

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	)	DAVID TUTHILL
	)	

DATE: July 30, 1996

TIME: 8:25 a.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
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For the Claimant
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ROSHOLT ROBERTSON & TUCKER
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Idaho Department of Water Resources
by BRENT R. KING
and CHARLES HONSINGER
1301 North Orchard
Boise, Idaho 83706-2237

Also Present

DENNY KUNTZ
STEVE CLELLAND
ALLEN MERRITT

1 INDEX 2 3 4 Witness, DAVID TUTHILL 5 Examination by: Page 6 Mr. Brown 4, 98, 127 7 Mr. Semanko 63, 119 8 Mr. King 126 9 10 11 12 13 14 15 (No Exhibits Marked.) 16 17 18 19 20 21 22 23 24 25 Page 2	1 DEPOSITION OF DAVID TUTHILL, taken at the 2 instance of the claimant, at the Law Offices of 3 Hepworth, Lezamiz & Hohnhorst, 133 Shoshone Street 4 North, in the City of Twin Falls, State of Idaho, 5 before Connie Stone, a Notary Public and Certified 6 Shorthand Reporter in and for the State of Idaho, 7 pursuant to notice and in accordance with the Idaho 8 Rules of Civil Procedure. 9 ***** 10 11 12 (Witness sworn.) 13 MR. BROWN: Let the record reflect this is the 14 time and place for the taking of the deposition of 15 the Department of Water Resources in the three rights 16 on the notice of deposition. This first deposition 17 is a 30(b)(6) deposition. And I've left it to 18 Mr. King to determine who will be deposed. He is 19 having Steve Clelland come over, but in the meantime 20 we're going to start with David Tuthill. 21 Counsel, can we stipulate that this is 22 being taken pursuant to the Idaho Rules of Civil 23 Procedure? 24 MR. SEMANKO: Yes. 25 MR. KING: Yes. Page 3
1 DAVID TUTHILL, 2 called as a witness at the instance of the claimant, 3 being first duly sworn, was examined and testified as 4 follows: 5 EXAMINATION 6 BY MR. BROWN: 7 Q. Mr. Tuthill, have you had your deposition 8 taken before? 9 A. Yes, I have. 10 Q. Okay. And then you know there are three 11 things that I always try to say just to be certain 12 that we get a good record. And the first one is, as 13 you realize, the court reporter is taking the 14 testimony orally, and we will therefore need an oral 15 response rather than a head shake or a gesture so 16 that we have a clear record. 17 A. Okay. 18 Q. Secondly, if I ask a question that you 19 don't understand, and I'm sure that'll probably 20 occur, please let me know so that we're not talking 21 on top of one another. 22 A. Okay. 23 Q. And then thirdly, let's just all of us try 24 to not talk on top of each other, so that when I ask 25 a question, I'll try to finish it and allow you to Page 4	1 finish your response, so that the court reporter is 2 only trying to report one person at a time. 3 A. Okay. 4 Q. Mr. Tuthill, you, with respect to these 5 three rights, I understand that you may testify in 6 the SRBA; is that correct? 7 A. That is correct. 8 Q. And about what elements might you 9 testify? And let me, just for the record, for 10 everyone here, when I refer to the elements of the 11 right, I'm referring to the elements listed in 12 42-1411(2), which you're familiar with, correct? 13 A. Yes. I'm acquainted with all of the 14 elements in a general way. In this particular 15 situation, the fieldwork and much of the early work 16 and recommendations were prepared by Steve Clelland, 17 so I would prefer that he be the expert testifier on 18 those elements that involve the fieldwork and 19 recommendations. 20 Q. What elements then would be left for you 21 to testify about? 22 A. I would consider myself competent to 23 testify as to policy aspects on each of the elements. 24 Q. Do you know which elements the policy 25 aspects would apply to in these three claims? Page 5

1 A. We've used policy on virtually all of
2 our -- all of the elements in our recommendations.
3 Q. And in these three particular claims, do
4 you know which elements those would pertain to?
5 A. On these three, it would be the policy
6 elements with regard to all of the three. The
7 elements that I'm referring to are those elements for
8 each of the aspects of the water right where
9 recommendations were made.
10 Q. All right. Let's talk more specifically
11 about these three water rights. What knowledge or
12 facts do you have about these three claims?
13 A. I have reviewed the files, and have looked
14 at the property, and have discussed them, to some
15 extent, with Mr. Clelland and others.
16 Q. Who have you had discussions with?
17 A. Allen Merritt and Brent King.
18 Q. Okay. Let's start. What has
19 Allen Merritt told you about these three claims?
20 MR. KING: Objection, hearsay.
21 MR. BROWN: Go ahead and answer.
22 A. We have looked at the site together. And
23 he, along with Steve Clelland, discussed the basis
24 for the recommendations that were made.
25 Q. BY MR. BROWN: Okay. When did you visit

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1 development of this site over time with the golf
2 course being initially developed in the '20s or '30s
3 or '40s, and being further developed in the 1980s.
4 Q. BY MR. BROWN: And did you in any way
5 discuss acreage as it pertained to place of use in
6 development over time?
7 MR. KING: Objection, hearsay.
8 A. We did discuss the fact that the acreage
9 off the east end was found to be approximately 41
10 acres -- correction, 23 acres on the east end. And
11 on the west end, it was found to be 41 acres.
12 Q. BY MR. BROWN: As of what time period?
13 A. As recommended in the claims. We provided
14 a priority date of -- or we have recommended a
15 priority date of February 1, 1937, for irrigation of
16 the 41 acres, as recommended in water right 36-04074,
17 and we recommended, let's see, a priority date of
18 January 1, 1927, for the 23 acres identified in water
19 right 36-4148B.
20 Q. Tell me how many acres do you understand
21 to be irrigated on the two properties as of the time
22 you looked at them yesterday?
23 A. It appears that the irrigation is
24 approximately that which is defined in a letter from
25 Steve Clelland.

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1 the site?
2 A. Yesterday afternoon.
3 Q. And did anybody else accompany you and
4 Allen and Steve?
5 A. Brent King.
6 Q. Tell me what you looked at.
7 A. We made an overview from a vantage point
8 above the site, looked at the operation from the
9 cliff above the site of the golf course.
10 Q. And what was the purpose of that overview?
11 A. To acquaint me with the site and to allow
12 for discussion of the elements that had been
13 recommended in this matter.
14 Q. Okay. Which elements did you discuss with
15 Allen or Steve?
16 A. The sequence of development of the site.
17 Q. Which elements would that involve?
18 A. The place of use, the diversion points,
19 generally the historic development of the site.
20 Q. Okay. Tell me what you discussed
21 concerning place of use.
22 MR. KING: I'll object on hearsay grounds
23 again.
24 A. The photographs reveal development over
25 time of the place of use. And we discussed the

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1 Q. Do you have your own opinion about how
2 many acres are presently irrigated?
3 A. I did not compare what we saw with the
4 maps specifically. I looked at the process of the
5 review rather than the case-specific examples.
6 Q. Do you have an opinion about how many
7 acres are presently irrigated?
8 A. I have not computed the acres irrigated.
9 Q. And so you do not have an opinion?
10 A. Based on the process that I was shown, I
11 would support the recommendation made by our field
12 examiner in this case.
13 Q. So you do have an opinion?
14 A. Yes.
15 Q. And your opinion is how many acres are
16 irrigated on the total properties presently?
17 A. As to the present irrigation, it would be
18 the -- it would be acres in excess of those that I've
19 just described, approximately 90 acres.
20 Q. And that opinion is based on what?
21 A. Based on a review of the acres that we
22 could see are being irrigated from the cliff, as
23 compared with the acres identified in photographs in
24 the file in comparison with the acres recommended.
25 Q. So --

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1 **A. Under these water rights.**
2 Q. -- you are taking the acres recommended by
3 Mr. Clelland as being correct?
4 **A. That is correct.**
5 Q. You haven't done anything independently to
6 verify whether or not they're correct?
7 **A. That is correct.**
8 Q. Is it fair to say you haven't done
9 anything independently on your own to try to
10 determine for yourself whether Mr. Clelland
11 accurately determined the acres presently irrigated?
12 **A. That is correct.**
13 Q. Okay. And is it fair to say that you
14 assume that what Mr. Clelland did is accurate?
15 **A. The process that he undertook appears to**
16 **have been correct. I have looked at the**
17 **documentation that he prepared. That looks**
18 **reasonable. I haven't planimtered the acres, that**
19 **is correct.**
20 Q. My question was whether you're assuming
21 what Mr. Clelland did is correct and accurate?
22 MR. KING: Objection, vague and ambiguous,
23 calls for speculation.
24 **A. I have verified his process but have not**
25 **recomputed the acreage that he calculated.**

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1 MR. KING: Asked and answered and calls for
2 speculation.
3 **A. The process that was used appears to be**
4 **appropriate in this matter. I have not**
5 **replanimetered, but the process of reviewing the**
6 **acreage that have been originally irrigated, based on**
7 **aerial photographs, and calculating those acres, and**
8 **making a recommendation based on those acres, appears**
9 **to be appropriate. What I did not do was to**
10 **replanimeter the acreage as per 40-acre tract.**
11 Q. BY MR. BROWN: My question is not about
12 the process. I understand that you've reviewed the
13 process. My question is about the particular
14 calculation. When you say you have not
15 replanimetered the photos or otherwise determined
16 acreage, isn't what you're saying is you don't
17 know -- you didn't calculate for yourself the number
18 of acres?
19 **A. That is correct.**
20 Q. Okay. And so you don't know if he
21 correctly determined them, you just know that he
22 applied the proper process?
23 **A. That is correct.**
24 MR. KING: Asked and answered, calls for
25 speculation.

