you want to
10 administer the water rights; isn't that right?

11 A. That's correct.

12 Q. Okay. So let's go back to the 1-6
13 right.

14 There's no requirement in the 1-6
15 right that there be a spill over Milner to have
16 the look back and change the storage to initial --
17 to natural flow as directed by the 1-6 water right
18 in the Eagle decree?

19 MR. STANISH: Objection. Relevancy.

20 THE WITNESS: Could you rephrase that,
21 please?

22 Q. (BY MR. ARKOOSH): I probably won't
23 rephrase it. I'll try to restate it.

24 There's no requirement in the 1-6
25 right that there be a spill over Milner in order

1 to change what was initially storage to natural
2 flow when there's a fill of the American Falls
3 Reservoir?

4 MR. STANISH: I'm just going to object to
5 this whole line of questioning.

6 MR. BAXTER: Go ahead and answer the
7 question if you understand it. You can ask him to
8 restate it again.

9 THE WITNESS: Maybe one more time, it will
10 help me.

11 Q. (BY MR. ARKOOSH): There's no
12 requirement in Exhibit 3, the language in
13 Exhibit 3 -- do you know what I'm talking about by
14 Exhibit 3?

15 There's no requirement in Exhibit 3 or
16 the 1-6 right that change what was storage to
17 natural flow if there's a fill of American Falls
18 that there be a spill past Milner?

19 A. I think I'd agree with that.

20 Q. Same question: There's no requirement
21 that the system be full, which I think is the same
22 as a spill past Milner?

23 MR. STANISH: I'd also object that it calls
24 for a legal opinion.

25 THE WITNESS: You know, maybe if I can take

1 an attempt to try and make it a little bit
2 clearer.

3 There are times when Reservoir
4 District 2 will get a full allocation and, in
5 essence, because of some additional I'll say
6 natural-flow runoff, you could have a full
7 allocation that would basically wipe out the
8 storage or excess use that somebody had been
9 charged to.

10 It's -- I mean, it's slightly
11 different than how you phrased it, but I think it
12 gets to your question -- or your statement.

13 Q. (BY MR. ARKOOSH): Wipe out the
14 storage that someone -- who would that someone be?

15 A. Well, we have had years when we had
16 people diverting using storage water. Subsequent
17 to that, the reservoir system has filled and we
18 have a full allocation. In that case you don't
19 increase the storage use to the reservoir system
20 capacity plus the storage used prior to that; we
21 just basically allocate up to the available --
22 excuse me, up to the available storage supply.

23 Q. But that's done for No. 2 at the time
24 of the last fill; is that right?

25 A. Certainly has happened that way.

1 Q. Okay. So I'm going to use 400,000 as
2 their allocation, but that's not exactly correct.
3 That was an historical allocation.

4 MR. BAXTER: I'm going to object. I think
5 that assumes facts not in evidence.

6 MR. ARKOOSH: And it's going to be a
7 hypothetical. I mean, I could use the number one
8 or 400,000.

9 MR. BAXTER: Okay. You just said that was
10 their historical diversion. I haven't heard
11 anything to represent that.

12 MR. ARKOOSH: "Historical allocation."

13 MR. BAXTER: "Allocation."

14 Q. (BY MR. ARKOOSH): Is that about
15 right, they have about 400,000 acre-feet in that
16 reservoir, give or take?

17 A. Yeah, when American Falls had capacity
18 of a million-seven, my recollection is they had
19 400,000 or that percentage of the total
20 reservoir's allocated space.

21 Q. And their right requires that on the
22 day of last fill, their allocation be 400,000,
23 notwithstanding what happened previously in the
24 season; is that right?

25 MR. STANISH: Again, it calls for a legal

1 conclusion.

2 Q. (BY MR. ARKOOSH): And to address that
3 objection, I want you to answer as the
4 watermaster. I don't want your legal opinions. I
5 want to know as the watermaster meeting these
6 rights. Okay?

7 A. Yeah, their -- Reservoir District 2's
8 allocation can be up to the amount of their
9 proportionate space in the reservoir.

10 Q. When?

11 A. When the storage is allocated.

12 Q. So that would be the date of last fill
13 they have a full allocation, is that correct, of
14 storage?

15 A. That's correct.

16 Q. Notwithstanding whether there's spill
17 over Milner?

18 A. Yeah. It can happen with or without
19 spill over Milner.

20 Q. Okay. And notwithstanding whether the
21 other reservoirs in the system are full?

22 A. Maybe if you could restate that,
23 please.

24 Q. Notwithstanding whether other
25 reservoirs in the system are full?

1 get -- let's call that number full allocation --
2 they get full allocation of storage,
3 notwithstanding prior use; correct?

