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MAR 25 2011

DEPARTMENT OF
WATER RESOURCES

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. 01-0006

)

Case No. 39576

)

SECOND AFFIDAVIT OF
MICHAEL C. ORR

)

)

STATE OF IDAHO

)

) ss.

COUNTY OF ADA

)

MICHAEL C. ORR, being first duly sworn upon his oath, deposes and states that:

1. I am a Deputy Attorney General in the Idaho Office of the Attorney General and one of the attorneys of record for the State of Idaho in the above-entitled proceedings.

2. The following is based upon my own personal knowledge.

3. Attached hereto as **Exhibit 1** is true and correct copy of a letter to me from American Falls Reservoir District No. 2's ("District No. 2") attorney Isaac D. Keppler, dated September 13, 2010.

4. Attached hereto as **Exhibit 2** is true and correct copy of a letter from me to Isaac D. Keppler, dated September 15, 2010.

5. Attached hereto as **Exhibit 3** is a true and correct copy of the transcript of the "Hearing on Motion to Compel Discovery" in SRBA Subcase No. 29-11609, dated October 5, 2004.

6. Attached hereto as **Exhibit 4** is a true and correct copy of the "Order on Motion to Compel, Motion to Strike and Motion to Accept" in SRBA Subcase No. 29-11609, dated October 15, 2004.

7. Attached hereto as **Exhibit 5** is a true and correct copy of the transcript of the Rule 30(b)(6) Deposition of the State of Idaho in this subcase, Testimony of Anthony Olenichak, dated July 7, 2010.

8. Attached hereto as **Exhibit 6** is a true and correct copy of District No. 2's responses to the State of Idaho's second set of discovery requests to District No. 2 in this subcase, dated January 3, 2011.

9. Attached hereto as **Exhibit 7** is a true and correct copy of District No. 2's responses to the State of Idaho's third set of discovery requests to District No. 2 in this subcase, dated February 8, 2011.

10. Attached hereto as **Exhibit 8** is a true and correct copy of District No. 2's first set of discovery requests to the State of Idaho in this subcase, dated October 21, 2010.

11. Attached hereto as **Exhibit 9** are true and correct copies of excerpted pages of the Rule 30(b)(6) deposition of District No. 2 in this subcase, witness, Craig D. Hobdey, dated July 28, 2010.

Further your affiant sayeth naught.

DATED this 24th day of March 2011.


MICHAEL C. ORR

///

///

A circular ink stamp from the National Archives and Records Administration. The outer ring contains the text "NATIONAL ARCHIVES AND RECORDS ADMINISTRATION". Inside this, another ring says "OFFICE OF PUBLIC AFFAIRS". In the center, it reads "OCT 1967".

My commission expires: 2/5/2012

CERTIFICATE OF SERVICE

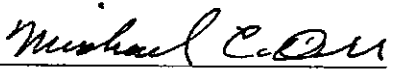
I HEREBY CERTIFY that on this 24th day of March 2011, I caused a true and correct copy of the foregoing SECOND AFFIDAVIT OF MICHAEL C. ORR to be filed with the Court and served on the following parties by the indicated methods:

Clerk of the SRBA Court 253 Third Avenue North P.O. Box 2707 Twin Falls, Idaho 83303-2707	☐ U.S. Mail ☒ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail:
City of Pocatello Represented by: A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: dtranmer@pocatello.us
American Falls Reservoir District No. 2 Represented by: C. Thomas Arkoosh Isaac D. Keppler Capitol Law Group, PLLC 205 N. 10th Street, 4th Floor Boise, ID 83701 and 301 Main St. PO Box 32 Gooding, ID 83330	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: tarkoosh@capitolawgroup.net ikeppler@capitolawgroup.net
American Falls Reservoir District No. 2 Represented by: Craig D. Hobday Hobday & Hobday PO Box 176 Gooding, ID 83330	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile:

	☒ E-mail: hobdeycraig@gmail.com
Blackfoot Irrigation Co. Fremont-Madison Irrigation United Canal Co. Represented by: Jerry R. Rigby Rigby, Andrus & Rigby, Chtd. 25 N. 2 nd E. PO Box 250 Rexburg, ID 83440-0250	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: jrigby@rex-law.com
City of Pocatello The Amalgamated Sugar Co. Represented by: Josephine P. Beeman Beeman & Associates, PC 409 W. Jefferson St. Boise, ID 83702	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: jo.beeman@beemanlaw.com
Independent Water Users of Jefferson Irrigation Dist. Montevue Canal Co. Mud Lake Water Users Inc. Producers Irrigation Co. Represented by: Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC 1000 Riverwalk Dr., Ste. 200 PO Box 50130 Idaho Falls, ID 83405	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: rharris@holdenlegal.com
Aberdeen American Falls Bingham Ground Water District Bonneville Jefferson Ground Carey Valley Ground Water Dist. Jefferson Clark Ground Water Madison Ground Water District Magic Valley Ground Water Dist. North Snake Ground Water Dist. Represented by:	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: rcb@racinelaw.net cmm@racinelaw.net

Randall C. Budge Candice M. McHugh Racine, Olson, Nye, Budge & Bailey, Chtd. 201 E. Center, Ste. A2 PO Box 1391 Pocatello, ID 83204-1391 and 101 Capitol Blvd, Ste. 208 Boise, ID 83702	
City of Pocatello Represented by: Sarah A. Klahn White & Jankowski LLP 511 16th St., Ste. 500 Denver, CO 80202	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: sarahk@white-jankowski.com
United States of America USDI Bureau of Reclamation Represented by: US Department of Justice Environment & Natural Resources 550 W. Fort St., MSC 033 Boise, ID 83724	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail:
E. Gail McGarry United States Department of the Interior Bureau of Reclamation 1150 N. Curtis Road, Suite 100 Boise, ID 83706-1234	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: ☐ Not applicable
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 44449	☐ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail

Boise, ID 83720-4449	☐ Facsimile: ☐ E-mail: ☒ Not applicable
IDWR Document Depository PO Box 83720 Boise, ID 83720-0098	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail:


 Michael C. Orr

COPY

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. 01-0006
	)	
Case No. 39576	)	SECOND AFFIDAVIT OF
	)	MICHAEL C. ORR
	)	

STATE OF IDAHO	)
	) ss.
COUNTY OF ADA	)

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2. The following is based upon my own personal knowledge.

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5. Attached hereto as **Exhibit 3** is a true and correct copy of the transcript of the "Hearing on Motion to Compel Discovery" in SRBA Subcase No. 29-11609, dated October 5, 2004.

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Further your affiant sayeth naught.

DATED this 24th day of March 2011.


MICHAEL C. ORR

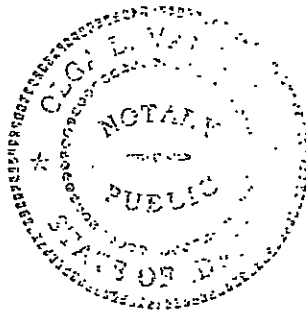
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SUBSCRIBED AND SWORN to before me this 29th day of March 2011.





Notary Public for Idaho

Residing at: Boise

My commission expires: 2/8/2012

CERTIFICATE OF SERVICE

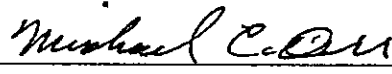
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Clerk of the SRBA Court 253 Third Avenue North P.O. Box 2707 Twin Falls, Idaho 83303-2707	☐ U.S. Mail ☒ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail:
City of Pocatello Represented by: A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: dtranmer@pocatello.us
American Falls Reservoir District No. 2 Represented by: C. Thomas Arkoosh Isaac D. Keppler Capitol Law Group, PLLC 205 N. 10th Street, 4th Floor Boise, ID 83701 and 301 Main St. PO Box 32 Gooding, ID 83330	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☒ E-mail: tarkoosh@capitollawgroup.net ikeppler@capitollawgroup.net
American Falls Reservoir District No. 2 Represented by: Craig D. Hobday Hobday & Hobday PO Box 176 Gooding, ID 83330	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile:

	☒ E-mail: hobdeycraig@gmail.com
Blackfoot Irrigation Co. Fremont-Madison Irrigation United Canal Co. Represented by: Jerry R. Rigby Rigby, Andrus & Rigby, Chtd. 25 N. 2 nd E. PO Box 250 Rexburg, ID 83440-0250	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: jrigby@rex-law.com
City of Pocatello The Amalgamated Sugar Co. Represented by: Josephine P. Beeman Beeman & Associates, PC 409 W. Jefferson St. Boise, ID 83702	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: jo.beeman@beemanlaw.com
Independent Water Users of Jefferson Irrigation Dist. Monteview Canal Co. Mud Lake Water Users Inc. Producers Irrigation Co. Represented by: Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC 1000 Riverwalk Dr., Ste. 200 PO Box 50130 Idaho Falls, ID 83405	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: rharris@holdenlegal.com
Aberdeen American Falls Bingham Ground Water District Bonneville Jefferson Ground Carey Valley Ground Water Dist. Jefferson Clark Ground Water Madison Ground Water District Magic Valley Ground Water Dist. North Snake Ground Water Dist. Represented by:	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: rcb@racinelaw.net cmm@racinelaw.net

Randall C. Budge Candice M. McHugh Racine, Olson, Nye, Budge & Bailey, Chtd. 201 E. Center, Ste. A2 PO Box 1391 Pocatello, ID 83204-1391 and 101 Capitol Blvd, Ste. 208 Boise, ID 83702	
City of Pocatello Represented by: Sarah A. Klahn White & Jankowski LLP 511 16th St., Ste. 500 Denver, CO 80202	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: sarahk@white-jankowski.com
United States of America USDI Bureau of Reclamation Represented by: US Department of Justice Environment & Natural Resources 550 W. Fort St., MSC 033 Boise, ID 83724	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail:
E. Gail McGarry United States Department of the Interior Bureau of Reclamation 1150 N. Curtis Road, Suite 100 Boise, ID 83706-1234	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: ☐ E-mail: ☐ Not applicable
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 44449	☐ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail

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Michael C. Orr
 Michael C. Orr

September 13, 2010

Michael C. Orr
Deputy Attorney General
Natural Resources Division
700 W. State Street, 2nd Floor
PO Box 83720
Boise, Idaho 83720-0010

Re: SRBA Subcase 01-06

Dear Mr. Orr:

As we near the time for filing motions for summary judgment in SRBA Subcase 01-06, there are several issues that I hope to clarify.

First, I have reviewed the documents you provided to us. With the exception of certain documents that we already possessed (which we provided in Response to the I.R.C.P. 30(b)(6) deposition), the documents appear to contain mostly general background on the construction of the Palisades Reservoir, and have little to do with the specific issue at hand. Please advise whether you believe this to be true.

Second, understanding that you represent "The State of Idaho," I am curious who you represent, or more specifically, what department or office do you represent? In other words, whose interests are you representing and attempting to advance?

Thirdly, when we noticed the deposition of the State of Idaho, the State designated Anthony Olenichak to testify on its behalf. Mr. Olenichak testified that he suggested changing the language of the 01-06 recommendation from the *Eagle Decree* language to the language which existed until after the Director's deposition. Based on his testimony, it appeared that it was the position of the State of Idaho, or of whatever office you represent, that the recommendation drafted by Olenichak was the correct one. After all, it is that position that has been vigorously advocated by Mr. Olenichak for several years now, and he was designated to testify.

Moving forward, the Director of the Idaho Department of Water Resources testified unequivocally that he did not agree with the recommendation drafted by Mr. Olenichak in that it didn't capture the language of the *Eagle Decree*, and as a result, he modified the recommendation back to the language of the *Eagle Decree*. My next question is: Since the time

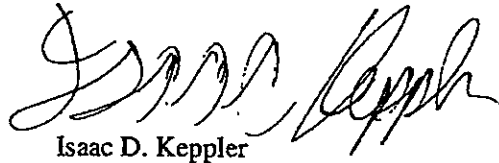
Page - 2
September 13, 2010

of the Director's deposition, has the State (or whatever office you represent) changed its position, or does your client still assert that the Olenichak recommendation is correct?

Under any circumstance, I am curious what your client's position is, as that has never been made clear. Please advise me as to these issues. Thank you.

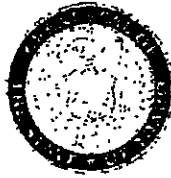
Sincerely,

Capitol Law Group, PLLC

A handwritten signature in black ink, appearing to read "Isaac D. Keppler", written over the printed name.

Isaac D. Keppler

IDK



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 15, 2010

Isaac D. Kepler
Capitol Law Group, PLLC
301 Main Street
P.O. Box 32
Gooding, Idaho 83330

Re: SRBA Subcase No. 01-0006

Dear Mr. Kepler:

Thank you for your letter to me dated September 13, 2010. I will attempt to clarify the issues you identified in your letter.

I presume your first question refers to the documents provided to you under cover of my letter dated August 10, 2010. I agree with your observation that a number of the documents pertain to the construction of the Palisades Reservoir. The documents were provided to you because they were identified as responsive to the document request in the notice of deposition of Tony Olenichak and potentially relevant to the issues raised by American Falls Reservoir District No. 2's summary judgment motion as we understand those issues. Thus, I cannot agree with your statement that the documents "have little to do with the specific issue at hand."

As to your second question, you are correct that in this subcase I represent the State of Idaho, but the State is participating in this subcase directly rather than through any of its various departments, offices or agencies. *See, e.g., I.C. § 42-1401C(2).*

With respect to your last question, the State's position as to the correct interpretation of the *Eagle Decree* has not changed as a result of the Director's filing of an amended recommendation. Further, we do not understand American Falls Reservoir District No. 2's interpretation of the *Eagle Decree* to have changed, and the State still does not agree with the district's interpretation.

Natural Resources Division
P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8072
Located at 700 W. State Street
Joe R. Williams Building, 2nd Floor

NA13482

Isaac D. Kepler
September 15, 2010
Page 2

You stated in your letter that you were curious as to what the State's position is in this subcase. I have the same curiosity as to American Falls Reservoir District No. 2's positions and arguments, but I am sure that summary judgment briefing will clear up these questions, for American Falls Reservoir District No. 2 as well as the State.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael C. Orr".

Michael C. Orr
Deputy Attorney General

MCO/olv

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10/5/04

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

COPY

In Re SRBA)
) Subcase No. 29-11609
Case No. 39576;)
)
)
_____)

HEARING ON MOTION TO COMPEL DISCOVERY

OCTOBER 5, 2004

REPORTED BY:

CATHERINE PAVKOV, CSR NO: 638

Notary Public

MAIL -67773

M & M Court
Reporting
Service, Inc.

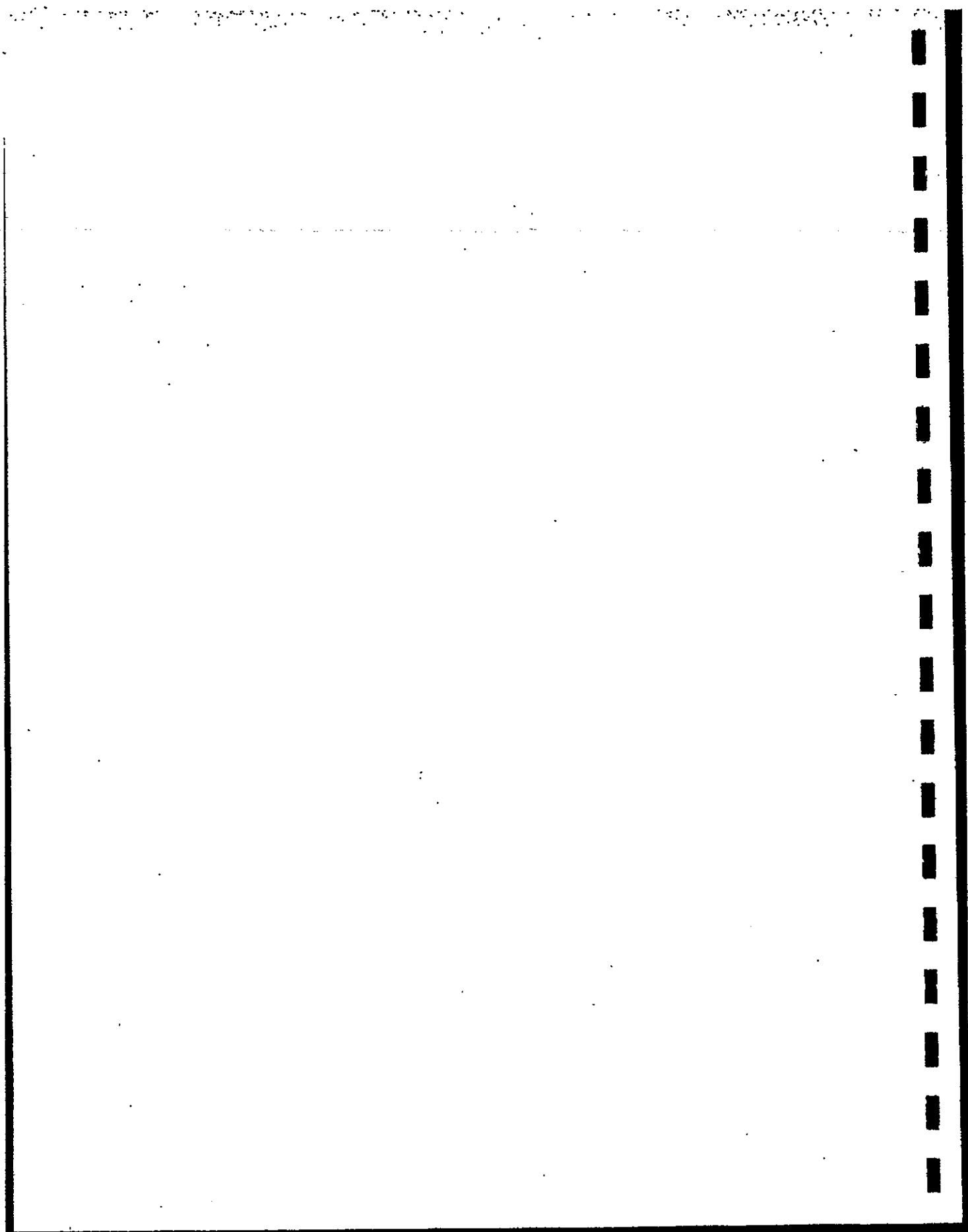
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■ SPOKANE, WA 509-455-4515



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

3
4
5 In Re SRBA)
6) Subcase No. 29-11609
7 Case No. 39576,)
8)

9 _____)

10
11
12
13 HEARING ON MOTION TO COMPEL DISCOVERY

14
15 OCTOBER 5, 2004

16
17
18
19
20
21
22
23 REPORTED BY:

24 CATHERINE PAVKOV, CSR NO. 638

25 Notary Public

1 THE HEARING ON MOTION TO COMPEL DISCOVERY

2 was taken on behalf of The City of Pocatello, at the
3 Snake River Basin Adjudication Building, 253 Third
4 Avenue North, Twin Falls, Idaho, commencing at
5 1:30 p.m., on October 5, 2004, before Catherine
6 Pavkov, Certified Shorthand Reporter and Notary
7 Public within and for the State of Idaho, in the
8 above-entitled matter.

9
10
11 APPEARANCES:

12 For the State of Office of the Idaho Attorney
13 Idaho: General
14 BY: DAVID J. BARBER, ESQ.
15 Capitol Building
16 P.O. Box 83720
17 Boise, Idaho 83720-0010

18
19 For Idaho Idaho Department of Water
20 Water Resources: Resources
21 BY: CANDICE M. McHUGH, ESQ.
22 P.O. Box 83720
23 Boise, Idaho 83720-0098

24
25 (Appearances continued to next page)

1 APPEARANCES (Cont.)

2
3 For the U.S. U.S. Department of Justice
4 Department of BY: PETER C. MONSON, ESQ.
5 Justice: Indian Resources Section
6 (Telephonically) 999 18th Street, Suite 945
7 Denver, Colorado 80202

8
9 For the U.S. Office of the Regional
10 Department of Solicitor
11 Interior: BY: FRANK WILSON, ESQ.
12 (Telephonically) 500 N.E. Multnomah
13 Suite 607
14 Portland, Oregon 97232

15
16 For the City City of Pocatello
17 of Pocatello: A. DEAN TRANMER, ESQ.
18 P.O. Box 4169
19 Pocatello, Idaho 83201-4169

1 APPEARANCES (Cont.)

2
3 Beeman & Associates, P.C.
4 BY: JOSEPHINE P. BEEMAN, ESQ.
5 409 West Jefferson Street
6 Boise, Idaho 83702

7 - and -

8 White & Jankowski, LLP
9 BY: SARAH A. KLAHN, ESQ.
10 511 16th Street, Suite 500
11 Denver, Colorado 80202

12
13 Special Master: Snake River Basin Adjudication
14 BY: BRIGETTE BILYEU, ESQ.
15 253 Third Avenue North
16 P.O. Box 2707
17 Twin Falls, Idaho 83303

18
19 Also Present: Office of the Idaho Attorney
20 General
21 MR. ROBERT WHEELER,
22 Legal Assistant
23 P.O. Box 83720
24 Boise, Idaho 83720-0010

1 SPECIAL MASTER BILYEU: Okay, we'll
2 go ahead and go on the record. Good afternoon.
3 We are on the record. This is the Court of the
4 Fifth Judicial District in and for the State of
5 Idaho. The Court is sitting in Twin Falls in the
6 SRBA courthouse on Wednesday, October the 5th,
7 2004. And the time is just after 1:30 in the
8 afternoon.

9 We are proceeding in several motions
10 today, a motion to compel by the City of
11 Pocatello, a motion to strike by the State of
12 Idaho, and a motion to accept the affidavit of
13 Josephine Beeman brought by the City of Pocatello.
14 These are all in Sub Case No. 29-11609. The
15 following parties are participating: for the City
16 of Pocatello, we have Jo Beeman, Sarah Klahn, and
17 Dean Tranmer; and Mr. Tranmer is by phone. The
18 other two are here in the courtroom. And I
19 appreciate everybody being here.

20 We also have the State of Idaho, we
21 have David Barber and Robert Wheeler with the
22 Attorney General's office. And I understand Mr.
23 Barber will be speaking to the motions on behalf
24 of the State.

25 For the United States, we have Peter

1 motion to strike, if that's --

2 MS. KLAHN: It might be more
3 appropriate to take our motion first, as it came in
4 last and we are essentially conceding that
5 Mr. Barber could have his affidavit in the record.
6 That may be a more expedient way to proceed, Your
7 Honor.

8 SPECIAL MASTER BILYEU: It doesn't
9 matter to me. Mr. Barber is already at the podium,
10 so we'll let him go ahead.

11 MS. KLAHN: Okay.

12 SPECIAL MASTER BILYEU: Mr. Barber.

13 MR. BARBER: Thank you. May it
14 please the Court. My name is David Barber, Deputy
15 Attorney General representing the State of Idaho.

16 We filed a motion to strike because of what
17 happened last week, last Friday; there was an
18 affidavit of Jo Beeman filed. We reviewed the
19 rules. It is clear that that affidavit should
20 have been filed much earlier. And so we have
21 asked alternative relief in the first case to
22 either strike the affidavit or to allow our own
23 affidavit that we also lodged with the Court
24 yesterday.

25 And we would still like the Court to

1 Monson. And we also have Frank Wilson with the
2 Department of Interior. And the final party is
3 the Shoshone Bannock Tribes, and we do not have
4 anyone here in the courtroom for the Tribes. And
5 I do not believe that they have joined us by
6 phone. Is there anyone by phone for the Tribes?
7 All right. There is no one participating for the
8 Tribes.

9 We also have, not a party, but here
10 to assist the parties, the Idaho Department of
11 Water Resources, and we have Candice McHugh with
12 the Attorney General's office and also Ray
13 Williams sitting in by phone for the Department.

14 So with that, Counsel, I have read
15 the motions, briefs and affidavits, together with
16 as many of the attachments as possible that
17 arrived late yesterday. Again, we are on a tight
18 time schedule, so since I have hearings at 2:30
19 and 3:00, we'll try to keep things to a brief
20 time.

21 First of all, Mr. Barber, if you
22 would proceed with five minutes on your motion to
23 strike. And then we'll follow that by five
24 minutes by either Ms. Beeman or Ms. Klahn on the
25 motion to accept the affidavit and responding to the

1 consider the motion to strike. They have since
2 put in their motion that I got late yesterday
3 afternoon. They have a recitation of some dates
4 and say this was a good cause and the Court should
5 allow that filing. I'd simply like to point out
6 that if you were to go to the affidavit of David
7 Barber at the very end, one of the attachments,
8 there are some letters from the State of Idaho to
9 the City of Pocatello back in 1991, where we were
10 attempting to resolve the City of Pocatello's
11 claims.

12 And so what I'd like to point out to the
13 Court is that that was a long time ago. They
14 could have proceeded with this research and gone
15 over the items that, whatever Mr. Shaw had or
16 acquired since -- during the 1990s, substantially
17 before September 22nd, which was the first time they
18 ever showed up to look at his files. So my point
19 is, they have shown a great deal of lack of
20 diligence here. They should not benefit from
21 their own untimely actions from the crisis they
22 created themselves by not doing the research on a
23 timely basis.

24 So in the alternative, we would ask
25 the Court very briefly to either strike the motion

1 because it is untimely under I.R.C.P. 7(b)(3), or in
2 the alternative, to certainly accept our affidavit,
3 at a minimum. And if the Court feels unwilling to
4 essentially grant us the motion to strike at this
5 point in time, we would at least ask the Court to
6 withhold its decision on that until the end of the
7 hearing. After you've heard the entire argument,
8 you will be in a better position to do that then.
9 Thank you.

10 SPECIAL MASTER BILYEU: To rule on
11 the motion to strike?

12 MR. BARBER: Yes, to rule on the
13 motion to strike. And the companion motion filed
14 by the City of Pocatello.

15 SPECIAL MASTER BILYEU: All right.
16 Thank you, Mr. Barber. Ms. Klahn.

17 MS. KLAHN: Thank you, Your Honor.
18 May it please the Court. I'm Sarah Klahn with
19 White & Jankowski, here today on behalf of the City
20 of Pocatello. Pocatello's motion, which was filed
21 with you yesterday, is filed under Rule 7(b)(3).
22 The deadlines under Rule 7(b)(3) apply except where
23 good cause is shown. And we believe we have
24 shown good cause. At the time -- did you have a
25 question, Your Honor?

1 SPECIAL MASTER BILYEU: Yes. My
2 question is, what about Mr. Barber's comment that
3 the City of Pocatello clearly has had
4 correspondence going back at least until -- I mean,
5 just in the attachments that I've seen with regard
6 to this motion -- 1991. What about that? I mean,
7 can you say with a straight face that you really
8 are in a position to claim that kind of a good
9 cause at this late date, where these contentions
10 have gone on for well over a decade?

11 MS. KLAHN: The 1991 correspondence,
12 Your Honor, obviously is not one I was a party to,
13 and Ms. Beeman was not representing Pocatello at
14 that time either. My understanding about that
15 correspondence is that it was an effort by the
16 City of Pocatello to settle its federal reserve
17 rights claims. At that time, around the time that
18 the 1990 Fort Hall settlement was entered,
19 there was correspondence exchanged.

20 And from the files I've seen, that was the
21 end of the matter until early this year, 2004, when
22 Pocatello began to prepare for the reserved rights
23 claims. It's ironic, Your Honor, that the State is
24 claiming that we somehow slept on our rights, when
25 what we did, after we failed to receive documents

1 which we believe are discoverable from the State,
2 was go out on our own and attempt to see what else
3 was out there, in order to be sure we had a
4 sufficient basis to file and ask the Court to
5 intervene and ask the State to produce what is
6 discoverable.

7 The documents in question are documents the
8 State should have provided in response to our
9 July 14th request for production.

10 SPECIAL MASTER BILYEU: But I wanted
11 to just deal, if we could, first with the motion
12 to strike, though.

13 MS. KLAHN: I understand that. I
14 think they're linked. And Ms. Beeman's affidavit
15 certainly would have been attached to the motion
16 to compel, had we had sufficient grounds to make
17 that affidavit at that time. Literally, Your
18 Honor, what happened was, Ms. Beeman and I were in
19 conversation one weekend -- I think it was the
20 weekend of Labor Day -- and she said, "You know,
21 maybe I could find another" --

22 MR. BARBER: Objection. She's
23 testifying here, Your Honor.

24 SPECIAL MASTER BILYEU: I won't let
25 her testify. I'll take it as just legal argument.

1 Point well taken.

2 MS. KLAHN: I'm simply trying to
3 answer your question about what happened. And I
4 can't do that just by reference to legal argument.

5 SPECIAL MASTER BILYEU: Go ahead.

6 MS. KLAHN: Ms. Beeman said, "Maybe I
7 have another source of these documents. Let me
8 call Dave Shaw." And she did. An appointment was
9 set up. The documents were received. In 1991,
10 Mr. Shaw did not have those documents. He
11 received them in 2001, at the earliest. So I don't
12 think the State's reference to 1991 letters is
13 well taken and it certainly wasn't even argued in
14 their motion.

15 We would ask that the Court accept
16 both affidavits. They are substantive, they
17 relate to the dispute, and they give the Court
18 additional insight into the State's withholding of
19 documents.

20 SPECIAL MASTER BILYEU: All right.
21 Thank you. I'm going to go ahead and accept both
22 the affidavit of Ms. Beeman and the affidavit of
23 Mr. Barber. No question that if the affidavit of
24 Ms. Beeman comes in, the affidavit of Mr. Barber
25 comes in. And, frankly, I find that affidavit

1 helpful to the Court in just understanding what
2 has occurred.
3 I do have some sympathy with Mr.
4 Barber's point. Although Mr. Shaw may or may not
5 have had the documents in 1991, certainly parties
6 in this case have been fairly warned throughout
7 the process that discovery, research, et cetera,
8 working on their cases, needed to happen as soon
9 as they were filing their claims. And I do have
10 some sympathy with Mr. Barber's contention in that
11 regard.

12 But, nevertheless, I'm going to allow in
13 both affidavits at this point, with the
14 reservation that I may reverse myself at the end
15 if something very strange comes up. But with
16 that, I'll make the ruling on those two motions.

17 Counsel, let me just make sure that
18 some of the other folks involved here don't have
19 anything else to say with regard to those motions.
20 Mr. Monson, you're not really directly involved in
21 the motions. Do you want to speak on any of
22 these, on the substantive nature of those?

23 MR. MONSON: No, Your Honor, I
24 hadn't intended to speak on anything.

25 SPECIAL MASTER BILYEU: All right.

1 I'll just double-check with you, hopefully, before I
2 rule the next time. I apologize for not getting
3 to you before I ruled, but sometimes I get
4 excited. And we don't have the Shoshone Bannock
5 Tribe still on the line? All right.

6 We'll go ahead then. Counsel, let's
7 get to the motion to compel then. Before we
8 start, and I will start with Ms. Klahn since it's
9 the City of Pocatello's motion, let me make a few
10 maybe just overview remarks so that you can tailor
11 your argument. Before you start, let me say that
12 I do not think in my opinion that the 1990 Fort
13 Hall agreement or the partial final consent decree
14 determining the rights of the Shoshone Bannock
15 Tribe's use of water in the upper Snake River
16 Basin provide any sort of a blanket protection
17 from discovery.

18 On the other hand, I'm also
19 inclined to order the State to provide what is
20 termed as a discovery log for any documents for
21 which they are claiming a privilege, not because
22 the Idaho Rules specifically provide for those, as
23 the Federal Rules they don't, there's no automatic
24 disclosure or automatic discovery log, from what I
25 can tell, in the Idaho Rules, but my understanding

1 is that the spirit of the Idaho Rules of Civil
2 Procedure have always allowed for courts and for
3 parties to go behind what the opposing party is
4 asserting when there's an assertion of privilege.

5 With that said, however, I am
6 concerned after having read all of the briefs, the
7 affidavits, and the attachments, that the request
8 for documents from the City of Pocatello at this
9 point appears to me to possibly amount to
10 requesting research of the opposing party. And
11 I'm mindful that if a party were to ask for all
12 the reported cases that support this theory or
13 that theory or a claim of this party or that
14 party, I would be very disinclined to order
15 something like that.

16 And, frankly, I've never had any lawyer ask
17 for anything like that. So that's kind of where I'm
18 coming down on this. It seems to me that you're
19 asking for legal research. So Ms. Klahn, with that,
20 you have ten minutes, if you can maybe address your
21 motion.

22 MS. KLAHN: Can I ask for a couple
23 of clarifications before I get started, to make
24 sure I'm targeting it?

25 SPECIAL MASTER BILYEU: You can ask,

1 yes.

2 MS. KLAHN: So I don't need to focus
3 on the Fort Hall settlement or partial decree
4 issues as raised by the State, I understand that.