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1 Q. BY MR. BROWN: What did you do to verify
2 his process?
3 **A. I reviewed the files, and reviewed the**
4 **methods of computation, and they appeared to be**
5 **appropriate.**
6 Q. I'm not trying to be difficult here, but
7 what I'm trying to get to is I don't want to dance
8 around about what you did. My understanding is
9 you're saying you verified the process. To me, that
10 means that you confirmed that he looked at the number
11 of acres and came up with a number to represent what
12 he found. Now, am I correct in understanding that
13 you've looked at the fact that he went through a
14 process, but have no idea whether or not the acres he
15 found are correct or not?
16 MR. KING: Asked and answered. Once again,
17 calls for speculation.
18 **A. Based on the placement of the acres within**
19 **the 40-acre tracts, those acreage computations appear**
20 **to be reasonable, but I have not replanimetered those**
21 **acres.**
22 Q. BY MR. BROWN: So is what you're saying
23 that you do not know whether the process was properly
24 applied to these particular acres to come up with the
25 acreage number?

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1 Q. BY MR. BROWN: Okay. What's your
2 understanding of -- I want to go back in time now
3 from the present -- about 90 acres or what time frame
4 do you understand that has been continuously
5 irrigated?
6 MR. KING: Calls for speculation.
7 **A. Based on the file, it is my understanding**
8 **that with the addition of the other nine holes to the**
9 **golf course in the late 1980s, additional irrigation**
10 **was created. And the development since that time has**
11 **been largely continuous. However, some development**
12 **is clearly taking place on the property now with home**
13 **sites.**
14 Q. BY MR. BROWN: What year do you understand
15 the 90 acres were first irrigated?
16 **A. As of the completion of the golf course,**
17 **approximately 1998 -- approximately 1988, correction.**
18 Q. 1988. Has anyone ever told you that they
19 were completed in 1987?
20 **A. Some irrigation in the -- my understanding**
21 **is that some irrigation could have been conducted in**
22 **the fall of 1987.**
23 Q. And where did you get that understanding?
24 **A. Based on the file and in discussion with**
25 **Allen Merritt.**

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1 Q. What did Allen Merritt tell you about
2 that?
3 MR. KING: Objection, hearsay.
4 A. His understanding is that's the date of
5 completion of the golf course.
6 Q. BY MR. BROWN: When?
7 A. 1987, the construction was completed, and
8 the irrigation could have begun in late 1987.
9 Q. And do you have any reason to believe it
10 did not begin in --
11 A. No. That may well have happened.
12 Q. Has anyone at the department ever told you
13 they lack information about when those 90 acres were
14 actually irrigated --
15 MR. KING: Objection.
16 Q. -- when they were initially actually
17 irrigated?
18 MR. BROWN: Counsel, just for the record, so we
19 don't have to keep doing this, I understand that you
20 are proffering Mr. Tuthill as an expert. To that
21 extent, I'm entitled to know from whatever source he
22 understands facts about this. And if any of that
23 goes to the basis of any opinion, it's simply --
24 whether it's hearsay or not is irrelevant. If you
25 wish to continue to make your objections, that's

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1 Q. Okay. So when that report -- so you
2 participated not at all in that?
3 A. That's correct.
4 Q. Okay. And do you know whether the
5 contents of that report are accurate?
6 MR. KING: Objection, calls for speculation.
7 A. The information in that report coincides
8 with the information in the files from which it was
9 based. That's the extent of my knowledge about that
10 report.
11 Q. BY MR. BROWN: And it corresponds in the
12 particular respect that there's no information in the
13 department's files that the full 90 acres was
14 irrigated in 1987?
15 MR. KING: Calls for speculation.
16 A. Let's see, do you have that report here?
17 The report states that in 1987, fairways
18 on the golf course were under construction per an
19 ASCS map. And the 1988 photo revealed that for this
20 area, the full 18-hole golf course was under
21 irrigation. From my understanding, the exact date of
22 initial irrigation, whether in late 1987 or early
23 1988, has not been fully clarified.
24 Q. BY MR. BROWN: Is it your understanding
25 that it's significant whether it was first watered in

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1 fine.
2 For the court reporter, Mr. Honsinger just
3 came in.
4 MR. HONSINGER: Thank you. I apologize for
5 being late.
6 THE WITNESS: Could you repeat the question,
7 please.
8 Q. BY MR. BROWN: My question is, what were
9 you told from the department, or anywhere else, about
10 whether irrigation of the full 90 acres began in
11 1987, okay? I think we generally asked who, and you
12 told me that you generally had an understanding that
13 that might have occurred or could have occurred.
14 Now, has anyone from the department or anywhere else
15 ever told you that it did not occur in 1987?
16 A. No.
17 Q. Has anyone ever told you that the
18 department doesn't have information showing that
19 those 90 acres were irrigated in 1987?
20 A. No.
21 Q. Tell me the extent to which you
22 participated in the preparation of the 706 report for
23 these rights.
24 A. The report was prepared prior to my
25 involvement in this area of the adjudication.

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1 '87 or '88?
2 A. Based on the claim that has been submitted
3 to date, I recognize that there is an issue regarding
4 the start time being before or after the initiation
5 of the adjudication. However, I have not analyzed
6 the start time significance relative to these claims.
7 Q. So you don't know whether or not that
8 would be important in these particular claims?
9 A. That's correct. I recognize that's an
10 issue, but I have not analyzed that issue.
11 Q. When there appeared -- when the department
12 investigates a claim and there appears to be an
13 expansion in acreage, is it important as a matter of
14 policy for the department to know when the expansion
15 occurred?
16 A. It is important.
17 Q. Why is it important?
18 A. Because the expansion date can influence
19 the manner of recommendation of the water rights.
20 Q. And if the expansion were to occur after
21 the initiation of the adjudication, how would the
22 department view the expansion?
23 MR. KING: Objection, assumes facts not in
24 evidence.
25 A. In general, some expansions that occur

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1 after the initiation of the adjudication would not be
2 admissible as expansions of claims as compared with
3 those that were initiated prior to the initiation of
4 the adjudication.

5 Q. BY MR. BROWN: To the best of your
6 knowledge, does anyone in the department dispute that
7 there are 90 acres irrigated on that property?

8 A. Presently?

9 Q. Yes.

10 A. That's the information that we had
11 gathered.

12 MR. BROWN: Could you read back the question.
13 (Record read.)

14 A. I'm not aware of anyone who disputes that
15 total irrigation.

16 Q. BY MR. BROWN: And is there anybody, to
17 your knowledge, that disputes that there have been 90
18 acres irrigated since at least 1988?

19 MR. KING: Assumes facts not in evidence.

20 A. I'm not aware of any dispute to that
21 information.

22 Q. BY MR. BROWN: In other words, what we're
23 saying is there's no dispute about the fact that 90
24 acres have been irrigated since at least 1988?

25 MR. KING: Assumes facts not in evidence.

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1 that?

2 A. This information --

3 Q. I'm asking only what photos you personally
4 have looked at.

5 A. I just looked at the photos that are in
6 the file.

7 Q. And do you have those photos marked?

8 A. We actually don't have all of the files
9 here.

10 MR. KING: We don't? What are we missing,
11 Dave?

12 A. Okay, here they are. I guess we do have
13 all the files.

14 Okay. This 1980 photo. We have --

15 Q. BY MR. BROWN: Maybe if we could -- could
16 you tab those with the pink tabs so we can come back
17 to them if we need to.

18 A. All right. We have a 1987 photo. And we
19 have a pre-1975 photo.

20 Q. Do you know what year that photo is?

21 A. We estimate it's pre-1975. It was part of
22 a report that was prepared for -- entitled
23 Agriculture in Idaho, and it's a plan -- it's an
24 aerial view of the area, which depicts that some of
25 the ground was dry at that time. It's not a

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1 A. That's correct.

2 Q. BY MR. BROWN: Okay. What did Mr. Merritt
3 particularly tell you about the number of acres which
4 have historically been irrigated?

5 MR. KING: Objection, hearsay.

6 A. Those on site discussed relationship
7 between the aerial photos, which show that there was
8 development through the years, as compared with the
9 irrigation that presently exists. And we discussed
10 the development of the property through the years.