4 A. Yes.

5 Q. This year -- and again, I think
6 American Falls Reservoir District No. 2, my
7 memory, was filled about July 13th; is that right?

8 A. In 2008 we didn't reach the system
9 allocation date until into July, that's correct.

10 Q. Okay. And prior to that time,
11 American Falls Reservoir District No. 2 had used
12 approximately 60,000 acre-feet of water that was
13 prior to the date of allocation labeled as storage
14 water? Does that comport with your knowledge?

15 A. I don't have that number in mind.

16 Q. Okay. Accept that number
17 hypothetically for a minute.

18 On date of allocation, that water used
19 prior to the last fill, then, would become natural
20 flow and American Falls would have a full
21 allocation of water; correct?

22 A. No, I disagree with that.

23 Q. Why?

24 A. You don't change a storage use to a
25 natural flow unless you have no harm to other

1 A. That's correct.

2 Q. Okay. Is there any condition stated
3 in that right that prohibits giving American Falls
4 Reservoir District No. 2 their full allocation on
5 the date of last fill if it occurs on or after
6 April 30th?

7 MR. STANISH: Calls for a legal conclusion.

8 THE WITNESS: Yeah, I didn't read a
9 restriction within this Exhibit 3.

10 Q. (BY MR. ARKOOSH): Is there any
11 restriction, period, in your mind?

12 A. Yeah, the limitation is usually the
13 storage allocation and American Falls Reservoir
14 District 2's proportionate share in that storage
15 allocation.

16 Q. Which is what? What limitation is
17 that?

18 A. Well, it's -- right now it's the
19 capacity of the reservoir less the evaporation
20 shrink or limitation.

21 Q. So let's say its like 395,000
22 acre-feet.

23 Is that what it is, approximately?

24 A. That's a ballpark.

25 Q. Okay. So on date of last fill, they

1 water rights. If you had a system-filled
2 situation or American Falls spilling situation,
3 then I could agree with your premise. But
4 otherwise, I do not.

5 Q. What other water rights would be
6 harmed? Would they be junior or senior water
7 rights?

8 A. They -- well, they certainly could be
9 other storage water rights somewhere in the
10 system.

11 Q. Well, if they're junior water rights,
12 they take subject to the 1-6 right, don't they?

13 MR. STANISH: Calls for a legal conclusion.

14 THE WITNESS: Yeah, I guess I'd have to see
15 an example. Certainly, a junior storage right
16 that was upstream certainly could still be
17 filling.

18 Q. (BY MR. ARKOOSH): Well, let me give
19 you an example. Let me tell you what I think has
20 happened.

21 I think what happened is that 60,000
22 acre-feet of space, assuming it was in American
23 Falls, that hole was filled with what the district
24 would label unallocated storage, because American
25 Falls Reservoir itself was full but 60,000

1 acre-feet of the No. 2 right was not in there.
2 Okay? It had been used. So I think what you did
3 is you allocated that storage to a junior
4 Palisades right.

5 A. No. In 2008, that example is not
6 correct. American Falls did not get physically
7 full. So you did not have the unallocated storage
8 topping off the rest of that reservoir.

9 Q. Okay. So where did that 60,000
10 acre-feet go, actually?

11 A. It went down American Falls Reservoir
12 District No. 2.

13 Q. Okay. And then -- go ahead.

14 A. And was consumed by the canal.

15 Q. But American Falls Reservoir did fill,
16 it was just held high?

17 A. The water right filled.

18 Q. Yeah.

19 A. The reservoir did not.

20 Q. So where did the water that would have
21 filled the reservoir, into whose account did that
22 go? Did it go into a junior account or a senior
23 account?

24 A. It went to the American Falls space
25 holder's water right.

1 Q. Why was it not given to American Falls
2 Reservoir District No. 2?

3 A. It was given -- American Falls
4 Reservoir District 2008 storage allocation did
5 fill, less the evaporation shrink.

6 Q. As of date of allocation?

7 A. Yes.

8 Q. And that date of allocation was the
9 date of the fill of the reservoir?

10 A. The date of allocation is the date
11 that we filled the last acre-foot of storage in
12 the system.

13 Q. Okay. So then as of mid-July, then,
14 American Falls Reservoir District No. 2 had an
15 approximate 395- acre-foot of storage,
16 notwithstanding prior storage use?

