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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Claimants/Objectors Heltsley and Felton

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

In Re SRBA	)	
	)	
Case No. 39576	)	Subcase Nos. 75-10603, 75-14531
	)	
	)	AFFIDAVIT OF CHARLES L. HONSINGER IN
	)	SUPPORT OF MOTION TO ALTER OR AMEND
	)	
	)	
	)	
	)	

STATE OF IDAHO	)	
	)	ss
COUNTY OF ADA	)	

CHARLES L. HONSINGER, being first duly sworn upon his oath, deposes and says that:

1. I am the attorney of record for Claimants/Objectors Heltsley and Felton in the above-captioned matter.
2. I make this affidavit based upon my own personal knowledge and belief of the facts contained herein.
3. One purpose of this affidavit is to satisfy the I.R.C.P. 59(a) requirement that any

motion for a new trial be accompanied by an affidavit stating in detail the facts relied upon for such motion. This affidavit is submitted in the event that it is determined to be necessary by the Special Master.

4. I have reviewed the trial transcript in this matter in detail and attach hereto as Exhibit "A" a true and accurate copy of the same.

5. The facts relied upon by claimants Heltsley and Felton as a basis for their request for a new trial because of "irregularity in the proceedings" at trial are contained in such trial transcript. Such facts include questions, testimony and discussion located as follows within the transcript:

A. P. 113, ln. 13 - p. 114, ln. 13.

B. P. 139, ln. 5 - p. 141, ln. 10.

C. P. 257, ln. 7 - p. 258, ln. 10.

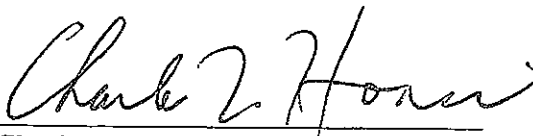
D. P. 162, ln. 18 - p. 163, ln. 4.

E. Pp. 412 - 440.

F. Pp. 443 - 449.

6. Attached hereto as Exhibit "B" is a true and accurate copy of the transcript of the Initial hearing held on January 6, 2011 in Snake River Basin Adjudication District Court Subcase No. 75-10547.

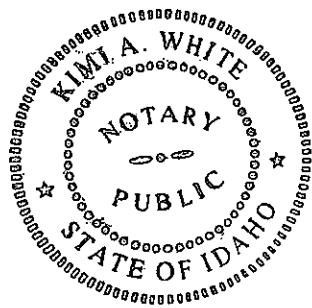
Further your affiant sayeth naught.


Charles L. Honsinger

STATE OF IDAHO)
)ss.
County of ADA)

On this 14th day of January, 2011, before me, the undersigned, a notary public in and for said state, personally appeared Charles L. Honsinger, known to me to be the individual that executed the foregoing affidavit, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.




Notary Public for Base, Idaho
Residing at Base, Idaho
My Commission Expires: 06/01/14

CERTIFICATE OF MAILING

I hereby certify that service of the within and foregoing document was made this 14th day of January, 2011, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098

Patrick Murphy
14 Blaze Tree Trail
North Fork, ID 83466

Daryl Hull
15 Blaze Tree Trail
North Fork, ID 83466

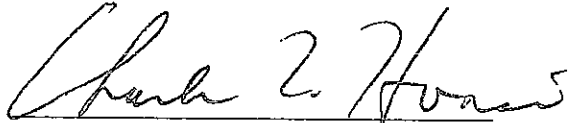

Charles L. Honsinger

Exhibit A

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

IN RE SRBA	)	
	)	Subcase No. 75-10603,
CASE NO. 39576	)	75-14531, 75-14532
	)	
	)	

TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS

BEFORE: TERRENCE A. DOLAN, Special Master
DATE: Friday, February 26, 2010
TIME: 9:00 a.m.
PLACE: Snake River Basin Adjudication Building
253 Third Avenue North
Twin Falls, Idaho 83301
HEARING: Court Trial

APPEARANCES:

Mr. Jerry R. Rigby of Rigby, Andrus & Rigby, Chartered, 25 North Second East, Rexburg, Idaho, 83340, appearing on behalf of the Ann M. Heltsley Living Trust and Stuart L. and Mitzi Felton.

Mr. Daryl Hull, 15 Blaze Tree Trail, North Fork, Idaho, 83466, appearing pro se.

Mr. Patrick Murphy, 14 Blaze Tree Trail, North Fork, Idaho, 83466, appearing pro se.

Mr. Garrick Baxter of the Idaho Attorney General's Office, Natural Resources Division, 322 East Front Street, Boise, Idaho, 83702-7374, appearing on behalf of the Idaho Department of Water Resources.

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Transcriber's Certificate

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TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS

THE COURT: We're on the record now. It's February 26, 2010, 9:00 A.M., the date and time set for trial in three subcases in Basin 75 here; 10603, 14531 and 14532.

I'm Terry Dolan, Special Master in the subcases.

Diana Delaney, our case administrator, will be clerking for us today.

Welcome to Twin Falls.

First of all, we have got the claimants of 10603, Stuart and Missy Felton. Are they here?

Good, thank you.

And let's see, then, we have the Ann M. Heltsley Living Trust. Technically, that's the claimant, isn't it, Jerry Rigby?

MR. RIGBY: That's correct. Annie Heltsley is here.

THE COURT: Okay, good. And Jerry Rigby is going to be representing both of the claimants.

Let's see, we have got the respondent here.

Steve Spencer is going to be monitoring the proceedings for the USDA, Forest Service. They were -- they filed responses.

And let's see, we have got the objectors, Daryl Hull and Patrick Murphy here. Are you folks going to be

7

representing yourselves today?

MR. HULL: Yes.

MR. MURPHY: Yes.

THE COURT: Okay. And finally for IDWR, we have Garrick Baxter, Monica Van Bussum and Susan Cooley-Denney.

Counsel, are we ready to proceed?

MR. RIGBY: We are, Your Honor.

THE COURT: Okay, now, the order I think we talked about earlier was for IDWR to start off by presenting the basis of its recommendation.

Mr. Baxter, are you ready?

MR. BAXTER: Your Honor, Garrick Baxter here for the department of water resources. Just one piece of housekeeping first. One of the water right numbers you read into the record, 75-14532, previously I talked to Mr. Rigby, and it's my understanding they're going to withdraw their objections to that water right for it to go forward as recommended.

I believe Mr. Hull had filed objections to that one, as well. It's my understanding he was going to withdraw his objections to that one, as well.

THE COURT: So let's see, the claimants are withdrawing their objection and the objectors are --

MR. BAXTER: Our request is both objected and -- Diana, you might need to double check that for

8

me and tell me if I'm wrong, but I'm pretty sure they both did. And if they both withdraw their objections, that one would be ready to move forward in a special master's report and recommendations.

THE COURT: And was it only Mr. Hull who filed an objection?

MR. RIGBY: No, Your Honor. We did, as well.

THE CLERK: I'm only showing Miss Heltsley.

MR. BAXTER: Okay. Maybe Mr. Hull filed a response, then.

THE COURT: Well, Mr. Hull, you're withdrawing whatever you filed?

MR. HULL: Yes, Your Honor.

THE COURT: Response or objection?

MR. HULL: Yes, sir.

THE COURT: So we can take 14532 off the table?

MR. RIGBY: Yes, Your Honor. That's all I wanted to -- Ann to say, is that we withdraw.

THE COURT: Good, thank you.

And for those who may not have been here for any kind of hearing or proceeding, we're tape recording, we have got a digital tape recorder down in the basement that's recording all of this. We have got microphones at all the tables and at the podium, so we should be able to pick everybody up. But if there's a problem, if anybody

9

has any trouble hearing what's going on, we have hearing assistance devices available, little ear things you can put in and listen to what's going on.

And if anybody needs anything during the proceedings, let me know. While these proceedings are formal and they're being recorded, we're going to try to make you as comfortable as possible. We all know where the bathrooms are, I suppose, by now.

So let us know if you need anything.

Mr. Baxter, are you ready to go?

MR. BAXTER: I think we are.

THE COURT: Let's do it.

MR. BAXTER: Your Honor, the department would call Monica Van Bussum as the first witness, the first and only witness.

MONICA VAN BUSSUM,

produced as a witness at the instance of the Idaho Department of Water Resources, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BAXTER:

Q. Good morning, Miss Van Bussum.

A. Good morning.

Q. Will you please state your first and last name

10

1 and spell it for the record?

2 A. My first name is Monica, M-o-n-i-c-a. My last

3 name is Van Bussum, two words. The first word is V-a-n,

4 next word B-u-s-s-u-m.

5 Q. And are you currently employed by the department

6 of water resources?

7 A. I am.

8 Q. And how long have you been employed by the

9 department?

10 A. It will be five years next month.

11 Q. And what is your job title at the department?

12 A. I'm a senior water resource agent.

13 Q. And what do you do as a senior water resource

14 agent for the department?

15 A. I have two areas of responsibility. One is for

16 new water rights, permits and licenses. But primarily, my

17 duties are in adjudication, which is the historic water

18 rights for the Snake River Basin Adjudication, and

19 essentially we take claims to water rights from the cradle

20 to the grave.

21 We help claimants or assist them in filing their

22 claims. We investigate the elements of those claims, and

23 then we make recommendations for the water rights based on

24 the evidence that we have.

25 Q. Have you been reviewing claims and making

11

1 Q. Okay, thank you.

2 A. Does that make sense?

3 Q. Oh, yes, it does.

4 A. Okay.

5 Q. Very good summary. Thank you.

6 Now, so when we're talking about point of

7 diversion, are you familiar with the term stream channel

8 geometry?

9 A. Yes.

10 Q. What does that term mean?

11 A. It's essentially observations of the channel

12 structure, what kind of cross-section does it have. Does

13 it have any obstructions that change that cross-section.

14 What is the rise and fall of the stream, or the slope of

15 the stream channel. So again, observations of the -- of

16 the channel itself.

17 Q. If you're trying to determine the location of a

18 point of diversion for a surface water right, would you

19 examine a stream channel's geometry?

20 A. Yes.

21 Q. Why is that?

22 A. Well, if you're looking for where the water is

23 diverted from the natural channel, which is what we call

24 the point of diversion, then you can look for those

25 characteristics of where it changes from a natural channel

13

1 recommendations in the SRBA the entire time you have been

2 employed by the department?

3 A. Yes.

4 Q. Well, if you had to ballpark it, how many

5 recommendations do you think you have made for the

6 department in the SRBA?

7 A. At last count, it was a little over 2,000.

8 Q. Okay. I think before we get any further, I

9 think it might be helpful to provide the court with an

10 overview of the issue presented to the court today,

11 explain what it is we're doing here on trial.

12 What is your understanding of the issue here at

13 trial today?

14 A. The location of the point of diversion for the

15 water rights.

16 Q. And how would you describe, generally, the --

17 How is the issue being framed by the parties?

18 A. The water users are saying that the point of

19 diversion is located on the Hull property. The, I guess

20 we'll call them, the objectors are saying that the point

21 of diversion is located on federal ground.

22 So the issue is what is the natural channel and

23 what actually is the start of the ditch, or the true point

24 of diversion for the ditch that feeds the water users'

25 properties.

12

1 to a ditch. Or you can see, okay, this has the hallmarks

2 of a ditch, or this has the hallmarks of a natural

3 channel, based on your observations of the geometry of the

4 stream.

5 Q. Okay, so again, you have somewhat -- you've

6 (unintelligible) some of the key points of what you would

7 consider -- Let's go through one more time.

8 So what specific aspects of stream channel

9 geometry would you consider as part of your normal

10 investigation into this issue?

11 A. Sure. Stream channel cross-section is a really

12 important part. Ditches generally have a very uniform

13 cross-section where it's kind of U or V-shaped, showing

14 the human interventions in the channel. Natural channels

15 vary in cross-section. They have areas of pooling, they

16 have areas where they run faster.

17 The type of substrate in the channel will be an

18 important factor. Natural channels have varying types of

19 substrate, depending on their flow. Ditches generally

20 have one fairly uniform size of substrate as you go along

21 the channel. You might look at --

22 This isn't a channel geometry thing, but you

23 might look at the vegetation around the channel, if

24 there's a variety of vegetation around the channel versus

25 if there's one type or one size of vegetation. You might

14

1 look for invertebrates, you might look for fish. You tend
2 to find those more in a natural channel than you would in
3 a ditch. Those kinds of things.

4 Q. What about berming and any manmade manipulation?

5 A. Absolutely. That's the hallmark of a point of
6 diversion, is, again -- I said this once before -- is
7 where water is diverted from the natural system. That is
8 typically by some kind of human intervention.

9 You'll have berming. I've seen all kinds of
10 points of diversion. That, you know, a dam would be one.
11 I've seen -- Actually, one of the more interesting ones
12 was a mattress was a point of diversion. So human
13 intervention in the channel I think is my point.

14 Q. Okay. So then through your work with the
15 department, have you gained experience in examining stream
16 channels and making evaluations of stream channel
17 geometry?

18 A. Yes.

19 Q. What's your education?

20 A. I have a Bachelor's in Zoology with Honors. I
21 have completed the course work for a Master's in
22 Hydrology. And I have a graduate certificate in
23 Geospatial Information Analysis.

24 Q. Okay. In your undergraduate and graduate course
25 work, did you take classes that are applicable in

15

1 number of mapping classes, of course, with the graduate
2 certificate.

3 And that's generally taken from far away, but
4 you can use GIS or this mapping to look at stream channel
5 geometry. The project I did to finish my certificate was
6 on using a GIS -- or again, this computer mapping
7 software -- to determine types of channel incision. So if
8 it's spring fed, it's rock-incised. Things like that,
9 using (unintelligible) and this mapping technology.

10 MR. BAXTER: Okay, Your Honor, based upon her
11 experience and -- both working for the department of water
12 resources and experience gained through education, at this
13 point I'd move to have Ms. Van Bussum recognized as an
14 expert in water right recommendations and assessing stream
15 channel geometry and characteristics pursuant to Idaho
16 Rule of Evidence 702.

17 THE COURT: The first area of expertise was water
18 rights --

19 MR. BAXTER: Recommendations.

20 THE COURT: And the second one was?

21 MR. BAXTER: Assessing stream channel geometry and
22 characteristics.

23 THE COURT: Assessing -- I'm a slow writer.

24 Assessing stream channel?

25 MR. BAXTER: Yep, geometry.

17

1 evaluating stream channel characteristics and stream
2 channel geometry?

3 A. Yes.

4 Q. Did these classes provide you the skills and
5 information that you use as part of your work?

6 A. Yes.

7 Q. Let's go ahead and explore these classes in a
8 little more detail. What specific courses did you take in
9 your undergraduate and graduate education relevant to
10 evaluating stream channel characteristics and stream
11 channel geometry?

12 A. A lot of those would be my hydrology courses. I
13 took classes in physical hydrology, hydrogeology. I took
14 classes in modeling, including flood frequency modeling.
15 I took classes in geochemistry, so you're looking at
16 release of nutrients into the -- into the stream system.
17 A number of classes like that.

18 I took graduate field studies where my project
19 was a stream channel geometry project, looking at flooding
20 and how it actually changed the geometry of the stream
21 from before the flooding event to after the flooding
22 event. I've taken other classes, earth materials.

23 So there's some overlap, certainly. My field
24 studies project would classify as earth materials. But
25 I've also taken geomorphology classes. And then I have a

16

1 THE COURT: Geometry.

2 MR. BAXTER: And characteristics.

3 THE COURT: Any objection to designating the witness
4 as an expert?

5 MR. RIGBY: No, Your Honor, not as to an expert in
6 that -- those areas.

7 THE COURT: Let's see, for the record,
8 Miss Van Bussum was designated an expert in a previous
9 case where I think the same issue came up, Jesse Creek.

10 MS. VAN BUSSUM: That's correct.

11 THE COURT: This isn't the first time she's been
12 designated an expert. Okay, she will be so designated.

13 UNIDENTIFIED: (Unintelligible).

14 Q. (By Mr. Baxter) All right, Ms. Van Bussum, I'm
15 going to be --

16 MR. BAXTER: Or actually, Your Honor, may I approach
17 the witness?

18 THE COURT: Please.

19 MR. BAXTER: Thanks.

20 Q. (By Mr. Baxter) Ms. Van Bussum, I'm going to be
21 handing you what's been marked as IDWR Exhibit Number 1.

22 A. Thank you.

23 Q. Now, Ms. Van Bussum, have you seen this document
24 before? Or these documents, I should say.

25 A. Yes.

18

1 Q. What are these documents?
2 A. These are each recommendations from the
3 department for water right 75-10603 and 75-14531.
4 Q. Now, I believe we need to do a little
5 housekeeping with regards to one of these water rights.
6 Are these recommendations exactly the same as the water
7 rights were recommended to the SRBA Court?
8 A. 75-14531 is. 75-10603 is not.
9 Q. And how does the one that differs, how does it
10 differ?
11 A. Actually, I see one area where it should differ
12 a little more from how it is on this page. There are two
13 changes that the department seeks to make to 75-10603.
14 One is for source, one is for point of diversion.
15 The source that's currently listed on this is
16 "spring." That should be struck, and it should be
17 replaced with the words "unnamed stream."
18 The second place in point of diversion that's
19 shown here on the recommendation that was handed out as
20 Exhibit 1, the old point of diversion is shown as being
21 struck through. That was in Section 15
22 southeast/southwest.
23 The new point of diversion is underlined, and
24 it's Section 15 southeast/southwest/southwest.
25 Q. So with regards to the first one, I'm going to

19

1 "spring"? I apologize for that. I was trying to make
2 them consistent between the two, and it should be "unnamed
3 stream."
4 MR. BAXTER: (Unintelligible) "unnamed stream"
5 (unintelligible).
6 MR. RIGBY: Your Honor, may I ask some questions in
7 aid of objecting?
8 THE COURT: Sure.
9 MR. RIGBY: To this point, it's always been "spring"
10 on this particular one. I had understood that the
11 modification you were going to be making would be the
12 "unnamed spring," as opposed to the "stream."
13 Why is the 10603 -- originally, why did it have
14 "spring" on it?
15 MS. VAN BUSSUM: I believe it was claimed as a
16 spring, and I don't think there's any argument that the
17 channel we're discussing does generate as a spring.
18 But the department has to recommend where the
19 water is diverted from the natural channel, and the
20 department is saying that the point of diversion is not
21 the spring, but the point of diversion is actually where
22 the stream has already begun. So it's no longer a spring,
23 it's a spring-fed channel. Hence, it's a stream.
24 MR. RIGBY: Let me ask you another question, then.
25 As far as the -- I mean as far as the changing from the

21

1 be handing you a pen and ask you to make the changes you
2 have just described on the record.
3 A. So I will repeat what I said. I'm going to
4 strike through the word "spring," and I'm going to write
5 in the words "unnamed stream." And essentially that makes
6 the recommended point of diversion consistent between
7 75-10603 and 75-14531. Both point of diversion and the
8 source are consistent between the two.
9 Do you want this pen back?
10 Q. Does the department recommend that the court
11 adopt the recommendations as attached and subsequently
12 edited by the department in IDWR Exhibit Number 1?
13 A. It does.
14 MR. BAXTER: Your Honor, I move to have the copy of
15 Exhibit Number 1 with Ms. Van Bussum that has been
16 scratched through and underlined -- or an additional
17 change made on it admitted as IDWR Exhibit Number 1.
18 THE COURT: Any objection to admission of IDWR
19 Exhibit 1?
20 MR. BAXTER: Jerry, do you want me to grab it and
21 show you the document?
22 MR. RIGBY: Please, because I had understood that
23 the modification was to put "unnamed," but it still is
24 "spring."
25 MS. VAN BUSSUM: "Unnamed stream." Did I say

20

1 "spring" to the "stream," you're doing that only
2 because -- to make sure I understand this -- only because
3 you have now changed your original recommendation, which
4 was the "spring" to the -- another point of diversion
5 which is below the spring, is that correct?
6 MS. VAN BUSSUM: So what I'm understanding is you're
7 questioning -- Because we moved to -- the description of
8 the point of diversion, the legal description, we then
9 have to change the name of the type of channel that it is.
10 Does that answer your question?
11 MR. RIGBY: It did, but let me ask further: What --
12 If the original source is the spring, why would
13 that not be consistent in continuing to name that as the
14 spring as far as the source is concerned?
15 MS. VAN BUSSUM: Again, it depends totally on the
16 location of the point of diversion. If we were going to
17 recommend the point of diversion as where water comes from
18 the ground, we would recommend that as a spring, because
19 that is where the spring flows up from the ground.
20 But once that spring then makes a channel, if
21 you're going to recommend a point of diversion anywhere on
22 that channel, then it becomes a point of diversion from a
23 stream and not from a spring.
24 Am I making that clear?
25 MR. RIGBY: You are. I guess, obviously, that goes

22

1 to the basis of our objection, and that's why I'm trying
2 to make sure I understand why the change in the
3 recommendation. Because again, until this very moment, we
4 have understood that to be a source of the spring.
5 MS. VAN BUSSUM: I think that it works the same way
6 with the Heltsley claim, 75-14531. I believe that was
7 also claimed as a spring. So we're just trying to make
8 them consistent to move forward, and we recommended the
9 Heltsley claim as a "unnamed stream."
10 MR. RIGBY: Well, Your Honor, with that
11 clarification -- Obviously, this is the recommendation by
12 the department, and it's their recommendation. And even
13 though we continue to have our same objection to the
14 recommendation, it is their recommendation.
15 I suppose they can change it to any
16 recommendation they feel is justified. For that reason, I
17 don't have an objection to the exhibit itself.
18 THE COURT: Any objections on this side of the room?
19 UNIDENTIFIED: No.
20 THE COURT: Okay, we'll admit that.
21 Let me ask a couple questions. The first time
22 you recommended it as a southeast/southwest, and this is
23 the southeast/southwest/southwest. So you go from a
24 40-acre tract down to a 10-acre tract?
25 MS. VAN BUSSUM: In a different quarter/quarter.

23

1 displayed here today on the court's dry erase board.
2 MR. BAXTER: And again thank you to the court for
3 allowing us to use their dry erase board today.
4 Q. (By Mr. Baxter) Ms. Van Bussum, have you seen
5 this map before?
6 A. Yes.
7 Q. And did you create this map?
8 A. I did.
9 Q. Was this map created to assist the court in its
10 understanding of the issues here at trial today?
11 A. Yes, it was.
12 Q. Can you please explain for the court what this
13 map depicts? Actually, before you do that --
14 MR. BAXTER: Your Honor, may the witness approach
15 the map?
16 THE COURT: Sure.
17 Do we have our pointer?
18 MS. VAN BUSSUM: I don't need a pointer. If I can
19 just stand up there, I think I'm okay.
20 THE COURT: That little antenna-looking thing.
21 MR. BAXTER: Your Honor, we can probably move the
22 microphone. Oh, that microphone doesn't move.
23 MS. VAN BUSSUM: I can be loud.
24 UNIDENTIFIED: They got this wrong on our water
25 right, cfs.

25

1 THE COURT: Let's see, I've got it as the
2 southeast/southwest, and now it's the
3 southeast/southwest/southwest.
4 MS. VAN BUSSUM: Right. So we moved it from the
5 southeast/southwest to the southwest/southwest and gave it
6 a 10-acre designation of the
7 southeast/southwest/southwest.
8 THE COURT: Well, if somebody were to look at your
9 first recommendation, and now they're looking at the
10 amended point of diversion, would you actually see your
11 dot on the map move?
12 MS. VAN BUSSUM: Yes. The map itself shows it. I
13 have a feeling we'll be going through the map fairly
14 extensively.
15 THE COURT: Okay. Other than that, there's no other
16 changes, though, is there?
17 MS. VAN BUSSUM: That's correct.
18 THE COURT: Okay, thank you.
19 MR. BAXTER: All right. And just for clarification,
20 Your Honor, IDWR Exhibit Number 1 was admitted into
21 evidence?
22 THE COURT: Yes, so admitted.
23 MR. BAXTER: Thank you.
24 Q. (By Mr. Baxter) All right, Ms. Van Bussum, I
25 will turn your attention, then, to the map we have

24

1 MS. VAN BUSSUM: It's been a long time. I think
2 seven years, to be exact. Okay, I'm wired, I guess.
3 Q. (By Mr. Baxter) All right, Ms. Van Bussum, why
4 don't you -- Can you speak again so we can --
5 A. I'm wired, I guess.
6 Q. Oh, yeah, I can actually hear it coming through
7 the speakers. There we go.
8 A. Okay.
9 Q. We'll just wait one second here.
10 (Unintelligible background conversation.)
11 THE COURT: Fingers wouldn't --
12 MS. VAN BUSSUM: I can't use my fingers? I'd rather
13 use my fingers, okay.
14 THE COURT: Oh, that's fine. We don't have any
15 laser pointer, so --
16 MS. VAN BUSSUM: If I'm unclear, though, I'm happy
17 to use the pointer.
18 MR. BAXTER: Your Honor, I do have a smaller version
19 for you and for the folks here today in the courtroom. If
20 I may approach and hand you this smaller version?
21 THE COURT: Has everybody had a chance to compare
22 the small version versus the large version, and they're
23 the same?
24 MR. BAXTER: I don't think we have actually had
25 people sit down and -- (Unintelligible) one to Jerry real

26

1 quick.

2 THE COURT: Hopefully, we're all looking at the same

3 map, just different scale.

4 MR. RIGBY: Your Honor, on behalf of my clients, we

5 have seen numerous versions of these maps and, therefore,

6 even though we may have several referred to today,

7 obviously if this one works, we may just stick with this

8 map to try to keep less confusion for the court.

9 So even though we haven't seen this before,

10 we're very familiar with the aerials that have been taken

11 over this -- this -- in essence the land that's under

12 dispute today.

13 THE COURT: Let's see, Mr. Hull, Mr. Murphy, are you

14 satisfied that we -- In other words, we can all look at

15 the smaller one, and it will be identical to the one that

16 we have on the board.

17 UNIDENTIFIED: That's fine, Your Honor.

18 THE COURT: Okay, thank you.

19 Q. (By Mr. Baxter) All right, Ms. Van Bussum,

20 again, can you please explain to the court what this map

21 depicts?

22 A. This map is a point of diversion, or POD,

23 overview to talk about the change in point of diversion

24 for 75-10603, but also provide some information as far as

25 the lay of the land. Do you want me to go into the

27

1 THE COURT: Now, is this Highway 93?

2 MS. VAN BUSSUM: It is.

3 THE COURT: So if I were to drive from Salmon to

4 Missoula, I'd be going from the lower left to the upper

5 right?

6 MS. VAN BUSSUM: That's correct. Special Master, if

7 you're familiar with the North Fork Store, the North Fork,

8 this is about six and a half miles north of the North Fork

9 Store. Between North Fork and Gibbonsville.

10 THE COURT: So after you make the turn -- after you

11 make the turn to head up toward Lost Trail Pass?

12 UNIDENTIFIED: Yes.

13 MS. VAN BUSSUM: I defer to the (inaudible).

14 THE COURT: Okay, that's why -- I was thinking we

15 were down on the Salmon River. But we're away from the

16 Salmon River here?

17 MS. VAN BUSSUM: We're at the North Fork of the

18 Salmon. Actually, I can point out the North Fork for you

19 on the map, if you'd like.

20 THE COURT: Sure.

21 MS. VAN BUSSUM: So you're familiar with 93. And

22 the North Fork of the Salmon actually runs winding, close

23 to parallel, to the highway. You can actually see the

24 water in some cases. So just where that brown dot is, if

25 you just go (unintelligible) the east and the south, you

29

1 details of the map?

2 Q. Yes, please.

3 A. So the underlaying imagery here is the 2004

4 (unintelligible) imagery, and what we have got, if you can

5 look at the legend, we have a red line, a green line, and

6 a blue line. The blue line is towards the north. The

7 blue line encircles the whole property in this map.

8 The green line is just a little bit to the south

9 and west. The green line circles the Murphy property.

10 And then there's a red line continuing further

11 to the south and west, and that circles Forest Service

12 property.

13 Then there are two dots on the map. One is a

14 brownish dot towards the center of the map. The brownish

15 dot is the original IDWR-recommended point of diversion

16 for 75-10603. And the yellow dot that is in the southwest

17 quarter of the map is the current IDWR-recommended point

18 of diversion for both 75-10603 and 75-14531.

19 THE COURT: Just for my benefit, Mr. Baxter, north,

20 I assume, is straight up?

21 MR. BAXTER: (Indicates.)

22 MS. VAN BUSSUM: There is a north arrow,

23 Special Master, here on the bottom left --

24 THE COURT: Oh, I see it now.

25 MS. VAN BUSSUM: -- of the map.

28

1 can actually see the water in the channel of the North

2 Fork.

3 THE COURT: Okay.

4 Q. (By Mr. Baxter) Ms. Van Bussum, I'm going to

5 ask you to -- recommend that we maybe lose the --

6 A. Lose the mike?

7 Q. Lose the (unintelligible) mike.

8 MR. BAXTER: And Mr. Rigby, if it's okay, I might

9 take your microphone and point it --

10 UNIDENTIFIED: Does that help?

11 MR. BAXTER: Yeah. We'll ask Diana -- We were

12 getting a little bit of feedback there from that.

13 THE COURT: (Unintelligible) the map was prepared

14 February of 2010, but I assume the photograph was not

15 taken in the wintertime?

16 MS. VAN BUSSUM: I would assume not.

17 THE COURT: I don't see any snow.

18 MS. VAN BUSSUM: I can't imagine it looks like this

19 in the wintertime.

20 Q. (By Mr. Baxter) All right, so using this map,

21 can you again explain for the court what the issues are

22 that we're here discussing today?

23 A. Sure. Special Master, if I can have you look at

24 the map, we have got -- There's a road that comes in from

25 the -- going to the west from Highway 93, and it snakes

30

1 just to the southwest toward the blue line.
 2 And you can see evidence of another channel by
 3 the green trees against the hill slope. And just on the
 4 north and east side of the Hull property line near this
 5 road is where I believe the water users are saying the
 6 point of diversion is, or where the spring is.
 7 And the yellow dot is where the department has
 8 recommended the point of diversion.
 9 Q. So Ms. Van Bussum, I'm going to hand you a
 10 plum-colored pen here today. Would you mark on the map
 11 the general area where it's your understanding where the
 12 spring arises?
 13 A. I'm just going to draw a circle in the general
 14 area. Again, that's just south of the road and just to
 15 the east of the Hull property line.
 16 THE COURT: Just north of where you circled that, it
 17 looks like there's something maybe in that roadway. Is
 18 that a culvert or a fence or -- On my copy, it's kind of
 19 a --
 20 MS. VAN BUSSUM: Are you talking about here?
 21 THE COURT: No, no, no. If you just go down where
 22 the blue line crosses, yes, right to the right of that
 23 blue line, it looks like there's something in the road
 24 there.
 25 MS. VAN BUSSUM: I would have to defer to the

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1 sparser vegetation towards the northwest. Then at the
 2 southwest, we have got very thick vegetation.
 3 MR. BAXTER: Your Honor, at this point I'd go ahead
 4 and move to have IDWR Exhibit Number 2 admitted into
 5 evidence. And because we are marking the larger map, I
 6 would like to ultimately have the larger map admitted into
 7 evidence. We'll fold it up in a nice 8-and-a-half-by-11
 8 size so the court won't have to have any special
 9 documentation for that. We'd like to use the large map as
 10 the original exhibit.
 11 THE COURT: Any objection to IDWR Exhibit 2?
 12 UNIDENTIFIED: No, Your Honor.
 13 MR. RIGBY: No, Your Honor.
 14 THE COURT: Okay, so admitted.
 15 Just for my benefit, though, you marked the
 16 spring, and it flows to the southwest. And the water has
 17 not joined the North Fork of the Salmon at this point?
 18 MS. VAN BUSSUM: That's correct.
 19 THE COURT: It's still -- And that's downgradient
 20 somewhere further?
 21 MS. VAN BUSSUM: That's correct. I'm sure we'll
 22 talk about where it would hit the North Fork at some
 23 point, but it would be downchannel, downgradient.
 24 THE COURT: Mr. Baxter, maybe I'm jumping the gun
 25 here, but I see that you have marked on there the original

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1 property owners on what that is.
 2 MR. RIGBY: That dark spot there, Your Honor?
 3 THE COURT: Yes.
 4 MR. RIGBY: I think that's just a bush by the
 5 side -- right on the side of the road there.
 6 THE COURT: What I was getting at is if that's a
 7 culvert, which would imply there's water flowing beyond,
 8 upgradient from the spring. But you're saying the spring
 9 actually begins below that road?
 10 MS. VAN BUSSUM: Yes.
 11 THE COURT: And then begins flowing to the lower
 12 left?
 13 MS. VAN BUSSUM: That's correct.
 14 THE COURT: Okay.
 15 MS. VAN BUSSUM: That (unintelligible) southwest.
 16 Q. (By Mr. Baxter) Ms. Van Bussum, if you could
 17 just generally show the court what direction -- I don't
 18 think you can -- Don't go ahead and use the marker yet at
 19 this point, but if you could just show the court generally
 20 what direction your understanding the spring goes, in what
 21 direction?
 22 A. Sure. I'll just put my finger there on the
 23 circle where the spring is. And it just goes to the
 24 southwest. You can actually see where the vegetation is
 25 very thick at the bottom of the hill slope. We have got

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1 point of diversion for 10603. How did it get marked way
 2 over there?
 3 MR. BAXTER: I've heard from Ms. Felton before that
 4 it sounds like the person who took the GPS reading maybe
 5 made an error in their original GPS reading out there.
 6 UNIDENTIFIED: Yeah.
 7 MR. BAXTER: That wasn't what was intended, but it
 8 might have been a technical error from the GPS unit.
 9 THE COURT: Because that one looks like it
 10 diverts -- the point of diversion would be from the North
 11 Fork of the Salmon River.
 12 MR. BAXTER: It's my understanding that's the middle
 13 of a field, the middle of a field out there, basically. I
 14 think everybody agrees that one's wrong. It's just -- I
 15 put it on there just again so everybody could be clear
 16 that's not the one anybody is suggesting is correct.
 17 I think everybody thinks it's either the yellow
 18 point or up where Ms. Van Bussum circled with -- that
 19 general area where she circled with the purple or the
 20 plum-colored pen.
 21 MR. RIGBY: I think, Your Honor, to make it clear, I
 22 think the original brown dot was intended to be where
 23 Ms. Van Bussum has now drawn the circle on the map.
 24 In other words, the original claims, the
 25 original recommendation, even with the location of the

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1 original recommendation, would put it where Ms. Van Bussum
2 has drawn the second dot.
3 THE COURT: Okay, nobody's claimed diversion from
4 the North Fork of the Salmon River?
5 MR. RIGBY: Not for that particular right,
6 absolutely not. I concur with Mr. Baxter that it was an
7 error. And, therefore, that's my only concern with this
8 map, is that it could cause confusion in court, and I want
9 to make sure we're clear that no one believes that was
10 intended nor claimed.
11 The dot that has been drawn by Ms. Van Bussum --
12 My point is that when you talk about the
13 original recommendation and, therefore, the original point
14 of diversion, it would be the dot where Ms. Van Bussum has
15 just drawn the circle.
16 THE COURT: Now, Mr. Hull, Mr. Murphy, do you agree
17 with that?
18 UNIDENTIFIED: Yes, we do.
19 THE COURT: One last thing before we move on: Where
20 you drew the circle where the spring is, the reason you're
21 saying it's an unnamed stream is because it's downstream
22 from that spring?
23 MS. VAN BUSSUM: That's right. So we had the
24 headwaters, really, of the channel here at the spring.
25 And then it becomes a channel. And then at the yellow dot

35

1 MR. BAXTER: Thank you.
2 Q. (By Mr. Baxter) All right, Ms. Van Bussum, now
3 that we have talked about the map and have a little bit
4 better understanding of the issues we're going to talk
5 about here today, let's get into the details.
6 Have you conducted a site visit for these water
7 rights?
8 A. Yes, I did.
9 Q. And have you walked the stream channel at issue
10 here?
11 A. Yes.
12 Q. I'm going to be handing you what is a greenish,
13 teal-colored marker. I think this will show up okay.
14 THE COURT: Teal means green?
15 MR. BAXTER: Isn't that kind of a teal-green?
16 THE COURT: What was the other word? Fuchsia?
17 MR. BAXTER: Plum.
18 THE COURT: Plum.
19 MS. VAN BUSSUM: I was thinking of the other --
20 MR. BAXTER: The last trial was aquamarine.
21 Q. (By Mr. Baxter) So using that green or
22 teal-colored marker, Ms. Van Bussum, could you show the
23 court what sections of this area you have walked?
24 A. Sure. I'm just going to do it in a dashed line
25 so that way, if you can't follow the color difference, you

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1 is where the department has recommended the actual point
2 of diversion from the channel. So we have to call it a
3 stream, because at that point it is a stream.
4 THE COURT: And your current recommendation shows a
5 point of diversion on federal land?
6 MS. VAN BUSSUM: That's correct.
7 THE COURT: Forest Service land, that is?
8 MS. VAN BUSSUM: That's correct.
9 THE COURT: Okay.
10 MR. BAXTER: And just for the record, Your Honor,
11 it's my understanding the Forest Service has no objection
12 to the point of diversion being described on federal land.
13 THE COURT: That's my understanding, yes.
14 MR. BAXTER: All right, do we got the sideboards put
15 in for -- for here for today?
16 THE COURT: I don't mean to short circuit your case
17 here.
18 MR. BAXTER: Oh, no, I think it's good that we make
19 sure everybody is kind of on the same page here starting
20 forward. And I think we put the sideboards on, so why
21 don't we talk in a little more detail now.
22 So then, Your Honor, just to clarify for the
23 record: Is IDWR Number -- Exhibit Number 2 being admitted
24 into evidence?
25 THE COURT: Yes.

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1 can tell the difference in what I'm doing.
2 So I'll start at the spring, and I'm just going
3 to draw a dashed line on the general area to the yellow
4 dot. And then I'm going to make just a little turn to the
5 west, because I actually went up on the hill slope and
6 looked down over the channel. I probably didn't go quite
7 that far, but I -- I did go up on the hill slope to look
8 down on the channel downstream of the yellow dot.
9 Let me take a second. That is not --
10 Q. Is that showing up okay now?
11 A. It's better now. I think it --
12 Q. Do you want to try a different -- Or I see the
13 court has some thicker markers up there. Do you want to
14 try using one of the court's markers, maybe?
15 A. I can.
16 Q. I want to make sure that there's no --
17 A. If you have a black one, that might actually --
18 Q. Okay, then, just for the record, we're now
19 overlaying with a black marker over the green. Oh, yeah,
20 that shows up quite well.
21 THE COURT: So black, we'll call charcoal?
22 MR. BAXTER: So ordered, the charcoal-colored pen.
23 MR. RIGBY: Your Honor, the reason I'm not joining
24 this discussion is I am colorblind, so actually the darker
25 lines look better to me.

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1 Q. (By Mr. Baxter) All right, all right, actually
2 I think one thing we haven't talked about, which I think
3 would be helpful for the court, also: Where is it, is it
4 your understanding, that the Feltons and Ms. Ann Heltsley
5 live?
6 A. Oh, they actually don't live on the scale of
7 this map. They live further downstream from this.
8 Q. Okay.
9 A. This map was strictly made for a point of
10 diversion overview, since the place of use is not at
11 issue.
12 Q. Okay. All right, Ms. Van Bussum, did you
13 prepare a report regarding your visit to the site -- or
14 your site visit?
15 A. I did.
16 THE COURT: Ms. Van Bussum, I know the place of use
17 isn't an issue, but just to kind of orient me: The water
18 is diverted at the yellow point, and then it's actually
19 used southwest from there?
20 MS. VAN BUSSUM: Right. Special Master, you can
21 actually -- So if you look on the map where I've drawn
22 the black lines indicating where I walked, you can
23 actually go along the hill slope and really kind of see
24 the path of that ditch as it moves off the southwest
25 corner of the map.

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1 that you'll have more rocks and cobbles.
2 And so, you know, it just kind of changes with
3 the power of the stream. But you can also have -- the
4 invertebrate activity will change with the stream and you
5 find, physically, a greater variety of invertebrates. You
6 find more fish and things like that in a natural channel.
7 Ditches, on the other hand, have a fairly
8 uniform cross-section. It will be a U or a V-shape, or
9 you can even consider it a D-shape in cross-section along
10 their path. So they generally will have one size of
11 substrate along their path, and less variety of
12 invertebrates and not quite so many fish.
13 MR. BAXTER: Again, Your Honor, I'm going to put
14 these a little bit closer to you. They aren't the biggest
15 pictures. I'll try to rotate it a little bit more so the
16 other folks might be able to see it a little better, too.
17 Q. (By Mr. Baxter) Now, Ms. Van Bussum, I just
18 posted what has been marked as IDWR Exhibit Number 4.
19 Would you -- Actually, let me ask you a
20 different question. Did you take this photograph?
21 A. I did.
22 Q. And when was it taken?
23 A. It would have been early May of last year.
24 Q. And does this photograph appear in your report
25 that you prepared?

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1 THE COURT: Okay.
2 Q. (By Mr. Baxter) All right, Ms. Van Bussum, I
3 have just handed you what has been marked as IDWR Exhibit
4 Number 3. Have you seen this document before?
5 A. Yes.
6 Q. And what is this document?
7 A. This is the report I wrote regarding the site
8 visit that I did.
9 Q. Is this document an accurate copy of your field
10 notes regarding that site visit?
11 A. Yes.
12 Q. Now, we talked earlier about stream channel
13 geometry and using stream channel geometry to determine
14 location of a point of diversion. Can you explain --
15 Well, let me rephrase that. I believe you
16 talked about looking at such things as shape of the
17 channel, substrate, berming, manipulation, looking at the
18 cross-sections. So could you again explain for the court
19 generally what is the characteristics of a natural stream?
20 A. Sure. A natural channel will vary in
21 cross-section along its length. You'll have some areas of
22 pooling, and you'll have some areas where the water runs.
23 The substrate will change according to the flow, so in
24 some areas you'll have smaller substrate, like you'll have
25 sand and things, silt and things like that. Other areas

40

1 A. It does. It is the photograph at the top of
2 page 2 in my report.
3 Q. Okay, can you, for the court, point out on our
4 larger map the general area in which this photograph was
5 taken?
6 A. Sure. It would have been right around the
7 plum-colored circle that I drew on the map.
8 Q. So towards the -- the beginning of the spring up
9 there?
10 A. Right.
11 Q. Okay. Now, you talked earlier about the
12 characteristics of a manmade channel versus a natural
13 channel. Could you go ahead and approach the photograph
14 and -- and kind of walk the court through what you see as
15 the important characteristics here in this picture?
16 THE COURT: We don't have a microphone there.
17 MS. VAN BUSSUM: If I just go right here?
18 MR. BAXTER: Can you still see that okay,
19 Special Master?
20 THE COURT: Yes, fine, thank you.
21 MR. BAXTER: Mr. Murphy, Mr. Hull, if you want to
22 come here to see something (unintelligible).
23 Q. (By Mr. Baxter) So again, Ms. Van Bussum, can
24 you talk about the characteristics of what you see here,
25 generally?

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1 A. Sure. Well, this is actually where the stream
2 takes a bend towards the right, so I'm standing on the
3 up -- the upstream side, taking a photo. The white arrow
4 is the general flow direction that is from left to right.

5 And what we have got, if you look in the
6 streambed, you see a number of cobbles as it makes this
7 turn. We also see a tree jutting out into the channel.

8 If this was a ditch, it would probably be
9 maintained so that there wouldn't be this vegetation in
10 the channel. And again, if you look in the channel
11 itself, you can see different types of substrate and, most
12 notably, the cobbles.

13 And if you look at the right third of the
14 picture in the stream, you can see some grasses that are
15 actually growing up along the side, so you have got a
16 variety of vegetation and a variety of substrate here, and
17 also some vegetation that overhangs and goes into the
18 channel.

19 Q. So would you say this photograph depicts
20 characteristics of a manmade channel or a natural channel?

21 A. It bears the hallmarks of a natural channel.

22 Q. Okay. All right, Ms. Van Bussum, again, did you
23 take this photograph that we have just put up?

24 A. I did.

25 Q. And it's page number 2 of IDWR Exhibit Number 4

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1 that are growing up through the water. Then again, as you
2 look upstream, you have some more trees and this variety
3 of vegetation in the channel.

4 Q. So would you normally expect to find such
5 variances of sizes from, I think you said, wide to narrow
6 to wide? Would you normally find that in what would be
7 considered a natural channel?

8 A. Oh, absolutely. You know, in a ditch, you know,
9 if you're going to compare and contrast (unintelligible),
10 in a ditch -- a ditch is constructed to deliver water to a
11 place of use. And so the easiest way and the fastest way
12 to deliver that water is going to be the way the ditch is
13 constructed, so ditches are constructed to get as much
14 water as possible to the property.

15 So they don't want to have a lot of surface area
16 or a lot of area where the channel spreads over, because
17 that leads to a lot of evaporation from the channel. So
18 it's much more beneficial for the property to have a
19 narrow or uniform ditch.

20 So in these natural channels, you see the
21 variety.

22 Q. I probably should have done this before you
23 started talking about this photograph, but where about on
24 the map was this photograph taken? If you could just go
25 over and point out for the court the general area where

45

1 that we have already handed out. Does this photograph
2 appear in your report that you prepared?

3 A. It does. This is the bottom photograph on page
4 2 of my report.

5 Q. Okay. So same question as previously: When
6 you -- when you went out there and did your site visit and
7 walked through and evaluated the channel, what does this
8 picture tell you with regards to what you found out there?

9 A. Just that, to orient really quick, the white
10 arrow then is flow direction, so I'm actually standing
11 downstream, looking upstream.

12 Oh, there is no white arrow in this one. I
13 apologize for that. There's a white arrow on my report
14 showing flow direction, Special Master.

15 So we're looking in the upstream direction. I
16 think it's clearer in this photo that it's a natural
17 channel. If you look, there's numerous trees that have
18 fallen into the channel itself. We have quite a bit of
19 variety in the substrate in the foreground of this
20 picture. We actually have some pooling that is evident
21 where the channel cross-section broadens and shallows.

22 And looking further, then, towards the
23 background, it's got a much narrower and slightly deeper
24 cross-section, and we again have that variety of
25 vegetation. So in the pooling area, we have these grasses

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1 this photograph was taken.

2 A. I think this one is fairly close to the property
3 line between the Halls and Mr. Murphy. So it's close to
4 that -- that blue line, Special Master.

5 Q. All right, well, let's go to the photograph you
6 identified as Number 3. So Ms. Van Bussum, again, same
7 questions: Did you take this report -- or did you take
8 this photograph?

9 A. I did.

10 Q. And does this appear in your report?

11 A. It does. This is the bottom photograph from
12 page 3 of my report.

13 Q. Okay. Now let's talk about what this photograph
14 relates to you. Again, comparing and contrasting a
15 natural channel versus manmade, what are the
16 characteristics you see here, and what's your conclusion
17 with regards to this location?

18 A. Sure. This bears strong hallmarks of a natural
19 channel. In the foreground, we have, again, a very wide,
20 flat channel. You can actually see the bottom. It's only
21 a couple inches deep here, kind of an area of pooling.
22 You have a variety of grasses, aquatic plants that are
23 growing along it.

24 And then looking towards the upper part of the
25 photograph, you have an enormous amount of deadfall in the

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1 channel. You couldn't walk this. You would have to, I
2 think, take a chain saw to actually get through this area.
3 So if a ditch is there, it's being maintained,
4 you can make your way through the channel. This deadfall
5 has evidently been there for quite some time.
6 Q. But even if it's -- hasn't been maintained in a
7 while, what are the characteristics of the channel itself
8 that lead you to particular conclusions?
9 A. Sure. In this case, if this was a ditch, it
10 wouldn't have this kind of cross-section and this kind of
11 aquatic plants growing in it. This is a very wide, flat
12 cross-section. And again, ditches have these D or
13 V-shaped cross-sections to reduce the evaporation from the
14 channel and better deliver water to the property.
15 Q. And could you point out on the map the general
16 area in which this photograph was taken?
17 A. Essentially, with these photos, we're moving
18 downstream from the spring, so my last photo was taken at
19 about the blue line. This would be probably in about this
20 area, so just that one hash mark, then, further to the
21 southwest from the property line, right in that area. And
22 that's the general area, moving downstream.
23 I'll just put these down. Thank you.
24 Q. Ms. Van Bussum, does this photograph appear in
25 your report?

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1 where about this photograph was taken?
2 A. We're just continuing to move downstream. So
3 generally, we're still kind of in this pooling area about
4 here.
5 Q. Okay.
6 A. And I'm sorry, Special Master, that would be
7 about two hash marks, two to three hash marks down from
8 the blue line on the larger exhibit here. So you can see
9 the area of vegetation kind of widens there.
10 Q. All right, something new, at least a little more
11 interesting, a physical structure here in this picture.
12 Page 5 of IDWR Exhibit Number 4 I believe is also located
13 in your report. What's the --
14 A. It's the top photo on page 7 of my report.
15 Q. Excellent. What's the significance of this
16 picture?
17 A. This isn't really a comparison, obviously, of
18 natural channel versus ditch. This is put in here because
19 there's a lot of talk about the foot bridge and the
20 location of the foot bridge.
21 The foot bridge is actually located near where
22 the department has recommended its point of diversion. So
23 when I first started talking to folks about this area, the
24 objectors said, "Well, the point of diversion is below the
25 foot bridge."

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1 A. It does. This is the top photo on page 5 of my
2 report.
3 MR. BAXTER: Identified as page number 4 of IDWR's
4 Exhibit Number 4 for those following along in the crowd.
5 Q. (By Mr. Baxter) Again, generally, I'm not
6 trying to beat a horse here, but if you could just
7 describe generally what are the characteristics you see
8 here and what's your conclusion with regard to those
9 characteristics.
10 A. Sure. On this photo, we have the white arrow
11 showing flow direction is generally from left to right.
12 You can see in the background, we have got the water
13 coming in. Then we have this huge area of pooling in the
14 foreground on the right-hand side of the photo.
15 Again, we have a variety of grasses. We have a
16 very wide, shallow cross-section. There is, again, a
17 significant amount of deadfall in the channel; so we have
18 got some in the foreground, we have quite a bit in the
19 background, as well.
20 In the background, you can actually see a couple
21 of larger rocks, so we have a variety of substrate.
22 Here in the foreground, you can't see it, but
23 there would be quite a bit of silt because of the pooling.
24 The water has slowed and dropped that silt down.
25 Q. Could you point to the court on our larger map

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1 So it's important to keep the location of the
2 foot bridge in mind, so it's just here as a vocabulary
3 word, if you will, since we'll talk about that a lot. I'm
4 sure it will be mentioned.
5 Q. Could you go ahead and for the court point out
6 on the larger map the general location of the foot bridge?
7 A. Sure. The department is currently recommending
8 the yellow dot as the point of diversion. The foot bridge
9 is just upstream of this yellow dot, but still inside the
10 red line; so it's on Forest Service property, but just
11 upstream of the yellow dot.
12 THE COURT: It's not visible in the photograph here?
13 MS. VAN BUSSUM: It's not visible on the map, but it
14 is -- on the photograph, you can see it, in my report.
15 Q. (By Mr. Baxter) So in your field, is it, if we
16 use, kind of, the foot bridge as a --
17 A. A landmark?
18 Q. -- as a landmark, as you came down through the
19 channel, what characteristics did that channel exhibit?
20 Was it -- Would you say it exhibited the characteristics
21 of a manmade channel or more of a natural channel?
22 A. Certainly, of a natural channel. If you look at
23 the photos in my report up to this point, but also the
24 photos we have seen so far that are blown up, there's a
25 significant amount of deadfall, there's a variety of

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1 vegetation. There are aquatic grasses and plants growing
2 in the channel. The cross-section varies with distance.
3 It certainly bears the hallmarks of a natural channel.
4 THE COURT: Mr. Baxter, did we say the recommended
5 point of diversion -- or current recommended is above the
6 foot bridge?
7 MS. VAN BUSSUM: No, it's just below the foot
8 bridge.
9 THE COURT: So it doesn't show in a photograph?
10 MS. VAN BUSSUM: No.
11 Q. (By Mr. Baxter) Ms. Van Bussum, for all intents
12 and purposes, is it about where the green line and the red
13 line are -- Is it along that property line boundary, I
14 should say?
15 A. It is. It is.
16 MR. BAXTER: Mr. Rigby tried to whisper to me, a
17 clarification question, and I didn't hear it quite right.
18 MR. RIGBY: I was trying to say where they parallel.
19 MR. BAXTER: Where they parallel. Thank you, Jerry.
20 MR. RIGBY: Sorry.
21 MR. BAXTER: No worries. I need any help I can get
22 to make sure -- We want to make sure --
23 MR. RIGBY: (Unintelligible) to help me
24 (unintelligible).
25 MR. BAXTER: We need to have a clear record. That's

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1 boundary?
2 UNIDENTIFIED: No, no.
3 THE COURT: Thank you.
4 Q. (By Mr. Baxter) All right. Well, let's go to
5 another picture. Sorry to make you run back and forth
6 today, Ms. Van Bussum.
7 A. Don't worry.
8 Q. You didn't get your run in this morning, I take
9 it, so this is probably good exercise for you.
10 A. That's not quite long enough to keep it from
11 curling. That's great, thanks.
12 Q. All right. Well, this is page number 6 of IDWR
13 Exhibit Number 4. And what -- what photograph number out
14 of your report?
15 A. This is -- We're still on page 7 of my report.
16 The foot bridge photo was the top photo. This is the
17 bottom photo of that page.
18 Q. So this is -- I don't need you to go across the
19 room to point out on the map, but where is this picture
20 taken from in relation to the foot bridge?
21 A. This is just downstream of the foot bridge, so
22 moving further into the red property, or onto the Forest
23 Service property.
24 Q. And what's the significance of this photo to
25 you?

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1 the important part. So where those two parallel lines
2 are, a little bit above there, that's where about the foot
3 bridge is.
4 Do you have any questions with regard to that,
5 Special Master?
6 THE COURT: And the foot bridge is on the Forest
7 Service land?
8 MR. BAXTER: It's my understanding, and it looks
9 like the parties' heads are all nodding, so -- And
10 Monica's head is nodding, so --
11 MS. VAN BUSSUM: I'm nodding, too.
12 MR. BAXTER: -- I think everybody agrees the foot
13 bridge is on Forest Service land.
14 THE COURT: The fences meander in your photograph,
15 Exhibit 4. Do those meandering fences designate any
16 boundaries?
17 MS. VAN BUSSUM: It would be awfully close to the
18 property line, but I'd defer to the property owners if
19 they are the property line.
20 UNIDENTIFIED: Your Honor, you see the white barn in
21 the background? Just to the left of it is my property
22 fence, kind of hidden back in the trees there. The jack
23 fence right in front of us is basically just to keep a
24 horse in the pasture over there, so --
25 THE COURT: That doesn't designate anybody's

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1 A. This photo is where I found the first evidence
2 of human intervention in the channel, and this actually
3 corresponds to the location of the yellow dot, so the
4 department is recommending this location as the point of
5 diversion.
6 Q. So again, we have been talking about
7 characteristics of a stream. But you have now changed to
8 say this is a -- a -- what you'd consider a point of
9 diversion. What is different about this photograph versus
10 the other photographs that we have been talking about?
11 A. Sure. Now, in this photograph, you still see
12 some of the -- the trademarks of a natural channel, so we
13 have got some deadfall in the stream. This is obviously
14 an area of pooling.
15 But if you look at the location of the yellow
16 arrow and what it's pointing to, this is actually an
17 earthen berm, so the channel here has been -- or a channel
18 has been artificially made by this berming. If the water
19 was left to go on its natural course, it would actually
20 continue towards the background of the photo, so the berm
21 actually serves to divert the water over to the right-hand
22 side, into the ditch.
23 Q. So if we're talking about characteristics --
24 I think previously you mentioned berming,
25 manmade manipulation. Any other characteristics that are

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1 significant to you out of this photograph?

2 A. Well, certainly the topography, which you can't

3 really see here; but like I said, the stream, if left to

4 go on its own, would continue flowing to the background.

5 If I could point this out on the map, that might

6 actually help.

7 Q. I think that -- that would be very helpful. I

8 think this is an important point.

9 A. So, Special Master, this photo was taken at the

10 yellow dot. And if left on its own, the stream channel

11 would continue flowing in a general southerly direction to

12 the North Fork, so it would meet the North Fork not far

13 from here. And that area is quite swampy.

14 But if you look at where I've drawn the hash

15 marks, I have drawn the hash marks that follow the ditch.

16 So we have got this berm that essentially obstructs some

17 of the natural flow of the water and diverts it slightly

18 to the north and west, under the hill slope, and then down

19 to the properties that we're talking about.

20 And so we have got the channel kind of making a

21 turn against the topography. And streams go downgradient

22 if there's a downgradient path available. So here we have

23 got the channel moving against gradient, if you will; or

24 not following what would be its natural path, because we

25 have this human intervention, we have this berming.

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1 And which photograph is this in your report?

2 A. This is the top photo on page 8 of my report.

3 Q. Can you orientate the court as to where this

4 photograph was taken?

5 A. Sure. This is very close to the yellow dot.

6 I've almost essentially just gone from my previous photo

7 and turned to the right and walked down just a little bit

8 and taken this photo, looking downstream of what the

9 department is saying is the point of diversion. And the

10 white arrow again denotes flow direction.

11 THE COURT: Now we're in the ditch?

12 MS. VAN BUSSUM: Now we're in the ditch.

13 Q. (By Mr. Baxter) So again, what are the general

14 characteristics that you see in this photograph and from

15 your experience there on the ground that suggest to you --

16 Or I should say what conclusion do you draw from the

17 (unintelligible) whether this is a natural channel or a

18 manmade ditch?

19 A. Sure. It really helps to just kind of compare

20 the two. So in all the previous photos, we have seen a

21 lot of deadfall in the stream, we have seen aquatic

22 grasses growing up through the water. We have seen the

23 channel cross-section change as it pools and runs.

24 In this area, we're essentially at the top of

25 the ditch, we're at the formation of the ditch, looking

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1 And berming doesn't happen in natural channels.

2 They kind of -- The water wears away the sediment, and it

3 again goes toward that downgradient path; so we have a

4 very strong indication of human intervention here.

5 And upstream of this yellow dot, I've said

6 before and my photographs show, that there's really no

7 evidence of human intervention or human diversion from the

8 stream.

9 THE COURT: The photograph shows essentially the

10 entire natural channel diverted?

11 MS. VAN BUSSUM: Right. So what we have got --

12 Obviously, in a two-dimensional photo, it's hard to point

13 this out. So we have got this kind of area of berming,

14 this hilly area that's been kind of put along the side,

15 and it diverts most of the channel.

16 There is some seepage, of course, that happens

17 through this just because of the material the berm is made

18 out of, but it diverts most of the channel.

19 THE COURT: What material is that berm made of?

20 MS. VAN BUSSUM: It looks like just the sediment

21 that's in the area, so dirt.

22 THE COURT: All right. No mattress?

23 MS. VAN BUSSUM: No mattress, no garbage bags.

24 Q. (By Mr. Baxter) All right. Well, let's take a

25 look at photograph number 7, IDWR Exhibit Number 4.

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1 downstream. And so towards the background of this

2 picture, you can -- you can see where the channel

3 cross-section is becoming uniform.

4 So if we look, there's kind of this large tree

5 to the right-hand side of the photo. From that point, the

6 channel really is -- is a single cross-section, and it's

7 very a hallmark of a ditch where we have this U-shaped or

8 D-shaped cross-section.

9 And you can tell that by looking at the top, and

10 that's really just kind of one size as we go along.

11 There's not really a lot of deadfall. In fact, I don't --

12 Past that tree to the right-hand side, I don't really see

13 any deadfall in the channel, and very little variety of

14 vegetation.

15 So up to this, we have seen the aquatic grasses,

16 we have seen the plants, we have seen the deadfall.

17 There's very little of that here, and that's

18 again a hallmark of a ditch. They're maintained, they're

19 cleaned out, they're scoured; and so they -- they have

20 these certain characteristics.

21 THE COURT: Is there any -- Do we know what this

22 ditch is called? Most ditches have a name.

23 MS. VAN BUSSUM: I would defer to the property

24 owners, if they call it something.

25 MR. RIGBY: Your Honor, the records as we'll produce

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1 will call it Spring Ditch.

2 Q. (By Mr. Baxter) All right. Well, let's go on,

3 then, to photograph number 8.

4 THE COURT: Do you have any history of when that

5 ditch was built?

6 MR. RIGBY: We'll put that on. Yes, Your Honor.

7 THE COURT: Okay.

8 Q. (By Mr. Baxter) So Ms. Van Bussum, can you

9 orientate the court to where you were when you took this

10 photograph?

11 A. Sure. Can I -- I think the easiest way is to

12 show it on the map. So from the point of diversion, I

13 followed the ditch and went up on the hill slope to look

14 down over this area. So this photo is taken about at the

15 end of this, end or beginning -- end of the second,

16 beginning of the third hash mark down from the yellow dot

17 on the map, in that general area. And it's probably

18 evident, but I'm up on the hill slope. I'm no longer

19 walking in the channel.

20 Q. So going, then, back to the photograph, I see

21 you have a number of arrows there, on there. Can you

22 describe for the court what those arrows represent?

23 A. Sure. There are three arrows on this map. The

24 white one, it should be evident by now, it denotes general

25 flow direction. The yellow arrow on the map shows the

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1 So we have got, looking down on this, we clearly have this

2 uniform-in-cross-section ditch following the hill slope.

3 This is indicative of ditches I've seen all over the

4 state. They generally, you know, head up under the hill

5 slope and then flow on down to the property.

6 Here again, we don't have a significant variety

7 of vegetation around the ditch. We can't really see a

8 variety of substrate in the ditch. So again, we have

9 marked out a lot of those characteristics of a natural

10 channel, and we draw the conclusion that it is a ditch.

11 And again, talking about the topography, if the

12 channel was allowed to go with the topography, it would

13 have actually run down this way towards the blue arrow and

14 have met up with the North Fork. The water would not have

15 come this way.

16 And upstream of the point of diversion, the

17 water is flowing with the gradient, so it's only

18 downstream that we really have it going against the

19 gradient, or away from the gradient.

20 Q. So again, from your experience, which direction

21 would the flow have gone naturally at this point?

22 A. Sure. The flow actually -- I'm putting my hand

23 on the bottom left third of the photo, and I'll just sweep

24 my hand up towards the blue arrow. So you're essentially

25 drawing a line, general line from my hand to the blue

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1 ditch. Again, this is downstream from the point of

2 diversion, so it shows the ditch. And then the blue arrow

3 points up to the North Fork.

4 Q. So where would the point of diversion be on this

5 map out --

6 A. Actually, it's not quite in the photo. It would

7 be just off the bottom left corner.

8 Q. Could you point again for the court so the

9 court --

10 A. I'm sorry.

11 Q. -- could see?

12 THE COURT: Where was she pointing, now?

13 MR. BAXTER: Where the point of diversion that the

14 department has recommended is located.

15 A. It would be off the bottom left corner of the

16 map, Special Master.

17 Q. (By Mr. Baxter) So what is significant to you

18 with regards to this picture and the conclusions that you

19 have reached here today?

20 A. It's nice to have an overview of this, because

21 we see a lot -- a lot of ditches on maps, and we see a lot

22 of photographs of ditches; and what I have talked about

23 today is the differences between natural channels and

24 ditches.

25 Ditches are generally uniform in cross-section.

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1 arrow, which again is the North Fork.

2 So it would have continued flowing towards the

3 North Fork. And I say "flow" in a fairly euphemistic

4 sense, because it would have gone very, very slowly. This

5 is a fairly flat area. Hence, there would be a lot -- a

6 lot of pooling that would have happened.

7 Q. So Ms. Van Bussum, then, going back -- I believe

8 it's one picture, if we could. Actually, two pictures. I

9 take that back, I'm sorry.

10 A. This is the one you want to look at?

11 Q. Yes, that's the one. You have a yellow arrow

12 marked on there. Again, was this the first point that you

13 saw evidence of a manmade diversion?

14 A. Yes.

15 Q. Okay.

16 MR. BAXTER: Well, Your Honor, at this point I'd

17 move to have IDWR Exhibit Number 3 and 4 admitted into

18 evidence.

19 THE COURT: Any objections to Exhibits 3 and 4?

20 MR. RIGBY: No, Your Honor.

21 THE COURT: Good, so admitted.

22 Q. (By Mr. Baxter) Ms. Van Bussum, let's go ahead

23 and have you take the stand again. Thank you.

