

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

In Re SRBA	)	Subcase Nos. 36-04074
	)	36-04148A and 36-04148B
	)	
	)	ORAL DEPOSITION OF
	)	
Case No. 39576	)	ALLEN MERRITT
	)	

DATE: July 30, 1996

TIME: 7:06 p.m.

PLACE: Law Offices of Hepworth, Lezamiz &
Hohnhorst
Twin Falls, Idaho

APPEARANCES:

For the Claimant
Clear Lake Country
Club

HEPWORTH LEZAMIZ & HOHNHORST
by PATRICK D. BROWN
133 Shoshone Street North
Twin Falls, Idaho 83301

For the Claimant
Clear Lake
Corporation

ROSHOLT ROBERTSON & TUCKER
by NORMAN M. SEMANKO
143 Third Avenue North
Twin Falls, Idaho 83301

Idaho Department of Water Resources
by BRENT R. KING
and CHARLES HONSINGER
1301 North Orchard
Boise, Idaho 83706-2237

I N D E X

Witness, ALLEN MERRITT

Examination by:

Page

Mr. Semanko

3

Mr. Brown

30

Mr. King

—

(No Exhibits Marked.)

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DEPOSITION OF ALLEN MERRITT, taken at the instance of the claimant, at the Law Offices of Hepworth, Lezamiz & Hohnhorst, 133 Shoshone Street North, in the City of Twin Falls, State of Idaho, before Connie Stone, a Notary Public and Certified Shorthand Reporter in and for the State of Idaho, pursuant to notice and in accordance with the Idaho Rules of Civil Procedure.

(Witness sworn.)

MR. SEMANKO: We're back on the record.

Allen Merritt has been sworn in.

ALLEN MERRITT,

called as a witness at the instance of the claimant, being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SEMANKO:

Q. Mr. Merritt, would you state your position with the department.

A. Presently I'm the southern region manager.

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Q. And what are your general responsibilities in that position with regard to the Snake River Basin Adjudication?

A. Well, I manage the region and the various functions within the region, as part of that is the adjudication effort. However, that effort does have a water right supervisor specifically to supervise that staff. But in general, I coordinate efforts between the various functions of the department, including the adjudication region.

Q. Do you review recommendations or proposed recommendations by water resource agents?

A. Presently I do not, but I have in the past.

Q. Did you in 1990 and 1991 do that?

A. Yes. Let me make a correction. I kind of do somewhat still.

Q. Let me ask you, are you familiar with the claims files for 36-4148A? Are you familiar with that claims file?

A. Somewhat, yes.

Q. Did you spend a lot of time looking at it, just some or --

A. Not very much, no.

Q. Were you involved in looking at it in 1990

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and 1991 when the recommendations were being formulated, do you recall?

A. Somewhat, yes.

Q. Let me ask you out of my ignorance, the water right or the SRBA printout form that the department can generate on their computers, the one 36-4148A -- just a second, I'll get that out. Do you have one of those there?

MR. KING: Are you talking about the CVR?

Q. BY MR. SEMANKO: I'll put one out and then you can tell me what it is. This document is dated 2/2/96, and is entitled Idaho Department of Water Resources Adjudication Claims Proof Reading Report Regional for 36-4148A. Is that a familiar type of document to you?

A. Yes.

Q. Toward the end, there are a number of abbreviations and comments and things beginning on page 2 under "comments" and going on to the next page. Can you take a moment to look at that, and there's several notations with Merritt, with your name. And can you, from looking at that, summarize what your involvement with 4148A has been? Take your time.

A. From that record, it appears that I

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1 responded to the notice of error and manipulated this
 2 particular record to reflect that.
 3 Q. Did you do anything else with it?
 4 A. Just to copy some remarks that were in a
 5 previous version to comments.
 6 Q. Okay. With regard to your involvement
 7 with the response to the notice of error, do you have
 8 a letter dated October 19, 1992, regarding 36-4148A,
 9 proposed recommendation to Mr. Brush from yourself?
 10 A. Yes. It's in the file.
 11 Q. In the third paragraph, it states, in your
 12 case, when the department conducted the review in an
 13 effort to confirm the beneficial use of your right,
 14 we determined that the present use of the water was
 15 established in 1988.
 16 Is there anything in the file, to your
 17 knowledge, that would lead you to change that
 18 conclusion?
 19 A. Well, I would have to look at the file.
 20 I'm not that familiar with it anymore.
 21 Q. When you used the wording in this letter,
 22 we determined that the present use of the water was
 23 established in 1988, are you inferring or stating
 24 that there was some previous use of that water prior
 25 to 1988?

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1 during the periods of years that he was looking for a
 2 beneficial use, he found none. So, you know, the
 3 priority date goes way, way, way back. 1890 is what
 4 was claimed. So I would say that there maybe was
 5 something way back when. We sure couldn't find it.
 6 So --
 7 Q. Doesn't this letter basically state that
 8 the previous use -- that a previous use had been
 9 forfeited? Doesn't this letter say that?
 10 A. Yes, that's what it says.
 11 Q. So is it safe to assume that prior to
 12 1988, at least five years prior, there had been some
 13 previous use?
 14 A. Well, in case there was a use, it was
 15 forfeited.
 16 Q. The last sentence of that paragraph says,
 17 Based on our understanding of the law, your right was
 18 disallowed for reasons of forfeiture and/or the use
 19 was reestablished in violation of the mandatory
 20 permit process.
 21 In order for a right to be forfeited, it
 22 first has to be established, is that true? You have
 23 to have a right before you can forfeit it, I mean?
 24 A. Generally, yes.
 25 Q. And if a right was established, it would

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1 A. I don't think you could make that
 2 inference.
 3 Q. Is there a reason for using the word
 4 "present" in that sentence?
 5 A. Well, I would say that signifies that in
 6 1992, the use at that time, the date of the letter,
 7 that present use was established in 1988.
 8 Q. When you say present use of the water
 9 established in 1988, can you recall what the nature
 10 of that use was under 4148A? Was it within the
 11 residential subdivision? Was it just irrigated land?
 12 A. I would have to, again, refer to the file.
 13 Q. Well, just in reading the rest of this
 14 letter, it says, additionally, prior to the present
 15 use of the water, there was an extended period of
 16 time in excess of the five-year period which
 17 establishes forfeiture in which the water was not
 18 beneficially used for the purposes claimed.
 19 And I'll ask you again with the benefit of
 20 that additional statement, was there some previous
 21 use of the water before 1988 that you're referring to
 22 in this letter?
 23 A. Well, I would -- I think my inference or
 24 reference is that Steve Clelland conducted an
 25 investigation for several periods of years, and

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1 have been established prior to the mandatory permit
 2 statute because there was no permit involved in this
 3 case, right?
 4 A. Right. Not --
 5 Q. If the right existed, it would have been
 6 before the permit, because there's no permit
 7 involved?
 8 A. Right.
 9 Q. Okay. Is it your understanding that this
 10 letter responding to the notice of error in 1992 is
 11 different than the response that the department filed
 12 in this matter to the objection?
 13 A. It could very well be.
 14 Q. Were you here when I discussed that with
 15 Steve Clelland, the response?
 16 A. Yes.
 17 Q. It didn't state anything about forfeiture,
 18 just said -- so that's different, isn't it, than this
 19 letter?
 20 A. Right.
 21 Q. I do note that, for the record, that you
 22 give them an opportunity to provide additional
 23 evidence if they want to, so I won't accuse you of
 24 not doing that.
 25 You stated that you were a supervisor at

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1 the time that the recommendation was made in
 2 36-4148A, correct?
 3 **A. Yes.**
 4 **Q. And you were involved in the SRBA**
 5 **recommendations at that time?**
 6 **A. Yes.**
 7 **Q. In your opinion, your work experience and**
 8 **as her supervisor, was Lori White competent in her**
 9 **position as a senior claims person in the department**
 10 **during 1990, 1991?**
 11 **A. Could you define "competent"?**
 12 **Q. Was she able to go out and do a field**
 13 **examination, review a claim, and come home with a**
 14 **recommendation at the end of the review period?**
 15 **A. In some situations, yes. Maybe not in**
 16 **others.**
 17 **Q. Is it your understanding that she prepared**
 18 **a verification form for 36-4148A?**
 19 **A. Yes, that's my understanding.**
 20 **Q. Is it your understanding that she did that**
 21 **only after two field -- at least two field**
 22 **examinations to the site?**
 23 **A. I would have to look at the file. I'm not**
 24 **sure.**
 25 **Q. Let's look at it then. The verification**