11 Q. BY MR. BROWN: Did you ever discuss
12 acreage numbers through the years?

13 MR. KING: Objection, hearsay.

14 A. We discussed the initial development of
15 the acres, to which I've already referred, in
16 comparison with the present higher number of acres
17 irrigated.

18 Q. BY MR. BROWN: Okay. When you say
19 "initial," what year are we talking about?

20 A. That would be the 41 acres and the 23
21 acres.

22 Q. And what years did you look at?

23 A. Okay. That would be the 41 acres
24 developed as of 1937.

25 Q. What photos did you look at that showed

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1 specifically dated photo.

2 Q. Are those the only photos?

3 A. Yes, that I'm acquainted with. Now, we do
4 have some newer ASCS slides that -- let's see. We
5 have 1980 -- these are actually photographs, color
6 photographs, June '87, showing the fairways being
7 developed. June '86.

8 Q. Are there any other photos that you're
9 aware of?

10 A. There's some photos that I'm not
11 personally aware of that are in the file. I'm not
12 aware of the dates on these. These are ortho --
13 copies of ortho photo quads. I think they're of 1977
14 vintage, but I'm not sure.

15 Q. Okay. So you have one photo from
16 pre-1975, correct?

17 A. That I'm aware of, yes.

18 Q. And from that, you were able to determine
19 that there were only 41 and 23 acres irrigated?

20 MR. KING: Objection, mischaracterizes his
21 prior testimony.

22 A. That's the evidence that I'm aware of.

23 There might be more that went into that.

24 Q. BY MR. BROWN: Did you consider any other
25 information that you're aware of in determining what

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1 has been irrigated since 1937?

2 MR. KING: Calls for speculation.

3 A. I have read the affidavits that have been
4 submitted by John LeMoyne and others, George Brush
5 and others that have been submitted for the record.

6 Q. BY MR. BROWN: And what do those
7 affidavits say to you, generally?

8 A. Generally, they say that there was some
9 irrigation, but it's not well quantified.

10 Q. Isn't it a matter of policy for the
11 department to ask for clarification when someone
12 doesn't clarify how many acres are irrigated?

13 A. Yes. And as I look through the file,
14 there have been many contacts between the department
15 and the claimants on this particular issue over the
16 years.

17 Q. And which claimants are you referring to?

18 A. Well, Mr. LeMoyne was actively involved
19 and George Brush was actively involved through the
20 years.

21 Q. And it's your understanding that the
22 department did contact Mr. LeMoyne or anyone else for
23 the golf course and tell them that they needed more
24 specific information?

25 A. There were contacts through the years. As

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1 Q. BY MR. BROWN: And if you need a more
2 particularized statement of acreage, isn't it your
3 policy to ask the person to particularize the
4 acreage?

5 A. We would ask for that if we feel that
6 would yield additional information.

7 Q. So if you think the person could tell you
8 more particularly the number of acres, you would ask
9 that question?

10 A. That's correct.

11 Q. And do you know whether that was done in
12 these cases or not before the department made its
13 recommendations?

14 A. The conversation memos support the -- or
15 demonstrate that there was contact. I can't say that
16 there was specific contact between the time that the
17 recommendation was determined by the department and
18 the findings were sent out. I'm not aware of contact
19 during that interim.

20 Q. Are you aware of contact at any time prior
21 to the recommendation being made?

22 A. Yes. There was -- there was contact by
23 the claimants coming in to make their filings. Some
24 of the filings were amended, which is an indication
25 that there was contact and some interplay between the

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1 far as the timing relative to the announcement of our
2 initial findings, I'm not sure.

3 Q. Isn't it the department's policy to tell
4 people if they need to submit additional information
5 and tell them what type of information is needed
6 before they make a recommendation?

7 MR. KING: Compound question, vague and
8 ambiguous.

9 A. We attempt to coordinate with water right
10 claimants in the process of our review of a water
11 right claim.

12 Q. BY MR. BROWN: Isn't it the department's
13 policy to have its personnel contact the claimants
14 and tell them that they need additional information
15 or more particular information before making a
16 recommendation?

17 MR. KING: Compound question, vague and
18 ambiguous, assumes facts not in evidence.

19 A. I would say we normally do that. I can't
20 say that we do that in every case. If we feel that
21 we already have received as much information as the
22 claimant has to provide, we might not contact the
23 claimant before making the recommendation. It's
24 normally the case that we would be in contact with
25 the claimant as we prepare our recommendation.

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1 claimants and the department.

2 Q. Is there any indication that the
3 department asked for more particular information
4 regarding acreage?

5 MR. KING: Vague and ambiguous.

6 A. Not that I'm aware of. It's possible that
7 another person in the department would be able to
8 testify to that or attest to it.

9 Q. BY MR. BROWN: Does the department have a
10 policy to not -- or to discount, rather, the
11 testimony of affiants who say the acreage was
12 irrigated?

13 A. No.

14 Q. So if someone swears upon an affidavit
15 that a certain amount of acres were irrigated, would
16 the department contest that?

17 A. We would not contest that. We take into
18 account an affidavit. But as to the number of acres
19 irrigated, we use other tools as well to make that
20 determination.

21 Q. Okay. I want to talk about the historic
22 irrigation here on this particular ground. The
23 department has a pre-1975 photo. Does it have any
24 other evidence to show that these acres were not
25 irrigated as claimed before 1975?

Page 25

1 MR. KING: Calls for speculation.
 2 A. I am not personally aware of additional
 3 evidence.
 4 Q. BY MR. BROWN: Okay. Let's talk
 5 about your conversation on your site visit with
 6 Steve Clelland. Did he ever discuss acreage numbers
 7 with you?
 8 A. Yes.
 9 Q. And what did he tell you?
 10 MR. KING: Objection, hearsay.
 11 A. The group on site discussed the same
 12 acreages that I have referred to.
 13 Q. BY MR. BROWN: At that site, did anyone
 14 have any conversation whatsoever about whether there
 15 could have been more than the 23 and 41 acres
 16 irrigated historically?
 17 A. The information in the file does not seem
 18 to support that.
 19 Q. I'm asking you if you discussed it.
 20 A. Relative to the historic use of these
 21 water rights, I don't recall that we discussed that.
 22 Q. Did you discuss it relative to anything
 23 else?
 24 A. We discussed the more recent use of
 25 additional -- or the more recent expansions, but not
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1 normal if the diversion can only occur over a 12-hour
 2 period.
 3 Q. Okay. Do you have any -- let me represent
 4 to you that the golf course in this situation, people
 5 will begin playing at 6:30 in the morning and are
 6 playing through 9:30 at night, which essentially
 7 leaves them from 10 p.m. to 6 a.m. to water. Is that
 8 a reasonable time period?
 9 MR. KING: Calls for speculation.
 10 A. For a golf course, we would, as a
 11 department, entertain a proposal for an increased
 12 rate of flow for that specialized use.
 13 Q. BY MR. BROWN: My question is whether from
 14 10 p.m. to 6 a.m. is a reasonable period for the golf
 15 course in this case?
 16 MR. KING: Calls for speculation, assumes facts
 17 not in evidence.
 18 A. It would be my judgment that that
 19 initially sounds reasonable. Now, I can't commit
 20 that the department will accept that, but I can say
 21 that that proposal would be entertained.
 22 Q. BY MR. BROWN: Okay. Can you tell me what
 23 the department has done to address that problem in
 24 making its recommendation?
 25 A. I'm personally acquainted with increased
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1 additional acres historically.
 2 Q. Okay. And when you say "more recent,"
 3 you're referring to what?
 4 A. 1988 and beyond irrigation, and perhaps
 5 fall of 1987.
 6 Q. Okay. Let me talk about golf courses
 7 specifically. Do you have any policies designed to
 8 address the problem faced by golf courses in that
 9 they don't continuously irrigate, but generally
 10 irrigate at night when people aren't playing?
 11 A. I'm not aware of a written policy that
 12 incorporates golf courses. However, on a
 13 case-by-case basis, we do consider increased rates of
 14 flow for specialized function, cemeteries, parks,
 15 golf courses.
 16 Q. Okay. And how do you deal with those
 17 situations?
 18 A. We review information submitted by a water
 19 user or proposed water user to see if there's
 20 justification in modifying the rate of flow. And we
 21 can issue increased rates of diversion in those
 22 specialized instances.
 23 Q. And how do you quantify that increased
 24 rate?
 25 A. For example, the rate might be twice
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1 rates of flow on municipal and graveyard systems, and
 2 we have allowed double rates of flow on those. I'm
 3 not aware of a specific situation where that's been
 4 done with a golf course, although it may well have
 5 happened. And I can see that it would be consistent
 6 to consider a golf course in the same vein.
 7 Q. What my question was, what has been done
 8 with regard to this golf course with regard to these
 9 recommendations to take into account that particular
 10 area?
 11 A. In my review of the file, I would say that
 12 that aspect has not been incorporated.
 13 Q. Do you know why not?
 14 A. One concern is that if a water right is
 15 created for irrigation, of alfalfa or pasture as was
 16 the case in this situation, that water right is
 17 created for a 24-hour rate of flow. And by
 18 converting that water right to a golf course use,
 19 that doesn't automatically increase the rate of
 20 flow.
 21 Now, the water right, to the extent the
 22 water right was initiated for golf course use, that
 23 water right could be eligible, perhaps, for an
 24 increased rate of flow. This particular analysis, in
 25 my view, should be considered as we prepare our 706
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1 report in this matter. It's my understanding that
2 you are submitting additional information to the
3 department for review for our preparation of a 706
4 report to analyze rates of flow, and that would be an
5 appropriate time frame, from my perspective, to
6 review this aspect.