24 Ms. Van Bussum, handing you what's been marked

25 as IDWR Exhibit Number 5 --

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1 MS. VAN BUSSUM: Diana, would you get this one?
2 THE CLERK: You want this?
3 MS. VAN BUSSUM: Yes.
4 THE CLERK: All right.
5 THE COURT: Garrick, would this be a good place to
6 take a break? It looks like a number of people had to
7 look at some documents here. It might take a while.
8 MR. BAXTER: Yeah, if we could, Your Honor. And
9 actually, if we could take about a 15 to 20-minute break,
10 20 minutes? Half hour? 20 minutes?
11 UNIDENTIFIED: It's a one-day trial. Your time is
12 over.
13 MS. VAN BUSSUM: 20 minutes should be -- 20 to 25
14 minutes.
15 MR. BAXTER: 20 minutes, Your Honor.
16 THE COURT: Okay, we'll go off the record.
17 Thank you.
18 MR. BAXTER: Thank you, Your Honor.
19
20 (Recess.)
21
22
23
24
25

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1 Mr. Warner in this letter?
2 A. It is that the channel above the yellow dot is
3 actually a ditch.
4 Q. And having received this after visiting the
5 property, has this letter caused you to change your
6 conclusion with regards to this matter?
7 A. No.
8 Q. Okay. Ms. Van Bussum, I'm going to approach and
9 hand you IDWR Exhibit Number 6.
10 Ms. Van Bussum, have you seen this document
11 before?
12 A. I have.
13 Q. And did you receive this document before or
14 after you walked the property?
15 A. After.
16 MR. BAXTER: I'll just pause a minute and let the
17 rustling settle down here real quick.
18 Q. (By Mr. Baxter) All right, Ms. Van Bussum, I
19 actually was just going to take a moment to clarify: IDWR
20 Exhibit Number 5, was that a letter from Mr. Roger Warner?
21 A. That was.
22 Q. And IDWR Exhibit Number 6, who is that a letter
23 from?
24 A. This is from Nancy -- is it Liebrecht? Is that
25 how you say it? Okay, so it's from Nancy Liebrecht to

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1 THE COURT: Now we're back on the record. We took
2 about a 20-minute break. And let's see, it's 10:49 and
3 we're currently going to resume with IDWR's presentation
4 of the basis of its recommendation.
5 Go ahead, sir.
6 MR. BAXTER: Thank you again, Your Honor. This is
7 Garrick Baxter for the department of water resources; and
8 we have, on the stand, Monica Van Bussum.
9 Thank you to the court and the parties for
10 allowing us that brief recess.
11 Q. (By Mr. Baxter) Ms. Van Bussum, I've handed you
12 what has been marked as IDWR Exhibit Number 5, I believe.
13 Is that correct?
14 A. (No response.)
15 Q. Have you seen this document before?
16 A. I have.
17 Q. And what is this document?
18 A. This is a draft of a letter to Jerry Rigby from
19 Roger Warner, and it was supplied to me by Mr. Warner.
20 Q. And after you walked the property -- Or did you
21 receive this water -- or this letter, excuse me.
22 Let me try that began. Did you receive this
23 letter before or after you walked the property?
24 A. After.
25 Q. And what is the general conclusion reached by

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1 Jerry Rigby.
2 Q. Okay. And has this letter been provided to the
3 department?
4 A. Yes.
5 Q. I believe that you said that you received this
6 letter after you visited the site -- site of the property?
7 A. That's correct.
8 Q. And what's the general conclusion reached by
9 Ms. Liebrecht in this letter?
10 A. That the channel above the yellow dot is a
11 ditch.
12 Q. Okay, and have you considered this letter, and
13 does it cause you to change your position with regards to
14 this matter?
15 A. No, I did not change my mind.
16 UNIDENTIFIED: (Unintelligible).
17 Q. (By Mr. Baxter) Now, Ms. Van Bussum, let's talk
18 about the previous two exhibits, actually, first. What is
19 the rationale used by the two experts to identify -- or to
20 state that that is a natural (sic) channel?
21 A. I'm actually going to grab the exhibits back
22 from the court, if I can. I had already turned them over.
23 So Mr. Warner's letters -- I'm sorry, letter
24 says that the ditch -- Or I'm sorry. In his mind, the
25 ditch would have meandered across -- meandered across the

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1 meadow that we see on the map. He was unable to visit the
 2 actual channel because of, obviously, some issues
 3 surrounding this case.

4 And that there are homestead documents that
 5 state that this -- that the homesteaders of -- the
 6 property that the Feltons and the Heltsleys now own was
 7 cultivated and did have a number of fruit trees on it.

8 Q. Okay, and then Ms. Liebrecht's letter?

9 A. So she begins by describing the spring flowing
 10 down. She says it flows in a relatively straight channel
 11 that flows to the base. She was able to review the aerial
 12 photos and has personal knowledge of farming and grazing.

13 And that the vegetation surrounding the area
 14 may -- may or may not indicate that it's a natural channel
 15 as opposed to a ditch. And her conclusion is that, again,
 16 with meandering and the long history of this that it would
 17 be a ditch.

18 Q. Okay, and you reached your conclusion -- Did
 19 you reach your conclusion based upon your -- your -- your
 20 site visit with regards to the property?

21 A. Yes.

22 Q. Okay. Now let's go ahead and talk about IDWR
 23 Exhibit Number 7. Have you seen that document before?

24 A. Yes.

25 Q. And what is this document?

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1 that we obviously have all three of those parties here.
 2 They're going to give their own testimony, and therefore I
 3 guess I'm surprised that we're introducing them, other
 4 than they are part of the record itself.

5 I guess with that caveat, I don't have any
 6 objection. Just so long as the court is understanding and
 7 aware that the three persons that are involved with 5, 6
 8 and 7 are here to testify.

9 THE COURT: Good. Any objections from the other
 10 side? 5, 6 and 7?

11 UNIDENTIFIED: No. No, Your Honor.

12 THE COURT: Okay, they are admitted.

13 MR. BAXTER: Thank you, Your Honor.

14 Q. (By Mr. Baxter) Well, Ms. Van Bussum, then I
 15 guess just in summary: What is your conclusion as to
 16 where the point of diversion in this matter should be
 17 recommended?

18 A. The point of diversion that the department
 19 recommends is at the yellow dot on Forest Service ground.

20 Q. That's consistent with the recommendations you
 21 have submitted to the court here today?

22 A. That's correct.

23 MR. BAXTER: Your Honor, I have no further questions
 24 of this witness.

25 THE COURT: Okay, thank you.

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1 A. This is an email that was provided to us by
 2 Daryl Hull. It is an email written from Jim Gregory to
 3 Mr. Murphy, who is another one of the objectors.

4 Q. And have you reviewed this document?

5 A. Yes, I have.

6 Q. And did you receive it before or after your site
 7 visit?

8 A. After.

9 Q. And what conclusion does Mr. Gregory reach?

10 A. That the channel above the yellow dot is a
 11 natural channel.

12 Q. Okay, and how did he reach that conclusion?

13 A. It's most evident really in the last paragraph
 14 of the email, and he says a diversion point is defined as
 15 a point where water is removed from a natural channel, and
 16 the water in a spring is clearly in a natural channel
 17 until the earthen dam, or what I have been calling the
 18 berm, removes it from the channel.

19 Q. Okay, so you concur with Mr. Gregory's
 20 conclusion here?

21 A. I do.

22 MR. BAXTER: Your Honor, I'll go ahead and move that
 23 IDWR Exhibits Number 5, 6 and 7 be admitted into evidence.

24 THE COURT: Any objections?

25 MR. RIGBY: Your Honor, the only objection I have is

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1 Does anybody have any cross-examination of
 2 Ms. Van Bussum?

3 MR. BAXTER: Actually, I apologize, Your Honor. I
 4 just should have said I do understand that there are
 5 additional witnesses, experts to testify here today. The
 6 reason why I did want to present kind of the letters
 7 that -- here today was just to point out to the court the
 8 department did have the opportunity to consider the
 9 statements of the other experts.

10 I don't know if we will be provided an
 11 opportunity for Ms. Van Bussum to come back to the stand
 12 after the other experts have had an opportunity to
 13 testify. Just in case, I wanted to point out that
 14 Ms. Van Bussum had considered their -- their comments up
 15 until this point, so that's the reason why I felt like it
 16 was important to get those in.

17 But if the court does allow us to re-call
 18 Ms. Van Bussum at the end of the experts testifying, I
 19 would request to reserve the right to be able to do that.

20 Thank you.

21 THE COURT: Will she be available the rest of the
 22 day?

23 MR. BAXTER: As long as she's able to be here.

24 MS. VAN BUSSUM: Yes, I plan on being here all day.

25 THE COURT: Good, thank you.

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1 MR. BAXTER: Thank you, Your Honor.
2 THE COURT: Then do you want to go right through
3 whose case next?
4 MR. BAXTER: Well, I would imagine that they want to
5 cross-examine Monica while she's up there?
6 MR. RIGBY: Yes, Your Honor, we certainly would.
7 THE COURT: Okay, good, Mr. Rigby, you're up.
8 MR. RIGBY: Thank you, Your Honor.
9 If it please the court and counsel, other
10 parties:
11 CROSS EXAMINATION BY MR. RIGBY:
12 Q. Monica, so that I don't reiterate some of your
13 testimony, I at least want to make sure I'm very clear as
14 to the basis upon your recommendation.
15 As I understood, and especially as the most
16 recent comment or question that was asked and answered, is
17 that you made your most recent recommendation based upon
18 this site visit?
19 A. Yes.
20 Q. In fact, isn't it true that originally the
21 recommendation was different?
22 A. The recommendation for 10603 was different.
23 There was no previous recommendation for 14531 before this
24 late claims director's report.
25 Q. Very good. Do you know -- Or were you involved

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1 that recommendation?
2 A. As I understand it, a contract field examiner
3 with the department went there with one of the water
4 users. I believe it was Miss Heltsley. She will have to
5 confirm for me. But I believe --
6 Q. Again, only if you know. What I'm saying is
7 what do you understand. That's all I'm asking.
8 A. Sure. I believe it was based on the contract
9 field examiner's field exam done. I don't have a date on
10 that, so I can't give you an exact date. Sorry.
11 Q. No, that's fine. I'm just trying to determine
12 that. Do you know what demonstrative evidence or any kind
13 of written evidence was used by the department in making
14 that recommendation?
15 A. He had written a field exam report.
16 Q. Isn't it true that that -- that all other water
17 rights in the SRBA --
18 There's a back file that has a significant
19 amount of documentation, if you will, that has been
20 produced for this particular water right?
21 A. Sure. His field report is in that.
22 Q. And that field report has attached to it
23 documentation from -- from, in essence, previous owners or
24 previous documentation that would in any way evidence this
25 particular area, right?

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1 with the original recommendation?
2 A. I was not.
3 Q. Okay, so you don't have knowledge as to -- to
4 why that is, why the recommendation of at least the one
5 claim put the location, although incorrect, in a -- in the
6 location that you drew on the map. And again, you're
7 going to have to tell me the color.
8 A. The yellow dot.
9 Q. No, I'm saying the original recommendation.
10 A. Oh, I'm sorry, the original recommendation is on
11 the dot -- on the map in the brownish-colored dot.
12 Q. But that brownish-colored dot was actually
13 incorrect, is that right?
14 A. You are correct in that understanding.
15 Q. Is it -- is it fair to assume or to agree that
16 the dot that you drew on the map this morning -- again,
17 you're going to have to tell me the color of that dot --
18 A. Plum, I think --
19 Q. Plum.
20 A. -- is what we decided.
21 Q. That the plum dot was the intended
22 recommendation of the original recommendation, is that
23 fair to say?
24 A. That is fair to say.
25 Q. Okay, do you know what basis was used to make

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1 A. Sure.
2 Q. Okay. And did you use that, or did you review
3 that when you made your recommendation?
4 A. I did.
5 Q. Okay. And is it fair to say -- And I'll start
6 out, initially: Is it fair to say that nothing within
7 that -- And I realize I'm being very broad. But nothing
8 that you recall in reading that ever evidenced anything
9 that would -- would indicate that reach? And I'm talking
10 about the plum-to-the-yellow point of diversion. So to
11 make yourself clear, that's what I'm always referring to.
12 Nothing in that documentation evidenced that or
13 called that anything other than a ditch?
14 A. I'm not sure I understand your question. What I
15 can say is that as an agent I take the evidence that's
16 available, so the evidence that's associated with the
17 file. And I review that along, in this case, with my site
18 visit. And then I make recommendations based on the
19 evidence that's available.
20 Q. I understand that. You're not answering my
21 question. Maybe I didn't ask it --
22 A. I didn't understand it, then. Sorry.
23 Q. I recognize that you based your recommendation
24 upon your site visit, and we'll get into that in just a
25 moment.

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1 My question is: There is, and clearly is some
2 documentation. And like I say, I'm -- I'm asking this
3 broadly to begin with, and I'll actually produce and have
4 you review a couple of the documents I'm referring to.
5 So I'm just asking broadly: Do you know of any
6 document or any evidence that's in the record of the -- of
7 this particular water right, or water rights that are
8 subject to this trial today, where that reach, that
9 plum-to-yellow reach was ever called "the creek" as
10 opposed to a "ditch"? Or anything other than a ditch?
11 I'm being very broad here.
12 A. You are being very broad. I don't recall
13 anything specifically. I did my site exhibit (sic), I
14 took the evidence into account and made a conclusion based
15 on what I had available: That it was a natural channel --
16 or is a natural channel until the yellow dot.
17 Q. No, again, you're not answering the question.
18 A. Then I'm still not understanding, because in --
19 and my thought is --
20 Q. No, I know why you made your recommendation.
21 You made that very clear.
22 A. Okay.
23 Q. I'm asking you: Did you consider the other
24 evidence, and was any of that other evidence supportive of
25 your recommendation? Maybe that's a better way to answer

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1 said this was exactly what you are now maintaining that it
2 is; and that is, a creek and not a ditch?
3 A. There were very few references to the channel in
4 the documents that I had. There are certainly references
5 to the homestead and, again, to Hughes Creek and to the
6 North Fork. But --
7 Q. But Hughes Creek and North Fork are irrelevant?
8 A. Completely -- Right, completely different than
9 the channel we're talking about today.
10 Q. Now, as far as -- And again, I'll get to those
11 documents in just a moment. I was just trying to find
12 out if there was something I was missing, because I have
13 not found any, myself, and I was asking you if you had
14 found any.
15 A. Yeah, I don't recall.
16 Q. Okay, isn't it correct that in your
17 investigation of the numerous water rights that you have
18 investigated that it's a very common practice, in the
19 upper basins especially, for the homesteaders to have dug
20 ditches along the base of the hill or the mountain that's
21 upgradient from their lands for the purpose of capturing
22 water or diverting water from, let's say, a river or a
23 stream or whatever, again, for the purpose of having
24 gravity-fed irrigation for their property?
25 A. Sure, it's very common for ditches to run along

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1 it.
2 A. I considered the other evidence.
3 Q. Right.
4 A. I did not find anything in that evidence that
5 would contradict the conclusion that I made.
6 Q. And again, though, did you see anything within
7 that evidence that called that or referred to that in the
8 historical documents as anything other than a ditch? I'm
9 not saying it said "ditch." I'm saying anything other
10 than a ditch?
11 A. I don't recall a lot of specific references to
12 the channel itself. I recall a lot of references to
13 Hughes Creek and a lot of references to North Fork, but I
14 don't recall very many references specifically to this
15 channel.
16 Q. But again, you can't say yes or no? Is that
17 what you're testifying today?
18 A. Until you show me what you want to show me --
19 Q. That's fair.
20 A. Yeah, there's a lot of documentation associated
21 with it and I --
22 Q. And I certainly acknowledge that, that there
23 was. All I'm trying to find out, just for all parties, is
24 whether or not you know of anything that you used in the
25 basis -- for your basis in making this recommendation that

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1 hill slopes.
2 Q. Very good. As a matter of fact, isn't it also
3 very common, and with your experience, knowledge, that --
4 in fact I think you just said it -- water runs
5 downgradient? I mean I'm no water expert, but I think I
6 can answer that one with pretty good assurity.
7 So the argument being that the reason those
8 ditches were originally dug, and the reason they're
9 parallel to the mountain, so to speak, is to do just the
10 opposite of what the natural water tendency is; which is
11 run directly to the creek or the stream or the water
12 that's generally a creek or river? In this case, we're
13 talking about the North Fork.
14 But it would run parallel to like the tree that
15 I think you testified to, to the river, right --
16 A. You're asking is that --
17 Q. -- within a ditch?
18 MR. BAXTER: Your Honor, I think there was a
19 question in there. I got lost. If Mr. Rigby could --
20 MR. RIGBY: Granted, granted. I retract that.
21 Q. (By Mr. Rigby) Isn't it also common: The
22 reason that ditches were dug parallel to those mountains
23 is to stop the water that would otherwise, without human
24 intervention, head directly -- or finding the lowest
25 gradient, head to the river?

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1 A. Sure. What they have done is they have diverted
2 to try to keep a little bit of head so that they can -- or
3 elevation so that they can get the water to their property
4 and to gravity feed. In this case, with a priority date
5 like this, it would have been gravity-fed irrigation.

6 Q. Certainly. We're talking in the late 1800s,
7 right?

8 A. Right.

9 Q. Okay, the other common practice was, in doing
10 the -- the ditch again at the hillside, upgradient, wasn't
11 it also a common practice, especially in these upper
12 meadows, to do that to avoid, in essence, the farmland
13 that was otherwise farmable becoming just basically a
14 marsh?

15 A. Well, if you put the ditch on the hill slope, it
16 allows you to irrigate the property underneath it. So it
17 could be that this was -- You know, you have these large
18 homesteads where there was one property owner and they
19 would have been irrigating all along the length of the
20 ditch. Or you could have a couple people that went in
21 together and dug a ditch along the side of the property so
22 that the upstream neighbor could irrigate and the
23 downstream neighbor could irrigate off the same ditch. So
24 for convenience sake, one ditch to maintain.

25 Q. Certainly.

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1 Q. Okay. Why is it you didn't take a picture of
2 this spring? Any particular reason in itself?

3 A. Well, I have got pictures where --
4 Can I borrow my report back --

5 Q. Certainly.

6 A. -- if you wouldn't mind?

7 Q. Certainly.

8 A. Thank you.

9 Q. I didn't notice one in there. That's why I'm
10 just asking whether or not there was a particular reason
11 why you didn't take a picture of the claimed point of --

12 A. A picture of a spring box?

13 Q. -- diversion by the claimants.

14 A. Okay, so this second picture -- that's the
15 picture at the bottom of the first page of my report --
16 just underneath that, it says "spring headwaters," so I do
17 have a picture of the spring headwaters.

18 Q. Oh, you do. Then I guess I didn't understand it
19 that way.

20 A. Okay. And it's only two words at the bottom of
21 a page of a report, so it's not --

22 Q. Okay, all right.

23 A. -- called out in the most fabulous way.

24 Q. Very good. Well, that clears a little bit of
25 that up for me. And that, as far as you're concerned,

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1 A. Does that answer your question?

2 Q. Not really, because, again, besides doing
3 exactly what you testified to, isn't the other common
4 practice of putting the ditch parallel to the bottom of
5 the mountain, upgradient from the farmland, is to ensure
6 that you can grow crops on a consistent basis, as opposed
7 to some burning up and some being just marsh as a result
8 of the water that's coming down the side of the mountain?

9 A. I've seen ditches run through fields. There are
10 a few up in Givens, where I did a field exam on last
11 summer, where the ditch runs through the field. It's more
12 common to have the ditch run along the hill slope,
13 certainly.

14 Q. Very good. Now, isn't it true that in this
15 particular area -- And you said you went to the spring
16 box itself, correct? The spring itself?

17 A. I went to the spring itself.

18 Q. By the way, as to that, you didn't have a
19 picture as to the spring box. Did you not see a spring
20 box?

21 A. I don't recall seeing a box or a structure at
22 the spring. I got my -- Obviously, my report's been in
23 evidence. I can look at that and tell you where the
24 spring is, but I don't recall seeing a structure such as I
25 would call a spring box.

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1 then, that was the head of the stream?

2 A. Yes.

3 Q. This spring?

4 A. Yes, that's the headwaters of the stream.

5 Q. Okay, would -- would you also concur that that
6 particular location is upgradient from the North Fork of
7 the river?

8 A. Just slightly.

9 Q. Just slightly?

10 A. Yeah.

11 Q. Okay. Would you agree, though, that if the
12 spring -- Let's just hypothetically, with your
13 experience: If the spring were to in essence -- You know
14 how springs can, all of the sudden they stop in one area
15 and come up in another.

16 Let's assume for just a moment this spring
17 stopped in its particular location and started just
18 downgradient, just, you know, three feet or whatever from,
19 in essence, the present -- you call it spring, I call it
20 ditch. Where would that water go?

21 A. There are actually a number of springs that feed
22 this channel as you walk further and further down, and
23 they continue going in the direction of the hash marks
24 that I put on the map earlier.

25 Q. Because of the channel, correct?

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1 A. Well, it's -- If you're going to follow the
2 gradient, it does go generally towards the North Fork, so
3 it's following gradient; but the channel, it's kind of a
4 chicken and egg thing. The channel comes along because
5 you have got water flowing in a downgradient fashion, and
6 the water itself works to make the channel.

7 Q. But again, remove the channel for just a moment.
8 Wouldn't that water that would -- is otherwise
9 captured by the channel, wouldn't that continue on its way
10 toward the North Fork?

11 A. It would.

12 Q. And therefore downgradient and not horizontally,
13 as it is depicted in the map, Exhibit 1?

14 A. By horizontally, you're going to have to clarify
15 that.

16 Q. Well, at least -- at least heading --

17 Right now it's almost parallel. As I viewed
18 that, the hash marks, as opposed to or compared to the
19 North Fork, that to me, for lack of better words, is
20 parallel.

21 A. And you make --

22 Q. My point is --

23 A. I'm sorry.

24 Q. Or my question is: Isn't it true that without
25 that, whether it's a ditch or a stream or whatever we want

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1 A. I think if I approach the map, if I could, it
2 might -- I might be able to understand your question
3 better and give you a better vision of how I see the water
4 flowing.

5 Q. Please do.

6 A. Okay, do you mind, Special Master?

7 Okay, so I have here the plum circle, and my
8 path along the ditch is the hash marks. And as I said
9 earlier, there is a slight gradient towards the North
10 Fork. What would happen is it would flow in this general
11 southwesterly fashion towards the North Fork.

12 So it's -- it's really following the gradient,
13 the very slight gradient here. I don't want you to think
14 it's, you know, something that's going make the channel
15 gush towards the North Fork.

16 Q. Now, I understand -- I understand your comment.

17 A. It's a very slight gradient, and you see
18 evidence of some braiding and some meandering of the
19 channel in this area. I mean you can see, you know, some
20 fairly heavy vegetation here.

21 So it's -- it's kind of making its way very
22 slowly. Again, very slight gradient. You're not talking
23 about a big channel incision.

24 Q. But it's -- Again, just for the record and for
25 the court, I saw your hand going in a different direction,

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1 to call it that captures the water that otherwise is above
2 the channel or ditch, would it not head more directly to
3 the North Fork?

4 A. There are a couple ways to answer that. One of
5 the -- This, I said before, this is a very slight
6 gradient from the North Fork, so it wouldn't necessarily
7 flow directly to the North Fork.

8 It would flow along the gradient. And the
9 gradient runs, as I have said before, in a southwesterly
10 fashion, so it would eventually meet up with the North
11 Fork. The first place we see it diverting, really, from
12 this natural gradient is at the yellow dot where it makes
13 a definite cut, because of the berm, to flow under the
14 hill slope.

15 Q. So your testimony today would be that you
16 deem -- Because obviously, you have seen the
17 representations of the claimants' experts and the
18 claimants themselves where they -- they obviously are
19 claiming that this was a ditch for the very purpose that
20 you and I discussed a moment ago, which is obviously to
21 keep it up higher and in essence feed the ditch down
22 below.

23 Your testimony would be, without that channel or
24 ditch or whatever we want to call it, that it would still
25 flow in the same direction?

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1 albeit not -- not at a 90-degree, but a different
2 direction than the parallel line of the hash marks.

3 A. So --

4 Q. Is that correct or not?

5 A. My hand is going from the plum circle, coming
6 down towards the yellow dot, and then it would run --

7 There's a large meander in the North Fork that
8 bisects the section line and the red property line, and
9 that would be -- given the gradient today, that's where I
10 would say the channel would hit the North Fork.

11 Q. Which is still closer to the North Fork than the
12 present channel that you're referring to, correct or not
13 correct?

14 A. What is closer to the North Fork?

15 Q. The -- the run of the water. Because again,
16 you're saying it would head toward, not in a 90-degree,
17 but your -- You got to testify.

18 Tell me what you're saying. Because your hand
19 keeps going more from -- from the spring box to where you
20 say it -- it starts heading toward the North Fork. Is
21 that -- Without the channel there, would it go in the
22 same direction as the channel, or would it go in a more --
23 in a direction that would get it to the North Fork sooner?

24 A. I don't really envision it getting to the North
25 Fork sooner. What you see in this area, you see a lot of

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1 braiding, you see a lot of pooling. There's not really
2 enough gradient to push it towards the North Fork any
3 sooner than right around this yellow dot, is where it
4 really starts making that turn into the North Fork.
5 Q. Well, again --
6 A. I'm really trying to testify to what I
7 understand.
8 Q. I understand you are. I'm just trying to get
9 your testimony.
10 A. Okay.
11 Q. Because again, you're -- you kept, I thought,
12 pushing toward the North Fork. But if that's not your
13 testimony, then I just need to know what you're testifying
14 to.
15 A. It would certainly hit the North Fork at some
16 point. That's absolutely what I said.
17 Q. But my question is: Would it hit it sooner
18 without the channel than with the channel? That's the
19 bottom-line question I'm asking of you, and I'm still not
20 quite sure I've got an answer from you.
21 A. What I'm saying: Up until the yellow dot is a
22 natural channel flowing along with gradient. A braided
23 channel, certainly; but a natural channel flowing --
24 flowing along its gradient, so water makes the channel in
25 a downgradient fashion.

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1 Q. Okay, and would you also acknowledge that
2 besides a site test in 2009 of a clearly unkempt,
3 unmaintained channel, which by your own testimony is
4 evident, that those who -- the testimony of those who have
5 worked the place would be important?
6 A. Absolutely.
7 Q. Okay, would that help to change your opinion if
8 in fact their testimony were to say that without that --
9 without that channel or ditch, as we call it, in the
10 present location, that the water would head more directly
11 to the North Fork, and in fact it did as they performed
12 work on there? Would you say that they're wrong?
13 A. Like I said before, we take every bit of
14 evidence that's available to us. We make conclusions. So
15 if there is evidence that it is a constructed and
16 maintained ditch, then certainly we would call it a ditch.
17 Q. Again, though, you're saying maintained.
18 Clearly, it's not maintained.
19 A. Okay, so --
20 Q. We will acknowledge that.
21 A. A constructed, a human-intervened channel, we
22 would call it a ditch, yes.
23 Q. Now, it's true that you took this site visit, if
24 you will, last year?
25 A. Yes.

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1 Q. But my question to you is, just to be sure,
2 because obviously -- You can appreciate why the different
3 distinction is important here.
4 If it really was a ditch, as is claimed by the
5 claimants, then that ditch has obviously captured the
6 water and created the channel that you're referring to
7 now, which then continues to add upon itself or dig itself
8 out and create the channel that you're referring to in
9 2009.
10 My question to you is: Without that channel --
11 assume it for just a moment -- as you viewed that terrain
12 and that gradient, would the water have gone -- if you had
13 brand-new water without a channel, would it go in the same
14 direction as those hash marks?
15 A. Yes, to the yellow line.
16 Q. Okay, that's your testimony?
17 A. Or the yellow dot, yes.
18 Q. And you know that others disagree with that?
19 A. Oh, absolutely.
20 Q. Okay, all right. Let me ask you this --
21 And you can take the stand again, thanks.
22 Isn't it your -- your --
23 You didn't do a survey of gradient, if you will,
24 in any of your inspection, did you?
25 A. No, I did not.

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1 Q. In '09?
2 A. Yes.
3 Q. You are aware that this was homesteaded back in
4 the late 1800s, are you not?
5 A. Yes.
6 Q. In fact, the recommendation of the priority date
7 is one of those pieces of evidence?
8 A. Well, the homesteaders were -- were further
9 downstream from this.
10 Q. Correct. But the homesteaders who are -- whose
11 successors-in-interest are claiming the point of diversion
12 are relying upon this point of diversion to get water to
13 them?
14 A. Yes.
15 Q. Okay. If -- if as consistent -- If as a
16 homesteader in the 1800s, and if there was no channel
17 there, it would be consistent, would it not, to have
18 needed to dig a ditch to ensure that they do keep it as
19 high as possible in order to reach even the second point
20 of diversion as you testified?
21 MR. BAXTER: Your Honor, I think we had a double
22 negative.
23 MR. RIGBY: Sorry.
24 MR. BAXTER: If we could just have Mr. Rigby clarify
25 the question.

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1 MR. RIGBY: I will.
2 Q. (By Mr. Rigby) Is it consistent that one who is
3 homesteading, again -- and I know this was probably asked
4 and answered -- one would want to keep the water just as
5 high as possible in order to reach as far down in the
6 valley as possible if one is homesteading and needing the
7 water?
8 A. Yes.
9 Q. Okay, so but for your site visit, is it
10 consistent to -- to recognize that if I'm homesteading
11 that area, if that wasn't already there as a natural
12 channel, I would want to dig that high-line ditch in order
13 to keep it as high as possible?
14 A. If you're going to be diverting from a general
15 channel, you would want it as high as you could get the
16 point of diversion.
17 Q. Now, there's -- Isn't it really a fact that
18 there's no way to look at the ditch in its present state
19 of affairs, in its position, and say a hundred years ago
20 this is how it looked?
21 A. It's a good question. I can't tell you exactly
22 a hundred years ago how it looked. There would still be
23 hallmarks, really, of a channel -- or of a ditch; and what
24 we have got here really are two different channels.
25 Above the yellow dot, we have pooling, running,

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1 potentially been a maintained ditch. That's a lot of work
2 to happen in a hundred years.
3 Q. Are you aware that that particular area had
4 significant livestock in it as opposed to the below reach;
5 and doesn't livestock -- doesn't it affect the banks and
6 the channel of a small ditch or stream?
7 A. Yes, livestock does affect the channel.
8 Q. And also are you aware that -- Especially
9 particularly where you're claiming the point of diversion
10 to be, and therefore the bank that was constructed, are
11 you aware that that construction, the testimony has been
12 or will be produced -- Strike that.
13 Let me represent to you that testimony will be
14 given today that that bank was as a result of beaver dams
15 that caused that to break out and, therefore, big
16 equipment was brought in. Would that be --
17 If you understood that now, would that in any
18 way change your opinion as to why that bank maybe was
19 constructed, that earthen bank that you're referring?
20 A. I would consider it. It doesn't change that
21 that's the first place where the stream goes away from its
22 natural gradient and forms some -- a channel that has the
23 hallmarks of a ditch. So I don't think that would --
24 I would consider it, and it's certainly an
25 interesting piece of information to have. And I wish, you

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1 we have different types of substrate, we have different
2 types of vegetation.
3 Below this point we have, very clearly, a
4 U-shaped cross-section, less vegetation. That would be
5 abnormal to really see such a change from one side of the
6 point of diversion -- or what I'm calling the point of
7 diversion, I understand. From one side to the other,
8 unless there's -- unless that's the point of diversion.
9 Q. But -- but there are two factors -- aren't there
10 two factors that can be considered here? Obviously, you
11 know, one of the arguments here is that the claimants
12 themselves are not -- have not been able to maintain the
13 upper reach as opposed to maintaining, in very good order,
14 their lower reach.
15 I guess what I'm asking is: That your site
16 visit that you say distinguishes the two because you can
17 see -- And numerous times, you said "see the overgrowth,
18 see the extra -- the growth here;" as opposed to below.
19 Wouldn't that just be the hallmarks of a
20 maintained reach versus an unmaintained reach from
21 overgrowth, from vegetation?
22 A. What I see when looking at that is a channel
23 that goes along with its gradient until the yellow dot.
24 It bears those hallmarks. In a hundred years, that takes
25 a lot of work to completely fill in what would have

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1 know, I had had more evidence -- certainly, you always
2 like to have more evidence -- before I drew my conclusion.
3 But I don't -- I don't know that it would --
4 And I haven't heard the testimony, and I don't know this,
5 but I don't know that it would completely change my mind
6 or change my conclusion. Because, again, that earthen
7 structure -- certainly, I think we would agree that it's a
8 human intervention or a human-constructed structure -- is
9 the first place where we really see this channel becoming
10 a ditch and really see it diverting from the natural
11 gradient. But again, I don't know the testimony, and I'm
12 speaking hypothetically on what you have told me.
13 MR. RIGBY: Your Honor, may I approach the witness?
14 THE COURT: Please.
15 Q. (By Mr. Rigby) I'm handing you what has been
16 marked for identification as Heltsley/Felton Exhibit 1.
17 (Unintelligible).
18 A. Okay, so these are all together?
19 Q. (Unintelligible).
20 A. Okay.
21 Q. Have you seen this before?
22 A. Yes.
23 Q. And did you use this in your evaluation of the
24 claim?
25 A. I did.

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1 Q. And in fact I will tell you I'm going to present
2 several exhibits. All I'm asking is whether or not you,
3 number one, know of -- have knowledge of these documents
4 are part of the IDWR, and whether or not you considered
5 them in your evaluation, okay?
6 A. Yes.
7 Q. Just so you understand. I'm also handing you
8 what has been marked for identification --
9 Yeah, just hold that for a minute.
10 A. Okay.
11 Q. We'll talk about introduction later.
12 A. Okay.
13 Q. -- as Heltsley/Felton Exhibit Number 2.
14 A. Yes.
15 Q. And ask you if you have seen that before? And
16 I'll purport to you that that's the homestead application
17 of the Alexander property.
18 A. This map looks better than my copy, but yes,
19 I've seen this before.
20 Q. Eldridge property. What did I say, Alexander?
21 The Eldridge property.
22 A. I knew what you meant.
23 Q. Excuse me. And I also represent to you that
24 that was actually -- it came -- why it's a better copy,
25 it's from the national archives.

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1 evaluation?
2 A. (Indicates.)
3 Q. I'm sorry I'm being redundant, but --
4 A. Yes.
5 Q. -- I'm just doing this for the record.
6 A. No, that's fine.
7 Q. I'm going to point to -- to a particular map
8 that's attached to the Number 3.
9 A. Okay.
10 Q. And if you'll refer to that map?
11 A. Okay, there -- We have got --
12 Q. (Unintelligible).
13 A. Actually, I've got three --
14 Q. Oh, did I -- I gave you the rest of the copies?
15 A. Well, they -- they appear to be different, but
16 I've got three back-to-front, so how do you want me to --
17 Q. This is the map I'm --
18 A. This is the map, okay. I just wanted to make
19 sure.
20 MR. RIGBY: All right, Your Honor, for purposes of
21 the court, may I just approach the bench --
22 THE COURT: Sure.
23 MR. RIGBY: -- hand you a copy of that?
24 THE COURT: Thank you.
25 UNIDENTIFIED: I have this Number 3

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1 A. Okay.
2 Q. Also handing you what has been marked --
3 You know what, did I give you several copies of
4 that, or just one?
5 A. Oh, you did give me a couple copies. I'm sorry,
6 here, I'll give all of that back. You can give what you
7 want.
8 Q. I hand you what's been identified as Number 3.
9 THE COURT: Mr. Rigby, are Mr. Hull and Mr. Murphy
10 getting copies of these, too?
11 MR. RIGBY: I sent them to them. They should have
12 them. If they don't, I suppose I can give them again. I
13 had sent them.
14 UNIDENTIFIED: Okay, we have copies of them.
15 MR. RIGBY: They got them just this week.
16 Q. (By Mr. Rigby) Okay, let's see, where was I?
17 Number 3?
18 A. You handed me Number 3, yes.
19 Q. And I didn't ask you foundation yet. Have you
20 seen that document before?
21 A. I have.
22 Q. And what is that?
23 A. This is a statement from Velma -- I don't know
24 how to pronounce -- is it Ravndal? Okay, Ravndal.
25 Q. Right. And again, did you use this in your

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1 (unintelligible).
2 THE COURT: Did I get those mixed-up?
3 THE CLERK: This is -- That one (unintelligible).
4 Q. (By Mr. Rigby) I'm sorry, let me retrieve that.
5 I handed them the right copies, and handed you the wrong
6 one.
7 A. Oh, sorry.
8 Q. So this, the final proof --
9 A. I have the final proof yet as Number 2.
10 Q. And it has attached to it the map?
11 A. I'll flip through it and see if that and these
12 two --
13 Q. Yes, yes.
14 A. Okay.
15 Q. So it is Number 3? I'm sorry, but I'm referring
16 to --
17 UNIDENTIFIED: (Unintelligible).
18 Q. (By Mr. Rigby) Okay. So then Number 4 --
19 UNIDENTIFIED: So we got those mixed-up. The bottom
20 page was Number 3.
21 UNIDENTIFIED: These are the water rights.
22 UNIDENTIFIED: I realize that.
23 UNIDENTIFIED: Okay, so --
24 UNIDENTIFIED: This one. This one needs to have --
25 UNIDENTIFIED: Velma?

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1 MR. RIGBY: I apologize, Your Honor. We have been
2 listening.
3 THE COURT: I asked that Number 3, is it --
4 UNIDENTIFIED: (Unintelligible).
5 THE COURT: It's Number 2.
6 MR. BAXTER: I have the homestead signed by
7 Woodrow --
8 MR. RIGBY: That's Number 1. Number 2 is the final
9 proof. And then Number 3 --
10 UNIDENTIFIED: (Unintelligible).
11 UNIDENTIFIED: (Unintelligible).
12 MR. RIGBY: Okay, so we're good to go. You were
13 (unintelligible) -- Good, I gave him the wrong copy.
14 MS. VAN BUSSUM: Okay, okay.
15 Q. (By Mr. Rigby) Okay, referring again to --
16 Again, as far as the statement itself is
17 concerned, the map -- is the map attached to the back of
18 that? It is.
19 A. Okay.
20 Q. I'm having you refer to the map, Exhibit
21 Number 3. And again, the report that this was -- a
22 statement filed by Wilma --
23 UNIDENTIFIED: Velma.
24 Q. Velma Rendal?
25 A. Ravndal.

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1 seen that.
2 A. Yes.
3 Q. And what is that?
4 A. This is a statutory claim filed with the
5 department.
6 Q. By whom?
7 A. The claimant's name is John Westman, and it's
8 signed by John Westman.
9 Q. Okay, do you know who he was, or did you
10 research enough to know where he fits in line with the
11 claimants or the objectors?
12 A. I do not know where he falls in the -- in the
13 title, no.
14 Q. Okay, again, this claim, this was -- was filed
15 pursuant to the adjudication, though, as far as you're
16 (inaudible), is that correct?
17 A. It's dated the 15th of October 1976, which would
18 have been before the adjudication.
19 Q. And this claim to the water right that was
20 made -- Again, I'd refer you to number 5 within this
21 document. And what does it read as far as the typewritten
22 is concerned? I'm not asking you for the point of
23 diversion, other than it's in Section 15. But it's 5B.
24 What does that purport to say?
25 A. 5B says, "Ditch to capture spring water."

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1 Q. Ravndal. As to this particular reach. Now, in
2 the map -- Do you understand the map? Do you understand
3 the position of the map and what it's purporting to give?
4 A. Yes.
5 Q. Okay, I would have you refer to the irrigation
6 Spring Ditch that's on that map and ask you if you are
7 familiar with that, what that's purporting to represent.
8 A. Yes, I am familiar with it.
9 Q. Okay, and where does that particular irrigation
10 Spring Ditch start from and go to?
11 A. According to this map, it has the point of
12 diversion in Section 15 on private ground, and this calls
13 it an irrigation Spring Ditch flowing down then towards
14 Hughes Creek Road at the lower left corner.
15 Q. Okay, so at least as far as -- You obviously
16 don't have this person here. But as far as what they
17 represented in the map, is it correct to say that their
18 map represented that the Spring Ditch, referred to as the
19 Spring Ditch, was a ditch; and there's nothing in there
20 that says "spring" or anything else other than "ditch"?
21 A. They're calling it Spring Ditch.
22 Q. Correct. Now, again, I'll try to do this fast
23 and not give the wrong copies so we get mixed-up.
24 I'm handing you what has been marked as
25 Heltsley/Felton Exhibit Number 4 and ask you if you have

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1 Q. Okay, handing you what has been marked for
2 identification as Exhibit 5 of the Heltsley/Felton
3 exhibits, and ask you if you know what that is.
4 A. This is the first page of an SRBA claim.
5 Q. And by whom?
6 A. I'm sorry, by Harold W. Taylor.
7 Q. Very good. And again, do you know how he fits
8 into the scheme of things?
9 A. I don't know where he falls in the title.
10 Q. But as far as the section, township and range,
11 would it be in this particular area?
12 A. Yes.
13 Q. And again, I'd have you refer to number 5.
14 A. Sure. Number 5 --
15 Q. The typewritten.
16 A. Number 5, "Description of diverting works, ditch
17 from spring."
18 Q. Very good. Again, I'm handing you what has been
19 marked as Heltsley/Felton Exhibit Number 6 and ask you if
20 you're familiar with that.
21 A. This is also a statutory claim filed with the
22 department.
23 Q. Very good. And does it purport to say when? I
24 haven't been asking you that. I apologize.
25 A. Oh, no, no. The date on it, on the second page,

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1 is the 13th of June 1979.
2 Q. Okay. Again, predating the adjudication?
3 A. Yes, that's correct.
4 Q. Again, I refer you to number 2 -- yeah, number
5 2, first of all, as far as the source is concerned?
6 A. Description of source, "Unnamed spring tributary
7 to Salmon River, North Fork."
8 Q. And again, this -- these particular entities,
9 you are familiar with the Kozaceks, are you not?
10 A. Yes, I am.
11 Q. I'd refer you again to number 5, and reading the
12 typed -- typed 5B, and read the typed description?
13 A. Okay, description of means of diversion, "Water
14 is diverted by means of headbox and open ditch approx" --
15 I'm sorry -- "approximately 14-feet-by-3975-feet. A USFS
16 permit has been issued in conjunction with this use.
17 Flood irrigation methods are used. Animals receive water
18 directly from the ditch. Also, water is pumped from
19 well." And it goes on, I believe under number 6, the next
20 typewriting is "which is fed directly from irrigation
21 ditch."
22 Q. Very right, very true, it did go on to number 6.
23 Again, did you use this in your evaluation?
24 A. I did.
25 Q. And in fact, the previous exhibits that I didn't

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1 A. I didn't know that until right now.
2 Q. (By Mr. Rigby) All right, well, I'll represent
3 to you that that is the claimant here. And again, for
4 purposes of the questions I have been asking all along,
5 you did review this, did you not, in your evaluation of
6 the claim?
7 A. Yes.
8 Q. And again referring to number 5, Section 15 is
9 obviously there, but I'll again have you read the 5B.
10 A. 5B says, "Spring flows through an open ditch by
11 means of a headbox. An association is being formed with
12 the Forest Service, and a permit has been issued. Water
13 will be pumped for domestic use and gravity flow used for
14 irrigation. Watering livestock, also."
15 Q. Now, again referring to this headbox, the reason
16 I was asking you the question earlier about whether or not
17 you had seen a headbox -- Have you seen a headbox?
18 A. No, I don't recall seeing a headbox up there.
19 Q. Do you have any knowledge as to why -- or what
20 this is referring to?
21 A. No.
22 Q. In your investigation, did you inquire as to a
23 headbox or what this claim could have been referring to,
24 and the others that address the headbox?
25 A. No, my site exhibit did not show evidence of a

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1 ask that about, did you use that, all -- each of them in
2 your evaluation?
3 A. All these are pieces of evidence in the file,
4 yes.
5 Q. Thank you.
6 A. And yes, I did.
7 Q. Again, were any of those, referring to those
8 claims or otherwise, saying anything other than they're a
9 ditch?
10 A. (No response.)
11 Q. Because I can't see anything. That's why I
12 asked you the beginning question, were any of the
13 documentation of any of these claims referring to this
14 other than a ditch?
15 A. No.
16 Q. Now I'm going to hand you what has been marked
17 as Heltsley/Felton Exhibit Number 7 and ask you: What is
18 that?
19 A. This is a copy -- Actually, it's an original of
20 a statutory claim.
21 Q. And who is the claimant?
22 A. Ann M. Noyes, N-o-y-e-s.
23 Q. And is that, as far as your understanding, is
24 that the objector here today, Ann Heltsley?
25 UNIDENTIFIED: (Unintelligible).

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1 headbox.
2 Q. Okay.
3 UNIDENTIFIED: Jerry, could I have a copy of that?
4 MR. RIGBY: You know --
5 UNIDENTIFIED: (Unintelligible).
6 MR. RIGBY: Well, here, let's -- (unintelligible).
7 I apologize, I don't have extra copies of these.
8 Q. (By Mr. Rigby) I'll hand you, finally, what has
9 been marked as Exhibit Number 8 and ask you --
10 Let's see, and make sure I've got this -- Yes.
11 And ask what that is.
12 A. This is a copy of one of the SRBA claims that
13 we're talking about today, 75-10603.
14 Q. And is that -- And who's the claimant in that?
15 A. Stuart Felton.
16 Q. And is that -- Do you know Mrs. Mitzi Felton,
17 who is here with me today?
18 A. I have not been introduced to her.
19 Q. Okay. But I represent to you that that, again,
20 is another one of the claimants and (unintelligible).
21 My question again is --
22 A. Yes.
23 Q. -- did you use these in evaluating --
24 A. Yes.
25 Q. And again, I'll have you refer to 5B.

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1 A. I don't think there is a 5B on this one. I
2 think it's just 5 on the SRBA claim.
3 Q. Oh, okay, very good.
4 A. Sorry. "Description of existing" diverting
5 works -- I'm sorry -- "diversion works...headbox and open
6 ditch 14-feet wide and approximately 4,000 to 6,000-feet
7 long."
8 Q. Referring to that, with your knowledge -- And
9 obviously, I don't -- I assume you did not go up there and
10 actually measure from the original point of diversion
11 versus the secondary point of diversion down to the
12 claimants' lands. But in your -- as your knowledge of the
13 particular areas concerned, would the footage there be
14 consistent with a claim that it be the original point of
15 diversion that was -- that you now have put in plum?
16 A. I cannot speak to that, because I don't have the
17 place of use on here, and there isn't really a good --
18 If I don't have the place of use --
19 I don't really have the full scale to the place
20 of use, so I really can't answer that.
21 Q. Very good, I have no problem.
22 MR. RIGBY: Your Honor, for purposes of, I guess,
23 foundation, these documents, each of which are found in
24 the IDWR's records and have been relied upon by
25 Ms. Van Bussum, I will introduce them as exhibits for the

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1 MR. RIGBY: Yes, I think Number 6 was Kozacek.
2 I'll represent that those are identical copies
3 of what I sent to you.
4 UNIDENTIFIED: Yeah, okay.
5 No objection, Your Honor.
6 THE COURT: Okay, then, Felton -- Heltsley, rather,
7 Felton Exhibits 1 through 8 are admitted.
8 And Mr. Rigby, the map that you handed to me,
9 that's attached --
10 MR. RIGBY: Your Honor, that's just an extra one.
11 That was just to follow for your purposes. I can take
12 that back if the court is (unintelligible).
13 THE COURT: But that was attached to one of the
14 exhibits?
15 MR. RIGBY: It was. I handed that back to you just
16 for you to read it.
17 THE COURT: Okay, thank you.
18 Is there any other cross-examination?
19 MR. RIGBY: May I have just a moment, Your Honor?
20 Probably not.
21 THE COURT: Sure.
22 Miss Heltsley -- Did I hear correctly, that
23 Miss Heltsley's former last name was Noyes?
24 MS. HELTSLEY: Yes, Your Honor.
25 THE COURT: N-o-y-e-s?

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1 court's reference.
2 THE COURT: But you're not offering them as exhibits
3 now?
4 MR. RIGBY: No, I am.
5 THE COURT: Oh, you are?
6 MR. RIGBY: I am.
7 THE COURT: And those are the Felton/Heltsley
8 Exhibits 1 through 8?
9 MR. RIGBY: 1 through 8.
10 THE COURT: Is there any objection to those
11 exhibits?
12 UNIDENTIFIED: Your Honor, I would ask that I just
13 be able to see a copy real quick before I agree to them.
14 THE COURT: Sure.
15 UNIDENTIFIED: Just trying to keep up with
16 Mr. Rigby. Not knowing what he was handing people, I
17 couldn't tell.
18 MR. RIGBY: I understand. I do understand.
19 UNIDENTIFIED: May I?
20 THE COURT: Sure, just go ahead.
21 THE CLERK: Mr. Rigby, was there an Exhibit 6 on
22 there?
23 MR. RIGBY: There was.
24 THE CLERK: Okay, I just missed it.
25 THE COURT: That's the Kozacek statutory claim?

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1 MS. HELTSLEY: N-o-y-e-s, yes, Your Honor.
2 THE COURT: Okay, that was a statutory claim?
3 MS. HELTSLEY: Yes. But I went back to my maiden
4 name.
5 THE COURT: Okay, thank you.
6 MS. VAN BUSSUM: Sorry about that. I didn't know
7 that.
8 MS. HELTSLEY: I forget I'm her, too.
9 MS. VAN BUSSUM: We don't pay attention to the names
10 so much.
11 Q. (By Mr. Rigby) In your investigation, in your
12 site visit, you were accompanied by the -- by whom?
13 A. By Daryl and Pat Hull and Paddy Murphy.
14 Q. And you, at that particular time, didn't make
15 any contact with, nor did you have any conversation with
16 my clients, did you?
17 A. No, I did not.
18 Q. And even thereafter, you have not had any
19 contact with them as far as further -- Before you made
20 your recommendation, you -- you had no further contact
21 with my clients, correct?
22 A. Other than between yourself and Mr. Warner. I
23 didn't have any direct correspondence with the water
24 users.
25 MR. RIGBY: Okay, I have no further questions.

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1 Thank you, Your Honor.
2 THE COURT: Ms. Van Bussum, when you did your field
3 inspection, site inspection, what it's been called, did
4 you have a GPS with you?
5 MS. VAN BUSSUM: I did.
6 THE COURT: And that's how you located the yellow
7 dot?
8 MS. VAN BUSSUM: Oh, you mean in -- Yeah, I used
9 the GPS point that I took that day as -- as a means of
10 locating the yellow dot on the map.
11 Is that what you're asking?
12 THE COURT: Yes.
13 MS. VAN BUSSUM: Okay.
14 THE COURT: So the yellow dot's not going to move?
15 MS. VAN BUSSUM: No, it's not going anywhere. I
16 don't think the foot bridge is going anywhere for a while,
17 either.
18 THE COURT: Okay, now we're done with Mr. Rigby's
19 cross-examination of Ms. Van Bussum.
20 Do the objectors have any questions?
21 MR. MURPHY: Yeah, I'd just like to ask a few
22 questions, Your Honor.
23 THE COURT: Yes. If you'd just state your name,
24 please, and make sure we get a voice recognition here.
25 MR. MURPHY: Okay, my name is Patrick Murphy.

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1 from the spring channel to flow southeast to the North
2 Fork of the Salmon without passing onto the Forest Service
3 property?
4 A. I -- I don't -- I don't envision it happening
5 any other way than that.
6 MR. MURPHY: Okay, that's all the questions we had,
7 Your Honor.
8 THE COURT: Good thinking, Mr. Murphy.
9 Mr. Hull?
10 MR. HULL: I don't (inaudible), Your Honor.
11 THE COURT: Are we finished with all
12 cross-examination of Ms. Van Bussum?
13 Do you have any re-direct, Garrick Baxter?
14 MR. BAXTER: Just, I think, one follow-up as to one
15 exhibit, Your Honor.
16 May the witness be handed IDWR -- or excuse me,
17 Felton/Heltsley Exhibit Number 6.
18 THE COURT: That's the Kozacek statutory claim.
19 REDIRECT EXAMINATION BY MR. BAXTER:
20 Q. And do you have that exhibit now,
21 Ms. Van Bussum?
22 A. I do.
23 Q. With regards to the Kozacek water right, has
24 Mr. Kozacek -- I think I'm going to lead you here a
25 little bit. Has this water right been split between

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1 CROSS EXAMINATION BY MR. MURPHY:
2 Q. Monica, did you observe any headgate or
3 measuring device on any of the property you investigated?
4 A. No, I did not.
5 Q. Would you say that spring channel would be
6 fairly stable? And how much cfs would you just estimate
7 it would be?
8 A. The channel itself is probably going to meander
9 a bit. You know, there were evidence -- there was
10 evidence of some braiding going on. It's not -- it's not
11 going to flow directly towards the North Fork, which we
12 talked about earlier, but it's -- it's certainly going to
13 move a bit in the -- in the plain.
14 Boy, cfs would be a tough one, because it's been
15 a while. It's probably -- it's going to change from place
16 to place, half to one cfs.
17 Q. Okay, would this --
18 A. I would have to give you a ballpark.
19 Q. So there's really no high water flows compared
20 to say the North Fork in the spring channel?
21 A. Oh, when I was there, yeah, there wasn't
22 evidence of high water flow.
23 Q. Okay, one question kind of similar to what
24 Mr. Rigby asked: But so in your opinion during your
25 investigation, would it be possible for the water flow

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1 Mr. and Mrs. Kozacek --
2 A. Yes.
3 Q. -- since the original recommendation?
4 A. Yes, it has.
5 Q. And has the department, through an objection,
6 resolved the objections to both splits of this water
7 right?
8 A. Yes.
9 Q. And where has Mr. and the former Mrs. Kozacek
10 agreed that their point of diversion is located?
11 A. At the yellow dot.
12 MR. BAXTER: Your Honor, I have no further
13 questions.
14 THE COURT: Let's see, did I hear we have another
15 question from the objectors?
16 MR. MURPHY: Mr. Murphy has one, Your Honor.
17 Your Honor, this -- this article here, Jerry's
18 seen that. (Unintelligible). It was a letter from Sue
19 Kozacek to Nate Arave -- Arave?
20 MS. VAN BUSSUM: Arave.
21 MR. MURPHY: Arave. Explaining that day where she,
22 with the contractor, put the point of diversion. She
23 admits in this letter to Nate that that was a mistake, and
24 she agrees with Hull and Murphy that the point of
25 diversion is down on the Forest Service.

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1 MR. BAXTER: Your Honor, are we transitioning then
2 to Mr. Kozacek -- or Mr. Murphy's case in chief?
3 MR. RIGBY: Your Honor, I'm not done yet. If he
4 wants to produce that for her for the record, he can, you
5 know, do so in the same manner. I -- I thought we were
6 still on the questioning of --
7 My point is I don't have a problem. I know
8 that's going to come in. So when it comes in is not as
9 important to me as, in essence, making sure we understand
10 the purpose and the reason for all of that.
11 MR. HULL: We can bring it in now, Your Honor, if
12 you want, since it was his question. Since Mr. Baxter
13 brought it up, I can submit it and ask Ms. Van Bussum
14 about it, and bring it in now as Exhibit 1 on our side.
15 THE COURT: Can we at least have Ms. Van Bussum
16 identify that she's seen the document?
17 MR. RIGBY: Oh, absolutely. That's why I say, in
18 the same manner that I introduced it, I don't have a
19 problem with it, because it's -- it's part of the record.
20 THE COURT: Let's see, Mr. Hull, you want to admit
21 that as --
22 MR. HULL: Yes, Your Honor.
23 THE COURT: -- Hull Exhibit Number 1?
24 MR. HULL: Yes.
25 MR. BAXTER: So if I could just, to put the

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1 I'll just read from the letter, if that's okay.
2 Q. Sure.
3 A. Okay, "This letter is a follow-up to our
4 conversation December 6, 2007. I called regarding two
5 objections that were filed regarding my water right number
6 75-10400. I explained that the two objections are
7 correct. As the two objections pointed out, an error was
8 made in the listing of the point of diversion. In our
9 conversation, you explained you would fill out Standard
10 Form 5, obtain the signatures necessary, and send me a
11 copy of the corrections.
12 "The legal descriptions that were originally
13 submitted for the point of diversion were" -- it lists
14 four point of diversions, all in Section 15; two in
15 southwest/southwest, two in southeast/southwest.
16 Then it goes on to say, "The legal description
17 of the correct point of diversion is Township 25 North,
18 Range 21 East, Section 15, southeast/southwest/southwest.
19 This would qualify for the first line above of
20 southwest/southwest. The other three lines of legal
21 description describe points of diversion "which are
22 springs flowing into a natural water course from which the
23 water is diverted on the Forest Service property at the
24 southeast/southwest/southwest point. I have indicated
25 this correction on the attached copy of the aerial photo

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1 sideboards on my legal mind here, we're transitioning now
2 from --
3 MR. RIGBY: No, we're not. That's why I say we're
4 doing this out of order, and it's okay with me, because
5 it's coming in, anyway. It's on the subject.
6 MR. BAXTER: And then we'll go back to you?
7 MR. RIGBY: Then we'll go back to me.
8 MR. BAXTER: In your case in chief, okay.
9 MR. RIGBY: If that's okay.
10 THE COURT: Sure.
11 MR. BAXTER: Okay.
12 THE COURT: Counsel, would you like to have
13 Ms. Van Bussum take a look at it? That's Hull Exhibit
14 Number 1.
15 UNIDENTIFIED: Thank you.
16 CROSS EXAMINATION BY MR. HULL:
17 Q. Monica, are you familiar with that letter?
18 A. Yes.
19 Q. And what is it?
20 A. This is a letter from Sue Kozacek to Nate Arave
21 who at that time was -- at the time this letter was
22 written, he was the agent working on recommendations in
23 Basin 75.
24 Q. And in the letter, what does Ms. Kozacek state?
25 A. She says, "This letter is a follow-up."

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1 that the department of water resources sent to me. I was
2 unable to respond earlier, because I had been out of the
3 country since October 15th, 2007." And then it's just
4 general closing from there.
5 Q. And that southeast/southwest/southwest point
6 would be where on the map?
7 A. It would be at the yellow dot.
8 MR. HULL: Thank you, no further questions.
9 Your Honor, at this time I would like to submit
10 that as Hull Exhibit 1, Your Honor, if there's no
11 objection.
12 THE COURT: Is there any objection to admitting Hull
13 Exhibit 1 at this point?
14 MR. RIGBY: No, Your Honor, we do not. Again, it's
15 out of order. Just so long as the court recognizes we're
16 not resting our case, and we're not moving on to --
17 THE COURT: Sure. Okay, Hull Exhibit Number 1 is
18 admitted.
19 And let's see, we were done with the
20 Heltsley/Felton Exhibits 1 through 8. They were all
21 admitted. I think we got our paperwork all sorted out
22 now.
23 Garrick Baxter, did you have anything further?
24 MR. BAXTER: I have nothing further, Your Honor.
25 Thank you.

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1 MR. RIGBY: Your Honor, may I ask now follow-up as a
2 result of this?
3 THE COURT: Sure.
4 MR. RIGBY: What number are we on?
5 UNIDENTIFIED: 9, I believe.
6 MR. RIGBY: May I approach the witness?
7 THE COURT: Please.
8 RECROSS EXAMINATION BY MR. RIGBY:
9 Q. I'm handing you what has been marked as a result
10 of this as the Felton/Heltsley Exhibit Number 9.
11 Are you familiar with that?
12 A. I am.
13 Q. And that (unintelligible) represent to you that
14 was Susan Kozacek's original claim. Is that correct?
15 Excuse me, claim -- not claim. The application
16 with the Forest Service for her special use permit?
17 A. Yes, it's the special use application.
18 Q. Very good. And again, are you familiar with
19 that --
20 A. Yes.
21 Q. -- particular document?
22 A. Yes, I am.
23 Q. You reviewed it?
24 A. Yes, I did.
25 Q. And again, without having it read in its

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1 A. You'd have to show me what the resolution was.
2 Q. Well, what I'm saying is that are you familiar
3 with the resolution that occurred between Mr. Kozacek and
4 the -- Murphy and Hull?
5 A. Yes.
6 Q. Okay, and -- and what is that?
7 A. You have to show me the recommendation. They
8 both agreed that it's on -- it's at the yellow dot. But
9 as far as the particulars, again, I was not involved, and
10 Nate Arave was the agent that was involved in the
11 objection resolution negotiations for that.
12 Q. But again, it was a resolution that they can
13 still enter the lands in some manner to do maintenance, is
14 that correct?
15 A. That's my understanding.
16 Q. Okay, so in essence, it's a resolution? I mean
17 it's not as clear-cut as saying "the point of diversion is
18 now at the yellow dot, and you are forever barred from
19 anything further up north, or upstream"?
20 MR. BAXTER: Your Honor -- Your Honor, at this
21 point, I think if Mr. Rigby wants to submit the settlement
22 documents to the court, they'd speak for themselves. I
23 don't know that Ms. Van Bussum can speak to the
24 specificities of that settlement agreement.
25 MR. RIGBY: I'm not asking her for specificities,

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1 entirety, isn't it correct that in that representation to
2 the Forest Service that she claimed that the point of
3 diversion was on private land, off of the Forest Service?
4 And I'm referring to 7(b): "Water then
5 flows" -- "Headgate on private land collects water from
6 spring. Water then flows in the ditch across Forest
7 Service land and then onto private land."

8 A. Yes, that's what it says.
9 Q. So obviously this would be inconsistent with the
10 Exhibit 1 from the Hulls' exhibits, in your estimation,
11 correct?
12 A. Yes.
13 Q. Okay, so obviously Sue Kozacek resolved her
14 claim by, in essence, conceding; which happens in the
15 adjudication all the time, right?
16 A. She resolved her -- I can't give you her
17 reasons for resolving or deciding on the course that she
18 did. I was not involved in the objection resolution for
19 that.
20 Q. Okay, as far as Russ Kozacek, what is your
21 information or knowledge as to his particular water right
22 and his claims?
23 A. I understand he resolved it the same way.
24 Q. So he -- But again, he didn't resolve it in the
25 same manner, did he?

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1 Your Honor. I'm asking her if a resolution occurred,
2 which is typical in the court, in the SRBA, that resolved
3 this particular claim, because they had claims similar to
4 my objectors', and they resolved their claims.
5 So my purpose in doing that is not to get the --
6 go into the specifics of it all, but to know that there
7 was a resolution that didn't make it just point of
8 diversion now at the yellow line (sic). It was more
9 involved than just that, with their ability to enter the
10 private land.
11 Now, I'm just asking her if she has that
12 knowledge.
13 THE COURT: Ms. Van Bussum, do you have that
14 knowledge?
15 MS. VAN BUSSUM: I have that knowledge.
16 Q. (By Mr. Rigby) And what is it?
17 A. The knowledge that I have is that the Kozaceks
18 agreed the point of diversion is at the yellow dot, and
19 they are allowed certain maintenance activities upstream
20 from the yellow dot.
21 MR. RIGBY: Okay, that's all. No further questions.
22 THE COURT: Okay, are we all finished with
23 cross-examination of Ms. Van Bussum?
24 MR. MURPHY: We are, Your Honor.
25 THE COURT: Okay, Ms. Van Bussum, you're ready take

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1 your chair back here with your counsel. But you say
2 you're going to stick around in case --
3 Oh, did you have something?
4 MS. VAN BUSSUM: Did you admit this as
5 Heltsley/Felton Exhibit Number 9? I don't want to --
6 MR. RIGBY: Oh, I would introduce it for that
7 purpose.
8 THE COURT: Let's see, Mr. Hull, did you have a
9 chance to look at it? That's Sue Kozacek's application
10 for special use permit.
11 MR. HULL: No objection.
12 THE COURT: Okay, then, Felton/Heltsley Exhibit
13 Number 9 is admitted.
14 Okay, go and have your chair.
15 It's 12:03 right now. Would this be a good time
16 to take a break and then we'll move on to the next
17 witness?
18 Mr. Rigby, you're going to have how many more
19 witnesses?
20 MR. RIGBY: Your Honor, we have one, two, three,
21 four, five.
22 THE COURT: Will we get done today?
23 MR. RIGBY: You bet.
24 THE COURT: Okay, good. We'll take a break and come
25 back what time?