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1 acres with field exam, NAPP photos and perimeter
 2 measurements? Isn't that Lori Wright's writing?
 3 **A. Yes, it appears to be.**
 4 **Q. Were you here earlier when Steve Clelland**
 5 **testified that he went with Lori White on a field**
 6 **examination during August? Were you here for that**
 7 **testimony?**
 8 **A. I was here, but I didn't --**
 9 **Q. Do you recall him testifying that he had**
 10 **gone on a field examination with Lori White?**
 11 **A. I recall that, yes. I don't recall the**
 12 **date at this time.**
 13 **Q. In looking at that verification form,**
 14 **specifically page 12, does it appear that Lori White**
 15 **found a point of diversion and the existence of other**
 16 **elements of the water right? On page 12 where she's**
 17 **asked to determine whether it's consistent with the**
 18 **claim, her findings are consistent with the claim?**
 19 **Specifically talking about the fourth column where it**
 20 **says, on page 12, change claim, yes or no. And her**
 21 **writing being the lighter writing --**
 22 **A. Could you repeat the question, please.**
 23 **Q. In looking at that information, isn't it**
 24 **true, on page 12, that Lori White found that there**
 25 **was a point of diversion, or at least that the point**

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1 form, on page 1, doesn't it say the field
 2 examinations were conducted on 8/2/90 and 8/30/90?
 3 It says, date of field exam, over on the left on page
 4 1 under the word "George Brush"?
 5 **A. Yes.**
 6 **Q. And flipping to the next page where it's**
 7 **signed by Lori, isn't it signed 9/6/90?**
 8 **A. Yes.**
 9 **Q. So would it be your conclusion in looking**
 10 **at this again that there were two field examinations**
 11 **prior to her recommendation or verification form**
 12 **filling out?**
 13 **A. Well, if I might explain, I'm not sure**
 14 **that she actually went into the field on those**
 15 **specific dates. Sometimes agents do a desktop review**
 16 **of records available with the department, and**
 17 **sometimes the agents would put down the date of that**
 18 **desktop review as the field examination date. It was**
 19 **done different ways. She very well could have done a**
 20 **desktop review on that specific day, or she may have,**
 21 **indeed, went into the field and conducted a field**
 22 **review.**
 23 **Q. Could you turn to page 6 of that same**
 24 **document. Under "remarks," the first two lines,**
 25 **isn't that Lori White's writing saying, confirmed**

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1 of diversion was consistent with what was claimed?
 2 If you look at point of diversion on line 2 and go
 3 over to change claim --
 4 **A. Yes.**
 5 **Q. -- what does that change claim indicate?**
 6 **A. It indicates to me that she did not wish**
 7 **to change the way the point of diversion was claimed.**
 8 **Q. And that's true for every element except**
 9 **for diversion amount and consumptive use, correct?**
 10 **A. Correct. And remarks.**
 11 **Q. Remarks. Is it your impression from**
 12 **reviewing this verification report that a first**
 13 **recommendation was provided by Lori White in**
 14 **September of 1990 and that subsequent review and**
 15 **recommendation was provided by Steve Clelland in**
 16 **November of 1991 on one form?**
 17 **A. That would be correct, yes.**
 18 **Q. Would you say that the two recommendations**
 19 **are inconsistent?**
 20 **A. I would say that Lori gave it her best**
 21 **shot, and Steve did some more investigation and found**
 22 **something different.**
 23 **Q. So you would say that the two**
 24 **recommendations are different?**
 25 **A. Yes.**

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1 Q. How typically are discrepancies between
2 one agent's examination and another agent's
3 examination resolved?

4 A. Well, generally the latter -- or the
5 latest recommendation comprises the department's
6 recommendation. And it's only after maybe
7 considering new information or so forth that we make
8 a change.

9 Q. Is it typical for the two agents in such a
10 scenario to discuss the case and try to come to some
11 resolve of the differences?

12 A. Sometimes that happens, yes.

13 Q. Is it your impression that that happened
14 in this particular case?

15 A. I don't get that impression from this
16 file.

17 Q. What impression do you get?

18 A. Well, I don't -- I couldn't say whether
19 they talked or not.

20 Q. Is it your understanding from reviewing
21 this file that Steve Clelland simply took her
22 recommendation and voided it out and replaced it with
23 his own without consulting with her or --

24 A. Well, again, I'm not sure if he consulted
25 with her or not. I do know that there was a period

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1 Q. You were aware, however, though, that
2 Steve had several conversation memos and interoffice
3 memos and other types of memos and communications
4 documented in this file, are you not?

5 A. Yes. I viewed some of those.

6 Q. Do you recall reviewing any memorandums
7 discussing a conversation with Lori White about these
8 recommendations?

9 A. I don't recall.

10 Q. Are you aware that one exists?

11 A. I'm not aware of one.

12 Q. Were you personally, in your role of
13 supervisor, asked to reconcile the difference between
14 Lori's and Steve's recommendations?

15 A. Well, I think I would have that
16 responsibility.

17 Q. Did either one of them come to you and ask
18 you to reconcile the differences?

19 A. No.

20 Q. Did you review and reconcile the
21 differences, or did you just go with Steve's
22 recommendation?

23 A. Well, I can't recall specifically
24 reviewing his file, but in general, I've reviewed a
25 lot of files for completeness, and if the R record

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1 when we had some preliminary recommendations drafted,
2 and then some of the more complex evaluations we
3 reevaluated. And Steve was assigned that task. I
4 believe Lori was leaving -- or moving.

5 Q. How long have you supervised
6 Steve Clelland?

7 A. I hired Steve Clelland.

8 Q. So how long is that?

9 A. Since about '88, I guess.

10 Q. Is it your impression, your experience,
11 that he's pretty thorough in reviewing those things?

12 A. Yes, he's very thorough.

13 Q. Is it your further impression that he's
14 thorough in documenting conversations of any
15 importance? For example, on page 1 of this thing,
16 you can see he's had some notes scribbled down. Is
17 that typical of Steve to do that type of thing?

18 A. Well, I might say yes, and with an
19 explanation, that as we originally went into
20 reviewing claims, particularly Basin 36, which is a
21 test basin, our investigation methods have evolved
22 and improved hopefully. Some claim files, there may
23 not be much conversation memos into it and so forth.
24 Others that have been with us for quite a while may
25 have extensive memos, documents in them.

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1 made sense with claims in the same area, and so
2 forth, if things tied together. And --

3 Q. As the process went at that time, was it
4 your obligation to review a proposed recommendation
5 and adopt it to the next level, or did that bypass
6 you? Did you have to make an affirmative decision as
7 to whether this was going to be the recommendation or
8 not?

9 A. In some situations, I looked at the final
10 recommendation and stamped it verified. However --

11 Q. Where would you do that at?

12 A. Generally on a R record. In this
13 particular file, it was verified by
14 Kelly Christensen.

15 Q. Are you aware of any departmental policy
16 on the resumption of use of a water use that's been
17 previously not used for a period of five years or
18 more?

19 A. I believe there is some discussion of that
20 issue in the claims verification manual, I think.
21 I'd have to look, but I think --

22 Q. And excuse me, a claim verification
23 memo --

24 A. Manual.

25 Q. -- is that what you said? Manual. Is

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1 that in the record? Claim verification manual?

2 Probably not.

3 MR. KING: It's not in these files. It's
4 usually provided or it was provided fairly
5 extensively when the adjudication was going. I know
6 Pat for sure has one. I don't know if you were
7 involved with any clients where you requested one and
8 got served in discovery or not.

9 Q. BY MR. SEMANKO: Is it something that's
10 readily accessible to the department?

11 A. Yes.

12 MR. SEMANKO: Could we be provided with a copy
13 of that --

14 MR. KING: Sure.

15 MR. SEMANKO: -- informally? That would be
16 good.

17 Q. BY MR. SEMANKO: But it's your
18 recollection that it may be in that manual --

19 A. Yes.

20 Q. -- something on the resumption of use?

21 A. Yes.

22 Q. So since it's in that manual -- or
23 assuming it's in that manual, is that something that
24 agents would be expected to apply when they review a
25 claim?

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1 establish the beneficial use? Is he looking at 1927,
2 the priority date for the B portion of the right, or
3 is he looking at some later point in time?

4 A. Well, in this particular claim file, I
5 believe it's still disallowed, right?

6 Q. Yes.

7 A. So he found no beneficial use. So I think
8 that the date of first use is kind of --

9 Q. Well, you've stated that in the notice of
10 error reply that probably there was a forfeiture of
11 an earlier used right. And if there was an earlier
12 used right existing or if there's not -- let's talk
13 about 4148B, the other part of the root right, or go
14 back to the root right or whatever, do you have an
15 impression as to what date Steve focused on to begin
16 historical use analysis to go forward from there?

17 A. Well, I think initially all claims agents
18 focus on priority of the claim. And then they try to
19 gather evidence to support the priority claim. If
20 they can't support the priority claim by evidence
21 gathered, then they start picking out a date that
22 they can support some kind of a use. And I don't
23 know exactly the date that's been recommended in
24 part B.

25 Q. Is an affidavit typically -- sworn

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1 A. Generally, yes. And I might add that that
2 claims verification manual has evolved over the
3 period of the review of this test basin. And I can't
4 at this juncture say exactly if that manual was
5 available at the time some of this was being
6 reviewed.