17 A. That's correct.

18 MR. ARKOOSH: Okay. Could we have just a
19 break here?

20 MR. BAXTER: Uh-huh.

21 MR. ARKOOSH: Let me ask one more question
22 before the break.

23 Q. And so the storage, the water that was
24 labeled storage prior to the last fill, was
25 reclassified as natural flow?

1 A. No, I disagree with you.

2 Q. So how can -- explain to me how we can
3 have storage of the full storage allocation, about
4 395,000 as of date of last fill, and have used
5 what's been labeled 60,000 acre-feet of storage
6 prior to that time?

7 A. It's not inconsistent, in my view.

8 Q. So then we would essentially have been
9 awarded 450,000 acre-feet of storage?

10 A. No. 390-some less, in your example,
11 the 60,000 acre-feet consumed would be your
12 remaining storage on that date.

13 Q. So you wouldn't do what the water
14 right said and go back and relabel that natural
15 flow?

16 A. I don't see where this says go back
17 and relabel that. That language is not in here.

18 Q. Explain for me, then, the meaning of
19 the following language. Beginning on line 18, it
20 says "Except." Do you see that? It says, "Except
21 that in any year in which American Falls Reservoir
22 is full to capacity on April 30 or fills after
23 that date, taking to account any water that may be
24 temporarily stored to its credit in upstream
25 reservoirs, all water diverted by American Falls

1 Reservoir No. 2 within the maximum of the
2 1700 cubic feet per second during the year" --

3 MR. BAXTER: Sorry to interrupt you. But I
4 think the copy that's in the exhibit is different
5 from what you're reading. Line 18 appears to be
6 different.

7 MR. ARKOOSH: Okay.

8 Q. If you don't mind, I'll come read it
9 with you.

10 A. Yeah.

11 Q. Line 8, Lyle.

12 A. Okay.

13 Q. It says, "Except that in any year in
14 which American Falls Reservoir is full to capacity
15 on April 30 or fills after that date, taking into
16 account any water that may be temporarily stored
17 to its credit in upstream reservoirs, all water
18 diverted by American Falls Reservoir District
19 No. 2 within the maximum of 1700 cubic feet per
20 second during the year prior to the initial
21 storage draft on the American Falls Reservoir
22 after the reservoir finally fills in that year
23 shall be considered natural flow."

24 Do you see that language?

25 A. Yes.

1 Q. How does that language comport with
2 not considering that water natural flow that was
3 diverted prior to the final fill?

4 MR. STANISH: Objection. Calls for a legal
5 opinion.

6 THE WITNESS: Yeah, I think the
7 inconsistency there is -- it says, "American Falls
8 Reservoir is full to capacity on April 30th." We
9 didn't have that situation.

10 Q. (BY MR. ARKOOSH): "Or fills after
11 that date."

12 A. "Or fills after that date."

13 Q. We did have that situation, taking
14 into account paper fill?

15 A. Yeah, it doesn't -- it certainly
16 doesn't state paper fill versus capacity. It's
17 talking about capacity -- excuse me -- in that
18 same -- right in that same sentence.

19 Q. "Or fills after that date, taking into
20 account any water that may be temporarily stored
21 to its credit in upstream reservoirs."

22 MR. STANISH: Objection. Calls for a legal
23 conclusion.

24 Q. (BY MR. ARKOOSH): Isn't that commonly
25 known as "paper fill"?

1 position. That's all.

2 MR. BAXTER: I think he's established how
3 the right is administered, and you've established
4 there's a disagreement with regards to the
5 language. I don't know why we need to continue to
6 belabor the point.

7 MR. ARKOOSH: I'm just looking for the
8 explanation why the language doesn't, in the
9 watermaster's mind, mean what it seems to say.
10 And if I get that explanation, I've accomplished
11 my purpose and I'll move on.

12 Q. The language "taking into account any
13 water that may be temporarily stored to its
14 credit" -- "its" meaning the reservoir -- "in
15 upstream reservoirs," isn't that the definition of
16 paper fill?

17 A. No.

18 Q. What does that language mean to you,
19 Lyle?

20 A. Well, there is -- during the delivery
21 season, there is always storage moving downstream
22 or in some cases being exchanged upstream. And
23 so -- so I think that just is trying to

24 distinguish whether you've got an American Falls
25 Reservoir that's at capacity or not, regardless of

1 A. Yeah, I disagree with that.

2 Q. You just described for me that
3 American Falls Reservoir didn't fill, but it
4 filled on paper?

5 A. That's correct.

6 Q. Isn't that what that means, taking
7 into account any water --

8 MR. STANISH: Can we go off the record for
9 a minute here.

10 I understand if you want to ask him
11 about how he interprets the system or how he
12 applies the water to his understanding of the
13 water is fine. But I'm not sure why you're asking
14 him to interpret a contract or a decree or
15 whatever it is you're asking him to interpret.