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1 ADELE CRAWFORD,
2 produced as a witness at the instance of Claimants
3 Heltsley and Felton, being first duly sworn, was examined
4 and testified as follows:
5 DIRECT EXAMINATION BY MR. RIGBY:
6 Q. Good afternoon.
7 A. Good afternoon.
8 Q. Please state your full name and current address
9 for the record.
10 A. I have two addresses. My name is Adele
11 Crawford, and I have a home in Oregon, 24155 Hewett Road,
12 Monroe, Oregon, 97456; and another home in Salmon, Idaho,
13 68 Perreau Creek Road, Salmon, Idaho, 83467.
14 Q. Very good. And in the interest of time, we're
15 going to try to -- Because we have several witnesses that
16 are fact witnesses, I'm going to try to keep the questions
17 basically dealing with the -- your personal knowledge and
18 your personal experience with the property that's the
19 subject of this -- this hearing today.
20 You have been here at the hearing this morning,
21 correct?
22 A. Yes.
23 Q. And you have seen the exhibit produced by the
24 IDWR, and that's Exhibit Number 1, of the map?
25 A. Yes, I have.

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1 MR. RIGBY: Let's get back soon.
2 THE COURT: 1:00?
3 MR. RIGBY: 1:00.
4 THE COURT: Okay, we won't be able to go too far,
5 but that will give you about 56 minutes.
6
7
8 (Noon recess.)
9
10
11 THE COURT: Okay, back on the record now, it's 1:06,
12 and I think we're ready to resume with Mr. Rigby's case in
13 chief, is it?
14 MR. RIGBY: That's correct, Your Honor. We would
15 call Adele Crawford to the stand.
16 Your Honor, while she's coming to the stand,
17 would you prefer that I go to the podium, or is it okay --
18 THE COURT: No, that's fine.
19 MR. RIGBY: Thank you.
20 THE COURT: The microphone works real well there on
21 your table, as far as I know.
22 MR. RIGBY: All right, very good.
23
24
25

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1 Q. And for convenience and trying to keep it
2 simple, I think we'll continue with the map; although, we
3 had some others that you and I were reviewing with each
4 other. Is it okay, and do you understand the map
5 sufficient enough that we can continue with this map?
6 A. Yes, I do. And yes, it's all right to continue.
7 THE COURT: Mr. Rigby, that's IDWR Exhibit 2.
8 MR. RIGBY: I'm sorry, that is Number 2, you're
9 right. Number 1 was the actual water right itself.
10 THE COURT: Yes.
11 MR. RIGBY: I apologize.
12 Q. (By Mr. Rigby) As to the particular IDWR
13 Number 2 map, are you familiar with those lands?
14 A. Yes, I am.
15 Q. And how are you familiar with those lands?
16 A. I lived on that property from 1968 until 1988.
17 And the section that's marked off on the map in blue was
18 my property from 1983, I believe, until I left there and
19 sold it.
20 Q. So you were on the land before you actually
21 owned it, if you were there in '68?
22 A. Yes. I lived -- The Hansons gave me a home and
23 helped me raise my sons there, and I lived there 20 years.
24 Q. Very good. And so therefore you're stating the
25 property that's outlined in blue on IDWR Number 2 is the

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1 land that you either were on to begin with or ended up
2 owning?
3 **A. I ended up owning, yes.**
4 **Q. Very good. Are you familiar with --**
5 While you were there, did you work the land in
6 the sense of irrigation or livestock or any kind of -- any
7 kind of working the land?
8 **A. Yes, I did. I helped with all of the daily**
9 **chores and the maintenance, and the maintenance of that**
10 **ditch.**
11 **Q. And as far as the spring that's been testified**
12 **to this morning, are you familiar with that spring?**
13 **A. Yes, I am.**
14 **Q. And is it located on the land that you were**
15 **working and/or owning?**
16 **A. Yes.**
17 **Q. And as far as the point of diversion -- or**
18 **excuse me, the point that was put in plum this morning,**
19 **are you familiar with where that location is?**
20 **A. Yes.**
21 **Q. And is that, in your -- When you were located**
22 **on the land or working the land, is that a location where**
23 **the spring rose, as far as you're concerned?**
24 **A. No.**
25 **Q. Where did it rise?**

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1 the information of --
2 **A. I'm sorry, Mr. Hanson. Harold Hanson.**
3 **Q. Very good. And now, as far as the --**
4 And again, obviously, you know the contention
5 with the -- the issue being whether or not this is a
6 creek, whether it's a channel, or whether it's a ditch?
7 **A. Yes.**
8 **Q. To begin with, I -- I, you noticed a moment ago,**
9 **I called it a ditch. What would you call it?**
10 **A. A ditch.**
11 **Q. And now let's talk about why you would call that**
12 **a ditch. What did you -- What --**
13 When you first came to the property, how did it
14 look, as far as this particular ditch is concerned?
15 **A. In 1968, it looked like a ditch.**
16 **Q. You saw the pictures that were part of the**
17 **evidence put on by the department this morning, Exhibit**
18 **Number 4, I believe on that, with a number of pictures.**
19 Is that -- What you see depicted there, is that
20 your memory of the way it looked when you were on the
21 property?
22 **A. Absolutely not.**
23 **Q. And how is it different?**
24 **A. We maintained it. It looked like a ditch. We**
25 **took brush out of it, and willows, and kept it flowing in**

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1 **A. On that map, it rose on the north side of the**
2 **road up to the house.**
3 **Q. And so if you were looking at the map, the**
4 **plum-colored circle -- When you were there, it actually**
5 **rose on the other side of the road, the road that would be**
6 **to the northeast, if I'm looking at that map?**
7 **A. Yes.**
8 **Q. And first of all, for the court's information,**
9 **was it one main stream and -- spring and other -- I don't**
10 **want to say spring, but other discharges into the ditch,**
11 **as far as you were concerned when you were there?**
12 **A. Down further towards the Forest Service ground,**
13 **yes.**
14 **Q. Okay, how are you so certain that the point of**
15 **diversion was on the other side of the road?**
16 **A. Because we developed it. Harold and I dug**
17 **probably a four-by-four hole, and he built a spring box**
18 **out of wood, two -- probably two-by-sixes. I don't**
19 **remember the exact size. And dropped it into the hole.**
20 **We put a pump in, and pipe to go up to the house; a**
21 **culvert in the road so that the water, the overflow will**
22 **go on into the existing ditch.**
23 **Q. Okay, and you did that while you were there?**
24 **A. Yes.**
25 **Q. And you said with Harold. Who is Harold, for**

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1 **a normal ditch fashion, if there's such a thing.**
2 **Q. And why did you do that? What difference did it**
3 **make to you?**
4 **A. Because the people down below had water rights**
5 **to that water; and when the Hansons first settled there,**
6 **they had sheep, and they had a shed down there which**
7 **everyone -- then everyone around referred to as a lambing**
8 **shed, which is where they lambed out their sheep.**
9 **We needed that ditch for water to water the**
10 **lambing shed and for livestock that later -- came later.**
11 **Q. And did -- and did any parties below come up and**
12 **help maintain that ditch?**
13 **A. Probably on occasion. I can't remember that far**
14 **back. It's been quite some time.**
15 **Q. But you maintained the ditch?**
16 **A. Absolutely.**
17 **Q. And -- and you have heard the testimony this**
18 **morning that dealt with the -- if -- if the ditch -- if**
19 **the runoff that occurs or --**
20 If the collection of that channel, or whatever
21 the ditch is, was not there, Ms. Van Bussum seemed to
22 indicate that the natural flow of that water would
23 continue on in the hashed version of the channel.
24 Is that the way you recall it being?
25 **A. No, not at all.**

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1 Q. And what -- how is it you recall it being?
2 A. If it wasn't maintained, it would head -- not
3 directly, of course -- towards the river; but it would
4 angle off probably towards where the Forest Service gate
5 is, as I remember.
6 Q. So --
7 A. Somewhere between the barn and the North Fork.
8 Q. So is there a reason -- Is that another reason
9 why you maintained the ditch the way you did?
10 A. Absolutely.
11 Q. Because did you want that water flowing onto
12 your place, unimpeded?
13 A. No, of course not. I had horses. And if I had
14 done that, allowed it to do that, I would have lost my
15 pasture.
16 Q. And did it ever happen that way so that you
17 physically saw the water heading away from the hashed
18 portion toward the river?
19 A. Occasionally when we had a big runoff, yes.
20 Q. So you physically saw it heading that direction?
21 A. Yes.
22 Q. And therefore, I guess, the cliché question is
23 but for your intervention, or someone else prior to your
24 intervention, digging that ditch or maintaining that
25 ditch, where, in your opinion and your -- in your

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1 A. Absolutely. Absolutely, yes.
2 Q. And when you failed to maintain, was it not --
3 then not contained?
4 A. Not contained.
5 Q. Now, you have seen some of the most recent
6 pictures, especially the aerials that are (inaudible)
7 today. Is there -- is there evidence, because there has
8 been a lack of maintenance, is there evidence, in your
9 opinion from what you recall, of the ditch in essence
10 moving back or causing water to head back to the river?
11 A. From what I saw today, yes, it's not been
12 maintained, obviously.
13 Q. And had it been maintained the way you
14 maintained it -- Well, obviously, you have already asked
15 and answered that it looks significantly different?
16 A. Yes, significantly.
17 Q. And -- and was there ever a challenge or a
18 question by anyone, to your knowledge, while you worked
19 and lived and owned there, that this was anything but a
20 ditch?
21 A. Never.
22 Q. The Forest Service itself, did they ever
23 question you as to whether or not this was a ditch or a
24 channel?
25 A. Never.

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1 observation, would the water travel?
2 A. It would have flooded the lower part of my
3 property.
4 Q. And that would be the lower part of the blue
5 area?
6 A. Yes.
7 Q. Okay. On its way toward the river?
8 A. I'm assuming so, yes.
9 Q. Now, one of the other questions this morning --
10 or one of the other observations made by the department,
11 Ms. Van Bussum, was that the ditch -- I mean the channel,
12 as she calls it, was narrow in certain areas and wide in
13 other areas. Do you have a reason why that was?
14 Or was it that way when you were there?
15 A. To some extent, there were wider places simply
16 because the livestock would get in there and trample it
17 down. And we'd have to do as best we could to put it
18 back; but it's a flat area, and so to make that happen, it
19 would take a lot of work.
20 And Harold was very sensitive to the
21 environment, and he did not want to make a huge mess,
22 basically, in there. So we -- we did minimal as far as
23 containing it in the wider spots, but we did -- there were
24 some, yes.
25 Q. But it was contained as a result of your --

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1 Q. And who did you sell the property to?
2 A. To a couple named Martin.
3 Q. And when -- when -- when you -- they purchased
4 it from you, were there ever any representations made by
5 you to them as far as this particular ditch is concerned?
6 A. No.
7 Q. Was there -- Did you represent to them anything
8 as far as maintenance is concerned?
9 A. Sure. I told them if they didn't maintain it,
10 they would end up having a swamp there, basically, at the
11 far end.
12 Q. Tell me the normal practice of maintenance.
13 A. Well, you start at the head, and you start
14 throwing out stuff, and digging -- or trenching where it
15 would -- where it looked like it was going to -- to break
16 over and move out of the ditch line.
17 And occasionally, we had a chain saw, and
18 (inaudible) the bigger pieces after a winter when there
19 was a lot of downfall.
20 Q. When you first came onto the property, was the
21 maintenance similar to the way you maintained it; or was
22 it better or worse?
23 A. I'm not sure I understand the question.
24 Q. When you first came on the property, how did the
25 ditch look? Did you improve the ditch, or did you just --

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1 A. Oh, no.
2 Q. -- maintain it the way it was?
3 A. We maintained it the way it was. Harold had
4 been maintaining it all those years prior to my coming
5 there.
6 Q. And do you know how long he was on the property?
7 A. You know, I wish I did; but I'm sorry, I don't.
8 Q. Was it a short period of time?
9 A. Oh, long time. Long time. There was no road,
10 even, when they -- Highway, I should say.
11 MR. RIGBY: Excuse me here a minute, Your Honor.
12 Q. (By Mr. Rigby) They have pointed out that
13 perhaps you and I have been talking about the wrong line
14 as far as your ownership is concerned. Would you go to
15 the map and just, if you can recall --
16 Didn't perhaps you maintain or work on even the
17 land down below the green line, as well as the blue line?
18 That's the question.
19 A. (Unintelligible).
20 Q. Where -- Where was your property? That's the
21 best way to answer it.
22 A. You know, this looks different to me, but it
23 would be the blue line here, and then over. I'm not sure
24 I recall the line (unintelligible).
25 Q. Okay. So -- so in essence when we're talking

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1 EXAMINATION BY THE COURT:
2 Q. So Ms. Crawford, was your testimony that the
3 property you owned -- or you occupied for 20 years from
4 '68 and '88 included both what is now the Hull and Murphy
5 properties?
6 A. No. Just the Murphy property.
7 Q. Only the green, the property outlined in green?
8 A. Yes.
9 MR. RIGBY: Yes, Your Honor, that's why I was trying
10 to clean that up. I apologize, I didn't make that clear.
11 Q. (By the Court) Now, the other thing is you said
12 that the spring was on the north side of the dirt road
13 indicated on the --
14 A. Yes.
15 Q. And you built a culvert underneath that road?
16 A. Yes.
17 Q. Do you know if that culvert's still there?
18 A. I have no idea. I haven't been there since; in
19 20 years, 22 years.
20 Q. Did you dig any of the ditch as opposed to
21 maintaining the ditch?
22 A. You mean initially to make it a ditch?
23 Q. Or at any time you were on the property for 20
24 years.
25 A. I maintained the ditch. There was water running

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1 about how far north did you go, did you go over the road,
2 as well?
3 A. For my property, you mean?
4 Q. Yes. In other words, now you're indicating that
5 the green is the bottom of your property, is that right?
6 A. It could be. I think the river was the
7 boundary.
8 Q. Okay, but as far as -- but as far as going
9 southwest is concerned, is the green line pretty much what
10 you recall your property to be?
11 A. Oh, yes, yes.
12 Q. Okay. Now, let's start heading up northeast.
13 How far up did you work the ditch? All the way to the
14 spring?
15 A. Yes.
16 Q. Okay, all right, very good.
17 So when we're talking about maintenance, the
18 hashed line is pretty much what you maintained; except for
19 your pointing out that initially the spring was on the
20 other side of the road, and you created a culvert to go
21 under the road?
22 A. Yes.
23 MR. RIGBY: No further questions, Your Honor.
24
25

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1 through the culvert and into what -- what she, Monica -- I
2 can't remember her last name, I'm sorry -- where she
3 maintains is the head of the ditch -- of the spring.
4 There was water running under, from my spring box through
5 the culvert, ditched to -- into where -- at the point
6 where she says is the head of the spring now.
7 And I don't know what it looks like now.
8 Q. But you recall the spring actually being on the
9 Hull property?
10 A. Apparently so. Now, when -- when the Hansons
11 gave me the property, they did not -- I don't remember
12 exact lines being drawn for it. I'm sure there were, but
13 he never assumed, I guess, he would die, because -- or
14 sell the property, so it didn't matter to him where the --
15 my water source was located. To him, it was on his
16 property or mine. It didn't matter to him.
17 Q. Well, did Mr. Hanson at one time own the whole
18 property?
19 A. Mr. Hanson owned the entire property from the
20 Forest Service up to what is now the old mill site, almost
21 to Sheep Creek.
22 Q. So both the Hull and the Murphy properties?
23 A. Yes.
24 Q. Did he ever tell you who built that ditch?
25 A. I don't think so, no.

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1 Q. Did he ever give you a name for the ditch?
2 A. Spring Ditch.
3 THE COURT: Okay, let's see, Garrick Baxter, do you
4 have any questions?
5 CROSS EXAMINATION BY MR. BAXTER:
6 Q. I think I'd just like some clarification with
7 regards to the development. It sounds like, Ms. Crawford,
8 at some point you dug a spring box on the other side of
9 the ditch -- or excuse me, on the other side of the road.
10 Is that correct?
11 A. Yes.
12 Q. And at that point, then, that you put in the
13 culvert underneath the road to run the water underneath?
14 A. For the overflow out of the spring box, yes.
15 Q. Okay. And then you utilized the water, then,
16 for using -- using a lambing shed on your property, which
17 is now identified as being outlined in the green?
18 A. I did not, because I didn't have sheep. The
19 Hansons did.
20 Q. Oh, okay, so they had a -- a sheep barn on your
21 property or their property?
22 A. It was their property. When they were -- had
23 the sheep, it was prior to my coming there in '68. They
24 lambled down there, and had way too much competition with
25 coyotes, so they gave up on sheep and moved -- they did --

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1 THE COURT: But that building isn't used any more?
2 A. No, it's been abandoned many years.
3 THE COURT: Okay.
4 Q. (By Mr. Baxter) Ms. Crawford, just one more
5 question. Just to clarify, also, to the best of your
6 knowledge -- Well, you can speak for yourself.
7 You've never owned the Heltsley or Felton
8 property. And your previous predecessor, Mr. Hanson, did
9 he ever own the Felton or Heltsley property?
10 A. No.
11 MR. BAXTER: Okay, that's all the clarification I
12 needed, Your Honor. Thank you.
13 THE COURT: Ms. Crawford, just for my sake -- and
14 maybe I should ask Steve Spencer this -- the Forest
15 Service land there kind of takes that little dogleg over
16 to the highway --
17 A. (Indicates.)
18 THE COURT: -- within the red boundary there. Is
19 the Forest Service -- Is their ranger station right there
20 in that little dogleg on the east side of the highway, or
21 the west side of the highway?
22 A. It's on the east side. The structure on the
23 north -- on the west side is a barn, and they have corrals
24 there, and they kept horses and mules in there.
25 THE COURT: Oh, so they have operations on both

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1 Ultimately, later on, I had sheep with them, but
2 we kept them up at the ranch house, closer to the house
3 where they were safer. So basically, the lambing shed was
4 abandoned at that time. But during that time they were
5 lambing out of the lambing shed, they used that ditch as a
6 water source.
7 THE COURT: Did we establish where the lambing shed
8 is? Is it on the current Murphy property or on the
9 current Hull property?
10 A. Murphy property. It's almost to -- almost to
11 the Forest Service barn.
12 THE COURT: There's, on IDWR Exhibit 2, there's --
13 Let's see, it's just a little bit to the right of that
14 yellow dot. Is that the lambing barn we have been talking
15 about?
16 A. It would be right about --
17 THE COURT: It looks like a structure, some kind
18 of --
19 A. Yes, yes.
20 THE COURT: Is that the old lambing shed?
21 A. That's the old lambing shed, yes.
22 THE COURT: Let's see, would that show up in any of
23 the pictures that we have taken a look at so far?
24 A. I haven't seen any that had it in there, other
25 than the aeriels.

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1 sides of the highway?
2 A. Yes.
3 THE COURT: Okay, do you folks have any questions?
4 MR. HULL: Just a couple, Your Honor.
5 THE COURT: All right.
6 CROSS EXAMINATION BY MR. HULL:
7 Q. Ms. Crawford, you mentioned that you had a
8 spring box on the north side --
9 A. Yes.
10 Q. -- of the road. How deep did you go down before
11 you hit water at the spring box?
12 A. The water was already there.
13 Q. Where was it surfacing from at the time?
14 A. There, where the spring box --
15 Q. Right there?
16 A. -- is, yes.
17 Q. And how big was your culvert going under the
18 road, leading from it?
19 A. Probably about that big, 18 inches, maybe.
20 Q. It was an 18-inch culvert. And over the time
21 you lived there, did you ever see the stream channel
22 leading from the spring vary very much in intensity, other
23 than when perhaps the Hansons were heavily irrigating from
24 their water right on the North Fork?
25 A. While I was there, it didn't. It was always --

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1 fairly large flow. There was a lot of overflow out of it,
 2 and it went directly into the ditch.
 3 Q. So you say it was a stable flow?
 4 A. Yes, very stable.
 5 Q. Okay. Okay, now, on the very south end of your
 6 property, okay, if you look at the map just before the
 7 yellow dot, you'll see a line of heavy vegetation there.
 8 A. Yes.
 9 Q. Do you recall a stream channel coming in there,
 10 or a finger channel coming in at that point on your
 11 property at the very, very bottom, right at your property
 12 line?
 13 A. No.
 14 Q. You don't recall it?
 15 A. No.
 16 Q. Okay.
 17 MR. RIGBY: Your Honor --
 18 I just want to make sure I know where you're
 19 talking about.
 20 MR. HULL: Right. If I may, I'll --
 21 A. On the fenceline.
 22 MR. HULL: Fenceline. It would be right at the
 23 fenceline.
 24 A. On the fenceline.
 25 Q. (By Mr. Hull) In fact, Murphy had put in a new

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1 high in that lower area there.
 2 MR. HULL: Okay, no further questions.
 3 THE COURT: Mr. Murphy? If you would, just for our
 4 record, state -- state your name each time you stand up.
 5 MR. MURPHY: Okay, Patrick Murphy.
 6 THE COURT: Thank you, sir.
 7 CROSS EXAMINATION BY MR. MURPHY:
 8 Q. I'm curious, Adele: How did you guys irrigate
 9 your lower pasture?
 10 A. You mean my pasture or the -- the section from
 11 my property --
 12 Q. Your pasture. Basically --
 13 A. My pasture?
 14 Q. Yeah.
 15 A. I didn't irrigate it, because as I said, it's --
 16 the ground is -- the water table is very high, and it subs
 17 in there, and it stays green -- or it did most of the
 18 time. It would dry maybe late in the fall, and by then I
 19 was feeding hay, so it didn't matter.
 20 Q. Okay, Adele, I guess on that note, why would you
 21 clean this -- this spring channel, or the ditch channel as
 22 you're calling it, why would you clean the ditch channel
 23 if you didn't have any water rights out of it and you
 24 didn't irrigate with it?
 25 A. Because it was -- People down below us had

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1 fenceline, so it won't show as much, but it would be right
 2 around this heavy vegetation here. Here's the main spring
 3 stream coming in. It would be right along here.
 4 A. No.
 5 Q. You don't recall that finger channel?
 6 A. No.
 7 Q. Do you recall other finger channels that were
 8 here?
 9 A. When the -- when there was a lot of snowpack and
 10 there was a lot of runoff, it -- it was difficult to keep
 11 it in its banks, because there was a lot of volume, and it
 12 would head off in the little finger --
 13 It's very undulating, the land is very
 14 undulating there and -- or it was when I was there, and it
 15 tended to want to go to the low spots, so we had to be --
 16 The spring, it took a lot of maintenance in the
 17 springtime.
 18 Q. So there were a lot of channels, then, finger
 19 channels coming in, is what you're saying? It was not --
 20 it was not per se straight and narrow, it had many
 21 channels and rivulets? Is what you're trying to say?
 22 A. It was straight and narrow, because we kept it
 23 straight and narrow. The only time that it had channels
 24 was when it had a lot of overflow from the runoff and high
 25 water. That area subs a lot. The water table is quite

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1 water rights, and it was our obligation to keep that
 2 clean.
 3 Q. Okay.
 4 A. I don't know if it says anywhere that it was,
 5 but it certainly was Harold's obligation, he felt, and
 6 mine, to keep it open.
 7 Q. When you first resided on the ranch and when you
 8 purchased the property, was the Hughes Creek barn there,
 9 and the lambing shed there at that time?
 10 A. By Hughes Creek barn, you mean the Forest
 11 Service barn?
 12 Q. Yeah, the Forest Service barn just across the
 13 fenceline.
 14 A. Yes.
 15 Q. The white barn, okay.
 16 A. And -- and the lambing shed, also.
 17 Q. Okay. Did you ever see those areas flooded?
 18 A. Possibly. As I said, when there was a big
 19 snowpack, all of the snow off that mountain came down onto
 20 my property, ultimately. And when the spring -- or when
 21 the ditch couldn't hold it all, it could sub in there,
 22 yes.
 23 MR. HULL: Okay, thank you.
 24
 25

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1 EXAMINATION BY THE COURT:
2 Q. Before we get back to Mr. Rigby, there was
3 testimony earlier about along the course of the -- and you
4 call it the ditch. Spring Ditch, I think is the phrase
5 you used. Were there more than one spring?
6 A. The only spring that I know of was the one we
7 developed and used for a water source for the house. But
8 I do know that there were other springs along the toe of
9 that slope that fed into that ditch.
10 Q. But that water just flowed into the ditch and
11 not onto your property?
12 A. Well, it was on my property, but -- I owned up
13 onto the hill, too.
14 Q. Oh, okay. Were you maintaining the ditch to
15 keep the water from flooding your property?
16 A. Partly, yes. And because of the obligation for
17 the water users down below.
18 Q. Did anybody ever pay you for that?
19 A. No.
20 Q. Did they ever come up and offer to help?
21 A. It was changing -- That property at Hughes
22 Creek was changing hands at the time, and I know for a
23 fact that the Gohmes, who bought it from Ravndals,
24 maintained it for the very same reason that Annie and
25 Mitzi do, is for their own water source.

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1 irrigate part of the ranch known to me as the old Ravndal
2 ranch on Hughes Creek, North Fork, Idaho, part of which
3 Russ Kozacek has purchased."
4 And yes, that is Mr. Hanson's signature.
5 Q. And the Ravndal ranch, do you know who owns that
6 now?
7 A. It's been subdivided, and there are numerous
8 owners in there. And I don't know them, no, except --
9 Q. You don't know all of them, but --
10 A. Yes, I know these --
11 Q. -- Ann Heltsley and -- Okay, very good.
12 MR. RIGBY: Your Honor, for this purpose, I'd
13 introduce or have -- offer into evidence Exhibit
14 Number 10.
15 THE COURT: Has everybody had a chance to look at
16 it? Let's see, that's Felton/Heltsley Exhibit 10.
17 Any objection?
18 UNIDENTIFIED: No, Your Honor.
19 THE COURT: Mr. Baxter, do you have any?
20 MR. BAXTER: No, Your Honor.
21 THE COURT: Okay, well, Felton/Heltsley Exhibit 10
22 will be admitted.
23 MR. RIGBY: Nothing further, Your Honor.
24 THE COURT: Any other questions of Ms. Crawford?
25 UNIDENTIFIED: (Inaudible) Your Honor.

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1 THE COURT: Mr. Rigby, do you have any recross --
2 redirect?
3 MR. RIGBY: You asked the very question I was going
4 to ask first, but there is one.
5 If it please the court, may I approach the
6 witness?
7 THE COURT: Please.
8 REDIRECT EXAMINATION BY MR. RIGBY:
9 Q. I'm handing you what has been marked for
10 identification as Heltsley/Felton Exhibit Number 10. I
11 will represent to you that that's -- that's part of the
12 water right records attached to the Heltsley --
13 Heltsley/Felton claim.
14 A. (Indicates.)
15 Q. The only reason I'm handing this to you is to --
16 it appears to be a (unintelligible) by Harold Hanson, who
17 you just testified about.
18 A. Yes.
19 Q. And I'd like you to just read at least the
20 statement and tell me if that, as you have testified, to
21 be Mr. Hanson's position; if this is inconsistent, or if
22 this is consistent with his position.
23 A. "I have lived on H.E.S. 95 since 1948 and do
24 hereby certify the -- the water that rises (sic) on the
25 lower end of my ranch is caught in a ditch that goes to

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1 THE COURT: Okay, Ms. Crawford, thank you for
2 joining us.
3 MR. RIGBY: Your Honor, may this witness be excused?
4 They have driven ten hours to get here, and I don't intend
5 to call them for any redirect, unless --
6 MS. CRAWFORD: We could stay a few hours more. I'd
7 like to make sure (unintelligible).
8 MR. RIGBY: Okay, all right, very good. I'm just
9 giving you the authority to leave, but that doesn't --
10 MS. CRAWFORD: Thank you very much.
11 THE COURT: Okay, Mr. Rigby, your second witness.
12 MR. RIGBY: Very good. We will call Mitzi Felton to
13 the stand.
14
15
16 MITZI FELTON,
17 produced as a witness at the instance of Heltsley and
18 Felton, being first duly sworn, was examined and testified
19 as follows:
20 DIRECT EXAMINATION BY MR. RIGBY:
21 Q. Good afternoon.
22 A. Good afternoon.
23 Q. Please state your full name and current address
24 for the record.
25 A. My name is Mitzi Felton. I live at 22 Hughes

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1 Creek Road, North Fork, Idaho.

2 Q. And again, in the interest of time, we'll try to

3 get -- try not to be redundant in these questions.

4 But as far as your familiarity with IDWR's

5 Exhibit Number 2, what is it?

6 A. That is a map of what was the Hanson property,

7 is now the Murphy, Hull property, Forest Service property,

8 and the Spring Ditch that starts at the Hull property and

9 goes down eventually leading to my property.

10 Q. And how are you familiar with this property?

11 A. My husband bought our ranch, which was part of

12 the old Ravndal ranch, in 1979. We became very good

13 friends with the Hansons. At that time Harold Hanson

14 irrigated our property from this ditch, and helped

15 maintain and establish the water right when the -- when we

16 bought the property. He showed us this ditch.

17 From our property, we walked all the way up to

18 the spring box; and he explained maintenance and what his

19 responsibility was as he saw it; and the historic nature

20 of that ditch, how it was built, when it was built,

21 et cetera.

22 Q. And as far as your understanding as far as the

23 ditch, when was the ditch originally built?

24 A. As close as we can figure, it was built by the

25 original homesteaders of my property and the property on

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1 They settled this property in 1887. Elizabeth

2 and David Eldridge had six boys and three girls, I think;

3 and it was common knowledge that the Eldridge boys built

4 that ditch by hand from the spring source somewhere around

5 1890, maybe early 1890s. The exact date is unclear.

6 Q. As far as the maintenance of that ditch is

7 concerned, you (inaudible) --

8 How long have you owned your particular

9 property?

10 A. Since 1979.

11 Q. Okay, and have you joined in or have you been

12 party to maintenance of the ditch?

13 A. Yes.

14 Q. And for the entire period of time, or how long?

15 A. Yes, for the entire period of time. Actually,

16 prior to -- From 1979 until 1992, Harold Hanson was

17 pretty much taking care of the maintenance and the

18 irrigation on our property, along with some cattle

19 ranchers to whom we leased our -- our acreage, because we

20 did not live on the property at that time. We lived --

21 We moved up to the ranch full-time in 1992.

22 Q. Okay, but were familiar with it before then?

23 A. Oh, yes.

24 Q. And again, as far as the maintenance is

25 concerned, you heard Mrs. Crawford indicate that they felt

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1 which Ann Heltsley lives.

2 Q. And who was that?

3 A. Elizabeth and David Eldridge.

4 Q. Now, introduced this morning with Ms. Van Bussum

5 was the homestead and the original deed to that property.

6 Are you familiar with those documents?

7 A. Yes, I am.

8 Q. And is that the entity that you're talking about

9 as far as --

10 A. Yes.

11 Q. -- building the ditch?

12 A. Yes.

13 Q. And as far as your understanding and knowledge

14 is concerned -- First of all, let's get, just a little

15 bit, so the court can understand: Have you studied the

16 history of this location?

17 A. I have.

18 Q. Kind of -- just kind of been your thing?

19 A. Well, I -- I -- I'm friends with the

20 great-granddaughter of Elizabeth Eldridge, who has done

21 extensive genealogy work, not only for her family and the

22 Eldridge homestead property, but the homestead to the

23 north, which was -- started out as the Levi Jones

24 homestead. That predates Forest Service, by the way.

25 Forest Service wasn't in existence then.

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1 they were duty-bound to maintain that.

2 Is that the way you understood it?

3 A. Yes. And we actually walked that ditch with

4 Harold, and he showed me the stretch from the spring box

5 and said that we were welcome to come up there and

6 maintain it any time we saw fit, but he was very concerned

7 that we did it properly and weren't heavy-handed with it

8 or use any kind of heavy equipment.

9 Q. And so have you kept that requirement?

10 A. Yes, up until recently. We haven't --

11 Q. And which change -- which changed recently?

12 A. Well, the property is -- has been subdivided

13 now, and that stretch from the ditch from the spring to

14 the Forest Service property has -- has not received

15 consistent maintenance by me or anyone, as far as I know.

16 Q. And why is that?

17 A. Well, I'm not really sure. I haven't exactly

18 had direct contact with the Murphys or the Hulls, and --

19 but they had prohibited us from entering their property,

20 but I kind of got that idea.

21 Q. Have you -- In your opinion, do you believe you

22 had a right to go up there --

23 A. Yes, I do.

24 Q. -- to maintain? And it was only because of

25 their prohibition that you did not?

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1 A. That, and the fact that it's -- it's been quite
2 a while since the maintenance of that ditch. It's now
3 starting to sustain some -- some bad habits, and so in the
4 last five years, it's really kind of gotten out of
5 control, and so it's in -- it's in desperate need of
6 maintenance now.

7 Q. And I guess the point the court could be asking
8 itself is what difference does it make whether or not your
9 point of diversion is given at the yellow dot or the plum
10 dot or wherever the spring is presently located.

11 What difference does it make to you?

12 A. It makes a difference to me, because if that
13 ditch between the spring box and the yellow dot is left to
14 go wild and on its own, we will lose that water source to
15 our property.

16 Q. And what does that mean to your property?

17 A. Well, it's -- it's -- it's a huge asset to all
18 of our properties. In our particular case, we irrigate
19 about nine acres with that water. We water livestock,
20 because it does run year-round. So all the livestock that
21 we have had in the past and will have in the future will
22 use that as a water source.

23 Q. Now, I don't want to forget one thing that you
24 brought up. The -- As far as the losing it, how would
25 you lose it?

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1 straight towards the North Fork.

2 Q. A couple of the other questions that were asked
3 as to the collection of the ditch of other waters coming
4 off of the hill: Were you privy to any of that in
5 recognizing the ditch collected water?

6 A. I have not witnessed any runoff water entering
7 the ditch.

8 Q. Okay, all right.

9 A. You know, just -- just snow melt.

10 Q. Sure. Now, you heard the testimony this morning
11 about -- from Ms. Van Bussum that the point of diversion
12 recommended is because of the -- the picture that was
13 given in Exhibit Number 4 evidencing an earthen, quote,
14 dam or dike or build-up or whatever; and then the ditch
15 continuing on thereafter.

16 Are you familiar with that particular spot --

17 A. I am, yeah.

18 Q. -- (unintelligible). And how are you familiar
19 with that spot?

20 A. Well, I've -- I've seen it.

21 Q. Have you worked it?

22 A. We have worked that whole stretch.

23 Q. Okay.

24 A. At one time.

25 Q. And are you familiar with --

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1 A. If the ditch is not maintained between the
2 plum -- well, where Adele pointed out the spring box and
3 the yellow dot, it will -- it will break out of its banks
4 and go towards the North Fork.

5 Q. And how do you know that?

6 A. Well, because you can see from here on this map
7 that that would be its natural course of action.

8 Q. You heard Mrs. Crawford actually physically see
9 it go that direction.

10 A. Yes.

11 Q. Did you ever physically see it --

12 A. Yes.

13 Q. -- breach its banks?

14 A. Yes, I have seen that. I have seen that ditch
15 blow out a couple of times, actually.

16 Q. And did it go toward the -- the --

17 Did it go parallel, as Ms. Van Bussum believes
18 it would; or did it go toward the river?

19 A. It went towards the river.

20 Q. Obviously, not 90 degrees.

21 A. No, no.

22 Q. No one's inferring that.

23 A. No, no, no. But you can kind of see right there
24 along that -- the -- where the dotted line and the blue
25 line meet, that area is where I have seen water flow

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1 A. Not maybe that particular spot, but yeah.

2 Q. Are you familiar with why the earthen dike or
3 dam is there in the first place?

4 A. Yes. I -- I can only assume that it's part of
5 the original ditch.

6 Q. Okay.

7 A. And it's constructed so as to -- Well, it
8 hasn't kind of meandered out. It's a little steeper, a
9 little different terrain there, it's not as flat.

10 Q. Are you familiar with any of the beaver dams
11 that were in that location that caused a break?

12 A. Yes.

13 Q. And -- and how are you familiar with that?

14 A. At one time the -- one of the previous owners,
15 Mr. Gohmes, submitted an application to the Forest Service
16 to do a reconstruction of the ditch that comes through
17 right there about where that yellow dot is. And the
18 reason that he wanted to reconstruct that is because of
19 the beaver dams causing problems for that waterway.

20 And he -- I -- I'm -- This was kind of before
21 our time, but he may have been the one that constructed
22 that section in order to avoid any problems with the
23 beaver dams.

24 Q. Thus changing the original construction,
25 whatever it might have been?

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1 A. Oh, probably not. It probably -- He just
2 improved upon the existing ditch and made it stronger and
3 deeper.
4 Q. Again, I've probably already asked this, but as
5 far as the reach that -- that's indicated on the map with
6 the dotted lines, have you personally been involved with
7 any shoveling or --
8 A. Yes. In fact, my husband and I both, sometimes
9 together, sometimes separately, walked up there and
10 removed debris and downfall from that, from the stretch
11 from the spring itself to the yellow dot.
12 Q. And although you have talked to the owner as far
13 as, you know, his caution of being careful, did you feel
14 like you needed his permission to go up that reach to do
15 your maintenance?
16 A. You mean the current owner?
17 Q. No, not the current owner. Obviously, the
18 current owner won't let you on the place.
19 I'm asking you at the time that you were
20 maintaining it, did you feel like you -- that you had a
21 right to go up there and do that?
22 A. Definitely, yes.
23 Q. Without his permission?
24 A. Without his permission.
25 Q. And did you assert that right?

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1 EXAMINATION BY THE COURT:
2 Q. Let's see, Ms. Felton, our records show that you
3 and Stuart both own the property?
4 A. Yes, that's correct.
5 Q. The claimants to the water right.
6 Did you say your name is Missy or Misty?
7 A. Mitzi.
8 Q. M-i-t --
9 A. M-i-t-z-i.
10 Q. M-i-t-z-y.
11 A. "i."
12 THE CLERK: "i."
13 Q. "i." So I guess we're going to have to change
14 that, because I think we show it M-i-s-s-y.
15 While we're looking at that, let's see, the
16 Hulls and the Murphys aren't claiming water out of that
17 ditch, as far as you know, are they?
18 A. No, they're not.
19 Q. Can you think of a reason why -- why they would
20 allow a blow-out like you talked about? Your concern is
21 the ditch blowing out and flooding their property. It
22 seems like they would have the same concern, and they
23 would want it maintained just as you want it maintained.
24 A. Well, one could assume that, yes.
25 Q. What would they have to gain if it blew out?

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1 A. Yes, occasionally.
2 Q. But you were a good neighbor?
3 A. Yes. And he was happy to, as long as we did --
4 if we did a good job, a proper job, so as not to disturb
5 the spring, he was happy to let us come up and remove any
6 debris and check for beavers and --
7 Q. And wouldn't you have the same interest as he
8 did as far as impacting the spring? By that I'm saying
9 you wouldn't want to impact the spring negatively, would
10 you?
11 A. Oh, no, no, no, no, no.
12 Q. The water --
13 A. We were very -- We were all very conscious of
14 the sensitive nature of springs in general and that you
15 don't want to be heavy-handed with them or use, you know,
16 equipment that might disturb the spring itself, because
17 you'll lose -- sometimes, if you're not careful, you'll
18 lose them.
19 Q. And so if there's a concern that this change in
20 point of diversion back to its original point of
21 diversion -- You're not asking the court to allow you to
22 come in with big equipment, because you wouldn't use it in
23 the first place?
24 A. Oh, never, never, no, no.
25 MR. RIGBY: Nothing further, Your Honor.

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1 A. You'd have to ask them.
2 Q. When was the last time, as far as you know, this
3 stretch -- and it's mostly across the Murphy property --
4 when's the last time that was maintained down to the
5 yellow dot?
6 A. I think probably, in my knowledge, the last time
7 that it was maintained on a regular basis was when Harold
8 and his wife, Alice, sold their ranch to Pat and Jerry
9 Farrell, who own the upper portion of the ranch now, and
10 who sold the property to the Hulls, I believe. They
11 subdivided it a little bit.
12 Pat Farrell maintained that ditch on a regular
13 basis, and so I think that in time it would probably have
14 been five years ago that she was down there on a regular
15 basis removing debris and deadfall, and trimming willows
16 and that kind of thing out of that, out of the dotted line
17 area.
18 MR. BAXTER: Your Honor --
19 A. She maintained that as did -- yeah, in the
20 Hanson tradition for our benefit and for hers.
21 THE COURT: Yes?
22 MR. BAXTER: I'd just like to clarify: Is
23 Ms. Felton speaking from personal knowledge or her belief
24 as to -- to how the previous owner --
25 A. Oh, I'm speaking from personal knowledge.

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1 MR. BAXTER: That you observed the --
2 A. Yes, I have not only seen her there, but I have
3 been with her when she's done it.
4 MR. BAXTER: Thank you.
5 Q. (By the Court) I just got a note from our case
6 administrator. It shows that your claim is in Stuart's
7 name only.
8 A. Yes.
9 Q. So -- Okay, so we don't need to concern
10 ourselves about how to spell your first name.
11 A. Right.
12 Q. Can you think of a reason why -- why that ditch
13 from the spring box down to the yellow dot would
14 deteriorate to such an extent that IDWR would say it looks
15 like a natural channel? Within five years, I think is
16 what you're saying.
17 A. Well, I -- The maintenance that's done on that
18 stretch is really minimal. And in order to maintain the
19 integrity of the spring itself is really all we're
20 interested in; and the water flow, keeping the water flow
21 in that ditch so it maintains its volume all the way down
22 through Forest Service property, Sue Kozacek's and
23 Heltsley, Russ Kozacek's, and then our -- our ranch which
24 is across Hughes Creek Road.
25 It has maintained its water volume even though

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1 that ditch so it maintains its natural look, because it
2 really is a beautiful-looking place, but it's -- it's
3 headed for trouble. So I -- I --
4 It would be my desire to have some experts come
5 in and take a look at that -- that ditch from the original
6 point of diversion to the yellow dot and make sure that
7 we're -- when we do maintain that that we're doing it the
8 right -- in the proper way and not destroying the riparian
9 areas or any of the environment any more than -- than is
10 necessary.
11 Q. But to date, you don't see any reason to --
12 You're not concerned that the flow is going to
13 substantially be altered, unless you do that?
14 A. Well, yes, we are concerned about that right
15 now.
16 Q. What's the basis of that?
17 A. Well, if you look at it, like Monica's pictures
18 show, it's a flat area up in there, and it -- water will
19 try to seek its way down to the North Fork, and that's
20 what it's doing. That's the reason it looks like it does
21 today, and it doesn't look like a ditch.
22 This has been a, you know, a hundred -- more
23 than a hundred years this ditch has been in existence, so
24 you know, nature's taking over.
25 Q. But again, I think you said it was maintained up

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1 it has not been maintained as well as it should have been.
2 Even when -- you know, when Harold Hanson owned the
3 property, he maintained it the same way, very gently.
4 And so I can only assume that's what -- that
5 what has happened is that it's trying to -- the water is
6 trying to seek another way out of that ditch right now,
7 and so that's why it's starting to meander and braid.
8 Q. But the amount of water getting to your
9 property, has that changed over the years?
10 A. I'm sorry?
11 Q. Has the water from that spring changed over the
12 years?
13 A. It has not.
14 Q. You're getting the same amount of water.
15 What would you do differently if the point of
16 diversion is the spring box up there by the road? Would
17 you go in there with a D-9 Cat?
18 A. Oh, no, no, never.
19 Q. What would you do differently than is being done
20 now? Nothing, basically.
21 A. I think what we -- what we would do is go up
22 there with the cooperation of the landowners, of course,
23 and take a look at what we all think needs to be done.
24 And at this point, we would really like to get
25 some experts in there to show us the best way to maintain

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1 until five years ago, so wouldn't it be --
2 A. Well, yeah, but not maintained to the -- to the
3 extent that we went in with shovels and, you know, heavy
4 equipment. It was mostly just brush-clearing. But it is
5 in need of some drastic maintenance now.
6 THE COURT: Let's see, Mr. Baxter, do you have any
7 questions?
8 MR. BAXTER: No, Your Honor.
9 THE COURT: Let's see, Mr. Hull or Mr. Murphy?
10 MR. MURPHY: Patrick Murphy.
11 CROSS EXAMINATION BY MR. MURPHY:
12 Q. I would like to refer to -- I believe it's
13 Exhibit 6 that Mr. Rigby submitted, Russ and Sue Kozacek's
14 1979 water claim, claim to water right.
15 Mitzi, do you recall submitting Russ and Sue
16 Kozacek's water right as evidence of priority for your own
17 water right?
18 A. I -- You know, I don't remember. I'm assuming
19 so. All of these documents were attached to all of the
20 water rights, so yes, I would think so.
21 Q. Well, it's located on the IDWR web page for your
22 water right 75-10603. Just any thoughts on --
23 Russ, in this water right claim claimed the
24 point of diversion the southwest of the southwest, not the
25 quarter/quarter/quarter section. That he claimed the

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1 40-acre sections. But he has a hand-drawn map that
2 basically shows it in the location on the Forest Service
3 today. That's not up by the spring head, and I was --
4 You guys submitted this as evidence of priority.
5 I didn't -- I didn't know if you had another
6 water right claim that you submitted that shows a
7 different priority, but that's -- Do you have any
8 thoughts on why you would have done that?
9 A. All I can tell you is this: That --
10 Q. If you know.
11 A. -- If -- You know, I don't know. And in my
12 experience since we bought that property, in all of the
13 historic documents, the head of the spring has always been
14 the point of diversion. And the point of diversion could
15 not have been designated at the Forest Service boundary
16 line, because the Forest Service did not exist then, so
17 there would be no reason for them to put it there.
18 Q. Okay. Mitzi, have you ever asked myself, the
19 Murphys or the Hulls, for permission to come up on the
20 property?
21 A. I have not.
22 Q. Okay. Do you know, currently, are you still
23 getting all of your water?
24 A. Yes.
25 Q. Okay. Is there any control structures for that

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1 A. Harold Hanson lived there. Jerry, Pat Farrell,
2 when they bought the property and built the house up on
3 the hill. So you know, within the last six years
4 somewhere. Seven years, maybe.
5 Q. Okay.
6 A. Before that, Pat Farrell was actually
7 maintaining that ditch.
8 Q. Okay. I've -- I've --
9 A. So there was --
10 Q. I've owned the property, it would be eight years
11 in July, and I have never seen --
12 A. Okay, well, then --
13 Q. -- any --
14 A. Okay.
15 Q. I've never seen any of the water users up on my
16 property or in the ditch, for that matter. I'm just --
17 I'm just -- We haven't had any interactions, I have
18 never -- I have never seen you there, you have never seen
19 me down there, right?
20 A. Right, yeah.
21 Q. Okay. Do you currently have a special use
22 permit with the Forest Service?
23 A. Well, that's -- that's a good question. When
24 the -- I don't know if this was part of the SRBA, but
25 yes, we have a special use permit under the Diamond H

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1 water in the ditch system anywhere from a headgate or a
2 measuring device to -- water you're not using, to put back
3 into a natural channel? I mean are you controlling that
4 water in any way by diverting it?
5 A. Oh, yes, yes. Of course.
6 Q. By -- by that berm, by diverting of all of the
7 water?
8 A. Well, by the -- the -- When the water gets to
9 our ranch, we're the last water users on that ditch, and
10 we -- we have ditches that come off of the main Spring
11 Ditch that go different places and water different pieces
12 of property. And we do pump out of the ditch. We have a
13 headgate in the ditch.
14 Q. But currently, you're getting enough water to
15 fill your right and --
16 A. Oh, yes.
17 Q. Okay. Have you ever maintained the ditch in any
18 portion, especially up on my property, since Adele
19 Crawford has sold the -- sold the property?
20 A. Yes.
21 Q. Okay. When was the last time that you were up
22 on that property?
23 A. I don't know. I can't tell you exactly what
24 date.
25 Q. Okay.

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1 Ditch Association.
2 Q. And it is active, it has not expired?
3 A. As far as I know, it's still -- still in force.
4 Q. Okay. Because I know Sue and Russ Kozacek have
5 their own irrigation water easement. I just didn't know
6 what -- what -- what your status was.
7 MR. RIGBY: Your Honor, he's testifying to this.
8 And let me just say: I assumed this was going
9 to come up. The issue with the Forest Service as opposed
10 to the issue before this SRBA Court, mutually exclusive.
11 And therefore, they're obviously and have been
12 getting their water all along, and I certainly hope we're
13 not heading down the road of attempting to determine
14 whether or not there's an argument whether an invalid
15 permit is there or whether a valid permit is not there.
16 It's irrelevant in the SRBA Court.
17 THE COURT: Mr. Murphy, do you agree with that?
18 MR. MURPHY: I'm not necessarily sure I do agree
19 with that, because you, unless you have an active special
20 use permit from the Forest Service, you cannot do any
21 excavation, ditch maintenance, install a headgate, install
22 a measuring device, weir box.
23 I don't believe that you can do any of that,
24 unless you have a current and active special use permit
25 for an easement.

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1 THE COURT: Well, maybe if we can get to that when
2 you --
3 MR. MURPHY: Okay, I just --
4 THE COURT: -- go on your direct.
5 MR. MURPHY: Okay, I was -- I was just curious if
6 she -- if they had gone through the process to -- if they
7 still had a special use permit or they were in the process
8 of acquiring one. She thinks they have one.
9 THE COURT: They do.
10 A. Yes.
11 Q. (By Mr. Murphy) I'm just curious: You just
12 made a statement, Mitzi, you know, you think the stream is
13 headed for trouble if we don't do something.
14 I guess more specifically, I'm interested on my
15 property, which I have control over. And you said you
16 have seen flooding and high water -- and high water on
17 that system?
18 A. Well, like Adele said, it -- it subs down in
19 that lower pasture. And as you know, you know, the water
20 table down there is very high, and so that's --
21 Can I just show you on the map what I mean here?
22 This is where we have seen it flood, right in here. Not
23 really flood, but the water has broken out and come this
24 way, right that way.
25 Q. Have you seen -- Have you actually seen that

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1 evidence -- I'm not sure why -- Russell Kozacek and Sue
2 Kozacek's water right. Whether it has been priority date,
3 point of diversion, I guess the question I would ask: It
4 was one ditch with four --
5 It was one homestead with one ditch, supposedly
6 one point of diversion. I'm trying to figure out where
7 that point of -- if the point of diversion was the same
8 for Russ Kozacek and they were agreeing with that in
9 their -- by submitting the 1979 claim as evidence of
10 priority. Just establishing a historical fact of where
11 they thought the point of diversion was located in 1979,
12 and if they -- why would they -- they would submit it as
13 evidence for the adjudication.
14 THE COURT: Who signed the claim that you're
15 referring to?
16 MR. MURPHY: The Kozaceks, Russ and Sue Kozacek.
17 THE COURT: And they said on the application -- or
18 claim, SRBA claim, that the point of diversion was on
19 Forest Service land?
20 MR. MURPHY: No, they didn't. They didn't. In the
21 1979 claim they use as evidence, they claim southwest of
22 the southwest. But they also have a hand-drawn map which
23 is very, very close -- it's actually very, very, very
24 close to southeast and southwest of the southwest, where
25 it is located -- where IDWR and we agree it is located.

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1 water connected?
2 A. Connected?
3 Q. Between the North Fork and that -- the dry area
4 on the -- on the green --
5 A. On here --
6 Q. -- that --
7 A. Have I seen this water connect to the North
8 Fork?
9 Q. Yes.
10 A. No, I didn't walk -- I didn't go down that far.
11 Q. Okay.
12 A. But you could just -- you know, you could see
13 the direction in the water. And whether it goes this way
14 or this way, I mean this is -- this is the gradient right
15 here.
16 MR. MURPHY: Okay, no further questions, Your Honor.
17 THE COURT: Mr. Murphy, your point in asking the
18 witness about it was the -- their own SRBA claim?
19 MR. MURPHY: As evidence of priority for --
20 The first question I asked?
21 THE COURT: Yes.
22 MR. MURPHY: Evidence of -- They submitted certain
23 things for evidence of priority for their water right to
24 IDWR, and it's on the website currently for water right
25 75-10603. Under evidence of priority, they submit as

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1 THE COURT: Okay.
2 MR. MURPHY: And that was in 1979.
3 THE COURT: Okay, I see your point.
4 MR. MURPHY: No further questions.
5 THE COURT: Okay, thank you, sir.
6 Let's see, Mr. Hull?
7 MR. HULL: Yes, Your Honor, Daryl Hull.
8 CROSS EXAMINATION BY MR. HULL:
9 Q. Mitzi --
10 A. Yes.
11 Q. -- during the first conference on this case, I
12 wasn't present, but my wife was, and we discussed in
13 detail, you know, how we would approach it.
14 Isn't it true that she offered you a good
15 neighbor policy at that time, and said we would even
16 assist in keeping that spring stream clean if it needed
17 it?
18 A. Yes.
19 Q. Okay. So you were never denied permission, were
20 you?
21 A. No, no.
22 Q. Okay.
23 A. No.
24 Q. I wanted to get that straight. Also, isn't it
25 true that you divert the entire spring stream to your

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1 properties? There is no diversion device that limits you
 2 to how much you get. So you not only get the water that
 3 you're entitled to under your water right, but you get the
 4 entire water under that stream, correct?
 5 A. That's correct.
 6 MR. HULL: Okay, no further questions.
 7 A. It's a -- it's a -- Actually, it's a ditch that
 8 we get the water from.
 9 Q. You can call it what you want. I'll call it
 10 what I want.
 11 A. Yeah, I'm sorry.
 12 THE COURT: I think she said she was at the end of
 13 the ditch, so that would explain why she gets whatever
 14 ends up there at the end of the ditch.
 15 MR. HULL: Well, what I'm trying to say, Your Honor,
 16 is there's nothing there to control the amount of water.
 17 THE COURT: Sure.
 18 MR. HULL: They get not only what they're entitled
 19 to -- In other words, if there was a blow-out somewhere
 20 in the -- Proposed blow-out. I would say that it
 21 couldn't blow out where we're at on our properties.
 22 But if there was, they not only get the water
 23 they're entitled to, they get the entire water that the
 24 whole stream system produces.
 25 THE COURT: Sure.

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1 blow-out or loss of it, because of what -- the testimony
 2 that's coming in here indicates, can be lost. And what
 3 can they do about it? They have got every water right in
 4 the world, but they don't -- it's now not coming to them.
 5 Right now they're getting it all, but you've
 6 heard plenty of testimony that that is -- could change and
 7 that it's in need of further work to make sure that that
 8 continues. Without a point of diversion there,
 9 Your Honor, or an agreement otherwise that is satisfactory
 10 to everyone, they have nothing.
 11 They can go to the yellow point of diversion and
 12 say bye-bye. The water is gone. And our testimony will
 13 be that that water is going to go to the river. And the
 14 argument back is, "Well, then, go change it."
 15 Your Honor, that's not what the law allows. If
 16 we have our right to go to the point of diversion and
 17 maintain it, then we have that right, and he --
 18 Like I say, the fact that there's a good
 19 neighbor policy right now is fine, but that doesn't give
 20 us the legal right to continue.
 21 THE COURT: Well, we have got good neighbors here
 22 right now. Is there anybody from California here?
 23 MR. RIGBY: Oh, oh, you got trouble now. Watch
 24 yourself now. Watch yourself.
 25 THE COURT: The reason I'm asking: Is there a

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1 MR. HULL: So they're way over their cfs's as it is.
 2 MR. RIGBY: Your Honor, is he testifying or -- I
 3 mean I guess --
 4 MR. HULL: No, I'm trying to explain to Your Honor
 5 what I was trying to get at.
 6 THE COURT: Well, you know, it occurred to me if
 7 your position is that you're willing to have them come on
 8 and help you maintain that stretch between what's called
 9 the spring box and the yellow dot, and that's what she
 10 wants to do, what are we talking about here? Why are we
 11 arguing?
 12 MR. RIGBY: Well, Your Honor, may I argue, as well
 13 as he did, at least make a point?
 14 THE COURT: Yes. I guess it's kind of close to
 15 closing argument, but I guess maybe we should.
 16 MR. RIGBY: Very good. Your Honor, obviously the
 17 court knows, as he said, good neighbor policy, that's
 18 great; but that can change tomorrow. He can sell. He's
 19 the best guy in the world, maybe.
 20 But he sells to someone else, the court knows,
 21 as well as I do, that if you don't have a legal right --
 22 and that's what the point of diversion gives you -- if you
 23 don't have a legal right to maintain, then that policy can
 24 change in the blink of an eye.
 25 And this water right, because of the potential

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1 chance an agreement could be reached here that would agree
 2 that, sure, they can maintain it, because it's in their
 3 interests -- that is, the property owners' -- to keep that
 4 stream full, or not onto their property, because there's
 5 high water level on their property.
 6 If it blows out or whatever fails, or it changes
 7 channels or whatever we call it, it's going to damage
 8 them, and it would damage your clients, so it looks like
 9 everybody's got a reason to do something here.
 10 MR. RIGBY: Well, Your Honor, I'm not -- I'm not
 11 convinced of that, because the present owner isn't --
 12 isn't -- I can't be convinced --
 13 First of all, nobody's up there making a living
 14 on this like it used to be, where it was absolutely
 15 imperative that you keep as much water in a channel as
 16 possible. As a matter of fact, Mr. Murphy is a fishery
 17 man, and fisheries can do well when it's all spread out
 18 and it's all -- the fingerlings that go out and everything
 19 else. In other words, that may be in his interest.
 20 He may exactly -- he may in fact want it to be
 21 marshy. The point being is that whether he does right now
 22 or not, someone who in his exact position can do that,
 23 because they can be the environmental aspect of this,
 24 saying, "Fine, let it go, let nature take its course."
 25 So to say, well, they -- they should have the

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1 same interest, they should have the same interest. But
2 they're not legally bound to have the same interest.
3 THE COURT: Unless they sign an agreement.
4 MR. RIGBY: Unless they sign an agreement where we
5 have our point of diversion. If we have our point of
6 diversion, then we don't care who moves in there. We're
7 going to protect that. We're not going to destroy it, but
8 we have a right to say, "You can't stop us."
9 And Your Honor, that's worth fighting for,
10 because they could lose their entire water right.
11 THE COURT: Would the objectors be willing to enter
12 an agreement?
13 MR. HULL: Your Honor, my only argument to Mr. Rigby
14 would be they were offered the same agreement we gave to
15 the Kozaceks, and turned it down.
16 THE COURT: Well, of course, Kozaceks aren't here
17 any more.
18 MR. HULL: And that agreement -- Well, that
19 agreement's on file. That was put into evidence under --
20 I put it in, in fact. It's Hull Exhibit 1.
21 THE COURT: Oh, there is some kind of agreement
22 already?
23 MR. HULL: Yes, it's there. And that's in file --
24 I believe that's the agreement we put on file.
25 Didn't we do that yet?

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1 a good neighbor -- written good neighbor document that
2 says the use on the property should be limited.
3 The issue is then where do you describe the
4 point of diversion. The Kozaceks said, "Well, give us our
5 agreement, we'll record it." And they have recorded their
6 agreement that allows them to -- on the property with
7 minimal work, but allows the point of diversion to be
8 described where the yellow dot is.
9 Mr. Rigby, on behalf of his clients says, well,
10 that isn't acceptable to them. That they want to have
11 the -- the agreement, but they want the point of diversion
12 described up above for other reasons. And Mr. Rigby can
13 probably explain the position better.
14 So we have danced this line for a while, and the
15 parties haven't been willing to budge on their positions,
16 so --
17 THE COURT: Well, I guess from my position I'm
18 thinking we have got good neighbors now, and obviously
19 you're going to have to live with each other for a while
20 after this is over with. But if everybody's going in the
21 same direction --
22 And I don't think anybody wants to destroy this
23 stream or change it in any way. They want the water to
24 continue flowing essentially the way it is now. And if it
25 takes some kind of an agreement, that may be -- from

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1 UNIDENTIFIED: No, I think we (unintelligible).
2 MR. HULL: We haven't; but there is an agreement on
3 file on two of the water rights, on two of the water
4 users.
5 THE COURT: Felton end?
6 MR. HULL: No, it's on the Kozaceks, Russ and Susan
7 Kozacek, who are two different parcels here. There's four
8 people on the water right. Two have already settled.
9 THE COURT: Would you be willing to extend that to
10 the --
11 MR. HULL: It was already offered and denied,
12 Your Honor, at a settlement conference.
13 THE COURT: How long ago was that?
14 UNIDENTIFIED: The second --
15 MR. HULL: The second settlement conference, third
16 settlement conference. A few months -- several months
17 ago. Probably eight months ago.
18 THE COURT: Do we need to take a break here and
19 maybe explore that possibility?
20 MR. HULL: We tried this morning.
21 MR. BAXTER: Your Honor, I think there's a
22 fundamental issue. I think the parties, and if I may --
23 And the parties tell me if I'm incorrect.
24 MR. HULL: No, no.
25 MR. BAXTER: They're willing to enter into a kind of

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1 IDWR's standpoint, it may be important where the point of
2 diversion is; but if the agreement is in effect from the
3 claimants, the water users' standpoint, it wouldn't make
4 any difference, would it?
5 MR. RIGBY: Well, Your Honor, I believe,
6 fundamentally, it does. Either our point of diversion,
7 which comes within the statutory right-of-ways in Chapter
8 11, Chapter 12 -- Chapter 11 being the right-of-way,
9 Chapter 12 the maintenance.
10 Having a point of diversion gives me that.
11 Without that, I don't have that. So therefore, I'm back
12 to just what the agreement says.
13 Now, what was not offered, and I'm just throwing
14 this out as long as we're here in this mode, is an
15 easement. Because those are the only two things I can
16 really recommend to my clients, because the easement is in
17 fact -- worded correctly, the devil's in the detail -- the
18 easement is really the only way I could ever recommend
19 anything beyond a point of diversion, because that gives
20 them a perpetual, in-perpetuity right to maintain.
21 Now, we -- we -- I think we're close, if not
22 right on, as far as what maintenance would be. Because
23 again, I think everyone -- We haven't heard any real
24 disagreement as far as maintenance, other than --
25 Well, I guess we have, because the way it's

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1 being maintained right now is not proper, according to our
2 clients. It needs to have a little bit more maintenance,
3 because their -- their dire concern is to lose what they
4 have now. As the court pointed out, they're getting their
5 water. They're fearing that they won't.
6 And if they don't, and they haven't gotten the
7 right to go on there and get it back, then they're --
8 that's the problem. If we have an easement that allows
9 that, I can recommend it.
10 Now, I haven't even talked to them. I'm
11 throwing it out. But an easement, I can recommend. Short
12 of an easement or a point of diversion, I don't know that
13 I can recommend it.
14 THE COURT: Well, the Kozaceks agreed to it, didn't
15 they?
16 MR. RIGBY: Well, but I don't represent the
17 Kozaceks. They can -- they can agree to anything they
18 want.
19 THE COURT: Who are the other people you have an
20 agreement with?
21 MR. RIGBY: Kozacek.
22 MR. HULL: Russ and Sue Kozacek. They're a divorced
23 couple. They split their land, and each one owns a
24 parcel, so that makes four water users on this water right
25 that comes from the spring stream and --

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1 And we'll record that and make it, again,
2 binding upon our heirs and successors. In other words, it
3 all comes down to "give us the point of diversion, and
4 we'll do exactly what they did with the Kozaceks," with
5 the exception -- I don't think the Kozaceks dealt with
6 the ability to use a chain saw or something like that.
7 But I mean very minor details.
8 THE COURT: Well, why couldn't we leave the point of
9 diversion at the yellow dot with an easement?
10 MR. RIGBY: If the easement gives us the perpetual
11 right, then I can recommend it. But like I say, the
12 easement wasn't offered. This is new.
13 MR. BAXTER: Perpetual right with notice? Like the
14 idea of that they have to provide notice before they
15 access the property?
16 THE COURT: Well, the perpetual right with the
17 limitations that they're concerned about.
18 MR. BAXTER: Right.
19 MR. RIGBY: Limitations, I don't think is the -- the
20 real issue, and I guess we'll find out. We haven't
21 explored that in a few months. But -- but I'm -- I'm
22 certainly willing to explore it, absolutely, the easement
23 or right. Point of diversion (unintelligible).
24 And then we can talk about it. If they will
25 talk about an easement, then I'm -- Again, my clients are

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1 MR. RIGBY: And they did not get an easement.
2 MR. HULL: And Russ and Sue Kozacek, they settled.
3 THE COURT: Is that a viable alternative, an
4 easement?
5 MR. HULL: Your Honor, here's our problem: If you
6 look at Idaho Code closely, down the road a new owner of
7 their property can come in and say, "Under Idaho Code, I
8 can ditch that, I can do whatever I want," because Idaho
9 Code plainly says they can do it.
10 And then we're back in this court again. We
11 don't want to come back to this court again. Whatever we
12 have, we have.
13 THE COURT: Well, couldn't an easement be worded --
14 MR. RIGBY: That's why I'm throwing it out, because
15 that is -- I -- I concur with him that a point of
16 diversion without anything else gives the right to
17 maintain my ditch for all Chapter 11, Chapter 12 purposes.
18 That's why we had said, "Okay, as long as we
19 have our point of diversion, we'll -- we'll concede that
20 we don't have everything in 11 and 12. We will concede
21 that we can't just treat it like it is."
22 That wasn't good enough for them.
23 THE COURT: But he's saying that their concern is
24 what you could do over and above --
25 MR. RIGBY: Exactly. We'll agree that we cannot --

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1 going to have to jab me in the side, but I'm willing to
2 talk to them about an easement right.
3 THE COURT: Well, I'm thinking, just from IDWR's
4 standpoint, their concern is that point of diversion.
5 That's critical, because that identifies where the natural
6 stream is for whatever purposes. I'm not sure why --
7 Obviously, that's very important.
8 But if you could concede that and they would be
9 willing to give you an easement with the restrictions, it
10 sounds like we have the problem solved.
11 MR. RIGBY: The devil's in the details, Your Honor.
12 Again, I'm certainly willing to talk, but that's
13 where we were this morning. Again, this morning was point
14 of diversion, we'll give you everything that the Kozaceks
15 (inaudible).
16 THE COURT: It's obviously clear, at any rate, after
17 we have gone through all of this, that there's awful good
18 neighbors up there. And people down here in Twin Falls
19 aren't this nice. Some of them.
20 MR. BAXTER: Special Master, do you maybe want to
21 give me -- or give us about five minutes to just
22 discuss --
23 THE COURT: That's what I was thinking about,
24 maybe -- Maybe could we run through some drafts of
25 easements, and maybe the Hulls and the Murphys could take

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1 a look at that and figure out what kind of restrictions
2 they would be willing to accept.