7 Q. Or what it looked like at that time, if it
8 was available?

9 A. Right.

10 Q. Do you know whether resumption of use was
11 evaluated in 36-4148A?

12 A. In my understanding of the file, I don't
13 believe it was really an issue.

14 Q. Another policy question for you.

15 Historical use, the department's definition of
16 historical use or actual beneficial use or whatever
17 you want to call it, what is your impression from
18 looking at -- and you did participate in the 706
19 report, did you not, formulating that?

20 A. Not really, no. I did submit an affidavit
21 of experience and education and so forth.

22 Q. What is your impression from reading the
23 file, looking at the file in your supervisory role as
24 to the date on which historical use is established in
25 this case? What date is Steve Clelland looking at to

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1 affidavit typically considered evidence if it talks
2 about the number of acres irrigated or the amount
3 diverted?

4 A. We have used evidence or affidavits as
5 evidence of priority. Some of them are very good and
6 provide specific information of them. Others are
7 pretty sketchy.

8 MR. SEMANKO: Do you have a copy of the 706
9 report?

10 MR. KING: Yeah.

11 MR. SEMANKO: Do you have the 706 report there,
12 too, or am I using yours?

13 MR. KING: No. You can use ours.

14 Q. BY MR. SEMANKO: The 706 report on page 5
15 under 1964, there's a reference to some initial maps
16 or aerials or something. Can you look that over real
17 quickly.

18 A. Okay. I've read this section.

19 Q. From reading that, is it your impression
20 that the actual beneficial use or the historical use
21 date that it was talking about as the starting point
22 is 1964? Let me rephrase that.

23 Doesn't Steve, or whoever wrote that
24 report, make a fairly firm determination that what
25 was evidenced in 1964 remained all the way through to

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1 the recommendation date as being the acres that were
2 evidenced in photography and other things?
3 **A. I would say that would be a correct**
4 **statement. However, I would point out that the use**
5 **may have been the same prior to 1964, but the photo**
6 **is just a snapshot in time. You know, it might have**
7 **started in 1963.**

8 Q. If a right has a 1927 priority date, that
9 means that that is the date it was established,
10 correct?

11 **A. Yes.**

12 Q. That's the date that there was intent,
13 beneficial use and a diversion under the
14 historical --

15 **A. Yeah.**

16 Q. -- beneficial use methods, correct?

17 **A. Yes.**

18 Q. So if you got a 1927 priority date, you
19 have to have an amount diverted and a number of acres
20 irrigated; is that right?

21 **A. Yes.**

22 Q. And if in the file you have no evidence
23 other than affidavits as to what the amount of acres
24 are, what the amount of water was, wouldn't you go by
25 those affidavits?

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1 somewhat familiarized with the agreement with Idaho
2 Power Company from reviewing that?

3 **A. Yes.**

4 Q. I'll represent to you that the agreement
5 itself states, quote, it is specifically understood
6 that this grant is not limited, is not intended to,
7 nor does it include a conveyance of the following
8 water or water rights now used by the grantors, but
9 these grantors specifically reserve from this grant
10 and by its acceptance, the grantee recognizes the
11 following described water rights. And it goes on to
12 list 2 cfs, 2 cfs and a 3 cfs right that are
13 recognized as being used in this 1927 agreement
14 signed by the Idaho Power Company. Put affidavits
15 aside. Is that not some competent evidence of the
16 amount of water that was used in 1927?

17 **A. It is evidence, yes.**

18 Q. Does it make sense in your experience that
19 if you've got a priority date, you also have to have
20 an amount diverted and a number of acres irrigated at
21 that same time, in this case 1927?

22 **A. Well, I don't know how they determined the**
23 **2 cfs. If it was measured, if it was guessed. I**
24 **don't know how many acres were irrigated at the**
25 **time. It doesn't make mention of any irrigated**

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1 **A. Could you rephrase --**

2 Q. If you have no information in the file for
3 1927 other than affidavits, you've got no aerial
4 photography, you've got no tax records, you only have
5 affidavits that say, this many acres, this much
6 water, isn't that competent evidence that you have to
7 go with in determining what the amount of beneficial
8 use was at the time the right was established?

9 **A. Well, this is a particularly hard question**
10 **to answer. And it could be various situations. And**
11 **in reviewing a claim for recommendation, we have to**
12 **look at a lot of different things, not just focus on**
13 **an affidavit or whatever. We have to, I think, look**
14 **at the big picture. And if there's a period of good**
15 **record in 1964 that this is the extent of beneficial**
16 **use, we sometimes might project back that maybe**
17 **that's what was then in 1927 also.**

18 Q. Are you aware of a 1927 agreement with
19 Idaho Power Company in this matter?

20 **A. I've heard mention of that.**

21 Q. Maybe refresh your memory by looking at
22 1927 on that same report you're looking at there. I
23 think it talks about Idaho Power Company indenture.

24 **A. Okay. Could you ask the question now.**

25 Q. I just was asking to review that. Are you

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1 **acres. It doesn't even, from this, mention what the**
2 **use of the water was.**

3 Q. I understand all that. What I'm asking
4 you is, at least with the B portion of 4148, the
5 department has recommended a 1927 priority date. If
6 that's the case, isn't there some amount of water
7 that was diverted and some number of acres that were
8 irrigated in 1927?

9 **A. There may very well be, yes. And I**
10 **believe we've projected what beneficial use that we**
11 **determined back to 1927.**

12 Q. So the beneficial use you're looking at as
13 1964 is not the beneficial use that necessarily
14 existed in 1927?

15 MR. KING: Calls for speculation.

16 Q. BY MR. SEMANKO: Can you say with
17 certainty that the 1964 level of development is the
18 same as the 1927 level of development?

19 **A. With a hundred percent certainty, no.**

20 Q. In your experience, are you aware of any
21 historical use rights, whether decreed or not, that
22 simply are described by an amount of water diverted
23 without specifying the number of acres irrigated or
24 even exactly where the area irrigated is? Is that an
25 uncommon thing to run into with old decrees or old

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1 beneficial use rights?

2 **A. That is a common occurrence. There's lots**
3 **of water right records that purport to be a water**
4 **right that is very vague about amounts of water,**
5 **where the water is diverted, where the water is used,**
6 **what the water is used for.**

7 **Q. So if you have a decree or an agreement**
8 **that specifies an amount of water that's used, you**
9 **somehow have to figure out the number of acres that**
10 **are irrigated, correct?**

11 **A. Somehow.**

12 **Q. And don't you have now a statute before**
13 **the supreme court that talks about clarifying vague**
14 **or ambiguous decrees to fill in those types of**
15 **elements?**

16 **A. I believe so, yes.**

17 **Q. Why in this case if this agreement is not**
18 **competent evidence -- if this agreement is competent**
19 **evidence of some type that this amount of water was**
20 **used by the grantors, why wasn't an attempt made to**
21 **extrapolate the amount of water used into some number**
22 **of acres?**

23 **MR. KING: Assumes facts not in evidence.**

24 **A. Well, I believe the effort was made truly**
25 **to determine what the beneficial use was. And if we**

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1 acres, and you've got to fill in that blank for the
2 last 80 years. Does the department have a method to
3 calculate the estimated acres?

4 **A. Well, again, you would have to make**
5 **assumptions. Some of those assumptions would be --**
6 **or determinations that must be made would be the duty**
7 **of water for whatever the use is. And in some**
8 **situations, the duty of water is one inch per acre.**
9 **Sometimes it's less; sometimes it's more. So we**
10 **would have to take the big-picture approach and do**
11 **the best we could to project backwards. And part of**
12 **that big picture would be maybe what beneficial use**
13 **we found at the time we did the field exams or aerial**
14 **photos that were gathered to get the whole big**
15 **picture.**

16 **Q. I want to wrap this up, so maybe I could**
17 **just ask a simple question and get a simple answer.**
18 **I know you extrapolate backwards all the time. You**
19 **have to because of the aerial photography and all of**
20 **that to try to figure out continuous beneficial use.**
21 **Was there any effort in this particular case to**
22 **extrapolate the amount of water mentioned as being**
23 **used in this Idaho Power agreement, to extrapolate**
24 **that amount of water diverted into a number of acres**
25 **irrigated, directly extrapolating this agreement, not**

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1 **based -- again, we tried to look at the whole big**
2 **picture. I mean, this is a piece of the puzzle. And**
3 **if we base solely our recommendation on this piece of**
4 **the puzzle, then we would have not needed to go do a**
5 **lot of measurements or whatever.**

6 **Q. BY MR. SEMANKO: As to what existed in**
7 **1927, does the department have in its possession or**
8 **is it aware of any evidence, other than the 1927**
9 **agreement and affidavits of people involved in this**
10 **case? Is there any other evidence as to what was**
11 **going on in 1927, direct evidence of what was going**
12 **on in 1927?**

13 **A. We may, but I'm not aware of such.**

14 **MR. KING: Question is vague.**

15 **Q. BY MR. SEMANKO: I'll ask you a**
16 **hypothetical question. If the department knows that**
17 **a certain amount of water or assumed that a certain**
18 **amount of water was used, they know the amount, is**
19 **there any method that you have to determine the**
20 **likely number of acres irrigated with that amount of**
21 **water? Don't you have to do that in some cases?**

22 **A. Well, you would have to make those**
23 **assumptions.**

24 **Q. Let's assume you have a decreed right with**
25 **a set amount of water, but you don't know how many**

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1 reaching backward? But was there any effort made to
2 make these irrigation diversion acres relate to
3 irrigated acres for 1927?