16 Q. (BY MR. ARKOOSH): Well, let me ask
17 you that, and then we'll go back to the question.

18 Isn't this your job, to read and
19 administer water in accordance with decrees?

20 A. It is a part of the job.

21 Q. And I understand you have the help of
22 legal counsel. I know that. And I'm not asking
23 you for legal opinions. I'm just trying to get at
24 how this right's administered, what the nubbin of
25 our disagreement is so I can understand your

1 whether that water is in American Falls or stored
2 upstream, has an American Falls label on it in
3 some other reservoir.

4 Q. So you don't -- one of the reasons
5 that the 60,000 this year wasn't natural flow and
6 our account started over at the date of fill of
7 American Falls is the fill defined by the right
8 and the fill that occurred this year, in your
9 view, are different?

10 A. No. I think we were consistent with
11 how this -- with my understanding of what this is
12 saying.

13 Q. Okay. Let's just get to it, Lyle, and
14 maybe -- I'm not trying to belabor the point, as
15 your counsels say, but I don't understand your
16 reasoning.

17 Tell me why, in your view, that on the
18 date of last fill of American Falls Reservoir this
19 year, all water taken prior by District No. 2 was
20 not natural flow?

21 A. It's the same for all the diversions
22 that took storage prior to the July allocation
23 date.

24 Q. Okay. All diversions don't have a
25 right like this, do they?

1 A. Most have more straightforward
2 language than what this says. I agree with that.

3 Q. Tell me how in the face of this
4 language that seems to me to say that all water
5 taken prior to the last fill is natural flow, why
6 American Falls No. 2's water taken prior to the
7 last fill is not natural flow. Help me with that.
8 I'm just trying to understand your thinking
9 because the language seems clear to me.

10 A. Yeah, I don't know how to bridge our
11 difference in understanding.

12 Q. Is there anything in this language in
13 Exhibit 3 that tells us that it's not to be
14 natural flow?

15 A. Well, it's talking about the American
16 Falls Reservoir storage right. And it basically
17 says when that right is full or that right has
18 been filled, that's when the American Falls
19 Reservoir District 2's natural-flow right goes
20 from 850 to 1700. I think that's what it's --
21 that's the interpretation that I have.

22 Q. So we have a natural-flow right after
23 that date of 1700?

24 A. That's correct.

25 Q. For the season?

1 A. As long as --

2 Q. Is that how you read that?

3 A. As long as that water right priority
4 is in effect.

5 Q. So in your -- even though -- and how
6 long is it at 1700?

7 A. Until the 1921 water right gets cut
8 off.

9 Q. Well, the interpretation given by
10 Mr. Olenichak was it was at 1700 until the first
11 draft of storage, which we used a hypothetical
12 date of July 15th.

13 A. I think that's happened. It may have
14 been what happened this year. I do know some days
15 when we were still filling 1921 and later rights
16 for a couple days between the storage allocation
17 date and when that's cut off.

18 Q. Okay. So in your view, then, the
19 phrase "after the reservoir finally fills that
20 year" defines -- strike that question.

21 I'm going to take a brief break. We
22 might be finished.

23 (Discussion.)

24 MR. GEHLERT: Back on the record.

25 ///

EXAMINATION

2 BY MR. GEHLERT:

3 Q. Mr. Swank, I'm David Gehlert. I
4 represent the Bureau of Reclamation in this
5 proceeding. I have just a couple of questions for
6 you.

7 You testified that generally you've
8 had little involvement with the issuance of
9 licenses in your career, but that suggested that
10 perhaps at some point you had more involvement,
11 perhaps earlier in your career?

12 A. No. I guess if there's -- I wasn't
13 trying to hint at anything. But I haven't really
14 been a water rights licensing agent. That hasn't
15 been one of the positions I've -- that I've held
16 in my career. I've maybe contributed information
17 to somebody that was doing a license on a
18 particular water right.

19 Q. Fair enough. Let me hand you a copy
20 of the license for water right 01-2061.

21 I suppose we should have this marked.

22 (Exhibit 11 marked.)