3 MR. BAXTER: Well, let's just -- let's just maybe,
4 before we get to drafting, let's take a second and talk
5 and -- I understand, from previous discussions, the Hulls
6 and Mr. Murphy have been reluctant when you start using
7 the word easement and the legal connotations associated
8 with that. And --

9 MR. RIGBY: That's what makes me concerned, then.

10 MR. BAXTER: Well, somebody who doesn't maybe
11 practice law might not understand that you can craft an
12 easement. It's less important what the document is
13 called, more important as to what -- the provisions you
14 put in there as to what happens, and when you access the
15 property, and how -- how that property can be accessed,
16 so --

17 THE COURT: Sure, an easement can be written to
18 define, for instance, if they have wear red shoes when
19 they go on there to maintain the property. Well, yes, you
20 can put anything you want in there.

21 MR. BAXTER: Let's not go that far, but --

22 THE COURT: Or at least we have red socks.

23 MR. BAXTER: I just didn't want anybody to be scared
24 by the term easement. That's just what I'm trying to say.

25 THE COURT: Good point. I agree with that.

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1 going down the slippery slope, and it would be fine. They
2 have the, you know, the convenient facilities when they
3 get up to speed to be able to irrigate the property, and
4 they have the requisite fall already, and the point of
5 diversion looks like it's there.

6 It isn't the point of where the point of
7 diversion is. And not getting sidetracked, I'm not
8 worried about, you know, the fisheries issues; but we have
9 to get, you know, where is the point of diversion, how do
10 they control the water.

11 The big -- the biggest issue for the Kozaceks --
12 And I'm not, you know -- The biggest issue for the
13 Kozaceks in making an agreement was water in the
14 wintertime, because it's very, very stable, 1 to 2 cfs.

15 And beaver -- beavers love to get into that
16 ditch, and love to get into the spring. And when the
17 super-cooled water freezes before it gets down to the said
18 properties, their biggest concern was to be able to get
19 into our property if there was a dam of some sort, usually
20 caused by beaver, because otherwise it can't flood.

21 2 cfs, it does not change.

22 And so that's the agreement they -- Russ and
23 Sue were very concerned, because their stock's out of
24 water in the wintertime; and so, you know --

25 The point of diversion, I'm very open to the

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1 MR. RIGBY: Your Honor, one additional thing that --
2 that is -- was another -- not a deal breaker, but a major
3 concern and would have to be drafted within the easement
4 itself, is the fact that we're in Endangered Species land.

5 THE COURT: Sure.

6 MR. RIGBY: And therefore, if this is a natural
7 channel, we could be subject to that; and that would
8 cause, again, different -- that could change our water.

9 MR. HULL: Your Honor, at this point, I'm going to
10 tell you that when he says that, no deal. Because I
11 myself, although I'm not a fisheries guy like Mr. Murphy,
12 I really value conservation. I love my land. I love the
13 fact that the animals come there to drink. I like to see
14 the baby ducks in there in the spring.

15 If there's an endangered species in there, it
16 has a right to live. I'm sorry. It's -- it's my land,
17 period.

18 MR. MURPHY: Your Honor, I think we have a lot of,
19 on both sides, fear-mongering going on here. Because from
20 our -- Where we -- We're calling it a stream and don't
21 want it channelized or altered. They're trying to protect
22 their water right. Endangered Species Act or not, the
23 definition of the point of diversion --

24 I'm very open if the point of diversion is down
25 there and we can continue on as it has gone for 110 years

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1 same agreement. I do not want a point of diversion on our
2 property, because I don't believe that's where -- I mean
3 the point of diversion where you physically divert the
4 water is on the Forest Service and has been.

5 And if their concerns can be addressed in an
6 agreement like -- like that, we might entertain that.

7 THE COURT: Okay, Garrick Baxter.

8 MR. HULL: Without the thing about endangered
9 species and all. That -- that's -- I don't want to hear
10 that.

11 MR. MURPHY: Well, that is if there's -- And
12 there's fish all through this system. I mean I just tell
13 you that because it blows back. When the water is
14 diverted, it goes back to the North Fork, so you have fish
15 all through the system. That's out of anybody's control.
16 That can be a regulatory to keep control.

17 That's out of the state of Idaho's hands as far
18 as ESA goes. But you know, there's -- there's things we
19 can do about it. There's things, you know --

20 The Upper Salmon River Basin has more federal
21 dollars to fix those types of problems than probably any
22 place in the -- certainly in the state of Idaho.

23 But I mean I don't want to talk about that
24 issue. I'm just talking -- We're talking about, you
25 know, where is the -- you know, where is the point of

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1 diversion and are they getting their water.
2 THE COURT: Sure.
3 Garrick Baxter, do you think we'd still benefit
4 from a 15-minute break here so you can talk to them? I'll
5 leave the courtroom, if you want to stay right where you
6 are.
7 MR. BAXTER: Sure.
8 THE COURT: Okay, we'll go off the record here for
9 15 minutes.
10
11
12 (Recess.)
13
14
15 THE COURT: We're back on the record now. It's
16 about 3:15. We took a short break to give the parties a
17 chance to possibly negotiate settlement, and it looks like
18 we're going to be resuming now.
19 And let's see, Mr. Hull finished his
20 cross-examination of Mitzi Felton.
21 Were there any more questions of her?
22 MR. RIGBY: I don't think so, Your Honor.
23 THE COURT: Okay, let's see, I guess then we'll go
24 to Mr. Rigby's next witness.
25 MR. RIGBY: Yes, Your Honor. I'm wondering about --

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1 our first presiding judge, we'll do this all night long,
2 if we have to. I'm willing to do it, but you're the ones
3 who -- you want to drive home?
4 MR. HULL: That's fine with us. We'd rather drive
5 and get it done today.
6 THE COURT: Garrick, do you have any -- any
7 thoughts?
8 MR. BAXTER: (Unintelligible).
9 THE COURT: Okay, well, I guess we'll just leave it
10 up to you, whatever order you want to present your
11 witnesses in.
12 MR. RIGBY: Well, I think just in case we won't get
13 done today, then I'm willing to call our expert witnesses,
14 and I'll call Roger Warner to the stand.
15 THE COURT: Sure.
16
17
18 WILLIAM ROGER WARNER,
19 produced as a witness at the instance of Claimants
20 Heltsley and Felton, being first duly sworn, was examined
21 and testified as follows:
22 DIRECT EXAMINATION BY MR. RIGBY:
23 Q. Please state your full name and address for the
24 record.
25 A. William Roger Warner. I live at 432 North 3900

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1 MS. FELTON: Am I done here?
2 MR. RIGBY: Yes.
3 THE COURT: Oh, sorry.
4 MS. FELTON: That's okay.
5 MR. RIGBY: I don't believe we're going to get done
6 today. We need to talk about who we put on, in what
7 order. You know, in other words, we have got some expert
8 witnesses. Maybe that's the answer right now. I'm just
9 trying to -- trying to determine what else we do, how late
10 the court wants to go, just so I have a time frame.
11 UNIDENTIFIED: I'm here.
12 THE COURT: How many expert witnesses do we have?
13 MR. RIGBY: I have two expert witnesses, and I have
14 the Heltsleys. And one of the Heltsleys is from
15 California. I'd like to at least get him on, and my two
16 expert witnesses. Ann, I could wait for another day,
17 because she obviously will be here no matter what.
18 THE COURT: Let's see, Mr. Hull or Mr. Murphy, do
19 you have any expert witnesses you're going to have?
20 MR. MURPHY: We have one, Your Honor.
21 THE COURT: Would we need to get him on today, too?
22 MR. HULL: Well, if we could. If you wanted to go
23 later, we can go later. I don't care. 500-mile drive for
24 us both ways.
25 THE COURT: Well, when we first started, I had told

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1 East, Rigby, Idaho, 83442.
2 Q. What's your occupation, Mr. Warner?
3 A. I'm a hydrologist. I work for a firm called
4 Rocky Mountain Environmental.
5 Q. Where is that located?
6 A. It's located in Idaho Falls, Idaho.
7 Q. And how long have you been so employed?
8 A. Three years now.
9 Q. And before that, what was your employment?
10 A. I was employed by the state of Idaho at the
11 department of water resources.
12 Q. In what capacity?
13 A. Well, it varied. I started out as a -- as an
14 agent measuring ground water wells out in the Mud Lake
15 area. After that, I went to work as the stream channel
16 alteration specialist, protecting streams, for a period
17 of -- oh, it was probably about almost two years.
18 Afterwards, I worked as an adjudication agent
19 for a short period of time, maybe about a year. And then
20 I moved into a supervisory position over water rights,
21 where I was there for another two years.
22 Q. You've heard the -- the experience and resume'
23 of Monica Van Bussum this morning. What -- what areas
24 did -- do you believe in your position you overlapped as
25 far as experience is concerned with Monica, if any?

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1 A. Well, I think Monica's experience and I have
2 overlapped quite a bit in the adjudication. She probably
3 has more experience in the adjudication in recommendation
4 of water rights, and I probably have more experience in
5 issuing new permits and transfers of water rights.
6 Q. And transfers, what does that entail?
7 A. Changing any of the elements in a water right;
8 place of use, point of diversion, nature of use.
9 Q. You obviously have been present today in the
10 courtroom?
11 A. I have.
12 Q. And as far as the particular experience that you
13 have in the particular issues before this court today,
14 what -- what do you believe your expertise to be?
15 A. Well, my expertise today is relevant to whether
16 or not -- Well, my expertise as a hydrologist would come
17 into play in terms of the stream channel. It also would
18 come into play as a water right person, and the knowledge
19 and basis of my water right experience.
20 Q. And what's your schooling, Mr. Warner?
21 A. I have a Bachelor's Degree in Geology and a
22 Master's Degree in Hydrology.
23 Q. Any other education or --
24 A. Just the school --
25 Q. -- seminars or anything? The hard knocks?

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1 issues.
2 Q. And but as far as the -- Well, again, let me
3 just ask you this: Have you been to the site?
4 A. I have.
5 Q. And when were you there?
6 A. Summer of '09. It was around the end of July,
7 first part of August.
8 Q. And you were -- Were you employed by me --
9 A. Yes.
10 Q. -- as counsel for the objectors?
11 A. Yeah, yeah.
12 Q. And -- and what did you do when you visited the
13 site?
14 A. Well, it's probably similar to Ms. Van Bussum's
15 visit. My purpose was to observe the ditch and to --
16 You know, I was trying to determine by my visit
17 what particular characteristics that I might be able to
18 observe in the field that would lend credibility that it
19 was a ditch or wasn't a ditch.
20 Q. Did you go there with preconceived notion?
21 A. Well, I'd like to think I didn't. You know --
22 you know, I have worked in -- in water right related
23 issues for quite some time; and I've also, you know, with
24 my experience in stream channel alteration permitting,
25 felt -- felt like I had an obligation to perform. And I

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1 A. School of hard knocks.
2 Q. There you go, okay.
3 MR. RIGBY: Your Honor, then I would move to have
4 him introduced -- or admitted as an expert, and be able to
5 cross-examine him accordingly.
6 THE COURT: Is there any objection to that?
7 (No response.)
8 THE COURT: Okay, we will designate him an expert in
9 hydrology and --
10 Q. (By Mr. Rigby) And how would you describe it,
11 Mr. Warner?
12 A. Well, yeah, an expert in hy -- hy --
13 Q. Hydrology is a fairly large area.
14 A. Hydrology is pretty broad, but it's -- it spills
15 over in hydrogeology.
16 Q. Explain hydrogeology.
17 A. Well, the geology part of it comes into
18 experience and academic background in geology and
19 geological sciences. Hydrology is -- is one of those
20 aspects of geology.
21 Q. In your capacity since leaving the department,
22 have you been employed to address issues similar to the
23 one that's present here in this courtroom today?
24 A. Some. Not too many. A few. But you know, my
25 experience has been mainly in water rights, water right

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1 don't -- I don't feel I had a preconceived notion on it.
2 Q. And who accompanied you in your visit?
3 A. I met with the -- the Feltons, both Stuart and
4 Mitzi, and Ann Heltsley. But as far as walking out and
5 observing, doing observations, I believe it was -- was
6 mostly Ann. Stuart tried to keep up the best he could,
7 but he's had some tough -- you know, he's had -- He
8 hasn't -- Not quite as ambulatory as he'd like to be.
9 Q. And how long were you there?
10 A. I think it was the better part of an afternoon.
11 I think there was five, six hours, I think.
12 Q. And exactly what part, where did you start,
13 where did you begin, end?
14 A. Well, we -- we -- You know, the Feltons and --
15 and Miss Heltsley is on the terminus of the ditch, and --
16 and so they -- they started me down there and -- and we
17 drove and observed, you know, where the ditch -- portions
18 of the ditch were able to -- to return to the North Fork.
19 But we also walked the entire length of the
20 ditch. We found Mr. Rattlesnake over by, I believe, the
21 Murphys' home. And thereafter, we -- we were asked to
22 leave.
23 Q. And who asked you to leave?
24 A. Well, I -- I believe it was Mrs. Hull asked us
25 to leave.

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1 Q. So in other words, did you --
2 You were on the Murphy property, but were not
3 able to get onto the Hull property. Is that correct or
4 not?
5 A. That was correct.
6 Q. So generally speaking, what did you observe?
7 And trying -- In the sake of time, referring to IDWR's
8 Exhibit Number 2 -- excuse me, 4, the photographs, if you
9 can refer to them in your description, that would be
10 helpful.
11 A. Well, their descriptions were accurate. You
12 know, I observed, if it were a ditch, I observed a very
13 poorly-maintained ditch with a substantial amount of
14 debris, substantial amount of vegetation. It didn't
15 appear that anybody had been there for a long, long time.
16 It was -- you know, it was a sobering walk to
17 walk that section and observe that and know, you know,
18 where your client wanted to go -- or was hoping that I
19 would be able to observe; and I -- it was very difficult
20 to observe much of anything relative to lending credence
21 to a ditch at that point.
22 Q. And so I guess in the end, then, what -- what
23 was your conclusion; and what documentation or whatever
24 have you used in making that conclusion?
25 A. Well, Jerry, you know, when I returned back to

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1 point of diversion on up, is in fact not a ditch.
2 Is that what you understand her testimony to be?
3 A. Yeah, that's what I understood her testimony to
4 be.
5 Q. Okay, have you concluded, after your -- after
6 your observation and your independent investigation,
7 something different than Ms. Van Bussum?
8 A. I -- I have. You know, after looking at -- at
9 the -- at the evidence that -- that I was able to look at
10 back in the office, and the evidence that was populated in
11 the file, you know, it became more apparent to me that --
12 that that creek -- or ditch is -- is located up on the
13 hill for a reason.
14 And also, you know, I -- I came to a conclusion,
15 also, that, you know, irrigators have used natural
16 waterways in order to further their purposes. To have a
17 natural waterway and to convey water through a natural
18 waterway is not unheard of.
19 I think it's hard work to dig a waterway. And
20 if they could use any means to -- to convey that water and
21 to keep it high on -- on the mountainside without having
22 to go to great lengths of excavating a new ditch, they
23 would have used it. I think they employed that.
24 Q. And how -- how do you come to that conclusion?
25 In other words, you -- you now -- You agreed that -- with

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1 the office -- At that time I didn't have the ability to
2 take an observation of that location from -- from high up,
3 from aerial photographic evidence. I wasn't -- I didn't
4 have a topographic map of the property.
5 You know, I really -- We tried desperately to
6 observe, you know, the best we could from the highway, you
7 know, the lay of the land, of the meadow and just -- I
8 wish we could have got on there to see -- see, you know,
9 really firsthand, really, what was going on.
10 But I had to rely on -- on -- you know, on the
11 aerial photography and other instruments that were
12 available; and so, you know, I went back to the office and
13 downloaded aerial photography that the -- that the
14 department keeps and are willing to share.
15 And you know, looked at the topographic map that
16 the USGS publishes, and also went through some of the back
17 file that had been populated, you know, during the course
18 of the claim and recommendation of the water right.
19 Q. So is it safe to say that your view of the area,
20 or your -- your -- what you observed in forming your
21 opinion was somewhat similar to what Ms. Van Bussum
22 indicated this morning?
23 A. I think so, yeah.
24 Q. Okay, and yet Ms. Van Bussum believed that
25 the -- the area that you were in, at least from the yellow

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1 Monica that it was in a state of disrepair.
2 Let me again get a little more detail in that
3 regard. Is that the only criteria that one should be
4 using in determining whether or not it's a ditch or a
5 natural waterway?
6 A. Well, I'm -- I'm not the judge of what people
7 should be using and what they shouldn't be using, but I --
8 Q. But you're the expert, I'm asking you.
9 A. I -- I certainly wouldn't use just that
10 criteria.
11 Q. Why?
12 A. Well, because I -- I feel that it doesn't --
13 You know, it would be like observing an incomplete
14 painting. The painting is not -- not complete without all
15 the colors and all the brush strokes on it. That's --
16 that's just a poor -- I mean it's a poor conclusion.
17 Q. Okay, the big issue that was addressed this
18 morning between, I guess, the questions I was asking of
19 Ms. Van Bussum was whether or not in her opinion, but for
20 the channel, as she called it, the ditch as we call it,
21 was present where the water would in fact flow.
22 In other words, was it naturally flowing without
23 man's intervention in the present location; or would it be
24 otherwise without man's intervention. To me, that's the
25 key. Is that the key for you?

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1 A. I think so. I think -- You know, there's --
 2 One of the -- the problems of this issue is, you know,
 3 there's -- there's not a lot of data available.
 4 And you know, if we -- if we were -- had a lot
 5 of money to work with, maybe we could understand a lot
 6 more by performing a survey of the site, getting a more
 7 detailed lay of the land. But we don't have -- we didn't
 8 have that.
 9 Q. So what did you use?
 10 A. Well, we had to use the -- the USGS topographic
 11 quadrangle map on it.
 12 Q. Do you have that map?
 13 A. I do. It's -- It's underneath that photo over
 14 there.
 15 Q. In fact, why don't you come and get any
 16 documentation you produced.
 17 Okay, now, Mr. Warner, before getting back to
 18 the issue of the -- the evidence you used in forming your
 19 opinion, again, let's make sure I understand what your
 20 opinion is. Let me just ask the question outright: But
 21 for man's intervention, would the water be flowing, as I
 22 said through Monica this morning, parallel with the North
 23 Fork, in your expert opinion?
 24 A. The water is going to seek the most direct path
 25 downslope. If there's an impediment in that path, then

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1 directly to the river?
 2 A. Yes.
 3 Q. Okay, therefore, again, the question: You, too,
 4 are -- I'm having a hard time getting both of you to
 5 answer the darn question.
 6 Is the -- in your opinion, without the --
 7 without the ditch or channel in its present location,
 8 would water coming off that hill head in the similar
 9 direction that the -- that the lines that were -- hatch
 10 lines that were put on the map that's Exhibit Number 2, or
 11 would they flow more directly toward the river?
 12 A. They would head more directly towards the river.
 13 Q. Okay, finally, I got an answer.
 14 A. And I'm sorry about that. You know, that's not
 15 the -- The topographic map is not the only evidence. I
 16 mean there -- there are other aerial photographs besides
 17 the 2004 aerial photograph. There's an '06 photograph and
 18 there's an '09 photograph.
 19 That I think even on this '06 -- excuse me, '04
 20 photograph, you know, it -- it does depict some drainage
 21 coming from nearby and heading towards the river.
 22 Q. And where does that show?
 23 A. Would you like me to approach the map?
 24 Q. Please.
 25 MR. RIGBY: Your Honor, may he?

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1 it's still going to seek the least-resistant direction.
 2 In the case of the -- the Spring Ditch, the
 3 Spring Ditch collects the water and conveys it under man's
 4 intervention. If not for the ditch, the water would flow
 5 to the river.
 6 Q. But it does flow to the river?
 7 A. It does, eventually, now.
 8 Q. So my question is: What's the difference
 9 between the -- Again, I'm asking you a question I asked
 10 Monica this morning. Would, in your opinion, it flow in
 11 the same direction that she's shown as far as the -- she
 12 calls it a channel, we call it a ditch?
 13 A. I don't -- I don't think so. I think it would
 14 flow more directly to the river. And I think that's what
 15 the -- the topographic map shows, too. I mean it's --
 16 I mean, Jerry, there's not -- There's -- The
 17 problem with the topo, too, I mean it's -- there's not a
 18 lot of data, because it's -- it's a topographic map, a
 19 quadrangle map that's designed to show a large area.
 20 But for the area it does show, I mean it shows a
 21 topographic line headed towards the river, where a flow
 22 would head more towards the river rather than heading
 23 directly towards the yellow dot in that direct fashion.
 24 Q. And therefore, are you using the topographical
 25 map as one of your sources to determine it would flow more

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1 THE COURT: Please.
 2 A. This is above the plum circle point of diversion
 3 that there's some drainage coming down across the Hull
 4 property, in this area. And it braids out, but its
 5 general direction is directly south, towards the river.
 6 THE COURT: Mr. Warner, would you mind using a
 7 pointer and standing back so I can see where you're
 8 pointing at?
 9 A. You bet.
 10 THE COURT: Garrick, that pulls out.
 11 Q. (By Mr. Rigby) But Mr. Warner, going from the
 12 point of diversion down is the area that's of most
 13 concern.
 14 A. Obviously. And the point of diversion down, I
 15 mean it's -- I don't see any particular evidence on this
 16 stretch that -- that shows anything that's going directly
 17 south. There's nothing on the photographs that I have
 18 observed that says this -- this is where it's going.
 19 But in -- in the general area of this location,
 20 we do have some drainage that's visible from the surface
 21 of those directly south.
 22 Q. So now again, you were here again this morning
 23 and heard Mrs. Crawford's testimony?
 24 A. I did.
 25 Q. In evaluating your (unintelligible) -- in

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1 evaluating your position for the purpose of determining
2 this to be a ditch versus a natural channel, does the
3 evidence or any of the testimony today either increase
4 your opinion or decrease your opinion as far as
5 determining if (inaudible)?

6 A. Well, I -- I believe that it increases my
7 opinion. I mean there's -- I don't think you can
8 discount any of the evidence that's been introduced in
9 testimony or in -- in affidavit format or letter format
10 that indicates the ditch was maintained.

11 Q. In your work, if testimony is such that the
12 person has observed -- or testifies, as long as he's
13 credible, testifies that they have actually observed water
14 from a channel heading a certain direction, is that also
15 helpful as far as (unintelligible)?

16 A. Absolutely, yeah. I think it -- You know,
17 it --

18 MR. BAXTER: Your Honor, at -- at this point, I'd
19 point out I think it's the court that weighs whether or
20 not the evidence is helpful to the trier of fact, and it's
21 most appropriate for the court to consider what the
22 earlier folks testified as to.

23 MR. RIGBY: Well, Your Honor, first of all, I want
24 to know who's representing the department or
25 (unintelligible) the objectors. But secondly, he's

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1 case?

2 A. Well, I -- I -- I would determine the point of
3 diversion to be somewhere in the environs of that -- of
4 that plum-colored circle that was made.

5 Q. And again, how, specifically for purposes of the
6 court, does that cause a diversion? What is the
7 diversion?

8 A. Well, that -- that's the diversion, because
9 that's where it was maintained to. You know, that was the
10 main spring source for that ditch. And if not, you know,
11 for that -- that -- that location, if not maintained back
12 to that location, there would be no water to be available
13 for your clients.

14 Q. Okay, but the second question is, and I believe
15 it has to go in conjunction with it: That if the water is
16 maintained higher, and thus diverted from its otherwise
17 natural flow toward the river -- that's why I was
18 inquiring further into that particular issue -- does that
19 make a difference for the purposes of determining that
20 point of diversion?

21 A. Oh, sure, sure. If you -- if -- if you want to
22 get water -- Maybe -- Correct me if I'm wrong,
23 Mr. Rigby, but you know, if you have got a farm that's --
24 or a ranch or whatever, you know, that you're trying to
25 get water to, and it's -- it's, you know, maybe a half a

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1 entitled, just as Monica was, to -- to -- in making his
2 determination as to the ditch, to take all evidence into
3 consideration.

4 I'm not -- I'm not asking him to make a legal
5 conclusion as you are required to do. I'm asking him to
6 make his observations, and whether or not that changes his
7 opinion as making this a ditch.

8 THE COURT: Assuming it were true that the
9 testimony --

10 MR. RIGBY: Absolutely.

11 THE COURT: Sure, if we can the question answered
12 that --

13 A. Can I answer it, then?

14 Q. (By Mr. Rigby) Please.

15 A. I -- I -- I think so. I mean that's certainly
16 how I arrived at my decision. You know, I -- I think
17 my -- my visit to the site was very similar to Monica's.

18 You know, I respect Monica's opinion on it, but
19 I arrived at a very different location after observing the
20 rest of the evidence for this.

21 Q. And therefore, because of your work with the
22 department and your knowledge of requiring and needing a
23 point of diversion in order to -- to actually have a
24 diversion from the natural -- or the source, how would you
25 determine the point of diversion to be in this particular

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1 mile or what -- you know, some distance away, and you're
2 trying to preserve head as you get it there, you're going
3 to want to -- to start --

4 You've got to start at a certain elevation to
5 convey it down to a certain elevation. I mean you got to
6 have head to convey it down. So preservation of the
7 elevation in that sense would be paramount in keeping that
8 water high.

9 Q. Do you believe that preservation of elevation is
10 manmade or natural?

11 A. Well, I believe it's manmade. It's a
12 combination of the two, though, Mr. Rigby. Again, I --
13 I -- I think that -- Well, it certainly appears manmade,
14 but the -- the testimony that's been given would -- would
15 lead you to believe otherwise.

16 I feel that without man's intervention in that
17 portion of the stream, it wouldn't convey the water down,
18 all the way down to the end of the ditch.

19 Q. As a result of the elevation -- Of course, I
20 recognize you did not go out there and survey as far as
21 elevation is concerned. But if there's a deviation from
22 its present elevation -- that is, that manmade elevation
23 that you -- that you believe exists -- would it in fact
24 even reach the point of diversion that is suggested by the
25 department; or is there -- substantially would not?

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1 A. Well, I don't -- I don't think -- You know,
2 there's a chance that portions may -- may get there. I
3 believe the ditch as it's observed is a gaining ditch,
4 meaning that, you know, spring -- springs are flowing
5 upward into the basin of the ditch and it's collecting
6 waters from ground water that are flowing.

7 It may convey a portion that may have -- you
8 know, may exist or upwell into the base of the ditch if a
9 portion were there. But it certainly wouldn't convey all
10 of it if it -- you know, if it didn't preserve that.

11 Q. If there were no manmade structure -- Of
12 course, you're saying manmade with some natural flow, as
13 well. Can one -- can one say with precision that but --
14 That it wouldn't -- I mean that any of it would get
15 there? You're -- you're suggesting that perhaps some
16 would. But it's also a possibility, is it not, that none
17 of it would get there?

18 A. Oh, sure. It's a possibility that none of it
19 would get there.

20 Q. Bottom line to all of this, and obviously one of
21 the big questions is why all this? Why are -- why would
22 one (unintelligible).

23 You deal with water rights and the necessity of
24 that. Why are -- why are you concerned -- Or are you
25 concerned that the point of diversion in this particular

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1 they tend to follow the department's recommendation quite
2 closely, and their -- their jurisdiction and handling of
3 that would closely mirror that of the department.

4 It -- it would be difficult to get permission.
5 You'd have to go through a stream channel alteration
6 permit, I suppose, and a 404 permit to do that.

7 Q. Is there a risk that even the normal maintenance
8 that was done as was testified this morning -- again,
9 assuming the testimony was correct, and we have no reason
10 it isn't -- that -- assuming that testimony to be correct,
11 would you be concerned in your experience that that even
12 hand use of tools would cause a violation and require a
13 404 permit?

14 A. Sure, yes.

15 Q. And with that -- with the point of diversion
16 located where the claimants and the objectors are asking
17 it to be, would that -- would that concern go away?

18 A. It would.

19 Q. Again, is there other concerns or other reasons
20 why you believe it's important to have their point of
21 diversion changed, if any?

22 A. None that I can remember at the moment.

23 Q. You -- Again, you have heard testimony this
24 morning as to the fact that this looks -- looks like a
25 duck, quacks like a duck, it's a spring. How do you

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1 area be at the place where the claimants or the objectors
2 are asking this court to give?

3 A. Well, there's -- there's risk. You know, the --
4 Obviously, we have heard testimony to the effect that --
5 that there's been opportunity where high runoff after a
6 heavy winter has, you know, added flows in the ditch such
7 that it overtopped the ditch and gave rise an opportunity
8 for the water to run more directly towards the North Fork.

9 I -- I believe that without maintenance that
10 the -- the opportunity exists that -- that your clients
11 would -- would risk losing their water completely.

12 Q. And do you know of a mechanism or means, as
13 your -- as your work in the department, that without the
14 point of diversion being in the place where they're asking
15 this court to give it, that one -- or they or any of their
16 successors-in-interest would have a right to require that
17 maintenance?

18 A. Well, it would be very difficult to do that.
19 You -- you -- if you lose that point of diversion
20 designation, you know, at where the plum circle is
21 located, you lose, you know, the department's
22 administrative powers in order to help remedy anything
23 relative to that.

24 But also, you know, you run risk with the Army
25 Corps of Engineers. They recognize a point of diversion,

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1 respond to that? Stream, excuse me.

2 A. Jerry, there's -- there's a lot of areas that
3 have appearances that we could easily judge, and it's not
4 a fair judgment. You know, I myself have been guilty
5 of -- of judging people based upon appearance.

6 And -- and I -- You know, certainly, you know,
7 I've -- we have canals and laterals in eastern Idaho that
8 are natural, they look natural. They're fisheries. I've
9 caught some good fish in some of these ditches that convey
10 water. Of those, you know, the Great Feeder is one of
11 them that conveys a tremendous amount of water from the
12 South Fork of the Snake River and services quite a vast
13 amount of land.

14 And among those lands is the Long Island Canal.
15 And the Long Island Canal folks were -- were clever in
16 that they -- they connected their canal to sloughs, back
17 sloughs that existed from between the South Fork and the
18 dry bed of the Snake River, and they -- they put water in
19 one end, and they conveyed it out the other end.

20 Obviously, because they did it that way, those
21 channels look as natural as can be.

22 Q. But what are they determined to be by the
23 department?

24 A. They're canals. They're -- they're -- they're
25 administrated as a canal.

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1 Q. The other issue that was raised by
2 Ms. Van Bussum this morning was the fact that there's --
3 she believes there's a notable difference between the
4 upper canal that we're calling a canal and the lower part.
5 Did you observe those kind of significant
6 differences? And if you did, are they -- are they
7 significant, as I think she called them?
8 A. Yeah, I think so. I think Monica's assessment
9 was -- was -- was very good on that. The lower portions
10 of that -- of that ditch, you know, display very closely
11 what one would, you know, consider a ditch. I mean it's
12 straight -- or straighter, no meanders; D-shaped geometry,
13 channel cross-section geometry.
14 The upper section, you know, it's -- it's got a
15 lot of -- it's got a lot of natural features that you
16 would -- would lend credence to be calling it a natural
17 stream. The features are -- the appearances are really
18 there.
19 Q. And so why doesn't that persuade you to take the
20 same position as she did?
21 A. Well, the -- the -- you know, the evidence
22 that -- that I have observed, you know, shows that the --
23 the applicants -- And, you know, they're the
24 successors-in-interest of people that, you know, they had
25 a -- they had a concept of -- of a spring such that they

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1 side that -- that, you know, you would see and excavate as
2 a ditch. So you know, it wouldn't take a lot to get that
3 ditch to overtop itself.
4 I mean a good, significant snowpack and some --
5 some runoff would -- would do it. And apparently has.
6 Q. Okay, by way of the testimony of
7 Mrs. Crawford --
8 A. Yes.
9 Q. Is that what you were referring to?
10 Okay, so therefore you believe it's necessary to
11 maintain that? Even though it's minimal, it's treated
12 differently above as opposed to below, you believe it's
13 important to maintain that and have the ability to
14 maintain that as
15 far as water right holders below the yellow point of
16 diversion?
17 A. Given time and -- and no maintenance, they will
18 lose their water right.
19 Q. So I guess bottom line to this after hearing all
20 the testimony and your own observation, looking at the
21 topography -- And by the way, I need to mark your
22 topographical map as Heltsley Exhibit Number 12.
23 Is this what you were referring to?
24 A. Yeah, and I do have 8-and-a-half-by-11s if
25 they're --

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1 were afraid that if they performed any type of maintenance
2 that would have been harsh on -- on those springs that
3 they would run the risk of losing springs.
4 And so -- And that's true. People -- people
5 have done that. They have -- they have gone in and worked
6 on springs and lost springs or lost portions of springs.
7 And so that there's credibility in why you would not, you
8 know, hop in the D-8 Cat or backhoe or some mechanized
9 machinery and go up and -- and -- and do the same type of
10 maintenance that you -- you did on the lower end of that
11 ditch.

12 Q. As far as the -- Strike that.

13 In your observation of the reach, again, above
14 the yellow proposed point of diversion --

15 You heard testimony that there is at least a
16 concern that the water right itself could be lost as a
17 result of breaching that, the present channel, ditch.

18 Were you able to observe anything that would
19 cause you concern?

20 A. Well, the -- the channel morphology, you know --
21 And that's -- that's part of the -- the testimony that's
22 been given. The ditch is not deeply incised into the
23 ground. It's not -- it's not four feet below the surface.

24 It's just inches below the surface and -- and
25 there's not -- there's not a big stream bank on either

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1 MR. RIGBY: I again gave copies to all the others,
2 but I do --
3 MR. BAXTER: If I could get a copy.
4 MR. RIGBY: I'm sorry, Your Honor, may I approach
5 the witness?
6 THE COURT: Please.
7 MR. BAXTER: Thank you, Jerry.
8 Q. (By Mr. Rigby) So again, just again for the
9 record, Heltsley/Felton Exhibit Number 12 for
10 identification, is that the topographical map that you're
11 referring to?
12 A. Yes.
13 MR. RIGBY: All right. Your Honor, I would then
14 propose the introduction of Heltsley/Felton Exhibit
15 Number 12.
16 THE COURT: Let's see, I was just looking through
17 my records. I show Heltsley Exhibit Number 9 is the last
18 one?
19 MR. RIGBY: Oh, did we jump?
20 UNIDENTIFIED: No, we had 10.
21 THE COURT: Which one is 10?
22 MR. BAXTER: It would be 11.
23 MR. RIGBY: We -- we did intentionally jump
24 Number 11, because we did not introduce it yet,
25 Your Honor. We will do so.

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1 THE COURT: Oh, okay. But 12, you're now moving?
2 Let's see, have you moved to admit 10 yet?
3 THE CLERK: Yes, he did.
4 MR. RIGBY: Yes, I think we did.
5 THE CLERK: He did.
6 THE COURT: That was admitted, okay.
7 So then we're going to skip 11.
8 MR. RIGBY: For right now, Your Honor.
9 THE COURT: And you're asking for Felton Exhibit 12.
10 Any objection?
11 (No response.)
12 THE COURT: Okay, admitted.
13 MR. RIGBY: In the interest of time, then, I -- I
14 don't have any further questions.
15 EXAMINATION BY THE COURT:
16 Q. Let's see, Mr. Warner, a number of questions I
17 have: You never walked the ditch from the spring source
18 to the recommended point of diversion?
19 A. I did. I -- Real -- very closely, yes. I --
20 I -- I was just below -- Well, let me point it out.
21 I think I got as far as maybe about right here
22 before we were turned back. I think we got up to this
23 location, so very close.
24 Q. But you didn't walk the ditch or channel below
25 that?

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1 A. I did not.
2 Q. Oh, so you -- you don't know the exact location
3 of the spring. There's been testimony of whether it's
4 north or south of the road.
5 THE COURT: Do we have a claimants' preferred
6 description of the point of diversion?
7 In other words, the spring box has gone from one
8 side of the road to the other side of the road. Or is it
9 the same, within the same --
10 MR. RIGBY: Your Honor, it's close enough within
11 the -- the description that again, for purposes of the
12 department and for the purpose of the original
13 recommendation, we are good with that.
14 THE COURT: Well, let's see, the -- the original
15 recommendation is the --
16 MR. RIGBY: I'm sorry, as modified by -- by
17 Ms. Van Bussum.
18 THE COURT: Did we -- Counsel, did we get a
19 description of the amended point of diversion? Not the
20 yellow one, but the plum point? Did we get a legal
21 description of that?
22 MR. BAXTER: I don't think one's been provided yet.
23 And I don't know if the one that was claimed is that.
24 Ms. Van Bussum would know. Maybe we can ask her that
25 question later.

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1 A. This channel? Yes.
2 Q. Oh, you did?
3 A. Yes.
4 Q. Oh, okay, I thought you were thrown off before
5 you got a chance to --
6 A. No. What -- what I didn't -- Yeah, that's
7 (inaudible).
8 Q. You started from the lower end and walked up?
9 A. Yeah, we -- we started way down here and walked
10 all (inaudible).
11 Q. Okay. You mentioned that it's not unusual for
12 farmers to use a natural channel as a ditch to save
13 digging a brand-new ditch. Is this the case where we have
14 got a natural channel and a ditch?
15 A. Perhaps. I mean obviously there's -- there's a
16 natural spring source that exists, and it ran somewhere
17 before the original homesteaders showed up. But for --
18 for the fact that they wanted to put the water elsewhere,
19 they would have -- would have done some alterations.
20 Q. So they take a natural channel and alter it to
21 make for more efficient delivery of water --
22 A. Sure.
23 Q. -- from the stream?
24 A. Yeah.
25 Q. Did you actually see the spring box?

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1 THE COURT: Okay.
2 MR. RIGBY: But you're right, Your Honor. I -- we
3 certainly want to have that tied down. Obviously, the
4 plum -- the plum line as produced -- as the evidence
5 produced, the plum location is the point of diversion we
6 would be claiming. So whatever we need to do to describe
7 that and amend it, we will do so.
8 THE COURT: Okay, hopefully you can get that to me
9 sometime; the township, range, section, quarter, whatever
10 quarter. I'm guessing you're going to get it down to a
11 10-acre tract?
12 MR. RIGBY: Well, again, if -- if the court desires
13 us to. We're concerned about getting it in the vicinity;
14 and, of course, I have a lot of water rights that are not
15 into the 10-acre tract that have the point of diversion.
16 Maybe for this particular one, maybe we do need
17 to have it within the 10-acre point of diversion.
18 Q. (By the Court) Well, Mr. Warner, is it, in your
19 experience, is it normal to describe a point of diversion
20 within a 10-acre tract?
21 A. We -- You know, the department has different
22 opinions, depending on -- on what is being done. They, in
23 the past, have been very comfortable with 40-acre
24 descriptions. But of recent, they're more concerned --
25 Well, they -- they have been describing it as a

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1 10-acre tract more -- more recently.
2 THE COURT: Okay, Mr. Baxter, do you think we can do
3 that now, get their description of the point of diversion,
4 the plum point?
5 MR. BAXTER: Yes. Let me have a second to talk with
6 Ms. Van Bussum.
7 THE COURT: Sure.
8 MR. BAXTER: I think we can provide that, and maybe
9 she can talk to the department's policy on how to describe
10 points of diversions for streams.
11 Ms. Van Bussum, is it the department policy
12 generally to describe points of diversions on springs to
13 the 10-acre tract?
14 MS. VAN BUSSUM: Yes, there is an adjudication memo
15 regarding points of diversion from springs; and for a
16 spring, it is designated to the 10-acre tract.
17 THE COURT: Do you happen to have that, the
18 description of where that plum point is?
19 MS. VAN BUSSUM: No, but I could come up with it for
20 you.
21 THE COURT: Well, if you would. Maybe we could do
22 that sometime here in a few minutes.
23 MR. RIGBY: That would be -- that would be -- Well,
24 Your Honor, I assumed that they -- they -- that after they
25 found their error that that was put with the other. If

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1 CROSS EXAMINATION BY MR. MURPHY:
2 A. Okay.
3 Q. Roger, what was the time of year, again, you did
4 the survey?
5 A. You know, I -- I think it was the first --
6 around the first part of August.
7 Q. At least on my parcel, would you say it was
8 difficult -- Was visibility good? Could you see the
9 stream channel at all?
10 A. When -- when we got to it, yeah, you know. But
11 it's wooded, it's thick. I tore a good pair of pants
12 looking at it.
13 Q. Yeah, okay. Let's see, can you -- can you
14 explain to me in the draft, on the first page -- I'm
15 kind -- I'm confused on -- on the fourth paragraph, the
16 largest paragraph at the bottom, basically the entire
17 paragraph. Could you explain what you're talking about?
18 THE COURT: Let's see, now, this is one of the two
19 letters that -- Let's see, IDWR 5 or 6?
20 Q. (By Mr. Murphy) Is it -- is -- This is your
21 letter, right, Jerry? I mean Roger.
22 MR. RIGBY: 5, I think. I believe it was, Roger?
23 Q. (By Mr. Murphy) Yeah.
24 A. Yes.
25 MR. RIGBY: Were you not asking --

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1 that's not the case, then I am in error and we will need
2 to do that.
3 THE COURT: Oh, maybe we already have that, then?
4 MR. RIGBY: Monica's (inaudible).
5 MR. BAXTER: I think they were claimed to the
6 10-acre tract. We just need to figure out if that was
7 where the plum area is.
8 MR. RIGBY: And that may be the case.
9 MR. BAXTER: We'll have to take a second.
10 MR. RIGBY: Your Honor, I think rather than take
11 additional time, I think we can work that out; and we'll
12 present that fact to the court, if that pleases the court.
13 THE COURT: Okay, good.
14 Now, should we get to cross-examination of
15 Mr. Warner? Garrick Baxter, do you want to go first, or
16 do you -- What's your preference?
17 MR. BAXTER: I'll defer to the parties to go first,
18 Your Honor.
19 THE COURT: Let's see, Mr. Hull, would you like to
20 go?
21 MR. MURPHY: Mr. Murphy.
22 THE COURT: Oh, Mr. Murphy.
23 MR. MURPHY: Your Honor, Patrick Murphy again.
24 Could I get Exhibit -- IDWR Exhibit 5 so Roger
25 could refer to it?

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1 MR. MURPHY: I said "Jerry." I meant "Roger."
2 Sorry.
3 THE COURT: So now we're referring to IDWR Exhibit
4 Number 5?
5 MR. MURPHY: Yes, the last paragraph on the first
6 page.
7 Q. (By Mr. Murphy) Can you explain to me where
8 that is?
9 A. Yeah. You know, this (unintelligible), I was
10 looking directly at this meadow area here.
11 Q. Okay. Now, correct me if I'm wrong: You were
12 not on the Hulls' property --
13 A. No.
14 Q. -- doing the survey?
15 A. No, no.
16 Q. Okay.
17 A. I don't think I was.
18 Q. Could you show me where, real quickly --
19 In the middle of that paragraph, it says: "At
20 the top of the meadow, the North Fork meanders near the
21 base of the slope and furthest west from the highway. It
22 is at that location that was represented the beginning of
23 the spring."
24 A. Yeah, it doesn't show it on this map, but
25 this -- you know -- this -- this meadow would

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1 (unintelligible) up here to the North Fork, comes around,
 2 swings in front of the highway, and it comes up near the
 3 base of the mountain in this area there.
 4 Q. Okay, then, in that question: "The spring-fed
 5 ditch then travels along the base of the slope southward
 6 while the North Fork meander curves its way eastward
 7 towards the highway."
 8 So we're coming downstream from above the map,
 9 is that what you're saying?
 10 A. Yeah, it was represented to me that -- that the
 11 springs -- the major springs started here; but there was a
 12 ditch that continued along the base of the slope here, and
 13 that it also invades spring flows.
 14 Q. Okay. So that's a ditch -- or that's a ditch
 15 you're referring to on the Hulls' property right there?
 16 A. That -- that is, yes.
 17 Q. Okay.
 18 A. You know, and that's --
 19 Q. That's fine.
 20 A. Go ahead.
 21 Q. You said you didn't go to the spring box?
 22 A. I didn't see a spring box.
 23 Q. Okay. I'm not saying there's one there. I'm
 24 just saying people said there's a spring box there.
 25 A. Yeah, you know --

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1 I don't -- I don't find any description of it in here.
 2 I mean you were talking about down on the Forest
 3 Service. What I'm thinking is off the map and up on the
 4 Hull property. If you can --
 5 If you have any description of something on the
 6 specific between the two points of diversion we're talking
 7 about, can you clarify that for me?
 8 MR. RIGBY: I believe that's what he did do --
 9 A. Yeah.
 10 MR. RIGBY: -- in the direct examination.
 11 A. Sure. I'll try the best I can. I mean towards
 12 the bottom of that same paragraph, it starts and says:
 13 "Along about where the Murphy driveway crosses the ditch,
 14 it is represented that additional springs discharge into
 15 the ditch, thereby increasing flows in the ditch."
 16 That's on your property.
 17 Q. Yeah, okay. Yeah, it actually starts on the
 18 Hulls' property, okay. Another question.
 19 A. Okay.
 20 Q. The last -- the top of the last paragraph on
 21 page 2, could you read the first two sentences for us?
 22 A. The last paragraph on page 2?
 23 Q. Yes.
 24 A. Okay, what starts "the opportunity"?
 25 Q. Yes.

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1 Q. I'm just asking that question.
 2 A. -- as close as I could estimate, you know, I
 3 think I got to about right here, and then we tried to
 4 traverse out. We actually went across the ditch right
 5 here, came out about right here, and then we turned back.
 6 Q. Okay.
 7 A. (Inaudible).
 8 Q. I just -- Yeah, thanks for the clarification,
 9 because I think that whole paragraph's talking about above
 10 my property, then?
 11 A. I think so.
 12 Q. Okay. And so the last sentence in the paragraph
 13 says: "The ditch progresses southward to a headgate
 14 control structure." Can you tell me where that is?
 15 A. (No response.)
 16 Q. It goes to -- I'm sorry, on the top of the
 17 second page. Sorry.
 18 A. I'm not sure it's on this map. I -- I -- my
 19 understanding, it's further below where it
 20 (unintelligible) back to the --
 21 Q. Okay, that's fine.
 22 A. Yeah.
 23 Q. I'm trying to find any description in -- in your
 24 assessment of actually the spring upon my property, the
 25 Murphy property, between the two points in question. And

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1 A. "The opportunity to observe the ditch and the
 2 North Fork without benefit of any outside knowledge might
 3 easily lead one to believe that the ditch is not a ditch,
 4 but a natural stream of itself conveying spring water from
 5 its origins to the lower ditch with excess wasted back to
 6 the creek and the North Fork near Hughes Creek Road.
 7 However, information obtained by" Felton -- excuse me --
 8 "Heltsley and Felton lead one to conclude otherwise."
 9 Q. What did you mean by that statement?
 10 A. Well, what I meant is if -- if you look at the
 11 information provided in the back file that was provided to
 12 the department, that concluded otherwise.
 13 Q. Okay, in the middle of that paragraph, just for
 14 clarification, about halfway down towards the right, it
 15 starts with a sentence, "For instance, the lower ditch
 16 turns sharply" --
 17 A. Okay.
 18 Q. Did you find that sentence?
 19 A. (Indicates.)
 20 Q. Could you read that out loud for us?
 21 A. "For instance, the lower ditch turns sharply
 22 towards the west and is excavated into the hillside,
 23 preserving its optimum elevation for maximum capability of
 24 irrigation of the lower meadow lands near Hughes Creek
 25 Road and south of the same road."

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1 Q. Would you say that section of water
2 (unintelligible) is indicative of a channelized ditch?
3 A. Sure.
4 Q. Okay, could you --
5 A. Channelized ditch?
6 Q. Well, a channelized section?
7 A. Channelized section, I'm not sure I understand
8 what you're trying to say. It's a -- If you're asking if
9 it looks like a ditch --
10 Q. Does it look more like a ditch than a natural
11 channel?
12 A. Sure, yes.
13 Q. Okay.
14 A. I would -- I would agree with you.
15 Q. Could you show us on the map where that takes
16 off?
17 A. I'll do my best. It looks like about right here
18 is where it takes on its normal banks.
19 MR. BAXTER: Mr. Warner --
20 Q. (By Mr. Murphy) (Unintelligible) see that?
21 A. No. I'm sorry about that. I had to step
22 slightly to see it. But it's down about right here, and
23 it takes a sharp turn here. Otherwise, it's --
24 Q. So would you agree above that section that
25 it's -- it's more difficult to ascertain if it's a ditch

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1 MR. BAXTER: No, Your Honor, no questions.
2 THE COURT: Okay, any re-direct?
3 MR. RIGBY: I don't believe so, Your Honor. Thank
4 you.
5 THE COURT: Do we need to hold Mr. Warner here for
6 further examination?
7 MR. WARNER: He needs a ride home.
8 MR. RIGBY: He's my ride, so I think I'm going to
9 say "yes."
10 THE COURT: Okay, we'll hold him.
11 THE CLERK: I need that exhibit.
12 MR. WARNER: Yes, yes, okay.
13 THE COURT: Okay, Mr. Rigby, your third witness on
14 direct.
15 MR. RIGBY: Your Honor, I -- I apologize. I'll have
16 (unintelligible). Yes, Your Honor, we would call Nancy
17 Liebrecht to the stand, please.
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1 or a stream?
2 A. I think that was my testimony earlier, yes.
3 MR. MURPHY: Okay, that's all the questions I have.
4 THE COURT: Okay, Mr. Hull? Please.
5 MR. HULL: Just one quick question. Daryl Hull.
6 CROSS EXAMINATION BY MR. HULL:
7 Q. Mr. Warner, you said that it was represented to
8 you that above, on the blue property, which is my land,
9 alongside the hillside, there is water coming down that
10 feeds into other water that creates more springs.
11 Who represented that to you?
12 A. Well, good question. You know, I -- I believe
13 Ann helped represent that.
14 Q. Okay.
15 A. We weren't sure.
16 Q. Okay, no further --
17 A. We would have liked to have walked that. Nobody
18 would give the opportunity to --
19 Q. Well, you could have asked.
20 A. Yeah.
21 MR. HULL: No further questions.
22 A. Sure.
23 MR. HULL: Thank you.
24 THE COURT: Any other questions?
25 Let's see, Mr. Baxter, you didn't get a chance.

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1 NANCY LIEBRECHT,
2 produced as a witness at the instance of the Claimants
3 Heltsley and Felton, being first duly sworn, was examined
4 and testified as follows:
5 DIRECT EXAMINATION BY MR. RIGBY:
6 Q. Good afternoon.
7 A. Good afternoon.
8 Q. Please state your full name and current address
9 for the record.
10 A. Nancy Liebrecht, 282 North Second West, Rigby,
11 Idaho, 83442.
12 THE COURT: Could we get a spelling of the last
13 name, please?
14 A. I was afraid you'd ask that. L-i-e-b-r-e-c-h-t.
15 THE COURT: That's almost spelled right.
16 A. Oh, good.
17 THE COURT: Okay.
18 Q. (By Mr. Rigby) Very good. Nancy, are you
19 employed?
20 A. Yes.
21 Q. And where are you employed?
22 A. I work as a consultant with Rocky Mountain
23 Environmental Associates.
24 Q. And are you employed elsewhere, or is that a
25 full-time job?

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1 A. I do some other work.
2 Q. For your own, or on a consultant basis for
3 others?
4 A. On a different line of work.
5 Q. Oh, okay. So it's not related to water?
6 A. No.
7 Q. Very good. And before being a consultant with
8 Rocky Mountain Environmental, were you employed elsewhere?
9 A. Yes.
10 Q. And where were you employed?
11 A. I was the managing partner of a consulting
12 business, environmental consulting business called Lone
13 Goose Environmental.
14 Q. Where was that located?
15 A. It was located in Idaho Falls, and then later in
16 Rigby.
17 Q. And can you give me approximately the years that
18 that was -- that you were --
19 A. 1991 until about two years ago.
20 Q. In the last two years, have you been doing
21 consulting work with Rocky Mountain Environmental?
22 A. Correct.
23 Q. Okay, so therefore prior to that time, before
24 the nineties, were you also employed elsewhere?
25 A. Yes.

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1 like the ice age, and that created a certain topography.
2 That you have planned communities in addition, adding to
3 that. So you're working in layers of factors to
4 understand the existing landscape.
5 Q. So it's kind of a macro-approach instead of a
6 micro-approach?
7 A. Absolutely.
8 Q. Therefore, you -- You have been present today
9 during the testimony that's been presented thus far,
10 right?
11 A. Yes.
12 Q. In fact, have you been retained by the -- the --
13 my clients --
14 A. Yes.
15 Q. -- for the purpose of giving your expert
16 testimony concerning this?
17 A. Yes.
18 Q. And do you believe that your past experience and
19 your education qualifies you to -- to opine as to the
20 issues that are relevant to this court today in helping it
21 make a decision as to the point of diversion?
22 A. I hope so, yes.
23 Q. Okay.
24 A. In addition, when Century Telephone put in
25 fiber-optic cable in the entire Salmon area, I did the

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1 Q. And where were you employed?
2 A. I was employed as -- in Philadelphia as a
3 landscape architect and environmental consultant for two
4 large planning firms, Kanalstein, Danton, Johns, and John
5 Olivieri, PA.
6 Q. And in general terms --
7 Well, let's see, I want to make sure I'm done
8 here. Prior to that time, what was your (inaudible)?
9 A. Prior to that time, I was in graduate school at
10 the University of Pennsylvania.
11 Q. Okay, so let's go into the education, then.
12 What is your educational background?
13 A. I have a Master's Degree in Landscape
14 Architecture with an emphasis in environmental site
15 analysis.
16 Q. And what does that entail?
17 A. That entails making land use decisions based on
18 an analysis of the physical and natural site factors. And
19 to do this, you have graduate level education in geology,
20 hydrology, soil science, plant ecology. And you look at
21 the natural and physical site factors to understand what
22 the nature of the existing landscape is.
23 In other words, you have landscape, you're
24 wanting to border bordering the North Fork. That
25 landscape is created by geology overlaid by various events

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1 analysis, wetlands delineation, and that entailed a number
2 of trips to this particular region. I have driven up and
3 down that stretch of 93 including Hughes Creek and Sheep
4 Creek, so I'm pretty familiar with that area.
5 Q. And how long were you employed or did that kind
6 of work?
7 A. I made trips over several years.
8 Q. In this area?
9 A. Yes.
10 Q. So therefore, again, I guess you said, "Well, I
11 think so." Don't (unintelligible). Are you being just
12 modest, or do you believe that you have an opinion and
13 would be a -- qualified to give an expert opinion
14 concerning this particular area?
15 A. I do.
16 MR. RIGBY: Your Honor, I would move that she be
17 treated as an expert witness.
18 THE COURT: What's the exact area?
19 MR. RIGBY: For the purpose of --
20 Q. (By Mr. Rigby) Again, I'll ask you to explain
21 that again, the two areas as to your expertise.
22 A. Environmental site analysis. I write
23 comprehensive baseline reports for projects on the
24 national forest, prepare documents to wetlands
25 delineations. And this type of work is -- is not just

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1 looking at hydrology, but looking at all of the natural
2 and physical factors that contribute to what you see.
3 Q. And let me ask you, also: Are you -- are you
4 educated in or have experience in plant ecology?
5 A. Yes.
6 Q. And to what extent?
7 A. I'm a Registered Landscape Architect, you know.
8 We study plants.
9 Q. Very good. So -- so I guess that would be an
10 additional area that you have expertise in, as far as
11 you're concerned?
12 A. Absolutely. And riparian wetlands species are a
13 particular specialty.
14 Q. Very good.
15 MR. RIGBY: So Your Honor, I guess I'd add plant
16 ecology into our area of expertise (unintelligible).
17 THE COURT: Let's see, I've got environmental site
18 analysis, landscape architecture, and plant analysis?
19 MR. RIGBY: Ecology. Or what --
20 THE COURT: Plant ecology?
21 MR. RIGBY: Let's ask the witness.
22 Q. (By Mr. Rigby) How would you term it?
23 A. Plant ecology.
24 THE COURT: Is there any objection to the witness
25 being admitted as an expert in environmental site

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1 along Highway 93, and -- well, I assume they installed it
2 up Hughes Creek and up Sheep Creek, the land all up the
3 stream reaches.
4 Q. For this particular, I guess, assignment that
5 you were asked to opine as to your expert opinion, you did
6 not visit with Mr. Warner that particular day, is that
7 correct?
8 A. No.
9 Q. In fact, you haven't visited this site
10 (inaudible)?
11 A. No.
12 Q. The question here, again, from a macro point of
13 view: What general characteristics does this reach have,
14 in your opinion, as opposed to the general area? Are
15 there certain distinctions that -- that you would give to
16 this particular area, or is it fairly general and normal
17 throughout the area?
18 A. Well, this particular reach along the North Fork
19 is a slightly altered landscape. I listened to
20 Ms. Van Bussum's testimony, and the field indicators that
21 she identified to make the determination that the Spring
22 Ditch was a natural stream, I don't have a disagreement
23 the specific elements are indicative of a natural stream.
24 But there are several critical factors you have
25 to consider in addition, and one is the history of land

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1 analysis, landscape architecture, and plant ecology?
2 (No response.)
3 THE COURT: Okay, hearing no objection, she's
4 designated as an expert in those three areas.
5 MR. RIGBY: Very good, Your Honor.
6 Q. (By Mr. Rigby) Then let's move on.
7 Nancy, as far as the familiarity with the North
8 Fork area, you just very briefly addressed your
9 familiarity, at least most recently, in dealing with the
10 cabling or whatever you were -- whatever you were
11 (unintelligible).
12 A. That was when Century Telephone put in
13 fiber-optic cable throughout that area. They did this in
14 increments. So throughout the mid 1990s, I made several
15 trips. I've also done wetlands delineations in the North
16 Fork.
17 Q. As far as this particular reach is concerned,
18 what -- what experience, if any, have you had in this
19 reach?
20 A. Well --
21 Q. And I don't want -- I don't want to compress it
22 to -- Because we're talking macro here. Excuse me, yeah,
23 macro versus micro here. I'm talking about the North Fork
24 reach.
25 A. Century Telephone put in fiber-optic cable all

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1 use, and the history of alterations.
2 Q. And what would lead you to believe that there
3 was a difference in land use or that land use would be
4 part of the equation here, and alterations for that
5 purpose?
6 A. Well, a number of different things. When I am
7 doing a site analysis or report, I rely -- Or in
8 understanding an existing condition, it's very important
9 to take into consideration whatever historical evidence
10 you have of changes in the landscape.
11 This means relying on written documents,
12 historical records, photographs, old aerial photographs.
13 And a very important source is just talking to people who
14 have been on the land not just for a few years, but
15 decades.
16 In Idaho, I have often found ranchers who have
17 been farming a property, you know, for three or four or
18 five decades, are an extraordinarily important source of
19 information regarding the existing condition of a
20 property.
21 So in making a final determination, you look at
22 the physical characteristics of the property, but you also
23 take into consideration work that's been done to change
24 the landscape.
25 Q. So in your -- in your analysis, and

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1 incorporating all of those sources --
2 By the way, the physical analysis, would that
3 include the -- the topographical features of the land, as
4 Mr. Warner indicated?
5 A. Absolutely. You have to look not just at what
6 you see right now here and there -- or in this particular
7 location, but consider the entire valley. This section of
8 the North Fork -- or this section of the drainage is a
9 relatively young drainage in geologic terms.
10 The North Fork flows through an area of a basin
11 that has been filled with alluvial and -- alluvial
12 sediments, and it has carved its channel in the sediments.
13 But as I even look at this particular
14 photograph --
15 Q. And you're referring to IDWR Exhibit Number 2?
16 A. Yes. I would strongly suspect from this reach
17 of the North Fork -- You know, you're looking at a
18 channel that's encased with mature woody vegetation. My
19 best professional opinion is the channel of the North Fork
20 has been altered to accommodate farming and the highway
21 through this valley.
22 I would suspect, if you came there as an early
23 settler, the North Fork would have a very different
24 configuration.
25 So you're looking at a channel bordering a

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1 Q. And -- and is it consistent with your
2 understanding and your expertise and your work that the
3 hatched area is -- is a ditch, or is it a stream?
4 A. I -- I kind of have to concur with Roger. My --
5 my best professional opinion would be that it is
6 partially or even perhaps wholly constructed.
7 You know, I, in sometimes doing research, I have
8 accessed photographs, even paintings that depict a
9 particular location, and can make a definitive decision
10 about the origin.
11 But in this case, I think it's most likely a
12 ditch. And it may have taken elements or portions --
13 homesteaders, you know, to facilitate the movement of
14 water; but I think -- I think the term you used, in
15 listening to this, is that human intervention or human
16 action created its current configuration; and I would have
17 to agree.
18 Q. And in fact that was going to be my next
19 question. Is that but for man's intervention, would that
20 drainage appear as it appears today, in your professional
21 opinion? I think --
22 A. No.
23 Q. -- you've already answered no. Therefore, what
24 would you -- Again, looking from the macro instead of the
25 micro, because you weren't there, looking at the macro,

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1 highway that, you know, the ordinary person -- or even an
2 educated person in alluvial geomorphology might possibly
3 say, "Hey, you know, that's -- it's got big trees around
4 it, that might be the natural channel."
5 But I strongly suspect that reach right along
6 the highway has been moved and straightened.
7 So it's important, in making the decisions in
8 any particular landscape feature, to look at the build,
9 you know, the physical things that man has put in; and
10 again, look at the historic records, what -- what have
11 people written, said about particular site features.
12 Q. And have you reviewed those records?
13 A. Some of them.
14 Q. And have you seen in those records anything that
15 would indicate that this is -- was in fact deemed by them
16 to be a ditch?
17 A. Yes.
18 Q. And are those records the ones I introduced this
19 morning?
20 A. Yes.
21 Q. And in any of those records or any of your
22 review of these, did you ever see any historical document
23 referring to -- and I'll call it the hatched area between
24 the yellow and the plum to be anything other than a ditch?
25 A. No.