4 **A. I don't know that -- I did not do the**
5 **review, and I don't know specifically.**

6 **Q. Are you aware of whether -- of the**
7 **criteria for granting a patent by the United States?**

8 **A. Somewhat vaguely familiar with it.**

9 **Q. Do you know whether water has to be**
10 **developed on the property for a patent to be**
11 **granted?**

12 **A. In some land grants, there were**
13 **requirements to divert water. I don't know what kind**
14 **of a granting this was.**

15 **Q. In view of the fact that the patent was**
16 **done in 1910, if the department became aware that**
17 **water needed to be developed to receive a patent, and**
18 **the patent was, in fact, received in 1910 or whenever**
19 **it was, would that change the department's view of**
20 **the historical use of this right?**

21 **A. Well, I can only speculate, but if there's**
22 **additional evidence, it would be considered.**

23 **Q. Including priority date and other things**
24 **probably?**

25 **A. (No audible response.)**

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1 MR. SEMANKO: Thank you.

2 MR. BROWN: Let me now pick up where Norm left
3 off, or maybe where you started, it's easier.

4
5 EXAMINATION

6 BY MR. BROWN:

7 Q. Norm asked you about an October 19, 1992,
8 letter you wrote, and he was talking to you about
9 that in the context of forfeiture. Now, it's my
10 understanding that you said if the right existed, it
11 had been forfeited, correct, on the 48A claim?

12 A. Yes.

13 Q. And that forfeiture would have been
14 because of five years continuous nonuse, correct?

15 A. Yes.

16 Q. Okay. We know that right was split in
17 1988, correct?

18 A. Well, I don't know that that's totally
19 correct.

20 Q. Okay. It was claimed as one right in '87,
21 right?

22 A. I don't know the specific date when it was
23 first claimed. It -- which file would that be in?

24 MR. KING: I'm not sure which one he's talking
25 about.

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1 pending. However, Clear Lake Country Club, Route 4,
2 Box 225, Buhl, Idaho, 83316, should be notified
3 regarding any action on this claim.

4 And then there's another entry which says,
5 this right has been split. Let me show you that.
6 Maybe that will help us nail down the time period.
7 The first comments, the one I just read, and then
8 there's another entry that says, this right has been
9 split.

10 Can you tell me from those notes about
11 when the department would have become aware of a
12 split between 48A and B?

13 A. Well, it would appear at the time that
14 comment was created, in 1992.

15 Q. Okay. So the split would have been
16 sometime after the claim was filed in '87, assuming
17 that's when it was claimed, and --

18 A. Sometimes -- if I might offer further
19 explanation. When initial claims taking is done, a
20 claimant might come in and file a claim to the whole
21 water right. And then later on, someone comes in and
22 files a competing claim for a portion of the water
23 right. And so that's when we start splitting up the
24 root number, so to speak.

25 Now, I don't know if specifically in this

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1 Q. BY MR. BROWN: 4148 was claimed originally
2 as one right. If you'd look at the claims proof
3 reading report you can --

4 A. I --

5 Q. Let me refer you to the claims proof
6 reading report for --

7 A. Let me answer the question in this way. I
8 yesterday reviewed the original statutory claim
9 files, the 242 claims. And the first record, I
10 believe, made of the water use in that area, there
11 were claims filed in 1982. Now, I guess I hesitate
12 in saying, yes, the right was split before that
13 time -- or after that time in that the right may have
14 been split before 1982, if there was an old, old farm
15 way back when, and there were fish farms developed
16 afterwards. So there's been a lot of evolution
17 through the period.

18 Q. I want to ask you specifically, though,
19 just about with regard to the split between 48A and
20 48B. Let me read to you a remark from the claims
21 reading proof report. It says, date, 6/15, 1992,
22 user ID Christensen, subject, copied from remarks.
23 Property is presently being developed as a PUD and
24 the Clear Lake Country Club is part of and purchasing
25 part of the land covered under this claim. Deed is

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1 situation, this A and B part are competing claims for
2 the same water right or portions of the water right
3 or it's actually a splitting of the original
4 adjudication claim file. I'd have to look in the
5 file a little more.

6 Q. But we know in any event that a split
7 apparently happened between '87 and '92?

8 A. Well, it appears that Kelly split it in
9 '92, the records.

10 Q. Do you have any reason to believe that it
11 was split before that in your review of the file?

12 A. Well, the exact date, no, not really.
13 Well, let me back up. There is kind of a -- well,
14 never mind.

15 Q. Whenever the split occurred, before that
16 time, a forfeiture could not be based upon nonuse
17 before the time of the split, correct, because the
18 department understands that there was use, at least
19 from 1927 as it's recommended under the original
20 claim?

21 A. Could you rephrase that question? Was
22 that a question?

23 Q. How is it -- let me take you back to your
24 testimony. In discussing the October 19, 1992,
25 letter with Norm Semanko, you said if there was a

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1 right, it had been forfeited, so that assumes there
2 was a right, of course. Well, isn't it true that we
3 know there was a right and the department has
4 recommended that there was a right since 1927 under
5 4148?

6 A. The department has recommended a water
7 right for a portion of these claims, yes.

8 Q. So we know there was at least a portion of
9 a use from 1927 through the time the recommendation
10 was made on 4148B?

11 A. Yes. We've evaluated the claims and the
12 evidence and found that there's a beneficial use
13 there that seems to date back from 1927.

14 Q. My question then is, if the split occurred
15 in 1988, how is the department able to find five
16 years nonuse to recommend forfeiture?

17 A. Well, in this particular situation, the
18 particular part A, there was no beneficial use
19 found. And if there was a beneficial use, it had
20 long since not been used.

21 Q. You say there was no beneficial use found;
22 is that true?

23 A. On the particular part A, as we understood
24 it.

25 Q. So what you're saying is the department

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1 could be explained differently.

2 Q. Do you have any facts that are different
3 than what Steve described the facts as being?

4 A. Well, I don't know if they're facts or
5 what you would refer to facts. I think there's some
6 things that could be explained better.

7 Q. Can you generally tell me what areas we're
8 talking about.

9 A. The one specific thing that I'm thinking
10 of is in relation to the irrigation requirements for
11 sprinklers.

12 Q. Can you explain to me what you think is a
13 better explanation than what Steve gave.

14 A. It was my understanding of the testimony
15 that -- about the valuation of sprinkler irrigation,
16 that, you know, we needed soils information. And I
17 think you kind of inferred that to Steve. Quite
18 frankly, the equation used for determination of the
19 duty of water for sprinkler irrigation does not take
20 into account soils information. It only relies on
21 the method of application and also the climatological
22 data. And in working through that equation, we have
23 found that less than an inch per acre is generally
24 required for sprinkler application.

25 Q. Does the fact that you have sandy soils

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1 had to determine there was no right, it couldn't have
2 determined that the right had been forfeited?

3 A. Well, I think we're talking about
4 semantics, forfeiture or beneficial use. The
5 department, again, tried to look at the big picture.
6 And during that review process, we did look at
7 elements of if there was periods of nonuse for water
8 rights. But on the other hand, we tried to document
9 what was beneficially used, to the best of our
10 knowledge. So our recommendation is, on the one
11 hand, based on beneficial use that we've found and
12 can hang on to.

13 And I think the issue of forfeiture enters
14 in here in that it's just pointing out the argument
15 that, well, we used it 80 years ago, we just couldn't
16 conclude that it was being beneficially used. And
17 maybe if it was 80 years ago, gee, there's been such
18 a long time it hasn't been used, that maybe
19 forfeiture enters in here.

20 Q. You've heard the testimony of
21 Steve Clelland today during his deposition, correct?

22 A. Yes.

23 Q. Is there anything about his testimony that
24 you believe is inaccurate?

25 A. I believe there's some areas that probably

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1 combined with a sprinkler application increase the
2 amount of water needed?

3 A. No.

4 Q. Okay. Do you know what the source of your
5 understanding of that would be?

6 A. It's the Hubble report.

7 Q. And you believe there's something in the
8 Hubble report that directly addresses that?

9 A. Yes.

10 Q. Can you recall what that is.

11 A. It's the equation for the duty of water
12 for sprinklers. The only inputs into that are the
13 efficiency of the sprinkler and also the inch per
14 acre or millimeters per day or inch per day, however
15 you want to quantify it, of ET rate for the crop.

16 Q. So it's your understanding that if you
17 have the ET and the crop, you can determine how much
18 is needed with a sprinkler system without regard to
19 the type of soil?

20 A. Right.

21 Q. Okay. Is there anything else about
22 Steve Clelland's testimony which you either disagree
23 with or think was confusing or unclear?