7 Q. Okay. My question, though, was, what was
8 done to take that into consideration in making the
9 recommendation in these cases?

10 A. I don't see evidence in the file that that
11 particular aspect was taken into consideration for
12 those portions that might have been initiated under
13 golf course use.

14 Q. Let me try to understand when you speak of
15 golf course use. Assume for a moment that the facts
16 are that three cfs were diverted out of the springs
17 for irrigation use historically. Now, if no more
18 than three cfs are diverted presently, does it matter
19 whether the initial appropriation was for agriculture
20 rather than a golf course?

21 MR. KING: Assumes facts not in evidence.

22 A. To me, it does matter, because the extent
23 of the water right rate of flow, and thus the
24 potential for delivery of a water right, is limited
25 to the amount of water required to provide for a

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1 used on those 64 acres?

2 MR. KING: Objection, vague and ambiguous.

3 A. We made a recommendation of an inch per
4 acre based on -- and that recommendation was based on
5 measurements and theoretical computations of output
6 and our assessment that the system could produce that
7 much. And that is supported in our files.

8 Q. BY MR. BROWN: Okay. So you recommended
9 an inch per acre based on your measurements and your
10 theoretical computations, correct?

11 A. Yes.

12 Q. Isn't that true that the measurements in
13 the theoretical computations were all for more than
14 one inch per acre?

15 A. Yes.

16 Q. Then why didn't you recommend more than
17 one inch per acre?

18 A. With the sprinkler system, we have
19 generally considered one inch per acre to be enough
20 water. However, we will prepare a 706 report, if
21 provided required information to further analyze.

22 Q. You generally considered an inch an acre
23 enough for an irrigation sprinkler system?

24 A. Yes.

25 Q. What analysis was that one inch per acre

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1 beneficial use. If a higher rate of flow than
2 necessary was diverted initially, for irrigation of
3 row crops or pasture, and now if that higher rate of
4 flow continues for golf course use, it could be that
5 the rates of flow have remained the same but the
6 requirement for flow has changed.

7 Q. BY MR. BROWN: So you believe if the flow
8 requirement goes down, so does the right?

9 A. Yes. And also if the flow requirement
10 goes up, then that doesn't automatically increase the
11 rate of flow of the right.

12 Q. So in other words, beneficial use is
13 limited to the minimum amount needed and can never
14 increase?

15 A. No.

16 MR. KING: Objection, mischaracterizes his
17 prior testimony.

18 A. Beneficial use would be limited to the
19 amount required. If the beneficial use required --
20 amount required is increased, then normally that
21 would be under a new water right.

22 Q. BY MR. BROWN: Okay. Now, let's talk
23 about what the department believes the historic use
24 of 64 acres required. Has the department determined
25 how much water per acre would have been needed or

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1 based on?

2 A. At the time these recommendations were
3 made to the court, we were using techniques and
4 information that resulted in an assessment of one
5 inch per acre being sufficient for sprinkler
6 systems. Since that time, our techniques have been
7 refined, our information has expanded, and we now
8 sometimes find that there is somewhat greater than an
9 inch per acre that can be required, given a certain
10 crop mix for sprinkler system.

11 Q. My question was, what is the basis, what
12 was the basis for the one inch per acre for
13 sprinklers?

14 MR. KING: Asked and answered.

15 A. Yes, that basis was the statutory normal
16 maximum for irrigation.

17 Q. BY MR. BROWN: Referring to 42-220? 222?

18 A. I would have to get the Volume 8.

19 Q. 42-220, which says that an inch per acre
20 is -- more than an inch per acre has to be necessary,
21 that's the statute you're referring to?

22 A. I don't know what number it is, but I --
23 that is the statute I'm referring to. I'm referring
24 to such a statute, yes.

25 Q. Was that the sole basis of the one inch

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1 per acre for sprinklers?

2 A. That was one basis. The other basis was
3 experience gained over many computations of the
4 sprinkler systems wherein we found that one inch was
5 sufficient. Throughout the state, we had gone
6 through the process many times of computing real flow
7 required for sprinkler system.

8 Q. Have you ever done that in this area near
9 the golf course?

10 MR. KING: Calls for speculation.

11 A. I don't know.

12 Q. BY MR. BROWN: Do your files show that
13 you've done it?

14 A. That was our statewide experience, and I
15 don't know that we had done it for this particular
16 area.

17 Q. Has the department done any irrigation
18 requirement analysis for these three claims?

19 A. We are prepared to do that when we receive
20 the information required to generate a 706 report.

21 Q. My question is have you done it?

22 MR. KING: Ambiguous.

23 A. To my knowledge, the assessment made at
24 the time the recommendation was made to the court was
25 based on the one-inch-per-acre guideline.

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1 Q. BY MR. BROWN: Even where the claimant
2 tells you he needs more than an inch per acre --

3 A. That's correct.

4 Q. -- the department doesn't do the analysis?

5 MR. KING: Assumes facts not in evidence.

6 A. We did not historically conduct that
7 analysis.

8 Q. BY MR. BROWN: Okay. And in these
9 particular rights, you did not conduct that analysis?

10 A. That's correct.

11 Q. Even though Mr. LeMoyne and others told
12 the department that they needed more than an inch per
13 acre?

14 MR. KING: Assumes facts not in evidence.

15 A. Well, what was told to the department in
16 this case, for example, claim number A 36-04148A, was
17 for 1.5 cubic feet per second as a rate of flow for
18 the irrigation for 73 acres. So that's just slightly
19 more than one inch per acre. So that claim didn't
20 indicate an excessive flow being required.

21 Q. BY MR. BROWN: Look at your affidavits,
22 please, in your file.

23 A. Okay.

24 Q. Start with the one by Mr. LeMoyne.

25 A. Yes.

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1 Q. BY MR. BROWN: So the answer to my
2 question is no?

3 A. At that time, we had not done a special
4 analysis, to my knowledge.

5 Q. At any time up until today, the department
6 hasn't done an irrigation requirements analysis for
7 these rights?

8 A. For these specific rights, no.

9 Q. Okay.

10 A. We are prepared to conduct that and have
11 agreed to do that, but we have not done it yet.

12 Q. Do you know why the department didn't do
13 that before making a recommendation?

14 A. Because our experience showed that one
15 inch per acre was sufficient for sprinkler systems.

16 Q. Even where the claimants are telling you
17 that more is needed?

18 MR. KING: Objection, assumes facts not in
19 evidence.

20 A. That has been the case, that we have
21 recommended an inch per acre as a maximum for the
22 sprinkler system. In fact, as of the date when these
23 recommendations were made, it would have been very
24 rare to have found more than an inch per acre
25 recommended for any sprinkler system.

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1 Q. Doesn't he tell you that more than an inch
2 per acre is needed?

3 A. Yes, he did state that in his affidavit.

4 Q. So was it as a matter of policy that the
5 department would not recommend more than an inch per
6 acre for sprinklers at the time it made these
7 recommendations?

8 A. At that time, we had not received
9 information that would support a technical conclusion
10 that more than one inch was required.

11 Q. And did you ask for more particular
12 information?

13 MR. KING: Calls for speculation.

14 A. We had done that on a variety of projects
15 throughout the state. On this particular project,
16 I'm not aware that we asked for that specific
17 information.