23 THE WITNESS: Okay.

24 Q. (BY MR. GEHLERT): Are you familiar
25 with that license?

1 A. You know, I may have seen this. I'd
2 probably defer, as the expert within our
3 Department, to Tony Olenichak.

4 Q. And so you had no personal involvement
5 in the issuance of that license?

6 A. I did not, no.

7 Q. Do you know, is that water right
8 included in the black books?

9 A. I don't know for sure.

10 Q. Then I have no further questions.
11 Thank you.

12 Actually, scratch that.

13 Do you know if that water right is
14 administered by your office?

15 A. Well, I believe that that's -- if that
16 is part of Falls Irrigation District's right, that
17 would be where their point of diversion and pump
18 would be -- traditionally diverted water.

19 Q. And is the water that's diverted, to
20 your knowledge, natural flow?

21 A. Well, only when we're filling this
22 particular water right priority, which is -- I
23 can't tell from this if it's 1956 or 1971.

24 Q. I'll represent to you it's 1956.

25 A. Okay. Yeah, only when we're filling

1 the 1956 priority water rights.

2 MR. GEHLERT: Okay. Thank you. No further
3 questions.

4
5 FURTHER EXAMINATION

6 BY MR. ARKOOSH:

7 Q. Let's finish up with this 1-6 right.

8 A. Okay.

9 Q. Just let me say this. As I understand
10 it in summary, you're treating this right as you
11 do the other natural-flow and storage rights in
12 the system; is that correct?

13 A. That's correct.

14 Q. And as I heard you say before, you're
15 doing so as a matter of fairness so that they're
16 all treated the same?

17 A. That's correct.

18 (Mr. Gehlert leaves the proceedings.)

19 Q. (BY MR. ARKOOSH): And as you sit here
20 today, it may or may not be the case; this one may
21 or may not be different. I have some sense that
22 you're really studying this thing for the first
23 time.

24 A. Well, I have reviewed this in the
25 past, but I'm not as -- I'm more rusty on it than

1 this more recent review of the affidavit.

2 Q. Okay. So you weren't sure whether --
3 when you said you had reviewed and approved his
4 affidavit, whether that was before he filed it or
5 afterwards?

6 A. Yeah, I can't remember if it was a
7 draft or a final version.

8 Q. Okay. But when he put it in final
9 form before it was submitted to be filed in this
10 proceeding, you had reviewed it and approved it?

11 A. Yes.

12 Q. Okay. And would it be your testimony
13 here that based on your review of that affidavit
14 you believe the information that's contained in it
15 is true and accurate?

16 A. Yeah, I agreed with what Tony was
17 saying. You know, he may have chosen some
18 different words than I might have picked out.

19 Q. We had some discussion in the Tony
20 Olenichak deposition about the stipulation that
21 was entered into that gave rise to the Eagle
22 decree. And that was a stipulation that was
23 signed by basically all of the claimants that are
24 involved in this high-water flood case -- AFRD 2,
25 Burley, Minidoka, Milner, I think Twin Falls,

1 some other people are.

2 Q. So let's just leave it at that summary
3 we just agreed to; is that fair enough?

4 A. Okay.

5 MR. ARKOOSH: That's all I have.

6 MR. STANISH: I do not have any questions.

7 MR. BUDGE: I've got just a few. I'll just
8 do them right here if that's all right.

9 MR. BAXTER: I'll back up a little bit.

10
11 EXAMINATION

12 BY MR. BUDGE:

13 Q. Lyle, just to clarify a few of the
14 questions and answers by Mr. Simpson and
15 Mr. Arkoosh.

16 You indicated that you had reviewed
17 the affidavit of Tony Olenichak filed in here.

18 And I wasn't clear whether that review
19 occurred prior to the time he submitted his
20 affidavit to be filed, or was your review
21 subsequent to that as a part of preparation for
22 this deposition?

23 A. Yeah, I -- I don't recall whether I
24 saw his -- his e-mail or a draft that he had put
25 out at that time. I did refresh my memory with

1 North Side, and the like -- and there's some
2 language in that stipulation. And I think we have
3 an exhibit. Let me find the language for you.

4 Part of that stipulation in the Eagle
5 decree was an exhibit attached to the affidavit of
6 Sarah Klahn filed in support of a summary judgment
7 motion. And in paragraph 6(c) of that -- this
8 isn't the best copy. But in that particular
9 paragraph, that's when all of the party plaintiffs
10 in that case stipulated that these rights were now
11 characterized as high-flood rights with a 1939
12 priority date.