24 A. Well, in regards to that same scenario, we
25 reviewed water systems. And if they demonstrated

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1 that they could provide capacity of an inch per acre,
2 the sprinklers, then we generally recommended the
3 inch per acre. But there are some sprinkler
4 irrigation systems that do not provide the capacity
5 of an inch per acre, and we generally recommend the
6 capacity of a system.

7 Q. It's my understanding that the
8 department's position is that the constitution limits
9 water rights to the beneficial use amount. Is that
10 your understanding?

11 MR. KING: Objection, foundation.

12 A. I would say a water right should reflect
13 what the beneficial use is.

14 Q. BY MR. BROWN: Can a water right exceed
15 the beneficial use?

16 MR. KING: Objection, foundation.

17 A. I would say that the water right is based
18 on the beneficial use. There may be water right
19 records that purport to show a water right. And in
20 analysis, the beneficial use just isn't there. So I
21 think that's what this process is all about is trying
22 to determine what the beneficial use is.

23 Q. BY MR. BROWN: Is it the department's
24 position that it can recommend an inch per acre even
25 if the right only need -- right holder of the

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1 acre and the water is being beneficially used, then
2 that rate is allowed. It's not only the rate of
3 diversion that is the measure of a water right,
4 there's also other elements of the right that are
5 also, in my opinion, more important.

6 Q. My question is this. Do I misunderstand
7 or is it the department's policy, as stated in
8 several places, including the claims investigation
9 manual, that if the person claims one inch per acre
10 or less, the department does not conduct an analysis
11 to determine -- and if their system will hold an inch
12 per acre, the department does not conduct an analysis
13 to determine if something less than an inch per acre
14 is a good amount, maximum amount needed or maximum
15 duty of water, correct?

16 A. Right.

17 Q. So if somebody comes in and says, I've got
18 a system that will pump one inch per acre, and claims
19 an inch per acre, the department will not conduct an
20 analysis to determine whether that person only needs
21 five-eighths of an inch per acre?

22 A. I think statutorily that if there is --
23 statutorily, if they have the capacity to divert an
24 inch per acre, the duty of water is set at an inch
25 per acre, and it's allowed.

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1 claimant only needs three-quarters of an inch per
2 acre?

3 A. Well, I believe statutorily, a water right
4 can be granted for up to one inch per acre if the
5 capacity is present to divert that much, and if the
6 one inch per acre -- well, I'll stop there.
7 Additionally, if there is justification, the water
8 right can be issued for more than one inch per acre.

9 Q. But my question deals with the situation
10 where a person has a sprinkler system and only needs
11 three-quarters of an inch per acre. It's my
12 understanding that in those situations, the
13 department will recommend an inch per acre; is that
14 right?

15 MR. KING: Objection, the question is vague.

16 A. Could you ask the question again.

17 Q. BY MR. BROWN: You said a few minutes ago
18 that the department will recommend up to one inch per
19 acre without conducting a beneficial use analysis on
20 that duty of water; is that right?

21 A. What I'm saying is statutorily, water
22 rights are granted up to one inch per acre, a
23 diversion rate of one inch per acre. If it's shown
24 that the capacity of the system is more than the one
25 inch per acre -- or it can generate the one inch per

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1 Q. So then the department doesn't conduct an
2 analysis?

3 A. Right.

4 Q. Okay. Norm was asking you about the
5 diversion rate for this right. What's your
6 understanding of the maximum amount of water which
7 was covered diverted for these three rights?

8 A. It's my understanding that we tried to
9 demonstrate by field exam what the capacity of their
10 systems were and what the historical beneficial use
11 was, and that's what the recommendations were based
12 on. And as far as entering into any -- I guess
13 that's my answer.

14 Q. Let's start with how about 1985. What was
15 the diversion rate of this right before 1985, of
16 these rights by diversion rate?

17 A. I don't know.

18 Q. Do you have any reason to believe that the
19 diversion rate for 4148A and B, which was claimed at
20 3 cfs, was not 3 cfs?

21 A. I don't know that we know that. We don't
22 know if it was used for 3 cfs or what. We tried to
23 measure the beneficial use that we observed, and
24 that's what the recommendation is based on.

25 Q. My question is not about beneficial use,

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1 but simply diversion rate. Does the department have
2 any evidence to suggest in any way that 3 cfs was not
3 diverted from 1927 through 1985?
4 MR. KING: Your question is vague.
5 A. I guess we -- in some respects, no, we
6 don't have that indication, other than the fact that
7 our measurements are, again, a part of the big
8 picture. And so whatever measurements were made,
9 that was considered. But it's just not the diversion
10 rate that sets what the water right is, it's also
11 what the beneficial use is. And that has a bearing
12 on what the ultimate recommended diversion rate is.
13 Q. BY MR. BROWN: But let's stick with
14 diversion rate with 1985 and backwards for a minute.
15 Now, you said in some respects the department doesn't
16 have any evidence to suggest that 3 cfs was not
17 diverted from '85 back in time. What do you mean by
18 that qualifier, by saying in some respects or --
19 A. Well, I don't know of documentation where
20 the department went out there in '85 and measured the
21 water. I don't know if we did it -- I don't think we
22 did it prior to that. There may be some geologic
23 survey. I'm just speculating. There may be
24 measurements. But I don't know of any particular
25 information in the file.

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1 Q. Is it fair to say that in the Hagerman
2 Valley generally, for a flood irrigation right, it
3 would not be surprising to you to learn that that
4 right required two or two and a half inches of water
5 per acre?
6 A. I believe we've reviewed claims and made
7 recommendations more than an inch per acre in the
8 Hagerman Valley.
9 Q. Isn't it true that you made recommendation
10 for more than three inches per acre?
11 A. I believe there are those situations, yes.
12 Q. So it wouldn't surprise you if someone
13 were to say, boy, we need two inches per acre to
14 flood irrigate this ground on this golf course, would
15 it?
16 A. Well, it would surprise me. I don't think
17 many golf courses are flood irrigated.
18 Q. I'm talking about from 1985 and before.
19 A. Well, I don't --
20 Q. I'm talking about this piece of ground
21 when it was flood irrigated as agriculture.
22 A. Well, I don't -- I don't, again, know of
23 what specifically underlined the golf course, what
24 was there before.
25 Q. Well, let's take what Steve Clelland says

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1 Q. Okay. Information in the file that would
2 suggest 3 cfs was not diverted or suggests that it
3 was diverted?
4 A. I guess there's suggestions of diversion
5 in claims filed, in historical affidavits purporting
6 to say this was here, this was there. But as far as
7 pure measurements of what we measured, I don't know
8 of anything prior to '85. I don't really know of
9 anything prior to when Lori and Bob and Steve made
10 the measurements they did.
11 Q. I guess I'm kind of asking the flip side
12 of that. Is there any evidence that you found in
13 your review of the files or anything that would
14 suggest that that much was not diverted?
15 A. Well, I think there's evidence in looking
16 at what has been beneficially used. If they were
17 diverting it, you know, where were they using it?
18 kind of logic. And again, take into account the
19 whole big picture, and we try to look at what we can
20 best justify as what's been beneficially used.
21 Q. Let me ask you this. You're familiar with
22 many of the claims in the Hagerman Valley; isn't that
23 correct?
24 A. Yes, I'm familiar with claims in the
25 Hagerman Valley.

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1 he believes that was there before. Let's take the
2 figure of 64 acres. Would it surprise you that it
3 would take 128 inches of water historically to flood
4 irrigate that? In other words, two inches per acre.
5 A. Well, I would be speculating, but there
6 would be situations that may justify two inches an
7 acre. I don't know if that specifically is the
8 scenario in this case.
9 Q. Okay. But let's say two and a half inches
10 per acre. I'm not asking you to speculate, I'm
11 saying based on your experience and your knowledge of
12 the duty of water generally through the Hagerman
13 Valley area for flood irrigating, does it shock you
14 to think that it might take two and a half inches of
15 water per acre to flood irrigate the golf course
16 ground?
17 MR. KING: Calls for speculation.
18 A. Well, again, those kinds of analysis are
19 done using the Hubble report, and some of that
20 information -- I don't know about the specifics in
21 this case. Again, there may be a situation of a golf
22 course somewhere, or not really a golf course, of a
23 field somewhere that requires more than an inch per
24 acre. Maybe two inches an acre, maybe five inches an
25 acre. I don't know if this is that case.

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1 Q. Would it shock you if someone were to tell
2 you that it's been determined that two and a half
3 inches per acre is necessary to flood irrigate this
4 property?

5 MR. KING: Calls for speculation.

6 A. I guess it's in the realm of possibility.

7 Q. BY MR. BROWN: Would that be out of line
8 with your experience of how much water is generally
9 required, especially in this area?

10 A. Well, there are specific situations where
11 more than an inch per acre is required in this area.
12 There are also specific situations in this area where
13 there is less than an inch per acre that is
14 required. So I guess it's within the realm of
15 possibility.