5 SPECIAL MASTER BILYEU: I'm just
6 telling you where I'm starting out. I'm not
7 saying that's where I'm ending up.

8 MS. KLAHN: I understand.

9 SPECIAL MASTER BILYEU: I just want
10 you to tailor your remarks so we don't repeat
11 everything that's already been said in your
12 briefs.

13 MS. KLAHN: It sounds like you would
14 benefit most, you think, from hearing about work
15 product?

16 SPECIAL MASTER BILYEU: I don't know
17 what I would benefit from. But I'm very concerned
18 about that topic.

19 MS. KLAHN: Okay. Let's talk about
20 work product then. Pocatello sought to obtain
21 from all the parties in this case, the United
22 States, Tribes and the State, historical documents
23 related to certain other documents. For example,
24 historical documents related to the second treaty
25 of Fort Bridger, historical documents related to

1 the session act of 1900. These sorts of request
2 for production, Your Honor, are routine and it's a
3 way for parties to share information that is
4 relevant.

5 The underlying theme of the Idaho
6 Rules, in fact all rules of civil procedure, is
7 that through discovery parties can share the
8 operative facts. Everybody starts from the same
9 starting point. The idea is to put everybody on
10 equal footing to avoid the ambush.

11 SPECIAL MASTER BILYEU: True. But
12 this is not fact. These are not facts that you're
13 asking for, are they? I mean, you're asking
14 for -- and that's why it is in, and we get into this
15 territory often, as you know, in water rights cases,
16 where it's kind of like legal research, it
17 certainly doesn't seem to me to appear to be facts
18 in the traditional sense.

19 MS. KLAHN: Well, to give you an
20 analogy, another type of request for production
21 that falls in the same category of documents
22 related to, would be, for instance, in banking
23 litigation, when you ask for all transactions
24 related to a particular disputed transaction.

25 SPECIAL MASTER BILYEU: But there's

1 just documents that relate to other relevant
2 documents.

3 We're trying to establish a base set
4 of facts from which we can have a summary judgment
5 motion. The way to do that in this sort of a
6 case, I believe, and the way it's been done in
7 other SRBA cases involving federal rights, is to
8 attach and rely on certain historical documents as
9 essentially undisputed facts. Maybe the
10 conclusions Mr. Barber draws from the same document
11 that he uses, that I use, are different. That's
12 where the augment comes in. That's where the legal
13 research comes in. That's where the attorney work
14 product comes in. And that's the nub of the work
15 product doctrine, Your Honor. The issue is, did the
16 lawyer create it? If the lawyer didn't create it,
17 it's not work product.

18 SPECIAL MASTER BILYEU: So under
19 your analogy, you would be able to ask Mr. Barber,
20 "Please provide me all reported cases that relate
21 to, say, the Winters doctrine."

22 MS. KLAHN: No, I think that is a
23 distinction, Your Honor.

24 SPECIAL MASTER KLAHN: But how is
25 that different? That's what I can't get my --

1 a distinct difference, it seems to me. When
2 you're asking a bank for the documents relating to
3 a transaction, the bank has not kept those
4 documents or has not found those documents with an
5 attorney, which is in a sense an expert that they
6 have retained to assist them in litigation. That's
7 the thing that I'm concerned about here. Aren't you
8 asking for Mr. Barber's research? And the thing
9 that I'm concerned about is, you know, in ordering
10 that kind of a thing, wouldn't I be getting into the
11 position of having Mr. Barber's client pay for and
12 do legal research that the City of Pocatello ought
13 to be doing?

14 MS. KLAHN: No, Your Honor. On the
15 table behind you are three boxes of documents that
16 are documents that we have obtained through our
17 own investigations. We continue to investigate
18 our claims at the national archives, at the Idaho
19 State archives. Where it's relevant, we've
20 provided those documents in response to discovery,
21 with no questions asked. United States of America
22 has done the same thing for us. We have exchanged
23 documents that we obtained which we believe are
24 related to, not necessarily supporting, not
25 necessarily supporting objectors, but they are

1 MS. KLAHN: In order for Mr. Barber
2 to provide those cases, he has to do some legal
3 analysis. He has to think -- he can't just run a
4 Westlaw search and send every document he gets to
5 me. Because the question is, all related cases,
6 he has to read Winters, he has to read the cases,
7 he has to decide. By contrast, if you go to the
8 national archives, as Mr. Barber can probably tell
9 you, you can get finding aides. And there are
10 documents related to, there's the eighteen -- the
11 second treaty of Fort Bridger. The second treaty of
12 Fort Bridger has correspondence associated with it.
13 It's stored with it.

14 SPECIAL MASTER BILYEU: Well, what
15 could Mr. Barber possibly have that you can't
16 get -- that's what I can't understand -- through
17 legal research, through historical research?

18 MS. KLAHN: You mean through
19 historical research? He may very well have
20 documents that the City of Pocatello has not
21 found. We are, as I say, in the midst of
22 investigation. We've hired an historian. We have
23 somebody out there who is looking for documents
24 that we believe will be relevant. We intend to
25 amend our discovery responses to the United States

1 when we get those documents from that person.
 2 It's as if you're looking for a needle in a
 3 haystack.
 4 Now, we are put in a position of
 5 great disadvantage here because we don't know what
 6 Mr. Barber has. He hasn't produced any sort of a
 7 privilege log so that we can go down the list and
 8 say, you know, we have, of these 200 documents, we
 9 have 150 of them. We're not going to fight about
 10 25 of those that are left; we don't think they're
 11 relevant, whether he does or not. And the other 25,
 12 we're willing to go to the mat for. We aren't in
 13 a position to make that argument because we don't
 14 know what he has. He may have two documents. He
 15 may have 2,000. It's not clear.

16 So it's a situation where the issue,
 17 as I started to say about the work product
 18 doctrine, is, first of all, did the lawyer create
 19 it? No. Second issue is, does it request the
 20 lawyer's mental impressions? And I would submit
 21 to you, Your Honor, that if I say to a historian
 22 or my law clerk, "Go to the archives and find
 23 everything related to this document," that that
 24 doesn't say anything about my mental impressions.
 25 There isn't anybody who could look at the claims

1 really at all.

2 MS. KLAHN: Well, I think if, to
 3 take your analogy on, if that were the case, that
 4 the litigant lives or dies by that decision, if
 5 Pocatello were to make that decision, Your Honor,
 6 it seems to me that we should fail. I mean, why
 7 would the State collect information willy-nilly
 8 that's going to be supportive of our case? And
 9 furthermore, the case law provides that collecting
 10 documents does not, by its terms, turn it into
 11 legal research. And it does not turn it into work
 12 product.

13 The case that Mr. Barber recited to you,
 14 the Sporck case, is distinguishable. The Audiotext
 15 case that we cited to you is somewhat more on
 16 point, but they both involve distinguishing facts
 17 involving collection of -- a situation where a
 18 huge number of documents had been provided to both
 19 sides, a lawyer went in, they sub-setted the
 20 documents, they showed them to the deponent prior
 21 to the deposition, and the deposing attorney asked
 22 what documents they had reviewed. Here, we don't
 23 even have that universe of documents that's been
 24 disclosed.

25 Had Mr. Barber disclosed a universe of documents

1 in Pocatello's case and not say that the second
 2 treaty of Fort Bridger is going to be relevant in
 3 some way, shape or form to what we ultimately end
 4 up arguing. That's not mental impressions of a
 5 lawyer. That's not delving into an attorney's
 6 thinking processes. And that's what the work
 7 product doctrine is designed to protect.

8 SPECIAL MASTER BILYEU: But aren't
 9 you required to do your own research? I mean,
 10 that's my bottom-line problem with this whole
 11 concept. Isn't each lawyer, each client, required
 12 to do its own research? And, for example,
 13 required to do its own expert research? I mean,
 14 why wouldn't -- if the discovery rules are to be
 15 read as broadly as you're suggesting them, why
 16 wouldn't the party just say, "Hey, you know what,
 17 the most cost effective thing for me to do is wait
 18 until the very last minute, not do anything, not
 19 go to the expense of doing anything, and to get it
 20 all from discovery, in discovery from Mr. Barber,"
 21 I mean.

22 And I don't see, frankly -- if that's the
 23 contention that the City of Pocatello is supporting
 24 with regard to discovery, I don't see how that is
 25 helpful in discovery or the adversarial process

1 and then we had submitted an interrogatory that
 2 said, "Please identify which documents the State of
 3 Idaho believes are important to rebutting
 4 Pocatello's claim in this matter," that would be
 5 protected work product; we would not be entitled to
 6 that information, because at that point, we're
 7 reducing what Mr. Barber has done with his own legal
 8 analyses in review of those historical documents,
 9 we're trying to reduce it to our own possession, and
 10 that's not appropriate under the work product
 11 doctrine.

12 SPECIAL MASTER BILYEU: All right.
 13 Thank you. Anything further that you have to say
 14 with regard to the motion?

15 MS. KLAHN: Well, you got me off my
 16 outline, so let me just take a quick look. Thank
 17 you, Your Honor.

18 SPECIAL MASTER BILYEU: All right.
 19 Thank you. Mr. Barber, do you have any reply?

20 MR. BARBER: Yes, I do. Thank you.

21 SPECIAL MASTER BILYEU: Thank you.

22 MR. BARBER: May it please the
 23 Court. My name is David Barber, Deputy Attorney
 24 General representing the State of Idaho. There's
 25 a great deal of background that needs to be

1 provided, and, obviously, I don't have very much
2 time, so I'm going to have as abbreviated a
3 presentation as possible.

4 I want to start, though, with the big
5 picture, because I would like the opportunity to
6 convince the Court the 1990 agreement provided
7 more protection than the Court perceives at this
8 point in time. And that big picture is, at
9 the -- prior to the settlement in 1990, we had the
10 Shoshone Bannock Tribes and the United States on
11 behalf of the Tribes, they had filed reserve right
12 claims based on the second treaty of Fort Bridger.
13 We had the Northwest band of Shoshone file claims
14 based on that treaty; in addition, we had the City
15 of Pocatello that claimed that the second treaty
16 of Fort Bridger applied as well.

17 We disputed all the claims. We did
18 extensive research in preparation for the litigation
19 of all these claims. Ultimately, the State of Idaho
20 made a partial settlement with the Shoshone Bannock
21 Tribes in the U.S. by settling their claims in the
22 upper Snake River Basin. We were unable to reach
23 agreement with the City of Pocatello or with the
24 other portions of the claims, et cetera, and they
25 were litigated.

1 Certainly, as the Court has well
2 noted, we are objecting to the discovery because
3 of the attorney work product doctrine. The Court
4 has pointed out exactly what our concerns are. I
5 do not want to spend a lot of time on that, but
6 simply to point out that neither this Sporeck case
7 nor the Audiotext case -- the Sporeck case we cited,
8 the Audiotext case the City of Pocatello
9 cited -- really apply because the factual predicate
10 behind both of those cases does not apply. In both
11 of those, there have been a large amount of
12 documents provided to the other side. And then
13 those documents were sorted by an attorney. In one
14 case, that sorting was protected work product; in
15 another case it was not.

16 Here we have not provided that information
17 to them. That factual predicate doesn't exist.
18 Now, you're certainly right; you've pointed out
19 certainly that there is a -- we did all this
20 research, and the City of Pocatello should do its
21 own. And that's really where we stand with respect
22 to that.

23 But I would like to go over to the
24 1990 Fort Hall Act. Attached to the exhibit --
25 excuse me, attached to the affidavit of Jo Beeman

1 is Exhibit 7. Exhibit 7 is a 16-page documented
2 list of documents, and they argue, "Look at all the
3 stuff that the State hasn't provided." Well, let me
4 explain to you, we didn't see Exhibit 7 until last
5 Friday. We haven't been able to investigate
6 Exhibit 7 in any detail. Exhibit 7 to the affidavit
7 of Jo Beeman is material from a Federal Court of
8 Claims case that the State of Idaho is not a party
9 to. Exhibit 7 is a list of Mr. Shaw's files from
10 that federal litigation, litigation commenced by the
11 Fort Hall Water Users against the United States.

12 SPECIAL MASTER BILYEU: And when
13 we're talking about Mr. Shaw, is this Mr. David
14 Shaw?

15 MR. BARBER: Mr. David Shaw. He was
16 formerly an employee of IDWR. But at the time
17 these files that we're talking about -- these are
18 files, as far as I can tell from what's been
19 submitted to the Court -- were prepared as an expert
20 witness on behalf of the United States. We had,
21 the State of Idaho had no duty to go out and
22 investigate and disclose the evidence in that
23 federal court case. Absolutely no obligation
24 whatsoever.

25 Now, of course, the City of Pocatello

1 will turn around and say, "Well, look, those files
2 Mr. Shaw got from the Idaho Department of Water
3 Resources. You had to go to the Idaho Department
4 of Water Resources." I have a response to that.
5 But I would like to very briefly discuss the
6 substance of those files. They have two different
7 lists they talk about. They have a list from the
8 reply memorandum and they have a list from the
9 affidavit. Very briefly, let me go over the one
10 with respect to the affidavit.

11 SPECIAL MASTER BILYEU: Are we still
12 looking at Exhibit 7?

13 MR. BARBER: It is Exhibit 7, yes.

14 SPECIAL MASTER BILYEU: Okay.

15 MR. BARBER: And if you go down to
16 Bates number FHS 661, it's described as a
17 handwritten note to David Shaw dated February 9,
18 1989. Well, my comment about that is that these
19 original notes of Mr. Shaw probably are -- the only
20 place where those were at, were with Mr. Shaw.
21 Those were his notes. I doubt, although I don't
22 know since I haven't examined those, that we
23 retained those.

24 We then have a series of three
25 troubling documents listed from the affidavit,

1 FHS 1002, FHS 1009, and FHS 685. On one of those,
2 the author is designated as Clive Strong and the
3 recipient is David Shaw and members of the Water
4 Board. Each of those three documents appear to be
5 strategy documents that normally would be
6 protected by perhaps the attorney-client, if not
7 the attorney work product, doctrine. In the case
8 of two of them, the author is not stated, or author
9 is not known, so you really can't tell for sure
10 from the very brief description there.

11 But my point is, that if that's really what
12 they want, that type of stuff should have been
13 protected. There is nothing in the file before the
14 Court as to how this stuff was obtained by Mr. Shaw,
15 whether there in fact was any type of waiver of
16 that privilege and whether this is an inadvertent
17 disclosure that may not allow that stuff to be
18 used ultimately.

19 Finally, we have FHS 1946. It's
20 described as a letter dated August 30, 1993, by
21 one federal expert to another group of -- to a
22 group of federal experts --

23 SPECIAL MASTER BILYEU: Mr. Barber,
24 not to interrupt you, can you give me that number
25 again? What was that? 11 --

1 does that waiver apply to the other documents held
2 by the Attorney General's office? And I don't
3 know of any basis for you to say that.

4 Now, the argument of the City of
5 Pocatello will be, "Well, look, you, State of
6 Idaho, those were IDWR's documents. You had to
7 disclose those to us." Let me point something out
8 to the Court. The objector, the party from the
9 State of Idaho, is the Idaho Department of Lands,
10 not IDWR. IDL, Idaho Department of Lands, was not
11 a participant in the negotiations for the Fort
12 Hall agreement. So we have no files on that. The
13 only files that the State of Idaho has are really
14 the Attorney General's office files.

15 As I'm sure the Court is well aware, in 1994
16 the legislature split off IDWR from the
17 adjudication. He deleted that agency in 42-1401A as
18 a party.

19 SPECIAL MASTER BILYEU: I do
20 remember that.

21 MR. BARBER: And you certainly added
22 42-1401B, which, in fact, made them a technical
23 expert. When you've had that statutory change, we
24 had no obligation to go over there and look at
25 those files. I certainly didn't do that in

1 MR. BARBER: Do you want the three
2 where there were strategy documents?

3 SPECIAL MASTER BILYEU: Well, I
4 think I got one of them.

5 MR. BARBER: One is 1002. Another
6 one is 1009. And the last one is 685. And those
7 are three that they talk about in Jo Beeman's
8 affidavit.

9 SPECIAL MASTER BILYEU: Okay.

10 MR. BARBER: And as I say, at least
11 the description, I haven't looked at the document,
12 but the description from Exhibit 7 is that these
13 appear to be strategy documents that probably
14 never should have been released in the first
15 place.

16 We come down to the last one, the
17 1946, it's a letter dated August 30, 1993. My
18 point there is that this document postdates the
19 Fort Hall agreement and the Fort Hall Act and it's
20 very doubtful that the State ever had this letter.

21 Let's assume for a minute that
22 whatever privilege that may have attached to those
23 documents, and certainly I think a claim of
24 privilege may have attached to some of them, has
25 been waived, or whatever. The question to me is,

1 responding to this discovery. I had no legal
2 obligation.

3 Now, the other thing that this has
4 demonstrated, that this list, Exhibit 7 has
5 demonstrated, is the City of Pocatello has as good
6 an access to these files as we had. So we haven't
7 denied them anything. They simply didn't look
8 until much later in the process.

9 Now, certainly there is an issue
10 that causes me a lot of concern. You have a person
11 who was an employee of the State, they leave, they
12 go into private practice, and then they come back
13 and because they know everyone, they have access
14 to those files. It's a matter that causes me a lot
15 of concern, and we're going to internally look at
16 how we proceed in that, to make sure that if there
17 are attorney work product documents, that they
18 aren't disclosed, as evidently they were here.

19 But the bottom line is that you
20 can't use Exhibit 7 and say that is an example of
21 what the State hasn't provided. We didn't have to
22 provide that stuff because it wasn't related to
23 the Department of Lands.

24 Now, I realize the Court has already
25 told me she doesn't agree with our analysis of the

1 1990 agreement. I would like to very briefly
2 address that --

3 SPECIAL MASTER BILYEU: Well, Mr.
4 Barber, what I was saying is I personally do not
5 think that those two documents give some sort of
6 broad invisibility cloak, a king's X. I just don't
7 think that those documents can create something
8 more substantial of a privilege than is conceived
9 in the Idaho Rules of Civil Procedure, from what I
10 know right now. I do not believe that those did
11 create that sort of a blanket --

12 MR. BARBER: I appreciate your
13 candor. I'd like the opportunity to convince you
14 otherwise, though.

15 SPECIAL MASTER BILYEU: Okay.

16 MR. BARBER: And let me put you in
17 the circumstances of someone negotiating one of
18 these settlement agreements. You have several
19 claims, all based on the second treaty of Fort
20 Bridger. You decide to settle with one of the
21 claimants, not the entire settlement, but a
22 partial settlement, just the upper Snake. And what
23 incentive do you have for entering into that
24 agreement if, after you sign, it comes back and
25 they use the fact that you have signed that

1 agreement to say you've resolved something in that
2 dispute to where now you can't claim in this other
3 portion of the claim that you haven't agreed to,
4 that you've already agreed to that, you've signed
5 that agreement.

6 SPECIAL MASTER BILYEU: No, I don't
7 disagree with that statement that you've made. I
8 guess what I'm saying is, to me, the fact that the
9 1990 Fort Hall Indian Water Rights agreement has
10 been entered into by the parties that entered into
11 that, and the fact that the Court entered a consent
12 decree relating to that doesn't, to me, give some
13 sort of an additional -- I don't know what you want
14 to call it -- a 1990 Fort Hall Indian Water Rights
15 Agreement special privilege to all documents
16 relating to that.

17 I'm just saying, to me, it doesn't give a
18 broad blanket statement. But I don't disagree with
19 what you've just said.

20 MR. BARBER: Well, there are two
21 bases for our objection. One of them is the Fort
22 Hall agreement with respect to the production of
23 documents. And the other is the attorney work
24 product doctrine. Now, the attorney work product
25 doctrine would protect that stuff that we have

1 retained in our files.

2 Certainly, let me at least finish
3 with respect to the Fort Hall provisions. I don't
4 want to suggest that those provisions are limited
5 in scope to the litigation between the Northwest
6 band and the City of Pocatello. Certainly, not in
7 my view, they were not. But they were certainly
8 intended to preclude what's happened here. And
9 all I can tell the Court, this is a very big deal

10 for the State of Idaho. You go through one of
11 these settlements, you get it achieved, and we
12 think we have gotten some protection, protection
13 more than what the Court presently is
14 acknowledging, but certainly more protection than
15 that; we thought we were getting that.

16 SPECIAL MASTER BILYEU: Well, what
17 did you think you were getting in terms of
18 discovery protection? I mean, I'm just trying to
19 make sure I understand what your argument is. Did
20 you think that you were getting protection and
21 that Judge Hurlbutt was giving you protection from
22 all documents relating to the 1990 Fort Hall Water
23 Rights Agreement?

24 MR. BARBER: Well, it comes back and
25 it says, this agreement, and really the

1 derivatives, the consent decree and the act can't
2 be used in any legal proceeding. And that's what
3 we were trying -- and maybe we didn't express it
4 very well. But that's at least how we were
5 looking at it.

6 SPECIAL MASTER BILYEU: Well, let me
7 tell you, because that's one of the points that
8 I'm having the most trouble with. I've got
9 another case in front of me right now that deals
10 with basically what is a motion relating to what
11 was included in the 1990 Fort Hall Water Rights
12 Agreement, and as I understand it to be saying,
13 you know, was this right included or was that
14 right included? Now, certainly, it's got to come
15 in in some instances.

16 MR. BARBER: Well, and I think in
17 that circumstance, it would. I --

18 SPECIAL MASTER BILYEU: So your
19 blanket statement -- I mean, that's what I'm
20 trying to say, I don't think there's a blanket
21 exemption from anything related to the 1990 Fort
22 Hall Water Rights Agreement. And it seems like
23 you're saying that too. So where do we draw the
24 line?

25 MR. BARBER: Well, okay. I'm not --

1 Special Master, is that a sub-case I'm involved
2 with?

3 SPECIAL MASTER BILYEU: No, it's
4 not. I'm just thinking, you know, it's got to
5 come in sometimes.

6 MR. BARBER: And I'm not familiar
7 with what we're dealing with with respect to that.

8 SPECIAL MASTER BILYEU: Well, and I
9 don't want to talk about the merits of that. But,
10 I mean, there are instances where that consent
11 decree and the water rights agreement have to come
12 into evidence, to be fair.

13 MR. BARBER: And I'm not suggesting
14 that. But what I'm suggesting here is
15 something -- and maybe we're not communicating very
16 well. Let me try it again. What I'm trying to say
17 here is that the agreement or the consent decree or
18 the act can't be used against the State of Idaho as
19 some type of whip. And that's essentially what
20 they're trying to do. And that's what we're
21 trying to -- we're saying that this is precluded.
22 It doesn't -- you're going to have to interpret that
23 decree. You're going to have to decide whether in
24 fact this particular right was included in the
25 decree or was not included in the decree. And I

1 think that's inevitable. I'm not suggesting that.
2 And if I've said something or have written
3 something that seemed to suggest that, I was not
4 implying that at all. All I'm trying to say is
5 that we were attempting to provide us some
6 protection from essentially the type of motions
7 that are being presented to the Court today.

8 SPECIAL MASTER BILYEU: Mr. Barber,
9 if I'm not getting you off too much, let me ask
10 you a couple of questions in that regard.

11 MR. BARBER: Certainly.

12 SPECIAL MASTER BILYEU: Ms. Klahn
13 talked about her understanding of the work product
14 doctrine, and I wanted to explore that with you a
15 little bit. She talked about, you know, that in
16 her mind, that the tenants of that doctrine are
17 basically, did the lawyer create it, does it
18 involve the mental impressions of the lawyer? And
19 I think this basic statement is true: collecting
20 documents or tangible items in and of themselves
21 by an attorney does not turn that into a work
22 product privilege. But where do you come down on
23 this issue of research? Because I'm very
24 concerned about the precedential effect here.

25 MR. BARBER: Okay, let me explain

1 this. And I regret that I don't have an affidavit
2 that would explain this to the Court in facts
3 properly presented. But since she's been allowed
4 to talk briefly, I will as well. She talked about
5 the distinction being one of legal analysis.
6 Well, I've done a great deal of research in the
7 national archives, and in other areas, and I can
8 tell you that there's a great deal of legal
9 analysis to figure out where to go to look, what
10 to look for, et cetera. And if that is in fact
11 the criteria that is the dividing line, there is a
12 great deal of legal analysis involved in
13 researching in the national archives.

14 Now, that's a rather conclusory statement, I
15 realize that, but it is something that requires a
16 great deal of time. It's a learning experience over
17 a lifetime. I've always, I think, been a good
18 researcher, but I can tell you that I'm a much
19 better researcher now than I was twenty years ago.
20 And it's a learning process. It's a process of
21 applying your legal research tools to finding
22 documents that assist or explain matters that are
23 the source of litigation.

24 I would like to briefly talk about
25 another issue that has been -- I realize I'm

1 running out of time, that they raised in their
2 written documents. I just want to remind the
3 Court of something that I'm sure the Court is very
4 well aware of. One of the things that the 1994
5 amendments did was, the 1994 amendments added
6 Idaho Code Section 42-1423. That section
7 prohibits a judgment for costs or award of
8 attorney fees against the State of Idaho. They
9 requested that here. I'm saying that there is a
10 preclusion of that by that section. It simply
11 states that the State of Idaho refuses to waive
12 its sovereign immunity with respect to such
13 awards. So that is an easy matter for the Court
14 to resolve.

15 I would ask the Court to deny the
16 motion to compel by the City of Pocatello and deny
17 the attorney's fees and costs. And I have nothing
18 further. Thank you.

19 SPECIAL MASTER BILYEU: All right.
20 Mr. Barber, would you stand for one more quick
21 question?

22 MR. BARBER: Absolutely.

23 SPECIAL MASTER BILYEU: In looking
24 at your affidavit -- and I'm looking at item no. 4
25 on page 2 of that affidavit -- you were talking

1 about, and I'm just trying to make sure I'm
2 understanding the scope of really what you were
3 saying. Are you saying that the documents that
4 you withheld are only those documents that were
5 researched through the Idaho State law library,
6 the Idaho State library archives and the national
7 archives and record administration? Is that kind
8 of what you're saying, these are all research?

9 MR. BARBER: It was all research.
10 Now, let me clarify this a little bit. This is
11 research, Your Honor, that I did back in 1987 to
12 1990, approximately. Now, I was the person that
13 did the research, did 99 percent of it. And Mr.
14 Strong did the other remainder. And there were
15 historians that worked under our direction. But
16 if there were other sources, I do not recall them,
17 and they were exceptionally a minor source of
18 information. It was the national archives
19 primarily.

20 SPECIAL MASTER BILYEU: All right.
21 That was my question. Thank you, Mr. Barber.

22 MR. BARBER: Yes.

23 SPECIAL MASTER BILYEU: Does the
24 City wish to respond very briefly, five minutes?

25 MS. KLAHN: Sure. I'm going to take

1 Department of Lands, doesn't have access to the
2 Fort Hall settlement documents. I believe that's
3 a red herring. The discovery was specifically
4 directed to all agencies of the State of Idaho,
5 from which documents could be obtained by the
6 Department of Lands. Mr. Barber has never
7 objected to that definition. And his answers to
8 discovery are required to comply with that, if he
9 doesn't object.

10 SPECIAL MASTER BILYEU: Have you
11 attempted to get any documents from the Department
12 of Water Resources? Because my dealings with the
13 Department over more than a decade have been very
14 consistent, that they have provided documents very
15 willingly without discovery requests to almost
16 anyone who has requested those.

17 MS. KLAHN: Well, we had a
18 conversation -- here I go again. Mr. Barber will
19 object, so I'll just say, here I go again --

20 SPECIAL MASTER BILYEU: Well, I'm
21 not taking this as testimony. I just want to know,
22 as an officer of the Court, have you requested
23 documents from the Department of Water Resources?

24 MS. KLAHN: No. And here's why. We
25 thought we were in litigation with the State of

1 Mr. Barber's issues in reverse order. First of
2 all, the issue of costs, he recited to you that
3 the City of Pocatello is not entitled to
4 attorney's fees under 42-1423. That section is
5 not what we moved under. We moved under Rule 37(f).
6 We're seeking sanctions. This relates, as I
7 understand it, to costs and attorney's fees at the
8 end of a case or for a frivolous action. And what
9 we're seeking is under Rule 37(f).

10 Second, Mr. Barber has asserted that
11 his legal -- quote, legal research at the archives
12 and other places should be protected under
13 attorney work product. As I've already stated,
14 the United States of America has provided the
15 documents that their historian has collected.
16 Without the benefit of Mr. Monson's analysis, we
17 don't know which ones of those the U.S. thinks are
18 important. We have provided all the parties with
19 copies of the documents that actually a lawyer
20 historian we have working for us has collected,
21 again without the benefit of our analysis about
22 which of the documents are useful and which of
23 them are not.

24 There was a discussion of the fact
25 that Mr. Barber, in his representation of the

1 Idaho, it was inappropriate to use the normal
2 public records route, and that we could narrow our
3 requests for documents in a way that would allow
4 the State to respond meaningfully without us
5 having to go behind their back, essentially. We
6 wanted the State of Idaho, basically, to know what
7 we thought was important. That's another thing
8 discovery does. Not only do you seek what the
9 other side thinks is important, but the other side
10 learns about your case because of what you ask.
11 So we're putting it all out there through
12 discovery, and that was the decision we thought
13 was appropriate, given the circumstances we were
14 in, in litigation with the State. Had we been in
15 litigation against a private water user, we
16 probably would have gone to IDWR.

17 SPECIAL MASTER BILYEU: You are
18 aware, though, that the Department is not a party in
19 the SRBA?

20 MS. KLAHN: I am aware, yes.

21 There was a concern raised by
22 Mr. Barber about potential privilege issues related
23 to Attachment 7 that you were looking at with
24 Mr. Barber. And I would like to refer you to a
25 letter. It is FHS 000914.

1 SPECIAL MASTER BILYEU: Can you tell
2 me what page it's on?

3 MS. KLAHN: It's on Page 7, at the
4 bottom of Attachment 7. It's from Hank Meshorer,
5 who represented the Department of Justice in the
6 Fort Hall Water Users Federal Court of Claims
7 case. And it's to Richard Simms. And in that
8 document, or in that letter, rather, there is a
9 list of the documents that were provided from the
10 files of Dave Shaw. And I would just reference
11 that, in that these documents were not willy-nilly
12 being thrown around; the State of Idaho allowed
13 Mr. Shaw to obtain them. They were aware of the
14 litigation in the Court of Claims. It is true,
15 Your Honor, the State of Idaho was not a party to
16 the Court of Claims. However, we, yesterday,
17 obtained from the Court of Claims the pleadings in
18 that case. And as part of the settlement of that
19 case, the State of Idaho had to ratify the
20 settlement between the Fort Hall Water Users and
21 the United States of America. So they were well
22 aware of the case. And --

23 SPECIAL MASTER BILYEU: How does
24 Exhibit 7 relate to what you're asking for? Are
25 you asking for the documents on Exhibit 7, or have

1 was not provided, everything else that was the
2 source material for the memorandum was provided,
3 in addition to materials from Spronk Water
4 Engineers.

5 And I did not want the Court left with
6 the impression that the City of Pocatello had
7 waited to do research. It has worked on this for
8 the last ten years. And the --

9 MR. BARBER: Objection, she's
10 testifying, Your Honor.

11 MS. BEEMAN: Your Honor --

12 SPECIAL MASTER BILYEU: Yeah, I'm
13 not considering it as testimony. I really am not.

14 MS. BEEMAN: The documents provided
15 in discovery document work done over a ten-year
16 period.

17 SPECIAL MASTER BILYEU: All right.
18 Thank you, Ms. Beeman.

19 MS. BEEMAN: Your Honor, I'm sorry,
20 I had one more point of clarification. The letter
21 from Hank Meshorer is a letter that is in response
22 to a discovery request. The one that Ms. Klahn
23 referred to is a document sent in response to
24 discovery. And we have it in the courtroom if
25 Mr. Barber would like to see it.

1 you obtained those?

2 MS. KLAHN: We have obtained those.
3 We are providing this as an example of what we
4 believe is being withheld. In the event the Court
5 was concerned that we were on some kind of fishing
6 expedition, we wanted to provide you with some
7 evidence that there are documents out there that
8 we believe should have been disclosed in our
9 discovery requests.

10 SPECIAL MASTER BILYEU: All right.
11 Anything further with regard to Exhibit 7?

12 MS. KLAHN: I don't think so. Ms.
13 Beeman has a quick point she'd like to make as the
14 affiant here.

15 MS. BEEMAN: Actually, Your Honor
16 and Counsel, I am speaking as counsel for almost
17 ten or eleven years now for the City of Pocatello
18 with respect to it's reserved right. If it isn't
19 clear, the Court needs to understand that what has
20 been provided in discovery is all of the
21 engineering and document research that was done on
22 behalf of the City of Pocatello for the last ten
23 years. When Ms. Klahn referred to the attorney
24 historian that was hired, that work was done
25 several years ago. And although the memorandum

1 SPECIAL MASTER BILYEU: All right.
2 Thank you, Counsel. Mr. Monson, did you have
3 anything that you needed to say relevant to the
4 motion before we wrap up here today?