18 Q. BY MR. BROWN: The department had access
19 to the SCS soil files, did it?

20 A. Yes.

21 Q. Did it look at the SCS soil files?

22 A. At that time we did not do that for
23 sprinkler systems, no. I would -- my assumption
24 would be no.

25 Q. Let's go back to you said your inch per

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1 acre was based on measurements. Now, the
 2 measurements for the use on these places was -- you
 3 actually measured in excess of three cfs combined
 4 use, correct?
 5 **A. That's correct, combined.**
 6 **Q.** So you had evidence that more than an inch
 7 per acre was being used, correct?
 8 **A. That's correct.**
 9 **Q.** You had evidence that the claimants stated
 10 that they needed more than an inch per acre, correct?
 11 **A. They -- the affidavits did state that,**
 12 **yes.**
 13 **Q.** And you did not conduct an analysis,
 14 correct?
 15 **A. That's correct.**
 16 **Q.** Okay. Let's talk about the historic duty
 17 of water. If the 64 acres the department believes
 18 were historically irrigated were irrigated by ditches
 19 in the flood system, how much water would it take to
 20 irrigate that ground, those 64 acres?
 21 **MR. KING:** Calls for speculation, assumes facts
 22 not in evidence.
 23 **A. Generally the flood irrigation or**
 24 **corrugate irrigation requires more water than**
 25 **sprinklers in terms of rate of flow. However, the**
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1 in a system that has been for many years sprinkler
 2 irrigated, even if the use was initiated with a
 3 gravity flow system, we would not recommend as a rate
 4 of flow the gravity flow rate, we would recommend the
 5 sprinkler rate.
 6 **Q.** Okay. Take me through your analysis
 7 then. You have to assign a priority date to these
 8 claims.
 9 **A. Correct.**
 10 **Q.** How do you determine the quantity in the
 11 acreage in these three cases? Take me through the
 12 appropriate process.
 13 **A. Okay. We use affidavits, records,**
 14 **photographs, all the information we can accumulate to**
 15 **develop a scenario that is most likely on which acres**
 16 **were developed during what date. Based on that, we**
 17 **come up with our acreage. For the rate of flow for**
 18 **the irrigation of that acreage, we look at the system**
 19 **that is presently used. If we determine that at**
 20 **least that much water has always been used on the**
 21 **property, then we recommend that rate of flow that is**
 22 **needed for the present use for those historically**
 23 **irrigated acres.**
 24 **So in this case, we found, for example,**
 25 **with the 23-acre parcel, we found that at least an**
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1 **consumptive use for gravity systems is no greater**
 2 **than for a sprinkler system.**
 3 **Q. BY MR. BROWN:** Okay. The quantity -- I
 4 don't want to speak about consumptive use. I want to
 5 talk about the diversion rate.
 6 **A. Okay.**
 7 **Q.** How much water would have to be diverted
 8 to irrigate the 64 acres the department believes were
 9 historically irrigated by a flood system?
 10 **MR. KING:** Objection, calls for speculation.
 11 **A. We haven't made that computation. It**
 12 **would generally be more than sprinkler, but we**
 13 **haven't made that computation.**
 14 **Q. BY MR. BROWN:** Have you collected the
 15 information you need to make that computation?
 16 **A. No. And when the system is a sprinkler**
 17 **system, we generally don't provide the amount of**
 18 **water for another type of system through our**
 19 **recommendation.**
 20 **Q.** If my understanding is with these rights,
 21 these rights are rights which have not been licensed
 22 or decreed previously, therefore the department has
 23 to initially determine what the original beneficial
 24 use was, correct?
 25 **A. I would not agree with that. For example,**
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1 inch per acre was being used, and had -- from our
 2 information, had always been used since the acres
 3 were initially irrigated. So we recommended the
 4 maximum amount that we were typically recommending
 5 for sprinkler systems at the time this recommendation
 6 was submitted to the court. In this case, 23 inches.
 7 **Q.** Okay. Let's talk about spring right 4148
 8 **A and B. First you understand that these two**
 9 **properties were historically one property?**
 10 **A. Yes.**
 11 **Q.** And you also understand that the claimed
 12 amount, cumulative amount of the two spring rights is
 13 three cfs, correct?
 14 **A. Yes.**
 15 **MR. KING:** Assumes facts not evidence.
 16 **Q. BY MR. BROWN:** Okay. Tell me why the
 17 department questions whether three cfs has
 18 historically been diverted at that point.
 19 **A. Our recommendation is based on the system**
 20 **that we find in existence, if at least that much**
 21 **water has always been irrigated. So the**
 22 **recommendation really doesn't depend on what had**
 23 **historically been irrigated for the gravity flow,**
 24 **it's based on the sprinkler requirement. And we're**
 25 **authorized to recommend only as much water as is**
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1 needed for beneficial use. That's where the inch per
2 acre came from.

3 Q. How much water is needed to beneficially
4 irrigate 90 acres under the current sprinkler system?

5 MR. KING: Vague and ambiguous, calls for
6 speculation.

7 A. That would be -- historically, I would
8 have replied 90 inches to irrigate 90 acres.
9 However, what we're finding in recent years is with
10 certain crop mixes in certain areas, more than 90
11 inches might be required. I don't know if that will
12 be the case in this particular situation. 706 report
13 that we will prepare will give us an indicator.

14 Q. BY MR. BROWN: Is 64 acres of water enough
15 to beneficially irrigate these 90 acres?

16 A. With any water right, of course, we have
17 the rate of flow and the total volume diverted as
18 parameters of the right, but the third parameter of
19 consumptive use can't be expanded in delivery of
20 water to historic rights. So while 64 inches might
21 be enough rate of flow in certain situations to
22 provide for irrigation of 90 acres, by using the 64
23 inches on 90 acres, an expansion would occur. So
24 that's why we can't recommend the additional acres as
25 a part of this recommendation at this time.

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1 irrigation.

2 Q. Okay. You said when you did a site visit,
3 you looked at the points of diversions and had
4 discussions about those.

5 A. Could I just add to my last statement? I
6 said 64 inches is likely inadequate to provide for
7 optimal irrigation. I would like to add to that
8 statement, that's optimal irrigation for the full 90
9 acres. I think 64 inches will be close to what's
10 optimal for the 64 acres, but will be less than
11 optimal for 90 acres, probably.

12 Thank you.

13 Q. Okay. For the 64, why do you say it's
14 likely to be close to optimal?

15 A. We have found that somewhat more than an
16 inch per acre can be required with a sprinkler
17 system, but I doubt that we'll find as much as an
18 inch and a half per acre will be required with a
19 sprinkler system.

20 Q. But what if an inch and a half is what's
21 been used?

22 A. We're limited in our recommendation of the
23 water right to what is necessary to provide for the
24 beneficial use.

25 Q. Explain to me what necessary means.

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1 Q. What do you mean, an expansion might
2 occur?

3 A. Anytime there is an increase in number of
4 acres irrigated, there's consequently an increase in
5 the consumptive use, typically.

6 Q. Let me go back to my question and see if I
7 can get an answer. My question is, is 64 inches of
8 water enough water to beneficially irrigate the 90
9 acres under the current sprinkler system?

10 MR. KING: Assumes facts not in evidence, calls
11 for speculation.

12 A. Based on what I've seen as results of 706
13 reports conducted in this area, it could be that we
14 will find that more than an inch per acre can, in
15 some cases, be required. So for optimal irrigation
16 of keeping the ground wet at all times, we will
17 likely find that more than 64 inches would be needed
18 for 90 acres.

19 Q. BY MR. BROWN: Okay. But my question is,
20 is 64 inches the maximum beneficial use under the --
21 the maximum amount of water that they need to
22 irrigate these 90 acres under the current system?

23 A. What is requested is more than 64 inches
24 for the 90 acres. And for the 90 acres, I think that
25 64 inches is likely inadequate to provide for optimal

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1 A. If a system is efficiently operated and is
2 being used properly, then the water right should show
3 what water is required to satisfy the crop needs, and
4 not necessarily what is convenient for the operation,
5 system operation.

6 Q. So what you're saying is something could
7 be convenient but not necessary?

8 A. That's correct.

9 Q. And what policy does the department have
10 that pertains to that question?

11 A. We look at reasonable change times. And
12 by that, I mean 12-hour sets, in some cases high use
13 periods, sometimes 8-hour sets for gravity flow
14 systems. For sprinkler systems, we look at system
15 design, to some extent. And in the case of a golf
16 course, I think we can look at system operation
17 times. So that is something that we can add to our
18 analysis in this particular case, I believe.

19 Q. Is it, in your opinion, a matter of
20 convenience or a matter of necessity that the golf
21 course only irrigates over an eight-hour period per
22 day?

23 A. I think in this case, in my judgment, the
24 golf course can make an argument that it's a matter
25 of necessity to only irrigate eight hours per day.