13 And you'll see in there that they --
14 in referring to those so-called high-flood rights,
15 they said as follows: Quote, "The so-called
16 flood-water rights being those water rights of the
17 river which were only available during periods of
18 high flow."

19 And the question I had for you: When
20 that terminology is used for these late-priority
21 water rights, high-flow rights, do you consider
22 that to be the same as flood rights? In other
23 words, Mr. Olenichak and I think Mr. Carlson in
24 their depositions said that the terminology "flood
25 rights" is sometimes used and the terminology

1 few things. I think people might have been left
2 with a misimpression after, I think, the last
3 question by Mr. Arkoosh dealt with fairness and
4 delivery of water rights. And I just want to ask
5 you a few questions about that.

6 Does the Department and the water
7 district, will they deliver water rights upon
8 fairness? Or how does the Department or water
9 district deliver water rights?

10 A. We deliver water according to the
11 water rights based on the available supply within
12 the budgetary and personnel constraints we've got.

13 Q. So does the water district deliver
14 water consistent with its understanding or
15 interpretation of decrees?

16 A. Yes.

17 Q. And does this issue of fairness come
18 up when you feel that somebody is calling for
19 water inconsistent with your understanding of a
20 decree?

21 MR. ARKOOSH: Object to the form.

22 THE WITNESS: We deliver water according to
23 the water rights. "Fairness" is more of a
24 subjective term.

25 Q (BY MR. BAXTER): Okay. The thing I

1 want to talk a little bit about is storage and how
2 that is accounted when water is flowing past
3 Milner.

4 Now, Mr. Arkoosh talked a little bit
5 about the Department -- excuse me, the water
6 district's policy with regards to storage.

7 When storage is used early in the year
8 and then the system is considered full -- and not
9 just American Falls, but all the -- all the
10 water -- or all the system is full. Now, in that
11 interim, some water might have spilled past
12 Milner.

13 What happens to the storage accounts
14 when water is spilling past one -- what has
15 happened when folks used storage water, water then
16 that was spilled past Milner and the system was
17 filled?

18 A. The storage used -- or the storage
19 used as a year-to-date number is reset to zero so
20 the storage in the system is consistent with the
21 total capacity of the storage available.

22 Q. So that's done for AFRD No. 2?

23 A. Yes.

24 Q. And it's done for other storage users
25 as well?

1 A. Yes.

2 Q. I'd like to look at Exhibit 10. And I
3 notice there's some red markings on this exhibit.
4 Now, if we look to the markings on the right-hand
5 side, the arrow going up to July 1st, and I
6 believe it says, "Instantaneous draft on storage."

7 That's consistent -- those markings
8 are consistent with your testimony; is that
9 correct?

10 A. Yes, we did talk about that.

11 Q. Okay. But these other markings on the
12 left-hand side, those are not your markings? And
13 I didn't recall you talking about those markings.
14 Do you recall testifying as to the markings on the
15 left-hand side?

16 A. I did not.

17 MR. BAXTER: I have no further questions.

18 MR. SIMPSON: None for me.

19 MR. ARKOOSH: I have a couple.

20

21 FURTHER EXAMINATION

22 BY MR. ARKOOSH:

23 Q. Lyle, post-1900 rights can be in
24 priority early in the year in some years, they can
25 be in priority during the middle of the season in

1 some years, and very often they're in priority
2 late in the season; is that a fair statement?

3 A. That's correct.

4 Q. So counsel asked you if Tony's
5 affidavit was true and accurate.

6 But when you reviewed Exhibit 10, did
7 you see some discussion that Tony had provided
8 that didn't show up in the affidavit about
9 possibility of these rights being available
10 throughout the year? And I would suggest the
11 second page of Exhibit 10 of the e-mails to you.

12 A. Okay.

13 Q. Actually, I think it's Exhibit 9
14 maybe.

15 Are the e-mails Exhibit 9?

16 A. (No audible response.)

17 Q. You have to answer audibly. "Yes"?

18 A. Yes.

19 Could you repeat the question, please?

20 Q. On the second page, is there some
21 discussion about when these rights were in
22 priority throughout the year?

23 A. (Reviews.)

24 Q. Let's stop there. It might be the
25 first page. It is the first page.

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

In Re SRBA)
Case No. 39576) Subcase No. 1-6
_____)

COPY

DEPOSITION OF RONALD DEAN CARLSON

OCTOBER 7, 2008

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

EXHIBIT NUMBER

5

M & M Court
Reporting
Service, Inc.