5 MR. MONSON: No, Your Honor. But
6 thank you for the opportunity.

7 SPECIAL MASTER BILYEU: All right.
8 Thank you, Mr. Monson. And do we have anybody
9 from the Shoshone Bannock Tribes yet? All right.
10 And one question that the Court might just ask of
11 the Department of Water Resources. Ms. McHugh,
12 can you give us any information, just in general,
13 about what sort of resources the Department has
14 available and makes readily available to parties,
15 you know, including in this case? Do you
16 generally require people to send you discovery?
17 Do you make your documents available to the
18 public? How do you generally handle that from the
19 Department's standpoint?

20 MS. MCHUGH: When a party makes a
21 request of documents, basically we go through a
22 review as to whether or not there's any privileged
23 information. But we generally, consider the
24 majority, the vast majority of the Department's
25 documents as public. And we do the best we can to

1 provide copies or to allow them to inspect. And
2 if we need to request them from state storage, or
3 whatever. But we do review the documents
4 primarily for attorney-client privilege
5 information.

6 SPECIAL MASTER BILYEU: All right.
7 Thank you. And you do that without a formal
8 request, usually?

9 MS. MCHUGH: Well, in fact, if we do
10 get a request and it's formal discovery from a
11 party in the SRBA, we respond and say we are a
12 non-party, but we are happy to provide this, but
13 we will not entertain it as a discovery request.

14 SPECIAL MASTER BILYEU: All right.
15 Thank you.

16 MR. LYNIGER: Good afternoon.

17 SPECIAL MASTER BILYEU: Good
18 afternoon. Is this Mr. Lyniger?

19 MR. LYNIGER: Yes.

20 SPECIAL MASTER BILYEU: Mr. Lyniger,
21 we are just finishing up a previous motion.
22 You're welcome to listen in, but we're still in a
23 motion to compel.

24 MR. LYNIGER: Oh, I'm sorry, Your
25 Honor. Should I call back?

1 SPECIAL MASTER BILYEU: Yeah, if you
2 don't want to listen in on this, you could call
3 back in about maybe five, ten minutes.

4 MR. LYNIGER: Sure. Okay. Thank
5 you. Bye.

6 MS. BEEMAN: Your Honor?

7 SPECIAL MASTER BILYEU: Yes?

8 MS. BEEMAN: May I ask the Court's
9 indulgence to ask a question? The question is about
10 the materials of the Idaho Department of Resources.
11 Was the Court's question going to the materials that
12 are Idaho Department of Water Resource's materials
13 or materials of the Idaho Water Resource Board?

14 SPECIAL MASTER BILYEU: I just
15 wanted to know if the Department made whatever
16 documents they had available to the public. It's
17 been my understanding throughout the SRBA that
18 they did. And I just wanted to make sure that I
19 wasn't misunderstanding their process. I wasn't
20 talking about any specific subset of documents. I
21 just wanted to know what they made available to
22 parties.

23 MS. BEEMAN: Okay. Your Honor, the
24 reason I asked is that the Idaho Water Resource
25 Board is a separate constitutional entity. It is

1 separate from the Idaho Department of Water
2 Resources. It's a party to the adjudication. It
3 was a party to the 1990 Fort Hall Indian Water
4 Rights Agreement. And so the distinction there is
5 important for the Court to keep in mind with
6 regard to control of the documents and
7 attorney-client privilege and what the Idaho
8 Department of Water Resources may or may not have
9 the authority to release.

10 SPECIAL MASTER BILYEU: All right.
11 Thank you. Yes, did we have someone else join us?

12 MS. BROWN: Yes, Special Master,
13 this is Roxanne Brown with Water Resources.

14 SPECIAL MASTER BILYEU: Yes,
15 Ms. Brown, we are still finishing up a prior motion
16 to compel. Mr. Lyniger just called in and I asked
17 him to call back in about five or ten minutes.
18 Would you be able to do that as well?

19 MS. BROWN: I'll do that, Your
20 Honor. Bye-bye.

21 SPECIAL MASTER BILYEU: Counsel, I'm
22 going to try to rule here from the bench. I'd
23 like to have more time to look through your
24 voluminous documents, but we've got some deadlines
25 here that are looming. And I hope this will be

1 helpful.

2 First, and this is going to come as
3 no surprise, in my legal opinion, neither the 1990
4 Fort Hall Indian Water Rights Agreement nor the
5 partial consent decree relating to that create a
6 blanket protection or privilege from discovery,
7 although I do concur with some of the statements
8 that Mr. Barber made that there were some limited
9 protections that it afforded. But it therefore
10 follows, in my mind, that the State of Idaho must
11 disclose all documents and tangible items which do
12 not fall within the protection of the attorney work
13 product or the qualified prohibition of disclosures,
14 offers of compromise, and whatever enhancement in
15 that regard that the 1990 Fort Hall Water Rights
16 Agreement would provide.

17 Second, it seems to me that Idaho
18 Rule of Civil Procedure 26(b)(3) protects against
19 disclosure of an attorney's work product in
20 pending litigation. And it seems to me -- I know
21 this is a very gray area in some respects, because
22 we're not talking about published opinions; we're
23 talking about historical documents -- but it seems
24 to me that the City of Pocatello in some ways is
25 seeking the results of the Attorney General's

1 office conducting research, legal research and
2 historical research relating to the second treaty
3 of Fort Bridger. And I know there are additional
4 documents, the act of 1888, the agreement of 1887,
5 all of those.

6 And it seems to me that -- you know, I take
7 Mr. Barber's affidavit very seriously, and he's
8 saying that those documents were obtained by the
9 State of Idaho, they're still available by
10 researching the Idaho State law library, the Idaho
11 State library archives, the national archives, and
12 the record administration. Notwithstanding the fact
13 that some others may have felt no need to seek that
14 protection, I'm still not willing to create the
15 precedential effect of opening all of that up to the
16 discovery process because I just -- I just feel in
17 my experience as a practicing lawyer that that goes
18 too far in my mind at this point in terms of the
19 discovery rules.

20 Finally, the State of Idaho, in my
21 estimation, is required to provide a log relating
22 to documents that it claims are covered by the
23 work product or any other privilege. This
24 requirement is made pursuant to the Idaho Rules of
25 Civil Procedure, not the Federal Rules of Civil

1 Procedure. So I hope I don't have anybody telling
2 me that I ruled improperly under the Federal
3 Rules; that's not my point. I think that the City
4 and any party that asks for such disclosure as
5 part of its regularly conducted discovery is
6 entitled to do that. And that Courts always are
7 entitled to ask for more specifics. So I'm
8 inclined to request that. And I might just say
9 too that the Special Master may require an in
10 camera review of those documents later when those
11 are submitted, when that list is submitted.

12 With regard to attorney fees, I'm
13 not inclined to award any attorney fees. I think,
14 again, the area is a little bit gray. Water
15 rights do involve discovery and expert areas such
16 as historical documents that are very different
17 than what we see in your run-of-the-mill divorce
18 case or personal injury case, and I don't think
19 that there's any grounds for attorney fees here.

20 Mr. Barber has been, in my view, in the many
21 years that I've seen him in this court, an extremely
22 capable attorney, and I think he takes his duties as
23 an officer of the court as seriously as anybody I
24 know. So there is no question about attorney fees
25 in this case.

1 So that's my ruling. Can we get any
2 additional discovery answers within fourteen days,
3 Mr. Barber? I know this -- the privilege log, I
4 don't really know what is out there, but what kind
5 of --

6 MR. BARBER: Your Honor, let me make
7 this representation to the Court. We'll work on
8 it as absolutely diligently as possible. If I can
9 get it done in seven days, I'll get it done in
10 seven days. I'm not confident off the top of my
11 head I can give you a good estimate today. But I
12 can make the representation I'll do my very best
13 and end up working the weekends and everything
14 else to get this done.

15 SPECIAL MASTER BILYEU: Well, let's --

16 MS. KLAHN: Your Honor, could I
17 suggest an accommodation?

18 SPECIAL MASTER BILYEU: Yes, that
19 would be wonderful.

20 MS. KLAHN: He could have his
21 fourteen days, if we could push off the summary
22 judgment briefing for a month.

23 SPECIAL MASTER BILYEU: It always
24 involves changing those deadlines, does it? I
25 don't even know if I -- does anybody have the

1 trial scheduling order out handy? I don't even
2 know what those dates are.

3 MS. KLAHN: Well, the summary
4 judgment motions are due October 29. They're
5 simultaneous cross-motions, I believe. And then
6 the responses are due approximately a month later.
7 And the replies are due approximately at the first
8 of the year.

9 SPECIAL MASTER BILYEU: Did we set a
10 trial date?

11 MR. BARBER: Just a summary
12 judgment.

13 SPECIAL MASTER BILYEU: Just a
14 summary judgment schedule? Do you have any
15 problem with moving those?

16 MR. BARBER: No, I do not have a
17 problem.

18 SPECIAL MASTER BILYEU: I don't have
19 a problem giving you thirty days if we have an
20 agreement on moving the summary judgment. Is that
21 a --

22 MR. BARBER: Of course, Your Honor,
23 there are other parties that need to be consulted
24 about moving the dates, et cetera. I don't know
25 whether Mr. Monson is still on. But I have no

1 problem moving those dates. I want to make sure
2 that I do a thorough and good job on that.
3 Fourteen days doesn't give me a lot of time to do
4 that. But again, I will make the representation
5 to the Court, I'll do my very best to get it done
6 as quickly as possible.

7 SPECIAL MASTER BILYEU: All right.
8 Counsel, let's leave it this way. And let me
9 check in with Mr. Monson. I keep getting excited
10 and ahead of myself here. Mr. Monson, if we were
11 to move the summary judgment schedule back a
12 little bit to accommodate Mr. Barber's supplement to
13 the discovery requests, would that cause you any
14 problems?

15 MR. MONSON: No, Your Honor, we can
16 be prepared to meet either date, either the
17 October 29th date or a later one.

18 SPECIAL MASTER BILYEU: Counsel, let
19 me leave it this way: Would counsel for all the
20 parties involved -- and get Ms. Wolfley on the line
21 if you can -- get on the phone today or tomorrow and
22 reach some sort of an accommodation, giving the
23 Court the updated dates? And maybe check with
24 Janet on the hearing date, with my clerk, just to
25 make sure that that's one where I'll be here. And

1 I have no problem with moving that.

2 MR. BARBER: Okay. We'll be happy
3 to do that.

4 SPECIAL MASTER BILYEU: All right,
5 Mr. Barber, anything further? Without trying to
6 talk me out of my --

7 MR. BARBER: I do have a few
8 questions. And I want to make sure that I comply
9 with and implement what the Court has decided
10 today. And perhaps part of that could be resolved
11 if I got the transcript as quickly as possible, so
12 I can go back over that. But if I understand
13 correctly what you have required, you have
14 required that we disclose documents that do not
15 come within what you have described as a limited
16 privilege of 11.3 and 11.4 of the agreement. In
17 other words, if it's not an offer of compromise
18 and concerns either the agreement or the consent
19 decree or the act, well, then we would have to
20 provide that.

21 And then you've also said that with
22 respect to all the requests for production, as I
23 understand it, a privilege log.

24 SPECIAL MASTER BILYEU: I think,
25 actually, I'm only referring to, and I think the

1 request was only for, the ones that they listed in
2 their motion. And, you know, that's only for the
3 documents that you haven't provided. I'm not
4 asking to supplement everything else.

5 MR. BARBER: Right. Okay. So it's
6 the requests for production that are listed in the
7 motion that you request a privilege log be
8 provided for?

9 SPECIAL MASTER BILYEU: That's my
10 best understanding of their motion, so that's what
11 I was intending to do with the order, yes.

12 MR. BARBER: Okay. Very well. We
13 will do our best to comply with that.

14 SPECIAL MASTER BILYEU: All right.
15 Thank you, Mr. Barber. All right. Ms. Klahn, do
16 you have anything further to put on the record
17 before we adjourn?

18 MS. KLAHN: I don't think so, Your
19 Honor. Thank you.

20 SPECIAL MASTER BILYEU: Thank you.
21 We appreciate you coming. And, Mr. Barber,
22 anything further before we adjourn today?

23 MR. BARBER: Just a question of the
24 court reporter when I can get a transcript.

25 SPECIAL MASTER BILYEU: We always

1 want to make sure we appeal on a timely basis.

2 MR. BARBER: No, that's not the
3 issue.

4 SPECIAL MASTER BILYEU: I'm just
5 teasing you.

6 MR. BARBER: That's not the issue.
7 I just want to make sure I'm following -- I follow
8 what you've asked me to do.

9 SPECIAL MASTER BILYEU: All right.
10 Thank you, Mr. Barber. Mr. Monson, anything
11 further before we adjourn from the United States?

12 MR. MONSON: No, Your Honor. Thank
13 you and good afternoon.

14 SPECIAL MASTER BILYEU: All right.
15 Thank you. And Ms. McHugh, anything additional
16 that the Department of Water Resources needs to
17 report?

18 MS. MCHUGH: No, Your Honor. Thank
19 you.

20 SPECIAL MASTER BILYEU: All right.
21 Thank you. And, Counsel, I will issue a written
22 order, and hopefully I'll keep it fairly
23 consistent with what I said on the record.

24 And with that, thank you all very
25 much. I appreciate you coming. I appreciate your

1 legal arguments; they were well thought out and I
2 appreciate being further educated. And with that,
3 we stand adjourned.

4 MS. KLAHN: Thank you.

5 MR. BARBER: Thank you.

6 (Hearing concluded at 2:45 p.m.)
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REPORTER'S CERTIFICATE

I, CATHERINE L. PAVKOV, CSR NO. 638, Certified
Shorthand Reporter, certify;

That the foregoing proceedings were taken before me
at the time and place therein set forth, at which time the
witness was put under oath by me;

That the testimony and all objections made were
recorded stenographically by me and were thereafter
transcribed by me, or under my direction;

That the foregoing is true and correct record of
all testimony given, to the best of my ability;

I further certify that I am not a relative or
employee of any attorney or party, nor am I financially
interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this
7th day of October, 2004.



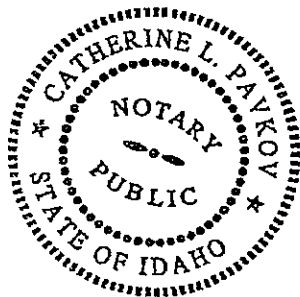
CATHERINE L. PAVKOV, CSR NO. 638

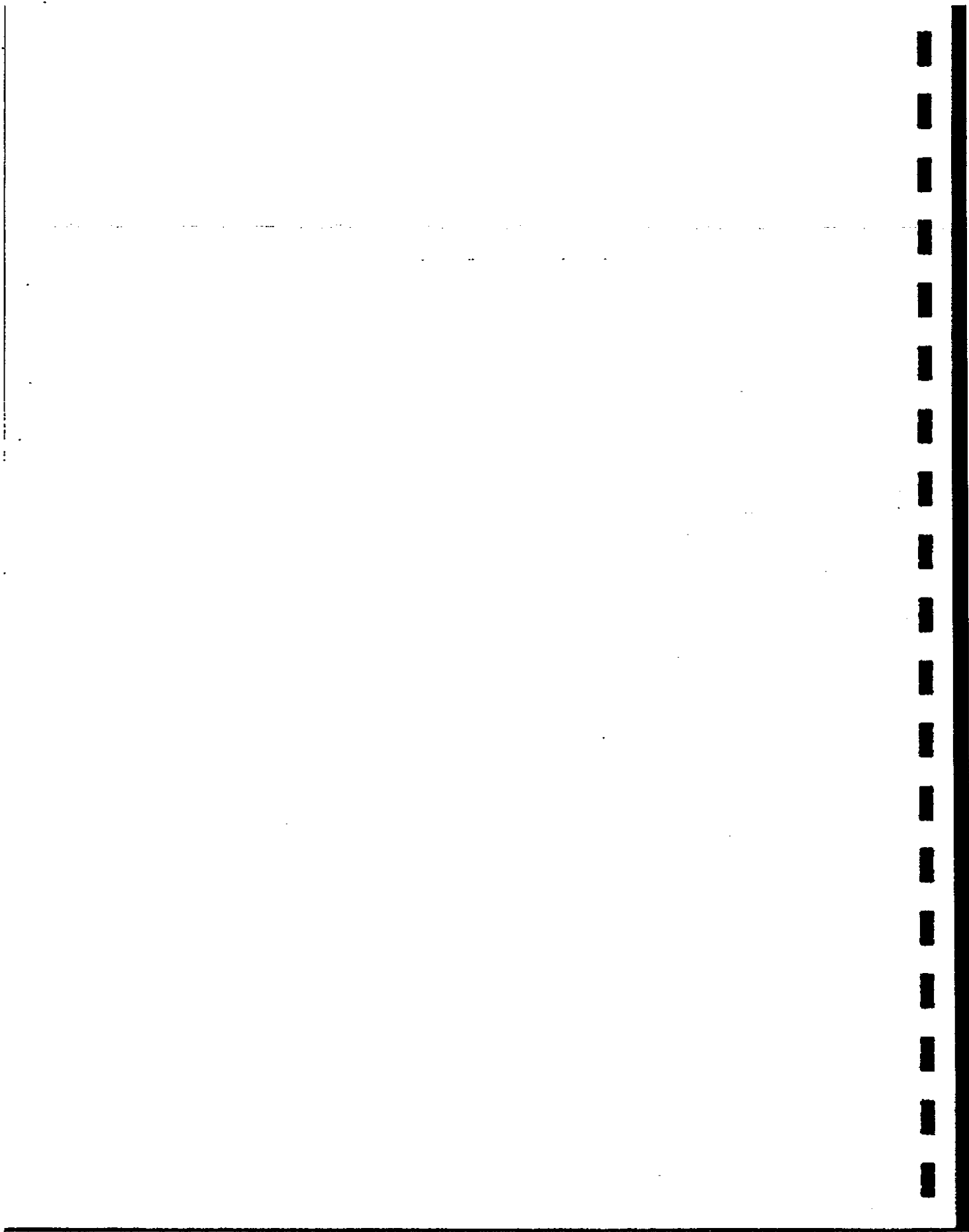
Notary Public

P.O. Box 2636

Boise, Idaho 83701-2636

My commission expires June 24, 2009.





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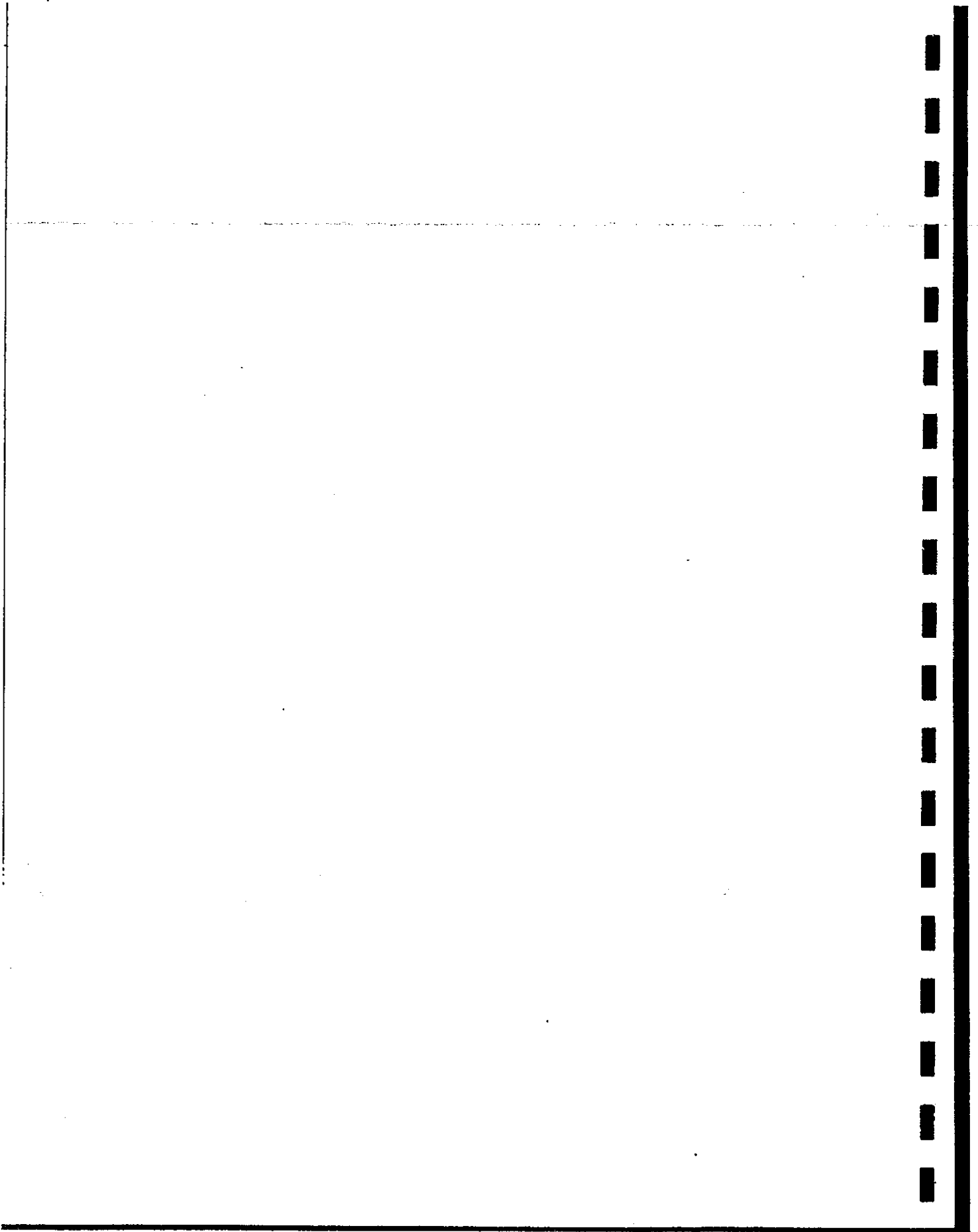
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October 7, 2004

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RE: In Re: SRBA

Case No. 29-11609 (Snake River Basin Adjudication)
Taken on 10/5/2004
M & M Job No. 6633B4

Enclosed is your copy of the above-referenced hearing transcript, along with the original transcript. Please let me know if you need anything further.

Thank you for letting us report for you.

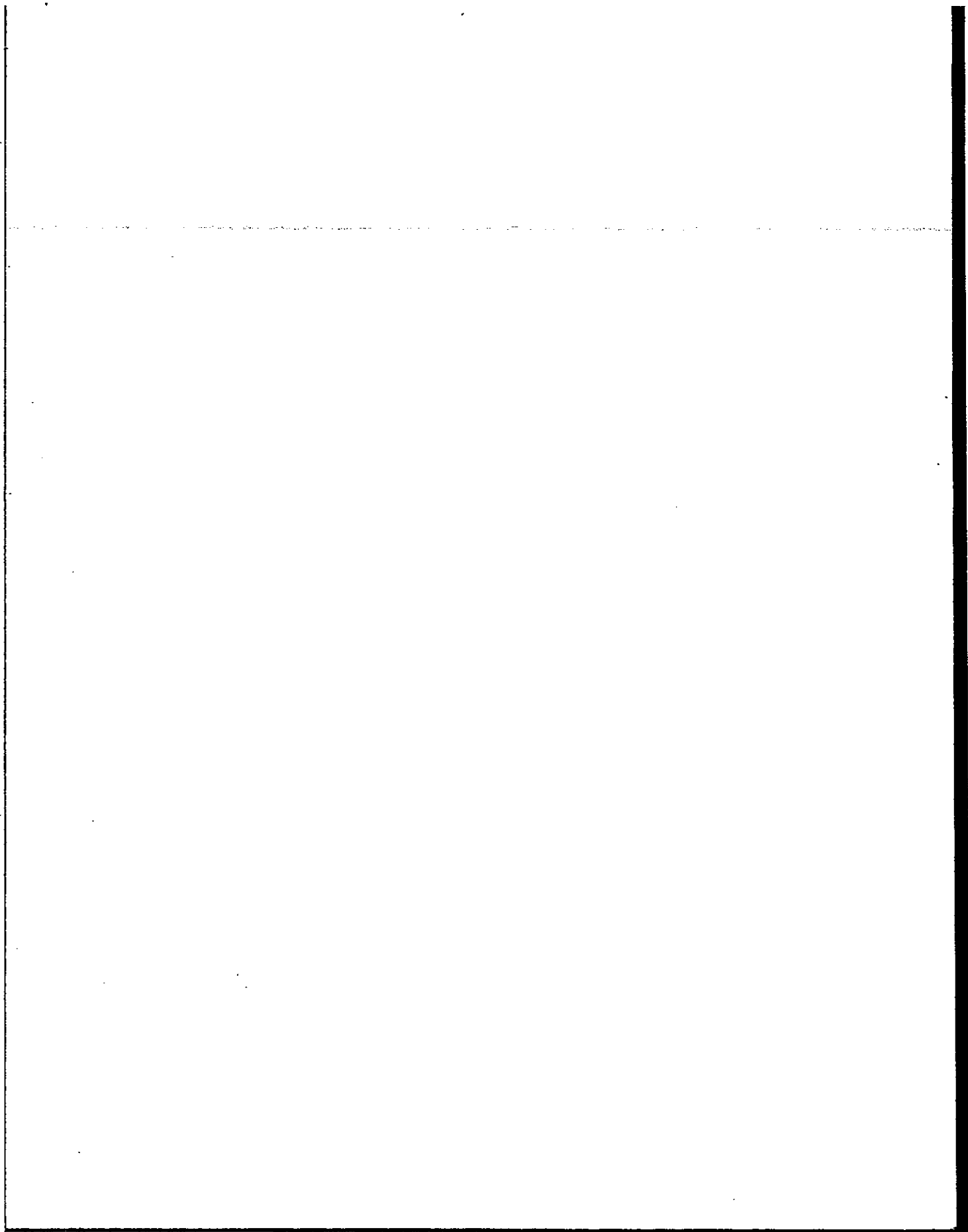
Very truly yours,

Teresa Salman

M & M Court Reporting Service, Inc.

Enclosures

pc: David J. Barber
File



001

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2004 OCT 15 PM 2 36

In Re SRBA	)	ORDER ON MOTION TO COMPEL,
	)	MOTION TO STRIKE AND MOTION
Case No. 39576	)	TO ACCEPT
	)	
	)	SUBCASE NO.: 29-11609
	)	

First, neither the 1990 Fort Hall Indian Water Rights Agreement nor the Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin creates an absolute protection or privilege from discovery. It

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follows that the State of Idaho should disclose all documents and tangible items which do not fall within the protection of attorney work product, attorney-client privilege, or the prohibition from disclosure of offers of compromise privileges.

Second, I.R.C.P. 26(b)(3) protects against disclosure of an attorney's work product in pending litigation. This Special Master concludes that the work product doctrine generally protects the results of legal research. The City of Pocatello sought the results of the State of Idaho's legal research relating to the 1990 *Fort Hall Indian Water Rights Agreement*, the *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, the Second Treaty of Fort Bridger, Section 10 of the Act of September 1888 (also called the Pocatello Townsite Act) the Executive Order of June 14, 1867, the Executive Order of July 30, 1869, the Agreement of May 27, 1887 Ratified by the Act of September 1, 1888, the Act of June 6, 1900 and a privilege log relating to documents not disclosed by the State of Idaho.

The State of Idaho produced all historical documents found in its research relating to the Act of September 1, 1888, ch. 936, 25 Stat. 452 and the Agreement of May 27, 1887. The State of Idaho, however, withheld its legal research relating to historical documents regarding the Second Treaty of Fort Bridger, the Executive Order of June 14, 1867, Executive Order of July 30, 1869, or the Act of June 6, 1900, ch. 813, 31 Stat. 372. The State of Idaho asserted the work product privilege. The withheld documents were obtained by legal counsel for the State of Idaho while conducting legal research at the Idaho State Law Library, the Idaho State Library archives, and depository centers of the National Archives and Record Administration. *Affidavit of David J. Barber.*

The City of Pocatello and the State of Idaho conceded that Rule 26(b)(3) protects a party from discovery of legal research of reported cases. The research sought by the city of Pocatello apparently does not include reported cases, but consists of historical documents relating to old treaties and orders. The research conducted by the State of Idaho appears to place these documents within the purview of the work product doctrine. *Affidavit of David J. Barber.* Accordingly, this legal research is protected under the work product doctrine.¹

¹ This Special Master notes that the results of a *Motion to Compel* historical documents may differ if the State of Idaho were to rely on these documents for an expert opinion, or if the State of Idaho was the custodian of these records.

Finally, the State of Idaho is required to provide a log relating to documents or tangible objects it has withheld.

Therefore, the *Motion to Strike* is denied. The *Motion to Accept* is granted. The *Motion to Compel* is granted in part and denied in part. Attorney fees sought by the city of Pocatello are denied.

IT IS ORDERED that the State of Idaho produce all documents and answer all discovery not protected by the work-product or other privilege

IT IS FURTHER ORDERED that the State of Idaho provide a "privilege log" relating to any documents or tangible items it has withheld.

DATED October 15, 2004.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO COMPEL, MOTION TO STRIKE AND MOTION TO ACCEPT was mailed on October 15, 2004, with sufficient first-class postage to the following:

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

In Re SRBA) Subcase No.
Case No. 39576) 01-00006

COPY

RULE 30(B)(6) DEPOSITION OF THE STATE OF IDAHO
TESTIMONY OF ANTHONY OLENICHAK

JULY 7, 2010

REPORTED BY:

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

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1 THE RULE 30(B)(6) DEPOSITION OF THE
2 STATE OF IDAHO, TESTIMONY OF ANTHONY OLENICHAK was
3 taken on behalf of American Falls Reservoir
4 District No. 2 at the offices of Capitol Law
5 Group, PLLC, 205 North 10th Street, 4th Floor,
6 Boise, Idaho, commencing at 9:02 a.m. on July 7,
7 2010, before Jeff LaMar, Certified Shorthand
8 Reporter and Notary Public within and for the
9 State of Idaho, in the above-entitled matter.

10
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1 ANTHONY OLENICHAK,
2 first duly sworn to tell the truth relating to
3 said cause, testified as follows:

EXAMINATION

4
5 BY MR. ARKOOSH:

6 Q. Would you state your name for the
7 record, please.

8 A. Anthony Olenichak.

9 Q. And spell your last name, Tony.

10 A. O-l-e-n-i-c-h-a-k.

11 MR. ARKOOSH: Mr. Orr, is there a
12 stipulation you'd like to put on the record?

13 MR. ORR: Well, it's my understanding that
14 all counsel have agreed to stipulate that all
15 objections will be reserved other than objections
16 to the form of the question. I think the rules
17 provide for that anyway, but I just wanted to make
18 it part of the record since it had been stated in
19 the record in prior depositions.

20 MR. ARKOOSH: We concur.

21 MS. McHUGH: Yeah.

22 MR. GEHLERT: Yes.

23 MS. McHUGH: Thanks.

24 Q. (BY MR. ARKOOSH): What's your
25

1 address, Tony?

2 A. My work address?

3 Q. Either.

4 A. 900 North Skyline, Idaho Falls.

5 Q. Do you live in Idaho Falls as well?

6 A. Yes.

7 Q. Okay. And what's your educational
8 background?

9 A. I have a bachelor of science degree in
10 watershed science at Utah State University.

11 Q. In what year?

12 A. 1983.

13 Q. And after school in '83, did you go
14 directly into the workforce?

15 A. Not directly. Less than a year later
16 I started working for the Helena National Forest
17 as a hydraulic technician.

18 Q. What's that?

19 A. Well, actually, immediately after
20 graduation I worked as a hydrologic technician for
21 the Humbolt National Forest for the summer. It
22 was a temporary position. And then there was a
23 short period of time, about nine months or so,
24 that I worked at a meat packing plant. And then
25 got the job as a hydrologic technician with the

1 Forest Service in Helena.

2 The primary responsibility initially
3 for my position in Helena was to review the water
4 rights that had been filed in the Montana
5 adjudication as they affected the federal reserve
6 rights.

7 Q. And then what did you do?

8 A. I worked there for approximately a
9 year and a half, and then got a job as a water
10 rights technician with the State of Montana in
11 Missoula, Montana, working for the Montana
12 adjudication.

13 Q. That would be in '85?

14 A. Yes, '85.

15 Q. And then how long did you have that
16 job?

17 A. Probably a year and a half or so. It
18 was in 1987, I believe, I was promoted to water
19 right specialist and moved to the Helena field
20 office with the State of Montana in the Water
21 Rights Bureau working for the water right
22 specialist. I had that job until 1988.