16 Q. So it wouldn't be inconsistent with your
17 experience of the duty of water you believe is
18 appropriate in that area to learn that two and a half
19 inches per acre, for instance, would be reasonable?

20 MR. KING: Asked and answered.

21 A. It's within the realm of possibility, yes.

22 Q. BY MR. BROWN: It's within the realm of
23 your experience, isn't it?

24 A. Yes.

25 Q. Isn't it also within the realm of your

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1 flood irrigate than it does to put water into a
2 closed pipe system and sprinkler irrigate?

3 A. Generally, yes.

4 Q. And isn't that a fairly commonly accepted
5 notion?

6 MR. KING: Objection, relevance.

7 A. Well, again, you've got to look at the big
8 picture. There are situations where efficiencies are
9 quite high on gravity type systems. And it just
10 depends on how you manage it. And --

11 Q. BY MR. BROWN: Do you know any gravity
12 systems that are more efficient than closed pipe
13 systems?

14 MR. KING: I'd like to have a continuing
15 objection to the relevancy of this line of
16 questioning.

17 A. I believe there could be.

18 Q. BY MR. BROWN: Have you ever seen one?

19 A. Well, I believe in theory there could be.

20 Q. But in practice, have you ever had anyone
21 tell you even that a ditch was more efficient than a
22 closed pipe?

23 A. Well, again, if you're looking at the
24 irrigation system, there are some contained basins
25 that apply water by gravity that have obtained a

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1 experience and pretty firmly so that it takes more
2 water to irrigate by conveyance through open ditches
3 and flood irrigating than by closed pipe and a
4 sprinkler system?

5 MR. KING: It's a compound question, assumes
6 facts not in evidence.

7 A. Well, again, there's a specific set of
8 circumstances, and it varies a lot, depending on the
9 situation. You may apply water through a pipe and so
10 forth and avoid conveyance loss. However, at the
11 field, if you apply it in a certain manner, you may
12 end up requiring more than, say, on the other
13 scenario. It just depends on the situation.

14 Q. BY MR. BROWN: You're telling me that it's
15 not fair to say as a general rule it takes more water
16 to convey it by open ditch and flood irrigate than to
17 convey it by closed pipe and sprinkler irrigate?

18 MR. KING: Objection, irrelevant.

19 A. I guess I didn't understand your first --
20 your other question. Could you repeat the question
21 before I answer.

22 Q. BY MR. BROWN: Do you understand the one I
23 just asked? Let's do it this way. Do you agree with
24 me that it generally takes more water to convey, to
25 divert water, convey it through an open ditch and

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1 higher efficiency of application than do sprinklers.

2 Q. Do you know of any within the Snake River
3 Valley between Twin Falls and Hagerman?

4 A. Generally that's not how they do it around
5 here, no.

6 Q. Is it fair to say the general rule within
7 the Snake River canyon between Twin Falls and
8 Hagerman, that a closed pipe sprinkler system
9 requires less diversion amount than a open ditch
10 flood irrigation system?

11 MR. KING: Question is asked and answered.

12 A. In general, a sprinkler is more efficient.

13 Q. BY MR. BROWN: And therefore would require
14 less water to be diverted for the same application?

15 A. Yes.

16 Q. Okay. Do you have any reason to believe
17 that that's not the case on the golf course property?

18 MR. KING: The question is vague.

19 A. I believe that irrigation from a gravity
20 system on the golf course, which doesn't exist, would
21 be less efficient than the irrigation of a golf
22 course with sprinklers, which I believe does exist.

23 Q. BY MR. BROWN: You told me that -- but to
24 get more specific, you have to look at the specific
25 set of circumstances on that property. Is that fair?

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1 A. Um-hmm.
 2 Q. Tell me, then, how it is fair for the
 3 department to say that one inch per acre for
 4 sprinkler systems is enough water throughout the
 5 Magic Valley.
 6 A. Again, you go to the equation in the
 7 Hubble analysis, which determines what the burden --
 8 or the duty of water for sprinkler irrigations is.
 9 You input the climatological data and what the
 10 efficiency of the sprinkler is, and you come up with
 11 a number that is less than an inch per acre.
 12 Actually the Twin Falls Canal Company, which is a
 13 surface water diversion system, delivers their
 14 shareholders five-eighths of an inch. So I think
 15 it's quite fair.
 16 Q. So for flood irrigating, it can vary in
 17 the Magic Valley from five-eighths of an inch to more
 18 than three inches in the Hagerman area?
 19 MR. KING: Assumes facts not in evidence.
 20 Q. BY MR. BROWN: Isn't it true that your
 21 experience -- didn't you just testify that it takes
 22 five-eighths of an inch for surface irrigation on the
 23 Twin Falls canal system?
 24 A. That's what their shares are, yes.
 25 Q. Is that what's delivered?

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1 claims was. And that's what our task was.
 2 Q. Okay. And to do that, you looked at --
 3 the department looked, it had information on
 4 diversion rate before 1985. There may be information
 5 which can be inferred from the land patent, correct?
 6 MR. KING: The question is vague.
 7 A. Well, we had representations of water
 8 diverted before 1985.
 9 Q. BY MR. BROWN: Okay. You had deeds and
 10 agreements with Idaho Power Company in around 1927?
 11 A. I believe so, yes.
 12 Q. You had deeds on Molly Seister's (phonetic
 13 spelling) property?
 14 A. I'm not familiar with what Molly Seister's
 15 property is.
 16 Q. That's this property relating to the
 17 agreements with Idaho Power. Those deeds are all in
 18 your file, are they not?
 19 MR. KING: Assumes facts not in evidence, lack
 20 of foundation.
 21 A. I don't recall what the name of the
 22 specific deeds are in the file.
 23 Q. BY MR. BROWN: Okay. You have affidavits
 24 of, amongst others, LeMoyné, George Brush,
 25 Ted Eastman, Frank Stewart, which say that the full

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1 A. Generally, yes. Sometimes a little more.
 2 Q. And isn't it also your experience, don't
 3 you know as a matter of fact that the department has
 4 recommended more than three inches per acre for flood
 5 irrigation in the Hagerman Valley in specific
 6 instances?
 7 A. Yes.
 8 Q. So we have a variation of five-eighths to
 9 three inches for flood irrigation, but you believe
 10 it's fair to say that one inch is always enough for
 11 sprinklers?
 12 MR. KING: Objection, irrelevant.
 13 A. I would say without further justification
 14 an inch per acre is sufficient for irrigation through
 15 a sprinkler system.
 16 Q. Now, my question here is, wasn't it the
 17 department's task in this situation to try to
 18 determine how much was diverted for a flood
 19 irrigation system since the '20s?
 20 A. I don't believe that was the task.
 21 Q. Weren't you trying to determine how much
 22 water was diverted when the right obtained in the
 23 '20s?
 24 A. No. We were trying to determine what the
 25 beneficial use was of the water represented by the

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1 right as claimed, the 3 cfs, was diverted and used
 2 since at least the late '30s or early '40s. Isn't
 3 that right?
 4 A. Again, there's lots of --
 5 Q. Do you have that evidence?
 6 A. We may. I'm not familiar with the --
 7 specifically with the file, what's in those
 8 affidavits.
 9 Q. Okay. Let me represent to you that that's
 10 in there.
 11 A. Okay.
 12 Q. Isn't that at least some evidence from
 13 which you could --
 14 A. Yes.
 15 Q. -- infer a diversion rate?
 16 A. Those are pieces of the big picture. We
 17 also have statutory claims in our records. One says,
 18 I diverted 5 acres, and then he amended the claim,
 19 said I irrigated 42 acres. One said, I irrigated 104
 20 acres. Then it was amended and said, I irrigated 90
 21 acres. So these are all things we consider in trying
 22 to determine what the beneficial use is. And they're
 23 all pieces of the puzzle we have to deal with.
 24 Q. Okay. Tell me what the department did
 25 with the evidence, the Molly Seister deeds, the Idaho

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1 Power Company agreement, which specifically list the
2 lot numbers, the government lot numbers, to which
3 these rights were used for irrigation.
4 MR. KING: Question is vague.
5 **A. I would assume we've used them as evidence**
6 **and part of the big picture and we considered it.**
7 Q. BY MR. BROWN: Okay. And where in your
8 file have you found anything to indicate that any
9 consideration was given to the lot numbers stated to
10 be irrigated with the 3 cfs right in the '20s and
11 '30s?
12 **A. Well, I personally couldn't show you that**
13 **in the file because I really didn't do the review.**
14 Q. So you're assuming -- specifically you're
15 assuming some weight was given that?
16 **A. Right.**
17 Q. You're guessing that it should have been?
18 **A. I believe my -- as the supervisor, I**
19 **directed all the agents to consider all the evidence**
20 **they could get their hands on for making a**
21 **determination. And I would assume that it was**
22 **considered, yes.**
23 Q. Are you aware that Mr. Clelland said in
24 his recommendations, which are in your files, that he
25 could not determine the historic diversion rate