Since 1970
Registered Professional Reporters

SOUTHERN
1-800-234-9611

■ BOISE, ID
208-345-9611

■ TWIN FALLS, ID
208-734-1700

■ POCATELLO, ID
208-232-5581

■ ONTARIO, OR
541-881-1700

NORTHERN
1-800-879-1700

■ COEUR D'ALENE, ID
208-765-1700

■ SPOKANE, WA
509-455-4515

MAIL 108385

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

In Re SRBA)
Case No. 39576) Subcase No. 1-6

DEPOSITION OF RONALD DEAN CARLSON
OCTOBER 7, 2008

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

APPEARANCES (Continued):

1
2
3 For American Falls Reservoir District No. 2:
4 CAPITOL LAW GROUP PLLC
5 BY MR. C. THOMAS ARKOOSH
6 P.O. Box 32
7 Gooding, Idaho 83330
8 For Bureau of Reclamation:
9 UNITED STATES DEPARTMENT OF JUSTICE
10 ENVIRONMENT & NATURAL RESOURCES DIVISION
11 NATURAL RESOURCES SECTION
12 BY MR. DAVE GEHLERT
13 1961 Stout Street, Suite 800
14 Denver, Colorado 80294
15 For Idaho Groundwater Appropriators, Inc.:
16 RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
17 BY MR. RANDALL C. BUDGE
18 101 Capitol Boulevard, Suite 208
19 Boise, Idaho 83702
20 For Idaho Department of Water Resources:
21 OFFICE OF ATTORNEY GENERAL
22 BY MR. GARRICK L. BAXTER
23 322 East Front Street
24 P.O. Box 83720
25 Boise, Idaho 83720-0098

1 THE DEPOSITION OF RONALD DEAN CARLSON, 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 the Department of
6 Water Resources, 900 North Skyline, Suite A, Idaho
7 Falls, Idaho, commencing at 9:13 a.m., October 7,
8 2008, before Jeff LaMar, Certified Shorthand
9 Reporter and Notary Public within and for the
10 State of 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
18 113 Main Avenue West, Suite 303
19 P.O. Box 485
20 Twin Falls, Idaho 83303-0485
21 For Minidoka Irrigation District:
22 FLETCHER LAW OFFICE
23 BY MR. W. KENT FLETCHER
24 P.O. Box 248
25 Burley, Idaho 83318

APPEARANCES (Continued):

1
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
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

1	INDEX	
2		
3	TESTIMONY OF RONALD DEAN CARLSON	PAGE
4	Examination by Mr. Simpson	6
5	Examination by Mr. Fletcher	72,144
6	Examination by Mr. Arkoosh	117
7	Examination by Mr. Gehlert	130
8	Examination by Mr. Baxter	143
9	Examination by Mr. Budge	146
10		
11	EXHIBITS	
12	6A - Snake River at Neeley gage data for	28
13	2008	
14	6B - River/Reservoir Flow Simulation for	28
15	2008	
16	7A - Gage data for 2002	28
17	7B - River/Reservoir Flow Simulation for	28
18	2008	
19	8 - Affidavit of Ronald D. Carlson in	41
20	Support of Motion for Summary Judgment	
21		
22		
23		
24		
25		

1 RONALD DEAN CARLSON,
 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. Will you please state your full name
 8 for the record and spell your last name.
 9 A. My name is Ronald Dean Carlson,
 10 C-a-r-l-s-o-n.
 11 Q. Okay. And, Mr. Carlson, my name is
 12 John Simpson. And I represent Twin Falls Canal
 13 Company, North Side Canal Company, Milner
 14 Irrigation District, A & B Irrigation District,
 15 and Burley Irrigation District in the subcases.
 16 Mr. Carlson, can I just call you Ron?
 17 A. I hope you would.
 18 Q. All right. Thank you.
 19 Ron, you provided an affidavit in
 20 support of a motion for summary judgment.
 21 Are you familiar with that affidavit?
 22 A. I am.
 23 Q. Okay. And that was an affidavit that
 24 you either drafted or reviewed and signed in
 25 response to a number of subcases that are part of

1 the SRBA; correct?
 2 A. That is correct.
 3 Q. Okay. And, Ron, you had your
 4 deposition taken previously in the Surface Water
 5 Coalition case.
 6 Do you recall that?
 7 A. I do.
 8 Q. Okay. And do you recall giving
 9 testimony in the Surface Water Coalition hearing?
 10 A. I do.
 11 Q. Okay. And to the best of your
 12 recollection, is the deposition that you provided
 13 in that matter and further your testimony provided
 14 at hearing, is that still your testimony as you
 15 sit here today?
 16 A. It is.
 17 Q. Okay. And you were present yesterday
 18 during the deposition of Mr. Olenichak?
 19 A. I was.
 20 Q. Okay. You recall that I asked
 21 Mr. Olenichak a number of questions regarding how
 22 the water rights accounting program works?
 23 A. Yes.
 24 Q. And based upon Mr. Olenichak's
 25 answers, would those -- if I asked you those