23 And then I moved to Idaho Falls and
24 took a job in the adjudication with the State of
25 Idaho as a senior water right agent. Worked in

1 that position for about a year and a half, and
 2 then took a position as hydrologist with Water
 3 District No. 1.
 4 Q. About '89 or '90?
 5 A. 1990.
 6 Q. Okay.
 7 A. Worked in that position until I think
 8 it was approximately 2005 that I was promoted to a
 9 program manager at Water District 1. And I still
 10 hold that position currently.
 11 Q. What's your job description as program
 12 manager?
 13 A. My job description is to monitor the
 14 day-to-day activities of the water district,
 15 regulating and measuring water, delivering to
 16 canals/pumps from the Snake River within Water
 17 District 1.
 18 Q. So you're not the watermaster of Water
 19 District 1?
 20 A. I am not the watermaster.
 21 (Exhibit 1 marked.)
 22 Q. (BY MR. ARKOOSH): The Notice of
 23 Deposition in this matter, Tony, asks that the
 24 State have somebody come testify about certain
 25 issues.

1 Have you seen that notice before?
 2 A. Yes, I have.
 3 Q. And you're the one that the State has
 4 designated to come testify about the issues in the
 5 Notice of Deposition?
 6 A. Yes.
 7 Q. Okay. And have you reviewed the
 8 Notice of Deposition?
 9 A. Yes.
 10 Q. So do you know why you're here? You
 11 know what you're here to testify about, the issues
 12 you're here to testify about?
 13 A. Yes.
 14 Q. Why were you chosen to testify about
 15 these issues?
 16 A. I don't know.
 17 Q. Who made that decision?
 18 A. Michael Orr contacted me.
 19 Q. Are you knowledgeable about those
 20 issues?
 21 A. Yes, I am.
 22 Q. Do you perceive yourself to be the
 23 most knowledgeable person to testify about those
 24 issues?
 25 A. I perceive that I've spent a lot of

1 time with the issue. I don't know that I know the
 2 most about the issue.
 3 Q. Would you tell me again what your job
 4 description is as program manager.
 5 A. Program manager at Water District 1
 6 I'm responsible for the day-to-day activities of
 7 how water is delivered in Water District 1 to the
 8 diversions.
 9 Q. And why are you the one familiar with
 10 the issues in Deposition Exhibit 1, which is the
 11 Notice of Deposition?
 12 A. I've been familiar with the issue, the
 13 complaints by AFRD No. 2 as to delivery of their
 14 water right. And I've done some research into how
 15 that water has been historically delivered.
 16 Q. Okay. You mentioned complaints by
 17 American Falls Irrigation District.
 18 What complaints are those?
 19 A. They felt the water right accounting
 20 program was distributing the water incorrectly
 21 according to how it's stated in the Eagle decree.
 22 Q. And who did you contact?
 23 A. I've talked to Lynn Harmon, Craig
 24 Hobdey.
 25 Q. H-o-b-d-e-y.

1 Who else?
 2 A. I did a PowerPoint presentation at
 3 AFRD No. 2's office in 2003 or 2004, I believe.
 4 And I'm not exactly sure who was in attendance at
 5 that meeting. But there were several questions
 6 during that meeting.
 7 Q. What was the presentation on?
 8 A. The presentation was the delivery of
 9 AFRD No. 2's natural-flow right in the accounting
 10 program.
 11 Q. Do you have that PowerPoint?
 12 A. Yes, I do.
 13 Q. Okay. Could I take a look at that?
 14 A. Sure.
 15 Well, I thought it was in this stack,
 16 but I'm not seeing it. Well, I thought I had
 17 brought a copy, but I don't see it in the file.
 18 Q. How did it occur that in 2003 or 2004
 19 you went to American Falls and delivered this
 20 PowerPoint presentation?
 21 A. Craig Hobdey, I think, had complained
 22 to Ron Carlson, who was watermaster at the time,
 23 that the water right was being delivered
 24 incorrectly in the water right accounting. And I
 25 was asked to go down and make a presentation to

1 American Falls Reservoir District No. 2 as to how
2 the accounting worked.

3 Q. When were you asked to do that? Do
4 you recall?

5 A. It was either at the end of 2003 or
6 the beginning of 2004.

7 Q. It was during the drought period from
8 2000 to 2004, then, is that what prompted the
9 phone call?

10 A. Yes. There was a drought between 2001
11 and 2003. So I'm sure that's what prompted the
12 call.

13 Q. Did you know about this issue prior to
14 that time?

15 A. I did not.

16 Q. Okay. And by "this issue," I want to
17 be clear, it's the issue identified in the Notice
18 of Deposition.

19 A. Yes.

20 Q. When I talk about the issue before us,
21 it's the difference in the statement of the water
22 right in the Eagle decree and the statement in the
23 recommendation.

24 Can we agree to that as the definition
25 for the issue, for the moment at least?

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1 A. Yes, that's the issue in the notice.

2 Q. So tell me generally what your
3 presentation said.

4 A. Well, it outlined through each phrase
5 in the Eagle decree how the water is delivered in
6 the water right accounting.

7 Q. I see you brought some documents with
8 you.

9 Is that in response to the Notice of
10 Deposition?

11 A. Garrick Baxter asked us to put
12 together all the documents that pertained to the
13 AFRD No. 2 issue. And I've started gathering
14 that. I haven't been able to compile a complete
15 list of documents. I have e-mails of mine dating
16 back to 2008.

17 And I had Michael Holliday, who did
18 the adjudication work with the IDWR staff, he
19 researched his e-mails and made copies. And I
20 brought those with me.

21 Q. So did you know about this issue prior
22 to your conversation with Ron Carlson in 2003? if
23 I understood your previous answer.

24 A. That's my first recollection of when I
25 started to research the problem.

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1 Q. What did Ron say to you about it?

2 A. I can't remember what Ron said to me
3 directly about the issue. I researched myself,
4 usually with asking Bob Sutter, who had put the
5 water rights programming together, as to how the
6 computer program was accounting for the rights.
7 And I checked the daily accounting printouts
8 during that time to see, in fact, if that's the
9 way the water was being delivered.

10 Q. What did Mr. Sutter tell you about how
11 the program accounted for the water?

12 A. Well, the program accounted for the
13 water when the American Falls right was not full
14 prior to May 1st, then everything diverted by AFRD
15 No. 2 was storage.

16 Once the American Falls right filled
17 on paper in the water right accounting, then --
18 excuse me, there's a time period after May 1st to
19 the time that American Falls filled on paper in
20 the accounting, they received the first half of
21 the first 1700 cfs available to the 1921 priority
22 water right.

23 Once American Falls filled on paper,
24 then they were entitled to the entire 1700 cfs
25 when the 1921 priority was being filled.

Page 16

1 Q. Now, you said you've researched this
2 historically; is that correct?

3 A. Yes.

4 Q. Did what you find in the
5 administration of this right historically comport
6 with what the water right accounting program was
7 doing?

8 A. Yes.

9 Q. Can I look at your documents there
10 that you brought?

11 A. Sure.

12 Q. Are those in chronological order?

13 A. They were before I took them. There
14 were two memos, too, that were also attached by
15 e-mail that kind of summed up the issue that I
16 wrote to Garrick Baxter.

17 MR. ARKOOSH: Go off the record, please.

18 (Recess.)

19 (Exhibit 2 marked.)

20 Q. (BY MR. ARKOOSH): Tony, I'm going to
21 show you what's been marked as Exhibit 2, which is
22 an e-mail from you to Lynn Harmon, who is the
23 manager of American Falls Reservoir District
24 No. 2, dated May 5, 2010. And it's got four
25 bullet points on top.

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1 Do you see those?

2 A. Yes.

3 Q. Are those bullet points an accurate
4 reflection of how you perceive this right should
5 be administered?

6 A. Yes.

7 Q. Now, you indicated to me that the
8 right is being administered as it has always been
9 administered; is that correct?

10 A. Since the inception of the
11 computerized water right accounting program.

12 Q. How about prior to that time?

13 A. It's difficult to tell in the
14 watermaster books precisely how it was delivered.
15 There were some changes in the computer accounting
16 from the previous process, just because it was
17 easier to account for the water with a computer
18 rather than by hand, as they did prior to 1978.

19 Q. Is the intent of the recommendation to
20 change how the American Falls No. 2 right is
21 administered under the current Eagle decree
22 language?

23 A. It is not.

24 Q. Is the answer to that question the
25 same before and after 1978?

Page 18

1 A. Yes.

2 Q. So the intent of your language is not
3 to change how the right is administered either
4 before or after 1978?

5 A. That's correct.

6 Q. Why change the language?

7 A. I felt the language in the decree is
8 ambiguous and has been interpreted in at least two
9 different ways by different people. And I felt
10 that if the recommendation was written more
11 clearly so that everyone could understand exactly
12 how it should be delivered, that's how the right
13 should be recommended.

14 Q. So I understand "ambiguity" to mean
15 that there are two reasonable readings of one
16 particular phrase or one set of language.

17 Is that what you understand it to
18 mean?

19 A. Yes.

20 Q. And so I also understand your previous
21 answer to be that this water right has been
22 administered two different ways under the Eagle
23 decree language?

24 MR. ORR: Objection. Mischaracterizes
25 prior testimony.

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1 THE WITNESS: No. I think it's been
2 administered the same way. There are different
3 processes in order to administer it. But it
4 was -- it has always been administered according
5 to the decree language.

6 Q. (BY MR. ARKOOSH): Okay. And
7 administration has been consistent both before and
8 after 1978?

9 A. Yes.

10 Q. So it's your position that the right
11 should be administered as it has always been
12 administered?

13 A. I think the right should be
14 administered as it's written in the decree.

15 Q. Then there's no point in changing the
16 decree language, is there?

17 A. As long as there's confusion over the
18 water users, the irrigation district, the water
19 district as to how the water should be
20 administered according to the language, I think
21 the language should be changed so as everyone
22 agrees to what it says.

23 Q. Okay. Now, I'm going to go back to my
24 prior question. I'm going to break it down in two
25 parts. I want to be clear.

Page 20

1 You perceive that this right has
2 historically always been administered the same
3 way, both before and after 1978?

4 A. No, not exactly the same way.

5 Q. What are the differences?

6 A. But administered according to the
7 decree language.

8 Q. Okay. Could you elaborate on that
9 answer.

10 A. Yes. Watermasters had different ideas
11 as to how the storage accrual was accounted prior
12 to the water right accounting in the computerized
13 water right accounting in 1978 and the methods
14 that we used after utilizing the computerized
15 accounting.

16 Q. Okay. Let's go to the period prior to
17 1978.

18 Was it always -- by "it" I mean this
19 water right. Was the water right always
20 administered consistently prior to 1978?

21 A. I don't know that I've looked at every
22 year prior to 1978, so it might have been done
23 differently. But I think it's always been
24 administered according to the decree.

25 Q. Consistently the same way? When you

1 say "according to the decree," do you mean it's
2 administered -- at least to your knowledge, and I
3 understand you've not gone year to year, but to
4 your knowledge it's been administered the same way
5 prior to 1978?

6 A. Using the same language in the decree,
7 it would be administered the same way.

8 Q. Well, is there an ambiguity in the
9 decree, then? Could it be read two different
10 ways?

11 A. Well, I have my interpretation of how
12 I read it, and I understand AFRD No. 2's
13 interpretation is different.

14 Q. Well, what I'm trying to understand,
15 to the best of your knowledge, prior to 1978 was
16 the decree administered in a consistent way?

17 A. No, I wouldn't say it was administered
18 in a consistent way, because water -- the water
19 supply changes from year to year. And that can
20 dictate as to how it's administered.

21 Q. Was it administered prior to 1978 in a
22 consistent way under similar conditions?

23 A. It could have varied from watermaster
24 to watermaster.

25 Q. How? And I'm not asking for a
Page 22

1 hypothetical, I'm asking for your knowledge, if
2 you know.

3 A. I don't know.

4 Q. Okay. Prior to 1978, then, you don't
5 know whether this was administered consistently
6 under similar conditions?

7 A. I don't know with absolute certainty.

8 Q. What do you think? What do you
9 believe?

10 A. I believe each watermaster could have
11 their own interpretation as to how to administer
12 it.

13 Q. But I want to be clear that it's not
14 your intent to change the import or meaning of the
15 language with the new proposed recommendation?

16 A. That's correct.

17 Q. Was there a change in the
18 administration of the right from 1978 forward?

19 A. No.

20 Q. Incidentally, part of the job of the
21 watermaster in administration is to account for
22 how the water was administered; isn't that
23 correct?

24 A. That's correct.

25 Q. And how does that occur?

1 A. Each day the water district calculates
2 the amount of natural flow that's in the river
3 system and then allocates it to the rights
4 according to their priority and the limitations
5 spelled out in the water rights.

6 Q. And how is that promulgated to the
7 world?

8 MR. ORR: Objection. Ambiguous.

9 THE WITNESS: Yes. Could you rephrase
10 that?

11 Q. (BY MR. ARKOOSH): How do you let
12 people know what the accounting is?

13 A. Well, currently we publish it on our
14 Water District 1 website after each day that we do
15 the accounting. Generally, we do it every Monday,
16 Wednesday, and Friday. We also have paper copies
17 of that daily accounting.

18 Q. When was it first posted to the web?

19 A. Probably just three years ago.

20 Q. Prior to that time how was it
21 disseminated?

22 A. We mailed copies generally every week
23 to the water users. It's also always available in
24 our Water District 1 office for people to view.
25 The State office, at least beginning in 1978 when

1 we had the computerized accounting, could also
2 access it through the computer database in the
3 IDWR office.

4 Q. What is the official record?

5 A. What do you mean by "official"?

6 Q. Isn't there a publication to summarize
7 each year's accounting?

8 A. There's a --

9 Q. It's called a Black Book.

10 A. Yes. There's a watermaster report
11 that historically has been bound in a black
12 binder, we call the "Black Books." That is a
13 summary of the water right accounting at the end
14 of the year.

15 Q. My understanding is there's a process
16 called "year-end accounting," and that process is
17 conducted, and then the final results of that
18 process are put in a Black Book, is that right, in
19 a summary?

20 A. The Black Book is a summary. It
21 doesn't, of course, detail every day's accounting.

22 Q. Is that the official watermaster
23 record, the watermaster report?

24 A. It is -- it's just a report. I don't
25 know if it's the official record.

1 Q. Do you know if there's an official
2 record?
3 A. I don't.
4 Q. Okay. When does the Black Book come
5 out?
6 A. Of course, anytime after the final
7 accounting. It could come out anytime from one
8 year after the final accounting to as long as five
9 or six years.
10 Q. Really? As a matter of curiosity, do
11 you know of an instance where the watermaster's
12 report for a particular year has come out five or
13 six years later?
14 A. Yes.
15 Q. What were those years concerned?
16 A. I think in the more recent years.
17 It's a low priority on our list. We have many
18 responsibilities that we rank a higher priority
19 than summarizing a previous year.
20 Q. It's a budgetary process, then?
21 A. Yes.
22 Q. Budgetary problem? I'm sorry.
23 A. Yes.
24 Q. In most years it comes out at least in
25 March or April of the following year is about the

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1 soonest it ever comes out; isn't that right?
2 A. That would be the soonest it would
3 come out.
4 MR. ARKOOSH: Let's mark this as Exhibit 3.
5 (Exhibit 3 marked.)
6 Q. (BY MR. ARKOOSH): What's Exhibit 3,
7 Tony?
8 A. Exhibit 3 is a four-page memorandum
9 that I had sent to Garrick Baxter on
10 February 17th, 2010. It was in regards to the 163
11 historical documents he had sent to me to read
12 regarding the delivery of the American Falls
13 Reservoir District No. 2 natural-flow right.
14 Q. Would you look on page 4. You have
15 some bolded language there.
16 Could you describe first what the
17 purpose of that language is.
18 A. Yes. I'll read it first, if that's
19 okay.
20 Q. Please.
21 A. "Was the purpose of the 1954 contract
22 language and 1968 decree language to protect the
23 newly constructed upstream reservoirs from AFRD
24 No. 2 diverting natural flow prior to May 1st and
25 prior to American Falls filling? Or, was the

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1 purpose of the language to protect AFRD No. 2 from
2 the impact of water physically being held in newly
3 constructed junior upstream reservoirs, allowing
4 AFRD No. 2 to divert the full 1700 cfs of natural
5 flow at all times when available to the
6 March 30th, 1921, priority in years when the
7 American Falls storage right filled?
8 And the purpose of that was I narrowed
9 it down to settling the difference between AFRD
10 No. 2's position and the position the water
11 district has historically held down to these two
12 things.
13 If -- if the language in the decree
14 was only to protect the fill of American Falls
15 Reservoir, then AFRD No. 2 should be entitled to
16 the full 1700 cfs if American Falls Reservoir
17 filled.
18 If the purpose of the language was to
19 protect the upstream junior storage rights, then
20 the position that Water District 1 has
21 historically taken would be the correct position.
22 Q. What did you conclude is the right
23 position, whether it's to protect the junior
24 upstream user or the fill of the American Falls
25 Reservoir?

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1 A. I wasn't able to determine that.
2 Q. So in your view, it's still up in the
3 air?
4 A. Well, until I see evidence to
5 definitely say that it should be otherwise --
6 delivered otherwise, then we currently deliver it,
7 I would stick with the way we're currently
8 delivering it.
9 Q. Which is the protection of the
10 upstream junior reservoir?
11 A. Well, it would be just as the language
12 in the early decree has been interpreted.
13 Q. Well, is the current administration in
14 accord with sentence one or is it in accord with
15 sentence two? My understanding would be in accord
16 with sentence one, that being "...the purpose of
17 the contract language and decreed language to
18 protect newly constructed upstream reservoirs from
19 AFRD No. 2 diverting natural flow prior to May 1
20 and prior to the reservoir filling?" That's
21 current administration, is it not?
22 A. Correct.
23 Q. Okay. And the purpose of the
24 recommendation is to make clear that that's how
25 the right would be administered; is that right?

1 A. That's correct.

2 Q. Okay. And you came to that conclusion
3 how?

4 A. Well, that was my analysis after
5 reading all the 163 historical documents.

6 Q. Okay. What should the State's
7 position be if in fact it was clear that the
8 purpose of the language was to protect American
9 Falls Reservoir District No. 2 from impact of
10 water physically being held in newly constructed
11 junior upstream reservoirs?

12 A. Could you repeat the question?

13 Q. What should the State's position be if
14 the purpose of the language was to protect
15 American Falls Reservoir District No. 2 from the
16 impact of water physically being held in newly
17 constructed junior upstream reservoirs allowing
18 American Falls Reservoir District No. 2 to divert
19 full 1700 cfs of natural flow at all times when
20 available to the 3/30/1921 priority in years when
21 the American Falls storage right filled?

22 MR. ORR: Objection. Calls for
23 speculation.

24 THE WITNESS: In that case the water
25 would -- the full 1700 cfs would be delivered to

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1 AFRD No. 2 under the 1921 priority in years when
2 American Falls filled.

3 Q. (BY MR. ARKOOSH): Okay. And that
4 should be the State's position if in fact that was
5 the correct purpose; is that right?

6 MR. ORR: Same objection. Speculation.

7 THE WITNESS: Yes, I think so.

8 Q. (BY MR. ARKOOSH): Okay. And you're
9 here today to speak on behalf of the State, are
10 you not?

11 A. Yes.

12 Q. Okay. If I understand correctly,
13 Tony, we've at least arrived at two things in your
14 testimony that I want to confirm.

15 First, it's your understanding at
16 least that under the history of this right it has
17 been consistently administered under similar
18 conditions, both before and after 1978?

19 A. Yes.

20 Q. And then we've established that in
21 your view the answer to the question as you stated
22 it on page 4 in bold language of Exhibit 3 would
23 lead to the proper interpretation of the American
24 Falls Reservoir District No. 2 right?

25 A. Well, I don't have any indication that

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1 the way that we currently do it isn't proper.

2 Q. I understand that. But your memo just
3 outright expresses the answer to those two
4 questions, answers how the right should be
5 administered?

6 A. If you can answer those two questions,
7 I think you can answer how the right should be
8 administered.

9 Q. Okay. In my head I have the notion,
10 Tony, that another way to state the difference in
11 our positions regarding the American Falls right
12 is that your view is American Falls doesn't get
13 natural flow over the 850 when the 1921 right is
14 in priority unless the entire system fills.

15 And my view would be they would get
16 natural flow over the 850 just if American Falls
17 Reservoir fills.

18 Is that another way to express our
19 difference?

20 A. No, I don't think that's quite right.

21 Q. Okay.

22 A. AFRD No. 2 is only entitled to 850 cfs
23 under the 1921 right until the American Falls
24 storage right fills. After the American Falls
25 storage right fills, from that point on, they're

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1 entitled to the full 1700 cfs.

2 Q. But the storage used prior to that
3 fill remains a storage debit unless the entire
4 system fills, under your view?

5 A. That's correct.

6 Q. Okay. And under my view, once
7 American Falls Reservoir fills, the storage used
8 prior to the American Falls fill would have been
9 debited as natural flow; is that your
10 understanding?

11 A. That's how I understand your position,
12 yes.

13 Q. Okay. I'm trying to frame the
14 difference in how we're doing this.

15 Tony, if you wanted to change -- now,
16 I will acknowledge you don't perceive that we're
17 changing the quantity amount in the American Falls
18 right. Okay? But if you wanted to change the
19 quantity element of the American Falls right, are
20 there administrative processes providing notice
21 and opportunity for hearing to do that?

22 A. That would be done through the
23 Director of the Department of Water Resources.

24 Q. And a water right holder would get
25 some kind of a notice under some kind of an

1 administrative process that there would be
 2 accomplished or had been accomplished a change in
 3 the quantity amount; is that correct?
 4 A. I don't know the answer to that.
 5 Q. Okay. We got a series of discovery
 6 asking "When did you first complain about the
 7 administration of the right?"
 8 Are you familiar with that discovery
 9 that came to us?
 10 A. When who complained?
 11 Q. When somebody from American Falls
 12 Reservoir District No. 2 complained about the
 13 administration of their right.
 14 A. And what was the question?
 15 Q. Are you familiar that we were
 16 presented discovery with those questions in it?
 17 A. Just recently?
 18 Q. Very recently.
 19 A. I was notified by Garrick Baxter to
 20 have all the documents compiled and sent to him by
 21 July 9th.
 22 Q. What was the significance of those
 23 questions? Do you know?
 24 A. The significance? I don't know.
 25 Q. Okay. Evidently, 2003 is the first

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1 time you were aware of this issue; is that
 2 correct?
 3 A. That's correct.
 4 Q. Okay. Did Ron Carlson indicate to you
 5 that prior to 2003 he had been made aware of the
 6 issue?
 7 A. No, he had not.
 8 Q. When the final accounting --
 9 watermaster's final accounting comes out, does the
 10 Committee of Nine have any input in how those
 11 final accounts are stated?
 12 A. No, they do not.
 13 Q. Never?
 14 A. I don't know that I can say never,
 15 because I only know from my experience in the last
 16 20 or so years that I worked for Water District 1.
 17 Q. Does the Committee of Nine have the
 18 power to have input?
 19 A. No, I don't think they do.
 20 Q. Okay. In my view, Tony, the water
 21 prior to final fill of American Falls Reservoir
 22 would be in whole or in part booked as storage,
 23 and then if American Falls filled it wouldn't be
 24 until the final accounting came out that American
 25 Falls Reservoir District No. 2 would know

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1 ultimately whether it was booked as storage or
 2 natural flow; is that correct?
 3 A. No, that's not correct.
 4 Q. When would American Falls Reservoir
 5 District No. 2 learn it was booked as storage or
 6 natural flow?
 7 A. Almost immediately. When we run the
 8 preliminary accounting during the irrigation
 9 season, it should be a pretty close reflection of
 10 what the final accounting should be.
 11 The purpose of the final accounting is
 12 to only add those small pump diversions that we
 13 don't have time to go around each morning and
 14 collect data for. And we put that diversion data
 15 in at the end of the year.
 16 Also, the USGS data that we use in our
 17 daily accounting to calculate reach gains and
 18 determine the natural flow, they finalize their
 19 numbers at the end of the year. And so they
 20 change their numbers sometimes.
 21 When -- we've always been under the
 22 procedures, we use that USGS finalized data so we
 23 don't have two sets of records: the Water
 24 District 1 stream flow date, and then the USGS
 25 final stream flow data that people would

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1 historically look back and look at. We didn't
 2 want to argue as to why our data was different.
 3 So we've always updated our accounting at the end
 4 of the year when the USGS publishes their final
 5 data.
 6 When you put that final data into our
 7 accounting, plus the small diversions, that
 8 changes -- or can -- has the potential to change
 9 the natural flow that we deliver each day.
 10 So there could be small changes to the
 11 delivery of the storage and natural flow to AFRD
 12 No. 2 or any other users due to those changes in
 13 the final accounting. But the whole purpose is to
 14 get a final accounting of all the diversions in
 15 Water District 1 with the finalized USGS data.
 16 Q. So you wouldn't expect an accounting
 17 to change in a magnitude of let's say 20,000
 18 acre-feet?
 19 A. It's possible. It all depends on the
 20 changes from the preliminary to the final
 21 accounting. You can have a situation where it may
 22 affect one canal over a short period of time by
 23 20,000 acre-feet, where it doesn't affect anyone
 24 else. It depends on where the change occurs and
 25 at what time period.

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1 MR. ARKOOSH: Okay. Let's take a brief
2 break, if we may. Just a minute, please.

3 (Recess.)

4 Q. (BY MR. ARKOOSH): Tony, did you draft
5 the language in the recommendation that's set out
6 in Exhibit 1, which is the Notice of Deposition?

7 A. Yes.

8 Q. When did you draft that? Do you
9 recall?

10 A. I have an e-mail when it was drafted.
11 December 8, 2005. It would be on the
12 second page. It's actually the page previous to
13 that one.

14 Then this is an e-mail after that,
15 May 2nd, which I made a correction to that.

16 MR. ARKOOSH: Let's go off the record a
17 minute and mark these.

18 (Exhibits 4 and 5 marked.)

19 MR. ARKOOSH: Let's go back on the record.

20 Q. So Exhibit 4 on the first page looks
21 like a definition of the dispute, and on the
22 second page is the first draft of the
23 recommendation by you?

24 A. Yes.

25 Q. And then you tell me Exhibit 5 is just

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1 a May 2, 2008 correction to the recommendation?

2 A. Yes.

3 Q. On Exhibit 4, the first couple of
4 paragraphs, you set out the nature of the dispute,
5 frankly better than I did in my question.

6 Is that still your understanding of
7 the nature of the dispute between American Falls
8 Reservoir District No. 2's view and your view of
9 how the rights should be administered?

10 MR. ORR: Just to clarify, Counsel, are we
11 talking about the first paragraph in that e-mail?

12 MR. ARKOOSH: First two paragraphs.

13 MR. ORR: First two.

14 THE WITNESS: (Reviews.)

15 Yes, I still agree with that.

16 Q. (BY MR. ARKOOSH): Now look at
17 Exhibit 4, please. Exhibit 4, the first page is
18 an e-mail on December 7th, 2005, to Ernie Carlsen,
19 C-a-r-l-s-e-n, and a carbon copy to Dave Tuthill.

20 Who is Ernie Carlsen?

21 A. Ernie Carlsen was the water right
22 supervisor for the adjudication in the eastern
23 regional office.

24 Q. And Dave Tuthill at that time was who?

25 A. He was either the administrator of the

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1 adjudication or he was Director at the time. I'm
2 not sure if he had become Director by that time.

3 Q. Okay. The e-mail starts out "People
4 have been arguing."

5 Was it your job to write these
6 recommendations? Is that why you wrote a
7 recommendation?

8 A. No, it was not. The adjudication
9 staff came to me occasionally and said "Here are
10 the water rights we're recommending. What do you
11 think?"

12 Q. So what is the genesis of your
13 involvement with this recommendation?

14 A. I saw the preliminary recommendation
15 made by the adjudication staff, which was the
16 original language of the decree. And that was
17 when I stepped in and said "There's been this
18 ongoing argument that I think can be settled if
19 the language were written more clearly."

20 Q. So it was on your initiative that you
21 thought the language should be changed from the
22 original decree language?

23 A. Yes.

24 Q. How did the watermaster at that time,
25 who I think was Ron Carlson, respond to that

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1 initiative?

2 A. I think he was in favor of it.

3 Q. And the Director at that time, who was
4 Director Dreher, how did he respond?

5 A. I don't know how he responded.

6 Q. Have you had any input from any
7 Director regarding the issue that's set out in the
8 Deposition Exhibit 1, which is the Notice of
9 Deposition?

10 A. Dave Tuthill participated in some of
11 these discussions. Whether or not he was Director
12 at the time, I don't recall.

13 Q. Well, actually on Exhibit 4

14 Mr. Tuthill says, "I like your recommendation, but
15 I'm circulating your suggestion more broadly for
16 additional input."

17 Do you see that?

18 A. Yes.

19 Q. Wasn't the argument at the time
20 between you and Craig Hobdey regarding the issue
21 that you've set out in the first paragraph of
22 Exhibit 4?

23 A. Yes.

24 Q. And it was your perception that the
25 water had always been administered in accordance

1 with your interpretation and Mr. Hobdey's -- well,
 2 as you state it, "Mr. Hobdey believes that on the
 3 day after the reservoir fills to 100 percent, all
 4 storage that had been previously diverted up to
 5 that point in time by AFRD No. 2 changes to
 6 natural flow"; is that correct?

7 A. That's how I understand his
 8 interpretation.

9 Q. And your interpretation was as you set
 10 out in the paragraph and that that had been the
 11 historic administration of this right?

12 MR. ORR: Objection. Ambiguous.

13 THE WITNESS: And can you rephrase that?

14 Q. (BY MR. ARKOOSH): Your interpretation
 15 was as you set out in the first sentence of this
 16 paragraph on Exhibit 4, and that your
 17 interpretation had been the historic
 18 administration of the right?

19 A. I believe that my interpretation was
 20 the historic delivery of the right, yes.

21 Q. Okay. That's better put. Historic
 22 delivery of the right.

23 Have you had any conversations with
 24 the current Director about this right?

25 A. Yes.

1 Q. What is his position?

2 A. I do not know.

3 Q. Does he have a position?

4 A. I don't know.

5 Q. Have you solicited a position?

6 A. I have not.

7 Q. Does the State of Idaho have a
 8 position regarding this?

9 A. I don't know what the State of Idaho's
 10 position is.

11 Q. If you learned you're wrong about the
 12 historic administration of this right, are you
 13 willing to recommend the adoption of the Eagle
 14 decree language?

15 A. Could you repeat the question?

16 Q. If you learned that you were wrong
 17 about the historic administration of this right,
 18 are you willing to adopt the Eagle decree language
 19 as the recommendation?

20 MR. ORR: Objection. Assumes facts not in
 21 evidence.

22 THE WITNESS: I think the water right
 23 should be delivered as decreed, regardless of what
 24 historical delivery has been.

25 Q. (BY MR. ARKOOSH): Well, I'm confused

1 because I thought the purpose of the genesis of
 2 the recommendation was to reflect historic
 3 deliveries?

4 A. That's correct.

5 Q. So if you learned that you were
 6 mistaken regarding what historic deliveries were,
 7 shouldn't the recommendation still reflect
 8 historic administration?

9 A. The reason I answered the way I
 10 answered was because I suppose there could be some
 11 year where it wasn't delivered according to the
 12 decree. That shouldn't have a bearing on the
 13 future. The water in the future should be
 14 delivered according to the decree.

15 Q. Mistakes notwithstanding?

16 A. Okay.

17 Q. Then you would agree with me, then, if
 18 you learned that the historic delivery of the
 19 right is as Mr. Hobdey says it is, rather than you
 20 say it is, are you willing to recommend the Eagle
 21 decree language?

22 MR. ORR: Objection. Foundation.

23 THE WITNESS: No. I recommend it how I
 24 understand the decree to read.

25 Q. (BY MR. ARKOOSH): Okay. Then what is

1 the relationship between historic delivery and
 2 your recommendation, if any?

3 A. It's certainly the way it's been
 4 historically delivered since 1978. It could have
 5 varied slightly prior to 1978.

6 Q. Let me ask the question this way: If
 7 you learned you're mistaken about the historic
 8 delivery of the right, does that have any bearing
 9 on your recommendation?

10 A. It would depend on why it was
 11 delivered the way it was delivered, if it were
 12 delivered differently.

13 Q. If it was delivered differently in
 14 accord with the Eagle decree language and not by
 15 mistake, would that have a bearing on your
 16 recommendation regarding the delivery of the
 17 right?

18 A. Well, that would reaffirm that the
 19 current way is correct.

20 Q. If it was delivered differently than
 21 you want it delivered would confirm that your
 22 recommendation was correct?

23 A. No, it wouldn't.

24 Q. It would be just the opposite,
 25 wouldn't it? If it's delivered differently

1 historically than you want it delivered, it would
2 not affirm your recommendation, it would be contra
3 to your recommendation?