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1 what would you more expect a spring that is abovegradient
2 from the river to -- what would be its general path?
3 A. I would have to say it would trend towards the
4 North Fork. It might connect with the North Fork, it
5 might not. But if you look at the aerial photographs,
6 even beyond, above and below the site, you see a fairly
7 consistent pattern of drainages, dark areas; you know, the
8 signature of old drainage-ways that pretty much follow the
9 same sort of angle as that blue line.
10 And I believe there was a previous witness who
11 testified that there was flooding out in that area.
12 Q. Mrs. Crawford?
13 A. Right. And I probably would have suspected that
14 there would be a series of springs along the toe of that
15 slope, and they would flow out to the south towards the
16 North Fork. They might not reach it. They might create,
17 you know, ponded areas.
18 Q. And again, I'm attempting to not put words in
19 her mouth or reiterate her testimony completely, but my
20 understanding is that her -- her testimony was that she
21 witnessed water overflowing the banks, or whatever it is,
22 actually into the area, and it did go toward the North
23 Fork. Would that be consistent, then, with what you
24 observed here and would testify to as an expert?
25 A. Yes.

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1 Q. So her testimony is not inconsistent, or you
2 find anything wrong with that testimony as far as
3 believability?
4 A. In the letter I wrote, I made that judgment
5 prior to hearing this testimony and meeting the people
6 involved. That was basically my assessment just from, as
7 I stated in my letter, reviewing aerial photography and
8 under previous general understanding of the region.
9 Q. So if water does flow more directly toward the
10 river, then it -- is there any other -- is there any other
11 reason than man's intervention that would cause that, in
12 your opinion?
13 A. The only thing that would, in my experience,
14 cause the channel to strictly follow the dashed line would
15 be if there was some kind of geologic feature containing
16 it in that location. And at that area is from --
17 You know, I have done some wetlands delineations
18 in the North Fork and done some soil test pads; and I
19 pretty much generally have found that the valley bottom is
20 unconsolidated sediment and sands and gravels, cobbles.
21 Now, there's nothing that would restrict a
22 channel to that location.
23 Q. So it would -- it would go towards the river?
24 A. Exactly.
25 Q. As far as the -- again, your experience with the

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1 It probably spread out in braided channels. That -- that
2 would be my expectation from what I know of this area.
3 Q. So therefore, with your expertise in plant
4 ecology, the fact that the vegetation has grown up on this
5 particular -- again, I call it hatched, you call it
6 dashed, whatever it is lines between the yellow and plum
7 dot, does that give you any cause to second guess your
8 opinion here today?
9 A. Plants grow where water is, and it -- You have
10 mature vegetation along ditch banks all over Idaho. When
11 flood irrigation was the common practice versus wheel
12 lines, you can look at old aerial photographs of Idaho,
13 and Russian Olives, mature Cottonwoods, all sorts of
14 vegetation is lining those ditch banks.
15 Additionally, as I stated in my letter, the
16 dominant tree along this corridor is Black Cottonwood,
17 populace trichocarpa. In 20, 30 years, you could have
18 something that looks pretty substantial.
19 Q. And you already know from the testimony we're
20 talking the ditch was claimed to have been built over a
21 hundred years ago?
22 A. Yes.
23 Q. So again, I guess to answer the question -- I
24 think you already said it, but in long form -- does that
25 cause you any concern with the vegetation there in

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1 historic use and diversion of water by the settlers, is
2 this particular one consistent with the argument that has
3 been testified to previous today of keeping it high toward
4 the top of the mountain -- or excuse me, the bottom of the
5 mountain as it hits the valley, before it gets into the
6 valley?
7 A. Absolutely. I see this all over Idaho, and
8 ranchers and farmers are still doing this. It -- it has
9 multiple benefits. As Roger said, it provides head to get
10 water downstream. It prevents --
11 It controls overflow across pasture and
12 farmland. You can control the amount of water that --
13 what one might ordinarily expect to flow south towards the
14 North Fork, so there are multiple benefits to that.
15 Q. And -- and that requirement in order to keep it
16 high and -- especially for users down below -- in your
17 opinion, then, if the normal tendency of water is to go
18 downgradient from a spring and it would go downgradient,
19 would that necessitate man's intervention at the base of
20 the spring or close to the spring?
21 A. I would expect, yes, that a certain amount of
22 work would have to be done. If you looked at this place
23 before the homesteaders came, I would suspect rather than
24 going into the channel, water from the purple dot, or the
25 plum dot, probably flowed directly downslope to the south.

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1 changing your opinion?
2 A. No.
3 MR. RIGBY: Okay, I have nothing further,
4 Your Honor.
5 EXAMINATION BY THE COURT:
6 Q. I can't believe they have had fiber-optic
7 service up there for 20 years.
8 Do we have it here in Twin Falls yet?
9 A. It was mostly the mid-nineties, you know, that
10 they put it in. I forget when -- The last one they did
11 was up Power Creek (Inaudible).
12 Q. Talk about lucky.
13 UNIDENTIFIED: We don't have cell service, but we
14 have fiber-optics.
15 A. I think that was about 2000, maybe, that it went
16 up Power Creek.
17 Q. (By the Court) Well, there are a lot of lines
18 on the IDWR Exhibit 2. Was this a mining district? Was
19 this area around here in the Gibbonsville -- wasn't it a
20 mining district?
21 A. Oh, there are -- there are huge spoil piles up
22 Hughes Creek. It was very heavily mined.
23 Q. Well, what I'm getting at is what we see on IDWR
24 Exhibit 2, is that evidence of mining activity? For
25 instance, like a dredge would leave a mess, I'd say, after

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1 their operation is over?

2 A. I -- I kind of doubt this particular area was
3 mined. There was mining in the vicinity.

4 Q. But you don't see mining as being a factor in
5 changing the flow of the North Fork or of the ditch?

6 A. No, I think the North Fork was probably altered
7 for the highway, you know. And rivers were also moved,
8 you know, to facilitate agriculture.

9 If you look at some of the really old
10 photographs, there are some old meander bends, you know,
11 much stronger meander bends that look like old oxbows or
12 old river channel. And you know, the early settlers
13 didn't have any problem moving things so they had a nice
14 big field that they could put their animals and farm and
15 that sort of thing.

16 Q. So they can get their fiber-optic service?

17 A. Oh, yes, they -- I didn't know they were
18 thinking of that.

19 THE COURT: Let's see, does anybody have any
20 questions of Ms. Liebrecht -- Liebrecht -- Liebrecht?

21 MS. LIEBRECHT: Liebrecht.

22 MR. BAXTER: I defer to the parties, first.

23 MR. MURPHY: Yes, Your Honor, Patrick Murphy.

24 CROSS EXAMINATION BY MR. MURPHY:

25 Q. Nancy, what general direction, at least in this

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1 But you know, it's possible there's a section --
2 you know, your early pioneers used sections of channel.

3 I think the North Fork in living memory, you
4 know, it is a flashy stream -- or river, high-gradient
5 river. It moves a lot of cobble, particularly in snow
6 melt.

7 But I think in living memory, it's probably been
8 pretty stable, you know. The highway department really
9 doesn't like it when it comes out of its banks and floods.
10 It's entrenched for much of its length, you know, from
11 Gibbonsville.

12 Q. In your experience, are -- in the Upper Salmon
13 River Basin, North Fork, would you say spring systems are
14 fairly stable?

15 A. Spring systems are fairly stable most places. I
16 haven't been on this property. I've looked at
17 photographs. And Ms. Van Bussum mentioned, you know, the
18 fact that the channel through your property is beginning
19 to braid and, you know, there is, you know, some meanders,
20 sinuosity developing, that sort of thing.

21 That typically indicates to me -- You know,
22 again, I'd have to look at this particular reach, but
23 that -- that kind of pattern indicates two things.

24 One, it's trying to find a more natural
25 configuration than what it's been in. And second, it's

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1 reach of the North Fork that this project and properties
2 are on, what general direction does the North Fork flow
3 in?

4 A. Well, you can see it. It flows kind of more
5 northeast/southwest.

6 Q. Would you say the North Fork, Salmon River is a
7 high-gradient river?

8 A. It is, yes.

9 Q. So it's going to follow along grade, right, in
10 kind of the southwesterly direction?

11 A. Yeah, it goes down to its confluence with the
12 Salmon.

13 Q. So hypothetically, because the North Fork is
14 probably very mobile, has very high water events;
15 hypothetically, because it can move all the way through
16 the flood plain where the spring is, also, can the --
17 You made the distinction that maybe the spring
18 flows in almost a southerly direction. But in fact a
19 hundred years ago, could it have -- could it have flowed
20 in a southeasterly direction on grade with the North Fork?

21 A. I doubt that. It -- it -- You know, you would
22 have to go back in time and -- You know, I've -- I've
23 used paintings of the Missouri River to determine, you
24 know, changes. You know, water color paintings, changes
25 in the configuration.

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1 moving a certain amount of sediment, which you'll --
2 you'll have some alluvial stuff moving through the spring
3 systems, but you know, it's possible -- and I'm
4 speculating -- that due to livestock grazing it in there
5 that it is moving some sediment and (unintelligible).

6 Q. So from the aerial photographs that you looked
7 at, could you tell with certainty between the two proposed
8 points of diversion either way, that that was either a
9 stream or a ditch from an aerial photo?

10 A. I think based on the aerial photographs, there's
11 a high probability that it's a ditch.

12 Q. Even without being able to see the water from an
13 aerial photograph?

14 A. Yes. And that's simply because you see the
15 signature of how drainage goes through that whole valley.
16 I mean if you look at aerial photographs -- And Roger
17 pointed it out here. This particular area, Mitzi Felton
18 pointed out the -- you can see the dark area here --
19 pointed out that that was where there was bank overtopping
20 and flooding.

21 That that same kind of pattern is fairly
22 consistent in the aerial photography, so that leads you to
23 the conclusion that springs, but for people altering the
24 landscape, it -- that that would be the way that it would
25 go.

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1 You know, as Ms. Van Bussum said, water goes
2 downgradient, and the quickest way to the lowest spot in
3 the landscape is the channel of the North Fork, and it's
4 going to find its quickest way there.

5 The one thing that will prevent it from doing
6 that is people altering drainages, which they have done
7 all over Idaho. The second thing might be some sort of
8 geologic feature that contains a channel in a location
9 that doesn't seem, on the surface, to make much sense.

10 But as I said in my letter, from a review of the
11 aerial photographs, I -- my best professional opinion is
12 that if you came there in 1870 and looked at the natural
13 landscape, you -- it would be flowing in that southerly --
14 the springs would be spilling out and flowing in the
15 southerly direction.

16 Q. I have a curiosity question: Because you're a
17 plant expert, can you tell almost the species composition,
18 diversity, all the species composition, diversity by
19 looking at an aerial photograph, without a ground --
20 without looking -- ground-truthing it?

21 A. You -- Well, I -- I've done some comprehensive
22 vegetation mapping, you know; and just recently finished
23 an 850-acre study on a national forest. And typically
24 what -- when you're dealing with large areas, you use the
25 signature of the aerial photographs.

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1 MS. LIEBRECHT: Okay.
2 MR. HULL: No questions, Your Honor.
3 THE COURT: Any further questions?
4 MR. BAXTER: Your Honor, actually, I do have a few
5 just for clarification on the record.

6 THE COURT: Garrick Baxter.
7 CROSS EXAMINATION BY MR. BAXTER:

8 Q. Ms. Liebrecht --

9 A. Liebrecht.

10 Q. Liebrecht. Just so -- so we're clear on the
11 record for the special master here today, you did not
12 conduct a site visit, and you did not take a survey of the
13 property, as talked through with Mr. Rigby.

14 So your conclusions here today are -- you said
15 were based upon documents, which were the documents --
16 You said that they were the documents submitted by
17 Mr. Rigby here as the exhibits, and then the review of the
18 two-dimensional aerial photographs.

19 Is that the basis of -- of your decision of
20 which you wrote about in your letter?

21 A. Additionally, as I pointed out, I have done a
22 fair -- substantial amount of site work in this area.

23 Q. But not on this particular stretch?

24 A. Not on that particular property, but I did the
25 wetlands delineation on the North Fork --

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1 And you know, you have different colors for
2 conifers, Cottonwoods; a scale, you know, for things like
3 Dogwoods and Alders, brush -- sagebrush. So you can use
4 aerial photography to do reasonable mapping. Then what
5 you go back and do is ground-truth it.

6 I can talk about the vegetation in this area
7 with a reasonable degree of confidence because I have
8 written several wetlands delineation reports, which meant
9 that I had to specifically describe the lands.

10 Q. Okay, when you say reasonable, but there's --
11 there's error within reason, right? You can -- You --
12 you might not be able to tell exactly from an aerial photo
13 if things are ditch or certain tree species?

14 A. I -- I don't follow -- I -- I can tell the
15 difference between conifers and Cottonwoods from an aerial
16 photograph. I can tell the difference between sagebrush
17 and other things.

18 But the dominant riparian tree which will
19 colonize ditches, as well as along rivers, in this area is
20 typically Black Cottonwood.

21 MR. MURPHY: Okay, no further questions, Your Honor.

22 THE COURT: Okay, thank you, sir.

23 Let's see, Mr. Hull?

24 MS. LIEBRECHT: Oh, I still have (unintelligible).

25 THE COURT: Don't go anywhere yet.

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1 Q. Right.

2 A. -- for that whole reach of the highway when
3 Century Telephone was doing its cable upgrades.

4 Q. And I agree that's -- that's good work. But
5 it's -- it's not this particular area that we're talking
6 about here today, so one last question: Have you
7 calculated the slope for this area?

8 A. I haven't.

9 MR. BAXTER: Okay, thank you.

10 No further questions, Your Honor.

11 MR. RIGBY: I have no further questions, Your Honor.

12 THE COURT: Okay, thank you for joining us,
13 Ms. Liebrecht.

14 Now, Mr. Rigby, are you ready to move on to --
15 do we have another witness, expert witness?

16 MR. RIGBY: No, we do not. We have two more lay
17 witnesses.

18 THE COURT: Just ordinary people?

19 MR. RIGBY: Just ordinary --

20 THE COURT: Good.

21 MR. RIGBY: The best kind, Your Honor.

22 THE COURT: Good. Please.

23 MR. RIGBY: We'll call Larry Heltsley to the stand,
24 Your Honor.

25 THE COURT: Mr. Heltsley, you're from California, I

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1 understand.
2 MR. LARRY HELTSLEY: That's right, so you'd better
3 watch out.
4 MR. RIGBY: We pick on you guys.
5
6
7 LAWRENCE LEE HELTSLEY,
8 produced as a witness at the instance of Claimants
9 Heltsley and Felton, being first duly sworn, was examined
10 and testified as follows:
11 DIRECT EXAMINATION BY MR. RIGBY:
12 Q. Good afternoon. Please state your full name and
13 current address for the record. We know it's California.
14 A. Lawrence Lee Heltsley, 253 Augustine Drive,
15 Martinez, California.
16 Q. And --
17 THE COURT: Could we get a spelling for that,
18 please?
19 MR. RIGBY: Heltsley?
20 THE COURT: Yes.
21 A. H-e-l-t, s like Sam, l-e-y.
22 THE COURT: s-t or s-l-e-y?
23 A. s-l-e-y.
24 THE COURT: Thank you.
25 Q. (By Mr. Rigby) And Mr. Heltsley, again, in the
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1 MR. RIGBY: I'll get -- I was just going to ask
2 that, Your Honor.
3 Q. (By Mr. Rigby) Let me -- let me first start at
4 the very beginning, because I was -- I wasn't actually
5 ready for you to get into all the ditch -- But that's
6 okay.
7 A. Okay.
8 Q. We'll start at the very beginning. When was
9 your first time on the property, to the best of your
10 recollection?
11 A. Thirty years ago.
12 Q. Okay, in that capacity is because Ann owned the
13 property?
14 A. I've actually been coming out here longer than
15 she's owned the property. So since she's owned the
16 property, I've worked on the ditch. I'm not --
17 Q. Another one of those Californians coming to
18 Idaho, is that what it was? Sorry, strike that.
19 A. Well --
20 Q. So when you worked on the property --
21 A. Yes.
22 Q. -- who were you working for?
23 A. I was working for her.
24 Q. Okay, so were you familiar with this -- this
25 particular reach before Ann held the property?
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1 interest of time, I'm going to try to fast forward on
2 this. You have been here during the entire hearing today?
3 A. Yes, I have.
4 Q. What is your involvement, if any, with the --
5 with the property described in Exhibit Number 2?
6 A. Well, I've -- I've worked on cleaning the ditch
7 that's described in this exhibit from Annie's property all
8 the way up to the -- where the stream comes out. I've
9 cleaned the ditch, I've worked on two what I call
10 bust-outs with Harold over the years.
11 Q. And Harold, you're referring to Harold who?
12 A. I'm terrible with names, but -- but Harold, from
13 what I knew --
14 UNIDENTIFIED: Hanson.
15 Q. (By Mr. Rigby) Hanson?
16 A. Hanson. -- owned the property and was always
17 working on -- on the ditch.
18 Q. And so were you with Mr. Hanson personally?
19 A. I was with Mr. Hanson, working on the ditch
20 twice.
21 Q. Okay, what's your relationship to Ann Heltsley?
22 A. She's my much-older sister.
23 Q. Okay, I'll let you two deal with that.
24 THE COURT: What time period are we talking about
25 here when he was helping Mr. Hanson?
260

1 A. Yes, because she lived nearby, and I've come out
2 before she owned the property, and I used to hunt this
3 area.
4 Q. Okay, so were you -- were you familiar with this
5 area even before -- this particular reach before Ann held,
6 owned the property?
7 A. Yes.
8 Q. Okay, now, you say you began work when Ann owned
9 the property. Again, you say that's 30 years, to the best
10 of your recollection?
11 A. Yes.
12 Q. And what would she have you do, or what did you
13 volunteer to do? Now, we're getting back to --
14 A. You mean drafted. I -- I helped build her
15 residence in North Fork.
16 Q. Okay, and where is that located in relationship
17 to Exhibit Number 2? It's not on there, is it?
18 A. Well, it doesn't show on there. It's farther
19 down.
20 Q. And you -- Again, in the interest of time, do
21 you have any additional evidence to, or modification to
22 the testimony that's already been given as to the general
23 location of the water users this particular day?
24 A. (No response.)
25 Q. Do you have any disagreement with -- as to the
262

1 general location of the place of use of this particular
2 water?

3 A. No.

4 Q. Okay. I'm sorry, I was trying to cut corners
5 there. So as we -- as we now get up to the disputed area
6 between the yellow dot and the -- and the plum dot, have
7 you been on this particular reach?

8 A. Yes, I have.

9 Q. For the purpose of cleaning?

10 A. For the purpose of cleaning and for the purpose
11 of repairing two break-outs.

12 Q. And where was -- where were those break-outs?

13 A. The first break-out was on Harold's property.

14 Q. And Harold is the previous owner to whose
15 property that owns it now?

16 A. Well, I -- I -- I'm terrible with names, but the
17 property that -- this area here that I've worked on with
18 Harold.

19 Q. So you're pointing to what is owned by
20 Mr. Murphy?

21 A. I guess so.

22 Q. Again, when you say you worked two particular
23 times on break-outs --

24 A. Yes.

25 Q. -- you and -- and he were the only two there?

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1 describe, then, what you found as you approached the
2 break-out.

3 A. Well, the first break-out, as I said, was on
4 what I thought was Harold's property. Harold located
5 where the break was, and I went up there with Sis to
6 assist him in the repair. And it had washed out and was
7 washing out down into the field.

8 Q. And which general direction -- Again, I'm
9 saying general. Maybe you can point to it, and then we'll
10 describe it.

11 A. Well, generally, it was going down this way.

12 Q. Okay, and you don't -- Do you recall
13 specifically where you were in that hatched line?

14 You probably don't, right?

15 A. No. I know we could -- we could see the -- the
16 driveway, you know, from where we were.

17 Q. Driveway of who?

18 A. Well, I guess to get on the property, you know.
19 You drive up this way, and then this is where the house
20 is. So I -- I -- I would say it was around in here,
21 because I could -- I could, you know, see down this way.

22 Q. Okay, but -- but at least is it -- is it fair to
23 say that it's in the hatched portion of what's been --

24 A. Yes.

25 Q. -- written on the map?

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1 A. And Sis.

2 Q. "Sis" meaning?

3 A. Annie.

4 Q. Okay, Annie. Was there anyone else present
5 there?

6 A. Not that I can recall.

7 Q. Okay, and what caused those break-outs, to the
8 best of your knowledge?

9 A. The first one, which was on Harold's property --

10 Basically, we were at Annie's property, and the water
11 stopped. So we -- Annie contacted Harold, and he went and
12 found out that there was a break-out, and that he would
13 work on it. So we volunteered to go help, and so that's
14 why we went up and helped with the break-out.

15 Q. Now, you heard the testimony of Mrs. Crawford
16 this morning that indicated that -- I guess this
17 afternoon -- that -- that indicated that she felt like,
18 for the most part, maintaining that reach of the ditch was
19 her responsibility, because she had assumed it from him
20 previously. Was that your understanding, as well?

21 A. Yes. I've actually met her before, although --

22 Q. She didn't remember you, did she?

23 A. Not really. But that's okay.

24 Q. But okay, so then as far as actually working on
25 this reach with -- all three of you, help me -- help

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1 A. Definitely.

2 Q. Okay, and what did you actually have to
3 undertake doing in order to repair the break-out, we'll
4 call it?

5 A. I had to do exactly what Harold said, which he
6 was -- he was very sharp and very efficient. He got a
7 board, I'd say like a 2-by-16, and we laid it across the
8 break, put some stakes in to hold it, which kind of
9 re-diverted the water back in the channel while we built
10 the bank back up.

11 Q. And -- and again, I'm not sure I asked you this:
12 Can you describe within the 30 years the (unintelligible)
13 that you began -- this particular time frame of this
14 break? Could it be -- If you don't know precisely, is it
15 closer to 30 years ago, is it closer to yesterday?

16 A. It's probably between -- about 10 years ago; 10,
17 15, in that range.

18 Q. Okay, and so did the fix work?

19 A. Yes.

20 Q. And did the -- What happened to the board?

21 A. After -- Well, Harold took it out. I didn't
22 take it out, but -- Because he had a whole procedure on
23 packing the soil back into the break, making sure it had
24 enough moisture and et cetera so he could compact it.

25 Then after he felt that it was going to hold

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1 substantial enough, at some point after that, he took the
2 board out. But I wasn't there to take the board out.
3 Q. Okay, now, you said there were two times?
4 A. Yes.
5 Q. When was the second occasion, to the best of
6 your --
7 A. Best of my recollection, maybe seven years ago.
8 And it was on the forestry part, and it was the result of
9 the beavers dropping a large branch down and breaking
10 the -- the bank out; and a lot of water coming out.
11 Q. And did you -- You were here, again, during the
12 testimony Ms. Van Bussum. And the pictures that were
13 produced, I think Exhibit Number 4 -- correct -- did you
14 see those pictures?
15 A. I saw the pictures, yeah.
16 Q. And I'll refer -- It's right there.
17 MR. RIGBY: May I approach the --
18 THE COURT: Yes.
19 MR. RIGBY: -- the exhibits?
20 Q. (By Mr. Rigby) I refer to this particular one,
21 and I can't remember the number of these.
22 MR. BAXTER: It would have been either 7 --
23 Q. (By Mr. Rigby) But the testimony for reference,
24 the testimony of Ms. Van Bussum, I believe, was that
25 that -- one of her reasons and analysis for making this

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1 Q. So why was he, in your opinion, why was he
2 helping down below his own property line?
3 A. Well, he kind of helped up and down.
4 Q. Good neighbor?
5 A. He was a great neighbor.
6 Q. In your normal maintenance, then -- Now, we're
7 not talking about breaches or any of the catastrophic
8 events that occurred. What, if any --
9 What kind of tools or what kind of equipment
10 would you use in your maintenance?
11 A. Hoes, shovels, hand-held weed whackers, and
12 occasionally a chain saw.
13 Q. Okay, and -- and in your opinion, was that
14 sufficient to -- to maintain the channel?
15 A. It was sufficient, but it was a lot of hard
16 work. I would have much rather have brought a backhoe in,
17 but as --
18 Q. Why didn't you? Why didn't you?
19 A. Well, Harold had a very good -- good point,
20 because I asked him that. And he said you take a bucket
21 in there and you catch a tree branch -- or tree root, you
22 pull that root up, and it's going to take the bank out on
23 both sides. And that -- that was pretty smart.
24 Q. And so in your opinion, is that form of
25 maintenance still required today?

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1 the point of diversion -- meaning the yellow point of
2 diversion -- was this picture depicted that there had been
3 an embankment, manmade embankment on this particular
4 (inaudible), in this particular area.
5 Is this the area that you're referring to?
6 A. Well, it could be, because it's -- it was -- it
7 was further down from this yellow spot; somewhere, you
8 know, in here. And you know, like I said, the beavers had
9 built a dam and dropped a fairly large branch down, and it
10 took the bank off on the downward side.
11 Q. And so therefore what did you have to do in
12 order to fix it?
13 A. We had to cut all the -- the beaver workings
14 out, including the large branch, cut it out and rebuild
15 the bank. We used the same procedure that we used before
16 to repair. We dropped a big board across, there was some
17 stakes, and then re-built the bank.
18 Q. Okay, so if -- if this picture, though, is
19 depicting, as represented by Ms. Van Bussum, the actual
20 yellow dot, then perhaps you were not involved with that
21 particular -- that particular embankment?
22 A. Probably not. As I said, I worked on it twice
23 with Harold. He was very sharp, very quick. He knew
24 exactly what to do, so he was quite experienced in
25 repairs.

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1 A. Well, given what I know of Harold and his
2 explanation, I'd say yes.
3 Q. Again, were you relying upon his expertise?
4 A. Very much so.
5 Q. Because of his years of working that
6 particular --
7 A. Absolutely.
8 Q. And -- and as far as the use of the shovel, what
9 type of digging was required?
10 A. We had to take out the, you know, plant growth
11 that would accumulate inside, and the silt; and anything,
12 you know, that the beavers would start working on. Clear
13 it out so that the flow of the water would be consistent
14 and it would stay within the -- the formed-up banks.
15 Q. Have you been -- In your maintenance, did you
16 go all the way up to the spring itself?
17 A. Yes, I have.
18 Q. And was that consistent?
19 A. It was always in pretty good shape until my last
20 visit, which was about two years ago. And there was a
21 "No Trespassing" sign, and so we decided not to go on the
22 property. But from what we could see, it was not in good
23 shape at all.
24 Q. And by that, what do you mean?
25 A. Well, instead of being in a narrow channel, it

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1 was much wider water-wise, and kind of overgrown and not
 2 maintained.
 3 Q. Now, during this, quote, 30 years, how often
 4 would you participate in -- would you always participate
 5 in when they actually did maintenance?
 6 A. When -- when my sister was putting up a work
 7 crew, I would participate; and I would guess that was
 8 probably maybe every other year. So I didn't do it every
 9 time I went, but --
 10 Q. Okay, that was my question, is that do you have
 11 personal knowledge as to how often it was normally done?
 12 And your answer is every other year?
 13 A. For me. I don't know beyond that. I know that
 14 when Harold was there, you know, he was working on it.
 15 And I only know from my sister's property up to Harold's
 16 property.
 17 MR. RIGBY: Nothing further. Thank you.
 18 THE COURT: Let's see, Mr. Baxter or Mr. Murphy,
 19 Mr. Hull?
 20 MR. HULL: (Unintelligible), Your Honor.
 21 THE COURT: Sure.
 22 CROSS EXAMINATION BY MR. HULL:
 23 Q. Mr. Heltsley, you said that the --
 24 Daryl Hull, by the way.
 25 Mr. Heltsley, you said that the first break-out

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1 A. Well, from here, I don't know without walking
 2 out there. But my -- I can give you my recollection.
 3 It's not where this circle is. It's actually
 4 (unintelligible).
 5 Q. Okay. And you maintain this, and you maintain
 6 this area, you were up there regularly?
 7 A. I have been up there.
 8 Q. Okay.
 9 A. I haven't had to maintain it, except for the
 10 break-out, because Harold always did a great job.
 11 Q. Are you familiar with the finger channels in the
 12 streambed?
 13 A. No, I wouldn't be.
 14 Q. Even though you maintained it, you never saw
 15 finger channels in the streambed?
 16 A. Well, there could have been finger channels, but
 17 that's not what I was there for. I was in mud --
 18 Q. You didn't see them, then, when you were walking
 19 up there? You never saw them?
 20 A. No.
 21 MR. HULL: Okay, thank you.
 22 THE COURT: Any other questions of Mr. Heltsley?
 23 MR. MURPHY: I have one question, Your Honor.
 24 THE COURT: Please, Mr. Hull -- or Mr. Murphy.
 25 Sorry.

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1 was 10 to 15 years ago?
 2 A. That's my guess.
 3 Q. Can you show me where it was, again, on the map?
 4 A. All I know from recollection, it was between
 5 here and the headwaters, so I would guess about in here,
 6 because from -- from where we were working, I could see
 7 down this way.
 8 Q. So you're saying up above where you testified to
 9 earlier? It looked like you had pointed out down below
 10 earlier.
 11 A. Well, right in here the first time. The second
 12 time was -- was down in the forest --
 13 Q. Okay.
 14 A. -- property.
 15 Q. And you say you're very familiar with the Hanson
 16 property, correct?
 17 A. Well, I have been on it several times. I don't
 18 know about being very familiar.
 19 Q. Okay. All right, where exactly does water begin
 20 to discharge from the spring?
 21 A. Where the spring is located.
 22 Q. Where exactly does water begin to discharge from
 23 the spring?
 24 A. Well --
 25 Q. If you know.

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1 MR. MURPHY: Patrick Murphy.
 2 CROSS EXAMINATION BY MR. MURPHY:
 3 Q. When you say a bust-out: So you obviously had
 4 one side that, when it busted out, the water would flow
 5 directly off an embankment, right?
 6 A. Yes.
 7 Q. Okay. And you said in the middle of my property
 8 there are -- there are said embankments?
 9 A. Well, there was -- there was a place where it --
 10 it had come out that we had to repair.
 11 Q. Okay. And the water flowed -- Did it drop
 12 off -- off the ditch bank at the time, or where did it --
 13 where did it flow to?
 14 A. Well, as I recall, it was probably about ten
 15 feet or more that it took out before it started down --
 16 you know, downhill, what I would call downhill.
 17 Q. Is it possible, from your recollection, that
 18 those steeper ditch banks could be what -- what Roger was
 19 calling the lower ditch? Were the other embankments on
 20 the forest service which regularly give out with beavers
 21 that would -- would break out, would your -- would your
 22 memory, the first time you did that quite possibly be down
 23 there where there is a steep --
 24 A. The first time I did it was on Harold's
 25 property. The second time was on the forest property.

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1 Q. Okay. One more question. You did make a
2 statement, 10 to 15 years ago, you were up there with
3 Harold, working?
4 A. That would be my best guess.
5 MR. MURPHY: Okay. The Farrells have owned that
6 property since 1986, so it's been -- it's been a
7 substantial amount of time. It's been almost -- I'll do
8 the math -- 24 years, so just to throw that out there.
9 It's been quite a -- quite a bit longer than you've --
10 you've recollected.
11 No more questions, Your Honor.
12 EXAMINATION BY THE COURT:
13 Q. Mr. Heltsley, are you able to account for that
14 discrepancy?
15 A. Well, I'm guessing. That's my best recollection
16 at the time frame, since I didn't keep a diary on it. I
17 remember the event.
18 Q. So Mr. Heltsley (sic) could have been working
19 with you to maintain the ditch even though he didn't own
20 the property?
21 A. Sure, possible.
22 Q. I assume Mr. Hanson didn't have a 404 permit
23 issued by the Army Corps of Engineers?
24 A. I have no idea.
25 THE COURT: Okay, is anybody going to come up with a

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1 on that property.
2 UNIDENTIFIED: The Farrells built that home.
3 MR. HULL: Right, the Farrells built the home we
4 live in.
5 MR. RIGBY: Your Honor, let me -- let me ask a
6 question, if I may, in aid of this.
7 REDIRECT EXAMINATION BY MR. RIGBY:
8 Q. You -- you even said in your testimony your best
9 guess was the number of years?
10 A. Yes.
11 Q. The fact of the matter is: Is there any
12 question in your mind that he was with you, and the break
13 occurred, and you worked on it?
14 A. No.
15 Q. So it was sometime within the 30 years?
16 A. Yes.
17 MR. RIGBY: Very good, I have no further questions.
18 THE COURT: Okay, let's see, Mr. Rigby, do you have
19 one last witness, you say?
20 MR. RIGBY: We do. Ann Heltsley, Your Honor.
21 THE COURT: The much-older sister?
22 MR. RIGBY: Yeah. I wasn't going to say that.
23 MS. HELTSLEY: He meant to say the best sister.
24 THE CLERK: It's a brother thing to say.
25

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1 Lewis and Clark map? They walked right through this area.
2 That is little ways before.
3 MR. BAXTER: No questions, Your Honor.
4 UNIDENTIFIED: Jerry, Jerry, the Farrells bought the
5 Hanson property on a life estate. Harold and Alice lived
6 on that property even though the Farrells owned it, so --
7 MR. RIGBY: I think we have an answer to your
8 question. Maybe we can put her back on the stand.
9 THE COURT: Well, she could -- She's still under
10 oath and she could --
11 MR. RIGBY: Yes, she is.
12 THE COURT: -- testify directly from where she is.
13 We got a microphone.
14 UNIDENTIFIED: Oh, I was just going to say that the
15 Farrells owned that property on a life estate, and Harold
16 and Alice Hanson continued to live on that property even
17 though the Farrells did own it.
18 THE COURT: Okay, thank you for clearing that up.
19 UNIDENTIFIED: Okay.
20 MR. HULL: Your Honor, I have to contradict that.
21 By '88, the Farrells were building their home on that
22 property, and there was no one on it.
23 UNIDENTIFIED: I don't know what the dates were,
24 exactly, but that's how it started out.
25 MR. HULL: My home was built in '88. My home sits

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1 ANN MARIE HELTSLEY,
2 produced as a witness at the instance of Claimants
3 Heltsley and Felton, being first duly sworn, was examined
4 and testified as follows:
5 DIRECT EXAMINATION BY MR. RIGBY:
6 Q. Good afternoon.
7 A. Good afternoon.
8 Q. Please state your full name and current address
9 for the record.
10 A. My name is Ann Marie Heltsley, I have two
11 residences. Do you want a physical address or my mailing
12 address?
13 Q. Let's do physical.
14 A. I live at 14 Elizabeth Eldridge Lane in
15 North Fork, Idaho. And I have a home on -- it's 2100
16 Highway 21, which is in Boise County.
17 Q. And, obviously, you have been here during the
18 testimony all day today?
19 A. I have. And no naps.
20 Q. And as far as your relationship to this
21 particular disputed area, what is it? What's your
22 relationship to the disputed area?
23 A. The map itself or where I live?
24 Q. Let me just ask that question. Where do you
25 live?

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1 A. I live at Hughes Creek, which is south of the --
2 that map.
3 Q. And do you have water rights?
4 A. I do.
5 Q. And are they the claimed water rights that are
6 the subject of this dispute?
7 A. They are.
8 Q. And do those water rights then originate in the
9 area that is the disputed area?
10 A. Yes, they do.
11 Q. And, obviously, the department is claiming the
12 point of diversion, one; and you're claiming the point of
13 diversion, the other. You have heard the testimony today
14 as far as the department and as far as the opinions by the
15 others. Let me first of all just ask you concerning the
16 historical, as I did Mitzi, and that is: What's your --
17 what's your knowledge, or what do you know about the
18 history of your particular place?
19 A. I have researched Elizabeth Eldridge's history.
20 Q. As Annie -- as Mitzi did?
21 A. As -- We have kind of done that in tandem. I
22 have lived on the Hughes Creek drainage since 1977. I've
23 lived there as a renter before it was subdivided. I
24 was -- as part of my rent payment, I helped Harold Hanson
25 with the flood irrigation of both his property for a

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1 As far as the maintenance of the Spring Ditch is
2 concerned, can you quickly tell us your -- your -- your
3 historical experience with that ditch?
4 A. Part of the ditch, what we'll refer to as the
5 upper part of the ditch, we have reconstructed as far as
6 making it wider and deeper, and used backhoe equipment to
7 do it.
8 Q. And what area are you referring to when you say
9 the upper part of the ditch?
10 A. From my property through Sue Kozacek's property,
11 through the Forest Service property, up to the boundary
12 lines of the -- of the Forest Service and Harold Hanson's.
13 Q. Okay, and so were you part of that work that was
14 actually done?
15 A. No, the -- the major reconstruction was done by
16 Lew Gohmes, who owned prior to us.
17 Q. Just quickly, then, let's go through the
18 historical ownership of the property. Elizabeth owned it
19 to begin with?
20 A. Elizabeth Eldridge homesteaded. In 1906, they
21 decided that they would -- I mean she settled it, and
22 then they -- they came in and said they would do the
23 homestead, so that started her documentation in 1906. She
24 had to fight tooth and nail with the government to get her
25 homestead. It was finally granted.

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1 while, and mostly the Hughes Creek property.
2 Harold Hanson was in charge of the irrigation on
3 the Hughes Creek property from the early 1970s until the
4 1980s. Harold taught me how to flood irrigate and how to
5 take care of the system.
6 Q. And when you say flood irrigate, what system
7 were you using flood irrigate?
8 A. Well, the Hughes Creek property has several
9 different ditches; one of them, the ditch that we call the
10 Spring Ditch. But there were several.
11 Q. And as far as the Spring Ditch is concerned --
12 Obviously, we have introduced evidence here
13 today, historical documents referring to a ditch called
14 the Spring Ditch. Is that the same Spring Ditch, as far
15 as your understanding is concerned?
16 A. That's the same Spring Ditch that Elizabeth
17 Eldridge's sons dug by hand in the early 1900s. We're not
18 quite sure of the date, but she started homesteading there
19 in 1887.
20 Q. As evidenced by the homestead application and
21 historical documents that we have introduced?
22 A. And others that we haven't introduced.
23 Q. Right. We have chosen to be selective, rather
24 than inundate the court, right? Okay. And I didn't mean
25 to use the word inundate.

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1 We have the documentation giving her the rights
2 from the federal government forever, and to hold all
3 ditches --
4 Q. That's in the deed that's been introduced?
5 A. In the deed that's been introduced. To all the
6 ditches on the -- on the property, to have and to hold.
7 And that was signed by Woodrow Wilson.
8 Q. And then thereafter, who owned it, the property
9 next?
10 A. Velma -- Not Velma, but the Ravndal family.
11 And Velma was part of that family.
12 Q. Okay, and what documentation evidences that as
13 far as what you have been able to discover?
14 A. Well, way back then, they didn't document water
15 rights. You -- you had them, you used them. And then as
16 time went on, people decided they needed to document these
17 water rights; so Velma Ravndal wrote a statement of which
18 she certified, had notarized.
19 Q. And that's, again, been introduced into evidence
20 today?
21 A. It's been introduced into evidence, and it
22 states about the Spring Ditch, that it originates at the
23 spring. That it comes across private property. It joins
24 with the Forest Service property, and comes onto our
25 property and irrigates our land.

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1 Q. Now, after -- after their ownership, continue
2 on, please.
3 A. After Velma, John Westman purchased.
4 MS. FELTON: Gohmes.
5 A. Gohmes. Lew Gohmes purchased after -- after
6 Velma.
7 MS. HELTSLEY: Thank you, Mitzi.
8 Q. (By Mr. Rigby) Okay, and then after Gohmes?
9 A. And Gohmes was a rancher, and so he cut down
10 most all of our apple trees, the historical apple trees,
11 and turned it all into hay fields. And then after Lew, he
12 sold it to John Westman, who is a developer, didn't live
13 on the ranch. He just bought the land for future
14 development.
15 Q. And again, as far as the documentation produced
16 for the court today from the Westmans, what -- what
17 documentation are you referring (unintelligible)?
18 Is there a documentation?
19 A. Well, John Westman applied for the water rights
20 for all of the ranch, so there's several of them. We only
21 introduced one of them.
22 Q. Right. But it's the claim, correct?
23 A. The -- the one that is associated with the
24 Spring Ditch.
25 Q. Very good. Now, continuing on, who then owned

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1 record a picture of the -- of the -- the use and the
2 ownership. Thereafter, then? Let's continue on.
3 A. After Hal, the property was subdivided, and I
4 actually bought one piece and stopped being a renter and
5 became a landowner. I only held onto that piece for a
6 short time, a little more than a year; and then I bought
7 another piece on the same -- in the same subdivision.
8 That piece gives me water rights to the Spring
9 Ditch. There are four parcels that all have water rights
10 on that same Spring Ditch. Mitzi is on the -- the mouth
11 of that spring that eventually feeds into Hughes Creek.
12 UNIDENTIFIED: No, North Fork.
13 A. The North Fork of the Salmon. And then there's
14 Russ Kozacek has upstream, I have upstream from Russ, and
15 Sue Kozacek has upstream from me. And then it goes into
16 the Forest Service property.
17 Q. (By Mr. Rigby) And at the Forest Service,
18 that's the map, then, that's depicted here?
19 A. Correct.
20 Q. Okay. Again, further ownership of the property,
21 then, that is owned by the hatch-mark area?
22 A. Well, that used to be Harold Hanson's property.
23 Prior to Harold, other ownerships, but it's the original
24 Levi Jones homestead.
25 Q. Very good. Now --

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1 the property (inaudible)?
2 A. Then John kind of got a partner, and his name
3 was Hal Taylor. And Hal Taylor then again re-filed the
4 water rights, of which we have entered into evidence, for
5 the Spring Ditch. And he describes from the spring, same
6 thing, across private property, on to Forest Service, on
7 to us.
8 Q. As far as the documents that we have introduced
9 today -- I realize I did that through Ms. Van Bussum in an
10 attempt to save the time -- but most of these documents
11 are located, as far as your knowledge is concerned, in the
12 department's database, is that correct?
13 A. That -- that's correct, although --
14 Q. Some are not?
15 A. I had -- I had many of the original documents.
16 Q. And also is it a fact that you also researched a
17 different source? That is, the -- the --
18 A. I -- I've researched the national archives.
19 Q. Okay. And -- and so therefore, that -- the one
20 document that was different than what's in the
21 department's documentation is because you got it from the
22 source, is that right?
23 A. I got it directly from the national archives.
24 Q. And again, I realize I'm going fast here, but
25 I'm just trying to give the court a picture, and the

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1 A. There were people settled there before Levi.
2 The ditch was actually in place prior to Levi Jones coming
3 onto the homestead.
4 Q. Now, as far as Mr. Jones is concerned, did he
5 own property that was -- Who owns the property today that
6 Mr. Jones owned then, if you know?
7 A. Well, on this map, the lower piece is owned by
8 Mr. Murphy, and the upper piece in -- in the blue is owned
9 by the Hulls. And above that, on the -- the river, you
10 can't see, it takes a sharp turn, but on the other side of
11 that is a hillside that was also owned by Levi Jones, and
12 it is now owned by the Farrells.
13 MR. RIGBY: Okay, Your Honor, may I approach the
14 witness?
15 THE COURT: Please.
16 Q. (By Mr. Rigby) I'm handing you what has been
17 marked for identification as Exhibit Number 11 of the
18 Heltsley/Felton exhibits. And do you know what that is?
19 A. I do.
20 Q. I'll represent to you that that was produced by
21 Mr. Hull to my office this last week.
22 Have you seen it before this week?
23 A. Not before this week.
24 MR. BAXTER: Jerry, do you have an extra copy of
25 that, by chance?

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1 MR. RIGBY: I don't, because they just sent it to
2 me. And I apologize, I (unintelligible).
3 A. I might -- I might have one in plastic.
4 Q. (By Mr. Rigby) Oh, well, we'll get you one.
5 A. Okay.
6 Q. And what's the date on that particular document?
7 A. February the 10th, 1909.
8 Q. Okay, so -- And it's -- Initially, it's a
9 letter addressed to Mr. Jones, correct, with a response
10 that's attached to it by Mr. Jones himself?
11 A. Correct. Well, the first page -- I'm sorry to
12 have done that -- the first page is February 10, 1909; and
13 it is signed by the then district forester, and it's
14 addressed to Mr. Bentz. And I understand that Mr. Bentz
15 at the time was also the forest supervisor.
16 Q. Was a response given to that letter attached to
17 the same document?
18 A. It is -- it is a response to Mr. Levi Jones'
19 letter.
20 Q. Very good. And is there -- is there a reply
21 back by Mr. Jones attached to that letter?
22 A. Yes.
23 Q. And -- and when is that again dated so we have
24 got that clear?
25 A. This reply is February the 10th, 1909.

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1 was written by Levi Jones of which he signed dated January
2 24th, 1909; and he addresses it to the Secretary of
3 Agriculture in Washington, D.C.
4 Q. Okay (unintelligible).
5 A. And the second paragraph, third line, he says:
6 "Now, the portion I am clearing will not exceed 12 or 15
7 acres, and it lies directly under my main ditch and also
8 directly" adjacent "my meadow, and is some of the most
9 valuable agricultural land on the claim."
10 Q. With your familiarity with the location and his
11 ownership, do you have an opinion as to -- I mean do you
12 personally believe you know where that location would be
13 located on this map?
14 A. I know that from personal experience, and also
15 from going through Levi Jones' historical homestead
16 documents.
17 Q. Okay, and where would you say that that is
18 located?
19 A. It is the ditch on Mr. Murphy's, up into
20 Mr. Hull's property.
21 Q. And by "the ditch," which ditch are you
22 referring to?
23 A. Well, Mr. Levi (sic) refers to it as --
24 Q. Main?
25 A. "My main ditch."

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1 Q. Now, I highlighted certain areas there,
2 especially on the third page.
3 MR. RIGBY: I'm going to approach the witness,
4 Your Honor.
5 A. Okay, got it.
6 Q. (By Mr. Rigby) Would you start beginning
7 reading the paragraph, the second paragraph of his
8 response to the forester. And of course, the issue of the
9 letter, I'll represent to you -- and of course, they
10 produced it for me -- was disagreement with the Forest
11 Service attempting to modify his what?
12 A. Well, originally, Mr. Levi (sic) was claiming
13 down past the Forest Service; and the Forest Service told
14 him he couldn't have it, they wanted it.
15 And so his argument to the Secretary of
16 Agriculture is that it's his land, he's settled it, it's
17 been settled, and he gave history to it. But the Forest
18 Service said, "We're taking it, anyway."
19 Q. Okay, so as far as the -- Is there any
20 reference in that letter, then, to ditches?
21 A. Yes, there is.
22 Q. And read that, please.
23 A. And -- and let me just clarify something for the
24 court. There are several different letters with different
25 dates, so the one I'm going to read from is a letter that

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1 Q. And what do you refer to that ditch as?
2 A. I refer to it as our Spring Ditch.
3 Q. Is there any other ditch that he could be
4 referring to in that particular locale?
5 A. There's no other ditch in the meadow that would
6 cause him concern as far as writing the Forest Service,
7 because the other sections were granted to him.
8 Q. Okay, so then, one, in light -- in light of that
9 letter, in light of the location, then, when he refers to
10 "my main ditch," is he referring to the same place that
11 the department is calling a stream?
12 A. Yes.
13 Q. Okay, now, continuing on, is there further
14 reference to the ditch in that, in the letter
15 (unintelligible)?
16 A. He refers to it in different areas, so I'm going
17 to turn to the second page of this letter, and the
18 paragraph on the second page, third line: "When he
19 surveyed, he wanted to lay off about eight acres."
20 And when he refers to "he," he's talking about
21 the Forest Service surveyor.
22 "When he surveyed, he wanted to lay off about
23 eight acres at the lower end of my claim, but I objected,
24 because it was some of my best land and was all under my
25 ditch."

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1 Q. Okay, anything further from that letter?
2 A. There's some other times when -- I mean he
3 refers to it several times in his letter as his ditch.
4 Q. Very good.
5 A. There's some more that's highlighted, if you --
6 Q. I think that's sufficient in the interest of
7 time (unintelligible). Obviously, they haven't seen that;
8 and I mean, may I have the exhibit?
9 UNIDENTIFIED: (Unintelligible).
10 A. And I just want to make sure that they
11 understand that it was 1909, and the ditch was already in
12 place prior to Levi Jones even coming into the
13 neighborhood.
14 MR. BAXTER: It might take Monica a while to review
15 it, so if you just want to keep --
16 MR. RIGBY: Oh, okay, let's do that, then. Good
17 idea.
18 Q. (By Mr. Rigby) Let's see, as far as -- I
19 believe we -- we accomplished the -- your testimony as far
20 as your knowledge of the ownership to the present date.
21 Now let's talk about your -- your historical use
22 or historical maintenance of the ditch itself, and get
23 specific. Obviously, your brother just testified. Do you
24 have anything to add to -- to what he said, or contradict,
25 as far as years of service with you?

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1 A. I have been on several different occasions.
2 Q. And why is that?
3 A. Because it's a very historical beaver problem
4 area behind -- on Forest Service property back where she's
5 calling a point of diversion, which we're calling just an
6 extension of our ditch.
7 Q. And therefore its shape and its present picture,
8 if you will, is -- is widened because of the beavers?
9 A. It's widened because we went in there with a
10 backhoe and dug it out and, you know, put the dirt. So
11 it's quite obviously higher in the bank, because we're
12 trying to keep from losing our water, you know.
13 Q. So prior to your requirement of taking care of
14 the beaver problem, what did the -- Was the general look
15 of that particular reach in that particular photograph
16 more like the ditch that -- that goes down beyond there?
17 A. Not as -- not as deep, but yeah, the same.
18 Q. Okay.
19 A. I mean they referred to it as an earthen dam.
20 It wasn't built as a dam. It's just dirt that was taken
21 out of the ditch.
22 Q. So put up on the bank?
23 A. And put up on the bank.
24 Q. And widened because of using the big equipment
25 and the -- and caused by the beavers?

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1 A. Well, other than my memory is better than his,
2 even though I'm older. He -- he comes every year. He
3 helps me build my house, work on the land, play, and work
4 on the ditch. Before, landowners on the Hughes Creek
5 property that have water rights on the ditch have
6 historically maintained the ditch. Sometimes we go
7 together, a lot of times we just go on our own; whatever
8 time frame allows us to keep it clean.
9 We do historically have problems with beavers.
10 You know, they used to trap beavers and get rid of them.
11 And then people liked beavers, and so then now we have got
12 to go back to trapping them, I think.
13 But they -- they do like the water, and they do
14 dam it up; and it does cause damage to the -- Which is,
15 hence, why Lew Gohmes had to reconstruct the ditch all
16 across the Forest Service property to make it deeper and
17 wider, and the banks higher.
18 You see that in the photographs. It's quite
19 evident, because it was done with a backhoe.
20 Q. And therefore the picture that I was referring
21 to, which is in, you know, Exhibit Number 4 that's
22 depicted over on the easel and used by Ms. Van Bussum as
23 evidence of man's intervention in that particular area
24 only, is that particular embankment -- were you involved
25 with that?

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1 A. Widened because, yeah, the backhoe as opposed
2 to, or the bucket as opposed to shovels.
3 Q. So in that particular location, according to
4 your testimony, then, have you ever determined or, in your
5 mind, ever believed that to be a diversion from another
6 source?
7 A. I have never called that our point of diversion.
8 Q. Well, I realize that.
9 A. And neither has --
10 Q. I'm not talking about point of diversion. I'm
11 just saying a diversion from one source to another, from
12 one ditch to another.
13 A. No.
14 Q. Is it -- is it just an extension, as far as
15 you're concerned?
16 A. It's an extension of our ditch.
17 Q. And historically, have you treated it that way?
18 A. Yes, we have.
19 Q. And before the beavers that caused what now
20 appears to -- to be a different area, if you will --
21 And like Roger had indicated, that -- that's
22 almost a swamp, the area, or a slough that then goes into
23 a ditch. Before the beavers, it was pretty much like a
24 ditch all the way along?
25 A. A ditch all the way along.

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1 Q. And you have personal knowledge of that, you
2 were involved with it?
3 A. I have. Harold Hanson taught me how to take
4 care of it.
5 Q. And so now continuing on with that, what -- how
6 often would you have to maintain this reach?
7 A. Every year.
8 Q. And would you be involved with that every year?
9 A. Every year.
10 Q. And how far would you go up the ditch?
11 A. We went all the way up to the spring.
12 Q. And -- and when did that cease, going up to the
13 spring?
14 A. Well, for me, it ceased about five years ago.
15 Q. Okay, and why was that?
16 A. Well, my brother and I were headed up there, and
17 we were taking out shrubs and brush and whatever, and we
18 ran across a fence that had "No Trespassing" signs.
19 And I knew that Harold had sold the property and
20 there was a new owner. And I was not familiar with the
21 new owner, and so I told my brother that we should stop.
22 I didn't feel comfortable in trespassing without them
23 knowing what -- who I was and what I was doing.
24 Q. Did you ever believe you didn't have a right to
25 clean out your ditch?

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1 Q. Can you pinpoint any better than he did as far
2 as where that breach occurred?
3 A. Well, it was one of those "hurry up, get up
4 here" kind of things, so we grabbed our shovels and went
5 up to help -- help Harold. But it was on Harold's
6 property. It was below the -- the head of the spring.
7 And it was -- it was going out toward the North
8 Fork. We were losing our water, and Harold attributed
9 that to animals tromping it.
10 Q. And -- and in fact, is that your understanding
11 historically with this property, that -- that the ditch
12 itself is -- has been subject to livestock?
13 A. Yes.
14 Q. With your experience in digging this ditch, did
15 that have an impact on the width of the ditch and the
16 narrowness of the ditch in certain areas?
17 A. It -- it did. But also, we're very sensitive to
18 the spring area.
19 Q. And why?
20 A. Well, I personally have lost a spring, myself,
21 on another piece of property. So, of course, why is
22 because Harold taught us to be very conservative in that
23 area. So historically, it's because that's the way Harold
24 taught us.
25 And then I bought a piece of property, I had a

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1 A. No. I've always had a right to clean out the
2 ditch.
3 Q. Has everyone -- Has anyone, prior to the
4 present owner, ever curtailed your right to do that?
5 A. In 110 years, there's never been a problem
6 taking care of the ditch.
7 UNIDENTIFIED: (Unintelligible).
8 Q. And -- and again, you're using --
9 A. I'm going with the historical documents.
10 Q. But as far as the years you have been on there,
11 has there ever been a problem?
12 A. Since 1977, I have never had a problem until it
13 was subdivided and Mr. Murphy wants to move our point of
14 diversion.
15 Q. Okay, now, as far as the blow-outs are concerned
16 as your brother testified to, were you present or involved
17 with those, as he indicated?
18 A. Yeah. I didn't let him far off the leash.
19 Q. Okay, so let's talk about the -- the first one
20 that he -- he testified to; and that is on the -- on what
21 he described to be the Murphy property as it sits today.
22 Or at least as he pointed out would indicate that it was
23 on the Murphy property.
24 Is that your understanding, as well?
25 A. Yes.

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1 spring on it. And I went to develop it, and I used a
2 backhoe, and I lost it. It went away. It just --
3 Q. So that taught you?
4 A. It just -- it just went away. So it taught me
5 even more to respect what Harold had said, and that's only
6 go in there with hand tools and keep it clean as much as
7 you have to, you know, keep it flowing down.
8 Q. Did Harold refer to this -- that reach within
9 his lands as the Spring Ditch?
10 A. The Spring Ditch in all of his writings.
11 Q. And you personally?
12 A. And -- and I refer to it as the Spring Ditch.
13 And he's -- that's what he's --
14 Q. No. No, I'm saying with you -- him to you?
15 A. Yeah, that's what he called it. When he wanted
16 me to go change the water, he'd go, he'd tell me which --
17 he'd say, "Go to the Spring Ditch and change," you know.
18 So I'd -- I'd pull the -- the plastic out and, you know,
19 bump it down the hill and put it back in.
20 Q. And he's the predecessor-in-interest to the
21 present owners, correct?
22 A. He is.
23 Q. As was Mr. Jones that you read the letter from?
24 A. Correct.
25 UNIDENTIFIED: And Adele.

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1 Q. (By Mr. Rigby) As far as the other -- Well,
2 okay, rather than get into the details, your brother
3 described how the fix occurred.
4 Is that pretty much your recollection?
5 A. Yes.
6 Q. Okay, and -- and again, because of that breach,
7 did that cause a change in the flow of your water?
8 A. Yes.
9 Q. And therefore, did that injure your water right?
10 A. Well, until we got it fixed.
11 Q. Temporarily?
12 A. Yeah.
13 Q. Right. You know, again, I'll ask you the same
14 as I have asked the others, of course; and all -- everyone
15 is asking. So what's the beef here? What -- why --
16 What's the concern? Is this one of the reasons
17 for the concern of having the point of diversion located
18 where you believe it to be?
19 A. Well, my personal opinion is that historically
20 the point of diversion has been the spring. I don't feel
21 the need to change history. I think Elizabeth worked
22 really hard to establish her homestead, and I respect
23 that.
24 Secondly, if the point of diversion is changed,
25 then we take great peril in being injured with our water

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1 Q. Okay. And when an event like that occurs, it
2 occurs. Now, is it fair to say that most of the events
3 have occurred below the yellow recommended point of
4 diversion?
5 A. Yeah.
6 Q. In other words, that as -- as Mr. Garrick (sic)
7 was attempting to -- to argue with the other witness --
8 not argue -- ask of the other witness, clearly there's a
9 difference in the -- in the potential breach in the Forest
10 Service area than there would be in the Murphy area. So
11 granted, that's -- that's a given, is that right?
12 A. A potential breach as far as the bank is much
13 higher, and it's higher up on the hill. The spring
14 flow -- The -- the topography along the hillside doesn't
15 allow you take it up on the hill until, you know,
16 you've -- you've gathered it and then you suck it up
17 against the hill as much as you can.
18 Q. I understand. But -- but nevertheless, even
19 though there's a greater risk down below, the risk still
20 exists above, as evidenced by your own historical
21 evidence -- experience?
22 A. And -- and it exists from the exhibit that the
23 department of water resources has -- has put into
24 evidence. You -- you can see that it's leaving -- it's
25 leaving its intended direction.

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1 right. And in evidence that the department of water
2 resources put in with their pictures, it proves me right.
3 They're not taking care of the ditch. They're
4 allowing all the downfall. They're not keeping it in the
5 channel. You can see from the photograph that they're
6 allowing it to leave the ditch.
7 Q. Is that different than what you've historically
8 observed?
9 A. Yes, very different.
10 Q. Are you concerned that -- that the -- that
11 the -- you will eventually lose your water right, if not
12 unchecked?
13 A. If that ditch is not repaired, we will lose our
14 water, which will make my land useless.
15 Q. And what do you use your water right for?
16 A. I use it for domestic, for irrigation, for
17 stock.
18 Q. Your brother also testified as to a second
19 breach or a second event. Are you familiar with that one?
20 A. Well, there's been many.
21 Q. Okay.
22 A. And so -- and he's been with me many times, so I
23 don't want to say this date or that date. I mean we
24 just -- It's -- it's standard practice to go and clean
25 the ditch every year.

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1 Q. Now, if you are required --
2 Because of this point of diversion being
3 recommended, if that were ordered by this court and -- and
4 therefore the potential, as witnessed by Roger, that you
5 may be required to actually obtain a 404 permit in order
6 to maintain the upper area, even if you have good
7 neighbors that allow you to do that, are you in a position
8 financially and otherwise to deal with that?
9 A. No. It's a ditch, and it needs to stay a ditch.
10 Q. And do you believe that's -- that's fair to --
11 to subject you to the federal 404 permit requirement under
12 the -- under the historic -- under the history that you
13 know of that particular reach?
14 A. No, it's not fair to subject us to that. And I
15 guess I would add I don't believe it's fair for neighbors
16 that have only been here five years to subject us to what
17 we're going through today.
18 MR. RIGBY: Excuse me just a minute, Your Honor.
19 All right, I have nothing further, Your Honor.
20 THE COURT: Does that wrap up the --
21 MR. RIGBY: Except for cross.
22 THE COURT: Mr. Baxter, any cross-examination of the
23 claimant?
24 MR. BAXTER: Not from the department.
25 THE COURT: Okay, Mr. Hull or Mr. Murphy, do you

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1 have any questions of Ms. Heltsley?

2 MR. HULL: Yes, Your Honor, we do; several.

3 Do you want me to start?

4 MR. MURPHY: Go ahead.

5 CROSS EXAMINATION BY MR. HULL:

6 Q. Okay, Ms. Heltsley, you have testified that

7 you've done extensive research on Ms. Eldridge's property

8 and Ms. Eldridge, correct?

9 A. Good afternoon, Mr. Hull.

10 Q. Hello. Daryl Hull, by the way.

11 You have testified that you have done extensive

12 research --

13 A. I have.

14 Q. -- on Ms. Eldridge? Okay.

15 MR. HULL: Your Honor, I would ask that we get

16 Exhibit 2 of Mr. Rigby's.

17 THE COURT: Let's see, IDWR Exhibit 2 is the map.

18 MR. HULL: Mr. Rigby's Exhibit 2.

19 UNIDENTIFIED: The homestead entry?

20 UNIDENTIFIED: Yes.

21 MR. HULL: Exhibit 3, is it?

22 UNIDENTIFIED: The homestead or the --

23 MR. HULL: The homestead.

24 A. Thank you.

25 Q. (By Mr. Hull) I call your attention to page 3,

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1 tracts of land are covered with three main ditches leading

2 from the North Fork of the Salmon River to and upon said

3 land."

4 Q. Wouldn't you say that Ms. Eldridge is very

5 detailed in what she has and what she's doing?

6 A. She wrote what was required of her by the

7 Department of Agriculture.

8 Q. Did she make any mention, any mention at all of

9 a ditch coming from a spring?

10 A. They called all of it the North Fork of the

11 Salmon in 1887.

12 Q. The North Fork of the Salmon is very different

13 from the spring.

14 A. They referred to all of their ditches from the

15 North Fork of the Salmon --

16 Q. And what do you -- what expertise are you

17 relying on to state that?

18 A. Reading through all the history and -- and all

19 the books.

20 Q. So someone who is so detailed that they spell

21 out exactly how many apples they had on the property and

22 got off the property is going to be so errant as to say

23 that they got three ditches coming from the North Fork of

24 the Salmon River when in fact one is coming from a spring?

25 A. Because that was the way they referred to it.

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1 question 8. If you would read that to me.

2 A. I'm reading from Exhibit 2. The first page is

3 the homestead entry, final proof of Elizabeth Eldridge.

4 And I'm turning to page 3. It doesn't say "page

5 3," but you're talking --

6 Q. There's a 3 at the bottom right-hand corner.

7 You'll see a 003 at the bottom right-hand corner.

8 A. Okay, so it's the fourth page, but it's 003 on

9 here.

10 Q. Okay, question 8?

11 A. Fourth page of the exhibit, and question 8:

12 "Describe fully and in detail the amount and kind of

13 improvement on each subdivision. State total value of

14 improvements on claim."

15 Q. If you want, you can skip right down to the last

16 two lines.

17 A. The character of improvements are: "One log

18 house, 18-by-26, 5 rooms," still standing. "One framed

19 barn, 24-by-80, 2-story. One log chicken house, 12-by-16.

20 One frame milk house, 10-by-36. The entire tract fenced

21 by leaning fence, part and part of what is known as a worm

22 fence. The leaning fence with posts and jacks 16 feet

23 apart, 5 poles nailed on said posts. And the worm fence

24 built of poles and stakes, about 9 poles, and rider in

25 each panel. Total cost of improvements, \$3,000. Said

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1 Q. Okay.

2 MR. HULL: If I may approach, Your Honor --

3 THE COURT: Sure.

4 MR. HULL: -- the witness?

5 THE COURT: Please.

6 MR. HULL: Can you hand these out? That's the lease

7 application.

8 UNIDENTIFIED: Do you want to do each one for --

9 MR. HULL: Well, we can.

10 UNIDENTIFIED: Because of the (unintelligible) it

11 shows it coming from the North Fork.

12 MR. HULL: Okay.

13 UNIDENTIFIED: (Unintelligible).

14 MR. HULL: Yeah, we can do this.

15 UNIDENTIFIED: Okay. Here you go.

16 MR. HULL: (Unintelligible).

17 A. Are you finished with Exhibit 2, Mr. Hull?

18 Q. (By Mr. Hull) Yes, we're done with Exhibit 2.

19 A. Thank you.

20 Q. What you're looking at is a copy of the 1908

21 survey done by the Forest Service.