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1 to accomplish the change in irrigated acres. Now,
2 are you aware of -- can you tell me whether the
3 original diversion rate was based on anything in the
4 department's files?
5 MR. KING: The question is vague.
6 **A. What do you mean by "the original**
7 **diversion rate"?**
8 Q. Do you understand what Mr. Clelland is
9 saying when he says, quote, the system uses almost
10 twice that amount, referring back to the 1.85 cfs,
11 and has increased the original diversion rate to
12 accomplish the change in irrigated acres? Do you
13 understand what Mr. Clelland is saying?
14 **A. Well, I would speculate what he's saying.**
15 **I believe it was -- it would be my understanding that**
16 **the beneficial use that Steve determined of so many**
17 **acres required a beneficial use diversion rate of so**
18 **much. And I think he kind of quantified that**
19 **beneficial use of so many acres and determined what**
20 **the beneficial use rate associated with those acres**
21 **would be. And if, indeed, there was more original**
22 **water diverted, he just couldn't figure out what the**
23 **beneficial use was associated with that extra**
24 **diversion. And then he probably found that there**
25 **were then more acres added after '87, and that may**

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1 because there were no longer any ditches?
2 MR. KING: Assumes facts, lack of foundation.
3 **A. I was here when he made those statements.**
4 **Well, I guess -- I don't know if he said it quite**
5 **that way, but I inferred from what he did say that he**
6 **couldn't measure the ditches because they no longer**
7 **were there.**
8 Q. BY MR. BROWN: Are you aware also that he
9 said that he couldn't recommend any expansion because
10 he couldn't find an original diversion rate upon
11 which to base the analysis?
12 MR. KING: The question is vague.
13 **A. I don't specifically recall his statement**
14 **like that.**
15 Q. BY MR. BROWN: Are you aware that
16 Mr. Clelland stated that he could not recommend an
17 expansion because the expansion would exceed the
18 historical diversion rate?
19 MR. KING: Asked and answered.
20 **A. I do not recall specifically how**
21 **Mr. Clelland said that.**
22 Q. Mr. Clelland came up with some figure of
23 1.85 cfs, and then he said, as I've read before,
24 however, the system was used as almost twice that
25 amount, and has increased the original diversion rate

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1 **take up some of that other water.**
2 Q. From your review of the files, can you
3 tell me what the department's position is concerning
4 the original diversion rate of these water rights?
5 **A. I think that the department's position is**
6 **that we tried to look at the big picture and**
7 **determine what the beneficial use of the water was.**
8 **And again, there's evidence in the file or documents**
9 **that purport other flow rates, but Steve could put**
10 **his hand around what the beneficial use was, and**
11 **that's what the recommendation is based on.**
12 MR. KING: Do you need a break, Allen?
13 Q. BY MR. BROWN: What diversion rate are we
14 talking about?
15 **A. What he has recommended.**
16 Q. One inch per acre?
17 **A. I believe so, yes.**
18 Q. So you believe that the original diversion
19 rate figure of one inch per acre is a reasonable
20 conclusion based on the evidence in this case?
21 **A. I don't know about the original diversion,**
22 **but I believe that the recommendation correctly --**
23 **well, it's based on the beneficial use Steve has**
24 **determined has existed there for some time.**
25 Q. Now, do you really believe it's fair to

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1 say that an original diversion rate can be based on
 2 one inch per acre when you know that the variability
 3 in the Magic Valley for flood irrigation diversion
 4 rates goes anywhere from five-eighths to three inches
 5 deep?
 6 MR. KING: Objection, irrelevant.
 7 A. Well, I think it's fair to start
 8 somewhere, and I don't think that anyone has shown
 9 anything different.
 10 Q. BY MR. BROWN: You don't think anyone has
 11 shown that there's a history of documents from early
 12 in this century clear up through 1982, 1983, 1985,
 13 that the 4148 right was quantified at 3 cfs,
 14 including by objective, disinterested parties?
 15 MR. KING: The question is vague.
 16 A. I think the true measure of the water is
 17 what can be documented as to what the beneficial use
 18 has been put to the water. And through those periods
 19 of time, Steve went to extreme measures to try to
 20 determine the acres that were being irrigated. Now,
 21 presently those acres are supplied water from a
 22 sprinkler system. And without further justification,
 23 I think it's a fair determination that those
 24 sprinkled acres require or allow one inch per acre
 25 under this situation.

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1 A. What was the question again?
 2 Q. Do you have any reason to believe that
 3 there were not 90 acres irrigated in 1987?
 4 A. I haven't reviewed the file clearly enough
 5 to make an exact determination about when those
 6 90-some acres were irrigated, if it was '87, '88.
 7 Q. Let me represent, you've seen the letter
 8 from Richard Kelly who put in the expansion on the
 9 golf course, have you not?
 10 A. Yes.
 11 Q. And it states that the entire system was
 12 irrigated three times a day in 1987, doesn't it?
 13 A. I'd have to look at the letter again.
 14 MR. KING: Do you need a break, Allen?
 15 THE WITNESS: No, I'm fine.
 16 Did you ask a question?
 17 Q. BY MR. BROWN: Yes. You were going to
 18 look at the letter from Richard Kelly.
 19 A. Okay. I've looked at the letter, and the
 20 letter says the use of water on Clear Lake Golf
 21 Course began on September 15, 1987.
 22 Q. Are you familiar enough with the file to
 23 know what water use that refers to?
 24 MR. KING: Objection, the question is vague.
 25 A. Well, I would have to be speculating. It

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1 Q. BY MR. BROWN: The sprinkled acres,
 2 though, when he investigated, were about 90 acres,
 3 weren't they?
 4 A. I believe there were more acres being
 5 irrigated than what historically for a very, very
 6 long time were irrigated. If it was 90, that might
 7 be the number.
 8 Q. Let me represent to you in the chart we
 9 just discussed with Steve at the end of his
 10 deposition, he calculated in 1987 89.9 acres.
 11 MR. KING: Objection, lack of foundation.
 12 Q. BY MR. BROWN: Do you have any reason to
 13 disagree with the fact that about 90 acres have been
 14 irrigated since '87?
 15 MR. KING: Assumes facts not in evidence.
 16 A. I don't know specifically when those acres
 17 were irrigated, as far as when they started to be
 18 irrigated. But I think it's a fair representation
 19 that Steve has determined that so many acres were
 20 irrigated before '87, and those acres irrigated after
 21 '87 should have been covered under some other water
 22 right than those that have been claimed.
 23 Q. BY MR. BROWN: Do you have any reason to
 24 believe that there were not 90 acres irrigated in
 25 1987?

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1 may very well refer to this application for permit,
 2 which the letter is contained in the file. It's a
 3 water right application that wanted to add 19.7
 4 acres.
 5 Q. BY MR. BROWN: Okay. Can you tell me
 6 when -- that's application number --
 7 A. 36-08704.
 8 Q. And that application was filed when?
 9 A. It was filed December 4, 1992.
 10 Q. Okay. And isn't it also true that that
 11 letter was received by the Department of Water
 12 Resources on December 1, 1992?
 13 A. No. It was received on December 10, 1992.
 14 Q. I'm looking upside down. It's one zero.
 15 Okay.
 16 You're not aware of anything in the file
 17 to suggest that that is not, in fact, true?
 18 MR. KING: The question is vague.
 19 A. Well, I haven't looked through the file
 20 specifically to make that determination. But I, at
 21 this time, don't know that.
 22 Q. BY MR. BROWN: Do you have any personal
 23 knowledge about whether it's true or not?
 24 MR. KING: The question is vague.
 25 A. No.