4 A. Yes, it would be.

5 Q. Okay. What effect would that have
6 upon your recommendation?

7 A. I don't know. I would have to look at
8 the reason why it was delivered the way it was
9 delivered.

10 Q. If you learned that the purpose was to
11 protect the priority of the American Falls right,
12 the issue as you state in Exhibit 3, would that
13 have a bearing upon your recommendation?

14 A. Well, I think it always protects the
15 American Falls right. The question is is whether
16 or not it protects the junior rights also in
17 addition to the American Falls right.

18 Q. Well, if you learn that the purpose of
19 the language is to protect American Falls No. 2
20 from the impact of water physically being held in
21 newly constructed junior upstream reservoirs
22 allowing American Falls No. 2 to divert the full
23 1700 cfs of natural flow at all times when
24 available to the March 30, 1921 priority in years
25 when American Falls storage right filled, would

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1 that have an effect upon your recommendation?

2 A. Could you ask the question again?

3 Q. If you learned the purpose was as
4 stated in the second sentence of Exhibit 3,
5 page 4, rather than the first sentence, would that
6 have an effect on your recommendation?

7 A. Yes, it would.

8 Q. Tony, I can't tell from your answers
9 whether this recommendation is coming from the
10 Director of the Department of Water Resources, the
11 Department of Water Resources, the watermaster,
12 Water District 1, the State of Idaho, or Tony
13 Olenichak.

14 Can you elaborate on that for me.

15 A. Yes. When the Department's
16 recommendation, the preliminary recommendation
17 came out, I felt that this argument between the
18 two parties was going to continue. I would like
19 to have that argument settled.

20 So my proposal to the adjudication
21 staff was this drafted new language to include, in
22 place of the old decree, existing language. And
23 they agreed to that.

24 If they had -- if they had decided not
25 to use that, then I would have been fine with the

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1 old language, and we would continue administering
2 it the way we are currently administering it.

3 Q. But that only solves half of the
4 problem, doesn't it, because if you have the old
5 language but you continue to administer the way
6 you administer, then there's still a discrepancy
7 between you and how Craig Hobdey interprets the
8 decree; is that correct?

9 A. That's correct.

10 Q. Okay. So the real issue is not what
11 language we have, except that your language
12 excludes his interpretation, the real issue is
13 when American Falls Reservoir itself fills up, is
14 the storage hole filled for American Falls
15 Reservoir District No. 2; is that a fair
16 statement?

17 MR. ORR: Objection. Ambiguous.

18 THE WITNESS: Could you ask it again,
19 please?

20 Q. (BY MR. ARKOOSH): The real issue is,
21 as you stated in paragraph 1 of Exhibit 4, the
22 real issue is whether all storage that had been
23 previously diverted up to the time American Falls
24 Reservoir fills changes to natural flow?

25 A. Oh, okay. I'm sorry... I was looking

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1 for the document.

2 Could you ask me the question again?

3 Q. The real issue is whether prior to the
4 time American Falls Reservoir fills up, all
5 diversions are changed to natural flow? That's
6 the real issue here, isn't it?

7 A. Yes. The word "prior" was not used in
8 the original language.

9 Q. Okay. Let's look at the original
10 language, page 2 of Exhibit 1. We're going to go
11 down about six lines and start with the word
12 "except."

13 Do you see that?

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

25 Do you see that language?

1 A. Yes.

2 Q. Okay. So is this recommendation the
3 recommendation of the State, the Department of
4 Water Resources, you personally, the Adjudication
5 Bureau of Department? Whose recommendation is
6 this?

7 MR. ORR: Objection. Ambiguous.

8 THE WITNESS: I drafted the original
9 language. The recommendation in the Director's
10 report is the Director's recommendation.

11 Q. (BY MR. ARKOOSH): Okay. But you do
12 not know the Director's current position on this
13 language?

14 A. That's what was recommended in the
15 Director's report.

16 Q. But my question was whether you know
17 what the current Director's position is regarding
18 this language.

19 A. I do not.

20 Q. Okay. Prior to the time Palisades
21 Reservoir was built and American Falls Reservoir
22 District No. 2 used storage, say up to mid-June,
23 and then American Falls Reservoir filled up, who
24 had the benefit of that fill?

25 A. And this was prior to when the junior

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1 upstream reservoirs were constructed?

2 Q. Yes.

3 A. The American Falls spaceholders.

4 Q. And that's different than your current
5 interpretation of how the right should be
6 administered; isn't that correct?

7 A. No. The -- this right only speaks to
8 the natural-flow delivery. It doesn't speak to
9 the fill of the storage space.

10 Q. Let's look at Exhibit 1 again. Let's
11 continue on that language I read. Start with the
12 number "...1700 cubic feet per second during the
13 year prior to the initial storage draft on
14 American Falls Reservoir after the reservoir
15 finally fills in that year shall be considered as
16 natural flow under license 15134."

17 So any debit to storage that was
18 within that 1700 cubic feet after the final fill
19 of the reservoir would have been natural flow;
20 right?

21 A. No.

22 Q. Okay. Your view is that the proper
23 interpretation of the American Falls Reservoir
24 District No. 2 decree is that, as you state in
25 Exhibit 3, page 4, sentence one in the bolded

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1 paragraph, the purpose of the language was to
2 protect the newly constructed upstream reservoirs
3 from American Falls No. 2 diverting natural flow
4 prior to May 1 and prior to American Falls
5 Reservoir filling? That's your view of the
6 purpose of the language; correct?

7 A. In my research that was the only thing
8 that could explain why it was written the way it
9 was written.

10 MR. ARKOOSH: Okay.

11 (Exhibit 6 marked.)

12 Q. (BY MR. ARKOOSH): Do you recognize
13 Exhibit 6, Tony?

14 A. Yes.

15 Q. What is Exhibit 6?

16 A. It's a contract with the Palisades
17 Water Users, Incorporated.

18 Q. Between BOR and Palisades Water Users,
19 Incorporated; is that right?

20 A. Yes.

21 Q. And it concerns the storage capacity
22 of Palisades Reservoir?

23 A. Well, I don't know. I've never read
24 the full contract.

25 Q. Well, I mean it says right on the

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1 title page "Concerning Storage Capacity in
2 Palisades Reservoir."

3 A. Yes.

4 Q. So this contract was entered as a
5 consequence of the development of Palisades
6 Reservoir?

7 A. Yes.

8 Q. And there was a whole series of
9 contracts for both upstream and downstream users
10 that were drafted at that time, approximately
11 1960, when Palisades was constructed; is that
12 right?

13 MR. ORR: Objection. Foundation.

14 THE WITNESS: I think everyone that has --
15 is a spaceholder in Palisades Reservoir has a
16 contract with the Bureau of Reclamation.

17 Q. (BY MR. ARKOOSH): Okay. When was
18 Palisades built? Do you know?

19 A. I think 1957 was the first year it
20 started accruing water.

21 Q. Okay. Let's look on page 30. Look on
22 page 31, over to page 32.

23 Do you see the American Falls
24 Reservoir District No. 2 water right language as
25 it's set out in the Eagle decree?

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1 A. I don't know if it's identical, but it
 2 looks very similar, yes.
 3 Q. Okay. What was the purpose of putting
 4 this language in this contract? Do you know?
 5 A. I don't know.
 6 Q. Does this language appear in all the
 7 Palisades contracts?
 8 A. I don't know.
 9 Q. Look on page 30. And it sets out the
 10 purpose of it was the "Priority of Certain
 11 Existing and Future Water Rights."
 12 Do you see that?
 13 A. I see a section labeled that, yes.
 14 Q. Okay. What does that suggest to you
 15 regarding the purpose of putting this language in
 16 the contract, if anything?
 17 A. I don't know.
 18 Q. Well, let's look at paragraph (b).
 19 Let's start here, let's look at paragraph (a).
 20 It talks about existing Island Park
 21 rights, is that correct, license No. R-590 and
 22 other licenses?
 23 A. Yes, it talks about license R-590 and
 24 R-686.
 25 Q. So paragraph (a) talks about existing

1 rights; correct?
 2 A. Yes.
 3 Q. Paragraph (b) talks about an existing
 4 right; isn't that correct?
 5 A. Yes.
 6 Q. Paragraph (c) talks about possible
 7 future rights; isn't that correct?
 8 A. Yes.
 9 Q. So paragraph (b) provides that, in
 10 part, "...United States may contract with American
 11 Falls Reservoir District No. 2 to recognize the
 12 right of that district to have water license
 13 No. 15134 exercised substantially as follows."
 14 And then it repeats essentially what is the
 15 American Falls right. And I'm not asking you to
 16 read it through, but I'll represent to you the
 17 best of my understanding it's precisely what's in
 18 the Eagle decree.
 19 Okay? Does it read that way?
 20 A. Yes.
 21 Q. Okay. So this upstream water user has
 22 agreed that the American Falls Reservoir District
 23 No. 2 right be exercised substantially as follows,
 24 and then it repeats the Eagle decree language;
 25 correct?

1 A. Correct.
 2 Q. And then at the end of that it says
 3 that "The company agrees that it will not oppose
 4 adjudication of the natural-flow right of the
 5 waters of the Snake River for the benefit of
 6 American Falls Reservoir District No. 2,
 7 consistent with the foregoing criteria."
 8 Do you see that language?
 9 A. Yes.
 10 MR. ORR: Objection to a
 11 mischaracterization of prior testimony.
 12 Q. (BY MR. ARKOOSH): The question was,
 13 do you see that language?
 14 A. Yes.
 15 Q. The answer is --
 16 A. I see that language.
 17 Q. Okay. So it would seem in all
 18 fairness, whatever that language means, the
 19 upstream junior reservoir users of the Palisades
 20 Reservoir, at least this one, has agreed that it
 21 will support this language in the adjudication of
 22 the American Falls Reservoir District No. 2 right
 23 and the administration would be in accordance with
 24 that language; is that correct?
 25 A. That is correct.

1 (Exhibit 7 marked.)
 2 Q. (BY MR. ARKOOSH): Tony, I'm going to
 3 show you what's marked as Exhibit 7, and I'm just
 4 going to tell you that that's the stipulation
 5 leading to the Eagle decree. The second document
 6 is the Findings of Fact Conclusions of Law in the
 7 Eagle decree. And the third document is the
 8 Supplemental Decree.
 9 Do you see that?
 10 A. Yes.
 11 Q. So this is approximately 1968, Tony,
 12 I'll represent that to you after the contract we
 13 looked at that was Exhibit 6. And let's go to
 14 page 6 in the second document.
 15 MR. ORR: Clarification. That's Findings
 16 of Fact and Conclusions of Law?
 17 MR. ARKOOSH: Yes.
 18 Q. Did you find it? That's it, Tony.
 19 A. Yes.
 20 Q. So the last paragraph on page 6 says,
 21 "It will greatly aid and assist all responsible
 22 State officials, watermasters, and other officials
 23 in handling, managing, and distributing the water
 24 of the Snake River and its tributaries above
 25 Milner Dam to have those rights enumerated and

1 listed in one decree as is intended to be
2 accomplished by this action."
3 Do you see that language?
4 A. Yes.
5 Q. So that's a fair paraphrase of that to
6 say what the Court was trying to do was gather
7 everything in the bottom end of the river together
8 to aid the watermaster in administration of the
9 rights; is that right?
10 A. Well, I don't know the answer for
11 certain.
12 Q. Well, at least the Court thought it
13 would greatly aid and assist the watermaster; is
14 that right?
15 A. Well, that's what it says.
16 Q. Okay. That's the purpose of decrees,
17 isn't it?
18 A. Yes.
19 Q. Let's look at the next page,
20 paragraph 13. And that paragraph says that "The
21 contracts entered between various of the parties
22 Plaintiff and the United States of America, Bureau
23 of Reclamation, in connection with the Palisades
24 and other projects, as amended and modified, were
25 intended to be, and should be, binding on all

1 persons claiming rights to the use of the water of
2 the Snake Rivers and its tributaries above Milner
3 Dam; and although the provisions of said contract
4 provide the basis of a common plan for the
5 administration of the waters of the Snake River,
6 certain paragraphs of said contracts common to all
7 types of contracts with the various party
8 Plaintiff, contain the major areas of agreement."
9 Do you see that language?
10 A. Yes.
11 Q. And so it recites that in all of the
12 contracts with BOR on the Snake River, there are
13 certain common clauses.
14 Do you see that?
15 A. No, I don't see the word "common
16 clauses."
17 Q. It says that "...although the
18 provisions of said contract provide the basis of a
19 common plan for the administration of the waters
20 of the Snake River, certain paragraphs of said
21 contract, common to all types of contracts with
22 the various parties Plaintiff."
23 Do you see that?
24 A. Yes.
25 Q. Okay. So there's some common

1 provisions in these contracts; correct?
2 A. I don't know without reviewing the
3 actual contracts. That is what this says.
4 Q. Okay. And it goes down to the next
5 paragraph and it talks about Exhibits A through D.
6 Do you see that?
7 And it talks about a typical
8 paragraph. And the very bottom of that paragraph,
9 "A typical paragraph relating to priority of
10 certain existing and future water rights is
11 thereto attached as Exhibit D."
12 Do you see that?
13 A. Yes.
14 Q. And if you go in the back and look,
15 would you find Exhibit D back there.
16 A. I'm having trouble finding it.
17 Q. Hand me Exhibit 7, please, Tony.
18 Do you see Exhibit D to the Findings
19 of Fact and Conclusions of Law?
20 A. Yes.
21 Q. And isn't that the same paragraph that
22 we read in the contract that's been marked as
23 Exhibit 6?
24 A. Yes, it looks similar.
25 Q. And the purpose of that Exhibit D is

1 priority of certain existing and future water
2 rights?
3 A. I've lost my place where we went from.
4 Oh, yes.
5 Q. Okay. I mean two things you said.
6 You said that there were complaints and it caused
7 you to do research.
8 In your research do you know why
9 Exhibit D was developed and put into these
10 contracts?
11 A. I don't know.
12 Q. What bearing would it have upon your
13 recommendation, or I should state the
14 recommendation as you've developed for the State
15 of Idaho or for the Department of Water Resources,
16 if the purpose of Exhibit D was to promulgate
17 historic administration of the American Falls
18 Reservoir District No. 2 water right?
19 MR. ORR: Objection. Ambiguous.
20 THE WITNESS: What was the question?
21 Q. (BY MR. ARKOOSH): What effect would
22 it have upon the recommendation that's at issue
23 here if the purpose of Exhibit D, which carries
24 the Eagle decree language, was to perpetuate the
25 historic administration or delivery of the water

1 right to American Falls Reservoir District No. 2?

2 MR. ORR: Objection. Ambiguous.

3 Q. (BY MR. ARKOOSH): Do you not
4 understand the question? because I want you to
5 understand what I'm asking you.

6 A. Well, I think right now in the present
7 time we need to administer it according to the
8 language of the decree. And whether or not that
9 was done in the past shouldn't have any bearing on
10 how we should do that in the future.

11 Q. But what if the intent, then, of
12 Exhibit D was to perpetuate or carry on how it was
13 done in the past, would that have any effect on
14 your interpretation as you set out in Exhibit 3?

15 A. No, not necessarily, because I think
16 we are doing it similar now to how it was done in
17 the past.

18 Q. What if you're wrong?

19 A. Well, I would have to understand why
20 it was wrong.

21 Q. Okay. But accept the fact that you
22 can be wrong. We as humans all have to accept
23 that.

24 What if you're wrong, Tony? What if
25 Mr. Hobdey is right about how it was administered?

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1 A. Well, if Mr. Hobdey was right, I
2 suppose AFRD No. 2 is going to present evidence to
3 the Court to show that they are right, and it will
4 ultimately be up to the Court to decide that.

5 Q. But what if you're convinced you're
6 wrong, would you ask the State to change its
7 recommendation?

8 A. Yes.

9 MR. ARKOOSH: Okay. Let's go off the
10 record.

11 (Recess.)

12 (Exhibit 8 marked.)

13 Q. (BY MR. ARKOOSH): Have you had a
14 chance to look at Exhibit 8?

15 A. Yes.

16 Q. And Exhibit 8 is a letter of August 4,
17 1952, from the acting regional director of the
18 Department of Interior, BOR, to Branch Bird,
19 attorney.

20 Do you know who Branch Bird was?

21 A. I do not.

22 Q. I'll represent to you at this time he
23 represented American Falls Reservoir District
24 No. 2.

25 And the middle paragraph of that

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1 letter says that "The intention is by this
2 language to formalize by contract the Secretary's
3 order of 1936 as that order has in fact been
4 administered. So formalized, the way will be
5 cleared to have the right covered by a decree."

6 Do you see that language?

7 A. Yes.

8 Q. And are you familiar with the
9 secretary's order of 1936?

10 A. I think I've read it.

11 Q. Okay. And then the language that's
12 attached to that letter is essentially Exhibit D,
13 which is the priority of prior existing rights;
14 correct?

15 A. Yes.

16 Q. And it's the American Falls Eagle
17 decree language; is that right?

18 A. Yes.

19 Q. So in contemplation of the
20 construction of Palisades Reservoir, it was
21 contemplated at least by the Department of
22 Interior in crafting this language that the right
23 would be administered as it has in fact been
24 administered; is that correct?

25 A. No, it doesn't say that.

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1 Q. Okay. The middle paragraph says --

2 A. Uh-huh.

3 Q. -- "The intention is by this language
4 to formalize by contract the Secretary's order of
5 1936 as that order has in fact been administered";
6 correct?

7 A. Yes.

8 Q. Okay. So the purpose of the Eagle
9 decree language, the language developed in 1952,
10 was to perpetuate how the American Falls right had
11 been administered historically; correct?

12 MR. ORR: Objection. Compound.

13 THE WITNESS: Can you ask the question
14 again?

15 Q. (BY MR. ARKOOSH): The purpose of the
16 Eagle decree language as developed in 1952 was to
17 perpetuate how the American Falls right had in
18 fact been administered?

19 A. This language here in the decree?

20 Q. Yes.

21 A. Yes.

22 Q. Okay. In 1952 there was no Palisades;
23 correct?

24 A. Correct.

25 Q. And you had indicated prior to the

1 construction of Palisades that if American Falls
2 Reservoir filled up, it would have filled up to
3 the benefit of American Falls Reservoir District
4 No. 2 and other American Falls placeholders;
5 right?

6 A. Correct.

7 Q. Okay. Does that influence your
8 opinion regarding the purpose of this language and
9 how it was interpreted?

10 MR. ORR: Objection. Ambiguous.

11 THE WITNESS: Can you ask the question
12 again?

13 Q. (BY MR. ARKOOSH): Does that influence
14 your opinion regarding the purpose of the Eagle
15 decree language and how it was interpreted?

16 A. No.

17 Q. Why not? Let me rephrase the
18 question. It might be helpful.

19 Prior to 1952, there could be no
20 administration of the American Falls Reservoir
21 District No. 2 right that would benefit newly
22 constructed upstream reservoirs because there were
23 no newly constructed upstream reservoirs; correct?

24 A. That's correct.

25 Q. The language of the Eagle decree was

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1 crafted to continue an historic practice that
2 existed at a time when there was no Palisades
3 Reservoir?

4 A. I'm sorry. I missed the question.

5 Q. The purpose of the Eagle decree
6 language was crafted to continue practices that
7 were in place when there was no Palisades
8 Reservoir?

9 A. I'm not sure that that was the
10 intention. I know that that's what this sentence
11 says in this letter.

12 Q. But you disagree with what the purpose
13 of the language was, then?

14 A. No. I agree with the language. And I
15 think it was administered as the way it's written
16 prior -- or up until 1952 in the same manner.

17 Q. That you are administering it today?

18 A. Yes.

19 Q. Okay. So then we can agree to this,
20 that the language was crafted in 1952 or
21 thereabouts for the purpose of continuing
22 administration of the secretary's order of 1936 as
23 that order has in fact been administered; correct?

24 A. That's what this says.

25 Q. Do we agree that that was the purpose

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1 or do you not know or you disagree?

2 A. No, I -- well, that could have been
3 one of the purposes. I mean obviously it states
4 here that that's --

5 Q. Do you know of any other purpose? And
6 if so, can you present me with some indication of
7 why you believe there was another purpose?

8 A. Well, I'm sure there were many
9 purposes for the Eagle decree. It wasn't just for
10 the American Falls Reservoir.

11 Q. I'm talking about Exhibit D, this
12 language that concerned American Falls Reservoir
13 District No. 2.

14 A. Oh, I see. In Exhibit D.

15 And what was the question?

16 Q. Is there another purpose, then, to
17 continue administration of the 1936 order as it
18 has been historically administered that you're
19 aware of?

20 A. No.

21 Q. Okay. So you can agree with me that
22 so far as you know, the only purpose of this
23 language was to continue administration of the
24 1936 order as it had historically been
25 administered?

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1 A. To formalize it in a decree, yes.

2 Q. Okay. And the historic administration
3 prior to 1952 was administration prior to the time
4 there was ever a Palisades Reservoir?

5 A. The way I understand the 1936 order
6 was that there were certain restrictions on the
7 AFRD No. 2 right that when the system filled and
8 spilled that all water that they diverted prior to
9 that time was considered as natural flow. After
10 Palisades was constructed, we still adhered to
11 that policy.

12 Q. Was there a Palisades Reservoir in
13 1952?

14 A. No.

15 Q. Okay. So the administration in 1952
16 was prior to the construction of the Palisades
17 Reservoir?

18 A. Prior to the construction of the
19 Palisades Reservoir. But the planning for the
20 construction of the Palisades Reservoir I think
21 went back all the way to 1939.

22 Q. Okay. So when the water was
23 administered prior to 1952, it was administered in
24 the absence of a Palisades Reservoir?

25 A. Yes.

1 Q. Okay. Now, look at the language that
2 starts on the second page of Exhibit 8, which is
3 the Exhibit D language, which is ultimately what
4 was adopted in 1968 by the Court.

5 MR. ORR: Objection. Assumes facts not in
6 evidence.

7 Q. (BY MR. ARKOOSH): Do you see that
8 language?

9 A. 34(b)?

10 Q. Yeah.

11 A. Yes.

12 Q. And in the middle of it it says,
13 "...except that in any year in which American
14 Falls Reservoir fills to capacity."

15 Do you see that language?

16 A. Yes.

17 Q. It's not talking about American Falls
18 Reservoir and the system, nor is it talking about
19 American Falls Reservoir and Palisades Reservoir.

20 It's limited to any year in which
21 American Falls Reservoir fills; is that correct?

22 A. For the time period after May 1st.

23 Q. Well, notwithstanding that discussion,
24 there's no discussion of system fill in this
25 right, is there, only American Falls Reservoir

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1 fill?

2 A. That's correct.

3 Q. Okay. But you, in your mind, have
4 transmuted that to mean that the entire system
5 must fill and spill before American Falls' storage
6 account is zeroed out?

7 A. No. This refers to the natural-flow
8 delivery, the 1700 cfs.

9 Q. Right.

10 A. In the current administration it's
11 when the American Falls Reservoir storage right
12 fills. Regardless of the physical fill in
13 American Falls, regardless of the system fill,
14 beginning on the date when American Falls
15 Reservoir fills, they're entitled to the 1700 cfs.

16 Q. So you and I at least concur that the
17 relevant fill is the American Falls right, not the
18 system?

19 A. That's correct, in the delivery of the
20 1700 cfs.

21 Q. Okay. So when the American Falls
22 right filled prior to 1952, what happened to the
23 storage debits of American Falls Reservoir
24 District No. 2 that accrued prior to the date of
25 fill?

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1 A. They were cancelled.

2 Q. Is that done today?

3 A. Only -- well, when the system
4 completely fills and we spill excess, all storage
5 used up until that point in time is cancelled.
6 Not just with AFRD No. 2, but with everyone.

7 Q. If --

8 A. There is a circumstance -- and in
9 fact, it happened this year -- where we didn't
10 spill water past Milner. But when we reached the
11 day of maximum system contents, we found that the
12 empty space in the reservoir system was less than
13 the amount of storage that had been used up until
14 that point. So we were able to cancel off the
15 majority of storage used up until that point in
16 time.

17 Q. So without adding the notion of system
18 fill, when American Falls Reservoir fills today,
19 its right fills, not the reservoir, but American
20 Falls Reservoir right fills today, but the entire
21 system does not fill, is the storage debit of
22 American Falls Reservoir District No. 2 accrued
23 prior to that date of right filling cancelled?

24 A. It is not.

25 Q. Was it cancelled prior to 1952?

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1 A. Yes.

2 Q. If the purpose was to continue the
3 administration as it was administered prior to
4 1952 with this language, the Eagle decree
5 language, why are we not doing that today?

6 MR. ORR: Objection. Assumes facts not in
7 evidence.

8 THE WITNESS: This again refers -- this
9 language refers to the natural-flow right. It
10 does not refer to the procedure of cancelling
11 storage.

12 Q. (BY MR. ARKOOSH): Well, in terms of
13 historic administration, in fact that's what was
14 done, was it not?

15 A. And it's still being done today.

16 Q. Only when the entire system fills or
17 about fills, not when American Falls' rights fill?

18 A. Well, prior to the construction of the
19 upstream reservoir, when American Falls filled,
20 the system was filled. And so by adding the
21 reservoirs, we still wait until the system fills
22 today. It takes a little bit more water to fill
23 the system, but we still adhere to the same policy
24 of cancelling storage when the system fills.

25 Q. So it's your interpretation of Eagle

1 decree language that the intent is only if there
2 is system fill do we cancel that storage debt, not
3 just when the American Falls Reservoir right
4 fills?

5 A. No, I don't think this language talks
6 about the process of cancelling storage. I think
7 this language was only to formalize when AFRD
8 No. 2 received natural flow.

9 Q. But isn't that sort of sophistic
10 because all of the water taken prior to the last
11 fill of the American Falls right, notwithstanding
12 how it was debited prior to that last fill, if it
13 was debited to storage, for instance, became
14 natural flow under the Eagle decree language;
15 isn't that right?

16 A. No. No. I don't agree with that
17 description that's used by many people.

18 When the water was diverted, according
19 to this language in the delivery of natural flow,
20 if AFRD No. 2, or whatever other diversion that
21 exceeded their right, diverted storage in the
22 account, sometime after that if the system fills,
23 there's no longer a need to debit that storage
24 from the storage allocation. And so that
25 storage -- all prior storage that was used when...

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1 the systems fill is cancelled.

2 And that's the same process we use
3 today. It has nothing to do with this language
4 here as to what are the conditions of when the
5 natural flow is delivered.

6 Q. So today we do it when the system
7 fills, historically it was done when American
8 Falls Reservoir right filled?

9 A. Well, historically before those junior
10 upstream reservoirs were constructed, it was one
11 and the same. When American Falls filled prior to
12 the construction of those reservoirs, the system
13 was full.

14 Q. But subsequent to the construction of
15 Palisades, it was when American Falls' right
16 filled when that prior use was considered natural
17 flow, not the whole system?

18 A. When American Falls filled, it was the
19 whole system, though, at that time.

20 Q. Subsequent to the construction of
21 Palisades, credits were given for natural flow
22 prior to the final fill if just American Falls
23 Reservoir right filled, not the entire system?

24 A. I -- I haven't seen a case where the
25 American Falls right was full and the system

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1 wasn't declared full.

2 Q. 2008?

3 A. Prior to the construction of the
4 upstream reservoirs.

5 Q. Well, I was talking about after
6 construction of Palisades.

7 A. Then what was your question?

8 Q. Water taken prior to final fill of the
9 American Falls Reservoir right without full system
10 fill was considered natural flow?

11 A. No.

12 Q. Okay. So we can agree that prior to
13 1952 when American Falls Reservoir filled, water
14 taken prior to that fill was considered natural
15 flow?

16 A. I would say that the storage was
17 cancelled.

18 Q. Okay. I thought that's not how you
19 wanted to say it, but that's how I would say too.
20 The storage was cancelled.

21 Okay?

22 A. Uh-huh.

23 Q. Can we agree about that?

24 A. Yes.

25 Q. And what's changed since the...

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1 construction of Palisades in your view is in order
2 for that event to occur, the entire system needs
3 to fill?

4 MR. ORR: Objection. Mischaracterizes
5 testimony.

6 THE WITNESS: Prior to the construction of
7 the upstream reservoirs, when American Falls
8 filled physically, generally we were spilling
9 water past Milner. So the whole system was full
10 and the storage was cancelled.

11 After the construction of Palisades
12 Reservoir, the American Falls storage right may
13 fill, but physically, since the system's not full,
14 we may not be spilling water past Milner and may
15 not be able to cancel out all the storage that was
16 previously used.

17 Q. (BY MR. ARKOOSH): Do you know who
18 Kenneth Dunn is?

19 A. I believe he's a former Director of
20 the Department of Water Resources.

21 Q. Do you know who Steve Allred is?

22 A. I think he was also a Director of the
23 Department of Water Resources.

24 (Exhibit 9 marked.)

25 THE WITNESS: (Reviews.)

1 Q. (BY MR. ARKOOSH): Have you read
2 Exhibit 9?
3 A. Yes.
4 Q. Have you seen that before?
5 A. No.
6 Q. Does Ken Dunn agree with you?
7 A. Well, there's one phrase in here that
8 I'm not sure what he's referring to.
9 Q. Which phrase is that?
10 A. On the last paragraph, first sentence,
11 he says, "American Falls Reservoir should not be
12 allowed to refill at the expense of junior users,
13 except for storage right provided under license
14 No. 15134."
15 Q. Is that the American Falls No. 2
16 right?
17 A. Yes.
18 Q. What's your confusion over that?
19 A. Well, I would like his explanation as
20 to why they have a right to a refill.
21 Q. Well, this is dated May 5, 1970; is
22 that correct?
23 A. Yes.
24 Q. What's changed since May 5 of 1970?
25 Anything?

1 MR. ORR: Objection. Ambiguous.
2 THE WITNESS: Yes. There are lots of
3 things that have changed since 1970.
4 Q. (BY MR. ARKOOSH): Okay. What's
5 changed relevant to this issue?
6 A. No, as far as this issue, I don't
7 think anything's changed.
8 Q. Okay. So at least in 1970, the
9 position of the Department was that storage right
10 provided under license No. 15134 could refill at
11 the expense of junior users; correct?
12 MR. ORR: Objection. Assumes fact not in
13 evidence, leading.
14 Q. (BY MR. ARKOOSH): If you know.
15 A. I do not know.
16 Q. Okay. Are there, to your knowledge,
17 facts we have not discussed in this deposition
18 that are relevant to this issue?
19 A. Well, we haven't gone through the
20 historical watermaster records, the Black Books,
21 each year. And I'm not sure we need to do that.
22 Q. Have you done that?
23 A. I've looked through the books from
24 1957 forward.
25 Q. What did you learn from 1957 forward?

1 A. It's probably best summarized in the
2 memo that I provided previously.
3 Q. The 2009 memo?
4 A. There were two memos.
5 Q. One was 2009 and one was 2010. The
6 2010 memo has been marked as Exhibit 4.
7 Let's mark this one.
8 (Exhibit 10 marked.)
9 Q. (BY MR. ARKOOSH): Is Exhibit 10 the
10 memo where you go through each year since 1957?
11 A. Yes.
12 Q. And can you summarize what you learned
13 by doing that?
14 A. Well, there were some small
15 differences in how the watermaster delivered the
16 natural flow to AFRD No. 2, but essentially it was
17 the same -- same delivery.
18 The major exception that I found was
19 that Henry Eagle, the watermaster at the time,
20 allowed for second refill of the American Falls
21 storage spaceholders storage usage and applied it
22 to all American Falls spaceholders, not just
23 American Falls Reservoir District No. 2.
24 Q. Was that consistent from '57 to '77?
25 A. No. When Art Larson became

1 watermaster after Henry Eagle, I couldn't find any
2 evidence that he did any accounting for a refill
3 of the storage rights.
4 Q. What year was that?
5 A. I don't know the exact date. I think
6 it was sometime around 1969, 1970.
7 Q. Okay. If you require enough water to
8 fill the entire system in order for the American
9 Falls Reservoir District No. 2 right to refill,
10 rather than merely enough water to fill the
11 American Falls Reservoir, does that alter the
12 priority of the American Falls Reservoir District
13 No. 2 right as a consequence of the construction
14 of Palisades Reservoir?
15 A. You'll have to repeat that.
16 Q. If you require the refill of the
17 entire system, including Palisades, in order to
18 refill the American Falls Reservoir District No. 2
19 right, rather than merely the refill of the
20 American Falls right, does that alter the priority
21 of the American Falls Reservoir District No. 2
22 right?
23 A. When you say "the American Falls
24 Reservoir District No. 2 right," I'm assuming
25 you're talking about the natural-flow right. As

1 far as their storage right -- well, while there's
2 no change to the delivery of the natural-flow
3 right. But as far as AFRD No. 2's storage right,
4 they're treated just like everybody else, all the
5 other spaceholders' storage rights.