22 THE COURT: How do we have the document marked? Is

23 this Hull or --

24 MR. HULL: Yes, this is going to be Hull -- Well,

25 I'm going to try and get it in as Exhibit 3, Your Honor.

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1 THE COURT: Okay, (unintelligible) what's called
2 Hull Exhibit 3. Go ahead.
3 Q. (By Mr. Hull) This is a 1908 survey from the
4 Forest Service that they did on the property in question.
5 If you'll notice, you see the irrigation ditch on the map
6 on the last page.
7 A. The last page is not dated. The survey map is
8 not dated.
9 UNIDENTIFIED: (Unintelligible).
10 Q. (By Mr. Hull) It's an original copy from the
11 Forest Service. That's all I can tell you, Ann.
12 A. But I'm just -- I'm just saying that I can't say
13 that this map goes with this document.
14 Q. Okay, okay. Well, that doesn't show --
15 It shows an irrigation ditch. Where is that
16 irrigation ditch coming from?
17 A. Well, it shows more than one ditch. Which one
18 are you referring --
19 Q. There's one marked "irrigation ditch,"
20 "i-r-r-i-g ditch."
21 A. There's one marked "Eldridge irrigation ditch,"
22 correct.
23 UNIDENTIFIED: It follows all the same.
24 Q. (By Mr. Hull) And where does that come from?
25 Where is the source of that ditch?

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1 Jones' property.
2 Q. On page 1 --
3 UNIDENTIFIED: This isn't even the (inaudible)
4 property.
5 Q. (By Mr. Hull) I'm going to call your
6 attention --
7 UNIDENTIFIED: This isn't the same property as this.
8 Q. (By Mr. Hull) -- to the second paragraph,
9 "Chains."
10 UNIDENTIFIED: No, it isn't. This is Carl's ditch.
11 Q. (By Mr. Hull) "To corner number 9, a...post 5
12 inches diameter, 3-feet long, marked R2 and identical with
13 corner number 1 of the Jones claim." To identify it on
14 this survey, okay. It spells it out.
15 A. I -- I'm not a surveyor, Mr. Hull. I'm just
16 saying that this --
17 Q. Okay.
18 A. -- map that you've given me doesn't tell me that
19 it's --
20 Q. Does this map show an irrigation ditch coming
21 from the North Fork of the Salmon River?
22 A. It does.
23 Q. In the north end of the property?
24 A. It does.
25 Q. Okay. Would you agree that that area would be

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1 A. It takes it up to the North Fork of the Salmon
2 River.
3 Q. Up to or down from?
4 A. Well, the ditch is connected to, on this map, on
5 the north -- I'm not sure if that's 56 west line.
6 Q. And it goes to the south, correct?
7 A. And it goes into what they have titled the North
8 Fork of the Salmon River.
9 Q. Wouldn't you agree that the North Fork of the
10 Salmon flows from the north to the south, or from the
11 northeast to the southwest?
12 A. It does today.
13 Q. Unless it flowed uphill, it did for life.
14 A. Well, I used to own to the middle of the river
15 on my property, but now I own both sides of the river
16 because it's changed its direction. So, you know, the
17 river channel does change.
18 Q. Okay, would you say that this irrigation ditch
19 is on the north end of the property, on the far north end?
20 A. On this map, it is.
21 Q. Okay.
22 A. Are you talking the property that -- that this
23 survey's supposed to depict? It doesn't really say whose
24 property it is. I mean I -- I'm taking your word for it.
25 I'm just saying that it doesn't say that this is Levi

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1 close to where now what you are referring to as a Spring
2 Ditch would be located?
3 A. I would agree that on this map, if you're
4 claiming that this is the Levi Jones survey map, I would
5 agree that this map shows the Eldridge irrigation ditch.
6 Q. Coming from the North Fork of the Salmon River?
7 A. And but where's the location? I don't know.
8 MR. HULL: Your Honor, I would like to have this
9 entered as Exhibit 3, Hull Exhibit 3.
10 THE COURT: Sure. Any objection to admission of
11 Hull Exhibit 3?
12 MR. RIGBY: Your Honor, just so long as it's
13 understood that -- that this witness can't -- can't locate
14 the -- where this -- It speaks for itself. I guess
15 that's what I'm saying. The document speaks for itself.
16 She cannot locate it as being part of this. And
17 obviously, I guess, let me ask her in aid of a question --
18 an objection, and that is: Other maps include a Spring
19 Ditch, correct?
20 A. Yes.
21 MR. RIGBY: Is that located on this map that you can
22 see?
23 A. No.
24 MR. RIGBY: And obviously the Spring Ditch,
25 regardless of where it's -- it's located as far as the

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1 point of diversion, whether it's a Spring Ditch or a
2 stream or whatever, it exists?
3 Everyone acknowledges that, correct?
4 **A. It exists. I'm just saying that --**
5 MR. RIGBY: It's not -- it's not -- it's not on here
6 if in fact this one's diverted from the North Fork, is it
7 not?
8 **A. No. Mr. Hull's asking me if that's the Spring**
9 **Ditch, is that's what he's referring to. And I'm just**
10 **saying that from this map, it doesn't say that. It says**
11 **"Eldridge," so obviously this is a ditch going to**
12 **Eldridge.**
13 **Q.** (By Mr. Hull) I -- I didn't say it was the
14 Spring Ditch. I said it does come out of the North Fork
15 in an area near what is now called the Spring Ditch.
16 Correct?
17 **A. I don't -- I can't testify to that.**
18 **Q.** Okay.
19 MR. RIGBY: And with that -- with that -- I guess
20 that confusion, Your Honor, we don't object to the
21 exhibit, because it speaks for itself. But I don't see
22 connection to the others, especially when it leaves out a
23 ditch that everyone acknowledges is there.
24 Or whether it's a ditch or a stream, everyone
25 acknowledges it; and this one isn't even pointing to it.

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1 **Q.** Can you tell me where he shows the ditch as
2 ending?
3 **A. This is a special use permit from the Forest**
4 **Service.**
5 **Q.** Application, yes.
6 **A. Yes. And it shows the ditch going across Forest**
7 **Service land.**
8 **Q.** And where does it show the end of the ditch on
9 the north end?
10 **A. It shows it going up to "live spring."**
11 **Q.** Is that where you see the ditch -- the ditch
12 reconstruction as ending, at the live spring; or does it
13 end at the horse pasture, Forest Service horse pasture?
14 **A. Mr. Gohmes had to get a special use permit from**
15 **the Forest Service, not from private land.**
16 **Q.** Where did he end the ditch reconstruction? He
17 shows it on his map.
18 **A. Mr. Gohmes got a special use permit from the**
19 **Forest Service to reconstruct the ditch across Forest**
20 **Service property, but the ditch he shows on the map**
21 **extending up to, and it's titled "live spring."**
22 **Q.** How many feet does he show it from the back --
23 the end of the Harold Hanson property to the start of the
24 double line that would indicate a ditch in his map?
25 **A. I don't understand your question, Mr. Hull.**

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1 THE COURT: Is there any other objection to Hull
2 Exhibit 3?
3 (No response.)
4 THE COURT: Okay, we'll admit Hull Exhibit 3.
5 **A. Okay, do you want her to have this one?**
6 MR. HULL: Yes, please.
7 Your Honor, I think I skipped an exhibit. I
8 should have gone to 2 next. Could I do that?
9 THE CLERK: This is marked Exhibit 3.
10 MR. HULL: Right. And here's Exhibit 2.
11 THE COURT: Sure.
12 MR. HULL: May I approach the bench?
13 **Q.** (By Mr. Hull) Okay, Ms. Heltsley, this is a
14 special use --
15 **A. Thank you.**
16 **Q.** -- application to the Forest Service from Lew
17 Gohmes. Perhaps you would be more familiar with this map
18 on his application. He draws out a proposed ditch
19 reconstruction. Can you tell me where he shows the ditch
20 is ending on this map?
21 **A. I -- I need to read this. This is the first**
22 **time I've seen this, and so I'm not going to answer stuff**
23 **until I'm able to read it.**
24 **Q.** That's fine.
25 **A. Thank you. Thank you for giving me that time.**

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1 **Q.** He has it marked in feet from the back of the
2 Harold Hanson property on this map to the proposed
3 reconstruction. How many feet is it?
4 **A. Okay, well, that would be an assumption that**
5 **you're making that he marked --**
6 **Q.** Why would he put the feet marker there --
7 **A. Well, I don't know.**
8 **Q.** -- if he wasn't starting the ditch at that
9 point?
10 **A. Because that's where he had to get the permit**
11 **from the Forest Service. He didn't have to get a permit**
12 **from Harold Hanson. He only had to get a permit from the**
13 **Forest Service.**
14 MR. RIGBY: Your Honor, I'm going to object, because
15 I think it's been asked and answered three times now.
16 **A. But even -- even Lew Gohmes extends the ditch**
17 **past the Forest Service, onto -- and he titles it, if**
18 **that's his writing -- "live spring."**
19 **Q.** (By Mr. Hull) "Live spring."
20 **A. Yeah.**
21 **Q.** Not ditch, "Live spring."
22 **A. "Live spring."**
23 **Q.** And then he shows the ditch reconstruction.
24 Well, I'll -- I'll let the -- I'll let the document speak
25 for itself. We'll let your testimony speak for itself.

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1 A. And I --
2 MR. HULL: Your Honor, at this point, I would like
3 to get Hull Exhibit 2 entered into evidence.
4 A. I'd like to add to the record, please, that this
5 is an unsigned document; this attachment, this map. We
6 don't know whether this map came with this document, and
7 we don't know whether this was granted. And this is not
8 stamped, so I don't know that it's official.
9 MR. RIGBY: But -- but Your Honor, let me -- let me
10 comment on that. I don't have a problem with this. I
11 gladly welcome it. I -- I fully support it, and we have
12 no objection to its being entered.
13 THE COURT: Okay.
14 MR. RIGBY: Thank you very much.
15 THE COURT: Any other concerns about Hull Exhibit
16 Number 2?
17 (No response.)
18 THE COURT: Okay, admitted.
19 MR. HULL: Your Honor, Mr. Rigby's letter that I
20 sent him, it's the letter from Levi Jones. I don't know
21 what number we have on that. 11, I think.
22 UNIDENTIFIED: It hasn't been marked.
23 MR. HULL: It was just marked recently, so I'm not
24 sure.
25 MR. RIGBY: Oh, our exhibit number?

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1 THE COURT: I don't mean to confuse you with
2 Mrs. Helmsly, the --
3 THE CLERK: Are we entering Heltsley/Felton
4 Exhibit 11?
5 THE COURT: That was the question. I thought we
6 could take care of it right now.
7 MR. RIGBY: I had moved for it, and the state wanted
8 time to review it.
9 THE COURT: Well, I thought the state already had
10 enough time to review it.
11 MR. BAXTER: There's no objection. We were just
12 trying to take a look at it.
13 THE COURT: Any other --
14 MR. HULL: None, Your Honor.
15 THE COURT: -- objection to --
16 MR. MURPHY: No objection.
17 THE COURT: -- admission of -- I'll just call it
18 Felton Exhibit 11.
19 MR. MURPHY: No objection, Your Honor.
20 THE COURT: Okay, admitted, then.
21 Now, we're going to get -- Do we have a copy of
22 it?
23 MR. BAXTER: I think I handed it back to Mr. Hull.
24 MR. HULL: Yes, there's a copy right here.
25 THE COURT: Oh, you've got it, okay, good.

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1 MR. HULL: Yes, it's the letter I sent you from Levi
2 Jones.
3 MR. RIGBY: I think it's 13. No, 11. It is 11,
4 Your Honor.
5 MR. HULL: 11, okay.
6 Q. (By Mr. Hull) Ms. Heltsley, I take you to
7 Mr. Rigby's Exhibit 11.
8 A. I don't have 11.
9 MR. RIGBY: Oh, we gave it to --
10 A. Monica has it.
11 THE CLERK: It's not been entered yet.
12 THE COURT: That's one we don't have copies of.
13 MR. RIGBY: That's right, they were reviewing it.
14 And I had moved it to be introduced; and they
15 wanted to review it, obviously.
16 UNIDENTIFIED: This is where Bob Smith --
17 MR. HULL: Okay, I can just -- I won't even enter
18 it.
19 THE COURT: Let's see, should we go ahead --
20 UNIDENTIFIED: You know, this is Bob Smith's
21 irrigation ditch right here.
22 THE COURT: -- and admit Felton Exhibit 11,
23 Heltsley/Felton, Felton/Heltsley?
24 MR. RIGBY: Heltsley/Felton.
25 UNIDENTIFIED: And Adele.

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1 And does anybody need copies of this?
2 MR. HULL: I think we're okay with it.
3 MR. BAXTER: At some point, I will need a copy, yes,
4 Your Honor.
5 THE COURT: Before we leave tonight?
6 MR. BAXTER: Yeah.
7 THE COURT: Okay. So Felton Exhibit 11 is admitted.
8 Is our case administrator satisfied?
9 MR. BAXTER: Got to keep Diana happy.
10 THE CLERK: I'm happy.
11 Q. (By Mr. Hull) Ms. Heltsley, I take you to the
12 second page of Mr. Jones' letter.
13 A. I'm sorry, Mr. Hull, the second page of the
14 document or --
15 Q. The second page of the letter.
16 A. That -- that Mr. Jones wrote?
17 Q. Mr. Jones wrote, complaining to the Forest
18 Service.
19 A. To the Secretary of Agriculture?
20 Q. Yes. Nine lines down from the paragraph break,
21 if you would read to me the part that starts "this land,"
22 that sentence.
23 A. Yes. You want -- you want me to read that?
24 Q. Yes.
25 A. "This land I mention is better for station

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1 because it lies right on Sheep Creek where they could have
2 splendid water" through "the whole year." Of course, he
3 didn't spell that right. "While on my land, a ditch or
4 pipe 2,000 feet from a spring is necessary, and they would
5 have to dig a ditch at least a mile and a half long from
6 Sheep Creek to water their land."

7 Do you want me to continue?

8 Q. That's -- no, that's fine. That's fine. He's
9 indicating that there is a spring on his property,
10 correct, where the Forest Service is taking his land; and
11 he's indicating that they would have to dig a ditch or a
12 pipe. So as of the date of this letter, there was no
13 ditch there.

14 A. That's -- I -- I --

15 Q. The ditch didn't exist at that time?

16 A. No, I disagree with you. And I will tell you
17 why. Spring Creek has a ditch that feeds the Levi Jones
18 property. It also has a ditch that they cut all the way
19 past Levi Jones' property, all the way down to what is
20 referred to as Carl's ditch.

21 Q. Right, we're familiar with it.

22 A. Okay, he's wanting the Forest Service not to
23 take his land, but to go up to Spring Creek instead of
24 taking his land.

25 Q. Exactly. And one of the reasons he's using is

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1 saying that.

2 A. He also --

3 Q. He makes no --

4 A. He also said --

5 Q. -- claim to that.

6 A. -- it's splendid water, and he says "t-h-w" when
7 he really meant to say "the whole -- whole year." So you
8 know, if you want -- if you want to get picky --

9 Q. "Lies right on Sheep Creek." Sheep Creek is a
10 mile to the north.

11 A. That's right.

12 Q. Sure, where they could have water the whole year
13 round. "While on my land, a ditch or pipe 2,000 feet from
14 a spring is necessary." Not from a Spring Ditch, but from
15 a spring. That's all I'm trying to make my point. It's
16 already been put into evidence, I'll --

17 A. And he's talking about taking from our -- from
18 this --

19 Q. -- I'll let the court --

20 A. -- Spring Ditch --

21 Q. -- decide.

22 A. -- all the way across the highway.

23 Q. Not the Spring Ditch --

24 A. Carl's --

25 Q. -- the spring.

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1 because there's no water there, except for a spring that
2 they would have to dig a ditch or a pipe 2,000 feet from
3 that spring to get water.

4 A. He's talking about having to dig from the Spring
5 Ditch up across the highway. That's the 2,000 feet he's
6 talking about.

7 Q. That seems like a fetch.

8 A. Well, if you'd like me --

9 Q. It sounds to me like he's trying to do just the
10 opposite.

11 A. The Forest Service wanted to take this piece of
12 property. And as you see, they --

13 Q. Right, they did.

14 A. -- got what they wanted. They built these
15 cabins over here. The Spring Ditch, he's saying they
16 would have to dig a ditch from here, our Spring Ditch, up
17 to and across the -- what was referred to then as the
18 Gibbonsville Trail to their -- to their property. That's
19 what he's referring to, in my personal opinion.

20 Q. But he's not saying in this letter that they
21 would have to take from his ditch.

22 A. That is --

23 Q. He's saying they would have to start a ditch.
24 It would seem to me he would have to say "he would be
25 taking from my ditch to build another ditch." He's not

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1 A. -- Carl's -- Carl's -- Carl's ditch is from
2 Spring Creek. It's more than a mile before it hit his
3 homestead.

4 Q. I'm not here to argue. I'm just here to put it
5 into evidence as it's stated, because that was not brought
6 into evidence earlier. I'm really not here to argue.

7 A. Well, your opinion is one, and my opinion is
8 another. Thank you.

9 Q. Okay, you've also stated, ma'am, that you're
10 familiar with the properties. Mr. Warner, in his
11 testimony, stated that it was represented to him that
12 water flows from the north part, okay.

13 MR. HULL: Your Honor, if I may, I'll approach the
14 map.

15 THE COURT: Sure.

16 A. Are you finished with this exhibit?

17 Q. (By Mr. Hull) Yes, I am.

18 Mr. Warner stated that as it was told to him by
19 you, water flows down this area, across and into the
20 spring, okay. Can you tell me where the water comes from
21 up here to do that?

22 A. There's a diversion dam up around the bend, off
23 of the North Fork of the Salmon River.

24 Q. And how does that have anything to do with the
25 spring?

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1 A. Other than contaminate it?
2 Q. How would it contaminate it?
3 A. Well, if it got into the spring water.
4 Q. So in other words, you're saying that's just an
5 irrigation ditch?
6 A. There's an irrigation ditch that -- where you
7 just pointed that goes up, bends around the bend by the
8 hill where your house is, goes up. And there's an
9 irrigation ditch that starts there with a headgate.
10 Q. So in other words, when you represented that to
11 Mr. Warner, it didn't affect the spring in any way, shape
12 or form?
13 A. No. His -- If -- Mr. Warner would have to
14 correct me, but his statement was that there's another
15 ditch up above.
16 Q. No, he said that water collected, because I
17 asked him about it.
18 A. Well --
19 Q. So okay, we'll just put it down as a
20 misunderstanding between the two of you.
21 A. Between you.
22 MR. HULL: Okay, no further questions.
23 THE COURT: Okay, Mr. Murphy, do you have any
24 questions?
25 MR. MURPHY: Yes, Your Honor. Patrick Murphy.

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1 Q. You quoted the second sentence of that second
2 paragraph --
3 A. Second --
4 Q. -- when you were talking about a ditch right on
5 Levi Jones' property.
6 A. Where -- where I quoted "now that portion I am
7 clearing"?
8 Q. And where do you think that ditch was, again?
9 A. (No response.)
10 Q. You said there was -- you said there was a ditch
11 on the property?
12 A. "The portion I am clearing will not exceed 12 to
13 15 acres." And that, he's referring to timber.
14 "And it lies directly under my main ditch and
15 also directly" adjacent "my meadow, and is some of the
16 most valuable agricultural land on the claim."
17 Q. All right, where did you say the ditch was from?
18 A. It's the Spring Ditch.
19 MR. MURPHY: Okay, Your Honor, I would like to
20 submit a few homestead applications. One homestead
21 application is October 10th, 12th -- 10th, 12th, 13th of
22 1908, which was the fall before that letter was written.
23 THE COURT: How do you have your exhibit marked? Is
24 this Murphy Exhibit --
25 MR. MURPHY: I have "Hull Exhibit" on it. Can I --

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1 CROSS EXAMINATION BY MR. MURPHY:
2 Q. Ann, I think it's the last exhibit you had, the
3 letter again --
4 A. Good afternoon, Mr. Murphy.
5 Q. How are you?
6 A. My name is Heltsley, for the record. Thank you.
7 Q. Okay.
8 A. I do have Exhibit 11 back in my possession.
9 Q. Okay, you quoted the second sentence in the
10 second paragraph. Could you read that again? I believe
11 you quoted it before about the -- something about the main
12 ditch on the -- on Levi Jones' property.
13 A. Okay, just to clarify with you, are you on the
14 first page, because there's several --
15 Q. I'm not sure.
16 A. There's several different --
17 Q. I'm on the first page of his letter. It would
18 be -- I think it's the second page on yours. Actually,
19 probably the third page on yours.
20 A. So you're on the letter that Levi Jones wrote?
21 Q. Yes, and you quoted earlier.
22 A. And the letter that Levi Jones wrote to the
23 Secretary of Agriculture dated January 24th, 1909?
24 Q. Yes.
25 A. Okay.

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1 THE COURT: Sure, that's fine.
2 MR. MURPHY: Okay.
3 THE COURT: So it will be Hull Exhibit 4?
4 MR. MURPHY: 4.
5 UNIDENTIFIED: (Inaudible).
6 MR. MURPHY: What's that? I don't have copies of
7 it. Your Honor, I don't have copies of this yet.
8 THE COURT: Let's see, if you could show that to
9 Mr. Rigby.
10 UNIDENTIFIED: (Unintelligible).
11 MR. MURPHY: The same surveyor (unintelligible).
12 THE COURT: Was that a homestead application or a
13 letter?
14 MR. MURPHY: Your Honor, right then, because the
15 Forest Service was coming into the country, they had --
16 Of course, they were scrambling, because they
17 were trying to homestead everybody before the federal
18 property went into existence. So they had federal
19 surveyors surveying -- George Thompson was his name --
20 surveyed Eldridge's property, Levi Jones' property, the
21 Hughes Creek Ranger Station; and he surveyed them all
22 within six weeks of each other.
23 THE COURT: So these -- the document, Hull Exhibit 4
24 is a result of the survey?
25 MR. MURPHY: It's a Report on Agricultural Homestead

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1 Applications, Form 110.
2 THE COURT: We'll call it Report Form 110.
3 MR. MURPHY: Yes.
4 THE COURT: And what's the date of the document?
5 MR. MURPHY: October 10th, 12th, 13th of '08. And
6 that's the time he actually surveyed -- surveyed the
7 property, also.
8 THE COURT: 1908?
9 MR. MURPHY: Yes.
10 THE COURT: Okay.
11 Q. (By Mr. Murphy) And can you read what's
12 underlined under question 6 there.
13 A. Mr. Murphy, I have to review the document --
14 Q. That's fine.
15 A. -- before I --
16 MR. RIGBY: Your Honor, while she's doing that, may
17 we take about a five-minute break?
18 A. Sure, you take a break.
19 THE COURT: Okay, we'll take a five-minute break
20 here.
21 MR. RIGBY: I'm sorry, I'm getting old here.
22
23 (Recess.)
24
25

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1 A. Question 6 says: "The soil consists chiefly of
2 an admixture of sand (sic) loam (sic) and gravel, which is
3 exceedingly fertile when subjected to irrigation.
4 Abundance of water for irrigation and domestic use is
5 obtained from Sheep Creek, but with little expense."
6 Q. Was that the ditch that you were thinking of was
7 on the Levi Jones homestead (unintelligible)?
8 A. No, that's a different ditch. Well, it's on the
9 Levi Jones homestead, but it's a different ditch. It's up
10 higher, which is not shown on this map.
11 Q. Do you think he would have put all the ditches
12 on his homestead application when he was trying to prove
13 up this property?
14 A. No. They didn't do that back then. Nobody paid
15 attention to the water stuff back then in detail. What
16 they had to prove for the homestead was that they were
17 going to be able to use it for agricultural land, not just
18 squatting, and not mining.
19 Q. Okay, thanks, Ann. I just have a question, Ann,
20 about what you submitted as a claim to a water right back
21 in 198 -- I believe it's 1983. Your claim to a water
22 right, you submitted as a point of diversion, I think --
23 I don't think -- Did you submit this? You
24 submitted everyone else, John Westman's, Feltons'.
25 MR. MURPHY: Jerry, did you guys submit her --

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1 THE COURT: We're back on the record now. It's 6:30
2 P.M., and we took a five-minute break.
3 And let's see, we were in the middle of
4 Mr. Murphy's cross-examination of Mrs. Heltsley.
5 MS. HELTSLEY: Miss.
6 THE COURT: Miss Heltsley.
7 MS. HELTSLEY: Thanks for giving me that time,
8 Mr. Murphy.
9 Q. (By Mr. Murphy) And did you get an opportunity
10 to read the underlined portion that I gave to you?
11 A. I read the document.
12 Q. Okay.
13 THE COURT: That's Hull Exhibit Number 4.
14 MR. MURPHY: Yeah, it's Exhibit Number 4.
15 A. You were starting to tell me to turn a page, but
16 I didn't. So you want me on page 2? Where do you want
17 me?
18 THE COURT: Is it question 6?
19 MR. MURPHY: I think it was question 6, underlined,
20 yes.
21 A. Okay. Page 2 of the document that's headed
22 "Report of Agricultural Homestead Applications," unsigned.
23 Q. (By Mr. Murphy) That's what question 6 said?
24 A. No, no. Sorry, I'm formal.
25 Q. Okay.

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1 MR. RIGBY: Under Noyes.
2 MR. MURPHY: Noyes, okay. And what exhibit was
3 that, the Noyes? I think it was probably 4, 5?
4 THE CLERK: John Westman?
5 MR. MURPHY: No.
6 MS. HELTSLEY: Ann Noyes, a little further.
7 MR. RIGBY: Ann Noyes.
8 MS. HELTSLEY: Probably original.
9 THE CLERK: Ann Noyes?
10 MS. HELTSLEY: That's me.
11 THE CLERK: Exhibit Number 7.
12 THE COURT: Which -- which --
13 THE CLERK: IDWR Exhibit Number 7 -- or excuse me,
14 Heltsley/Felton Exhibit Number 7.
15 Q. (By Mr. Murphy) Ann, Exhibit Number 7, question
16 5 on the first page, what quarter/quarter section do you
17 put the point of diversion in?
18 A. Point of diversion is southwest one-quarter,
19 southwest one-quarter, Section 15, Township 25 North,
20 Range 21 East, Lemhi County.
21 Q. I just wanted some clarification. I noticed
22 on -- both on the IDW -- IDWR website for water rights on
23 your claim, your recommendation and your objection, all
24 three; and you didn't object -- Not your objection,
25 sorry. Yeah, your initial objection to IDWR's

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1 recommended. On all three, you have the same water right,
 2 which is southeast of the southwest of the southwest,
 3 which would put the point of diversion, I believe, down on
 4 the Forest Service.
 5 I just have problems understanding why.
 6 That's -- that is exactly the recommendation that the IDWR
 7 had. And in the objection, you state that's where the
 8 point of diversion is, and also stated that in your claim,
 9 and also in your -- IDWR's recommendation.
 10 So we have got three -- four places where we're
 11 not in the southeast of the southwest, but we're in the
 12 southwest -- in a quarter/quarter, in the southwest of the
 13 southwest. But further than that, we're in the southeast
 14 of the southwest of the southwest on ten acres.
 15 **A. Are you asking me a question?**
 16 **Q.** I'm -- I'm asking if that is correct.
 17 **A. Is all the stuff that you just said on this**
 18 **document?**
 19 **Q.** No, but it's on -- it's on -- it's on your water
 20 rights, which were submitted on to the IDWR website.
 21 Your objection -- If I have it here. Give me a
 22 moment, please.
 23 I guess that is -- It's easily checked, because
 24 it's all -- it's all documented on the website.
 25 But I wanted to know if that was the original

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1 it's in -- It's only -- It's in a 40-acre section, not
 2 a -- not a 10-acre section, so it's not an in a
 3 quarter/quarter/quarter. But it is --
 4 Southwest of the southwest is outside -- is
 5 closer to the point of diversion that IDWR recommended and
 6 we support down on the Forest Service. Otherwise, you're
 7 in the southeast of the southwest, and -- and that was
 8 what was confusing to me.
 9 I guess I don't have any other questions. I
 10 just -- I wanted to make -- make that point that if
 11 someone could enlighten me why all of them are in the same
 12 quarter/quarter, and most of them are in the same
 13 quarter/quarter/quarter section.
 14 **THE COURT:** But does that claim, the Heltsley 1983
 15 SRBA claim state the source as a spring?
 16 **MS. HELTSLEY:** Yes, Your Honor. It says "unnamed
 17 spring," and it refers to the tributary of the North Fork
 18 of the Salmon River.
 19 **MR. MURPHY:** It says, Your Honor, "Spring flows
 20 through an open ditch by means of a head box. An
 21 association is being formed with the Forest Service, and a
 22 permit has been issued. Water" has been "pumped" from the
 23 "domestic."
 24 **UNIDENTIFIED:** Which is the spring box. Which is
 25 the spring itself.

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1 intent on -- The objection was unclear to me. On your
 2 objection to the recommended water right by IDWR, why it
 3 was the same. And it was the same on all three counts,
 4 and I'm -- I'm trying to figure that out, because we keep
 5 going into another -- into another quarter -- into another
 6 quarter/quarter section, let alone a quarter/quarter (sic)
 7 section.
 8 **MR. RIGBY:** And Your Honor, my only problem with
 9 this is that obviously there's been a lot of confusion as
 10 to where it is as far as the actual description of it.
 11 The one thing that is absolutely clear is all
 12 objectors or claimants have said the source is the spring.
 13 And if we need to conform that to the evidence, then I so
 14 move. Because if that's even my mistake by believing that
 15 to be the particular location of the spring, then maybe it
 16 was my mistake for not objecting that it be changed.
 17 The fact of the matter is all documentation has
 18 always said the point of diversion should be the spring.
 19 Where that's actually located and where we finally
 20 determine it to be located, that's -- that's what we would
 21 move as far as the point of diversion.
 22 **THE COURT:** Mr. Murphy, your point was that the --
 23 the 1983 Heltsley claim placed the point of diversion
 24 approximately where IDWR's yellow dot is?
 25 **MR. MURPHY:** Your Honor, it -- it put it in -- Yes,

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1 **THE COURT:** Well, Ms. Heltsley, has anyone ever
 2 named that spring?
 3 **MS. HELTSLEY:** We have always called it the Spring
 4 Ditch, Your Honor. It does not --
 5 **THE COURT:** No, that's "ditch." But the spring
 6 itself?
 7 **MS. HELTSLEY:** Spring. Well, we have --
 8 Everybody's put it on their water right as "unnamed
 9 spring."
 10 **THE COURT:** It seems like down here in the south
 11 every spring is named.
 12 **MS. HELTSLEY:** Yeah, and -- and in helping
 13 Mr. Murphy and myself, as well, I'm guilty of the fact
 14 that I didn't pay attention to water rights. We had them.
 15 We always had them. Nobody paid attention to it.
 16 None of this stuff in the old documents is like
 17 totally to scale. Nobody said we had to do that. And we
 18 just transferred, you know, from the subdivision water
 19 rights to the individual water rights, and we always
 20 referred to it as the "unnamed spring."
 21 And now we're needing to, you know, choke it in;
 22 so that's why I hired an attorney.
 23 **THE COURT:** Are you prepared to name the spring?
 24 **MS. HELTSLEY:** Well, I'd name it Elizabeth Eldridge
 25 Spring.

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1 THE COURT: Mr. Murphy, anything further?
2 MR. MURPHY: Just a few other questions.
3 Q. (By Mr. Murphy) Ann, you said that --
4 A. Did I -- did I help you with that?
5 Q. Yes, you did.
6 A. Thank you. I'm sorry of my ignorance on water
7 rights.
8 Q. When was the last time you said that you have
9 been on my property and your -- and maintained, did any
10 maintenance work in the so-called ditch?
11 A. We came up about three, four years ago and
12 started doing maintenance on the spring, the dotted area,
13 the slashed area. And then we ran into a fence that I
14 didn't recognize as original, and it has a sign on it that
15 said "No Trespassing," so we backed away and didn't
16 continue any further.
17 Q. But you didn't -- You were in there three or
18 four years ago, cleaning the spring?
19 A. To -- to do maintenance is what you asked.
20 Q. Okay.
21 A. I -- I was there this summer, as well. But --
22 Q. Not doing maintenance?
23 A. No, I brought people up. We had a
24 teleconference, and on the teleconference, we said that we
25 were going to be bringing an expert up. But you and

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1 your -- You obviously have done ditch maintenance from
2 your property all the way, you claim, into my property?
3 A. Yes.
4 Q. Right, the last couple years?
5 A. (Indicates.)
6 Q. You still don't -- Do you have a -- currently
7 have a special use permit, also?
8 A. We have a Diamond H Ditch Association with all
9 four members. And to my knowledge, it's still in process,
10 it's still active.
11 Q. When was the last time you submitted -- The
12 Diamond H, when was the last time they submitted an
13 application for special use permit?
14 A. Well, we don't have to submit one every time we
15 do low maintenance. This last summer, we had a backhoe in
16 on the Forest Service property. We didn't have to do a
17 special use permit. We already have one in place.
18 Q. Did the Kozaceks do that, or was that -- Did
19 you guys --
20 A. All of the members pay for the maintenance. If
21 we have to bring somebody extra in, we all pay for the
22 maintenance.
23 MR. MURPHY: No other questions, Your Honor.
24 THE COURT: Diana asked whether Hull Exhibit Number
25 4 was admitted. Was there any objection to admission of

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1 Mr. Hull were not on the line for that teleconference, so
2 apparently you didn't bother to be on that teleconference.
3 Q. Well, maybe we didn't get a phone call.
4 A. Whatever.
5 Q. Okay.
6 A. You know, I -- I understand scheduling.
7 Q. Okay.
8 A. But I brought Mr. Warner up, and Miss Hull
9 aggressively told us to leave.
10 Q. Ann, do you -- do you know how many years that I
11 have lived on that property?
12 A. You bought the property in '04.
13 Q. Have you ever seen me on the property, or have
14 we ever encountered each other on the property?
15 A. I've never met you before, Mr. Murphy, until the
16 time that I and Mitzi met you in the field.
17 Q. But you have been doing work in the ditch three
18 or four years ago?
19 A. We have always done work in the ditch.
20 Q. Okay.
21 A. There was never any problem until now.
22 Q. You understand I haven't seen you down there, my
23 dogs haven't been barking. It's just -- That's news to
24 me. I did not know that you had been down there.
25 Just one other question, too: Have you resolved

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1 Hull Exhibit Number 4?
2 MR. RIGBY: What -- what was it, again? Was it the
3 special use application?
4 THE COURT: Well, it's the Report Form 110 dated
5 1908. It was --
6 THE CLERK: Report on Agricultural Homestead
7 Applications.
8 MR. RIGBY: Oh, yes, no objection.
9 THE COURT: Mr. Murphy, any objection to that?
10 MR. MURPHY: No, no.
11 THE COURT: Okay, we will admit Hull Exhibit
12 Number 4.
13 Now, Mr. Rigby, where are we?
14 MR. RIGBY: Your Honor, I almost hesitate to
15 introduce this exhibit. We intentionally kept it out, but
16 it's been brought up by --
17 I guess -- I guess let me ask the court if the
18 court has any question about the upper ditch that is not
19 really relevant to this, that was pointed out. Because if
20 so, I was going to introduce a picture to evidence that
21 that was in fact -- that is in fact a diversion off of the
22 North Fork itself.
23 But quite frankly, all it does is cause
24 confusion, as has been evidenced by some of the testimony
25 here. It's not relevant to this.

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1 THE COURT: And it's not part, it doesn't --
2 MR. RIGBY: No.
3 THE COURT: How do I say it. That it's not --
4 MR. RIGBY: It -- it is a ditch. It was a ditch, as
5 was testified.
6 THE COURT: But it's not hydraulically connected
7 to --
8 MR. RIGBY: It can be. It can overflow into, but --
9 THE COURT: That was the talk about the
10 contamination --
11 MR. RIGBY: Exactly.
12 THE COURT: -- of the spring source?
13 MR. RIGBY: Exactly. But I fear we already have
14 enough confusion. If the court's concerned about this at
15 all, I'll introduce it to show that -- where it's diverted
16 from the North Fork. But otherwise, I'd just as soon
17 leave it alone, because it's not relevant.
18 THE COURT: Okay, unless we need it, let's leave it
19 out. Okay, it looks like everybody is in agreement.
20 What's your next step, Mr. Rigby?
21 MR. RIGBY: I have no further questions, Your Honor.
22 THE COURT: So you rest?
23 MR. RIGBY: I rest.
24 THE COURT: Let's see, Mr. Baxter, we're done with
25 your presentation in support of your recommendation.

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1 fisheries and related --
2 **A. After -- after I finished my Master's Degree, I**
3 **have been working in the field for 15 years.**
4 **Q. And do you have expertise in stream assessment**
5 **or stream --**
6 **A. Yes. I've -- I've done extensive fieldwork in**
7 **streams and with fisheries, and particularly as it relates**
8 **to irrigation. The last several years, I have been**
9 **involved in fish passage projects as related to passage**
10 **over irrigation structures.**
11 **I've also done several assessments on -- on**
12 **where fish barriers may be that are primarily -- consist**
13 **of irrigation structures. I've conducted those in the**
14 **Big Lost River, Little Lost River, the Upper Green, and**
15 **the Little Snake.**
16 MR. HULL: Okay, Your Honor, at this time I would
17 like to have Mr. Gregory entered as an expert witness on
18 irrigation structures and --
19 THE COURT: Let's see, that would be an expert in
20 fisheries biology and fish passages? Or how do we phrase
21 it?
22 MR. HULL: And irrigation structure.
23 MR. RIGBY: Was that what you indicated, irrigation
24 structure?
25 **A. Yeah. And identifying irrigation structures,**

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1 So I guess we're ready to move to the objectors'
2 case in chief. Mr. Murphy or Mr. Hull, do you want to
3 proceed with your case? Or was your case developed
4 already?
5 MR. HULL: No. We'd call our expert.
6 THE COURT: Okay, and whom do you want to call?
7 MR. HULL: Jim Gregory.
8 THE COURT: And will you be conducting the
9 examination, Mr. Hull? Will you be doing the examination?
10 MR. HULL: It looks like both of us will.
11 THE COURT: Okay.

12
13
14 JIM GREGORY,
15 produced as a witness at the instance of Objectors Hull
16 and Murphy, being first duly sworn, was examined and
17 testified as follows:
18 DIRECT EXAMINATION BY MR. HULL:
19 **Q. Jim, can you -- Daryl Hull again.**
20 **Jim, can you tell me a little bit about your**
21 **educational background?**
22 **A. Yes. I have a Bachelor's Degree in Wildlife**
23 **with an emphasis in Fisheries. And a Master's Degree in**
24 **Biology, also with an emphasis in Fisheries.**
25 **Q. And how many years have you been working in**

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1 **whether they're a barrier to fish or not.**
2 MR. RIGBY: Whether they're a barrier to fish.
3 **A. But also identifying them. In those**
4 **assessments, what I do is walk the stream and identify the**
5 **structures and -- and geo-locate them. I also manage a**
6 **recreational ranch above Mackay Reservoir that's about**
7 **2,000 acres.**
8 MR. RIGBY: Your Honor, for those purposes, I have
9 no objection.
10 THE COURT: So you're working with the high flow
11 claims in the Lemhi?
12 **A. No, no. And primarily in the Big Lost, the**
13 **Little Lost, and then a couple of places in Wyoming.**
14 THE COURT: Okay, since there's no objection, then,
15 to admission of his expertise in the fields of irrigation
16 structures and fish passages and fish biology, I'll
17 designate him as an expert.
18 Go ahead, sir.
19 **Q. (By Mr. Hull) Okay. Jim, in November of this**
20 **year, you had the opportunity to meet with Mr. Murphy and**
21 **I on the property?**
22 **A. Yes.**
23 **Q. And walk it with us. Can you tell me where we**
24 **started at and what we observed?**
25 **A. Yeah. Can I approach the map?**

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1 THE COURT: Oh, yes, go ahead. I'm sorry.
2 A. Okay, what we did is started up at the top of
3 the -- of the project -- or of the property and looked at
4 the irrigation structure that was talked about just
5 recently, and proceeded down the ditch.
6 And although -- although the diversion and the
7 water itself aren't relevant to this, I think the -- the
8 way the water flows is, so I'll just go over that.
9 The water comes down along the toe of the slope
10 here. It crosses -- This is from the upper ditch out of
11 the North Fork. It crosses the driveway, and then it goes
12 out onto this area.
13 And this -- this is kind of a high area. They
14 put the ditch up on the highest spot so that it can
15 irrigate down the sides, and irrigates this direction.
16 And the water that goes that way is captured into this low
17 spot and runs into the North Fork. And then the water
18 also runs down the high spot this way.
19 And it was dry when we -- when we went there,
20 but the slope of the land was such, and the ditches that
21 were there indicated that -- that the water would run off
22 of this high spot this direction and run into the spring.
23 And then we -- we went down the spring at the
24 spring source right here, which was the first place water
25 was evident on the surface. There was a couple of small,

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1 Q. So in other words, it flows away from the North
2 Fork, into the spring channel?
3 A. That's correct.
4 Q. Where was the first point that you observed
5 anything that looked modified in the spring channel?
6 A. The first place that I saw any modification was
7 down where the yellow dot is located.
8 Q. And what did you see at that point?
9 A. I saw a berm that looked like it was placed
10 across the existing channel, and the water was turned at a
11 right angle or nearly a right angle to the direction that
12 it had been traveling, and moved towards the slope of
13 the -- towards the toe of the mountain.
14 Q. Past that point, what did you observe?
15 A. I observed the ditch was along the side of the
16 hill there, and the -- the berm along the side of the
17 ditch that held it up towards the hill was -- was evident.
18 Q. Did it appear to have been done with bigger
19 machines? I mean it was a high -- Was it a high berm,
20 low berm?
21 A. Yeah, it was -- it was a substantial berm. And
22 it was on a fairly good slope of the -- of the hill, and
23 so it had to be bermed substantially to hold it there.
24 Q. Through the dotted area, was there anything
25 consistent with any manmade or man-caused intrusion to a

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1 I guess you'd call them, tributaries or finger streams or
2 whatever coming in together, and they formed the channel
3 that came down this direction.
4 As we proceeded down, there's another one that's
5 a little bit larger that comes in right here, flowing this
6 direction.
7 Sorry, can you see that all right?
8 THE COURT: Sure.
9 A. Flows into the spring channel and then
10 continuing down this direction. And there's another one
11 of those that comes right here and flows into the spring
12 channel. We went down across the fence to this -- this
13 point that's marked as the yellow dot, and at that point
14 the channel went towards the hill briefly and -- and came
15 into the ditch, the ditch here. And that --
16 Well, okay, do you want me to stop there?
17 Q. (By Mr. Hull) You can stop.
18 A. Okay.
19 Q. The finger channels, it's been testified here by
20 others that water in that area would flow toward the North
21 Fork. The finger channels in the irrigation on the
22 property flow which way?
23 A. From that high spot, it flows towards the spring
24 channel, and the finger channels also flow into the spring
25 channel.

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1 natural stream system?
2 A. I -- I didn't see anything that I could identify
3 as work being done to keep the channel open or to keep the
4 channel in that location.
5 Q. Did the stream channel seem like it was very
6 consistent in volume?
7 A. Actually, up at the spring head where it --
8 where it started, it was very small, just a trickle. And
9 as these finger streams came into it -- and it was also
10 evident that there was spring flow coming in from the
11 ground right in the channel, and it gained in discharge
12 throughout the reach, down to the point of the yellow dot.
13 Q. Did you see any evidence of a head box,
14 headgate, spring box or anything else on the property?
15 A. I saw no headgate, no measuring device. And the
16 only thing I saw that could be construed as a spring box
17 was the vertical culvert that was buried where Mr. Murphy
18 indicated he got his domestic water.
19 Q. And can you show us again on the map where that
20 is?
21 A. Yeah. Just up from the purple circle, across
22 the -- across the road.
23 Q. Was there any evidence of water on the surface
24 at that point?
25 A. Not on that side of the road.

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1 Q. So the water started on the other side of the
2 road?
3 A. The spring water started on the other side of
4 the road.
5 Q. And how far from the driveway would you say it
6 started?
7 A. Oh, not far. 20 to 30 feet.
8 Q. Okay.
9 THE COURT: Mr. Hull, the testimony was he saw a
10 spring box on the north side of the road, north of the
11 purple, plum dot?
12 MR. HULL: He saw what could be construed as a
13 spring box. It was a culvert, a vertical culvert.
14 That is actually, sir, just for clarification,
15 the Murphys' well.
16 THE COURT: But that's a metal culvert?
17 MR. HULL: Yes, yes.
18 THE COURT: In the ground?
19 MR. HULL: It's not -- it's not a cased well. It
20 goes down about 12 feet. I know, because my property
21 gives an easement to him for that well and it's listed on
22 the easement as a well. We have a copy of the easement,
23 if you would like to see it.
24 But it's actually a vertical culvert down into
25 the ground, and there's a submersible pump in it that

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1 right angle where people have said there's a high water
2 spot and water could back -- water could make it back to
3 the North Fork, do you believe that water could be backed
4 up high enough where it could actually go over that spot
5 into the North Fork, or would it drain into the spring?
6 A. Could you clarify where you're talking about?
7 MR. MURPHY: Can I approach the map?
8 THE COURT: Sure.
9 Q. (By Mr. Murphy) A couple of people have stated
10 that there's been backed-up water here, flooding. A
11 couple of statements. They said water -- the water going
12 this direction takes a more southerly straight course
13 instead of the southwest course.
14 I'm asking if, in your expert opinion, would
15 that water be checked-up? Would that happen to that
16 water, or water (unintelligible) --
17 What direction would it go if it was checked
18 (unintelligible)?
19 A. Okay, the spring channel in there is -- as has
20 been described earlier, has fairly low banks. But as you
21 move away from the -- from the channel itself, you move
22 out onto what I would call a flood plain. And then as you
23 get away on the -- on the northwest side, of course, you
24 go up into the mountain.
25 As you get away on the southeast side, you go up

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1 pumps water up to the house through a pipe system.
2 THE COURT: But you were saying, too, that the first
3 time he saw spring water rising from the ground was on the
4 south side of that road?
5 MR. HULL: Correct.
6 THE COURT: And that would be right at the plum dot?
7 MR. GREGORY: That's right.
8 MR. HULL: At the plum dot, yes.
9 THE COURT: Okay.
10 MR. GREGORY: Yeah, the vertical culvert was buried,
11 and there was no water around it on the surface.
12 THE COURT: No one said anything, but in IDWR
13 Exhibit 2, is that a home on top of the hill there, up the
14 dirt road from the plum dot?
15 MR. MURPHY: That's my home.
16 MR. HULL: Yes, that's the Murphys' house. It was
17 Ms. Crawford's, Ms. Crawford's residence.
18 THE COURT: Okay.
19 MR. HULL: And the Martins after that.
20 THE COURT: Okay. Go ahead, sir.
21 MR. HULL: Okay, no further questions.
22 MR. MURPHY: Patrick Murphy.
23 DIRECT EXAMINATION BY MR. MURPHY:
24 Q. Jim, as stated earlier, do you think in some --
25 Well, in that section below, kind of in the

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1 into the field. And so right -- right here -- In fact,
2 the irrigation water in the ditch comes down right across
3 this high spot here that exists.
4 And so as to your question of if it could be
5 backed-up enough to go over there, it's -- it's not a high
6 area. It's a wide area. I'd say, you know, just
7 eyeballing it and guessing, it looked to be elevated a
8 couple of feet above the channel.
9 Certainly, with a beaver dam or something that
10 was -- that was wide across there, it could probably be
11 backed up to the point that it went over the top. And
12 maybe if there was a flood flow, snow melt coming over
13 there, it might have sufficient discharge to go over the
14 top. But in my opinion, it would take one of those two
15 things before water could go over -- over that side.
16 Q. Did you observe any banks -- banks, channel
17 banks that would be busted out that would flow that
18 direction?
19 A. I didn't. I didn't observe anything that looked
20 like it had either broken out in the past and been
21 repaired or that it could break out easily.
22 Q. Okay, thanks, Jim. Where -- where do you
23 believe, with your opinion --
24 A. Actually, can I qualify that?
25 Q. Yes.

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1 **A.** The only -- the only place that I did observe
2 something like that was down where the yellow dot is.
3 That berm was -- was not very big, and clearly the
4 water -- And it wouldn't take a whole lot. The water
5 could breach that.
6 And from that point, it looked like it curved
7 around. And I didn't walk that southeast of the yellow
8 dot, but -- but from the yellow dot looking down, it
9 looked like it curved around towards the North Fork and
10 would probably go into the North Fork fairly soon if it
11 breached that part of the -- breached that structure.
12 **Q.** Okay, thanks, Jim. In your expert opinion
13 working with irrigation and by being an irrigator, would
14 you see any reason to gain elevation -- What would you
15 gain -- Would you gain anything by going upstream of the
16 Forest Service -- the yellow dot right there? Do you have
17 enough elevation there to --
18 Do you have the proper elevation and facilities
19 to -- to conduct water from that point, in your opinion?
20 **A.** Well -- well, based on the aerial photo
21 pictures, it looks like that ditch continues down and
22 does -- and is able to irrigate the land. If you moved
23 that point of diversion upstream and actually diverted the
24 water from the channel, you could get some additional
25 elevation on it, but I don't think it would be enough to

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1 **cfs. It's a very small amount.**
2 MR. MURPHY: Thanks, Jim.
3 No more questions, Your Honor.
4 THE COURT: Okay, Mr. Hull, your witness. Do you
5 have any further questions of your --
6 MR. HULL: Not at this time, Your Honor, no.
7 THE COURT: Okay, we're ready for cross, Mr. Rigby.
8 MR. RIGBY: Thank you, Your Honor.
9 CROSS EXAMINATION BY MR. RIGBY:
10 **Q.** First of all, as to that particular issue of the
11 point of diversion: You -- you claim to be an expert, and
12 I understand you are, in working with irrigation ditches
13 themselves. Isn't it a fact that there's a lot of
14 irrigation ditches that have gaining reaches within the
15 ditches themselves --
16 **A.** That's true.
17 **Q.** -- and (unintelligible). So is that really
18 relevant? I got to admit, as a water attorney, I'm going
19 "so?" Is there -- is there relevancy there that I'm
20 missing?
21 **A.** The relevancy is that if it's -- if you're
22 actually removing the water from the channel at the
23 spring, you're going to remove less water.
24 **Q.** Oh, certainly, certainly. But -- but the point
25 somehow is inferred that there's less of a water right as

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1 make any difference as far as irrigating additional land.
2 The thing that you would do is you would divert
3 less water, because a lot of the water seeps into the
4 channel below that point.
5 **Q.** Do you see any point above that which you would
6 qualify as a point of diversion?
7 **A.** Well, when I look at -- look for a point of
8 diversion, what I'm looking for is a place where the water
9 is diverted from a natural channel, actually removed to
10 where it would not naturally flow.
11 And the first place I saw that in coming down
12 through that spring channel was at the yellow dot, so
13 that -- that appeared to me to be the first place where
14 the water was actually removed from the channel.
15 **Q.** In your opinion, where the water first comes out
16 of the ground, do you believe that water could actually
17 be -- would -- would be measurable for the said water
18 rights? Is there enough water there, even if we --
19 If we move that point of diversion to where the
20 water comes out of the ground, could you actually measure
21 the water for said water rights, do you think?
22 **A.** Well, you can measure a very small amount of
23 water. I'm not sure exactly what the water right is, but
24 I would say the -- right there at the spring source, the
25 water is -- is, I don't know, less than a quarter of a

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1 a result of that. That's not --
2 **A.** No, there's not less of a water right. There's
3 less water removed.
4 **Q.** Sure.
5 **A.** Able to be removed.
6 **Q.** At that particular -- at that particular point?
7 **A.** Yes.
8 **Q.** Now, would you concur, as the other experts did,
9 that part of an analysis should be if you have available
10 credible witness testimony, that should go into -- in your
11 determination? I'm not asking --
12 **A.** As a legal issue, yes.
13 **Q.** As a legal issue?
14 **A.** Yeah, if you --
15 **Q.** How about factual? In forming an opinion, if
16 you have a witness that is credible, shouldn't that go
17 into forming your opinion?
18 **A.** Yes.
19 **Q.** Thank you. Assume for a moment, just assume for
20 a moment -- I'm not asking you to -- to address the
21 credibility. That's for the judge.
22 But assume for a moment that Adele Crawford's
23 testimony that she several times saw a breach and it
24 flowed toward the North Fork is credible, that would --
25 that would be in contradiction to what you just said here,

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1 correct?

2 A. That's correct.

3 Q. Okay, but -- but if she's correct, then you're

4 wrong?

5 A. That's correct.

6 Q. If you're right, she's wrong. But she claims to

7 have seen it, okay.

8 A. And I -- I didn't say that it couldn't happen.

9 I said that it would be under those few circumstances, in

10 my opinion; a beaver dam or very high flow.

11 Q. Okay, and in -- and in Heltsleys' testimony,

12 both of them, as to the breach that occurred in the lower

13 part, somewhere in the middle of the -- of the part that

14 caused them to actually lose their water; again, if that

15 testimony is credible, wouldn't that be in contradiction

16 with -- with -- with your testimony (unintelligible)?

17 A. It is. That's exactly right.

18 Q. And -- and -- and therefore, if they're called

19 up by Mr. --

20 MR. RIGBY: What's his name (unintelligible).

21 UNIDENTIFIED: Harold Hanson.

22 Q. (By Mr. Rigby) -- Harold Hanson to help in doing

23 that, if that actually occurred, then your hypothesis is

24 wrong; right?

25 A. If it actually occurred, my hypotheses are

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1 understood, as well?

2 A. That's what she said.

3 Q. Okay, so in other words, a diversion at this

4 particular point could have been there. And after all --

5 I mean in your -- in your experience with

6 springs, do they change?

7 A. They do change.

8 Q. Okay. And so therefore, it's not implausible

9 to -- to believe that she's correct, that it was on the

10 other side, she had to put in the culvert; and then it's

11 no longer required, because the spring is now flowing on

12 the southwesterly side instead of the northeasterly side?

13 A. That's possible.

14 Q. Okay. Finally, when you say that even if there

15 is a breach of the bank or whatever, you're saying it

16 can't go all the way to the river.

17 Isn't it a fact, though, in irrigation, if you

18 lose it, you lose it? What I'm saying is -- is is

19 there -- Does it make any difference to the end user if

20 it's -- if it's breached and no longer up high where it

21 can continue on into even what you claim to be the ditch?

22 A. Well, the difference is that when you --

23 Typically, when you have a ditch, you have it on

24 the side of some slope. It's there to hold the water from

25 flowing down the slope. In an alternate situation, you

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1 wrong.

2 Q. Okay.

3 A. Or -- or if it occurred in the location that

4 they indicated, my hypothesis --

5 Q. Good point.

6 A. -- is wrong.

7 Q. Good point. It has to be in the particular

8 location, and it has to be credible? I mean it has to be

9 actual --

10 A. Exactly.

11 Q. -- (unintelligible)?

12 A. Actually, let me qualify that, too. He said

13 there was two break-outs. The second one, he indicated

14 was down --

15 Q. Yeah, and I'm not talking about that.

16 A. -- below the yellow dot, and that one clearly

17 could happen.

18 Q. Clearly. And -- and that -- that wasn't my

19 question, but thanks for clearing it up.

20 As to the spring on the other side of the

21 driveway, of the culvert --

22 A. Yes.

23 Q. -- flowing water, again, Mrs. Crawford's

24 testimony was -- and you have been here today -- when she

25 was there, it actually started there. Is that what you

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1 have a stream where when the water goes out of the stream,

2 it comes around and goes back into the stream.

3 And my contention is that above the yellow dot,

4 this is the latter situation.

5 Q. If that -- that -- You mean if you lose it,

6 it's going to come back?

7 A. Well, and I'm not saying that you couldn't lose

8 it. I said there's those two situations I think you

9 could, but -- but I don't think you're going to lose it

10 just as a matter of course.

11 You're not going to lose it for a little

12 vegetation, you're not going to lose it for a branch

13 falling in the stream or whatever. If it -- if it moves

14 over a little bit, it's going to flow back into that

15 because of the slope of the land around it.

16 Q. So your contention is, if I follow that to its

17 logical conclusion, is that let's say we do have a

18 historical event that wipes out the channel as you see it

19 now. Your -- your -- your position would be that that

20 will all still reach the -- the yellow point of diversion?

21 A. That's true.

22 Q. And you base that on?

23 A. On the fact that that meadowland between the

24 channel and the North Fork is higher. It's -- it's not a

25 narrow dike that it's breaching. It's that whole land

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1 between the -- between the two channels that it has to
2 pass over.

3 Q. Again, I assume you heard the testimony that --
4 that the water was gone when this breach occurred that was
5 in -- again, testified to be in the -- in Mr. Murphy's
6 property.

7 A. Right.

8 Q. Therefore, the ditch was gone. You're saying
9 that, well, just be patient and it will come back?

10 A. Actually, what I would say is that probably
11 occurred at the yellow dot.

12 Q. Oh, so in other words, you -- Again, you're not
13 convinced that the testimony is credible?

14 A. I'm not convinced that the location is credible.

15 Q. For these people that have been there their --
16 basically for years and years and years, and you -- you
17 viewed it in one afternoon?

18 A. Well, actually, I think that testimony came from
19 somebody who had been there intermittently, the last time
20 several years ago.

21 Q. And -- and also by Mrs. -- by Ann herself.

22 A. That's correct.

23 Q. Okay. I guess -- And again, I use experts all
24 the time, but it still amazes me how we can take evidence
25 of -- of individuals that have been there and testify, and

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1 only do that for a number of feet above; which -- which
2 does not cover the reach here.

3 A. No, that's not what I'm talking about. What I'm
4 talking about is if your point of diversion -- let's just
5 say, hypothetically, that your point of diversion was
6 at -- at the yellow dot, but you wanted to be able to
7 maintain the channel above it. That to me doesn't seem
8 like reason enough to move the irrigation point upstream,
9 unless you actually remove the water upstream.

10 Q. Oh, I totally concur. That's not -- that's not
11 the issue here. If that was the only reason for doing it,
12 asking for a change in point of diversion, I would concur
13 with you completely.

14 But that's not the evidence that's been
15 presented. Whether you believe it or not is different.

16 But that's not the evidence that's been
17 presented, correct?

18 A. That's correct.

19 MR. RIGBY: I have no further questions.

20 MR. BAXTER: No questions, Your Honor.

21 THE COURT: No further questions of our witness.

22 MR. MURPHY: I just want to make sure: Was Jim
23 Gregory's analysis, site visit submitted? I think Garrick
24 submitted it? I'm not sure.

25 UNIDENTIFIED: The email was.

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1 in essence discount it without using that in your analysis
2 itself.

3 A. Actually, that amazes me, too. And I think this
4 whole issue could be easily cleared up with a site visit
5 by the court. I think -- And they would be able to see
6 for themselves what the issue was, and how it should be
7 resolved.

8 Q. But -- but again, you understand, do you not,
9 knowing irrigation laws as you have worked with them, why
10 it's important for one to have -- especially in this area
11 with the Endangered Species and also with -- with in
12 essence being a stream, and attempting to clean out a
13 stream, the importance of having this referred to as a
14 ditch for them, do you not?

15 A. I do, actually. And I have run into this
16 situation before where for some reason or another somebody
17 needed to alter the channel above their irrigation
18 diversion point, which in this case, in a different case
19 that I'm talking about, the irrigation point wasn't in
20 question. But they needed to alter the channel above
21 that. That happens all the time. It doesn't necessarily,
22 in my opinion, mean that you move the diversion point
23 upstream to that point.

24 Q. Well, and I'll represent to you we were told
25 today by the department that that's for -- for -- you can

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1 MR. MURPHY: What's that?

2 UNIDENTIFIED: The email was.

3 MR. MURPHY: The email was. Okay, it's the same,
4 the email is the same, okay.

5 Exact same as the letter, right, Jim?

6 MR. GREGORY: Right.

7 MR. MURPHY: Okay.

8 THE COURT: Okay, Mr. Gregory, I think you're
9 excused. Thank you.

10 Anything else from Mr. Murphy or Mr. Hull?

11 MR. MURPHY: I'd like to call Mr. Hull as a witness.

12 THE COURT: Sure.

13

14

15 DARYL HULL,

16 produced as a witness at the instance of Objectors Hull
17 and Murphy, being first duly sworn, was examined and
18 testified as follows:

19 DIRECT EXAMINATION BY MR. MURPHY:

20 Q. Patrick Murphy again.

21 Daryl, could you tell me how long you have owned
22 the property?

23 A. We have owned the property now for about eight
24 years.

25 Q. Okay, how long have you been irrigating the

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1 property?

2 A. Well, prior to me, I do a lease agreement with
3 Keating Outfitters, who did it until I got there. So I've
4 been doing it now for the past three, irrigating it
5 myself, since we got up there full time.

6 Q. Because there seems to be a question of the
7 movement of water across some of the fields, could you
8 explain how you irrigate from the North Fork of the Salmon
9 down through your pastures and down into my pasture, since
10 we share the same point of diversion?

11 A. Yes, I sure can.

12 Can I approach the map, Your Honor?

13 THE COURT: Please.

14 A. Outside of this map is a slough (unintelligible)
15 that comes out of the North Fork of the Salmon River. It
16 travels through a fish (unintelligible) into a diverter
17 box that goes to both my north pasture -- Which I really
18 can't see on this. It would be up in here. One goes to
19 the north pasture. The other one continues along the
20 slope here and irrigates the south pasture and down into
21 the Murphy property. I do that with -- flood irrigate
22 using dams, arc dams. There's a ditch all the way down.

23 As you can see from this photo, when this was
24 taken, Earl Keating must have been irrigating, because you
25 can see the water coming down through the ditches here and

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1 it flows into the North Fork. But I do get water that way
2 from right in this area.

3 But everything else tends to run this way. This
4 is all water grass. I don't know if anybody's familiar
5 with the real tough grass that you get from constantly
6 wet. The horses won't eat it. I get that all the way
7 along here. We get it again down along here. We get it
8 again right here, and it's all because it's continuously
9 running that way (unintelligible) irrigation.

10 Q. While you're there, Mr. Hull, if Harold Hanson
11 was irrigating -- say high water, irrigating a lot of
12 water, where would it most likely have settled and looked
13 very swampy and looked like it might -- the spring might
14 back up?

15 A. There are two places that, really, it's bad. It
16 gets bad right here when you're irrigating heavily. As
17 you know, a couple times, I've swamped your well.
18 Irrigated so heavily, I couldn't get across the drive
19 without the well --

20 This area right here is very, very wet; and this
21 runs directly into the spring.

22 This area down here, as your property really
23 tends towards the southwest, this area down here gets low
24 and wet when we irrigate heavily.

25 Also, again, along this, what I'll call a

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1 spreading out on the property.

2 As it comes out here, comes across the culvert
3 right here, across the driveway, comes down, the water
4 comes into a high spot here. And I have a great deal of
5 difficulty, because it always wants to run this way,
6 towards the spring. Not away from it, but towards it. I
7 have a hard time getting water over on this side of the
8 property. It's even worse down on the Murphy property.

9 When you get here, the ditch high lines right
10 across here, and the water continuously runs this way. I
11 hardly ever get it over here, because that's just the
12 slope of the land. Everything slopes toward the
13 southwest. The property is just that way.

14 The property is very uneven. That's why we
15 don't hay it. We can only use it for pasture. Big
16 gullies. In fact, I've caught my tractor in a couple of
17 them, they're so big.

18 It's never been levelled, so that's a problem.
19 Water tends to pool in certain areas, so it's hard to get
20 it to flow, you know, a good sheet flow across it.

21 As you come across here, this is a very low
22 area. The vegetation you see here, and it's cattails and
23 everything else, and water will tend right here to come
24 in. This vegetated area here, some will flow into this
25 area and pool. And then later, when it gets high enough,

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1 low-lying swampy area right here. Those three areas.

2 Q. Okay, thank you. Since you have been there
3 irrigating -- And you're there almost every day in the
4 summer, I imagine?

5 A. I try to be.

6 Q. Have you seen anybody up on my property or your
7 property doing any maintenance?

8 A. The only time I've ever seen anybody is when
9 they came up to do the assessment, which Mr. Warner
10 (unintelligible), but my wife did.

11 Q. Okay, at high water -- One more, one other
12 question. The difference between high water in the North
13 Fork, have you ever seen the spring on my property
14 actually have high -- change -- change in volume from --
15 from high to low water?