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1 But I can say that that is a judgment that the
2 department needs to make in this, so I can't say that
3 we'll look at it that way, but I can at least say
4 that we will consider that in our assessment.
5 Q. My question is, as you sit here today, in
6 your opinion, is an eight-hour watering period
7 necessary --
8 MR. KING: Objection. Pardon me, counsel, I'm
9 sorry. Calls for speculation.
10 A. I think there is an argument to be made
11 for that. I'm not prepared to say that that will be
12 our final decision.
13 Q. BY MR. BROWN: I'm asking for what your
14 opinion is as you sit here today.
15 MR. KING: Calls for speculation.
16 A. My opinion is that we need to consider
17 that. I'm not prepared to say that that's the way
18 we'll recommend it, but we certainly will consider
19 that in our analysis.
20 Q. BY MR. BROWN: So you don't have an
21 opinion as you sit here today?
22 A. I don't have a final opinion on that
23 issue, no.
24 Q. Do you have a preliminary opinion?
25 A. My initial assessment is there is a good

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1 has evolved significantly in the past three or four
2 years.
3 MR. BROWN: Could you read back the question.
4 (Record read.)
5 A. Yes, it is appropriate to make the opinion
6 before it makes its recommendation.
7 Q. BY MR. BROWN: But that didn't occur here?
8 A. It did --
9 MR. KING: Objection.
10 Q. BY MR. BROWN: It did occur?
11 A. Yes. Based on the standards at the time
12 this recommendation was made, it was made consistent
13 with other recommendations across the state.
14 Q. So in other words, you were making
15 recommendations based on standards?
16 A. Yes.
17 Q. As opposed to particularized facts?
18 A. Particularized facts have always been
19 important, and were important in this case.
20 Certainly we were very explicit on acreage. Relative
21 to rate of flow, we didn't see at that time, in any
22 situation that I'm aware of, a justification of more
23 than an inch for irrigation.
24 Q. Isn't it true that at that time, the
25 department had already calculated and that the SCS

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1 argument for that eight-hour period.
2 Q. And is your preliminary opinion that eight
3 hours would be necessary?
4 A. I'm not going to provide an opinion on
5 that today.
6 Q. So you don't have an opinion?
7 A. My opinion is not formed, that's correct.
8 Q. Isn't it up to the department to form its
9 opinions before it makes recommendation?
10 A. In this particular case, with an
11 irrigation use, this water right was recommended --
12 these water rights were recommended as irrigation
13 rights. The aspect of fewer hours of time available,
14 I don't see having appeared in the file as being
15 mentioned by the claimants.
16 Q. You didn't find that in the files?
17 A. That's correct.
18 Q. Okay. Now, could you answer my question.
19 Isn't it for the department to form its opinion
20 before it makes its recommendation?
21 A. At the time these recommendations were
22 made, I would doubt that many golf courses had
23 received excess rates of flow in addition to an inch
24 per acre. This process of providing for excess rates
25 of flow is something that's evolving in the state and

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1 had already calculated that more than an inch per
2 acre was necessary for sprinkler systems in the
3 Hagerman Valley?
4 MR. KING: Calls for speculation, assumes facts
5 not in evidence.
6 A. It was about that time that this issue was
7 being reviewed. Our recommendation was prepared in
8 1991. Some of the data that -- some of the studies
9 that were ongoing in the Hagerman Valley, for
10 example, were being conducted in '91-92 time frame.
11 So it was about the same time that we were making the
12 recommendations that additional studies were taking
13 place.
14 Q. BY MR. BROWN: So you don't know whether
15 the department had already calculated that more than
16 an inch per acre was necessary when it made its
17 recommendation here?
18 A. I would suspect that we had not found that
19 more than an inch was needed at the time this
20 recommendation was made.
21 Q. Okay. Let's talk about the point of
22 diversion again. You understand that there are two
23 points of diversion, one at the springs and one down
24 at the lake?
25 A. Yes.

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1 Q. Now, if water is not diverted at the
2 springs but instead left to run into the lake, and
3 taken out down at the lake diversion, can you tell me
4 whether any other water rights would be injured?

5 A. I think the water rights that might be
6 impacted by these water rights are water rights
7 farther down on the Snake system.

8 Q. Would it matter whether it's taken out at
9 the spring or farther down at the lake?

10 A. I'm not aware of other water right impacts
11 in this area. I'm aware that there are some other
12 uses of water for the fish hatcheries, but as far as
13 water diversions in between, I'm not acquainted with
14 the other ones. I guess I'd have to say I don't know
15 the answer to that question.

16 Q. Let me ask you about the spring right 4148

17 A and B. You understand that was for three cfs?

18 A. Yes.

19 Q. The department recommended no water right
20 under the portion claimed -- well, I should correct
21 myself. It was originally claimed as one right.
22 Subsequent to the initial claim, the right was split
23 between the golf course and the ranch in equal
24 portions. Now, is it your testimony that -- please
25 explain to me your understanding of the basis for the

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1 that element. You said that the department may
2 reconsider consumptive use in these cases. Under
3 what criteria would it reconsider consumptive use?

4 A. In our 706 evaluation that we will prepare
5 for these, if -- when we receive the information
6 requested, we will consider the consumptive use
7 aspect based on our assessment in the Hagerman area.

8 Q. In other words, based upon the 706 I think
9 you prepared --

10 A. Yes.

11 Q. -- for the Hagerman Valley?

12 A. That's correct.

13 Q. Okay. Let's talk about that report for a
14 minute. In that report, the department chose a
15 methodology that -- why did it choose the particular
16 methodology it followed?

17 A. It was recommended by Chuck Brockway.

18 Q. The methodology was recommended?

19 A. That's correct.

20 Q. Isn't it true that Mr. Brockway informed
21 the department that you needed sufficient temperature
22 information in order to employ that methodology?

23 A. That is correct.

24 Q. Isn't it also true that Dr. Brockway
25 informed the department that it may not have

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1 recommendation of no water right to the ranch as it
2 pertains to the 1.5 cfs.

3 A. The 1.5 cfs claim was in excess of the
4 amount of water that we could recommend for the
5 irrigation of those acres. At the time of this
6 recommendation, we considered an inch per acre to be
7 sufficient for this irrigation. And the senior right
8 was -- well, the water right recommendation for one
9 claim was sufficient. So the 1.5 cfs additionally
10 claimed was found not to be required for the inch per
11 acre.

12 Q. Show me in the department's files whether
13 or not it shows that any of the ranch's land was
14 irrigated.

15 A. Well, we show the place of use where water
16 was used. We had a series of maps that depict those
17 places of use.

18 Q. Does that include use on any ground
19 claimed by the ranch?

20 A. Well --

21 Q. Let me ask you -- if you're not familiar
22 with it, I can certainly ask Mr. Clelland later. If
23 you just depended upon what was in the files --

24 A. That would be more efficient.

25 Q. Okay. Consumptive use, let's talk about

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1 sufficient temperature information on the Hagerman
2 Valley to employ that methodology?

3 A. I don't know about that. I wasn't there
4 for the meeting.

5 Q. Do you know who Dr. Brockway communicated
6 with?

7 A. Jeff Peppersack.

8 Q. Do you know when those communications
9 occurred?

10 A. April of '96 was at least one meeting
11 between Dr. Brockway and Jeff Peppersack.

12 Q. Do you have any opinion yourself as to
13 whether you have adequate temperature data?

14 A. The temperature data, from my perspective,
15 were limited and barely adequate.

16 Q. Explain to me what you mean, "limited."

17 A. We had five years of comparison. And
18 those five years were considered by Jeff Peppersack
19 to be sufficient based on his conversations with
20 Dr. Brockway.

21 Q. Did you form any of your own opinions in
22 regards to the consumptive use?

23 A. My sense was that the consumptive use that
24 we computed was, indeed, the maximum consumptive use
25 for that area.

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1 Q. Okay. You concluded that it was the
2 maximum consumptive use. You're familiar with
3 Dr. Brockway's affidavit which states essentially
4 there 3.75 acre feet is the maximum, correct?
5 MR. KING: Assumes facts not in evidence.
6 A. Dr. Brockway stated that, given a yield of
7 ten tons per acre on alfalfa in the Hagerman area,
8 that 3.75 acre feet would be the ET required.
9 Q. BY MR. BROWN: So you are familiar with
10 his affidavit?
11 A. Yes. And he did not say that the ten tons
12 per acre was realistic and did not say that he felt
13 that was a reasonable ET for the area, but just based
14 that consumptive use on a ten-ton-per-acre yield.
15 Q. Okay. Tell me, does the department have
16 any information to suggest that the affiants who said
17 they raised ten tons of alfalfa per year did not, in
18 fact, do so?
19 MR. KING: Assumes facts not in evidence.
20 A. Our evidence is that the ten tons per acre
21 is on the high side of reasonable.
22 Q. BY MR. BROWN: Is ten tons reasonable?
23 A. Yes.
24 Q. Do you have any --
25 A. On the high side of reasonable.