6 If there's more water in the system
7 physically than we have on paper, then the
8 difference between those two totals allows us to
9 cancel storage usage.

10 Q. But prior to the construction of
11 Palisades, that occurred with just the fill of
12 American Falls Reservoir?

13 A. Generally, I think that's true, yes.
14 The system -- when American Falls filled, the
15 system generally filled.

16 Q. After the construction of Palisades,
17 more water's required in order to refill the
18 American Falls Reservoir District No. 2 rights?

19 A. More water would be required to cancel
20 out the storage of all spaceholders.

21 Q. Well, the American Falls Reservoir
22 District No. 2 storage right is also a 1921 right,
23 is it not?

24 A. Yes.

25 Q. And it was refilled every time Tony.

1 American Falls Reservoir right filled on paper
2 prior to the construction of Palisades?

3 A. The storage was cancelled, yes.

4 Q. The way you want to administer water,
5 that won't happen; correct?

6 A. Well, just as it did prior to the
7 construction of those reservoirs, when the system
8 fills, then we're able to cancel --

9 Q. Wasn't my question. My question was
10 just on the fill of American Falls Reservoir.

11 It won't happen the way you administer
12 water?

13 MR. ORR: Objection. Ambiguous.

14 THE WITNESS: With the construction of the
15 junior's reservoir -- junior reservoirs, it's less
16 likely that we'll refill the system and spill
17 water.

18 MR. ARKOOSH: Let's take a small break
19 here.

20 (Recess.)

21 Q. (BY MR. ARKOOSH): If the right's
22 interpreted as you want it interpreted, the
23 construction of Palisades Reservoir lessens the
24 chances of American Falls Reservoir District No. 2
25 refilling its right; is that correct?

1 A. If AFRD No. 2's storage is cancelled
2 only when the system fills and spills, after the
3 construction of the additional storage reservoirs,
4 it does lessen the likelihood that the storage
5 will be cancelled.

6 Q. Do you recognize that American Falls
7 Reservoir District No. 2 was to be left
8 indifferent to the construction of the Palisades
9 Reservoir?

10 MR. ORR: Objection. Calls for
11 speculation.

12 THE WITNESS: I haven't seen any historical
13 administration of the right that singled out AFRD
14 No. 2 over other spaceholders.

15 Q. (BY MR. ARKOOSH): Well, this right is
16 uniquely written, is it not?

17 A. Well, it describes how AFRD No. 2's
18 natural flow should be delivered. There are
19 several unique water rights in the decrees.

20 Q. This right's very uniquely written, is
21 it not?

22 A. It's one of the longest sentences I've
23 ever read in a decree.

24 Q. You know, we're just dancing here,

25 Tony.

1 I mean you don't take the position
2 that this right is not very uniquely written? Or
3 do you take that position? Either way. Do you
4 take the position this is not a uniquely written
5 right?

6 A. No, it's certainly different than most
7 rights.

8 Q. Okay. But you do not perceive the
9 efforts that went into the creation of this right
10 in order to protect this right from the
11 construction of Palisades Reservoir?

12 A. I haven't been able to determine that.

13 Q. Okay. You don't disagree with that,
14 however, you just don't know?

15 A. I don't know.

16 MR. ARKOOSH: Okay. I'm going to hand you
17 all of the documents, including the PowerPoint
18 that you brought, and we'll mark them as
19 Exhibit 11. And then I'm going to go through
20 these. I'm going to recess my portion of this
21 deposition, so if something really occurs that we
22 really need to visit about prior to the summary
23 judgment, I'll reconvene the deposition probably
24 by telephone.

25 THE WITNESS: Okay. These were the e-mails

1 from Michael Holliday as well.
 2 MR. ARKOOSH: These are part of it also.
 3 Okay.
 4 Can we mark this as Exhibit 11.
 5 Let's go off the record.
 6 (Recess.)
 7 (Exhibit 11 marked.)
 8 Q. (BY MR. ARKOOSH): I'm going to hand
 9 you what's been marked as Exhibit 11.
 10 Are those all documents kept in the
 11 regular course of business at the Department?
 12 A. Yes.
 13 Q. And were produced pursuant to the
 14 Notice of Deposition, Exhibit 1?
 15 A. Yes.
 16 MR. ARKOOSH: Okay. I'll represent to you
 17 that neither I nor other participants in the
 18 deposition have had an opportunity to review
 19 those, and so for my part, I'm going to recess my
 20 portion of this deposition. And I'll go through
 21 those, and if something drastic needs to be
 22 discussed, I'll reconvene the deposition, probably
 23 by telephone, if there's any inquiries to follow
 24 up on that.
 25 If that's agreeable with counsel.

1 MR. ORR: I have no objection to that.
 2 MS. McHUGH: That's fine.
 3 MR. GEHLERT: I think that's acceptable to
 4 the United States.
 5 MR. ARKOOSH: Let's go off the record.
 6 (Recess.)
 7
 8 EXAMINATION
 9 BY MS. McHUGH:
 10 Q. Good morning, Tony. My name is
 11 Candice McHugh, and I represent the ground water
 12 districts in this matter. And Tom's asked you a
 13 lot of questions today about varying language.
 14 And I guess I wanted to just kind of
 15 ask you to tell me in practical terms what you see
 16 the practical difference between AFRD's
 17 interpretation and Water District 1's
 18 interpretation as far as how it would change
 19 delivery on the Snake River.
 20 A. The current process Water District 1
 21 uses in the distribution of AFRD No. 2's natural
 22 flow and storage is that prior to American Falls
 23 Reservoir filling, they only have a right under
 24 the 1921 priority beginning on May 1st for 800 --
 25 or I should say half of the first 1700 cfs

1 available under the 1921 priority up until the
 2 time the American Falls storage right fills on
 3 paper.
 4 Once that occurs, then they have a
 5 right for 1700 cfs under the 1921 priority of
 6 natural flow.
 7 Q. And --
 8 A. If we use their interpretation, they
 9 would have a right to the full 1700 cfs of natural
 10 flow under the 1921 priority, unless American
 11 Falls didn't fill during the year.
 12 And then only in that case would we go
 13 back and only deliver them the 850 cfs of natural
 14 flow after -- between May 1st and when the 1921
 15 priority was cut.
 16 Q. And can you explain what the impact
 17 would be to upstream junior spaceholders under
 18 AFRD No. 2's interpretation. What would be the
 19 impact to their storage water rights?
 20 A. Since they share in the 1921 priority,
 21 when American Falls' storage right is filling,
 22 they are entitled to only 850 cfs of natural flow.
 23 Under their interpretation, they would
 24 be entitled to the 1700 -- full 1700 cfs of
 25 natural flow, and therefore the American Falls

1 storage right would take longer to fill. And if
 2 American Falls storage right takes longer to fill,
 3 then that pushes it later in time before we can
 4 fill junior rights, because junior rights, of
 5 course, can't be filled until after the 1921
 6 storage right is completely full. And that would
 7 be the difference.
 8 Q. Is it fair to say that the junior
 9 upstream storage rights would fill less often
 10 under AFRD No. 2's interpretation?
 11 A. Well, if you compare the two
 12 interpretations, if we didn't spill excess water
 13 past Milner, AFRD No. 2 would get more natural
 14 flow under their interpretation than under the
 15 current interpretation by Water District 1, which
 16 would mean that junior rights would get less
 17 natural flow.
 18 Q. Junior upstream natural-flow rights?
 19 A. Wouldn't necessarily be upstream.
 20 Q. Okay.
 21 A. Probably upstream. But it would be
 22 anyone junior to the 1921 priority.
 23 Q. Okay. And just so the record's clear,
 24 when you talk about the American Falls right,
 25 you're talking about the Bureau's right in

1 American Falls Reservoir?

2 A. Yes.

3 Q. Because there is some potential
4 confusion in the record when we talk about
5 American Falls Reservoir District 2 and the
6 American Falls right.

7 So when you're referring to the
8 American Falls right, you're talking about the
9 Bureau's right for storage in American Falls
10 Reservoir?

11 A. Correct.

12 Q. Okay. Okay. Can you generally
13 describe when Water District 1 knows whether or
14 not American Falls Reservoir storage right is
15 full, is filled.

16 A. Each day we calculate the amount of
17 natural flow available in the system. And we
18 distribute that natural flow according to the
19 priorities and the right. So we keep a daily
20 accounting of the accrual into that American Falls
21 storage right. And once it's reached its maximum
22 volume limit, then that's when we consider it
23 full.

24 Q. And do you know approximately when
25 that occurs, or a date range during the irrigation
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1 season?

2 A. It depends on the carryover storage
3 from the previous year and the water supply of the
4 current year. It could probably happen anytime in
5 early spring to -- well, all the way into
6 mid-July, or not filling at all.

7 Q. Is it fair to say that one of the
8 reasons that this issue is important to AFRD No. 2
9 or from their perspective is the longer they're on
10 natural flow, the less storage they use?

11 A. That's correct.

12 Q. And therefore, they have more storage
13 to carry over?

14 A. Or would extend their season.

15 Q. Okay. Can I have you look at
16 Deposition Exhibit No. 3. And turn to page 4.

17 A. Okay.

18 Q. And in the middle there there's a
19 sentence that starts out "AFRD No. 2." Underneath
20 that there's a "2" with a parentheses that says
21 "If American Falls Reservoir."

22 Do you see that in the middle there?

23 A. Yes.

24 Q. And then Mr. Arkoosh also asked you a
25 bunch of questions about when storage goes to zero

1 and it's zeroed out, and I think there was some
2 dialogue back and forth about that. And I guess I
3 just was confused in some of the answers and some
4 of the questions.

5 So in looking at that paragraph, when
6 is AFRD's storage zeroed out, if you understand
7 that question?

8 A. AFRD No. 2's storage right is zeroed
9 out at the same time any other spaceholder's
10 storage right is zeroed out. And it occurs when
11 we're spilling excess water past Milner.

12 The process that the water district
13 has always used is when the system is full or when
14 American Falls is full and we're spilling excess
15 past Milner, meaning we cannot capture any
16 additional storage water, if there had been any
17 previous storage water used by diversions, that
18 storage is cancelled because it otherwise just
19 would have added to the excess spill out the end
20 of the system. And so in that case it was
21 cancelled.

22 This year was a rare exception. It
23 was the first year since I've been working for the
24 water district where we were able to cancel
25 storage without spilling any excess past Milner.

1 And that's because the system nearly refilled, but
2 not quite enough to spill excess past Milner, but
3 enough to cancel out the majority of storage used
4 by spaceholders.

5 Q. Okay. Not talking about 2010, but in
6 other years, when do you cancel out storage use by
7 storage spaceholders? When does that occur?

8 A. On the day that we cease spilling
9 excess water past Milner Dam.

10 Q. Okay. So it doesn't occur in the
11 final accounting, but it's reflected in the final
12 accounting?

13 A. It would be done the same way in the
14 final accounting as it is in the preliminary
15 accounting.

16 Q. Okay. But you know that storage is
17 cancelled out, and therefore the storage
18 spaceholders know that their storage is cancelled
19 out or zeroed out sometime during the irrigation
20 season?

21 A. Yes.

22 Q. Okay. Now, referring you back to the
23 paragraph on page 2 of Exhibit 3, does this have
24 anything to do with or explain when AFRD 2 or any
25 other storage right holder's storage would go to

1 zero?

2 A. No. This is -- this is the
3 differences I see between how Water District 1 is
4 currently delivering the natural-flow right and
5 how AFRD No. 2 would like the natural-flow right
6 delivered.

7 If the paragraph that you're referring
8 to were implemented in Water District 1's
9 accounting, the results of that would be AFRD
10 No. 2 would use less storage or less storage would
11 need to be cancelled, depending on the water
12 supply.

13 Q. Thank you.

14 I just want to look real quick at this
15 PowerPoint presentation, and then I think I'm
16 done.

17 MR. ARKOOSH: Let's go off the record.
18 (Discussion.)

19 MS. McHUGH: Back on the record.

20 Q. Could I have you look at Exhibit 11.

21 The first document in Exhibit 11 is
22 the PowerPoint presentation that you gave to
23 American Falls Reservoir District No. 2; is that
24 correct?

25 A. It is the entire document.

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1 MR. ARKOOSH: Let's go off the record just
2 a minute.

3 MS. McHUGH: Okay.

4 (Discussion.)

5 MS. McHUGH: Back on the record.

6 Q. Okay. Is the first document in
7 Exhibit 11 your PowerPoint presentation that you
8 gave to AFRD No. 2?

9 A. Yes.

10 Q. Okay. And just so, you know, I'm
11 clear when I'm reviewing this later and so I
12 understand some of the abbreviations that you've
13 used in here, I just want to make sure I'm clear.
14 If you could flip through to page approximately 6.
15 In there you have "LTF" in various places there.
16 "American Falls LTF," it says 57,752 acre-feet.

17 A. Yes.

18 Q. Is it fair to say that that stands for
19 last to fill?

20 A. Yes.

21 Q. Okay. And if you flip back to
22 page 12. It's unnumbered page 12. The first page
23 behind the title page that says "2002 Late-Season
24 Reservoir Accrual and Carryover." The next page
25 behind that.

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1 A. I'm not sure I have the right page.

2 MR. ORR: This page and then (indicating).

3 THE WITNESS: Before that?

4 MR. ORR: I think it's approximately
5 page 12 from the front.

6 THE WITNESS: Okay.

7 Q. (BY MS. McHUGH): In the middle there
8 it says "Reservoir Water Rights Accounts
9 October 6th, 2002," and in parentheses it says
10 "Filling 1905 priorities."

11 A. Yes.

12 Q. Do you see that?

13 A. Uh-huh.

14 Q. Is it fair to say that this document
15 is capturing storage prior to the day of what's
16 considered the day of allocation of Water
17 District 1? Or can you explain what this is
18 intended to show.

19 A. This was intended to show the
20 carryover in the reservoir accounts as of
21 October 6th, 2002. And at that -- on this date in
22 the water right accounting, there was enough
23 natural flow to fill the 1905 priorities for the
24 diversions that were diverting at that time.

25 Q. Okay. So this is actually a snapshot

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1 in time of October 6th, 2002?

2 A. Correct.

3 Q. Okay. Got it. If you can just
4 generally flip through the rest of those pages.
5 It appears that every one of the what I'll call
6 kind of a flow chart of reservoir fill also has a
7 square box with a date.

8 And is it fair to say that those are
9 just snapshots in time of what was going on on
10 those dates for reservoir fill?

11 A. Yes.

12 Q. And finally, the second page to the
13 end, the second to last page of the document, it
14 just says there "Reservoir Water Right Accrual,"
15 and then it has "June 16th, 2003 (Last day of
16 filling 1913 priority) Day of Maximum Accrual."

17 Is it fair to say that day of maximum
18 accrual is also considered day of allocation in
19 Water District 1?

20 A. No, not necessarily.

21 Q. Okay.

22 A. The day of maximum accrual is the last
23 day in the water right accounting in which there
24 was sufficient natural flow to go into a storage
25 right and empty -- or an unfilled storage right.

1 Q. So it refers to the natural-flow water
2 rights?

3 A. Yes. On this day, on June 16th, 2003,
4 we were filling the 1913 priority, which is the
5 storage right in Jackson Reservoir. After
6 June 16th we cut below the 1913 priority, and we
7 didn't have any additional reservoir accrual into
8 the storage rights after that point in time for
9 the remaining part of the irrigation season -- or
10 remaining part of the summer.

11 Q. Okay. And does it relate at all to
12 the day of allocation for storage in the system?

13 A. It relates, but there are three things
14 that have to happen for day of allocation: One,
15 you have to have this day of maximum accrual.

16 Q. Uh-huh.

17 A. Two, you have to have maximum -- reach
18 your maximum day of physical contents. And three,
19 excess water spilling past Milner has to cease.
20 All three of those things have to occur in order
21 to reach the day of allocation.

22 Q. Okay. Thank you.

23 Are you familiar with the term
24 "refill" or "second fill" in the Upper Snake?

25 A. Yes.

1 Q. Can you tell me what that means to
2 you.

3 A. "Refill" or "second fill" has been
4 terms used to describe additional storage accrual
5 after the storage rights have reached their
6 maximum volumes.

7 Q. And do you understand that AFRD
8 No. 2's issue in this case is different than the
9 question of whether or not refill or second fill
10 is allowed in the Upper Snake?

11 A. No, I think they tie the two issues
12 together.

13 Q. Okay. Can you explain.

14 A. The language in the Eagle decree
15 describes the delivery -- or when the delivery of
16 the 1700 cfs, or portion thereof, can be delivered
17 to AFRD No. 2. By definition, if they aren't
18 diverting natural flow, they're diverting storage.

19 And I think that's where the
20 description of the decree ends. It doesn't
21 address the issue of refilling the storage that
22 has been accounted for previously.

23 Q. Okay. And then can you then tie that
24 to how refill or second fill would address that or
25 relates to that?

1 A. Well, AFRD No. 2, if I understand
2 their argument, is that if they diverted storage
3 and American Falls Reservoir storage right fills,
4 then all their previously used storage should be
5 cancelled.

6 The way the process works in Water
7 District 1, their storage use would only be
8 cancelled in the situation where we would spill
9 excess water past Milner out the end of the system
10 or the system entirely refilled.

11 MS. McHUGH: Okay. No further questions.
12 Thank you.

13 EXAMINATION

14 BY MR. ORR:

15 Q. Okay. Tony, as you know, I'm
16 representing the State of Idaho here. I have a
17 few questions I'd like to ask you regarding
18 clarification of your prior testimony in this
19 deposition.

20 Referring to Exhibit 1, the Notice of
21 Deposition.

22 A. Okay.

23 Q. And before we look at it, I just want
24 to get a terminology issue cleared up here.

1 As I understand it, the principal
2 issue or point of dispute between your
3 interpretation of the Eagle decree and that of
4 AFRD 2 is the matter of storage cancelling, which
5 I understand to mean whether diversions of water
6 by AFRD 2 prior to the filling of the American
7 Falls storage right will be considered natural
8 flow or whether they will be considered storage.

9 MR. ARKOOSH: Object to the form.

10 MR. ORR: Let me try it.

11 Q. Storage cancelling, can you describe
12 for me what the term "storage cancelling" means to
13 you.

14 A. In our water right accounting, we
15 calculate the natural flow in the system each day.
16 And we divide that flow up and deliver that flow,
17 that natural flow, according to the priorities in
18 the water rights.

19 If the canal is diverting water in
20 excess of its natural-flow water right, it's --
21 the difference is charged to storage use. If
22 after some point in time after this storage use
23 has occurred, if the -- if all the reservoirs in
24 the systems are full, if you can see that we
25 haven't developed a hole from which the storage

1 came from, therefore it gives us the ability to
2 cancel that previous storage use.

3 Q. So if AFRD 2's storage diversions in a
4 given year are cancelled, on the date it's
5 cancelled, their storage diversions go to zero?

6 A. Not their storage diversions, but the
7 storage that has been debited from their storage
8 allocation goes to zero.

9 Q. Okay. Referring to page 2 of
10 Exhibit 1, the Eagle decree language there, and I
11 think there's a small paragraph of it as well on
12 page 3 where it finishes up.

13 As you read that and interpret that,
14 does that language address storage cancelling?

15 A. It does not.

16 Q. Okay. Let's see. Take a look at
17 Exhibit 6 now, if you would, please.

18 A. Okay.

19 Q. And I'd like you to flip over to
20 pages 30 through 32. Well, I guess actually 31 to
21 32. And on my copy beginning on page 31 is the
22 language of Exhibit 6 pertaining to the American
23 Falls Reservoir District No. 2 right under permit
24 15134.

25 Is that what you see?

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1 A. Yes.

2 Q. In that language on pages 31 and 32 of
3 Exhibit 6, does any of that language address
4 storage cancelling?

5 A. No.

6 Q. Comparing the language on pages 31 and
7 32 of Exhibit 6 to the language on pages 2 and 3
8 of Exhibit 1, have you checked to determine if
9 those passages are identical?

10 A. I have not.

11 Q. Okay. Now, earlier in the deposition
12 I believe that counsel, Mr. Arkoosh, referred to
13 the language on pages 31 and 32 as the language of
14 the Eagle decree. And I think you may have agreed
15 that it was the language of the Eagle decree.

16 And I want to clarify whether in your
17 opinion, based on your reading, those two
18 languages are identical. Granted, they may be
19 similar, but are they identical?

20 A. Do you want me to go through word for
21 word and compare to see if they are identical?

22 Q. I think it's enough if you find any
23 differences. I just want to --

24 MR. ARKOOSH: Could we go off the record
25 for a minute?

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1 MR. ORR: Yeah.

2 (Discussion.)

3 MR. ORR: Back on the record.

4 Q. So what I want to get at here is
5 whether the language in Exhibit 1 pertaining to
6 the water right and the language in Exhibit 6
7 pertaining to the water right is identical. As I
8 read them they are not identical.

9 Do you agree with that?

10 A. Yes, I agree.

11 Q. Okay. Tony, regarding the
12 recommendation on page 3 of Exhibit 1 -- well, I
13 want to use the word "recommendation" here. I
14 want to be clear.

15 In the middle of page 3 of Exhibit 1
16 we have subparagraph b, "The Director's Report
17 provides as follows."

18 That language, as I understand it, you
19 agreed that you had recommended that language to
20 the Director; is that correct?

21 A. That's correct.

22 Q. Did you recommend this language to the
23 SRBA court?

24 A. No, I did not.

25 Q. Do you have authority to recommend any
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1 water right language to the SRBA court?

2 A. No, I do not.

3 Q. So is it safe to assume that when you
4 referred to your recommendation in prior testimony
5 in this deposition, you're not suggesting that you
6 had the authority to recommend language such as
7 this to the SRBA court?

8 MR. ARKOOSH: Object to the form.

9 THE WITNESS: In previous questions when I
10 said "my recommendations," those recommendations
11 were made to the adjudication staff of the
12 Department of Water Resources.

13 Q. (BY MR. ORR): Okay. So in your prior
14 testimony in this deposition when you referred to
15 your recommendation, you were referring to your
16 recommendation to the adjudication staff of the
17 Department of Water Resources?

18 MR. ARKOOSH: Object to the form.

19 THE WITNESS: I was referring to both my
20 recommendation and what appears in the Director's
21 report, which are the same --

22 Q. (BY MR. ORR): Have --

23 A. -- same language.

24 Q. Same language. Did you file a
25 Director's report in the SRBA?

1 A. I did not.
 2 Q. Do you have the authority to file a
 3 Director's report in the SRBA?
 4 A. No, I do not.
 5 Q. Have you been approached by
 6 adjudication staff or other personnel from IDWR
 7 regarding your recommendations or input for other
 8 water rights in the SRBA other than the AFRD 2
 9 right?
 10 A. Yes.
 11 Q. Have you ever made recommendations in
 12 response to those overtures or inquiries?
 13 A. Yes.
 14 Q. Have they been accepted or used by the
 15 Director and filed in the Director's report in the
 16 SRBA?
 17 A. Sometimes I think what I provide may
 18 be incorporated into what they produce. But there
 19 are some instances where what I had recommended
 20 was not included in the Director's report.
 21 Q. When they do not include what you
 22 provide in the Director's report, does the
 23 adjudication staff ever get back to you and
 24 explain why?
 25 A. Yes.

1 Q. Did they get back to you on this
 2 right, on the AFRD right, after you provided this
 3 recommendation?
 4 A. No.
 5 Q. Did the Director ever contact you on
 6 it?
 7 A. I had some discussions with David
 8 Tuthill, and I saw it appear in the Director's
 9 report. But I can't remember any specific
 10 conversations after the recommendation was made.
 11 Q. In your opinion, based on your
 12 experience with making recommendations to the
 13 adjudication staff, do you believe the Director
 14 agreed with your recommendation for the remark in
 15 this water right for AFRD 2?
 16 A. Yes.
 17 Q. Tony, I think you testified early on
 18 that there were some changes in water rights
 19 administration that occurred when the 1978
 20 computer program accounting program was
 21 implemented.
 22 A. Yes.
 23 Q. Based on your review of documents
 24 related to the American Falls Reservoir District
 25 No. 2 water right, do you believe the water right

1 administration for that water right prior to the
 2 1978 program is reflected in your remark, your
 3 recommended remark -- or in the Director's report,
 4 I guess I should say?
 5 A. I don't understand the question.
 6 Q. I didn't phrase it very well. Maybe I
 7 should just come at it this way.
 8 Based on your review of records and
 9 documents pertaining to the administration of
 10 American Falls Reservoir District No. 2 water
 11 right, was the pre-1978 administration of that
 12 right the same as the post-1978 administration of
 13 that water right?
 14 A. Yes, there was one small difference
 15 that I remember.
 16 Q. Can you tell us what that was.
 17 A. In the current accounting, once the
 18 American Falls right fills on paper, AFRD No. 2 is
 19 entitled to the full 1700 cfs under the 1921
 20 priority.
 21 Some of the historical Black Books
 22 that I've reviewed prior to 1978, the way they did
 23 the accounting, when the American Falls Reservoir
 24 filled -- this was prior to -- well, it wasn't
 25 prior to when Palisades was built.

1 But when American Falls' right filled
 2 and then was drafted and then refilled according
 3 to the watermaster, during that time period when
 4 it was being drafted and refilled, AFRD No. 2 was
 5 only delivered 850 cfs of their natural flow under
 6 the 1921 priority, whereas in the current
 7 accounting program, they would have been delivered
 8 the full 1700 cfs during that period of time.
 9 Q. So that change has worked to AFRD 2's
 10 benefit?
 11 A. Well, not necessarily, because if the
 12 American Falls Reservoir right did in fact
 13 completely refill, then the storage use would have
 14 been written off and the result would have been
 15 the same. But I suppose there could be a
 16 situation where AFRD No. 2 could benefit from the
 17 current accounting as opposed to the previous
 18 accounting.
 19 Q. Okay. I see what you mean. Earlier
 20 in your deposition you have referred to, quote,
 21 "preliminary accounting prior to the Black Book
 22 issuance"?
 23 A. Yes.
 24 Q. What records are used to record or
 25 compile this, quote, "preliminary accounting"?

1 A. The preliminary accounting is the
2 distribution of water during the irrigation
3 season, with the best data that we have available
4 at the time.

5 Some of that data at the end of the
6 year is in addition to the data that we collected
7 previously in the preliminary accounting or it has
8 been refined or finalized. And so that's the
9 difference between the preliminary and the final
10 accounting.

11 Q. Are there documents that reflect the
12 preliminary accounting?

13 A. In most years we have printouts of the
14 daily preliminary accounting, and we also have
15 printouts of the daily final accounting that you
16 could compare. And that's since the computerized
17 accounting.

18 I'm not sure if we have records for
19 every year, but certainly the more recent years we
20 have copies of both the preliminary and the final
21 accounting.

22 Q. So accounting is performed on a daily
23 basis; correct?

24 A. Yes.

25 Q. And how is that information made
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1 available or disseminated to the public or the
2 water users?

3 A. It's on file at our office or -- our
4 Water District 1 office. Since the computerized
5 accounting began in 1978, you can also go to the
6 State office and get the daily accounting off
7 their computer program.

8 We send out weekly reports to water
9 users as to what the current status is on the
10 storage allocation and storage use. And within
11 the last few years we've started periodically
12 publishing the daily accounting on our
13 WaterDistrict1.com website.

14 Q. Do you get inquiries, say phone calls,
15 from water users asking "Where do I stand today
16 with my storage accounting?"

17 A. Yes.

18 Q. And so you use the daily accounting to
19 respond to those inquiries?

20 A. Yes.

21 Q. How often do you get those type of
22 calls?

23 A. At least a few a week during the
24 irrigation season.

25 Q. Have you ever gotten them from

1 American Falls Reservoir District No. 2?

2 A. Yes.

3 Q. Tony, I'm going to go back to
4 Exhibit No. 1 here, the Notice of Deposition.

5 I believe you stated that you reviewed
6 it before coming here today?

7 A. Yes.

8 Q. And you also testified you were
9 involved in crafting the recommendation.

10 My question is, was there anyone else
11 in Water District 1, other than yourself, involved
12 in crafting this recommendation? And by that, I
13 mean the language of the Director's report on
14 page 3 of Exhibit 1.

15 A. What do you mean by "was anyone else
16 involved?" What do you mean by "involved"?

17 Q. Well, good point. Was there anyone
18 else who had a direct role in reviewing and
19 commenting on this proposed language other than
20 yourself in Water District 1?

21 A. Well, it would only have been Lyle
22 Swank, watermaster in Water District 1. But I
23 can't remember for certain if I showed him the
24 draft of this language before submitting it to the
25 adjudication staff.

1 Q. Does Lyle Swank have as much knowledge
2 of the issue stated in the Notice of Deposition as
3 you do? I'll go back to that issue here.

4 Any claimed explanation, reason,
5 justification, or policy, whether based on fact or
6 law or otherwise, for the difference between the
7 language in the Eagle decree and the Director's
8 report, does Lyle know more about that than you
9 do?

10 A. No.

11 Q. Does anyone in Water District 1 know
12 more about that than you do?

13 A. No.

14 MR. ARKOOSH: I'm going to object to that.

15 Q. (BY MR. ORR): Does anyone, to your
16 knowledge, in Water District 1 know more about
17 that issue than you do?

18 A. No.

19 Q. Why don't we turn to storage
20 cancelling. You testified that storage
21 cancelling, in your view, is not provided for in
22 the Eagle decree as recited in the Notice of
23 Deposition or in the Director's report. It's
24 recited in the Notice of Deposition.

25 What is the basis for storage

1 cancelling?

2 MR. ARKOOSH: Object to the form.

3 Q. (BY MR. ORR): Well, why are storage
4 debits or charges cancelled?

5 A. One of the duties of the water
6 district is to allocate the storage water that's
7 available in the system. If we have accounted for
8 storage usage previously by canals, it comes out
9 of their storage allocations.

10 If we reach a point in time where the
11 reservoir system is full and we're spilling excess
12 water past Milner, then any storage use that we
13 account for previously would need to be deducted
14 from the storage allocations of the spaceholders,
15 and therefore, that storage is cancelled.

16 And from that point, from when the
17 system is physically full, everyone starts with a
18 full allocation without any deductions for
19 previously used storage.

20 Q. What is the origin of that practice?

21 A. I think that practice has been used
22 since Water District 1 was delivering water,
23 started delivering water.

24 Q. Do you know approximately when that
25 was, that date? Just a year?

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1 A. Early 1900s, 1911, 1912.

2 Q. And this storage cancelling practice,
3 does it apply to all storage water right holders
4 or just to certain ones?

5 A. It applies to all storage
6 spaceholders.

7 Q. To your knowledge, is this practice of
8 storage cancelling memorialized in any decree?

9 A. No, it's not.

10 Q. You may not have direct knowledge of
11 this, but I'll say based on your review of the
12 documents that you've discussed in this
13 deposition, did the practice of storage cancelling
14 change when Palisades was constructed? And by
15 that, I mean was the rationale for it the way you
16 just described and the way of doing it, the
17 methodology, did that change when Palisades was
18 constructed?

19 A. Yes, it has changed in a way that it
20 was different from how Henry Eagle had done it
21 when he was watermaster.

22 Q. And would you describe that.

23 A. Henry Eagle felt that the American
24 Falls storage right could refill a second time
25 ahead of the initial fill of the upstream junior

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1 storage rights.

2 So as a result, when you had American
3 Falls spaceholders use a portion of their storage
4 allocation, if Palisades Reservoir accrued
5 additional water, rather than adding that accrual
6 to the Palisades junior storage right, it was used
7 to cancel out the storage that had been previously
8 used by American Falls spaceholders.

9 Q. And that practice you just described
10 by Henry Eagle, was that unique to American Falls
11 Reservoir District No. 2?

12 A. No. It was applied to all American
13 Falls spaceholders.

14 Q. As far as you know, did it have any
15 basis in the Eagle decree?

16 A. No, it did not.

17 Q. Looking at Exhibit 8 here, Tony. This
18 is related to a point I made earlier. That
19 language in Exhibit 8, on pages 2 and 3 of
20 Exhibit 8, appears to me to be similar to the
21 language in Exhibit 6, the contract we discussed
22 earlier. And I think the cover letter makes it
23 clear, it's language being proposed for a
24 contract.

25 I'll represent to you that based on my

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1 review of that language and the language on page 2
2 of Exhibit 1 that the language in Exhibit 8 is not
3 identical to the Eagle decree. I'd ask if you
4 agree with that?

5 What I'm trying to get at here is when
6 we talk about Exhibit 8, I'm not talking about the
7 Eagle decree. We're talking about language that
8 may be similar, but it's not the Eagle decree
9 language. I'm wondering if you agree with that?

10 A. I have not made a word-for-word
11 comparison to see if they're identical.

12 Q. Well, as before, just -- how did we
13 handle this before?

14 MR. ARKOOSH: Well, Counsel, I'd invite you
15 to tell us the difference. I mean we can all sit
16 down and take a break here and go through this
17 line by line, everybody can go through these three
18 exhibits, or you can tell us the difference you
19 see.