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1 Q. BY MR. BROWN: You hired Steve Clelland in 2 1988? 3 A. I believe that's the year, yes. 4 Q. Do you know what experience he had before 5 1988? 6 A. As I recall, Steve worked for the canal 7 company for a time measuring water. He also had a 8 degree from the University of Idaho, I believe, in ag 9 science, something like that. He taught school for a 10 while. 11 Q. Do you know if he had any experience in 12 examining water rights before you hired him? 13 A. Specifically examining water rights, I 14 don't recall that he did. 15 Q. Did you participate in training Steve how 16 to examine water rights? 17 A. Yes, as well as others. 18 Q. And during what years did you help train 19 Steve? 20 A. Well, from 1988 to the present. We 21 undergo all sorts of training. 22 Q. Okay. I want to talk about from 1988 23 through 1991. What specific things did you have to 24 train Steve in so that he could be what I guess he 25 refers to as being an expert in water right Page 62	1 investigation? 2 A. Well, quite frankly, a lot of the 3 expertness in what we do comes with experience. But 4 Steve came with background knowledge on a lot of 5 things that we need to know about legal descriptions, 6 measurement of water. Having an agricultural 7 background, he dealt with chemicals and chemical 8 applications and those kinds of things. And we did 9 training with specifically field examination, claims 10 review, that kind of thing was conducted with our 11 legal staff and with our engineers and so forth in 12 Boise. 13 Did I answer your question well enough? 14 Q. I guess. To your knowledge, have there 15 been any trials that have made it to the district 16 court level through Judge Hurlbutt's analysis 17 concerning water right claims Steve Clelland has 18 investigated? 19 A. Trials? I know Steve has been involved in 20 settlement conferences and preparations of 706 21 reports. He was involved in the Candy case. I don't 22 know if you'd call that going to trial. I don't 23 know. 24 Q. Are you aware of any cases -- what I mean 25 by going to trial is where the judge has actually Page 63
1 held a hearing, determined the evidence and issued a 2 decree or a partial decree based upon 3 Steve Clelland's expertise? 4 A. Well, I believe that Steve participated in 5 the Niagra Springs matter. Now, I don't know if you 6 consider that a trial. Judge Hurlbutt did make some 7 decisions regarding that. 8 Q. And that reached a settlement agreement, 9 correct, or at least an interim settlement agreement? 10 A. Yeah, yeah, interim settlement. 11 Q. Pending a trial. So you're not aware of 12 any other that have been tried where Steve Clelland 13 made the recommendation, the court subsequently tried 14 it and made a determination? 15 A. Well, I'm not aware of one. I might be 16 mistaken, but none come to mind at this point. 17 Q. You're aware of Steve Clelland's 18 participation in settlement conferences and reaching 19 standard form fives? 20 A. On, excuse me. I guess the Cleve Lloyd 21 case did go before a special master. I don't know if 22 you consider that a trial, but he did issue a 23 decision on that. 24 Q. But it hasn't reached the district court? 25 Special Master Dolan made a recommendation, but that Page 64	1 hasn't been reviewed, correct? 2 A. It hasn't, to my knowledge, gone before 3 Judge Hurlbutt. 4 Q. Okay. Do you have any idea of how many 5 recommendations Steve has been involved in where he 6 was then involved in settlement discussions that 7 resulted in settlement of the claims? 8 A. I know Steve has been involved in a lot 9 having reviewed most of the claims in the Hagerman 10 Valley. Numbers, I haven't really kept track. 11 Q. Have you kept track of the results in the 12 sense of whether they settled for what he originally 13 recommended or whether the settlements were based on 14 changes? 15 A. I haven't really kept track. 16 Q. Does the department keep track of those 17 kind of things? 18 A. I really don't know. 19 Q. Okay. No one has told you they kept 20 track, you -- 21 A. I know I'm not keeping track. 22 Q. You don't know whether the district court 23 has or the other claimants have accepted Steve's 24 recommendations more often than not or whether his 25 original recommendations have changed and that led to Page 65

1 settlement? You just don't have any idea of what
2 the -- I guess what I'll call results are?

3 **A. I know there have been changes, but I**
4 **don't know exactly which way. I'm sure that there's**
5 **middle ground obtained in a lot of those.**

6 **Q. Is there anything you know about any of**
7 **these claims which you haven't heard discussed in any**
8 **of the depositions today that you think is important**
9 **to consider?**

10 **A. Well, quite frankly, personally, when I --**
11 **years back in the '70s, I used to go fishing down**
12 **around Clear Lake. And there was a period in, I**
13 **believe, the late '70s when I helped survey a line**
14 **through the eastern portion of the property for**
15 **purposes of preliminary work in the proposed dam**
16 **site. And I just have some vague recollections of a**
17 **lot of that ground being dry. And there were some**
18 **areas of irrigation. And just my view of some of**
19 **those aerial photos seem to support my recollection.**

20 **Q. Are you a golfer?**

21 **A. Yeah.**

22 **Q. Do you golf down there very often?**

23 **A. I've never golfed down there.**

24 **Q. When you say the aerial photos support**

25 **your recollection, does that mean you have any recall**

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1 help people fill out statutory claims accurately?

2 **MR. KING: The question is vague.**

3 **A. Well, again, let me explain that in taking**
4 **claims, statutory claims or adjudication claims, we**
5 **weren't helping people fill them out accurately, we**
6 **were -- it was usually their story. I mean, it was**
7 **always their story. And there were times when claims**
8 **numbers were put in there that, in reality, we had**
9 **question about, but they got put in there anyway. I**
10 **think there's a little bit of that in some of these**
11 **claims file.**

12 **Q. BY MR. BROWN: And particularly what are**
13 **you referring to?**

14 **A. Well, I believe there's a sense of when**
15 **the -- if you look at the evolution of the statutory**
16 **claims and how they were changed and what was going**
17 **on at the time with the necessity of developing this**
18 **planned unit development, I guess the questions ran**
19 **through my mind that, truly, were these numbers**
20 **documenting historical use or is it just a way to try**
21 **to get a water right?**

22 **Q. And when you say with PUD going in, are**
23 **you referring to the golf course or are you referring**
24 **to the ranch rights?**

25 **A. Well, in this particular situation, I**

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1 of how many acres would not or would have been used,
2 or is it just a general recall that some was
3 irrigated and some wasn't?

4 **A. Well, specifically when you talk about the**
5 **island, that's where we used to fish off of. And I**
6 **don't recall that ever being irrigated.**

7 **Q. But you do recall seeing the irrigation**
8 **pipes that were abandoned that run out to it?**

9 **A. No, I don't recall that.**

10 **Q. You've never seen those?**

11 **A. I don't recall that.**

12 **Q. Okay. And that would have -- your**
13 **experience would have started in the '70s, your**
14 **personal knowledge of the area, I guess?**

15 **A. Yes. Additionally, I was one of the**
16 **people who oftentimes helped Mr. Brush in his water**
17 **filings. I really couldn't tell you if it was George**
18 **or David, but it was one of them. And, for example,**
19 **some of the writing on the permit applications and so**
20 **forth is mine. And on the statutory claims is mine.**

21 **Q. Some of the more recent statutory claims?**

22 **A. Yes.**

23 **Q. Okay. You worked with Loren Holmes?**

24 **A. Yes.**

25 **Q. And in your experience, did Loren Holmes**

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1 **would be referring to the ranch rights.**

2 **Q. Is there anything else that you think**
3 **is -- that we haven't talked about that you think is**
4 **significant with respect to recommending these rights**
5 **that should be taken into account?**

6 **A. I believe in looking at the permit**
7 **36-08329, there was some discussion about whether**
8 **that permit included irrigation and memos to the**
9 **effect that maybe it did. It's my recollection that**
10 **the permit was not intended to include irrigation.**
11 **It was my recollection that this permit was for the**
12 **sanitary water for the PUD.**

13 **Q. When you're referring to the permit, what**
14 **you're referring to is the permit for the ranch fire**
15 **protection domestic system, correct?**

16 **A. Yes.**

17 **Q. And isn't it also true that within the**
18 **files concerning that particular application, it**
19 **also -- within the 4148A claim, it's clear that the**
20 **irrigation portion of the same system would be**
21 **used -- to use the 4148A irrigation claim in**
22 **conjunction with the permit water? In other words,**
23 **they didn't intend to have two separate conveyance**
24 **systems?**

25 **A. I don't know that that's clear. It's my**

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1 recollection that at the time of this, he was kind of
 2 bouncing back and forth around where the point of
 3 diversion was where he was going to put this
 4 collection box. It was my impression that he had
 5 this water contractually, that he was, through this
 6 application, using some of it.

7 Q. When you say "he," you mean --

8 A. One of the Brushes.

9 Q. Would it be George Brush?

10 A. I don't know if it's George or Dave.

11 Q. Was he an older gentleman?

12 A. No. It was the younger gentleman.

13 MR. BROWN: I have nothing further. Thank
 14 you.

15 (Deposition concluded at 9:00 p.m.)
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 17
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 22
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1 STATE OF IDAHO)
 2 COUNTY OF _____) ss: VERIFICATION

3

4 I, ALLEN MERRITT, being first duly sworn,
 5 depose and say:

6 That I am the witness named in the foregoing
 7 deposition consisting of pages numbered 1 through 70,
 8 that I have read the said deposition and know the
 9 contents thereof; that the questions contained
 10 therein were propounded to me; that the answers to
 11 said questions were given by me; and that the answers
 12 as contained therein (or as corrected by me therein)
 13 are true and correct.

14

15

16 ALLEN MERRITT

17

18

19 SUBSCRIBED AND SWORN to before me this _____
 20 day of _____, 199__.

21

22

23 Notary Public residing at _____

24 My commission expires _____

25

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REPORTER'S CERTIFICATE

1
 2
 3 STATE OF IDAHO)
 4 COUNTY OF TWIN FALLS) ss
 5
 6
 7 I, CONNIE STONE, Certified Shorthand Reporter
 8 and Notary Public in and for the State of Idaho, do
 9 hereby certify that prior to being examined, the
 10 witness named in the foregoing deposition was by me
 11 duly sworn to testify to the truth and nothing but
 12 the truth;

13 That the foregoing transcript is a true and
 14 correct transcript of my original stenographic notes.

15 I further certify that I have no interest in
 16 the event of the action.

17 WITNESS my hand and seal this _____ day of
 18 September, 1996.

19

20

21

Connie Stone
 CSR Number 353
 My commission expires 4/5/99

22

23

24

25

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