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1 applied, unreasonable?
2 A. No. We find that to be an acceptable
3 alternate methodology in some cases based on alfalfa
4 yields. However, we find that it is -- for
5 application on a statewide basis, it's not as strong
6 as our present methodology.
7 Q. For application in the Hagerman Valley,
8 does the department dispute that the most consumptive
9 crop that can be grown can consume 3.75 acre feet a
10 year?
11 A. No, we don't dispute that.
12 Q. You just didn't recommend it?
13 MR. KING: Assumes facts not in evidence.
14 A. Relative to consumptive use, the amount of
15 water available to the crop consists of what's
16 applied via irrigation, plus what is available
17 through transpiration.
18 Q. BY MR. BROWN: My question is what the
19 crop will consume without regard to what's the source
20 of the water. You don't dispute that a crop in the
21 Hagerman Valley of alfalfa can consume 3.75?
22 A. That's on -- we feel that that's on the
23 high side of reasonable, but it is an acceptable
24 number.
25 Q. Okay. Now, I think what you were alluding

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1 Q. Okay. Do you have any reason to -- does
2 the department contend that people don't raise ten
3 tons per acre?
4 A. No.
5 Q. Okay.
6 A. We feel that ten tons per acre is on the
7 high side of reasonable.
8 Q. And the department believes that it is
9 nevertheless reasonable?
10 A. Yes.
11 Q. Okay. Do you have any problem with
12 Dr. Brockway's application of his consumptive use
13 calculation to the ten tons per acre?
14 A. No.
15 Q. You don't question that methodology?
16 A. That methodology is based on a work done
17 by Dr. Wright that had a high degree of variability.
18 The department accepts Dr. Brockway's work and his
19 judgment in that matter, but we also recognize that
20 there was a great deal of variability in the data
21 collected by Dr. Wright. And we feel that that
22 methodology is not as strong as the FAO methodology
23 that was used -- that is being used throughout the
24 state.
25 Q. Is Dr. Brockway's methodology, the one he

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1 to was the department, in your 706 report, states
2 that the statutory definition of consumptive use is
3 different than the technical definition, in that you
4 need to deduct the average effective precipitation
5 from the total consumptive use --
6 A. Yes.
7 Q. -- is that correct?
8 A. That's correct.
9 Q. Where in the definition does the
10 department find the wording from which it believes it
11 is supposed to deduct average effective
12 precipitation?
13 A. The water right that we issue is not
14 for -- is not to provide a full supply of water. The
15 water right is to provide what water is not provided
16 by transpiration. So routinely, throughout the
17 state, computations have been made of not only crop
18 requirements, but also they've been made of
19 consumptive irrigation requirements. And this dates
20 back to studies done by Suter in 1970, Brockway and
21 Allen in 1983. Those studies all differentiate
22 between evapotranspiration and consumptive irrigation
23 requirement.
24 Q. Where in the statutory language does the
25 department find that differentiation?

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1 MR. KING: Calls for speculation.
 2 A. I'd be happy to discuss that with you. I
 3 don't have that in front of me.
 4 MR. BROWN: Why don't we take a break. I think
 5 everybody is ready for a break, and we can come back
 6 to that.
 7 (Break.)
 8 MR. BROWN: We're back on the record.
 9 Q. BY MR. BROWN: Before we took a break, I
 10 asked you about the effective precipitation deduction
 11 for consumptive use, and particularly I was
 12 interested in where the department finds that that is
 13 called for by statute. And I asked you -- and I
 14 assume during the break you've looked at the statute,
 15 and maybe you can let me know where the department
 16 finds that authority within the statute.
 17 MR. KING: I'm going to object to that.
 18 Mr. Tuthill is not a lawyer. You're asking him to
 19 make a legal conclusion.
 20 MR. BROWN: Go ahead and answer.
 21 A. Well, the way we have viewed consumptive
 22 use is it's the consumptive use of the water right.
 23 And in the context of the statute, the statute
 24 describes consumptive use for an irrigation water
 25 right shall be based on the most consumptive crop

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1 A. It's the average consumptive use of the
 2 crop that uses the maximum amount of water.
 3 Q. Okay. Well, some years it doesn't rain
 4 the average effective precipitation --
 5 A. Correct.
 6 Q. -- correct? And during those years, a
 7 plant nevertheless consumes water, correct?
 8 A. Correct.
 9 Q. And if it doesn't rain, then that
 10 consumption has to come out of the irrigation
 11 diversion, right?
 12 A. That's correct.
 13 Q. Okay. But you deducted that?
 14 A. Yes. Because other years it will rain
 15 twice the average amount. And the consumptive use is
 16 utilized for purposes of conveying a water right from
 17 one use to another. And in those situations, the
 18 average -- it's the average consumptive use that's
 19 important, not the maximum.
 20 Q. Okay. The average consumptive use is --
 21 I assume you're talking for purposes of the
 22 administrative transfer proceeding?
 23 A. Correct.
 24 Q. Okay. In administrative transfer
 25 proceeding, is there some law or regulation which

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1 that can be grown in the area during the period of a
 2 year when the water is used for irrigation. And the
 3 water right identifies diversion of water for the
 4 water right. The consumptive use that we compute is
 5 the average consumptive use for the purpose of
 6 transferring a water right or conveying a water
 7 right. And water that's not diverted, we have not
 8 considered to be a part of the consumptive use.
 9 Q. BY MR. BROWN: Okay. Let me be sure I
 10 understand. The deduction the department has made is
 11 for the average effective precipitation?
 12 A. Correct.
 13 Q. Can you explain to me what "average
 14 effective precipitation" is?
 15 A. That's the precipitation that falls during
 16 the growing season that can be used by the crop as a
 17 contribution toward the consumptive use.
 18 Q. You said falls during the growing season.
 19 Every year?
 20 A. On average. That amount will be higher
 21 and lower during certain years, but the consumptive
 22 use parameter of the water right is the average
 23 consumptive use, not the 80 percentile consumptive
 24 use or the maximum, it's the average consumptive use.
 25 Q. It's not the maximum consumptive use?

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1 states that the average consumptive use rather than
 2 maximum consumptive use is utilized?
 3 MR. KING: Objection, foundation.
 4 A. Idaho has, to my knowledge, always used
 5 the average consumptive use of the maximum crop.
 6 That is common with other states. Other states in
 7 the west utilize the average consumptive use of the
 8 average crop pattern. So we have historically been a
 9 bit more generous than some other western states, but
 10 I'm not aware of any state which allows greater than
 11 an average consumptive use of the maximum consumptive
 12 use crop.
 13 Q. BY MR. BROWN: Okay. My question, though,
 14 is, is there any statute which prescribes that limit?
 15 MR. KING: Once again -- I'm sorry, Dave --
 16 foundation, and not relevant.
 17 A. I'm not aware of a statute.
 18 Q. BY MR. BROWN: Are you aware of any other
 19 legal authority, a rule or other published law?
 20 A. No.
 21 Q. Okay. I don't want to drag this out
 22 today. I'm getting the impression, though, that the
 23 department is prepared to gather information and make
 24 new recommendations concerning these rights; is that
 25 correct?

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1 A. That's correct.
 2 Q. And it is my understanding that you would
 3 be testifying about those new recommendations,
 4 correct?
 5 A. That's correct.
 6 Q. Okay. I certainly want the opportunity to
 7 know what your opinions are and what the basis for
 8 those new recommendations would be -- if that were a
 9 sentence. You know, in other words, you understand
 10 what I'm trying to do here today is find out what the
 11 department would say at a trial.
 12 A. Yes.
 13 Q. Now, I correctly understand that the
 14 department feels it's in a position where it needs to
 15 gather other information in order to make the new
 16 recommendation; is that correct?
 17 MR. KING: Calls for speculation.
 18 A. At least we want to review the information
 19 that we understood was going to be submitted to the
 20 department for the preparation of a 706 report. And
 21 we will prepare such a 706 report. Now, whether that
 22 translates to a new recommendation, I don't know at
 23 this point. It could translate into a new
 24 recommendation.
 25 Q. BY MR. BROWN: Okay. My point is, would

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1 recommendations, specifically for 36-04148A, were
 2 made, and then maybe spend some time on that
 3 particular claim itself.
 4 You're aware of the department's
 5 decision -- or the court's decision, are you not, on
 6 basin wide issue No. 10 with regard to partial
 7 forfeiture?
 8 A. Yes.
 9 Q. To your knowledge, has the department
 10 amended or changed or issued any new recommendations
 11 in response to that, or is the department awaiting a
 12 final determination by the supreme court?
 13 A. We are awaiting a final determination by
 14 the supreme court. We recognize that that decision
 15 does not change our mandate to only recommend on a
 16 water right the extent of beneficial use. So I'm not
 17 sure what, if any, recommended water rights will
 18 change based on that decision, because while partial
 19 forfeiture has been found not to be valid by the
 20 district court, still we've been advised to limit our
 21 recommendations to the extent of beneficial use.
 22 Q. Okay. Resumption of use, that doctrine,
 23 does the department have a policy that it applies in
 24 looking at claims and making recommendations with
 25 regard to resumption of use of a right that perhaps

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1 our time be better spent taking up this deposition
 2 later after the department has gone through another
 3 analysis?
 4 A. I would be happy to do that.
 5 MR. BROWN: Okay. With that, let's conclude
 6 with Mr. Tuthill for today.
 7 MR. KING: Okay.
 8 MR. SEMANKO: And, Mr. Brown, if I could ask
 9 Mr. Tuthill a couple questions?
 10 MR. BROWN: Yes.
 11
 12 EXAMINATION
 13 BY MR. SEMANKO:
 14 Q. Mr. Tuthill, my name is Norm Semanko. I'm
 15 an attorney for what's commonly referred to as the
 16 ranch, but more properly the Clear Lake Corporation
 17 and L and M, Inc., who are partners in the
 18 residential development down at Clear Lake, which I'm
 19 sure you saw yesterday.
 20 A. Yes.
 21 Q. I'm going to ask you some general
 22 questions about department policy and procedure,
 23 which frankly I've been lacking. We've had some
 24 great discussions with the department, but have been
 25 lacking maybe on some of the policy on which