16 A. Not significantly. Even when we're irrigating
17 real heavily and I'm really pumping the ditch,
18 (unintelligible) flooding your well, you'll see a slight
19 volume difference right here in this low area where it's
20 coming in and it's actually flowing directly into the
21 spring, wastewater. That's the only time I've ever seen
22 it, and it's -- it's insignificant.

23 Q. Okay.

24 A. Even last year with the heavy snows, and we had
25 record -- a record water year, that spring never changed

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1 volume.
2 Q. Thanks.
3 MR. MURPHY: I think there's no further questions
4 from me, Your Honor.
5 THE COURT: Okay, thank you.
6 Do you have any other witnesses?
7 MR. RIGBY: May I cross?
8 THE COURT: No.
9 MR. RIGBY: Okay. And it would probably be just
10 fine.
11 THE COURT: Go ahead, please.
12 MR. RIGBY: And I will -- I really do only have a
13 couple.
14 CROSS EXAMINATION BY MR. RIGBY:
15 Q. And again, I'd ask you the same as I asked
16 Mr. Gregory: You heard the testimony of Adele Crawford?
17 A. Yes.
18 Q. And so therefore you do not believe her
19 testimony?
20 A. No.
21 Q. Thank you. Is there any reason you -- that she
22 would -- I mean you don't know of any reason? She's --
23 she's the most disinterested party I see here, is what I'm
24 saying. Everybody else seems to be interested in -- one
25 way or another. And you -- you don't -- you don't know of

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1 THE COURT: Okay, I guess that's it.
2 Thank you, Mr. Hull.
3 Let's see, now, Mr. Hull, do you intend to call
4 Mr. Murphy as a witness?
5 MR. HULL: Yes, Your Honor.
6
7
8 PATRICK MURPHY,
9 produced as a witness at the instance of Objectors Hull
10 and Murphy, being first duly sworn, was examined and
11 testified as follows:
12 DIRECT EXAMINATION BY MR. HULL:
13 Q. Paddy, I'm going to refer you to Hull Exhibit
14 Number 2.
15 A. Okay.
16 Q. It's the special use application submitted by
17 Mr. Gohmes.
18 THE CLERK: I'm sorry, which exhibit, again?
19 MR. HULL: It's Hull Exhibit 2.
20 THE CLERK: Okay.
21 Q. (By Mr. Hull) I'm going to go to the second
22 page, the map that Mr. Gohmes submitted with his
23 application to the -- the special use application to re-do
24 the ditch, to re-build the ditch. It's a proposed ditch
25 reconstruction.

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1 any reason, do you?
2 A. No.
3 Q. Okay.
4 THE COURT: Who was it you were -- you mentioned?
5 Mrs. Crawford?
6 MR. RIGBY: Mrs. Crawford. She was the one that
7 owned it (unintelligible) before these folks did, I should
8 say.
9 Q. (By Mr. Rigby) And of course, I guess this is
10 rhetorical, but as far as the Heltsleys are concerned in
11 the breach in the particular area, you would dispute that,
12 as well?
13 A. I would dispute their location based on what I
14 know of the property, yes.
15 Q. Okay. You do understand their concern of
16 needing this -- this -- you call it a stream -- to be in
17 the channel to get to them? You do understand that?
18 A. I understand their need to have the water come.
19 I don't understand their need for this case, because they
20 have always gotten water. So yes, I guess I do in a way
21 understand.
22 MR. RIGBY: I have no further questions, Your Honor.
23 THE COURT: Mr. Baxter, do you have anything you
24 wanted to ask?
25 MR. BAXTER: No questions.

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1 Based on what Mr. Gohmes did here, can you tell
2 me where he ended his ditch reconstruction, and how many
3 feet it was from your property line?
4 A. I believe this -- this -- what this map shows
5 and what is represented on the ground is right on the
6 downstream side somewhere of the foot bridge across --
7 across the spring channel, probably a hundred feet from my
8 fenceline.
9 Q. And Mr. Gohmes actually puts a foot marker on
10 that map. Can you tell me what that says from your
11 fenceline?
12 A. (No response.)
13 Q. If you follow it up near "c-o-r number 8"?
14 A. Oh, I didn't even see that. 150 feet.
15 Q. From the fenceline. Would you say that this
16 is -- this represents the end of the ditch, the ditch
17 reconstruction that he proposed for the Forest Service?
18 A. Absolutely. I mean --
19 Q. And what shows north of that point?
20 A. What shows north of the point says "live
21 spring."
22 Q. And that's all?
23 A. Yes.
24 Q. And he designates it as ending at what point?
25 There's an "F.S." on there, Forest Service.

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1 A. Forest Service horse pasture, which is currently
2 still there.
3 Q. And that would be where the barn is on that map?
4 A. Yes.
5 Q. And --
6 A. Pretty much right where the yellow dot is.
7 Q. Okay, just roadside of the yellow dot, would you
8 say, is the horse barn?
9 A. Oh, yeah. Can I approach the --
10 THE COURT: Please.
11 A. This is the horse barn. It's fenced right here.
12 This is a little horse pasture they keep usually Forest
13 Service mules in.
14 Q. (By Mr. Hull) Okay, I'm going to refer you to
15 Hull Exhibit 3. This is a paper that you got from the
16 Forest Service. Have you done anything, any studying to
17 identify the post corners in the surveys?
18 A. Yes, I have. I just got this actually last
19 week. I did not know this existed. The corner posts
20 which is shown on this map, R3 and R2, is the Levi
21 Jones -- southern portion of his property.
22 And it says on the first page on both chains 4
23 and 19.56, "R2 is identical with corner number 1 of Jones
24 claim. Marked R3 is identical with corner number 13 of
25 Jones claim." That shows it abutting exactly where it

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1 they had to be very specific.
2 The process that was going on with the Forest
3 Service, federal property, if you didn't prove it up, it's
4 kind of like this water adjudication process. You need to
5 prove it up and have all your ducks in a row, or you don't
6 get it. And so she was very specific about what was going
7 on, and it always intrigued me, because it said, "Lands
8 are covered with three main ditches leading from the North
9 Fork of the Salmon River to and upon said land."
10 Well, I would guarantee most of us, if our
11 livelihood depended upon all the orchards and produce and
12 dairy barns that she had, I would make very specific that
13 I -- I was entitled to that spring water.
14 When Levi Jones just purchased the property in
15 19 -- 1909 -- 1908, 1909 era, even more so. These people,
16 their whole livelihoods depended upon this water.
17 I was very specific about trying to figure out
18 where that comes from, and I think the last -- the last
19 exhibit that you just showed me asks that fact, is that it
20 came from the North Fork of the Salmon.
21 Now, this is very, very common to intercept
22 other said minor tributaries. I have no doubt, because
23 you can't -- If that ditch came out of the North Fork --
24 Can I approach the map for a second?
25 THE COURT: Sure.

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1 was.
2 I believe Ms. Heltsley brought up in a little
3 bit of history that the Forest Service parcelled off a
4 piece of the Jones ranch, the southern portion; and that
5 is it.
6 It also shows the irrigation ditch coming out of
7 the North Fork right on basically the corner of my
8 property where I meet the North Fork. It shows it in that
9 vicinity.
10 Going around the Bonanza Placer which is shown
11 in red here -- so the ditch actually went behind the
12 Bonanza Placer at the toe of the hill and went down; and
13 it was the high-line ditch, obviously, to the Eldridge
14 property.
15 Q. Okay. You're familiar with Hull Exhibit -- it's
16 the homestead -- Oh, it's Mr. Rigby's entry, the
17 homestead entry for Elizabeth Eldridge.
18 A. Yes, I'm very familiar with this.
19 Q. During the course of this case, have you had the
20 opportunity to go over a number of historical documents
21 related to the case?
22 A. I have. You know, because I have an intense
23 interest in, you know, the spring, this issue, I was
24 trying to find out -- Because, as I think you pointed out
25 before, Miss Eldridge was very specific. And in fact,

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1 A. You can see by the lay of the land. This is the
2 North Fork. This is somewhere -- this is somewhere in the
3 ditch vicinity. That that ditch took (unintelligible).
4 And this is before this was built, of course. This was
5 before the horse barn was built. This is -- they just
6 parcelled this off.
7 This would have easily come down and high-lined
8 with the ditch. And in fact, I believe it's the low
9 ditch. That old ditch is the low ditch that serves
10 Heltsley and the Kozaceks' properties.
11 And the new ditch, for some reason, and I don't
12 know why, they moved said point of diversion from here to
13 here. And I can understand a little bit if they still got
14 water down here from seepage.
15 But the problem was why would you -- why would
16 you switch points of diversion while trying to maintain in
17 the springtime a point of diversion in the North Fork
18 without heavy equipment would be -- in a bad water year
19 would be monstrous. You can't get up there. You'd get
20 killed.
21 If you could get enough water and enough water
22 year-round that didn't freeze, why wouldn't you just move
23 this point of diversion up to this point and carry the
24 water down? And I think we have two maps to show, the
25 1962 map, and this -- And it started in the North Fork,

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1 so this is --

2 Part of the problem is that wasn't the original

3 ditch for the homestead. They moved it at some point to

4 the spring. Although, I bet the North Fork, Salmon ditch,

5 it had to capture this spring.

6 I don't think the spring took off in this

7 direction. I really don't. I think it probably, in this

8 area right here, intercepted the spring. That's very,

9 very common. You have a larger ditch, and an intermittent

10 spring or something that's not a big volume encompassed

11 that water and took on down to (unintelligible).

12 MR. HULL: Your Honor, at this point, I have to ask

13 a question. Did Mr. Rigby submit Miss Eldridge's

14 application for homestead under the act of June 11th,

15 1906? I don't know if we got that into evidence or not.

16 MR. RIGBY: I think --

17 MR. HULL: You did, okay. That's this one Mr. Rigby

18 just (unintelligible).

19 UNIDENTIFIED: I don't think so.

20 MR. RIGBY: Oh, you know what, no --

21 THE CLERK: I don't think you did.

22 MR. RIGBY: -- we did not. (Unintelligible). We

23 did not. I'm sorry.

24 MR. HULL: I don't have copies, do I, of this?

25 MR. BAXTER: I actually have copies of

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1 Hull Exhibit Number 5?

2 Mr. Rigby, have you seen Hull Exhibit Number 5?

3 MR. RIGBY: If it's the one you just showed me?

4 MR. HULL: Yes.

5 MR. RIGBY: I haven't had a chance.

6 MR. HULL: You don't have a copy. I'll just --

7 THE COURT: Okay, if you can show that to him. He's

8 going to figure out if there are any objections to its

9 submission.

10 Q. (By Mr. Hull) Okay, Paddy, on page number 4 of

11 the application, paragraph 5 and paragraph 6, can you read

12 them to me?

13 A. Question 5 and 6?

14 Q. Yes. It's topography and formation.

15 A. Yes. "Claim covers bench and bottom land in

16 Hughes Creek and North Fork canyons, with a southeastern

17 aspect. The altitude is approximately 4100 feet. On all

18 sides of the claim, except up and down the creeks, the

19 mountains are very precipitous and rise in elevation to

20 about 6,000 feet. All of the bench and bottom land is

21 under ditch from North Fork and Hughes Creek."

22 Question 6, formation: "The soils consist of a

23 sandy loam from one to two-feet deep, under which is a

24 formation of -- which is a formation of coarse wash

25 gravel. There are no possibilities for developing water,

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1 (unintelligible).

2 MR. HULL: You have a copy?

3 UNIDENTIFIED: We have a copy.

4 UNIDENTIFIED: If I had one more copy, I could get

5 by (unintelligible).

6 UNIDENTIFIED: You don't need it.

7 MR. BAXTER: Yeah, I was just going to show it to

8 him. I'd like to keep my copy.

9 (Background conversation.)

10 Q. (By Mr. Hull) Paddy, this is Ms. Eldridge's

11 homestead application as of June 11th, 1906.

12 THE COURT: Are we going to call this document the

13 Hull Exhibit --

14 MR. HULL: What's our next one? Number --

15 THE COURT: 5?

16 MR. HULL: 5, Number 5.

17 THE COURT: Hold on a second here. I want to make

18 sure we have -- Hull Exhibit 5, and it's the --

19 THE CLERK: Eldridge --

20 MR. HULL: Eldridge homestead application act under

21 June 11th, 1906.

22 THE COURT: It's the application for the homestead.

23 MR. HULL: Yes, this is the application for

24 homestead.

25 THE COURT: Has everybody had a chance to look at

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1 but there is an abundance of water in both the North Fork

2 and Hughes Creek easily obtainable for irrigation."

3 Q. Once again, would you say Ms. Eldridge is very,

4 very specific as to what she's doing and what she has?

5 A. Yeah, she is very specific.

6 Q. Does she make any mention of drawing water from

7 a spring on any properties?

8 A. No, she doesn't.

9 Q. Okay.

10 A. One -- one interesting aspect of this, this was

11 signed October 9th, 1908. That is the exact same --

12 Within October 8th, 9th and 10th, they surveyed,

13 George Thompson surveyed that homestead, a federal

14 surveyor. I think we submitted that. The federal

15 surveyors were working with the homesteaders so they

16 could -- they could get this process done.

17 And I believe it was kind of a collaborative

18 effort, because a lot of the dates, Levi Jones' and

19 Eldridge's property is in the same month of October; were

20 all -- had surveyors, applications, correspondence with --

21 basically with the Forest Service in trying to figure this

22 out.

23 Q. And in your research, were you able to find any

24 reference to what is being called the Spring Ditch prior

25 to the proposed ditch development, the reconstruction in

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1 1962, which clearly shows the ditch going from the horse
2 barn on down, and not above?
3 A. Will you repeat that again?
4 Q. In your research, your historical research, were
5 you able to find any mention of the Spring Ditch prior to
6 the 1962 ditch reconstruction?
7 A. I did actually in -- There's a discrepancy in
8 the map from Hull Exhibit 3. This was rather unusual.
9 This was actually submitted, Your Honor, by --
10 This was actually -- this was actually submitted to us by
11 Jerry Rigby. It was another map, very similar map, except
12 it said -- similar map of the Hughes Creek Ranger Station,
13 okay, except that it said "microfilmed in 1992."
14 I guess it appears to us that someone -- I don't
15 know who or when -- had altered the irrigation. It says
16 in small letters "irrigation." And can we submit that?
17 Q. (Unintelligible).
18 A. Okay.
19 THE COURT: And that's Hull Exhibit Number 5?
20 MR. HULL: This will be 6, Your Honor.
21 A. Actually, Daryl, you submitted the wrong -- You
22 gave -- You didn't give me the -- The front map is not
23 the one with the -- The front map is not the one with the
24 old map on it. Sorry.
25 Q. (By Mr. Hull) Okay, I thought we had them --

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1 understand what you're talking about based on what you're
2 looking at. That's been marked Hull Exhibit Number 6?
3 MR. HULL: Yes, Hull Exhibit 6.
4 And I have another form here, Your Honor, if I
5 can find it. That's not it.
6 Q. (By Mr. Hull) In what document did you find --
7 In what document did you find --
8 A. It says -- it says --
9 Q. -- a discrepancy, Mr. Murphy?
10 A. In the document of this, of this map that was
11 sent to me by Jerry Rigby, same map that's not -- It's
12 white, and it says "microfilmed 1992," and it actually
13 says "page 69" at the top, and it's over there somewhere.
14 I do have, Your Honor, what was -- the exact
15 same map, except it said "i-r-r-i-g ditch" on it.
16 The other map that we need to find has -- "i"
17 had been changed to an "S," the "r" had been changed to a
18 "p," and they added an "n," and so it says "Spring Ditch"
19 instead of "irrigation ditch."
20 I had a stamped copy. On February 23rd, 2010,
21 Sharon Plager, who is an assistant archaeologist at the
22 Salmon-Challis National Forest, the North Fork Ranger
23 Station, pulled this out of the original file for me and
24 said -- I saw "irrigation ditch" on it.
25 I went back to the old copies of the same map,

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1 A. We just got a pile of papers over there.
2 Q. The old map is on the second sheet?
3 MR. HULL: Excuse me for just one second,
4 Your Honor.
5 THE COURT: While he's looking, was there any
6 objection to admission of Hull Exhibit 5?
7 MR. RIGBY: I don't they had offered it, Your Honor.
8 MR. HULL: Oh, I forgot, Your Honor. I'm sorry. I
9 would ask now that Hull Exhibit 5 be entered into
10 evidence.
11 THE COURT: That's the Eldridge 1908 --
12 MR. HULL: That's the Eldridge application for
13 homestead.
14 MR. RIGBY: No objection, Your Honor. We're going
15 to have to put another witness on to address what
16 (unintelligible).
17 THE COURT: Okay, that's Hull Exhibit Number 5,
18 admitted.
19 And now we're researching Hull Exhibit Number 6.
20 Q. (By Mr. Hull) At any rate, what does -- what
21 did we find as a discrepancy? Or what did you find as a
22 discrepancy on --
23 A. Oh, you haven't found the map yet?
24 Q. -- these maps?
25 THE COURT: Let's see, now, we have to make sure we

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1 and -- Actually, we -- we were looking at it, and it said
2 "Spring Ditch" on the other one. But it's a different --
3 different copy of the map, so that brought into question
4 an alteration. It wasn't submitted, but that was one
5 piece of evidence where I saw it was switched.
6 The only other, to answer your question, Daryl,
7 is the stick map that Velma Ravndal submitted in 1984. We
8 submitted her test -- rig --
9 Q. Mr. Rigby submitted --
10 A. Mr. Rigby submitted it. It was a stick map that
11 just said "Spring Ditch." She certainly wasn't around
12 when -- when we found evidence of a ditch in the North
13 Fork of the Salmon River, so it obviously -- there's
14 some -- there's a question of doubt if this Spring Ditch
15 was solely from the spring. Or it looks like to me that
16 the irrigation ditch, based on Elizabeth Eldridge's
17 testimony in her homestead, that the ditch actually came
18 out of the North Fork first at one time.
19 Could I see that exhibit?
20 This exhibit that Velma wrote has Spring Ditch
21 in quotations. In two spots, it says: "A berry patch and
22 large garden, all watered by said Spring Ditch."
23 And it also says: "Stock and irrigation water
24 was obtained by tapping the overflow from a spring on
25 private property now owned by Harold Hanson, and building

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1 the Spring Ditch coming across Forest Service."
 2 "Tapping the overflow," it doesn't say where, it
 3 doesn't say head of the spring. And in fact, that could
 4 be very well on the Forest Service. I mean it could be --
 5 it could be at that yellow -- the yellow dot. It's just
 6 hard to say.
 7 But Spring Ditch in quotations, that's the only
 8 other place I have seen this, other than this new map
 9 from -- in the Forest Service that to me looks pretty
 10 easily altered when you take an i-r-r-i-g, and you see the
 11 difference between this to that, everything else is the
 12 same. Although, it was a little fuzzier.
 13 That's the only place I have seen Spring --
 14 Spring Ditch on any historical information.
 15 MR. HULL: Okay. Your Honor -- Your Honor --
 16 THE COURT: Let's get a handle on this. We have got
 17 Exhibit 5 that was admitted. Do we have a Hull Exhibit 6?
 18 MR. HULL: Yes, Exhibit 6.
 19 THE COURT: And what is that?
 20 MR. HULL: It's a copy of an altered map, and I do
 21 have the ones that Mr. Rigby gave us in discovery that
 22 shows the alterations. And we also have an original copy
 23 that we obtained from the Forest Service showing that that
 24 map had to have been altered by someone at some time.
 25 We don't know where, because we don't know where
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1 page 69 of a PDF document for his evidence of priority,
 2 for evidence of a water right. And I believe that's where
 3 someone, Ann or, you know, your clients found that,
 4 because it -- where would the 69 come from?
 5 MR. RIGBY: Your Honor, then I'm going to object.
 6 We did not introduce it into evidence. We're not
 7 purporting one way or another and, therefore, if they're
 8 attempting to show that there was alteration, apparently
 9 they're claiming that it now come from the Kozaceks.
 10 They're not parties. I didn't introduce it into evidence.
 11 MR. MURPHY: I just wanted to --
 12 MR. RIGBY: We're -- we're confusing the issue.
 13 THE COURT: Well, Mr. Hull, do you intend your
 14 exhibit -- to move for admission of Hull Exhibit Number 6?
 15 MR. HULL: If Mr. Rigby's going to object and say
 16 that -- We were just putting it in because it shows the
 17 historical record in some cases in this particular case
 18 are not accurate.
 19 Ms. Eldridge in her applications shows no Spring
 20 Ditch, no ditch from the spring. She says she gets all
 21 her water from the North Fork and Hughes Creek. All of
 22 the sudden this comes up on a 1908 map showing a Spring
 23 Ditch where in fact the original copy shows an irrigation
 24 ditch.
 25 There's a lot of misrepresentation in the
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1 Mr. -- Mr. Rigby got this particular map.
 2 MR. RIGBY: Your Honor, I guess my concern is we
 3 didn't even offer this into evidence, so therefore --
 4 MR. HULL: Yes, you did offer it into evidence.
 5 MR. RIGBY: No, we didn't.
 6 MR. HULL: I mean you submitted it to us, though.
 7 MR. RIGBY: I said may be (unintelligible). The
 8 point was I gave you all the documents that may be
 9 introduced into evidence. We have not introduced it.
 10 I'd like to go into this (unintelligible). It's
 11 getting, though -- I mean this is -- it's not even an
 12 issue. It's not been introduced.
 13 You have introduced it, and I guess I'm kind of
 14 grateful you have now, because unless you're -- unless
 15 you're suggesting the alteration occurred by -- by my
 16 clients --
 17 MR. MURPHY: I'm not -- I'm not suggesting the
 18 alteration occurred by your clients, because there's
 19 one -- one thing you can check out. At the top of the
 20 page says "page 69." I was like "where does that come
 21 from." Russell Kozacek's, when you go to his evidence of
 22 priority on IDWR's website, he has evidence of priority,
 23 he has almost 75 pages, give or take.
 24 Sue has almost 95 pages of evidence.
 25 Both of them submitted that map; Russell, on
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1 historical record.
 2 THE COURT: How do you know which is the original
 3 and which is the altered version?
 4 MR. HULL: Well, the original, we got from the
 5 Forest Service. We requested an original copy after we
 6 saw the discrepancies in the maps.
 7 THE COURT: And you have --
 8 MR. RIGBY: Your Honor, may I inquire? Again,
 9 attempting to bring this to a conclusion.
 10 You're not attempting, by these records, to --
 11 to in essence have the court believe that whether this is
 12 a spring or a ditch, that there was no water from the
 13 spring that entered this land, are you?
 14 MR. MURPHY: No. I'm saying I fully believe that --
 15 that even if the North -- even if it was diverted from the
 16 North Fork, it had to capture that spring water. That
 17 spring water was going to go into that ditch.
 18 MR. RIGBY: But what I'm saying is that that isn't
 19 depicted here.
 20 MR. MURPHY: No, but it's --
 21 MR. RIGBY: So it's inaccurate already?
 22 MR. MURPHY: It's not depicted there, but that shows
 23 that on her homestead application, it shows in pretty good
 24 detail that the water came from the North Fork of the
 25 Salmon River, not the spring.
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1 MR. RIGBY: As one of the sources, yeah. One.
2 Ditches, the three ditches she's talking about, it could
3 be one of those, could it not?
4 MR. MURPHY: No, it couldn't be, because that's the
5 high-line ditch. If you look at where it enters, if you
6 look on the ditch where it enters the Eldridge property,
7 it's on the top end of Sue, Ann's, and Russ' -- Russ'
8 land. It's a high-line ditch so they can irrigate the top
9 of their property.
10 MR. RIGBY: But -- but again, this map that you're
11 referring to as number -- I believe it's 3? Am I right?
12 Number 3, it doesn't even show the entrance of
13 the -- you call it stream -- and spring water that would
14 even enter into the, quote, irrigation ditch you're
15 referring to here. So it's not -- it's not complete in
16 the first place, is it not?
17 MR. MURPHY: It's not complete, because it doesn't
18 show where the spring comes in. However --
19 MR. RIGBY: That's right.
20 MR. MURPHY: -- it shows my corner point, which is
21 R3, which would encompass where the spring comes into that
22 channel.
23 MR. RIGBY: So now you're saying the spring ended up
24 in the river where we said it was?
25 MR. MURPHY: The spring always went to the river.

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1 MR. HULL: No.
2 THE COURT: Okay.
3 Q. (By Mr. Hull) Mr. Murphy, going back to the
4 map, you have been on the property how long?
5 A. It will be eight years in July.
6 Q. Okay, and you have seen water, and you have
7 helped irrigate the property during that time, correct?
8 A. Yes, I have.
9 Q. Can you show me the water flows for the
10 irrigation?
11 A. Show you how the water flows?
12 Q. How the water flows from the irrigation from the
13 ditches.
14 A. Okay, (unintelligible) your property? Or
15 just --
16 Q. No, we can start there down below in the
17 interest of time.
18 A. Okay, this is my driveway right here. This goes
19 up to the Hulls' property. This is my driveway that comes
20 down to my house. The ditch, the west part of the ditch
21 comes down -- comes out of a culvert underneath the road,
22 comes down along a high spot, doesn't have to irrigate
23 much over here.
24 But the ditch comes down, you can see it, and
25 the fingers comes all the way down into my pasture. This

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1 MR. RIGBY: At your point?
2 MR. MURPHY: No.
3 MR. RIGBY: What I'm saying is if that's your
4 testimony, I'll --
5 MR. MURPHY: I -- I -- I don't know. No, I don't
6 know where the spring came in. It could have come in
7 anywhere in this -- in this general vicinity.
8 MR. RIGBY: But this map, all I'm trying to point
9 out is --
10 MR. MURPHY: That map's showing it right here.
11 MR. RIGBY: That's right. And that's, even by your
12 own testimony -- or your own evidence as you produced with
13 your expert and otherwise, there is no dispute that the
14 spring, whether it's a stream or otherwise, came into this
15 property, and it's not depicted here.
16 MR. MURPHY: No, it's not depicted here.
17 MR. RIGBY: Okay.
18 MR. MURPHY: But it's --
19 MR. RIGBY: Then, Your Honor, I'm objecting.
20 MR. HULL: Your Honor, we will drop our request to
21 get that into evidence.
22 THE COURT: Okay.
23 MR. HULL: Okay.
24 THE COURT: So we don't have a Hull Exhibit
25 Number 6?

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1 is the main spine of the ditch right here. It drains, for
2 the most part, to the north -- basically to the west.
3 Very easy in a low -- low-lying area.
4 This is a high spot. This is a high spot. You
5 can see how dry it is up here. You can see how dry that
6 is, and I've got a pretty -- My pasture, you can see the
7 green spots. It's got low spots, high spots.
8 Very -- very cobbly, bouldery. This was all
9 flood plain of the North Fork at one time, so it's, you
10 know -- you dig down two, three feet, and you got some
11 serious cobble. Very porous, also. But it heads this way
12 to the ditch.
13 Q. Have you ever seen the spring channel flood over
14 during your eight years on the property?
15 A. No, absolutely not. It's just -- it's very
16 stable. In fact, it's probably varied between -- This is
17 about a quarter of a cfs up at the -- up at the
18 potential -- where it comes out of the ground.
19 It just seeps. It seeps and seeps and seeps,
20 comes down to here. There's another spring channel comes
21 into here, comes down. There's about two other spring
22 channels, very braided. Another channel that comes down
23 here. Lew Gohmes was very smart when he put the ditch
24 there, absolutely smart, because he captured everything,
25 okay.

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1 Q. And what direction do those finger channels
2 flow?
3 A. This finger channel flows this way. Oh,
4 combined?
5 Q. What's the -- The finger channels, do they flow
6 toward the North Fork?
7 A. No, they don't. They flow parallel to the North
8 Fork. But he was very smart here, because if you did
9 ditch this -- He stopped at the right spot, because he
10 could collect everything.
11 If you put a 20-foot-wide ditch through this
12 black line, you would have a third of your water on one
13 side, a third of your water on the other. It would be the
14 biggest mess you'd ever seen.
15 He did it here, because he could capture all
16 the -- This is the spot that -- the gathering point where
17 he could capture all the water without making a big mess.
18 His concern was, and probably validated by everybody else,
19 this is extremely attractive for beavers.
20 There's a lot of willows around, you know.
21 Very, very easy to negotiate. The water is warm. The
22 water is 40 degrees year-round; 35 to 40 degrees, it never
23 freezes. That's another bonus in this.
24 But beavers always want to get in there, because
25 they can make a dam, and they can start flooding it. A

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1 below as a result of a blockage on your land or mine?
2 A. Absolutely not. In fact, you know, their -- if
3 it could be called a control structure, their berm down on
4 the Forest Service always has water, and always delivers
5 almost all of the water in the spring.
6 MR. HULL: Thank you, no further questions.
7 EXAMINATION BY THE COURT:
8 Q. If a beaver were to obstruct the channel -- and
9 I think you called it the spring channel --
10 A. Yes.
11 Q. -- as opposed to the Spring Ditch, would you
12 allow some of the interested parties to come in there
13 and --
14 A. Oh, absolutely.
15 Q. -- remove it?
16 A. You know, their -- their livestock is dependent
17 upon that water, and I understand that. That -- that's
18 fine, yeah. That's not -- that's not -- You know, if
19 they go get a permit from Fish and Game which costs them
20 five bucks, they go down and get a beaver tag, if they
21 want to take the beaver out.
22 Or they just go remove -- You're allowed to go
23 remove a dam by, I believe, stream alteration permit. If
24 the dam's less than a year old, you're allowed to take it
25 out. I mean this happens.

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1 beaver dam is the only way you could flood any of this,
2 and it would have to be a heck of a dam to flood anywhere
3 near the North Fork. You just couldn't do it.
4 I don't -- Personally, I don't see any way --
5 As I said, there's no -- I have been there for eight
6 years and never seen high water. There's no snowpack. It
7 doesn't charge that. In fact, the only thing that does
8 charge it a little bit, because it's so porous, is during,
9 oh, tail end of July -- June, July, August when you're
10 irrigating, it does charge it a little bit, but not much.
11 Q. During your eight years on the property, have
12 you ever denied anybody access to the property if they
13 needed to get a problem -- if there was a problem with the
14 ditch? Has anybody ever asked you if --
15 A. I have never been asked by anyone on that ditch.
16 I take that back. Russ Kozacek once asked if he could
17 come up and trap beaver, because there was actually a
18 beaver making multiple small dams, and most of them were
19 on the Forest Service ponds there.
20 Q. And did you deny him access?
21 A. No, I've never -- He's the only one who's ever
22 asked me for access. In fact, that's -- that's not an
23 issue, if you call.
24 Q. And during your time on the property, have you
25 ever seen the water flow impeded to the water users down

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1 This situation, I believe, is no different than
2 any other tributary anywhere, except it's smaller. It
3 doesn't seem to be an issue here, because it's only 1 to 2
4 cfs of water. But say if you went up Hughes Creek at low
5 water --
6 This happens all the time to irrigators in
7 smaller creeks. Beavers go make dams in between points of
8 diversion, submerged points of diversion, submerged
9 headgates, and do all kinds of things.
10 This is no different than any other irrigator
11 who irrigates on a smaller spring system, even a smaller
12 tributary system. They have to deal with beaver. This is
13 no different than, you know -- I guess I don't see the
14 differences. You're going to have to deal with what
15 Mother Nature throws at you.
16 If the spring channel, which is very, very
17 stable -- I don't see it moving at all, meandering at
18 all. It's a much better point of diversion than the North
19 Fork. The North Fork moves a serious amount of substrate.
20 It's a disturbance -- disturbance-generating creek at high
21 water. But I don't --
22 You know, as I said, you're going to have to
23 deal with moving points of diversion, beavers. That's
24 just -- that's just irrigating.
25 But the fact, it just seems to be here, it's

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1 small enough they -- you know, they can easily walk
2 through it and pitch some sticks and some fallen debris
3 down, but it does not change the course of the water. The
4 only thing that would probably change -- in my opinion
5 that would change the course of the water would be the
6 beavers.

7 And as I reiterated, maybe Daryl said it before,
8 the two -- there's only four irrigators on this diversion.
9 They all have the same water right, same priority date.
10 Therefore, I believe -- this was talked about in the
11 settlement conference -- on that basis, they would
12 probably only have one point of diversion.

13 I'm not saying the Kozaceks were right for
14 agreeing with us, but they did agree with us, and they had
15 just as much to lose as -- as Ann and the Feltons did.
16 But -- And Russ has been there since 1979. If he would
17 have cleaned that -- And he cleaned the ditch a lot.

18 I don't know if -- You know, he agreed with us
19 because he's had 30 years of one problem; and his concern
20 was, okay, "I don't want to slow that water down in the
21 wintertime so it freezes." That's the same -- same issue
22 was -- There was no other -- It's not jumping the
23 channel. It wasn't -- it wasn't because of high water.
24 It wasn't because of any of that.

25 MR. RIGBY: Well, Your Honor, I'm going to object to

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1 Mr. Murphy.
2 MR. RIGBY: That's right.
3 CROSS EXAMINATION BY MR. RIGBY:
4 Q. First of all, and I don't even want to introduce
5 it as an exhibit, but you keep saying you have been on the
6 property eight years. I show a notice of change of water
7 site -- water ship -- ownership in your name. It says
8 date acquired property, July 8, 2004.

9 That's incorrect?

10 A. No, that is correct. Sorry.

11 Q. Okay.

12 A. Yeah, sorry. No, that is absolutely --

13 Q. Because we were --

14 A. -- 2004 --

15 Q. -- talking about these dates, and we're going
16 "whoa." All right, next --

17 A. That was my mathematics on a sugar low there.
18 I'm sorry.

19 Q. Okay, all right.

20 A. I should be saying six years --

21 Q. Well, I haven't had much -- I haven't had my
22 sugar yet, so I --

23 A. -- in July.

24 Q. Again, then, I'll ask you the same as I asked

25 Mr. Hull: You would then absolutely disagree with your

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1 this. I mean, you know, he settled.

2 MR. MURPHY: Yeah.

3 MR. RIGBY: Right?

4 MR. MURPHY: Yeah.

5 MR. RIGBY: And you don't -- You can't get into his
6 mind and tell me why he settled?

7 MR. MURPHY: No.

8 MR. RIGBY: Okay.

9 MR. MURPHY: I'm just -- I'm making the point that
10 he had the same --

11 MR. RIGBY: You were assuming.

12 MR. MURPHY: He -- They should probably supposedly
13 have the same point of diversion based on the water right.
14 It was one ranch.

15 MR. RIGBY: But the fact that he settled, you're --
16 you're telling the court that that in essence obligates
17 the rest of them just because he settled?

18 MR. MURPHY: No, I didn't say that. I didn't say he
19 was right.

20 MR. RIGBY: Okay.

21 THE COURT: Any further questions of the witness?

22 MR. HULL: I've -- I've already (unintelligible).

23 THE COURT: Mr. Rigby?

24 MR. RIGBY: Just a couple, Your Honor.

25 THE COURT: This would be cross -- cross of

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1 previous owner, Mrs. Crawford, as far as the breach is
2 concerned and the water heading toward -- again, as I
3 understand her testimony was, she didn't follow it down to
4 the river, but it headed toward the river.

5 You would disagree with that?

6 A. I would totally disagree with that.

7 Q. Okay. And obviously with the Heltsleys, as
8 well, as far as the breach that caused them to actually
9 run out of water?

10 A. I just believe it was in the wrong location. I
11 mean I -- I'm around that area all the time, because it's
12 on the Forest Service.

13 Q. And again, you have been here five years, and
14 she's been here how many, and you think that she's wrong
15 in her location?

16 A. I am -- I do, yeah.

17 Q. Okay, all right.

18 A. I don't think you can physically -- I don't
19 think there's anything -- As I said, and I think what --
20 I'm -- I'm all up for a field visit to see. There's no
21 elevation there. There's -- there's nothing to bust out
22 of. It's not on my property. There's nowhere to go for
23 the water. It's --

24 But as soon as you get down there, as soon as --
25 as soon as you start on the low ditch, high-lining as

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1 Roger said, optimum elevation to get it to the property,
2 you breach that, it goes straight down the hill basically
3 to another ditch on the bottom of that hill, which is
4 basically a seep ditch, because that -- that ditch is not
5 in the best shape. It leaks like a sieve. Probably
6 always has, though. That's just -- that's just the --
7 MR. RIGBY: No further questions.
8 THE COURT: Okay, are we done with questioning
9 Mr. Murphy?
10 MR. BAXTER: No questions from the department.
11 THE COURT: Okay, let's see, Mr. Murphy or Mr. Hull,
12 do you have anything else you wanted to present?
13 MR. HULL: No, Your Honor.
14 MR. MURPHY: I -- I did have one thing I wanted to
15 present.
16 THE COURT: Sure. How do you want to do this?
17 MR. MURPHY: I'm -- If I just -- It will probably
18 take me two seconds to find it over here.
19 THE COURT: Sure.
20 MR. MURPHY: Okay.
21 THE COURT: That will be another exhibit you want to
22 offer?
23 MR. MURPHY: Yes. It's already been talked about,
24 Your Honor. We -- we --
25 Just to keep it simple, what was the last Hull

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1 application for a special use permit of a prior owner and
2 a subsequent permit being issued to reconstruct and
3 maintain an old ditch, portions of an old ditch were
4 reconstructed and altered. This was a 1962 application
5 and the point in time when, as an example, a ditch was dug
6 directly from the spring" barn "across the back of a small
7 horse pasture by the Hughes Creek barn. If other parts of
8 the ditch would qualify for an easement, these constructed
9 and reconstructed segments would require a special use
10 permit."
11 I don't care about the special use permit. It
12 just -- He identified back then, because of the special
13 use permit, they had to bring in other water rights
14 components. They had -- they had a map. 1962, he saw the
15 map, he saw the situation on the ground.
16 During my research, I never did find this until
17 last week. The top paragraph on the first -- The top
18 paragraph on the second page says -- Basically, I'll read
19 it from the top.
20 "His statement of when the spring was put to
21 beneficial use was December 26, 1912. If this" ditch --
22 "if this date is not the correct date, then we may never
23 know the true date; but the Westman date may be more
24 supportive, since a 1908 Forest Service survey shows a
25 ditch in that vicinity coming from the North Fork and not

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1 Exhibit? Is that okay if I submit it as Hull?
2 THE COURT: Sure, Hull Exhibit 6.
3 MR. MURPHY: Okay.
4 THE COURT: And what is Hull Exhibit 6?
5 MR. MURPHY: Okay, the reason I'm bringing this up:
6 Because we have already talked about this in two other
7 exhibits. This is a letter to Mr. Felton, Robert Felton,
8 who is Stuart's brother, who was a lawyer for the Diamond
9 D Ditch Association for -- pretty much through the
10 eighties and nineties.
11 This letter is dated September 4th, 1986, and it
12 is written by -- this name always throws me off, because I
13 don't know if it's Thomas Rogers or Rogers M. Thomas. It
14 says -- it's signed Rogers M. Thomas, District Ranger for
15 the Salmon-Challis National Forest, North Fork, Idaho.
16 I believe, Your Honor -- I believe this -- this
17 letter kind of sums even the situation today. He
18 addresses the same two big issues of basically --
19 They were looking at a priority date, but they
20 were trying to ascertain what ditch with what priority
21 date, because of the Forest Service -- because of the
22 special use permits.
23 The top -- the -- the second to the last
24 paragraph says -- They already submitted the Lew Gohmes
25 application, but he says: "As can be seen by the

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1 from the spring area. On-the-ground evidence may also
2 support this when the old holding pond located at the
3 administrative site is considered in the analysis."
4 I -- I believe this situation is the same as it
5 was in 1962. Rogers M. Thomas signed this in 1986 and
6 observed the same argument that -- basically that we're
7 trying to make, is there was a ditch out of the North Fork
8 at one time. They reconstructed it. It was in the --
9 It was -- it was -- It was reconstructed in
10 1962, and the reconstruction portion, point of diversion
11 where they diverted water for the new reconstructed ditch
12 was right behind the Hughes Creek barn, right where the
13 yellow dot is.
14 And I want to submit that as Hull Exhibit 6. It
15 just re-affirms. It's a government document from the
16 Forest Service.
17 THE COURT: Has everybody had a chance to look at
18 Hull Exhibit 6?
19 MR. RIGBY: Yes. Yes, Your Honor, we have. I mean
20 again, it shows, I guess -- My concern is relevancy to
21 it, because again, it goes back to that same issue, what
22 ditch are we referring to. Is it the lower ditch that
23 comes out of the North Fork, the Spring Ditch? Which one
24 are we referring to?
25 But it speaks for itself, and I don't think --

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1 I mean certainly they can argue as he did, what his
2 opinion is; but the document speaks for itself.
3 THE COURT: Okay, in that case, we'll admit Hull
4 Exhibit Number 6.
5 Anything further from Mr. Hull or Mr. Murphy?
6 MR. HULL: None, Your Honor.
7 MR. MURPHY: I believe that's it, Your Honor.
8 THE COURT: Okay, let's see, do we need to go back
9 with IDWR? At one time you talked about calling Monica
10 back.
11 MR. BAXTER: Yes, Your Honor, I think after hearing
12 the testimony, I think there's some key parts based
13 upon -- based upon some of the testimony that was provided
14 here today. There were some inferences drawn, and I think
15 it's important that the department clarify for the clarity
16 of the court's sake, and so if I could, I'd like to
17 re-call Ms. Van Bussum.
18 THE COURT: Okay, then, we'll, I assume, go to
19 Mr. Rigby. I think you wanted to re-call your witness --
20 MR. RIGBY: Yes.
21 THE COURT: -- or some of them?
22 MR. BAXTER: Well, we can go ahead --
23 MR. RIGBY: Do you want to do that right now?
24 MR. BAXTER: You go ahead, because I think Monica --
25 I told Monica we needed her in a few minutes, so if Jerry

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1 oath.
2 MS. HELTSLEY: Yes, Your Honor.
3 (Ms. Ann Marie Heltsley re-called as a witness
4 on behalf of Claimants Heltsley and Felton.)
5 REDIRECT EXAMINATION BY MR. RIGBY:
6 Q. Okay, go ahead and proceed, then. We'll go
7 (unintelligible).
8 A. And -- and let me clarify I don't presume that
9 the court is ignorant, but fortunately, I'm afraid that
10 our opponents are throwing in apples and oranges.
11 MR. BAXTER: Your Honor, just real quick: The court
12 clerk's not here. This was intended to be on the record.
13 Are we on the record?
14 THE COURT: She didn't say.
15 MR. BAXTER: Okay.
16 THE COURT: I guess maybe we should wait to make
17 sure she's still got it running.
18 MR. BAXTER: I -- I just -- I didn't want something
19 to be said that you wanted to be on the record.
20 MR. RIGBY: Is there any way to look at that? Do
21 you know?
22 MR. BAXTER: No.
23 MR. RIGBY: (Unintelligible) you hang around these
24 things.
25 MR. BAXTER: That, Diana's world is all magic over

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1 wants to go first.
2 THE COURT: Okay. So this will be redirect.
3 MR. RIGBY: Ann Heltsley back. That's fine.
4 And Your Honor, because (unintelligible) into --
5 as they put in this most recent evidence, I'd ask leave of
6 the court to let me just kick it off by having
7 Ms. Heltsley address the concerns that were raised by the
8 evidence that was just produced by Mr. Hull and
9 Mr. Murphy.
10 THE COURT: Sure, if that will --
11 MR. RIGBY: Very good.
12 THE COURT: -- get things a little more logical.
13 MR. RIGBY: Yeah.
14 THE COURT: Ms. Heltsley --
15 MS. HELTSLEY: Heltsley.
16 MR. RIGBY: Heltsley.
17 THE COURT: Heltsley, you're -- let me remind --
18 MS. HELTSLEY: The "t" -- the "t" is silent. It's
19 okay.
20 THE COURT: It is?
21 MS. HELTSLEY: Yeah.
22 THE COURT: Oh, so you do run the hotel in New York.
23 MS. HELTSLEY: Yeah, but the income isn't coming
24 fast enough.
25 THE COURT: Let me remind you you're still under

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1 there.
2 MR. RIGBY: He left when it was -- she left when the
3 testimony was on. I can't believe it's not recording.
4 MR. BAXTER: I don't think she would have left and
5 left it off.
6 THE COURT: The court time -- the court time is on,
7 so it must be still going.
8 MR. BAXTER: All right. Sorry, Your Honor.
9 MR. RIGBY: No, it's a good point.
10 THE COURT: Thanks for bringing it up.
11 MR. RIGBY: I didn't notice her leaving. Okay, it
12 doesn't matter, she's got it on.
13 THE COURT: And this -- this whole digital thing is
14 controlled with a computer over here and goes down to the
15 basement. By the way, if anybody wants to listen to this,
16 we still don't have the capability for you to get on a
17 computer and listen, but you can -- Diana can make a CD
18 and then mail it to you. As far as I understand, you can
19 get in fact the whole day today on a single CD. It's
20 really a slick system.
21 We're still on the record? We're still on
22 record?
23 THE CLERK: Yes.
24 THE COURT: Okay, Ms. Heltsley.
25 A. Your Honor, I -- I felt the need to come and

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1 give some clarification with the cross, because when
2 they -- when the opponents throw in these maps that are
3 not dated and not signed, and first they want to use it,
4 then they say it's been altered; so we're wondering do
5 they want to use it or is it altered, and is only part of
6 it altered, or not (sic) of it altered.

7 UNIDENTIFIED: Your Honor, that -- that was
8 withdrawn.

9 A. They refer to -- they refer to ditches.

10 UNIDENTIFIED: It's not relevant.

11 A. There were three homestead ditches on the
12 Eldridge homestead. But back in 1906 when the Forest
13 Service first started doing -- And these are the actual
14 field notes from the Forest Service in 1906 for the Hughes
15 Creek, North Fork -- for all of the North Fork drainage.

16 They weren't interested in water. They were
17 interested in the fact that you were doing agriculture and
18 improving the land.

19 Before this even started -- Elizabeth Eldridge
20 was on that property for 20 years before they even started
21 the homestead. And she actually got her homestead 11
22 months before Levi Jones did, and they granted her all
23 rights to ditches.

24 We entered into evidence a signed survey, dated
25 and signed, that shows the ditch on that survey. It's not

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1 So they refer to ditches left and right.

2 May I -- may I go to the map, Your Honor?

3 THE COURT: Sure.

4 A. They came up and testified that this ditch is
5 separate from this one, and this one irrigates. And they
6 called this, which is not a ditch -- It's flood
7 irrigation. Flood irrigation is not a ditch.

8 And you can see from their flood irrigation
9 exactly where gravity is taking that water. Right to the
10 North Fork of the Salmon River. So how can it take it
11 right here and not here? And the -- and the --

12 Talking about the river and another ditch,
13 that's in a whole other piece of Elizabeth's property. It
14 is not the same ditch. The spring fed the upper part, the
15 North Fork of the Salmon fed another part. She had
16 ditches down Hughes Creek.

17 People lived a mile below her, came up to Hughes
18 Creek, dug a ditch from Hughes Creek a mile down the
19 canyon along the mountain wall. Elizabeth allowed them to
20 do it, she helped them do it. And now here we are.

21 So here's the question to the court: Should we
22 have gone in there with a backhoe? Would it be a ditch if
23 we used equipment, or is it a ditch simply because we did
24 it by hand and by shovel? I mean a ditch is a ditch is a
25 ditch. It's not an apple, it's not an orange. It's a

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1 called North Fork of the Salmon. It's called ditch, and
2 it goes across the top of the hill.

3 And all they showed was the part that was
4 important for Elizabeth. They didn't take it up past the
5 Forest Service. They didn't take it any further.

6 If we knew back then that we were going to be
7 dealing with these kind of things today that they didn't
8 deal with then, perhaps it would have been better for
9 Harold to have let us go up to the head of the spring with
10 a backhoe. If we had done that, it would be looking like
11 the other part that goes across the Forest Service.

12 But we were very sensitive to the land and to
13 the spring and to the environment. And even before the
14 Murphys and Hulls came into the neighborhood, we took care
15 of the spring all the way up to the -- to the head of the
16 spring as our point of diversion, and we did it by hand,
17 and we did it sensitively.

18 But now it's in question, that it's supposed to
19 be natural, because we didn't take a backhoe in there.

20 But it isn't. It's a ditch. It's been a ditch
21 since the early -- since the late 1800s until today. And
22 our problem is that the Murphys and Hulls aren't taking
23 care of the ditch. It's not flowing the way that it used
24 to, and now it's going to take major work to get in there
25 and put it back the way it was.

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1 ditch.

2 MR. RIGBY: I have nothing further.

3 THE COURT: Where is Hughes Creek?

4 MS. HELTSLEY: It's -- it's down south where --

5 MR. HULL: About a mile to the south, Your Honor.

6 MS. HELTSLEY: -- Elizabeth's -- Where Elizabeth's
7 property actually lies on the Hughes Creek drainage.

8 THE COURT: It flows into the North Fork?

9 MS. HELTSLEY: And it flows into the North Fork.

10 THE COURT: Okay, nothing further, then?

11 MR. RIGBY: Nothing further, Your Honor.

12 MS. HELTSLEY: Thank you, Your Honor.

13 THE COURT: So anything further from the claimants?

14 MR. RIGBY: Nothing further, Your Honor, other than,
15 as I said, we need to fix the POD for purposes of
16 accurately describing the legal description as the
17 testimony has been to the spring, to conform -- to conform
18 the evidence with the -- with the actual location.

19 THE COURT: And that's something you're going to
20 work out?

21 MR. RIGBY: Yeah. I understand that Monica's
22 getting back on, and perhaps with her guidance, we can
23 find out exactly where that's at.

24 THE COURT: Okay, well, she's --

25 MR. RIGBY: I'd ask leave of the court to have it

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1 accurately determined and filed. I'll do it either way,
 2 whatever the court -- Because of the lateness of the
 3 hour, if we need to have a longer period of time in which
 4 to accurately describe that particular point, that's all
 5 we're concerned about, is that we describe that particular
 6 point accurately.

7 THE COURT: For bookkeeping purposes, we had Hull
 8 Exhibit 6 admitted?

9 MR. MURPHY: Yes, we did.

10 MR. HULL: Yes, we did, Your Honor.

11 THE COURT: Okay, good.

12 Okay, now we're back to -- what do we call this,
 13 redirect of Monica Van Bussum.

14 MR. BAXTER: Re-calling of Monica Van Bussum, yes,
 15 Your Honor. I think that works out okay.

16 THE COURT: Do you still have a child waiting for
 17 you somewhere?

18 MS. VAN BUSSUM: My -- my child and my husband are
 19 actually sitting right over there. Is that what you're
 20 asking?

21 THE COURT: Oh, they're here still.

22 MS. VAN BUSSUM: They're actually here still. I
 23 thought about sending them home, but then wasn't sure if
 24 we'd stay the night tonight, so I thought they'd better
 25 stay here.

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1 determination that this is a manmade stream.

2 MR. BAXTER: If the clerk would hand Ms. Van Bussum
 3 the Heltsley/Felton Exhibit Number 1.

4 Q. (By Mr. Baxter) Now, Ms. Van Bussum, have you
 5 previously reviewed this document?

6 A. I have.

7 Q. And does this document support the position that
 8 this stretch we're talking about here between the yellow
 9 and plum sections is a manmade channel?

10 A. No.

11 Q. Why not?

12 A. The document really doesn't support either
 13 argument here. It's a general homestead document with
 14 standard language describing the property to which it
 15 applies. The last statement is a general statement and
 16 says "there is reserved from the lands...a right-of-way
 17 for ditches or canals constructed by the authority of the
 18 United States."

19 It does say it is -- that the holder of the
 20 homestead -- It talks about "vested and accrued water
 21 rights for mining, agricultural, manufacturing, other
 22 purposes." That's a standard language that's placed in a
 23 number of legal documents. It does not specifically point
 24 out the source, point of diversion, conveyance, any of
 25 these things that would constitute an element of a water

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1 (Ms. Monica Van Bussum re-called
 2 as a witness on behalf of IDWR.)

3 REDIRECT EXAMINATION BY MR. BAXTER:

4 Q. All right, I'll try to make this as expedited as
 5 possible, but Ms. Van Bussum, I think it's important to
 6 hit back on a few points.

7 While you weren't here in the courtroom, one of
 8 the experts talked about how they went to the site and did
 9 a site visit; but then felt that after they left the site
 10 and went back to the office and (unintelligible) looked at
 11 all the colors and all the brush strokes of what's in the
 12 department's back files that all that other information,
 13 when added in, supported this other position.

14 And I wouldn't want the court left with that,
 15 with the impression that you didn't consider those other
 16 additional brush strokes or colors throughout.

17 In fact, another expert testified that a series
 18 of documents -- she didn't go to the site, but she said
 19 these series of documents is what she's basing her
 20 conclusion that this was a manmade altered channel.

21 So I want to go through those documents with you
 22 and again ask you if you considered them, and what's the
 23 conclusion you draw from them, so let's go ahead and --
 24 and jump on in. I think -- Let's -- let's start back
 25 with the documents that establish the -- the alleged

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1 right.

2 Q. But it lays the foundation that there might --
 3 there apparently was some water use taking part on this
 4 property, though? That would at least be the impression
 5 one gets on the -- Is this for the Eldridge property?

6 A. This is for the Eldridge property.

7 Q. Okay, so then let's go ahead and jump to Exhibit
 8 Number 2. And have you reviewed this document?

9 A. Yes.

10 Q. And does this document support the notion that,
 11 again, the stretch between the yellow dot and the plum dot
 12 is a manmade ditch?

13 A. It doesn't really here, either. The only real
 14 specific reference that we've got is on page 4 of the
 15 document under question 8 that talks about "tracts of land
 16 are covered with three main ditches leading from the North
 17 Fork of the Salmon River to and upon said land."

18 So it doesn't specifically call out a spring-fed
 19 ditch or a point of diversion for a spring-fed ditch. It
 20 specifically mentions the -- the channels off the North
 21 Fork -- or these three ditches off the North Fork.

22 Q. So it talks about diversions off the North Fork.
 23 But again, no talk about a spring?

24 A. That's correct.

25 Q. Is it your understanding this is the document

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1 that's been referred to as the basis that water has been
2 used out of the spring for hundreds of -- or a hundred
3 years?
4 A. This would be one -- one of the documents I'd
5 consider as part of that.
6 Q. And do you think that supports that position?
7 A. No.
8 Q. Now, let's go ahead and jump to Exhibit
9 Number 3.
10 THE COURT: Mr. Baxter, while you're doing that --
11 MR. BAXTER: Yes, Your Honor?
12 THE COURT: There was talk about the North Fork is a
13 high -- what did you call it, a high --
14 UNIDENTIFIED: Energy.
15 THE COURT: High-energy stream. And in looking at
16 the map, could what we're now calling the spring channel
17 or the Spring Ditch, could that have at one time been a
18 meander of the North Fork?
19 MS. VAN BUSSUM: A good question. It is towards the
20 edge of what I would consider the flood plain for the
21 North Fork. It would be hard to say without fairly
22 extensive surveying if it was actually part of the North
23 Fork, or if those springs at one time underlaid the bed of
24 the North Fork. There would have to be extensive
25 surveying done.

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1 A. This is, like I said earlier, it's a statement
2 from Velma Ravndal. And we do take statements and
3 affidavits into consideration when looking at water
4 rights, but they're given the most weight when they are a
5 first-person account of the water use and the water right.
6 And what we have got is -- is Ms. Ravndal is
7 essentially summarizing the documents that are available
8 regarding the past use. So she's not specifically talking
9 to her first-hand knowledge.
10 The closest she gets is in the fourth paragraph,
11 it says, "The above property was purchased by Eric and
12 Hattie Ravndal on June 1st, 1918, and Gerald and Velma
13 Ravndal sold" the property. She doesn't specifically say
14 how long she was on the property.
15 Judging by her last name, I would assume that
16 she married into the Ravndal family, so they could have
17 sold the property soon after they were married. It
18 doesn't, again, specifically say how long she was on that
19 property and what her first-hand knowledge of the ditch
20 is; if she's been up in the ditch, if she's seen the
21 spring. It doesn't speak to any of that.
22 And so I can't take that into account, because
23 it's just not that first-hand evidence that we need.
24 Q. Okay, Your Honor.
25 Well, Ms. Van Bussum, let's go ahead and jump to

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1 THE COURT: I guess what I'm sort of hinting at here
2 is the possibility that -- that -- that the North Fork may
3 have split at some point there, or one of its meanders may
4 have created the Spring Ditch or a spring channel, and now
5 it's back to the main channel, or it moved all the way
6 over toward the highway. Because just looking at the map,
7 it looks like there's a whole series of channels here that
8 could be meander channels of essentially the same river.
9 Do you see any evidence of that in --
10 MS. VAN BUSSUM: I haven't seen any --
11 THE COURT: -- within the last 100 years?
12 MS. VAN BUSSUM: Yeah, and certainly rivers --
13 rivers and streams move; but I haven't seen anything that
14 would indicate that 110 years ago they were the same
15 channel.
16 THE COURT: Okay.
17 MS. VAN BUSSUM: So I don't have anything that --
18 that points to that.
19 THE COURT: Okay.
20 Go ahead, Mr. Baxter.
21 Q. (By Mr. Baxter) Okay, let's go ahead and go to
22 Exhibit Number 3. And have you seen this document before?
23 A. I have.
24 Q. And what is your assessment with regards to this
25 document?

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1 Number 4. And have you seen that document before?
2 A. Yes, I have.
3 Q. And does that document support the contention
4 that the stretch between the yellow point and the plum
5 point is a manmade ditch?
6 A. It does not. And I realize it says under 5B
7 that the description of the means of diversion is a ditch
8 that captures spring water. However, this is a statutory
9 claim. Statutory claims were filed with the department so
10 people could try to preserve their priority dates once the
11 mandatory permit statutes came into effect.
12 Statutory claims were just that. They were
13 claims. They were never verified by the department. So
14 this is one person's claim to what was going on, and
15 that's what the adjudication is all about.
16 And as I said early this morning, is it's my job
17 to take a claim from cradle to grave. We take the claim,
18 we investigate the elements of the claim; and then based
19 on that evidence, we make recommendations to the court.
20 You know that from long history with it.
21 So this is a statutory claim, not a definitive
22 account. Did you want me to keep it?
23 Q. Actually, one more point there. I think it's
24 5B. It says, "Ditch to capture spring water." Does it
25 say where that it captures spring water?

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1 A. No.
2 Q. Okay. Let's go ahead and jump to Number 5.
3 Have you seen this document before?
4 A. I have.
5 Q. And did you consider it in your assessment?
6 A. I did.
7 Q. And does this document support the contention of
8 the -- of it being a manmade ditch between the yellow
9 point and the plum point?
10 A. No, it does not. It does say, again,
11 description under -- of diverting works, "Ditch from
12 spring," and it doesn't say where the ditch is or the
13 point of diversion for the ditch. And again, this is an
14 adjudication claim, so this is not actually a verified
15 water right. It's a claim to a water right.
16 Q. Okay.
17 THE COURT: Do we know when the claim was
18 investigated, and who did it?
19 MS. VAN BUSSUM: I can make a guess.
20 THE COURT: The SRBA claim, that is.
21 MS. VAN BUSSUM: The SRBA claim was filed -- Or you
22 want when it was investigated. The field exams were done
23 in this area by the contract field examiners around 2005,
24 2006. And most of the recommendations were made about
25 that time, as well.

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1 about a head box. And I -- There's no evidence of a head
2 box or a spring box where water arises on the property
3 according to my site visit that was done. I was unable to
4 locate that.
5 And the Kozaceks actually, if we're going to go
6 there, the Kozaceks agreed to have the point of diversion
7 at the yellow dot.
8 Q. Well, we've had conversations about that
9 already, and so let's --
10 A. (Unintelligible).
11 Q. -- let's just go ahead and leave that behind.
12 A. I almost hesitated to go there, but --
13 Q. Ms. Van Bussum, could you be handed Number 7?
14 Actually, I don't have a copy of that one, so I'm going to
15 come join you, Ms. Van Bussum.
16 Ms. Van Bussum, have you seen this document
17 before?
18 A. I have.
19 Q. And did you consider it in your examination or
20 your work here?
21 A. I did.
22 Q. And could you identify for the court what that
23 document is?
24 A. This document is a statutory claim from Ann
25 Noyes, and it lists the point of diversion as being in the

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1 THE COURT: And that's when we got the erroneous
2 point of diversion recommendation?
3 MS. VAN BUSSUM: Exactly.
4 Q. (By Mr. Baxter) All right, let's jump to
5 Number 6. Have you seen this document before,
6 Ms. Van Bussum?
7 A. I have.
8 Q. And did you consider this document in your
9 assessment?
10 A. I did.
11 Q. And does this -- in your mind, does this
12 document establish that the -- the stretch between the
13 yellow point and the plum point is a manmade ditch?
14 A. It does not.
15 Q. And what's your assessment -- Or actually, what
16 is this document, and what's your assessment of it?
17 A. This is a statutory claim from the Kozaceks. So
18 again, it's a statutory claim, and I have already
19 established that we don't weight these very heavily when
20 reviewing them.
21 The statutory claim says that the point of
22 diversion is in the southwest/southwest, and the
23 department would say that the point of diversion is in the
24 southwest/southwest.
25 The description of the diversion works, it talks

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1 southwest/southwest of Section 15. Again, the department
2 agrees the point of diversion would be in the
3 southwest/southwest of 15.
4 But again, this is a statutory claim to a water
5 right. This is not a verified water right.
6 Q. All right --
7 THE COURT: Mr. Baxter, just for my sake, we've
8 always been referring to IDWR Exhibit 2 all along here,
9 and there's -- there's a blue line down the left side
10 here. And then there's a yellow line between those two.
11 Is that a quarter/quarter?
12 MS. VAN BUSSUM: It is, Special Master. The blue
13 line is the section line. You'll see, in the legend, it's
14 called out. The quarter/quarter line doesn't stick out
15 very clearly in the legend. The blue -- the light -- the
16 fine blue line is a section line.
17 THE COURT: Well, what's the yellow?
18 MS. VAN BUSSUM: The fine yellow line is a
19 quarter/quarter line.
20 THE COURT: So what we're actually looking at here,
21 this is -- this entire block right here in which the
22 yellow dot is, that is the southwest of the southwest of
23 Section 15?
24 MS. VAN BUSSUM: That's correct.
25 THE COURT: Okay.

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1 MR. BAXTER: So if the witness could be handed
2 Number 8.
3 Q. (By Mr. Baxter) And again, I don't have a copy
4 of that, Ms. Van Bussum. I'm (inaudible).
5 A. Sure.
6 Q. Ms. Van Bussum, have you seen that document
7 before?
8 A. I have.
9 Q. And did you consider it in your assessment?
10 A. I did.
11 Q. And what is that document?
12 A. This document is the original notice of claim
13 for the SRBA claim for Stuart Felton.
14 Q. And again, what is the significance of that
15 document to you?
16 A. Again, it's an adjudication claim, so it's an
17 unverified water right that was filed with the department
18 for our review. And under the description of the
19 diversion works, it again calls it a head box. And again,
20 my site visit did not show any evidence of a head box or
21 any intervention -- or human intervention in the stream
22 until the yellow dot.
23 Q. All right. Well, let's -- let's jump to Exhibit
24 10. Ms. Van Bussum, have you seen Exhibit 10 before?
25 A. I have.

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1 Q. Why not?
2 A. I could go through real quickly. Mr. Jones
3 wrote to -- Levi Jones wrote to the Secretary of
4 Agriculture. He was clearly upset that the Forest Service
5 wanted to take some of what he believed was his property.
6 And he wrote to the Secretary of Agriculture,
7 asking the Secretary to concede on his behalf -- or
8 intercede on his behalf and take that land -- it's
9 actually what we have been calling the bootleg, as far as
10 I can tell.
11 Q. So could you actually approach the map and point
12 out to the special master the location that we're talking
13 about there?
14 A. Sure. I was able to talk with Steve Spencer,
15 who was here earlier with the Forest Service, and what
16 we've got, we've got a mining claim that came up this way,
17 and a homestead that came this way.
18 And for some reason, they did not meet. And so
19 when the land was -- was designated a national forest in
20 1906, this land became part of the Forest Service.
21 So Mr. Jones is writing the Secretary of
22 Agriculture in 1909 saying "the Forest Service surveyor is
23 telling me this isn't my property. You need to make this
24 my property."
25 The Forest Service surveyor is saying "we're

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1 Q. And what is this document?
2 A. This is an affidavit from Harold Hanson.
3 Q. And does this document, in your opinion, support
4 the position that the stretch between the yellow dot and
5 the plum dot is a manmade ditch?
6 A. It does not.
7 Q. Why not?
8 A. The affidavit says: "The water that raises on
9 the lower end of" his ranch, meaning the Hanson ranch, "is
10 caught in a ditch that goes to irrigate part of the
11 ranch." It does not specify where the origin of that
12 ditch is or where the point of diversion for that ditch
13 is. It simply says it's caught in a ditch.
14 MR. BAXTER: Can the witness be handed Exhibit
15 Number 11.
16 Q. (By Mr. Baxter) Ms. Van Bussum, I don't know
17 if you got to take a look at this document before today.
18 Is that correct?
19 A. I just saw it today for the first time.
20 Q. Okay, have you had an opportunity to take a look
21 at it?
22 A. I have.
23 Q. And does this document cause you to change your
24 conclusions?
25 A. It does not.