20 MR. ORR: I think the difference exists on
21 its face, to tell you the truth. The Eagle decree
22 as quoted on page 2 starts off, "The right to
23 divert as natural flow."

24 Page 2 of Exhibit 8 starts off in the
25 very first sentence with "In connection with Idaho

1 permit No. 15134."

2 And when we get down to the indented
3 paragraph that begins with "American Falls
4 Reservoir District No. 2 to have the right to
5 divert as natural flow."

6 The point being there are differences.
7 So when we refer to the Eagle decree, we should
8 look at the Eagle decree. That's all I was doing.

9 MR. ARKOOSH: Okay. If they're not
10 material, we'll go through them later, then.

11 Q. (BY MR. ORR): Looking again at
12 Exhibit 1, page 2, the Eagle decree language. I
13 want to clarify a point that I think might not be
14 clear.

15 I believe earlier in the deposition
16 counsel, Mr. Arkoosh, represented substantially
17 something to this effect, "we concur" -- meaning
18 you and him -- "that American Falls Reservoir fill
19 is a relevant event."

20 And I just wanted to clarify. I
21 believe you agreed with that characterization.

22 But my understanding was that in the
23 context of the Eagle decree language you were
24 agreeing to that as to natural-flow diversions,
25 not as to storage cancelling?

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1 MR. ARKOOSH: Object to the form.

2 THE WITNESS: Okay. You'll have to repeat
3 that.

4 Q. (BY MR. ORR): I believe earlier in
5 the deposition when Mr. Arkoosh was walking
6 through the Eagle decree language with you he
7 pointed out that in the middle this language says
8 "...except that in any year in which American
9 Falls Reservoir is full," and said that there's no
10 reference to system fill here. And you agreed
11 with that.

12 And then I believe you also agreed
13 with his representation when he said "Well, then
14 we concur that American Falls Reservoir fill is a
15 relevant event."

16 What I'm trying to get at is what is
17 the relevant event we're talking about here,
18 storage cancelling or natural-flow diversions
19 under the Eagle decree?

20 MR. ARKOOSH: Object to the form.

21 THE WITNESS: I think this language in the
22 Eagle decree only provides for the delivery of
23 natural flow.

24 Q. (BY MR. ORR): So to the extent it
25 talks about American Falls Reservoir is full, that

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1 reference does not go to storage cancelling, in
2 your interpretation of the Eagle decree?

3 A. That's correct.

4 MR. ARKOOSH: Object to the form.

5 Q. (BY MR. ORR): On storage cancelling,
6 then, Tony, would it be fair to say that prior to
7 Palisades, storage cancelling occurred when Milner
8 spills, and that that is also true today?

9 A. Yes.

10 MR. ARKOOSH: Object to the form.

11 Q. (BY MR. ORR): Prior to construction
12 of Palisades Reservoir, did spills at Milner,
13 excess spills at Milner, equate generally to the
14 fill of the reservoir system?

15 MR. ARKOOSH: Object to the form.

16 Q. (BY MR. ORR): Did it take place when
17 the reservoir system was full?

18 MR. ARKOOSH: Object to the form.

19 THE WITNESS: Yes.

20 Q. (BY MR. ORR): Currently do excess
21 Milner spills take place when the reservoir system
22 is full?

23 MR. ARKOOSH: Object to the form.

24 THE WITNESS: Yes.

25 Q. (BY MR. ORR): Are there any other

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1 circumstances under which there might be spills at
2 Milner?

3 A. Yes.

4 Q. Could you describe those.

5 A. Yes. It's possible that you could
6 have excess spill past Milner and not have the
7 system full. That situation commonly occurs when
8 the upstream reservoirs are not physically full
9 but American Falls and Lake Walcott are full to
10 capacity and you have gains in excess of
11 diversions in the lower part of the river, and so
12 there's nowhere to store that excess water. And
13 so you can have a situation where spilling excess
14 water past Milner and the upper reservoirs are not
15 full.

16 Q. So if I'm understanding what you're
17 saying, the reason the water is spilled is because
18 there's no reservoir capacity available in the
19 reach the excess water is present?

20 A. Or downstream reach.

21 MR. ARKOOSH: Object to the form.

22 Q. (BY MR. ORR): And under that scenario
23 does storage cancelling take place?

24 A. Yes.

25 Q. Tony, I would like to go to Exhibit 3.

1 And the first page of Exhibit 3 is an e-mail, and
2 attached to that is a memo that you wrote dated
3 February 27th, 2010; correct?

4 A. My Exhibit 3 doesn't have the e-mail
5 attached to it. It's just the memorandum to
6 Garrick Baxter on February 17th.

7 Q. Oh, that's right. I stuck my exhibit
8 sticker on the e-mail.

9 So Exhibit 3 is your four-page
10 memorandum of February 17th, 2010, to Garrick
11 Baxter?

12 A. Yes.

13 Q. Was this memo written after you had
14 already given your recommendations to the
15 adjudication staff on the AFRD 2 water right?

16 A. Yes.

17 Q. What was the purpose of this
18 memorandum?

19 A. Garrick sent me these 163 historical
20 documents, and I was assuming the reason was he
21 wanted me to research to see if there was anything
22 to increase my knowledge of the delivery to AFRD
23 No. 2 and determine whether or not the
24 recommendation was in -- based on historical
25 events.

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1 Q. Based on this review, did you find
2 anything that made you doubt your recommendation
3 on the remark for the AFRD 2 water right?

4 A. No.

5 Q. So going over to page 4 of the memo,
6 near the bottom you have a bold-faced font, the
7 second-to-the-last paragraph. Just prior to that,
8 the first sentence before that paragraph says, "I
9 think the key to settling this issue is to answer
10 the question posed earlier," and then you have
11 your bold-faced statement of issues.

12 Was your purpose here to simply
13 identify what you thought the controlling issues
14 in the dispute were?

15 A. I didn't find anything in the
16 documentation that was sent to me to indicate that
17 the way Water District 1 was delivering the water
18 right was incorrect, but I left open the
19 possibility that it has been. And I think by
20 answering these two questions, you can determine
21 which is right.

22 Q. Does this language in bold face, this
23 passage you wrote, in any way explain to you why
24 the Eagle decree was written the way it was
25 written?

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1 A. Ask the question again.

2 Q. I'll preface it by saying I believe
3 that in discussion with Mr. Arkoosh regarding this
4 bold-faced passage, I thought I heard you say that
5 something in this passage was, quote, "The only
6 thing that could have explained why it" -- I think
7 the Eagle decree -- "why it was written the way it
8 was written." So that's what I'm trying to get
9 at.

10 Is there anything in this bold-faced
11 paragraph that explains in your mind why the Eagle
12 decree was written the way it was written?

13 A. Well, the only reason that I could
14 fathom for the decree being the way it was written
15 would be to protect the upper stream reservoirs or
16 junior rights.

17 Q. What do you base that conclusion on?

18 A. Well, if AFRD No. 2 had a right for
19 1700 cfs with a 1921 priority and you wanted to
20 put restrictions on the diversion of that right,
21 there would only be two reasons that I can think
22 of, one is that they couldn't beneficially use the
23 water or, two, it would be to protect junior
24 rights.

25 Q. When you say "protect junior rights,"

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1 do you mean favor junior rights over senior
2 rights?

3 A. I look at it from a perspective of
4 water delivery. When the watermaster divides up
5 the daily supply of natural flow, if someone has a
6 senior priority right, they're delivered ahead of
7 the junior priority right, unless there's some
8 restriction imposed upon that senior right that
9 doesn't allow you to deliver that natural flow to
10 the senior right. And the result of that would be
11 the natural flow would go to a junior right rather
12 than to the senior right.

13 Q. Does that apply to the AFRD 2 right?

14 A. Yes.

15 MR. ARKOOSH: Objection to the form.

16 Q. (BY MR. ORR): Would you describe how.

17 A. Yes. If AFRD No. 2 had a full right
18 of 1700 cfs under the 1921 priority, in most cases
19 that would lessen their storage usage. By them
20 using storage, that frees up more natural flow for
21 junior rights.

22 And so if they had a right to the full
23 1700 cfs at all times under the 1921 priority,
24 there would be less water available to the junior
25 rights under that procedure than the procedure

1 where you have restrictions of when or how much of
2 that 1700 cfs they can divert.

3 Q. When Palisades was constructed and
4 water began to be stored up there in Palisades,
5 did that reduce the frequency of spills over
6 Milner?

7 A. Yes.

8 Q. Does that also mean it reduced the
9 frequency of storage cancelling?

10 A. Yes.

11 Q. And did that apply to all storage
12 right holders or just AFRD No. 2?

13 A. It applied to all spaceholders.

14 Q. Can we take a quick look at Exhibit 9,
15 please, Tony. And that's the copy of a memorandum
16 from Ken Dunn to Steve Allred dated March 5, 1970.

17 A. Yes.

18 Q. Do you know the circumstances under
19 which this memo was written?

20 A. I don't.

21 Q. Do you know the purpose for which it
22 was written?

23 A. I don't.

24 Q. Well, let me back up, and we'll go to
25 the last paragraph on that exhibit. And I'll read

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1 here beginning in that last paragraph, "American
2 Falls Reservoir should not be allowed to refill at
3 the expense of junior users, except for storage
4 right provided under license No. 15134."

5 Do you know if that was ever the
6 official position of the Department of Water
7 Resources?

8 A. I do not, no.

9 Q. Has it ever, to your knowledge, been
10 the official position of Water District 1?

11 A. It hasn't since I've been working for
12 Water District 1. I'm not sure of any previous
13 year that you could find where there might be a
14 case where it was done.

15 Q. Okay. I think I'm about done here. I
16 believe Mr. Arkoosh asked you if we'd addressed or
17 if we discussed here all of the facts relevant to
18 the issue identified in the Notice of Deposition,
19 Exhibit 1, and I believe you said yes. But I just
20 want to clarify. And let me put the question this
21 way.

22 Have we addressed all facts that could
23 possibly be relevant to the issues stated in the
24 notice?

25 MR. ARKOOSH: Object to the form.

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1 THE WITNESS: No. There may be additional
2 facts than what has been provided here today.

3 Q. (BY MR. ORR): Have you truthfully and
4 fully answered counsel's questions regarding the
5 relevant facts to the best of your ability?

6 A. Yes.

7 MR. ORR: Well, I'm done. I appreciate you
8 giving me the time.

9 MR. ARKOOSH: You got ten minutes left in
10 you, Jeff? Or we can break.

11 THE COURT REPORTER: Go.

12

13 FURTHER EXAMINATION

14 BY MR. ARKOOSH:

15 Q. Have you provided all of the facts
16 about which you know are relevant?

17 A. No. I haven't had the time to fully
18 research all the documents that are in the eastern
19 region.

20 Q. Okay. The purpose of my question,
21 Tony, was, is there some major relevant fact,
22 relevant defense, relevant cause about which you
23 know we haven't discussed here today?

24 A. There may be, but I can't think of one
25 right now.

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1 Q. That's a fair answer. Okay. And I'll
2 remind you that -- your counsel knows -- under the
3 discovery rules if they turn up, they have an
4 obligation to supplement.

5 Exhibit 9, you don't know that to be
6 the official position of the Department of Water
7 Resources; is that correct?

8 A. That's correct.

9 Q. You don't know it not to be the
10 official position of the Department of Water
11 Resources?

12 A. What's not to be the -- I don't
13 understand the question.

14 Q. Well, you don't know if it is or is
15 not the official position at the time that was
16 written?

17 A. That's correct.

18 Q. The Director of the Department of
19 Water Resources is responsible for the
20 administration of water through the watermasters;
21 isn't that correct?

22 A. That's correct.

23 Q. Ultimate responsibility lies with the
24 Department; isn't that correct?

25 A. With the Director, yes.

1 Q. Yes. The construction of the 1936
2 memo from the Bureau of Reclamation regarding the
3 split of the 1700 cubic feet natural-flow water
4 right was a resolution of a dispute between
5 American Falls Reservoir District No. 1 and
6 American Falls Reservoir No. 2; isn't that
7 correct?

8 A. My recollection of the history is it
9 started before that and was actually an argument
10 that started with the watermaster as to how the
11 water right should be delivered and the Director
12 at that time.

13 Q. Well, the American Falls Reservoir
14 District No. 1 wanted all the water for storage
15 and No. 2 wanted all the water for natural flow,
16 and so they settled it the way they settled it in
17 the 1936 memo from the BOR; isn't that right?

18 A. Yes, I think that's what happened.

19 Q. So that's a third reason, perhaps,
20 that the language is drafted the way it was
21 drafted?

22 A. I don't know.

23 Q. You mentioned to me that prior to
24 posting on the Internet there was a weekly report
25 that was mailed out to everybody.

1 Is that the current text report that
2 we see today? Is that the weekly report that you
3 were referring to?

4 A. It's changed over time. Prior to the
5 web -- having the web page, I think each week we
6 actually sent a page of the daily accounting. We
7 no longer send a page of the daily accounting in
8 our weekly report that we mail out to all the
9 water users. It's a shortened report that shows
10 the current storage use and storage allocation of
11 all the diversions.

12 Q. You testified to me that you don't
13 know how the Director feels about your
14 recommendation, and you testified to counsel based
15 on your experience you believe the Director agreed
16 with your recommendation.

17 Let me ask you this: In your
18 experience, if you changed your recommendation to
19 read as the Eagle decree, do you think the
20 Director would go along with that?

21 A. I don't know.

22 Q. What do you anticipate?

23 A. I don't know.

24 Q. Okay. Which is correct, do you think
25 the Director agrees, disagrees, or doesn't know

1 about your recommendation, or has never expressed
2 an opinion to you, or some other alternative?

3 A. Well, the Director's report is the
4 Director's opinion. In the e-mail that I
5 provided, I actually proposed adding a sentence to
6 the current recommendation shown in the Director's
7 report.

8 Q. Okay. You were offered Exhibit 6,
9 Exhibit 1 and 8 regarding the language in the
10 Eagle decree, and you said there's some
11 differences.

12 Are there any material differences
13 that you're aware of?

14 A. I don't know. I'd have to sit down
15 and compare them word for word and do a precise
16 analysis. I don't know.

17 Q. Okay.

18 A. I could do that if required.

19 Q. As you sit here today, there's no
20 material difference that you know of?

21 A. Sitting here today, I don't know of
22 any.

23 Q. Okay. If you book storage use, say
24 for American Falls Reservoir District No. 2, and
25 the final report comes out and it's still booked...

1 as storage use, the user of the water won't know
2 it's going to remain booked as storage use in the
3 final report until the final report comes out, is
4 he?

5 A. If nothing changes, no data changes
6 between preliminary and the final accounting, then
7 the numbers will stay the same. If they change,
8 there's certainly a possibility that they will be
9 different. And no one knows what that number will
10 be until it happens.

11 Q. Okay. And counsel talked to you about
12 storage cancelling.

13 If you book storage use like you did
14 for American Falls this year, American Falls
15 Reservoir District No. 2 this year, and then the
16 system fills, that storage is either cancelled or
17 written off or changed to natural flow, but
18 there's a change, is there not --

19 A. Yes.

20 Q. -- in how that was booked?

21 A. Yes.

22 Q. Okay. Is that what you mean by
23 "storage cancelling," there is a change in how it
24 was booked?

25 A. Yes.

1 Q. Okay. So do you believe American
2 Falls Reservoir District No. 2 agrees or has ever
3 agreed or ever expressed acquiescence or agreement
4 to how you perceive the right should be
5 administered?

6 A. Could you repeat that?

7 Q. Do you think American Falls Reservoir
8 District No. 2 has ever manifested an agreement
9 with how you believe this right should be
10 administered?

11 A. Since 2003, I don't think they've
12 agreed how we administered the right.

13 Q. Prior to that time do you have any
14 knowledge that you believe they agreed to it?

15 A. I don't.

16 MR. ARKOOSH: Okay. Go off the record just
17 a minute.

18 (Discussion.)

19 MR. ARKOOSH: I think we're done. Thank
20 you, Tony, very much.

21 THE WITNESS: You're welcome.

22 (Deposition concluded at 1:00 p.m.)

23 (Signature requested.)

24 -oOo-

25

1 REPORTER'S CERTIFICATE

2 I, JEFF LaMAR, CSR No. 640, Certified
3 Shorthand Reporter, certify:

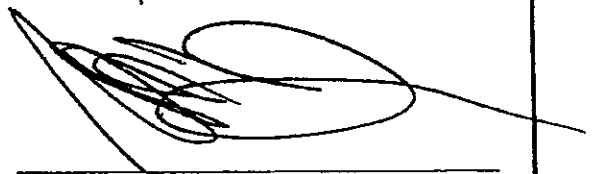
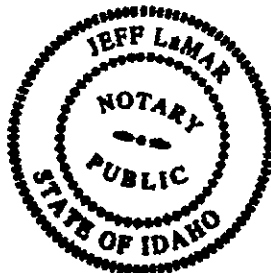
4 That the foregoing proceedings were taken
5 before me at the time and place therein set forth,
6 at which time the witness was put under oath by
7 me.

8 That the testimony and all objections made
9 were recorded stenographically by me and
10 transcribed by me or under my direction.

11 That the foregoing is a true and correct
12 record of all testimony given, to the best of my
13 ability.

14 I further certify that I am not a relative
15 or employee of any attorney or party, nor am I
16 financially interested in the action.

17 IN WITNESS WHEREOF, I set my hand and seal
18 this 16th day of July, 2010.



JEFF LaMAR, CSR NO. 640

Notary Public

Eagle, Idaho 83616

My commission expires December 30, 2011



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

In Re: SRBA	)	Subcase No. 01-00006
	)	
	)	AMERICAN FALLS RESERVOIR
	)	DISTRICT NO. 2'S ANSWERS TO
Case No. 39576	)	STATE OF IDAHO'S SECOND SET
	)	OF DISCOVERY REQUESTS TO
	)	AMERICAN FALLS RESERVOIR
	)	DISTRICT NO. 2
	)	
	)	

American Falls Reservoir District No. 2, by and through its attorneys of record, C. Tom Arkoosh and Isaac Keppler of Capitol Law Group, PLLC, submits the following answers to the State of Idaho's Second Set of Discovery Requests as follows:

AMERICAN FALLS RESERVOIR DISTRICT NO. 2'S ANSWERS TO STATE OF IDAHO'S
SECOND SET OF DISCOVERY REQUESTS TO AMERICAN FALLS RESERVOIR
DISTRICT NO. 2 - P. 1

MAIL 111836

PRELIMINARY AND GENERAL OBJECTIONS

Claimant is engaged in continuing discovery in this case and will supplement its responses if and when additional information becomes available. Accordingly, all of the responses are based upon the information and documents presently available to and specifically known to Claimant. Claimant, therefore, provides the following responses to the State of Idaho without prejudice to present at trial further evidence of proof not yet obtained or completed.

Each response is given subject to all appropriate objections (including, but not limited to, objections of materiality, relevancy, authenticity and admissibility) which would require the exclusion or limitation or any statement made herein if the statement was made in court. All such objections and grounds therefore are reserved and may be interposed at the time of trial. Except for facts explicitly admitted herein, the fact that any interrogatory, request for production, or request for admission has been responded to shall not be taken as an admission, or concession of the evidence, of any fact set forth or assumed, or that such response constitutes evidence of any fact thus set forth or assumed. All responses must be construed as given on the basis of present recollection.

Claimant objects to the State's requests to the extent that they seek information which is confidential, proprietary, protected by the attorney/client privilege and/or protected by the attorney product work doctrine, and to the extent that the State attempts to impose obligations beyond those required by the Idaho Rules of Civil Procedure. Claimant has identified certain documents in response to specific interrogatories or requests. However, additional records may exist and additional information may be derived or ascertained which the State finds responsive to its specific interrogatories or requests by reviewing Claimant's records relating to this matter. Such records are in the possession of Claimant's counsel at 205 N. 10th Street, 4th Floor, Boise ID 83701, and may be

examined, audited, or inspected during business hours upon reasonable notice.

INTERROGATORIES

INTERROGATORY NO. 1: Please provide the name, telephone number and address of each person, other than any persons you identified in your responses to the State's previous interrogatories to you in this subcase, with whom you or your representatives have communicated seeking information relating to this subcase or any issue in this subcase, or who you or your representatives have interviewed seeking information relating to this subcase or any issue in this subcase.

RESPONSE TO INTERROGATORY NO. 14: In addition to the information sought from the State of Idaho, attorneys for American Falls Reservoir District No. 2 (AFRD No. 2) have sought additional information relating to this subcase from the following persons and their respective clients:

1. Randall Budge and Candace McHugh
101 Capitol Blvd., Ste. 208
Boise, Idaho 83702
(208) 395-0011
2. Jerry Rigby
PO Box 250
Rexburg, Idaho 83440
(208) 356-3633
3. Robert Harris
PO Box 50130
Idaho Falls, Idaho 83450
(208) 523-0620
4. Josephine Beeman
409 W. Jefferson St.
Boise, Idaho 83702
(208) 331-0950

INTERROGATORY NO. 15: Please provide the name, telephone number and address of each person, other than any persons you identified in your responses to the State's previous interrogatories to you in this subcase, who has knowledge of the facts and/or issues in this subcase.

RESPONSE TO INTERROGATORY NO. 15: Other than any individuals who may have been identified by the State of Idaho as having knowledge of the facts and/or issues in this subcase, and the individuals named in AFRD No. 2's Responses to the State of Idaho's previous interrogatories to AFRD No. 2 in this subcase, AFRD No. 2 is not presently aware of any additional persons who have knowledge of the facts and/or issues in this subcase.

INTERROGATORY NO. 16: Please describe how you contend the water received by AFRD No. 2 is categorized as natural flow water and water received by AFRD No. 2 is categorized as storage in language other than that set out in the *Eagle Decree* and the Palisades Contracts.

RESPONSE TO INTERROGATORY NO. 16: AFRD No. 2 objects to this interrogatory on the grounds that it seeks a legal conclusion and further seeks a conclusion or opinion that is different than the position actually held by AFRD No. 2. AFRD No. 2 further objects on the grounds of relevance. Without waiving said objections, it is the position of AFRD No. 2 that the *Eagle Decree* and Palisades Contracts clearly and adequately describe how water received by AFRD No. 2 should be categorized as natural flow and how water received by AFRD No. 2 is categorized as storage, and therefore would not describe the water received as natural flow nor the water received as storage in any language other than that described in the *Eagle Decree* and Palisades Contracts.

INTERROGATORY NO. 17: Please describe, in language other than that in the *Eagle Decree* and/or Palisades Contracts, AFRD No. 2's view of the correct method for determining, under the *Eagle Decree* and/or the Palisades Contracts and applicable Idaho law, for the purposes of

administering water right 01-0006, what portion of AFRD No. 2's overall diversions from the Snake River under water right 01-0006 are to be considered natural flow diversions, and what portion of AFRD No 2's overall diversions from the Snake River under water right 01-0006 are to be considered storage water diversions

RESPONSE TO INTERROGATORY NO. 17: AFRD No. 2 objects to this interrogatory on the grounds that it seeks a legal conclusion and further seeks a conclusion or opinion that is different than the position actually held by AFRD No. 2. AFRD No. 2 further objects on the grounds of relevance and on the grounds that this interrogatory is vague and ambiguous. Without waiving said objections, it is the position of AFRD No. 2 that the *Eagle Decree* and Palisades Contracts clearly and adequately describe which diversions should be categorized as natural flow and which diversion should be categorized as storage water, and therefore would not attempt to categorize diversions in any language other than that described in the *Eagle Decree* and Palisades Contracts.

INTERROGATORY NO. 18: Please state each element of water right 01-0006 in the form you contend these elements should be partially decreed in the SRBA pursuant to Idaho Code §§ 42-1411(2) and 42-1414(2), including any remarks that you contend are necessary for definition of water right 01-0006, or for the administration of water right 01-0006.

RESPONSE TO INTERROGATORY NO. 18: AFRD No. 2 objects to this interrogatory on the grounds that it seeks a legal conclusion and on the grounds of relevance. AFRD No. 2 further objects on the grounds that this interrogatory seeks attorney work product. Without waiving said objection, AFRD No. 2 asserts that the material elements, i.e. quantity, of subcase 01-0006 should be decreed as set forth in the *Eagle Decree* and Palisades Contracts. AFRD No. 2 has not determined at this time that additional remarks are necessary for definition, clarification or administration of water

right 01-0006.

INTERROGATORY NO. 19: Please provide the names, addresses and telephone numbers of the persons who made the determinations resulting in your answers to Interrogatories Nos. 16, 17 and 18, when such determinations were made, and by what authority they were made.

RESPONSE TO INTERROGATORY NO. 19: The answers to Interrogatories Nos. 16, 17 and 18 are a result of the existence and application of the historical record applicable to water right 01-0006. The information supporting that record and these answers has been obtained from numerous sources, which have been identified in Response to Interrogatories Nos. 1, 2 and 3 in *American Falls Reservoir District No. 2's Answers to State of Idaho's First Set of Discovery Requests*.

The position held by AFRD No. 2 is simply that the *Eagle Decree* and Palisades Contracts speak for themselves and are clear on their face. Therefore, the "determinations" you refer to were made by the persons who negotiated, developed and drafted the Eagle Decree and Palisades contracts. When and specifically by whom said determinations were made is clearly reflected in the historic record that has been developed in this subcase.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 28: Please produce each and every document and/or physical or tangible object, other than those you already produced in response to the State's previous requests for production of documents to you in this subcase, that you contend supports your answers to Interrogatory Nos. 16, 17 and 18.

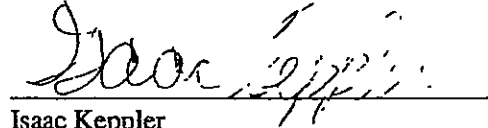
RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS NO. 28: Other than documents already produced by the State of Idaho in discovery, none.

RESERVATION OF RIGHT TO SUPPLEMENT

In the event the Claimant discovers additional evidence or witnesses to be called at trial, prior to and during trial, evidence will be submitted for inspection by the State of Idaho. The Claimant reserves the right to supplement discovery information as it becomes available and to call any or all witnesses listed by the State.

DATED: this day of 3 January, 2011.

CAPITOL LAW GROUP, PLLC

A handwritten signature in dark ink, appearing to read "Isaac Keppler", is written over a horizontal line.

Isaac Keppler

Attorney for American Falls Reservoir District No. 2

**OFFICE OF THE
ATTORNEY GENERAL**

MAIL 111966

PRELIMINARY AND GENERAL OBJECTIONS

Claimant is engaged in continuing discovery in this case and will supplement its responses if and when additional information becomes available. Accordingly, all of the responses are based upon the information and documents presently available to and specifically known to Claimant. Claimant, therefore, provides the following responses to the State of Idaho without prejudice to present at trial further evidence of proof not yet obtained or completed.

Each response is given subject to all appropriate objections (including, but not limited to, objections of materiality, relevancy, authenticity and admissibility) which would require the exclusion or limitation or any statement made herein if the statement was made in court. All such objections and grounds therefore are reserved and may be interposed at the time of trial. Except for facts explicitly admitted herein, the fact that any interrogatory, request for production, or request for admission has been responded to shall not be taken as an admission, or concession of the evidence, of any fact set forth or assumed, or that such response constitutes evidence of any fact thus set forth or assumed. All responses must be construed as given on the basis of present recollection.

Claimant objects to the State's requests to the extent that they seek information which is confidential, proprietary, protected by the attorney/client privilege and/or protected by the attorney product work doctrine, and to the extent that the State attempts to impose obligations beyond those required by the Idaho Rules of Civil Procedure. Claimant has identified certain documents in response to specific interrogatories or requests. However, additional records may exist and additional information may be derived or ascertained which the State finds responsive to its specific interrogatories or requests by reviewing Claimant's records relating to this matter. Such records are in the possession of Claimant's counsel at 301 Main Street, Gooding, Idaho 83330, and may be

examined, audited, or inspected during business hours upon reasonable notice.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 5: Admit it is the position of AFRD No. 2 that the *Eagle Decree* and Palisades Contracts clearly and adequately describe how water received by AFRD No. 2 should be categorized as natural flow and how water received by AFRD No. 2 should be categorized as storage.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Admit.

REQUEST FOR ADMISSION NO. 6: Admit it is the position of AFRD No. 2 that the *Eagle Decree* and Palisades Contracts clearly and adequately describe which of AFRD No. 2's diversions from the Snake River should be categorized as natural flow and which of AFRD No. 2's diversions from the Snake River should be categorized as storage.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Admit.

REQUEST FOR ADMISSION NO. 7: Admit that AFRD No. 2 would not describe the water received by AFRD No. 2 as natural flow nor the water received by AFRD No. 2 as storage in any language other than that described in the *Eagle Decree* and Palisades Contracts.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: Objection. This Request for Admission seeks neither fact nor the application of law to fact, and therefore is not within the scope of discovery. Furthermore, to the extent the Request for Admission seeks information, such information is protected by attorney-client privilege and the attorney work product doctrine. Without waiving said objections, AFRD No. 2 is *capable* of describing water received by AFRD No. 2 as natural flow and water received by AFRD No. 2 as storage in language other than that described in the *Eagle Decree* and Palisades Contracts, but perceives no present obligation to do so. On that

basis. AFRD No. 2 denies.

REQUEST FOR ADMISSION NO. 8: Admit that AFRD No. 2 would not attempt to categorize AFRD No. 2's natural flow and storage diversions from the Snake River in any language other than that described in the *Eagle Decree* and Palisades Contracts.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Objection. This Request for Admission seeks neither fact nor the application of law to fact, and therefore is not within the scope of discovery. Furthermore, to the extent the Request for Admission seeks information, such information is protected by attorney-client privilege and the attorney work product doctrine. Finally, as used above, the language "would not attempt" is ambiguous and subject to more than one meaning. Without waiving said objections, AFRD No. 2 is *capable* of categorizing its natural flow and storage diversions in language other than that described in the *Eagle Decree* and Palisades Contracts, but perceives no present obligation to do so. On that basis, AFRD No. 2 denies.

REQUEST FOR ADMISSION NO. 9: Admit that for the purposes of defining and/or administering water right no. 01-0006 consistently with the provisions of the *Eagle Decree* and Palisades Contracts, the partial decree for water right no. 01-0006 need not include any language other than that described in the *Eagle Decree* and Palisades Contracts.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Objection. This Request for Admission seeks information that is protected by attorney-client privilege and the attorney work product doctrine. Furthermore, said request contains multiple, different and inconsistent subparts. Without waiving said objections, AFRD No. 2 can neither fully admit nor deny. AFRD No. 2 admits that the language of the *Eagle Decree* and Palisades Contracts would define water right no. 01-0006 consistently with the provisions of the *Eagle Decree* and Palisades Contracts. Beyond that, AFRD

No. 2 cannot admit as to what language might be required for administering said water right, nor can it admit as to all the language that may need to be written in the partial decree. The remainder of this Request for Admission is denied.

INTERROGATORIES

INTERROGATORY NO. 20: If AFRD No. 2 denies the above-stated Request for Admission No. 5 in whole or part, please fully explain the basis for such denial.

RESPONSE TO INTERROGATORY NO. 20: None.

INTERROGATORY NO. 21: If AFRD No. 2 denies the above-stated Request for Admission No. 6 in whole or part, please fully explain the basis for such denial.

RESPONSE TO INTERROGATORY NO. 21: None.

INTERROGATORY NO. 22: If AFRD No. 2 denies the above-stated Request for Admission No. 7 in whole or part, state the language other than that described in the Eagle Decree and Palisades Contract how AFRD No. 2 would describe the water received by AFRD No. 2 as natural flow and the water received by AFRD No. 2 as storage.

RESPONSE TO INTERROGATORY NO. 22: Objection. This Interrogatory seeks neither fact nor the application of law to fact, and therefore is not within the scope of discovery. Furthermore, to the extent the Interrogatory seeks information, such information is protected by attorney-client privilege and the attorney work product doctrine. Without waiving said objections, AFRD No. 2 is *capable* of describing water received by AFRD No. 2 as natural flow and water received by AFRD No. 2 as storage in language other than that described in the *Eagle Decree* and Palisades Contracts, but perceives no present obligation to do so, as the distinction is correctly and adequately described in the *Eagle Decree* and Palisades Contracts.

INTERROGATORY NO. 23: If AFRD No. 2 denies the above-stated Request for Admission No. 8 in whole or part, state in language other than that described in the *Eagle Decree* and Palisades Contracts how AFRD No. 2 would attempt to categorize AFRD No. 2's diversions of water from the Snake River as natural flow and storage.