1 similar questions or identical questions, would
 2 your answers be the same?
 3 A. They would.
 4 Q. With respect to the filling of the
 5 reservoirs and the accounting associated with that
 6 action, Ron, can storage in a reservoir be filled
 7 with water which is not tributary to that
 8 particular reservoir?
 9 A. In the distribution of storage, it is
 10 possible to end up with water from any reservoir
 11 in the system being held in a different reservoir
 12 that is not tributary. For example, we could have
 13 Jackson water in Island Park. We could have
 14 Palisades water in Ririe.
 15 So we could end up with water in --
 16 being held in any system at the end of the year.
 17 You can't store it except to the extent that the
 18 water is available to be stored in that reservoir.
 19 Q. So for example, can Palisades storage
 20 accounts accrue water which is not tributary to
 21 Palisades?
 22 A. No.
 23 Q. Okay.
 24 A. But Palisades water can be stored in
 25 American Falls.

EXAMINATION

BY MR. ARKOOSH:

Q. I'm going to show you -- I'm Tom Arkoosh, Ron.

Do you remember me?

A. I do.

Q. And I represent American Falls Reservoir District No. 2. And I'm showing you what we've marked as Exhibit No. 3 in this series of depositions. And it is a part of the Eagle decree. And it's the part that deals with the description of American Falls Reservoir District No. 2 right.

Are you familiar with that?

A. I am.

Q. Okay. The last --

A. Or used to be.

Q. Well, I'm going to see if I can't refresh you.

Would you read this last sentence into the record of that first paragraph, please.

A. Starting with "Nothing"?

Q. Yes.

A. "Nothing herein shall prevent American Falls Reservoir District No. 2 from diverting

Other than that, the storage that they had used prior to that time will still be storage that's on the books and will go forward.

Q. To paraphrase, then, when the system filled --

A. When we allocate.

Q. When you allocated, that water that was previously storage, as addressed in that last sentence, became natural flow?

A. Well, it would be -- yeah, would just -- we reshuffle the deck and we start over at that point. Because there's no -- there's no empty space in the system, and we would allocate it to the space holders in the system.

Q. So if the system filled the date of allocation, then they would get their full -- it's approximately 400,000 acres? They'd get their full 400,000 acre-feet of storage?

A. Right. But if it is not and they've used storage, then that would stay on the books.

Q. Okay. The reason I ask you these questions, Ron, is because that is a systemwide cause, is it not, that affects the 1-6 water right, not just spring freshet? It's all the water in the system?

water under said license prior to May 1 of a given irrigation season but all such diversions shall be charged as storage in the event the reservoir is not full on April 30th of that season and does not fill after April 30th of that season."

Q. So, Ron, do you know what happens in the event the reservoir is full on April 30 of that season or does fill after April 30 of that season? Do you know what happens then to that water that was stored?

A. I know how we have done it.

Q. Well, how have you done it?

A. What we have done historically is the -- the distribution of -- I think prior to that time, you know, I'm a little fuzzy on the details, but half of 1700 second-feet of water got delivered as natural flow.

The remainder got delivered as storage, assuming they diverted 1700, then half would be natural flow, half would be storage.

If the system is full -- and so we reach the point when we allocate storage and we have no other space in there, then we will give -- we would give Reservoir District No. 2 a full allocation.

A. The -- the thing that I'm struggling with is the water in the system that goes to fill all of the reservoir rights. And I guess I would view all of the reservoir rights as being high-water rights, in that that's what they tended to appropriate to fill those -- to fill those facilities.

If we don't have the snowpack to fill a reservoir system, the rest of the water right -- the rest of the water that's in the system probably isn't material.

If we have the snowpack, then what happens with all of the remaining water that we have coming into the system and moving around dictates the fill date and those kinds of -- those kinds of things.

So it's a -- there's a curve out there. And so the -- I guess the answer to your question is, as a generalized answer, we operate this as a system. And the water in that system is -- I like to -- I like to tell people everything affects everything.

So I mean, it's not -- if you don't use your storage, somebody else is affected by that. If you do, they are. So the water in the