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1 going to put a ranger station in this area."
2 And he then suggests a location up on Sheep
3 Creek, which is up off the top right-hand corner of the
4 map. And I'll defer to the parties for actually how far
5 it is up Sheep Creek. And he's saying, if I can talk
6 about --
7 So it's, of the exhibit, it's page 5. It's
8 halfway down. He says -- He's -- he's told them "you
9 should find a location up on Sheep Creek and give me my
10 land." And he says: "This land I mention is better for a
11 station," meaning the land up on Sheep Creek, "because it
12 lies right on Sheep Creek where they could have splendid
13 water the whole year round."
14 And he says: "While on my land, a ditch or pipe
15 2,000 feet from a spring is necessary, and they would have
16 to dig a" deep -- "ditch at least a mile-and-a-half long
17 from Sheep Creek to water their land."
18 What he's essentially saying is "if you're going
19 to get water right here, it's going -- you're going to
20 have to pipe or ditch from the spring 2,000 feet." He's
21 overestimating the distance here, certainly. "You're
22 going to have to pipe or ditch from the spring onto the
23 property or -- and/or," I'll say -- "you're going to have
24 to dig a ditch from Sheep Creek."
25 And actually, there is a ditch from Sheep Creek,

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1 and you can see the point (unintelligible). Steve
2 Spencer, again, from the Forest Service, pointed out a
3 ditch. And you can see it on the map running in a flow
4 direction here, so generally southwesterly.
5 And it runs to the other side of the highway.
6 And again, those are Forest Service buildings. That would
7 be the southern side of the highway.
8 So essentially, the Forest Service did dig a
9 ditch from Sheep Creek onto that property, but they still
10 retained the property on the other side, and did not give
11 that to Mr. Jones.
12 THE COURT: What are those green dots on the east
13 side of the highway?
14 UNIDENTIFIED: Settling ponds.
15 THE COURT: For?
16 UNIDENTIFIED: (Unintelligible).
17 UNIDENTIFIED: The old septic system for the ranger
18 station.
19 THE COURT: Why would you put it upgradient from the
20 ranger station?
21 UNIDENTIFIED: I'm not sure.
22 UNIDENTIFIED: Too bad he's not here.
23 THE COURT: I know water flows downhill, but --
24 MR. BAXTER: It all flows downhill.
25 THE COURT: So the ranger station is served by water

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1 Heltsley Site," is what it's titled.
2 Q. Okay. So when you worked on this, did you
3 consider the topographic map for this area?
4 A. Yes, I did.
5 MR. BAXTER: And Your Honor, do you have a copy of
6 the topographic map? I think it's going to be important
7 for us to -- I guess I have an extra copy. I'll give it
8 to the special master. I want to go in a little more
9 detail about that topographic map (inaudible).
10 THE COURT: Thank you.
11 MR. BAXTER: Thank you, Your Honor.
12 Q. (By Mr. Baxter) Where about on that map is the
13 place of use that we're talking about here today?
14 A. You mean the point of diversion?
15 Q. Let's talk about the point of -- Yeah, I should
16 say the point of diversion and the properties we're
17 talking about here today.
18 Thank you for the clarification there.
19 A. The point of diversion that we're talking about
20 today is -- Well, if you look in the center of the map,
21 you can see where it says "North Fork Ranger Station," and
22 we were just talking about the ranger station.
23 If you go across the highway from that, you've
24 got the word "Fork," and the point of diversion we're
25 talking about, I'm going to guess, is between the "o" and

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1 both from Sheep Creek coming down the east side of the
2 highway, and water from the spring on the west side?
3 MS. VAN BUSSUM: No. It appears that the Forest
4 Service decided just to dig a ditch from Sheep Creek.
5 And I would imagine that was a little easier
6 given most, if not all, of the land from Sheep Creek to
7 the ranger station was Forest Service land. They didn't
8 have to go on private land. If they had, they probably
9 would have come diagonally across the property to serve
10 the ranger station.
11 Q. (By Mr. Baxter) All right, Ms. Van Bussum, so
12 these, I think the documents that have been submitted as
13 evidence of -- of -- that this has been --
14 At least one -- one expert's conclusion, these
15 are the documents that support this is a manmade ditch.
16 And you would disagree with that conclusion?
17 A. I would disagree, yes.
18 Q. Well, let's talk about some of the other colors
19 and brush strokes.
20 MR. BAXTER: If the witness could be handed Exhibit
21 Number 12.
22 Q. (By Mr. Baxter) Ms. Van Bussum, what is that
23 document?
24 A. This is a topographic map of what looks like the
25 area in question. "Site Location Topo Map, Felton

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1 the "r" in "Fork," right in that general area.
2 THE COURT: Now, that's your recommended point of
3 diversion?
4 MS. VAN BUSSUM: That's correct.
5 THE COURT: The yellow dot?
6 MS. VAN BUSSUM: That would be the location of the
7 yellow dot.
8 THE COURT: Okay.
9 Q. (By Mr. Baxter) So actually let's go ahead and
10 mark that on that exhibit, if we could. I'm just going to
11 hand you a simple blue pen.
12 THE COURT: Azure?
13 A. Okay, so I'll just put a blue circle in the
14 vicinity of the "o" and the "r" in the word "Fork" on the
15 exhibit.
16 Q. (By Mr. Baxter) So it's rather a large scale
17 of a map and it's kind of difficult to pinpoint, but all
18 right, Ms. Van Bussum, let's talk about your experience
19 evaluating topographic maps. Do you have any experience
20 evaluating topographic maps?
21 A. I do.
22 Q. What's that experience?
23 A. Well, certainly in my -- in my employment at the
24 department, we assess topographic maps as part of the
25 evaluation for a vast majority of our water rights.

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1 I also have other experience where, when I was
2 in graduate school, I was a teaching assistant for Geology
3 100 and 101 at BSU, and we taught units every semester on
4 analyzing topographic maps and actually had the students
5 draw their own topo maps.

6 Q. Okay, well, let's -- let's evaluate this
7 topographic map and see if it -- I think a conclusion
8 reached here was that this topographic map suggests that
9 the water would run quickly to the North Fork.

10 What do you see, or what does this topographic
11 map tell you?

12 A. Well, what -- And I'm going to have to verify
13 with Roger just a couple of things. Just these are
14 20-foot contour intervals, it looks like.

15 So I looked at the index contours and they
16 appear to be about 100 feet apart, and there are five
17 contours between them. So 100 feet -- 100 feet in
18 elevation, that is, divided by five would be pretty
19 standard for 20-foot contour intervals.

20 And a contour interval, for those that don't
21 know, would be the interval -- or one of these squiggly
22 lines to the next would be an elevation change of 20 feet;
23 so they appear to be 20-foot contour intervals.

24 And if the -- if this is kept to the standard
25 scale of 1 to 24,000, that would be 1 inch is essentially

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1 I'm sorry, for one foot in distance. So it's -- it's a
2 very, very low gradient in this area.

3 Q. So -- so in other words, this is a fairly flat
4 area? I'm trying to put it in layman's terms. I
5 understand what you're saying there, but I've -- I've been
6 given mixed pictures of -- today of what this land looks
7 like. And unfortunately, we can't go out there.

8 And I think one of the experts testified that
9 they used this to draw the basis that the water would --
10 would go towards the North Fork directly.

11 Would you draw the same conclusion from this
12 map?

13 A. As I said in my earlier testimony, I think the
14 water would eventually reach the North Fork if it
15 continued to follow its natural path. I don't think the
16 water would head directly to the North Fork from where it
17 generated, or even just slightly below where it generated.

18 Q. So again, you considered this, this was part of
19 the broad brush, or the strokes that you considered in the
20 picture; but given the detailed information when you took
21 a look at the document, you didn't rely upon this
22 document?

23 A. It wasn't my sole piece of evidence in
24 determining it. But certainly, you look at this kind of
25 thing.

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1 2,000 feet. I was doing the calculations on my phone a
2 little bit ago.

3 If you take a look at where the point of
4 diversion is -- so around the "o" and the "r" in the word
5 "Fork" -- and you go just upstream of that, you'll see
6 where one of these contours actually crosses the stream,
7 okay. And if you go back to the word "Fork" and you go
8 slightly downstream of that, you'll see where another one
9 of these contours crosses the stream.

10 And in my estimation, that's about -- And I
11 eyeballed this. It's about an inch and a half or so
12 between the two, which would be about 3,000 feet.
13 Obviously, there's room for error here, give or take.

14 It's about 3,000 feet or so between these two
15 contours that cross the North Fork, and they're 20 feet in
16 elevation apart. So there are no -- no contours --
17 contour intervals between them, so we just have a 20-foot
18 elevation change from one to the next.

19 So if we calculate the slope of that -- So it's
20 the change in elevation divided by the distance. We have
21 a 20-foot elevation change divided by 3,000 feet in
22 distance. You come up with less than one percent slope.

23 It's essentially, how did I calculate this
24 out -- It's less than a thousandth of an inch. Or I'm
25 sorry, a thousandth of a foot elevation change for 1000 --

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1 Q. Well, let's talk about that. When -- when
2 you're taking a look at evidence and you take a look at
3 this map or a GIS overlay, what is it -- is your
4 experience is the better evaluation? Sitting in an
5 office, taking a look at -- at two-dimensional maps, or
6 going out and taking a look at what's on the ground?

7 A. In my opinion, there's no substitute for
8 ground-truthing. The aerial photos have come a long way,
9 and they're awesome, and I'm so glad that we have them.
10 And I use them a lot. But when you have an area of
11 contention, there's just -- there's just no substitute for
12 actually going out there and taking a look.

13 And I think I heard Roger say these are 40-foot
14 contours, so -- I was eavesdropping, and I heard 40. And
15 they very well may be. That would change the slope
16 measurement just a little bit, not enough to be very
17 significant. My conclusion still stands that it's a very
18 low-gradient area, very flat.

19 Q. So this area is fairly flat, okay, thank you.

20 THE COURT: Would those sewage ponds being north of
21 the ranger station be there simply because, as you're
22 saying, it's very flat out there? Maybe the ranger
23 station is actually above those?

24 UNIDENTIFIED: I -- I think, Your Honor, there's
25 a -- there's a sliver -- I don't know when it was --

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1 Basically, if you just go on either side of the
2 sewage ponds, there's a piece of Forest Service property
3 in that section, also. There's a piece of private
4 (unintelligible) to the north and kind of splits. There's
5 a piece of private halfway on the lower end.
6 I think they had to find a spot to get it far
7 enough from the ranger station itself, and that was the
8 farthest piece of property they -- they could do it. I
9 don't know if that answers your question.
10 THE COURT: Well, is it downhill from the ranger
11 station to the settling ponds?
12 UNIDENTIFIED: No. And I'm not really sure -- That
13 seems weird they pumped it up there. It's never really in
14 use. I don't know -- I've always heard that's the --
15 that is for the -- for the bunkhouses there. I'm not sure
16 what else it would be for, though. I've only heard those
17 are the sewage ponds for the --
18 MS. VAN BUSSUM: For the bunkhouses.
19 UNIDENTIFIED: Yeah.
20 THE COURT: That may not be relevant. I thought
21 that might explain the gradient, the flatness up here.
22 UNIDENTIFIED: Oh, it's very flat in there. But
23 yeah, I don't know if it's a higher grade or lower grade.
24 It is very, very flat, but I don't know if it just gravity
25 flows or they pump it or what they do. (Unintelligible).

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1 property, isn't it?
2 UNIDENTIFIED: Yes.
3 MS. VAN BUSSUM: I'm sorry, I misspoke.
4 MR. RIGBY: Again, as long as we're talking about
5 testimony, I think her testimony was yes, that's how they
6 got their water, as well, out of that spring box. The
7 spring box actually took the spring and diverted it into
8 the culvert across the road at that time.
9 MS. VAN BUSSUM: They said that they developed the
10 spring above -- above the road --
11 MR. RIGBY: That's right.
12 MS. VAN BUSSUM: -- and used it for in-home use,
13 yes.
14 MR. RIGBY: That's right. And -- and also put it
15 into the culvert across -- to go across the road.
16 MS. VAN BUSSUM: (Indicates.)
17 Q. (By Mr. Baxter) And Ms. Van Bussum, there's
18 some -- Kind of represents a unique aspect. I don't know
19 if you caught it, as well, but what did that really sound
20 like to you?
21 A. It sounds like a new water right to me. It
22 sounds like a water right is -- is just then being
23 developed. There was -- If they developed the springs,
24 there had been no spring box there before, there had been
25 no digging out there before, that's the development of a

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1 Q. (By Mr. Baxter) Ms. Van Bussum, I think this
2 case actually really presents a neat issue of law and kind
3 of when -- when does something become a point of
4 diversion. From the department's -- How does the
5 department define what a point of diversion is?
6 A. The point of diversion is defined as where water
7 leaves the natural system -- or where water is diverted to
8 leave the natural system.
9 Q. And you have been present for much of the
10 earlier testimony by the witnesses. I believe you were
11 here for Ms. Crawford's testimony, were you not?
12 A. Yes, I was.
13 Q. And -- and she talked about developing a -- a
14 well out of a spring box. Were you here for that
15 testimony?
16 A. She didn't actually talk about a well out of a
17 spring box. She said they developed a spring above the
18 road and put a spring box in.
19 Q. So developed a spring, okay?
20 A. It's Mr. Murphy who has the well on his property
21 now.
22 UNIDENTIFIED: There's no spring box there any more,
23 and I don't know if the road has changed compared to --
24 It's in a very close location, but we have a 12-foot --
25 MS. VAN BUSSUM: Oh, it's an easement onto the Hull

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1 new water right.
2 And she said she entered the property in 1968,
3 but she didn't say exactly when they developed this spring
4 and put the spring box in. And that really flirts with
5 the mandatory permit statute date for this area.
6 So we could be talking about an application for
7 permit or, certainly, moving a priority date, or even a
8 new claim for a new point of diversion.
9 Q. But that sounded like a new development of --
10 of -- Her testimony was that it wasn't there before, and
11 it's my --
12 A. It sounded like post-1968 development, because
13 she testified that she was on the property starting in
14 1968.
15 MR. RIGBY: But Your Honor, again, you're ignoring
16 the testimony of her saying she came there, and it was
17 already developed. She just put in the box itself.
18 A. She said she developed the spring.
19 UNIDENTIFIED: No.
20 MR. RIGBY: No, she did not.
21 MS. VAN BUSSUM: Yes.
22 UNIDENTIFIED: No.
23 MR. RIGBY: No, she didn't.
24 MS. VAN BUSSUM: She said they developed the spring.
25 UNIDENTIFIED: No.

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1 MR. BAXTER: Well, I think the neat opportunity --
2 MR. RIGBY: Hey, you know --
3 MR. BAXTER: -- is Special Master Dolan will be able
4 to review the record and --
5 MR. RIGBY: -- tell you what, this is getting bad.
6 MR. BAXTER: -- determine whether or not that's the
7 testimony. So I don't want to get into a shout --
8 shouting match.
9 And Mr. Rigby, I'd appreciate it if you not
10 shout at my witness, so --
11 MR. RIGBY: Well, all I'm saying is that --
12 MR. BAXTER: I shouldn't say shout, but argue with
13 my witness.
14 MR. RIGBY: -- when everything is going against,
15 because she's taking every example and -- and inferring it
16 against my client when -- when clearly there is a
17 different definition (inaudible).
18 MR. BAXTER: Your Honor, if Mr. Rigby wants to
19 present closing argument on this, I --
20 MR. RIGBY: Well, everyone did, so I guess I'll join
21 in.
22 MR. BAXTER: Actually, I think I'm asking questions
23 of the witness at this point.
24 Q. (By Mr. Baxter) Ms. Van Bussum --
25 A. Yes.

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1 RE CROSS EXAMINATION BY MR. RIGBY:
2 Q. I guess -- Initially, I guess my concern is
3 that when you -- when you indicate the numerous claims and
4 you're still treating them all like it's a single claim
5 and not giving any weight to them, that concerns me.
6 (Unintelligible). But I'm a little unnerved by that.
7 But having said that, there are numerous claims,
8 and they all -- even though a lot of them have different
9 (inaudible) in points in diversion, which even the
10 department screwed up on the point of diversion -- So
11 you're not going to hold that against them, are you?
12 A. What's your question?
13 Q. My question is: They have -- Is there any
14 dispute from which you heard today that the point of
15 diversion as being claimed is the whatever color it is
16 dot?
17 A. It appears from the testimony the intent of
18 the claims was to put the point of diversion at the
19 plum-colored dot.
20 Q. And there are numerous of those claims by
21 numerous people?
22 A. Now, there's a difference between statutory
23 claims and adjudication claims.
24 Q. I realize that. But I'm just saying there's
25 numerous people that have claimed that to be the point of

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1 Q. -- and some of the other testimony I think
2 referenced the cleaning out of the -- of -- they were
3 calling it the ditch; going up, removing branches.
4 Does that establish a water right -- or does
5 that establish a point of diversion, in your mind?
6 A. No, it does not.
7 Q. Why is that?
8 A. Well, as Ms. Liebrecht testified earlier, the
9 North Fork has been cleared out. They have had debris
10 cleared out of the North Fork. She said it appears to be
11 channelized -- or not channelized, I'm sorry. It appears
12 to be straightened along the highway.
13 That doesn't make the North Fork a ditch.
14 Q. So if somebody (unintelligible) -- In other
15 words, you're saying if somebody goes up and does some
16 work on a previous stream, that doesn't necessarily mean
17 that that makes it a point of diversion?
18 A. That's correct.
19 MR. BAXTER: Okay.
20 Your Honor, I have no further questions. Thank
21 you. I appreciate the court's indulgence.
22 THE COURT: Do we have any recross examination of
23 Monica?
24 MR. RIGBY: Yes, Your Honor, just a few.
25

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1 diversion in their claim as far as their water right, is
2 that correct?
3 A. From their testimony, it appears their intent
4 was that, yes.
5 Q. And doesn't adding the additional number of
6 people and the witnesses that have been here today --
7 doesn't that -- isn't that part of your consideration, or
8 should be part of your consideration?
9 A. It is part of my consideration. It's -- You
10 take, like I said earlier, you take it from cradle to
11 grave. You take every piece of evidence that is
12 available. "You" meaning me, the department.
13 Take every piece of evidence that is available,
14 and you make conclusions. It's like being a detective.
15 You've got this piece and this piece and this piece, and
16 you have to decide what tells the most cohesive story.
17 Q. Okay, and -- and let's -- let's discuss the most
18 cohesive story. All the evidence I've heard today of
19 those who have been there -- not the newcomers, but those
20 who have all been there -- is that it was always
21 considered a ditch. Does that mean something?
22 A. I've actually been in a trial where this issue
23 was discussed before, and we had witnesses that said it
24 was a ditch, and we had witnesses that said it was a
25 natural channel. So I've been in this exact scenario

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1 before.

2 **Q.** No, I'm not asking you the witnesses that are

3 saying it's a natural channel now. I'm saying all of

4 those witnesses that were back during all of these years,

5 all of them said it was a ditch. In fact, to my

6 knowledge, I heard no evidence at all during those years,

7 until the newcomers came, that there was ever anyone that

8 said it was not a ditch.

9 Have you -- do you know of any?

10 **A.** Do I know of any who say it was not a ditch?

11 **Q.** Who said back then, made any documents or made

12 any claims that said it was not a natural -- that it was

13 anything other than a ditch?

14 **MR. BAXTER:** Your Honor, a lack of documentation

15 doesn't mean that it's true.

16 **MR. RIGBY:** I didn't ask that. I'm saying --

17 She's talking about all the things that she's used in her

18 evaluation, and I'm asking her:

19 **Q.** (By Mr. Rigby) Of those people, the numerous

20 people with the evidence that's been presented, was there

21 one of them or any documentation that said that it was a

22 stream?

23 **A.** I think you're leading me a little bit.

24 **Q.** Well, you're -- I'm -- You're obviously an

25 adverse witness. I -- I hope I have the indulgence to do

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1 here. I can understand why, too. It's about 8:58, almost

2 9:00.

3 **Ms. Van Bussum,** can you answer? I think what

4 **Mr. Rigby** is simply saying is -- He says from his

5 viewpoint, all the evidence points one way; and I think

6 he's suggesting you're disregarding that.

7 **MS. VAN BUSSUM:** I don't see evidence that points to

8 it being a ditch starting at where the plum circle is.

9 The evidence that I have would lead me to believe that the

10 point of diversion is the yellow dot.

11 I don't have evidence that I see as credible or

12 sufficient to say that the channel between the yellow dot

13 and the plum circle would be considered a ditch. I just

14 don't have anything sufficient for the department or me as

15 the department to recommend it as a ditch.

16 **THE COURT:** Okay, I think that answers Mr. Rigby's

17 concerns.

18 **Q.** (By Mr. Rigby) I guess I'm referring to some

19 specific testimony that you have just given as to the

20 issue of this ranger station and the argument that

21 **Mr. Jones** -- Is it **Mr. Jones**? It's getting too late.

22 **A.** It is **Mr. Jones**.

23 **Q.** -- **Mr. Jones** had -- had with the Forest Service.

24 And I guess, there again, I can clearly see a different

25 interpretation than the one you concluded.

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1 that.

2 **A.** What I'm saying is I took the evidence that was

3 available. If the evidence is -- is lacking in a certain

4 way -- So if the evidence doesn't say, for example, where

5 the point of diversion is --

6 **Q.** But you're not answering my question. I'm

7 sorry, but you're not answering my question on the stand.

8 Doesn't that mean something to you that it was

9 never raised as a non-ditch until now? And we're talking

10 recently.

11 **MR. BAXTER:** Again, Your Honor, lack of

12 documentation about whether or not there was a ditch

13 previously is not the issue here. **Ms. Van Bussum** has been

14 asked to evaluate the information that's been provided to

15 her.

16 **MR. RIGBY:** And I'm asking her --

17 **MR. BAXTER:** She has made statements with regards

18 to her evaluation of the testimony that was provided.

19 Specifically, as testified, what she thought of the

20 statements that have been provided here.

21 **Mr. Rigby** is now hounding her.

22 **MR. RIGBY:** I'm not hounding her. I'm asking her

23 doesn't that mean something, and she's not answering my

24 question.

25 **THE COURT:** We're getting a little late and cranky

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1 Isn't there an argument that it does say

2 "spring," then in essence you -- you would have to --

3 "Ranger station, you would have to pipe your -- your ditch

4 or pipe your water from the spring to get to the ranger

5 station"?

6 **A.** It does say that.

7 **Q.** And so therefore isn't it just as logical to

8 assume, because even your testimony would say that the

9 natural channel of the spring is heading up along the --

10 the rim of the mountain, that -- that in fact that --

11 I mean the -- For them to absolutely ignore

12 that, isn't it an explanation -- one of the explanations

13 could be "not in my ditch; you got to get it from the

14 source itself, the spring"?

15 **A.** The distinction to make here is that **Mr. Jones**

16 is not saying the spring or ditch is there at all. He's

17 not saying it's physically there. He's saying they would

18 have to pipe or ditch from the spring to the ranger

19 station.

20 **Q.** Okay, but I guess I -- I -- from -- from your

21 testimony was then -- then there wasn't a -- anything

22 developed at all to get the water to our -- our lower

23 land. But even --

24 **MR. BAXTER:** Your Honor, I think he's

25 mischaracterizing **Ms. Van Bussum's** argument -- or

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1 testimony here today. I think Ms. Van Bussum --
2 This -- this document was provided to suggest
3 that this proves that that stretch between the yellow and
4 plum dot is a manmade ditch. And Ms. Van Bussum's
5 testimony is simply that that -- this document does not
6 establish that fact.
7 MR. RIGBY: Well, obviously, I'll let the court see
8 it when it says "under my main ditch." I guess we'll let
9 the court read the document and make the decision
10 yourself.
11 Q. (By Mr. Rigby) Again, getting back to our
12 concern here, is do you or have you had an opportunity to
13 determine where the plum drawing is at for purposes of
14 our -- our motion to amend whatever claim is necessary to
15 make our actual legal description fit with the evidence
16 that we have put -- provided as being our point of
17 diversion?
18 MR. BAXTER: Your Honor, might I offer a compromise
19 on this issue? That the department provide the -- the
20 court with a letter that says "should the court decide
21 that the --
22 UNIDENTIFIED: Purple.
23 MR. BAXTER: -- purple, the plum dot is the correct
24 point of diversion, here is the legal description"? We
25 can provide that in written documentation to the court

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1 witness? And the answer is "yes."
2 Q. (By Mr. Rigby) Well, I -- I think her
3 testimony -- She maintains she can prove that.
4 Again, it's so darn late, I don't -- I don't
5 know how relevant it is; but again, it's another one of
6 those where what's your evidence --
7 I guess I'll ask you that: What's your evidence
8 that that ditch was built by them?
9 A. Can you be more specific?
10 Q. You testified that Carl's ditch was -- How was
11 it put?
12 A. What are you calling Carl's ditch? I need that
13 first. Sorry.
14 Q. I'm sorry, I'm sorry.
15 MS. HELTSLEY: You said that the Forest Service had
16 a ditch all the way up to Sheep Creek.
17 MS. VAN BUSSUM: Yes.
18 MS. HELTSLEY: And that the Forest Service built it.
19 MS. VAN BUSSUM: Yes.
20 MS. HELTSLEY: That's inaccurate.
21 MS. VAN BUSSUM: Okay.
22 THE COURT: And now you were talking about the ditch
23 built on the east side of the highway?
24 MR. RIGBY: That's right. That became relevant
25 because of the issue of could it be another area instead

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1 after the hearing, if that's acceptable to all the
2 parties.
3 THE COURT: And that will get it down to a 10-acre
4 tract?
5 MS. VAN BUSSUM: Yes, that would be down to a
6 10-acre tract.
7 THE COURT: Okay. Just for my understanding, to
8 make sure: Your recommended point of diversion is in the
9 southwest of the southwest?
10 MS. VAN BUSSUM: That's correct.
11 THE COURT: And they're claiming the point of
12 diversion is in the southeast of the southwest?
13 MS. VAN BUSSUM: Yes.
14 THE COURT: Okay.
15 Q. (By Mr. Rigby) And again, because of the
16 lateness in the hour, I'm going to ask this in a different
17 way. If -- if -- if -- if Ann were to testify that Carl's
18 ditch wasn't built by the Forest Service, that it was
19 already there, you -- you believe that's wrong?
20 A. Is Ann testifying to her firsthand knowledge of
21 when the ditch was put in?
22 Q. I'm -- I'm --
23 MR. BAXTER: Your Honor, calls for speculation on
24 behalf of the witness.
25 MR. RIGBY: She asked me the question. Am I the

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1 of the spring or the ditch that we're talking as far as
2 Spring -- Spring Ditch is concerned.
3 THE COURT: Well, has anybody suggested --
4 MR. RIGBY: I just didn't want there to be
5 confusion.
6 THE COURT: Is anybody suggesting water from that
7 ditch on the west -- east side of the highway --
8 MR. RIGBY: No.
9 THE COURT: -- contributes to the place of use
10 claimed here?
11 MR. RIGBY: No, but she raised -- she raised it. I
12 just wanted to make sure that it's not relevant.
13 THE COURT: Okay.
14 UNIDENTIFIED: That's on the homestead, Your Honor.
15 You can see on Levi Jones' property that the old Carl's
16 ditch comes out of Sheep Creek.
17 The homestead for Levi Jones was actually on the
18 east side of the river, up around the bend, the current
19 Farrell house. They expanded it. They brought water all
20 the way down to the ranger station.
21 THE COURT: Okay, did that make sense?
22 MS. VAN BUSSUM: It did.
23 THE COURT: Okay.
24 MR. RIGBY: Nothing further, Your Honor.
25 THE COURT: Okay, the claimants rest?

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1 MR. RIGBY: Yes, I guess with our redirect, we
2 would. Or no, were we on redirect? I'm not --
3 MR. BAXTER: Recross examination.
4 MR. RIGBY: I lost it a long time ago. On
5 recross --
6 THE COURT: Recross, right.
7 MR. RIGBY: -- recross, we rest.
8 THE COURT: Now, is there anything further from
9 IDWR?
10 MR. BAXTER: No, Your Honor.
11 THE COURT: Anything further from Mr. Hull and
12 Mr. Murphy, other than you want to get out of here?
13 MR. HULL: Your Honor, can I say something just
14 really quick in closing?
15 THE COURT: We can consider it closing arguments.
16 MR. RIGBY: Do you want to hear them tonight?
17 MR. HULL: It will take me two minutes, our
18 argument.
19 THE COURT: Well, there are several possibilities.
20 We could hear your two minutes now, and then
21 offer everybody the chance to submit closing arguments in
22 writing. Hopefully maybe closing arguments and findings
23 of fact.
24 MR. RIGBY: That -- that's what I'd prefer,
25 Your Honor.

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1 UNIDENTIFIED: Yes, sir.
2 THE COURT: That will get us out of here a little
3 bit sooner.
4 MR. BAXTER: May Ms. Van Bussum leave the stand,
5 Your Honor?
6 THE COURT: Let's see, would IDWR be submitting any?
7 MR. BAXTER: Heck, no.
8 THE COURT: We have your report and recommendation,
9 and we're done.
10 MR. BAXTER: Leave it to the parties.
11 THE COURT: Okay.
12 MR. BAXTER: Unless --
13 THE COURT: Well, in that case --
14 MR. BAXTER: Unless the parties agree it's
15 necessary, but I'd prefer not to. Thank you.
16 THE COURT: How much time do you want to get to
17 submit closing arguments and findings of fact, conclusions
18 of law?
19 MR. RIGBY: You know, Your Honor, I --
20 THE COURT: If there really are any conclusions of
21 law, or just pure fact.
22 MR. RIGBY: Well, I mean I guess the point being if
23 we feel like there are, we certainly can submit them for
24 your consideration.
25 THE COURT: Sure. Can we just dismiss

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1 THE COURT: Suggested findings of fact.
2 Are you folks familiar with that, that concept?
3 After a trial is over with, the court -- and I'm left with
4 this mountain of evidence -- and sometimes what I have
5 done in the past and I'd like to do here, I think, is to
6 give you a chance to tell me what you think the evidence
7 showed, kind of a summary sort of thing. Not necessarily
8 a narrative, but you could say "well, this shows this and
9 that shows that." So that's your proposed findings of
10 fact.
11 And then maybe on top of that, you can give me
12 your conclusions that you want to draw from that. But
13 that's done in writing, and everybody else gets a chance
14 to see what you're -- you're submitting, and you get a
15 chance to see what they have submitted.
16 UNIDENTIFIED: That's fine, Your Honor.
17 THE COURT: So that will give everybody a chance to
18 kind of stew over what was presented here, to maybe
19 eliminate the fluff and get down to the real basics.
20 "Here's what the real important facts showed," and maybe
21 "here's what it didn't show." And then submit that to me
22 in writing. And we can set a deadline.
23 And in a sense, that would be your closing
24 argument. That's a possibility, if you folks are willing
25 to go along with that. Do you think that will work?

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1 Ms. Van Bussum?
2 MR. RIGBY: Absolutely.
3 MS. VAN BUSSUM: It's more comfortable in my chair
4 over there.
5 THE COURT: Go ahead.
6 MR. RIGBY: Your Honor, here's my problem: I am so
7 booked this next little while that -- I mean I hate to say
8 this, but I mean about 30 days.
9 THE COURT: That wouldn't bother me at all.
10 MR. RIGBY: Okay.
11 THE COURT: As you know, I have got one of your
12 trials --
13 MR. RIGBY: Yeah, you got a couple.
14 THE COURT: -- that (unintelligible).
15 MR. RIGBY: It's okay, it's okay. I -- I mean like
16 I say, I totally understand. This is just one after
17 another.
18 THE COURT: What do you folks think about --
19 You're saying 30, 60 days or?
20 MR. RIGBY: Well, if the court will allow us 60
21 days, I would -- I would love it, because of what I've got
22 going now.
23 MR. BAXTER: Doing back flips?
24 THE COURT: I don't think anybody's in a real hurry.
25 MR. RIGBY: No, it's not an emergency situation.

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1 It's a long-term situation. That's obviously our concern.
 2 THE COURT: Well, with everybody's permission, maybe
 3 we'll just go ahead and set a 60-day deadline for parties
 4 to file proposed findings of fact and closing arguments.
 5 Because, as I understand it, there aren't any
 6 questions of law here. Questions of law are unique in
 7 that they don't depend on any particular facts. That it's
 8 purely a question of law, and I don't think that's the
 9 issue here.
 10 MR. RIGBY: Well, but there could be, Your Honor.
 11 So therefore, I guess what we -- what we -- If we feel
 12 like there are, might we -- might we propose them for your
 13 consideration?
 14 THE COURT: Sure. I guess I could understand where
 15 there's a possibility of that. So deadline for proposed
 16 findings of fact and conclusions of law, what's 60 days?
 17 Do we want to put April 30th? Or is everybody
 18 still going to be working on your taxes?
 19 UNIDENTIFIED: (Unintelligible).
 20 THE COURT: Filing late returns?
 21 MR. RIGBY: Is everybody waiting for me? I'm sorry.
 22 You know, I -- I'm sure that can be, because --
 23 even if I've got a problem with that particular time, I'll
 24 get it done beforehand.
 25 THE COURT: Okay.

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1 Okay, actually, it's a remarkable case, and I'm
 2 certainly glad we went right on through it.
 3 But again, I apologize for not being able to
 4 hold this up in Salmon, which we'd normally do. We began
 5 the whole SRBA with the idea that we would take the court
 6 to the claimants. But I think you know, for budgetary
 7 reasons, we can't do it.
 8 IDWR is getting cut. I think officially you're
 9 on furlough today?
 10 UNIDENTIFIED: Attorney general.
 11 THE COURT: Oh, the AGs are on furlough?
 12 MR. BAXTER: Yep.
 13 THE COURT: You're not getting paid today?
 14 MR. BAXTER: I moved my furlough day. I'll not get
 15 paid another day.
 16 THE COURT: That's how tough it is.
 17 MR. RIGBY: And then you really did make me almost
 18 (inaudible).
 19 UNIDENTIFIED: Almost.
 20 THE COURT: And that's why we haven't traveled up to
 21 Salmon to do this, where we'd normally do it. And I
 22 certainly appreciate you coming all the way down here.
 23 And I'm sorry we're going to have to turn you
 24 late -- or turn you out of here so darn late. It's, let's
 25 see, 9:12 right now. I wouldn't encourage anybody to

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1 MR. RIGBY: With that amount of time, I can do it.
 2 THE COURT: But the general idea is that you would
 3 submit yours simultaneously --
 4 MR. RIGBY: Yes.
 5 THE COURT: -- with the other parties, Mr. Hull and
 6 Mr. Murphy. And of course, you may all copy to IDWR, and
 7 copies to Mr. Rigby. Okay, and it doesn't have to be in
 8 any particular form, just simply call it "Proposed
 9 Findings of Fact, Conclusions of Law, and Closing
 10 Argument." That's simple enough.
 11 I think we've got all the exhibits admitted.
 12 Does anybody know of any that we have missed?
 13 (No response.)
 14 THE COURT: Or are there any other housekeeping
 15 matters we need to tend to? Let's see, this, the large
 16 map is the exhibit. Are these --
 17 MR. BAXTER: I think we used the smaller ones.
 18 These were simply for demonstrative purposes.
 19 THE COURT: So you'd take those with you?
 20 MR. BAXTER: We'll take these ones with us. We'll
 21 fold that one up nicely for Diana.
 22 THE COURT: Okay. And has everybody returned
 23 exhibits to us? Nobody's holding out?
 24 MR. RIGBY: I don't believe so, Your Honor.
 25 THE COURT: Okay, Diana thinks she's got them all.

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1 drive the roads after dark going up.
 2 Is anybody going to really do it?
 3 UNIDENTIFIED: (Unintelligible).
 4 THE COURT: Oh, gosh, drive carefully.
 5 MR. BAXTER: We love Twin Falls, Your Honor, but
 6 we're heading home.
 7 THE COURT: I'm just worried about animals on the
 8 road up to Salmon.
 9 UNIDENTIFIED: We have big bumpers.
 10 THE COURT: I hope so.
 11 UNIDENTIFIED: In North Fork, you got to have one.
 12 THE COURT: Okay, if there's nothing else, then
 13 we'll go off the record. Thank you all for joining. I
 14 think it was a terrific case, well-argued, well-presented
 15 by everybody; and thank you for a good presentation.
 16 UNIDENTIFIED: Thank you, Your Honor.
 17 MR. RIGBY: Thank you, Your Honor.
 18 MR. BAXTER: Thank you, Your Honor, for your time.
 19 THE COURT: Good night, everybody.
 20
 21 (End of proceedings.)
 22
 23
 24
 25

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1 TRANSCRIBER'S CERTIFICATE.

2 STATE OF IDAHO)
3) ss
4 County of Twin Falls)

5 I, LINDA LEDBETTER, duly appointed, qualified
6 and acting official reporter of the Fifth Judicial
7 District of the State of Idaho, DO HEREBY CERTIFY that I
8 transcribed the digitally recorded proceedings adduced in
9 the above and foregoing cause February 26, 2010 to the
10 best of my ability to hear and understand; and that the
11 within and foregoing constitutes and is a true and correct
12 copy of the transcript of said requested proceedings, said
13 transcript consisting of pages 1 through 459, inclusive.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 29th day of October 2010.

16
17
18
19 _____
20 LINDA LEDBETTER
Idaho CSR Certificate No. 26
21 Twin Falls, Idaho
22
23
24
25

Exhibit B

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

IN RE SRBA)

CASE NO. 39576)

Subcase No. 75-10547)

TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS

BEFORE: Terrence A. Dolan Special Master

DATE: Thursday, January 6, 2011

TIME: 9:00 a.m.

PLACE: Snake River Basin Adjudication Building
253 Third Avenue North
Twin Falls, Idaho 83301

HEARING: Initial Hearing

APPEARANCES:

Ms. Ann Heltsley, Mr. Stuart Felton, Mrs. Mitzi Felton,
Mr. Patrick Murphy appearing pro se by telephone.

Mr. Garrick Baxter, Ms. Suzy Cooley-Denney, Ms. Monica
Van Bussum appearing on behalf of the Idaho Department of
Water Resources by telephone.

TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS

THE COURT: Good morning, we're now on the record. It's January 6, 2011, just after 9:00 A.M., the date and time set for what we're calling an initial hearing in correspondence we received in subcase 75-10547.

Let's go through the roll call here and figure out who's on the line.

Do we have Adele Crawford with us?

(No response.)

THE COURT: Let's see, Ann Heltsley?

(No response.)

THE COURT: Do we have the Martens with us?

(No response.)

THE COURT: Patrick Murphy?

MR. MURPHY: I'm here, Your Honor.

THE COURT: You are, sir. Are you representing yourself today?

MR. MURPHY: Yes, I am.

THE COURT: Okay, do we have Stuart or Mitzi Felton on the line?

(No response.)

THE COURT: Do we have anyone with IDWR?

MR. BAXTER: Good morning, Your Honor. This is

2

MS. HELTSLEY: Yes, Your Honor.

THE COURT: Okay.

And I remind everybody we're on the record.

And Miss Heltsley, in case you didn't hear, we have got Patrick Murphy on the line, and Stuart and Mitzi Felton; and for IDWR, Garrick Baxter, Susan Cooley-Denney and Monica Van Bussum.

Will anyone else be joining us today, do you know?

MR. MURPHY: I know -- I know the Martens probably won't be.

THE COURT: Okay.

MS. HELTSLEY: Well, and we have -- we have talked to Adele Crawford, and she trusts us to explain the situation. She won't be joining us, no.

THE COURT: Okay, good, thank you.

Let's see, Miss Heltsley, you -- you were the first one to file the objection, and your concern is the -- the domestic water right that was decreed back in, let's see, 2010, I guess. Oh, no, it was 2000, ten years ago when it was decreed.

Can you explain to us what your intent is with the objection?

MS. HELTSLEY: Yes, Your Honor.

The water right says that it's ground water, and

4

Garrick Baxter for the department.

THE COURT: Good morning, sir.

MS. COOLEY-DENNEY: And Suzy Cooley-Denny in Coeur d'Alene.

THE COURT: Hi, Suzy.

MS. VAN BUSSUM: And Monica Van Bussum, also.

THE COURT: We have the whole gang here from IDWR.

It looks like we're missing some critical parties. Miss Heltsley filed the objection. She called it an objection. And then the Feltons filed essentially the same thing. And part of the reason for the hearing today is to figure out where we go from here.

Did someone just join us?

MS. FELTON: Yes, hi. It's Mitzi Felton. And --

MR. FELTON: Stuart Felton.

THE COURT: Good morning. Are you representing yourselves today?

MS. FELTON: Yes, we are.

THE COURT: Okay, we've got Patrick Murphy on the line. And for IDWR, Gary Baxter, Susan Cooley-Denney and Monica Van Bussum. So far no one else has joined us.

MS. HELTSLEY: Ann Heltsley, Your Honor.

THE COURT: Oh, you are on the line?

MS. HELTSLEY: Yes.

THE COURT: Are you representing yourself today?

3

Mr. Murphy testified that it is a well. And it is not a well. It is ground water -- surface water.

THE COURT: Surface water. That is, water that flows without the use of a pump to lift it out of the ground?

MS. HELTSLEY: It's not coming out of the ground, Your Honor. It's surface water. And his well does not fit the definition of the department of water resources as far as the depth. He is not 18-feet deep.

He has got a surface pump within 10 feet, actually, of -- of the ground. And the water source that he's using was developed by Adele Crawford, and it is a spring. And it's surface water, not ground water.

THE COURT: Okay.

Mr. Murphy, do you have any response to that?

MR. MURPHY: Yes, Your Honor.

THE COURT: For everybody's benefit -- I'm sorry to break in, sir -- but I just want to let everybody know we're not here to take evidence today, but I'm basically at this initial stage trying to figure out where we go; do we need to set this for trial on factual matters, or is it something that we can refer on to IDWR.

So we're not taking sworn testimony day. If it comes to it, that can be arranged later.

So go ahead, Mr. Murphy.

5

1 MR. MURPHY: There actually -- I did testify, and
2 what I have there, Your Honor, is -- is called a well.
3 It's an enclosed system, concrete culvert, and a cap on
4 it. It's 12-feet deep and does have a pump. It's my
5 domestic water for the house.
6 However, it is -- it was excavated, and the
7 source is ground water. Even though it's probably
8 (unintelligible), it's before the water comes up to the
9 surface. It's about 150 feet to the north of where that
10 spring would -- would come to the surface.
11 THE COURT: Do you have a pump in the well, you say?
12 MR. MURPHY: Yes.
13 THE COURT: If you shut off the pump, what would
14 happen?
15 MR. MURPHY: (No response.)
16 THE COURT: Would the water continue --
17 MR. MURPHY: Nothing.
18 THE COURT: Would the water continue flowing up and
19 then flow on to some later source -- surface?
20 MR. MURPHY: I would assume it is -- The whole
21 bottom of the North Fork there where we intercept is old
22 alluvium, and I have no doubt that water is moving
23 underneath the surface, you know. But you know, I don't
24 know how you call it.
25 You know, the definition of ground water, when

6

1 a well, does that supply domestic to your home?
2 MR. MURPHY: Yes, it does.
3 THE COURT: As I recall, it's got quite a ways to
4 pump up that hill to your house?
5 MR. MURPHY: It does.
6 THE COURT: Okay.
7 Let's see, Mr. or Mrs. Felton, do you have
8 anything you wanted to add or subtract?
9 MS. FELTON: Stuart? Do you know what you have to
10 say? Anything?
11 MR. FELTON: As far as I'm concerned, that is not a
12 well, and that is surface water.
13 MS. FELTON: What we -- Our contention, Your Honor,
14 is that that water is water from the spring, which is the
15 point of origin of our water rights which predate
16 Mr. Murphy's; and as far as we're concerned, he's taking
17 water from that spring without a right.
18 THE COURT: Okay, thank you.
19 Let's see, let's get to IDWR. Garrick Baxter,
20 you were involved with the earlier proceedings that
21 involved somewhat the same actual circumstances. They
22 were on that area. And Monica Van Bussum testified in
23 that matter. Do you have anything you want to suggest of
24 where we go from here?
25 MR. BAXTER: I guess, Your Honor, if the objection

8

1 it says "ground water is all water under the surface of
2 ground" wherever "may be the geological structure on which
3 it is standing or moving," I have no idea--
4 You know, that water is probably tied to water,
5 hyporheic flow from the North Fork or the -- probably the
6 spring. But it is -- There's actually --
7 It's not what Adele says it was. She -- I
8 don't know if her memory was in -- You know, I don't
9 doubt, when she first maybe put the house in, there was a
10 spring box that was on the surface with a pump. I have no
11 idea.
12 There's an easement deed to the property in the
13 county courthouse. And actually, this structure is
14 actually located on the Hull property; and Adele Crawford
15 was given -- given an access, an easement deed which was
16 transferred to the property owners, to the Martens, and
17 then to myself, to have all appurtenance -- all
18 appurtenances to this well, even though he says it's only
19 12-feet deep.
20 So by definition of a well, you know, it's more
21 of maybe a cistern pump system. But it definitely was
22 excavated, and there's no -- there's no surface water
23 around the well or, you know, where -- where I'm pumping
24 from.
25 THE COURT: Does the water from your -- and you call

7

1 is the letter that was filed with regards to this matter
2 by Miss Heltsley and the Feltons, when we go and take a
3 look at it, I think it has what I would call an incorrect
4 analysis of law, of Idaho water law here.
5 And particularly -- I'm looking at the letter
6 right now, and it's date stamped -- I think this is the
7 one Miss Heltsley sent in October 12th, 2010; and I'm
8 looking at the paragraph there -- one, two, three, four,
9 five -- the fifth paragraph down that starts "Mr. Murphy
10 has not," and the "not" is underlined there.
11 Have you been able to track with me, Your Honor?
12 THE COURT: Let's see, now, are you reading from her
13 objection?
14 MR. BAXTER: Yes, the statement in support of
15 objection, I guess.
16 THE COURT: Hold on a second, I'm just looking for
17 that now. Let's see, I see a note here saying "attached
18 affidavit," but for some reason, I don't see any
19 affidavit. Hold on, Diana is going to help me find it.
20 Oh, okay, I'm with you now. Let's see, I've got
21 the -- that's the -- dated October 7, and it was filed
22 here October 12, but that's the one signed by Ann
23 Heltsley. Now, you're saying the fifth paragraph down?
24 MR. BAXTER: Yeah.
25 THE COURT: "Mr. Murphy is in fact" using surface

9

1 water?

2 MR. BAXTER: Actually, if you'd go one more

3 paragraph.

4 THE COURT: Oh, okay. Go ahead. "Mr. Murphy has

5 not obtained a well drilling permit"?

6 MR. BAXTER: Yes. So if we go to the second

7 sentence there, it says, "By definition, the department of

8 water resources, in order to qualify for ground water use,

9 a well must be at the depth of at least 18 feet."

10 There's a bit of confusion here. I would

11 distinguish, Your Honor, the difference between ground

12 water and what is a regulated well by the department of

13 water resources; and I think the two issues have been

14 fused together in this one sentence.

15 Now, it is correct that before a well becomes

16 regulated by the department of water resources for well

17 construction and well drilling purposes, it must be deeper

18 than 18 feet. That's --

19 So somebody can go out and dig a 12-foot well,

20 and they don't need to comply with the department's well

21 construction standards and other certain standards of the

22 department.

23 Now, however, though, Your Honor, it is

24 important to distinguish that is not tied to the

25 definition of ground water. The department considers the

10

1 and is for a domestic home.

2 Now, I'm not going to argue -- I have no

3 information with regards to the priority date, when that

4 first started happening. I can't remember what Adele

5 Crawford said about when it took place, so I don't speak

6 as to that.

7 So I guess from the department's standpoint, I

8 guess we don't see anything -- any issues with regards to

9 this particular partial decree. So that's my thoughts on

10 the issue, Your Honor. Do you have any questions of me?

11 THE COURT: If the water were to flow --

12 Let's see, let me back up. If they stopped

13 pumping and the water came up in the well and then flowed

14 to the spring, would that change your view?

15 MR. BAXTER: No. The point that Mr. Murphy is

16 diverting, taking control of the water, is down below the

17 sub -- the surface. So if I understood you correctly, if

18 Mr. Murphy, instead of using a well, started diverting

19 from the surface and, let's say, dug a ditch and -- though

20 I know it sounds like he's upgradient -- but let's say he

21 dug a ditch and ran it over to his house. Then the point

22 at which he takes control of the water is at the surface,

23 and we would call that surface water.

24 But he's taking control of the water 12 feet

25 below the surface, so we'd -- we'd call that ground water,

12

1 definition of ground water to be water that is flowing

2 below the surface.

3 So somebody can still have a ground water right

4 and be diverting the water from -- be diverting the ground

5 water, using a well. The well just might not be under the

6 regulation or purview of the department of water

7 resources, so to say.

8 And I think Mr. Murphy was -- previously started

9 giving you a definition that is found in Idaho Code

10 42-230, where therein it defines "ground water is all

11 water under the surface of the ground" wherever it may

12 be -- or "may be the geological structure in which it is

13 standing or moving." So I just refer the court to that

14 definition there.

15 So when you step back from that, then, and look

16 back to the partial decree that has been issued to --

17 originally to the Martens, and you take the statement that

18 I think everybody agrees with here that fundamentally

19 Mr. Murphy is withdrawing water -- Let's not put a title

20 on it, but is withdrawing. Everybody would agree

21 Mr. Murphy is withdrawing water from a hole in the ground

22 12-feet deep with a pump.

23 You then take a look at the partial decree that

24 was issued. I still come to the conclusion that that's a

25 correct partial decree, that the source is ground water

11

1 Your Honor.

2 THE COURT: Okay.

3 Ms. Van Bussum, you were involved in

4 investigations in the earlier related matter. Do you

5 recall seeing this well?

6 MS. VAN BUSSUM: Yes, Special Master, I have seen

7 this.

8 THE COURT: Do you agree that it's 12-feet deep?

9 MS. VAN BUSSUM: Well, I have not looked at the well

10 logs for it, but I can tell you there was no water around

11 the well structure, there's no surface water. But I

12 can't, you know, testify as to how deep it is. That would

13 be up to Mr. Murphy.

14 THE COURT: Okay. Would it be fair to say that the

15 water at the bottom of the well -- we'll call it a well

16 for now -- if that were not pumped, that water could end

17 up at the spring lower down, the one that supplies water

18 to Miss Heltsley and others?

19 MS. VAN BUSSUM: That's a tough one. It's -- it's

20 presumably upgradient because of the general flow

21 direction of surface water in that area, but I don't know

22 the lithology underneath. Like Mr. Murphy says, it's

23 alluvium, which -- which would indicate that it's

24 upgradient and potentially would eventually make its way

25 to the stream.

13

1 Whether water, you know, 12-feet deep on the
2 other side of the road, and at least 150 feet up from the
3 spring, or the headwaters of the spring, would be
4 connected, that's a -- that's a tough call.
5 I have a feeling that eventually the water,
6 underground, would -- would bubble up to the surface at
7 some point. But as to where it would meet the spring, I
8 don't know. Does that answer your question?
9 THE COURT: Sure.
10 Let's see, Ms. Heltsley, do those questions or
11 responses give you any -- any ideas, any further ideas of
12 what we need to explore here?
13 MS. HELTSLEY: Yes, Your Honor. I understand you
14 said we're not presenting evidence on this teleconference,
15 but I will tell you that in trial, Miss Van Bussum said
16 she did not see the spring box, and that she did not see
17 the well, and that she did not cross the road. And now
18 she says that she has, so I'd like her to clarify when she
19 saw that, if it's been since the trial date.
20 And number two, you asked would this water
21 eventually end up in the spring water. And this is spring
22 water that Mr. Murphy is using for his domestic. This
23 spring is the head of our -- what our contention is is the
24 point of our diversion. It was developed into a wooden
25 spring box to collect the water so that a pump could be

14

1 structure up from the road?
2 MS. VAN BUSSUM: Yes, Special Master, I could.
3 THE COURT: Okay. Let's see, Mr. Murphy --
4 MR. BAXTER: Your Honor --
5 THE COURT: Mr. Murphy, is it?
6 MR. MURPHY: Yes.
7 THE COURT: Go ahead, sir.
8 MR. MURPHY: Oh, no, I wasn't trying to speak,
9 Your Honor.
10 MR. BAXTER: Your Honor, that was me, Garrick.
11 THE COURT: I'm sorry.
12 MR. BAXTER: Your Honor, I was just going to add one
13 other further point of -- something for you to consider in
14 this matter. I think some of the concerns, too, that are
15 being raised more so go to address water administration.
16 If somebody has a water right and they believe
17 that their water right is being interfered with by another
18 water right, their remedy isn't to go to the SRBA Court to
19 try to say that the other person doesn't have a water
20 right. Their remedy is to seek water administration from
1 the department of water resources.
2 So I -- I don't think, again, when we take a
3 look back and look generally at what's going on here, I
4 don't think the argument is that Mr. Murphy does not have
5 a water right altogether. I think the facts point out

16

1 put in it to use for Miss Crawford's house, which is now
2 Murphy's house. So this isn't --
3 This is spring water that Mr. Murphy is taking
4 advantage of, and it is surface water that was developed
5 by Adele Crawford simply to capture the water, to make it
6 deeper, so that she could put a submergible pump in it.
7 So in answer to does this water eventually end
8 up in the spring: Yes, it does. And it is a spring,
9 itself.
10 THE COURT: Miss Van Bussum, do you have any
11 response to that?
12 MS. VAN BUSSUM: I apologize, it's going to be just
13 a little bit noisy here for a minute. I'm in the airport
14 in Denver.
15 I do have a quick response. The spring box and
16 the well are presumed to be two different structures.
17 When Adele Crawford was testifying at trial regarding the
18 spring box location, it was well on the other side of the
19 road, well up from where I conducted my field exam.
20 When I met with Mr. Murphy and the Hulls for the
21 field exam, Mr. Murphy pointed out his well structure and
22 said, "That's my well for my domestic use."
23 And seeing the well structure did not require me
24 crossing the road. I hope that satisfies the question.
25 THE COURT: But you could see the -- the well.

15

1 there is a water right and water use associated with
2 Mr. Murphy's property, so that was just another additional
3 point I wanted to add for your consideration.
4 THE COURT: Good. Well, thank you.
5 When the matter first came to our attention down
6 here, the presiding judge noted that possible problem,
7 that maybe this is really administration, rather than --
8 rather than a proper attempt to set aside a partial decree
9 and then void that water right.
10 So your point, Mr. Baxter, is that the remedy
11 should be with IDWR on administration, rather than the
12 court to set aside and void a partial decree?
13 MR. BAXTER: I'm just saying, Your Honor, I haven't
14 heard facts here today that suggest that there's any
15 problem with the partial decree that was issued.
16 THE COURT: If Miss Heltsley and the Feltons were to
17 go to IDWR and present their -- their case, can you tell
18 us generally what the process is there?
19 MR. BAXTER: I'm not familiar enough with this part
20 of the basin to know if -- I'm assuming they're in a
21 water district.
22 Monica, do you know for sure if they're in a
23 water district there right now?
24 MS. VAN BUSSUM: Garrick, I don't -- They're
25 probably subject to 170, but I don't think they're

17

1 regulated as a water district.

2 MR. BAXTER: Okay.

3 Your Honor, once the partial decrees are issued,
4 and assuming the court has issued an order granting
5 interim administration for the department to administer
6 water rights in this particular area pursuant to the
7 partial decrees issued by the SRBA Court, somebody who is
8 dissatisfied with the amount of water that they're getting
9 under their water rights can then go to the watermaster
10 and ask that the -- their water rights be administered.
11 So assuming that that can be shown, you know, they can go
12 and do that.

13 Now, generally here in Idaho, though, when it
14 comes time for administration, there's going to be the
15 question of domestic use and how is that being used. I
16 think the department would have some questions about --
17 from both parties about, "Okay, Mr. Murphy, how are you
18 using your water," ensuring that it's properly being used.

19 And then the watermaster would also go out and
20 ensure that there is actually a deficit, that the Murphys'
21 (sic) and the Stuarts' (sic) water needs are not being
22 met. And if they are -- aren't being met, then the
23 watermaster would find some solution to that or work with
24 the parties to find resolution of that matter.

25 THE COURT: Okay, thank you. While you were

18

1 there?

2 MR. MURPHY: Yes, I did. I didn't say spring box,
3 Ann. And there is no spring box, okay. There hasn't been
4 a spring box there. There might have been one when Adele
5 first moved in.

6 Since 1990, in this deed, there has been this
7 other structure. In the deed, it's called a well. As I
8 said, it's concrete. It's a culvert with concrete and a
9 cap on it. It's not a box, it's not a spring box.

10 I said it's 150 feet upstream of where the water
11 starts to come to the surface.

12 MS. HELTSLEY: And what area are you talking about,
13 Mr. Murphy?

14 MR. MURPHY: I'm talking about -- Obviously, we're
15 not -- we don't -- You haven't seen this structure, and
16 Adele hadn't seen it, even though she has an easement for
17 it, because she -- when she --

18 MS. HELTSLEY: Just because you changed from a wood
19 box to a culvert doesn't mean it's not a spring box.

20 MR. MURPHY: I did not --

21 MS. HELTSLEY: I mean --

22 MR. MURPHY: Ann, I got to explain something to you.
23 When the first water right -- When the first water right
24 was -- When Adele put in for a water right, she called
25 the source ground water. And she also, when she sold the

20

1 talking, our clerk with us today, Diana, mentioned that it
2 looks like the order for interim administration in that
3 area is pending with the court. I don't know when it's
4 going to be issued, though. Does that change anything?

5 MR. BAXTER: You know, I'm trying to recall.

6 Judge Wildman did order interim administration
7 for a number of water districts up there. We have water
8 districts, I think it's like A through like number F or
9 something like that. I just don't know if this
10 particular -- these particular houses, or this particular
11 house and the Stuarts -- or the Feltons and Ms. Heltsley
12 are within one of those water districts.

13 So if they are and it's pending, as soon as we
14 have interim administration out there, we -- And there
15 is -- assuming there is a created water district and a
16 watermaster, then that's -- that's the process. That's
17 still the process you go through.

18 THE COURT: Okay, thank you.

19 Miss Heltsley, do you have anything, finally,
20 you wanted to add?

21 MS. HELTSLEY: Yes, Your Honor. Did -- I heard
22 Mr. Murphy say that his water source for this ground
23 water, he assumed, was 150 feet north of the spring box.

24 Is that correct, Your Honor?

25 THE COURT: Mr. Murphy, do you recall what you said

19

1 property to the Martens, she had to have an easement,
2 because it's located -- at the time was located on the
3 Farrells' property, who bought it from Harold Hanson.

4 There was no easement to the well which is
5 located -- My well, which is located now on the Hulls'
6 property, needed -- needed an easement.

7 They put that structure in at least by 1990. It
8 has been there for 21 years. The same structure has been
9 there. It is not a spring -- wooden spring box, and it's
10 not on the surface.

11 MS. HELTSLEY: It's -- it's a culvert spring box.

12 MR. MURPHY: Well, yeah.

13 MS. HELTSLEY: So you -- you have -- you have a
14 water right on the North Fork of the Salmon River, on a
15 ditch that flows down that you share with Mr. Hull.

16 MR. MURPHY: Yes.

17 MS. HELTSLEY: Are you saying that the water for
18 your well is coming 150 feet north of -- being that
19 particular irrigation ditch?

20 MR. MURPHY: No. It's directly between -- My well
21 is probably directly between, in a north/south line --

22 The spring comes up probably 150 feet below --
23 below my well; and our ditch is probably, oh, I don't
24 know, 200 feet above that.

25 MS. HELTSLEY: Who drilled your well, Mr. Murphy?

21

1 MR. MURPHY: What's that?
2 MS. HELTSLEY: Who drilled -- well?
3 MR. MURPHY: I'm sorry, I couldn't hear you.
4 MS. HELTSLEY: I'm sorry. Was that a drilled well?
5 MR. MURPHY: I don't know. Adele Crawford -- Adele
6 Crawford and Harold Hanson put this structure in.
7 MS. HELTSLEY: Okay, well, Adele has testified that
8 the reason that they built that structure was to capture
9 the overflow water from the spring for her use; and the
10 overflow from that goes into the ditch.
11 MR. MURPHY: Well, she also said, Adele also said --
12 MS. HELTSLEY: She also testified --
13 MR. MURPHY: Adele also testified that the "wooden
14 spring box," and that's not the case. In fact, she should
15 have known that, because she has -- she has an access
16 easement in her name, and that's --
17 And I can read it to you. It says -- It's
18 fairly long, but just a portion of it says, "In connection
19 with the pumping and transportation of water from that
20 certain well 12-feet deep with a one-and-a-half-inch
21 (unintelligible) developed by Glenn Goddard on the
22 property belonging to the parties in the first part."
23 So she -- That is not a wooden spring box, and
24 it wasn't on the sur -- It might have been on the surface
25 when she first put the house in in 1982. I have no idea.

22

1 MS. HELTSLEY: An easement deed is just an access,
2 Your Honor. It doesn't have anything to do with the
3 development, on whether he has a ground water well or
4 whether he's using surface water.
5 THE COURT: Okay, that sounds like it wouldn't do
6 you much good, Mr. Murphy.
7 Okay, well, what I'll do, like I say, I'll try
8 to get an order out on this, some sort of determination,
9 either set it for further hearings for factual -- or trial
10 on the issue, or whether it should be properly referred to
11 IDWR as an administrative matter.
12 But in the meantime, like I say, we have got to
13 get off the line here.
14 Thank you all for joining us this morning.
15 We'll go off the record.
16
17 (End of proceedings.)
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1 But certainly as of 1990, that's not the case. So I
2 don't -- I don't know, I can't answer your question.
3 MS. HELTSLEY: Well, the point is here, I think, is
4 that that structure, however it got where it is, was built
5 to capture spring water. An overflow spring is what Adele
6 has told us. That's what she's testified under oath in
7 court. And that's -- that's our point of contention right
8 there.
9 THE COURT: Okay, thank you, Ms. Heltsley.
10 For everyone's benefit, we only allowed half an
11 hour for this matter to go to the initial hearing, so
12 we're going to have to finish. We have another matter
13 coming up right now.
14 But what I'll do is take another look at the
15 objection and what's been said, particularly by Garrick
16 Baxter on the issues of administration versus adjudication
17 of water rights; and I'll try to get some sort of an order
18 out on this within the next couple weeks.
19 Let's see, I -- Yes, go ahead, sir.
20 MR. MURPHY: Special Master, this is Patrick Murphy.
21 Would it be helpful for me to send to all parties the
22 easement deed that runs with my property and the Hulls'
23 property for this certain well, we'll call it?
24 THE COURT: Ms. Heltsley, would that help you, do
25 you think?

23

TRANSCRIBER'S CERTIFICATE

1 STATE OF IDAHO)
2)
3) ss
4 County of Twin Falls)

5 I, LINDA LEDBETTER, duly appointed, qualified
6 and acting official reporter of the Fifth Judicial
7 District of the State of Idaho, DO HEREBY CERTIFY that I
8 transcribed the digitally recorded proceedings adduced in
9 the above and foregoing cause January 6, 2011, to the best
10 of my ability to hear and understand; and that the within
11 and foregoing constitutes and is a true and correct copy
12 of the transcript of said requested proceedings, said
13 transcript consisting of pages 1 through 25, inclusive.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 7th day of January 2010.
16
17
18

19 LINDA LEDBETTER
20 Idaho CSR Certificate No. 26
21 Twin Falls, Idaho
22
23
24
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