RESPONSE TO INTERROGATORY NO. 23: Objection. This Interrogatory seeks neither fact nor the application of law to fact, and therefore is not within the scope of discovery. Furthermore, to the extent the Interrogatory seeks information, such information is protected by attorney-client privilege and the attorney work product doctrine. Finally, as used in Request for Admission No. 8, the language "would not attempt" is ambiguous and subject to more than one meaning. Without waiving said objections, AFRD No. 2 is *capable* of categorizing its natural flow and storage diversions in language other than that described in the *Eagle Decree* and Palisades Contracts, but perceives no present obligation to do so. In that regard, AFRD No. 2 "would not attempt" to categorize its natural flow and storage diversions in language other than that described in the *Eagle Decree* and Palisades Contracts.

INTERROGATORY NO. 24: If AFRD No. 2 denies the above-stated Request for Admission No. 9 in whole or in part, state in language other than that described in the *Eagle Decree* all of the elements, remarks, provisions, and conditions that AFRD No. 2 contends must be included in the partial decree for water right no. 01-0006 in order to define and administer water right no. 01-0006 consistently with the *Eagle Decree* and Palisades Contracts.

RESPONSE TO INTERROGATORY NO. 24: Objection. This Interrogatory seeks information that is protected by attorney-client privilege and the attorney work product doctrine. Without waiving said objections, AFRD No. 2 contends that the language of the *Eagle Decree* and

Palisades Contracts correctly defines the elements of water right 01-0006. Beyond that, AFRD No. 2 has made no determination as to what language might be required for administering said water right, nor as to what additional language, if any, may need to be written in the partial decree.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 29: Please produce each and every document and/or other physical or tangible object, other than those you already produced in response to the State's previous requests for production of documents to you in this subcase, that you contend supports your answers to any of the Requests for Admissions and Interrogatories set forth above.

RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS NO. 29: None.

RESERVATION OF RIGHT TO SUPPLEMENT

In the event the Claimant discovers additional evidence or witnesses to be called at trial, prior to and during trial, evidence will be submitted for inspection by the State of Idaho. The Claimant reserves the right to supplement discovery information as it becomes available and to call any or all witnesses listed by the State.

DATED: this day of 8 February, 2011.

CAPITOL LAW GROUP, PLLC



Isaac Keppler

Attorney for American Falls Reservoir District No. 2

RECEIVED BY

OCT 26 2010

OFFICE OF THE
ATTORNEY GENERAL

C. Thomas Arkoosh
CAPITOL LAW GROUP, PLLC
301 Main Street
Post Office Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873
Idaho State Bar No. 2253

Attorneys for American Falls Reservoir District #2

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. 01-00006

AMERICAN FALLS RESERVOIR
DISTRICT NO. 2'S FIRST SET OF
INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS
TO THE STATE OF IDAHO

INTERROGATORIES

Request is hereby made by the undersigned that you answer the interrogatories attached hereto under oath as provided by the Idaho Rules of Civil Procedure within thirty (30) days after the date of service hereof.

AMERICAN FALLS RESERVOIR DISTRICT NO. 2'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO THE STATE OF IDAHO -
Page 1

MAIL 111480

REQUEST FOR PRODUCTION

Request is hereby made by the undersigned pursuant to Rule 34 of the applicable Rules of Civil Procedure, that you produce each document and thing identified in your answers to the interrogatories, except any such document and thing attached to your answers to the interrogatories, in the manner following:

(1) either by copying such items for production and then mailing or delivering such copies to the undersigned so that such copies are received by the undersigned not less than five days before the date specified in subparagraph (2) hereof in which case the undersigned will forthwith reimburse you through your counsel for such copies at the rate of ten cents per page of such copies;

(2) or, (if at your option you elect not to produce the items for production in the manner specified in subparagraph (1) hereof) by producing such items for production and permitting the undersigned, or someone acting on behalf of the undersigned, to inspect by reading and examining the same and to copy and photograph the same at the time and place hereinafter designated.

TIME AND PLACE OF PRODUCTION

The production above requested shall take place at Capitol Law Group, PLLC.

Time: 5:00 o'clock, p.m.

Date: thirty days from date of service.

Place: The law office of the undersigned counsel at 205 N. 10th Street, 4th Floor,
Boise, ID 83701.

Notice

ANSWERS UNDER OATH

You are hereby informed that you are answering these interrogatories under oath under the penalties of perjury and that your answers may be used as evidence in the event of a trial of this action.

In answering these Interrogatories, furnish all information available to you through due diligence, including information in the possession of your attorneys or agents, and consultants, and experts retained by you or your attorneys, not merely information known of your own personal knowledge.

If you cannot answer the following Interrogatories in full, after exercising due diligence to obtain the information to do so, answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information and knowledge you have concerning the unanswered portion.

In the event you object to providing information requested on the basis of privilege, please identify the information not provided in a "privilege log."

These Interrogatories are deemed continuing Interrogatories, and your answers thereto are to be supplemented as additional information and knowledge become available or known to

you.

DEFINITIONS

Some terms used in these interrogatories shall have the specific meaning which is set forth below. There shall be no difference in such meaning between the singular and the plural of any such term except that the number referred to by the plural shall be more than one. These terms are as follows:

- (a) "you" means the State of Idaho.
- (b) "person" means a natural person and every kind of legal entity known to or recognized by law.
- (c) "representative" means every person acting on behalf of the person designated and includes but is not limited to officers, employees, agents, attorneys, independent contractors, fiduciaries, consultants, experts and each representative as heretofore defined of each insurer of the person designated.
- (d) "third party" means a person who is not now a party to this action.
- (e) "identify each communication" means:

--- with respect to a written communication, a complete statement setting forth the following: the date thereof; the name and address of the person who initiated the communication; the name and address of each person to whom the communication was directed; a description thereof sufficient to identify it; the

present location of the original thereof and of each copy thereof; and the name, address, job title and relationship to the parties of each person having custody or possession of the original thereof and of each copy thereof.

--- with respect to a verbal communication by personal meeting, a complete statement setting forth the following: the date thereof; the approximate time thereof; the place thereat; the substance of what was said by each person present thereat; whether any conversation thereat was recorded and if so the name and address of the person who recorded it and the name and address of the person who has custody or possession of such recording and of each copy thereof; and whether any notes or memorandum were made of any conversation thereat and if so the name and address of the person who made such notes or memorandums and the name and address of each person who has custody or possession of the original of such notes or memorandum and of each copy thereof.

--- with respect to a telephone conversation, a complete statement setting forth the following: the date thereof; the approximate time thereof; the name of the person initiating the call; the location from which the call was placed; the name of the person called; the location to which the call was placed; the words spoken or the substance of what was said by the person initiating the call and by the person called; whether anyone else listened in on one or both sides of such

telephone conversation and if so the name and address of such person; whether such conversation was recorded and if so the name and address of the person who recorded it and the name and address of the person who has custody or possession of such recording and of each copy thereof; and whether any notes or memorandums were made of such conversation and if so the name and address of each person who has custody or possession of the original of such notes or memorandum and of each copy thereof.

- (f) "document" means anything: which is written or printed or typed; or which is graphic matter of any kind or nature or pictures however produced or reproduced; or which is recorded mechanically or electronically; or which is a copy and draft or transcript of any of the foregoing.
- (g) "identify each document" means with respect to each such document a complete description thereof sufficient to identify it, the present location of the original thereof, the present location of each copy thereof and the name and address and job title and relationship to the parties to this action of the person who has custody or possession of the original thereof and of each copy thereof.
- (h) "identify each person" means with respect to such person and insofar as applicable to such person his or her name, last known address, last known residence telephone number, last known business telephone number, last known

business or occupation or profession, address of last known employer or place of business, actual (or estimated) age, and the relationship to any party to this action.

- (i) "identify each exhibit" means with respect to each such exhibit a complete description thereof sufficient to identify it, the present location of the original thereof, the present location of each copy thereof and the name and address and job title and relationship to the parties to this action of the person who has custody or possession of the original thereof and of each copy thereof.
- (j) "knowledge" includes first-hand knowledge and information derived from any other source, including but not limited to hearsay knowledge.
- (k) "relevant" means information or evidence of any kind having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence; and, information or evidence of any kind which is reasonably calculated to lead to the discovery of relevant evidence.

INTERROGATORIES

INTERROGATORY NO. 1: Please separately identify each communication which is relevant or which you intend to offer in evidence at the trial of this action for any purpose.

INTERROGATORY NO. 2: Please separately identify each document which is relevant or which you intend to offer in evidence at the trial of this action for any purpose.

AMERICAN FALLS RESERVOIR DISTRICT NO. 2'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO THE STATE OF IDAHO -

INTERROGATORY NO. 3: - Please identify each person with whom you or your representatives have communicated or who you or your representatives have interviewed seeking information relating to this action or any issue in this action.

INTERROGATORY NO. 4: Please separately identify each person who, according to your information or knowledge or the information or knowledge of your representatives, has relevant knowledge of any of the issues or any of the occurrences which are relevant to this action and state the substance of the facts and opinions which constitute such relevant knowledge.

INTERROGATORY NO. 5: Please separately identify each person who you may call as a lay witness at the trial of this action and state the substance of the facts and opinions to which such lay witness is expected to testify.

INTERROGATORY NO. 6: Please separately identify each person retained or specially employed by you as an expert in anticipation of this litigation or in preparation for the trial of this action whom you do not expect to call as a witness at the trial of this action and state with respect to any reports made to you by the expert the subject matter thereof and the location of each such report.

INTERROGATORY NO. 7: Please separately identify each person whom you may call as an expert witness at the trial of this action and state the subject matter on which such expert witness is expected to testify, the substance of the facts to which such expert witness is

expected to testify and the substance of the opinions to which such expert witness is expected to testify.

INTERROGATORY NO. 8: Please separately identify each exhibit which you may offer into evidence at the trial of this action and as to each such exhibit which consists of more than 15 pages or more than 3,000 words, quote or otherwise specifically designate each portion of such exhibit which you contend is the relevant portions thereof.

INTERROGATORY NO. 9: Please separately identify each person who supplied answers to these interrogatories and designate the answer or part thereof supplied by such person. (This interrogatory is intended to discover principal sources of information and does not seek to ascertain the identity of mere draftsmen or persons responsible for the mechanical preparation of these answers.)

INTERROGATORY NO. 10: Please describe how you contend water received by American Falls Reservoir District No. 2 (AFRD No. 2) is categorized as natural flow and water received by AFRD No. 2 is categorized as storage in language other than that set out in the *Eagle Decree* and the Palisades Contracts.

INTERROGATORY NO. 11: Please identify the individuals who made the determination resulting in the answer to Interrogatory No. 10, when such determination was made, and by what authority it was made.

INTERROGATORY NO. 12: Please identify the language found in the documents identified in Exhibit A, attached hereto and incorporated herein, which you claim supports your

contention identified in the answer to Interrogatory No. 10. By "identify the language," this interrogatory requests that you recite page and line of whatever language you contend supports your contention identified in the answer to Interrogatory No. 10.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Please produce each and every document and/or other physical or tangible object that supports your answers to Interrogatory Nos. 1 through 11, above. Also, please produce each and every document and/or physical or tangible object identified, described, or discussed in your responses to Interrogatory Nos. 1 through 12, above. With respect to each such document or object, please indicate the number of the interrogatory or interrogatories to which the document or object is responsive.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that your answer to Interrogatory No. 14 identifies all the language which you contend supports your contention identified in the answer to Interrogatory No. 10.

DATED this 21 day of October, 2010.

CAPITOL LAW GROUP, PLLC


C. Tom Arkoosh
Attorney for American Falls Reservoir District #2

EXHIBIT A

Bates #	DocDate	Description
IOAG000000001	9/14/1949	Letter from Ernest MacFarland, Chair of Senate Committee on Interior & Insular Affairs, to Senator O'Mahoney re: Subcommittee Report on Legislation on Pallsades Dam & Reservoir Project, Northside Pumping Division and Disposition of Reserved Space in American Falls Reservoir.
IOAG000000005	9/29/1949	US Senate Report No. 1116 re: Legislation on Pallsades Dam & Reservoir Project, Northside Pumping Division and Disposition of Reserved Space in American Falls Reservoir
IOAG000000014	7/17/1950	Letter from F. J. Lawton, Director, Bureau of the Budget, Executive Office of the President, to Secretary of Interior re: Pallsades Dam Project
IOAG000000024	10/8/1943	Memorandum for USBR Regional Director from E.H. Neal re: Water Right from Snake River for American Falls Reservoir Dist. #2
IOAG000000027	8/5/1968	Status Report - Workings of Pallsades Water Savings Agreements
IOAG000000036	3/13/1989	Letter from John W. Keyes III, USBR Regional Director, to Alan D. Jensen. P.E., re: Documents Relating to Authorization of Pallsades Dam and Reservoir (Project Authorization)
IOAG000000039	4/11/1957	Letter from E.G. Nielsen, Commissioner of Reclamation, to the Secretary of Interior re: Inter-Bureau Agreement on Water Supply for Michaud Division, Fort Hall Indian Reservation from American Falls & Pallsades Reservoirs - Minidoka & Pallsades Projects
IOAG000000042	2/21/1934	Letter from Lynn Crandall, USGS District Engineer to Dr. Elwood Mead, Commissioner of Reclamation re: Comments on Proposal to Construct a Government Power Plant at American Falls
IOAG000000045	1/31/1960	Table Entitled Existing and Proposed Holdings of American Falls, Jackson Lake and Pallsades Reservoir Space, Minidoka-Pallsades Projects.
IOAG000000048	10/1/1946	Water Supply for Pallsades Reservoir Project - Project Planning Report 1-5.17-1 - A General Plan For The Elimination Of Winter Diversions, Coordinated Operation of Reservoirs, and Development of New Land (United States Dept of the Interior, Bureau of Reclamation)
IOAG000000273	11/27/1950	House Document No. 721 - A Report on the North Side Pumping Division of the Minidoka Project, Idaho, Pursuant to Public Law 864 (81st Congress, 2d Session) (Government Printing Office)
IOAG000000330	12/12/1941	House Document No. 457 - Report on the Pallsades Dam Projects Near Idaho Falls, Idaho - Letter from the Secretary of the Interior Transmitting a Letter from the Commissioner of the Bureau of Reclamation Submitting the Engineering and Economic Report on the Pallsades Dam Projects on the South Fork of the Snake River Near Idaho Falls, Idaho (77th Congress, 1st Session) (Government Printing Office)
IOAG000000359	11/27/1950	House Document No. 720 - Pallsades Dam and Reservoir Project in Idaho - A Supplemental Report on Allocation & Repayment of Costs of the Pallsades Dam & Reservoir Project Pursuant to Public Law 864 (81st Congress, 2d Session)
IOAG000000415	1/1/1935	Hoyt, W.G. - Water Utilization in the Snake River Basin - USGS Water Supply Paper 657
IOAG000000841	6/21/1937	Letter from B.E. Stoutemyer, USBR District Counsel, to R.W. Faris, Idaho State Commissioner of Reclamation re: Twin Falls Hydropower Site Expansion

EXHIBIT NUMBER

2

IOAG Documents Produced 8/10/2010

Bates #	DocDate	Description
IOAG000000845	3/12/1936	Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935
IOAG000000849	2/21/1934	Letter from Lynn Crandall, USGS District Engineer to Dr. Wilwood Mead, Commissioner of Reclamation Mead re: Comments on Proposal to Construct a Government Power Plant at American Falls
IOAG000000852	2/21/1934	Letter from Lynn Crandall, USGS District Engineer to Dr. Wilwood Mead, Commissioner of Reclamation Mead re: Comments on Proposal to Construct a Government Power Plant at American Falls
IOAG000000855	8/1/1941	Excerpted Pages of Report on Palisades Dam Project, Corrections by E.B. Debler
IOAG000000896	9/17/1943	Letter from H.W. Bashore, Commissioner of Reclamation, to Congressman Dworshak re: Construction of Palisades Reservoir
IOAG000000898	12/9/1941	Letter from Harold L. Ickes, Secretary of Interior Ickes, to the President of the United States Senate re: Reclamation Report on the Palisades Project
IOAG000000900	8/20/1940	Letter from Lynn Crandall, USGS District Engineer, to S. O. Harper, Chief Engineer, U.S. Bureau of Reclamation re: Grand Valley Reservoir
IOAG000000903	8/16/1940	Letter from S.O. Harper, Chief Engineer, U.S. Bureau of Reclamation, to Lynn Crandall, USGS District Engineer re: Grand Valley Reservoir
IOAG000000905	6/1/1935	Report on Upper Snake River Storage Investigations, Volume I, Snake River Above Idaho Falls (U.S. Dep't of the Interior, Bureau of Reclamation)
IOAG000001060	8/1/1939	Report on Upper Snake River (South Fork) Storage Investigations - Project Investigations Report No. 34 (U.S. Dep't of the Interior, Bureau of Reclamation)
IOAG000001227	10/11/1940	Letter from S.O. Harper, Chief Engineer, Bureau of Reclamation, to Lynn Crandall, USGS District Engineer re: Comments on Report on Grand Valley Reservoir
IOAG000001230	9/25/1940	Letter from Lynn Crandall, USGS District Engineer, to S.O. Harper, Chief Engineer, Bureau of Reclamation, re: Report on Grand Valley Reservoir
IOAG000001236	9/25/1940	Letter from Lynn Crandall, USGS District Engineer, to S.O. Harper, Chief Engineer, Bureau of Reclamation, re: Report on Grand Valley Reservoir
IOAG000001241	8/1/1940	Report on Upper Snake River (South Fork) Storage Investigations, Grand Valley Reservoir, Project Investigations Report No. 34-A (U.S. Dep't of the Interior, Bureau of Reclamation)
IOAG000001367	9/8/1939	Letter from Lynn Crandall, USGS District Engineer, to B.E. Stoutemyer, USBR District Counsel re: Water Problems on the Snake River
IOAG000001375	9/8/1939	Letter from Lynn Crandall, USGS District Engineer, to B.E. Stoutemyer, USBR District Counsel re: Water Problems on the Snake River
IOAG000001383	9/8/1939	Letter from Lynn Crandall, USGS District Engineer, to B.E. Stoutemyer, USBR District Counsel re: Water Problems on the Snake River
IOAG000001392	6/24/1949	Letter from Michael W. Straus, Commissioner of Reclamation, to the Secretary of the Interior re: Supplemental Report on Palisades Dam and Reservoir Project

Bates #	DocDate	Description
IOAG000001395	6/12/1946	Letter from Oscar L. Chapman, Acting Secretary of the Interior, to Walker B. Sheppard re: The Pallsades Project, Idaho
IOAG000001398	12/9/1941	Letter from Harold L. Ickes, Secretary of the Interior, to the Speaker of the House of Representatives re: Reclamation Report on the Pallsades Project
IOAG000001400	6/17/1952	Memorandum from Michael W. Straus, Commissioner of Reclamation, to Oscar L. Chapman, Secretary of the Interior re: Repayment and water savings contracts - Minidoka and Pallsades projects
IOAG000001405	12/6/1951	Memo from G.W. Lineweaver, Acting Commissioner of Reclamation, to Secretary of the Interior re: Extension for Completion of Pallsades Water Savings Agreements
IOAG000001407	12/1/1960	Technical Record of Design and Construction, Pallsades Dam and Power Plant (Part I, Introduction) (U.S. Dep't of the Interior, Bureau of Reclamation)
IOAG000001444	10/15/1934	Supplementary Water for Irrigation in Idaho, with Particular Reference to Boise and Snake River Valleys (Revised)
IOAG000001471	6/21/1937	Letter from B.E. Stoutemyer, USBR District Counsel, to R.W. Farls, Idaho State Commissioner of Reclamation re: Twin Falls License Stipulation
IOAG000001475	1/1/1960	Table Entitled Existing and Proposed Holdings of American Falls, Jackson Lake and Pallsades Reservoir Space, Minidoka - Pallsades Projects
IOAG000001478	12/31/1936	Water Distribution and Hydrometric Work, Water District No. 36, 1936 (Lynn Crandall, Watermaster)
IOAG000001508	6/15/2010	Letter from C. Tom Arkoosh to Gary Spackman, Director of Idaho Department of Water Resources re: American Falls Reservoir District No. 2
IOAG000001524	6/14/1937	Letters Between Dana Templin, Superintendent, Minidoka Project, and S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Water Delivery Under Secretary of the Interior's Instructions
IOAG000001526	4/6/1936	Draft Letter from Superintendent of Minidoka Project to Lynn Crandall, Watermaster, and R.W. Farls, Idaho State Commissioner of Reclamation re: Secretary of the Interior Instructions for Delivery of Water Under Permit no. 15134
IOAG000001529	6/15/1937	Letter from Lynn Crandall, Watermaster, to S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Water Delivery Under Secretary of the Interior's Instructions
IOAG000001531	4/6/1936	Letter from John C. Page, Acting Commissioner of Reclamation, to E.B. Darlington, Superintendent of Minidoka Project re: Instructions for Delivering Water Under Permit 15134
IOAG000001534	2/4/1936	Letter from B.E. Stoutemyer, USBR District Counsel, to P.T. Sutphen, Secretary of American Falls Reservoir District No. 2 re: Delivery of Water Under Permit 15134
IOAG000001538	6/14/1937	Letters Between Dana Templin, Superintendent, Minidoka Project, and S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Water Delivery Under Secretary of the Interior's Instructions
IOAG000001540	6/15/1937	Letter from Lynn Crandall, Watermaster, to S.T. Baer, Manager, American Falls Reservoir District No. 2 re: Delivery of Water Under Secretary of the Interior's Instructions
IOAG000001542	4/6/1936	Letter from Superintendent of Minidoka Project to Lynn Crandall, Watermaster and R.W. Farls, Idaho State Commissioner of Reclamation re: Delivery of Water Under Secretary of the Interior's Instructions

IOAG Documents Produced 8/10/2010

Bates #	DocDate	Description
IOAG000001545	4/6/1936	Letter from John C. Page, Acting Commissioner of Reclamation, to E.B. Darlington, Superintendent of Minidoka Project re: Instructions for Delivering Water Under Permit 15134
IOAG000001548	2/4/1936	Letter from B.E. Stoutemyer, USBR District Counsel, to P.T. Sutphen, Secretary of American Falls Reservoir District No. 2 re: Delivery of Water Under Permit 15134
IOAG000001552	6/25/1929	Woodville Decree
IOAG000001587	3/30/1921	License and Certificate of Water Right, Water License No. 15134
IOAG000001646	8/1/1945	Idaho Reclamation News
IOAG000001650	1/1/1947	Idaho Reclamation News
IOAG000001654	1/1/1948	Idaho Reclamation News
IOAG000001658	3/1/1948	Idaho Reclamation News
IOAG000001662	10/1/1949	Idaho Reclamation News
IOAG000001666	10/1/1952	Idaho Reclamation News
IOAG000001670	10/1/1954	Idaho Reclamation News
IOAG000001674	5/10/2010	IDWR E-mails re: American Falls Reservoir District No. 2 Natural Historical Flow Records
IOAG000001679	2/17/2010	Memorandum from Tony Olenchak, Water District #1, to Garrick Baxter and IDWR Legal Staff re: Historical Documentation for AFRD2 Water Right
IOAG000001683	8/8/1949	The Palisades Dam & Reservoir Project - Hearings Before A Subcommittee on Irrigation & Reclamation of the Committee on Public Lands, House of Representatives and a Special Subcommittee of Committee on Interior & Insular Affairs - HR 5506 (81st Congress, 1st Session) (Government Printing Office)
IOAG000001813	8/5/1968	Status Report - Workings of Palisades Water Savings Agreement (U.S. Bureau of Reclamation)
IOAG000001823	6/28/2010	Idaho Department of Water Resource's Backfile for Water Right No. 01-2064

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

In Re SRBA

) Subcase No.

Case No. 39576

) 01-00006

COPY

DEPOSITION OF 30(b)(6) WITNESS, CRAIG D. HOBDEY

July 28, 2010

REPORTED BY:

COLLEEN P. KLINE, CSR No. 345

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DEPOSITION OF 30(b)(6) WITNESS, CRAIG D. HOBDEY
July 28, 2010

REPORTED BY:
COLLEEN P. KLINE, CSR No. 345
Notary Public

APPEARANCES (Continued):
For United States of America and Bureau of
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United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
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speaker-device)
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Denver, Colorado 80294
For Idaho Ground Water Appropriators, Inc.:
Racine, Olson, Nye, Budge & Bailey, Chtd.
BY MS. CANDICE M. McHUGH
101 S. Capitol Boulevard, Suite 208
Boise, Idaho 83702
For the Upper Water Users:
BY MR. JERRY RIGBY (via telephonic
speaker-device)
25 N. 2nd E.
P.O. Box 250
Rexburg, Idaho 83440-0250

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1 THE DEPOSITION OF 30(b)(6) WITNESS,
2 CRAIG D. HOBDEY, was taken on behalf of American
3 Falls Reservoir District No. 2, at the offices of
4 Capitol Law Group, located at 205 N. 10th Street,
5 4th Floor, Boise, Idaho, commencing at 12:02
6 p.m., on July 28, 2010, before Colleen P. Kline,
7 Certified Shorthand Reporter and Notary Public
8 within and for the State of Idaho, in the
9 above-entitled matter.

10 APPEARANCES:
11 For American Falls Reservoir District No. 2:
12 Capitol Law Group, PLLC
13 BY MR. C. THOMAS ARKOOSH
14 MR. ISAAC D. KEPPLER
15 205 North 10th Street, 4th Floor
16 Boise, Idaho 83702
17 For the State of Idaho:
18 Office of the Attorney General
19 BY MR. MICHAEL C. ORR
20 700 West State Street, 2nd Floor
21 Boise, Idaho 83720
22
23
24
25

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23 Discovery Requests
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25

1 CRAIG D. HOBDEY,
2 first duly sworn to tell the truth relating to
3 said cause, testified as follows:
4 MR. ORR: Well, let the record reflect
5 this is the time and place set for the deposition
6 of American Falls Reservoir District No. 2. I am
7 Michael C. Orr, Deputy Attorney General, of the
8 Idaho office of the Attorney General. And that
9 is O-r-r.

10 EXAMINATION
11 QUESTIONS BY MR. ORR:

12 Q. Mr. Hobdey, would you please state, and
13 spell your name for the record.

14 A. Craig Hobdey, C-r-a-i-g, H-o-b-d-e-y.

15 Q. And it's my understanding, sir, you are
16 an attorney; correct?

17 A. Correct, Idaho State Bar License 3199.

18 Q. So you are familiar with depositions,
19 and we don't need to go over any procedures, and
20 rules, or anything like that?

21 A. That's correct.

22 Q. Have you been deposed before,
23 Mr. Hobdey?

24 A. I have.

25 Q. Would you tell me when, and what the

1 and the chairman, and the board of directors, and
2 they thought I would be the best one to represent
3 them at this deposition.

4 Q. So your understanding here, is that you
5 are the person designated to be deposed for
6 American Falls District No. 2?

7 A. That's correct.

8 Q. And in the Notice, which is on page 3,
9 there is a request for certain documents to be
10 produced. Did you bring any documents to this
11 deposition pursuant to that request?

12 A. I personally didn't bring any documents
13 pursuant to that request, no.

14 Q. I know that counsel produced to us a
15 number of documents in response to our discovery
16 requests. Are those documents the documents that
17 you consider to be responsive to this request in
18 the Notice?

19 A. They are.

20 Q. Are there any other documents you are
21 aware of, besides those produced by counsel in
22 response to the State's discovery request, that
23 are responsive to the request in the Notice?

24 A. None that I am aware of at this time.

25 Q. At this time, are you, or is American

1 matters were?

2 A. It was about ten years ago. I was
3 deposed regarding a contract dispute with one of
4 my clients.

5 Q. Is that the only time?

6 A. That was the only time that I was
7 personally deposed, yes.

8 Q. Mr. Hobdey, I'm going to hand you a
9 document.

10 (Exhibit 17 marked.)

11 Q. (BY MR. ORR) And mark it Exhibit
12 No. 17. It's entitled Notice of Deposition of
13 American Falls Reservoir District No. 2. Have
14 you seen this document before, sir?

15 A. Yes.

16 Q. Have you reviewed it substantively?

17 A. I've reviewed it with Mr. Arkoosh and
18 Mr. Isaac Keppler.

19 Q. And are you the person at American
20 Falls Reservoir District No. 2 as designated for
21 purposes of this deposition under Rule 30(b)(6)?

22 A. I cannot truthfully say, that AFRD No.
23 2 had a board meeting, and appointed me to
24 represent them at this 30(b)(6) deposition. I
25 have, however, discussed this with the manager,

1 Falls Reservoir District No. 2, still conducting
2 file review to conducting these file documents,
3 or have you completed that review?

4 A. I can't answer that question. I don't
5 know.

6 Q. Do you know who would be able to answer
7 that question?

8 A. I believe that would be up to
9 Mr. Arkoosh's discretion.

10 Q. I'm not sure I understand your answer
11 here. Are you claiming privilege, and refusing
12 to answer the question?

13 A. No, I'm telling you, I don't know if
14 Mr. Arkoosh believes he has sufficient
15 information to produce on summary judgment or
16 not. So I don't know if he's asked anybody to
17 produce any other documents or not, so...

18 MR. ARKOOSH: Counsel, we've produced
19 all the documents we thought were responsive to
20 your request. The witness didn't go gather them
21 up. We did, and we previously produced them. So
22 he did not physically bring another set for you,
23 if that's what you are asking. There are no
24 other documents at this time that were responsive
25 to your request.

1 MR. ORR: And from that, I assume your
2 file review for documents of this nature have
3 been complete?

4 MR. ARKOOSH: I didn't say that. I
5 said we've produced all the documents that we
6 perceive to be responsive to your request.

7 Q. (BY MR. ORR) Who at American Falls
8 Reservoir District can I ask this question of?
9 My question, I am simply asking if a file review
10 has been initiated and completed, and I'm not
11 getting an answer. I just want to know if I
12 should be expecting more or not. Is there
13 someone in American Falls Reservoir District No.
14 2 who would know the answer to this question?

15 A. No.

16 Q. Is there anyone at American Falls
17 Reservoir District No. 2 who has any kind of file
18 review pursuant to this Notice?

19 A. I don't know.

20 MR. ARKOOSH: Well, again, so you
21 understand, the witness did not conduct the file
22 review, we did. Are you asking if we're
23 complete? We're complete today. Okay? You may
24 get supplemental discovery.

25 MR. ORR: That answers my question. I

1 appreciate that, Counsel. Thank you for the
2 clarification.

3 Q. (BY MR. ORR) Mr. Hobdey, are you an
4 employee of American Falls Reservoir District No.
5 2?

6 A. I wouldn't consider myself an employee,
7 no. I'm retained on a monthly basis as general
8 counsel, and have been in that position since
9 1991.

10 Q. So would it be more accurate to say,
11 you are a contractor, than an employee?

12 A. I believe that would be more accurate.

13 Q. Are you an officer of American Falls
14 Reservoir District No. 2?

15 A. No, I am not.

16 Q. Have you ever been an officer of
17 District No. 2?

18 A. No, I have not.

19 Q. Are you a board member of American
20 Falls Reservoir District No. 2?

21 A. No, I am not.

22 Q. Have you ever been a board member of
23 American Falls Reservoir District No. 2?

24 A. No, I have not.

25 Q. Other than your contractual

1 relationship with American Falls Reservoir
2 District No. 2 as general counsel on retainer, do
3 you have any other business relationship or
4 employment relationship to American Falls
5 Reservoir District No. 2?

6 A. No, I do not.

7 Q. Did I understand you correctly, that
8 you have been general counsel for American Falls
9 Reservoir District No. 2 since 1991?

10 A. Approximately.

11 Q. Approximately. In your capacity as
12 general counsel -- well, let me put it this way:
13 Could you describe for me what general counsel
14 duties for American Falls Reservoir District No.
15 2 consists of?

16 A. Attend the board meetings; advise the
17 board as to legal matters when they have legal
18 questions; foreclose on delinquent payments.
19 Just handle all the legal matters for the board,
20 unless we feel it's beyond -- unless it becomes
21 too involved for me as a single and solo firm to
22 do.

23 Q. Do you directly handle litigation for
24 the American Falls Reservoir District No. 2?

25 A. From time to time.

1 Q. And when I say "directly handle," I
2 mean do you make appearances and file briefing,
3 and oral argument, and things of that nature?

4 A. I do.

5 Q. What is the term of your current
6 contract as general counsel? How long does it
7 last?

8 A. We don't have a written contract. If
9 they want me to no longer to be their general
10 counsel, I guess they'll tell me, and I'll move
11 on down the road.

12 Q. It's a verbal arrangement, essentially?

13 A. That's correct.

14 Q. Okay. How much of your time does your
15 duties as general counsel for American Falls
16 Reservoir District No. 2 take up, say, in a given
17 week or a given month?

18 A. It varies considerably. I could spend
19 as little as four hours a month, or as many as 80
20 hours a month, depending on what's happening, and
21 what needs to be --

22 Q. I'm sorry. Did you say as many as
23 eight or 80?

24 A. 80.

25 Q. So it's variable. Does your retainer