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1 had been discontinued for a period of time over five
 2 years?
 3 A. That policy has been discussed. Today I'm
 4 not prepared to articulate that policy correctly.
 5 Q. Is that a policy that is applied when you
 6 make recommendations? Do you use that -- consider it
 7 if the facts warrant it? Is that policy considered
 8 whether you can articulate that policy today or not?
 9 A. It is considered, but that is normally
 10 applied if there are no intervening water rights and
 11 if the resumption occurred prior to 1971 for surface
 12 water. For those situations where there are
 13 intervening water rights or resumption occurred after
 14 '71, there are inhibitors to applying that policy.
 15 But I can't fully explain those today. I'm not fully
 16 acquainted with the department's position on that.
 17 Q. Now, when you say "intervening water
 18 rights," what do you mean by that?
 19 A. Water uses that would have occurred in the
 20 interim on a certain source between when the use was
 21 discontinued and when it was resumed. If there are
 22 such water rights that could impact the use, then
 23 that can inhibit the application of resumption of
 24 use.
 25 Q. So are you talking about new water

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1 rights? Innocent error, for example, if a water
2 right was discontinued in 1960 and wasn't resumed
3 again until 1975, are you talking about new water
4 rights developed between 1960 and 1975?

5 A. Yes.

6 Q. Okay. The department's policy on
7 appurtenancy, that is when a water right is pertinent
8 to a piece of property and the property is divided,
9 what is the department's policy with regard to the
10 water? Does it stay with the property, or can it go
11 anywhere?

12 A. It stays with the property unless
13 specifically withheld or modified in some way.

14 Q. I'm going to refer counsel to the report
15 submitted, the 706 report. On page 11, about the
16 one, two, three, four, five, six, seven, eighth line
17 down, the sentence begins, "A warranty deed shows
18 that Clear Lake Country Club bought part of the
19 historical place of use for Clear Springs in 1988.
20 Of the land that the ranch retained, only a fraction
21 of ranch property included the historical place of
22 use for Clear Springs irrigation water."

23 Does that statement to you indicate that
24 some portion of the property that historically the
25 spring water was used on continued to be owned by the

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1 identified by the department as being historical use.

2 A. Yes.

3 Q. This number of acres.

4 A. Yes.

5 Q. From reading that statement in this expert
6 type report --

7 A. Yes.

8 Q. -- is any portion of that historical place
9 of use owned by the ranch on your reading of this --

10 A. Yes.

11 Q. -- or did it all go to the country club?

12 A. Well, just on the face of it, I would read
13 it as you do. But --

14 Q. I'm just --

15 A. -- I don't know what the quantification of
16 that is.

17 Q. I understand that. And I'm just trying to
18 get an understanding of the department's view on who
19 owns the historical place of use.

20 The next paragraph down refers to the
21 facts above, and states, "It was concluded that any
22 of the 23 acres historically watered on the east end
23 of the property" -- and those are the acres that were
24 irrigated by the springs -- "from the Clear Springs
25 source was transferred to the fairways constructed in

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1 ranch after 1988?

2 A. On that, I would prefer you refer that
3 question to Steve Clelland.

4 Q. Let's take a minute and read those couple
5 of sentences. And in your opinion, does that mean,
6 in just reading this report, that some portion of the
7 property, only a fraction, was retained by the
8 ranch?

9 A. Well, but it goes on to say, "that
10 retained portion showed no irrigation or diversion
11 works in the ASCS maps and photos for '87 and '88."

12 Q. I understand that. But I'm asking you as
13 to the ownership of that property, it says, "for only
14 a fraction," but nevertheless, a fraction was
15 included in the historical place of use. I'm not
16 asking you right now about diversion or irrigation,
17 but the actual ownership of that property that was in
18 the historical use identified in the examination
19 process.

20 A. I'm sorry, can you repeat the question
21 then.

22 Q. I'll rephrase it. I'm asking only about
23 ownership.

24 A. Yes.

25 Q. There's a portion of property that's been

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1 1987 and sold to the Clear Lake Country Club in
2 1988."

3 Getting back to this question of
4 appurtenancy, unless there's something in the deed
5 that shows that the portion of the water that was on
6 the ranch property was to be transferred to the
7 fairways, what is the department's basis for that
8 conclusion, it was concluded, because I don't see any
9 other facts that would support that?

10 A. Yeah. Well, my assessment of this was
11 that we were trying to give the benefit of the doubt
12 to try to retain that water right somewhere. If our
13 examination shows that the water right is not being
14 used anymore -- in this case, for example, let's say
15 we found an acre that historically was irrigated, but
16 when we conducted our examination was not irrigated.
17 Rather than to say that the land is no longer
18 irrigated, we were in this process attempting to
19 retain the validity of that water right by putting it
20 on some land that was irrigated.

21 Now, where there was at one time a joint
22 ownership, it's not uncommon that we would do that to
23 try to retain the water right. If the water right
24 should have better been described at some location on
25 the ranch, then we would certainly be willing to

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1 listen to that. If that -- if a factual situation is
2 built thereby.

3 But in this case, it's very common for a
4 water right location to migrate through the years
5 from one location to another, just as the fields
6 change. And the way I interpreted this analysis was
7 that we were attempting as much as possible to
8 migrate the water right with those places of use that
9 we found actually to be irrigated. So we found the
10 full acreage that we had determined would have
11 qualified for senior water rights and applied that on
12 nearby ground. If there is an interpretation where
13 that portion of the water right should have remained
14 with the ranch, that certainly is something that
15 could be brought to us.

16 Q. Now, are you saying that the benefit of
17 the doubt was to move the water in the recommendation
18 over to the fairways because that portion of the
19 ranch that was shown to be historically irrigated was
20 no longer irrigated after 1988? Is that why? Or was
21 there still irrigation on that portion of the ranch
22 at that time?

23 A. Well, in this particular case, we didn't
24 find irrigation continuing where we had found the
25 original irrigation to be.

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1 A. I have reviewed it, yes.

2 Q. It's dated at the top, and I don't
3 understand these things as well as you, obviously,
4 but it's dated at the top 9/6/90, and then it says
5 claim number A36-04148A. I'm curious because there
6 are, throughout that report, comments or reports,
7 notations by, it appears, more than one claim
8 examiner. And frankly, to me, they appear to be
9 inconsistent.

10 What is the department's policy with
11 regard to making a recommendation at the final stage,
12 which I assume is not a claim examiner stage, when it
13 appears that there are some discrepancies between the
14 claim examiners' review, the claim examiners, plural,
15 review of the claim?

16 A. Well, we did have three examiners
17 working on this. Bob Worstell, Lori White and
18 Steve Clelland. And the examination process is a
19 dynamic process in many cases, particularly with a
20 scenario as complex as this one is. So what might
21 appear to be the factual situation as we initially
22 investigate it, sometimes will evolve to be a
23 different factual situation when we finally make our
24 recommendation.

25 And that's how I view the information in

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1 Q. Continuing after what date?

2 A. When the exam was made. Just to look back
3 at this, the retained portion showed no irrigation
4 nor diversion works in the ASC maps and photos for
5 1987 and '88. Additionally, the retained ranch
6 property showed no irrigation nor diversion works
7 during the field exam, time line from 1990 to '91.
8 So at least during that period, there was no
9 irrigation on those lines.

10 Q. So as to 1977, the previous aerial
11 photography, you wouldn't make the same conclusion?
12 Only beginning in 1987 you would make that
13 conclusion?

14 A. I'm not sufficiently familiar with the
15 1977 photo to answer that. I'd have to look at the
16 maps and look at that in more detail. I think Steve
17 could probably answer that for you.

18 Q. Is the historical place of use for Clear
19 Springs based on, in part, the 1977 aerial
20 photography, the recommendation of the historical
21 place of use?

22 A. These ortho photo quads appear to be dated
23 1977. And I would presume so.

24 Q. Thank you. You're familiar with the claim
25 verification report in 36-4148A?

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1 these files, is initial impressions are noted, and
2 they're retained, as they should be, to show the
3 track record of the evolution in the thought process
4 and determinations on these rights.

5 The final recommendation is made by the
6 examiner who finalizes the research record, and in
7 that case, it was Steve -- in this case it was
8 Steve Clelland. So he used the information that was
9 developed in his assessment and determined the
10 recommendation for this right -- for these rights.

11 Q. To the best of your knowledge, is it true
12 that the field examinations on this matter for 4148A
13 were conducted on August 2 of 1990, August 30 of
14 1990, and then a follow-up in September of 1991?

15 A. Well, there was at least one other. One
16 of the measurements were made -- August 22, 1990,
17 polysonic measurements were made. And the other one
18 is October 11, 1990. I think you mentioned that
19 date.

20 Q. I did not. And those two dates were, I'm
21 sorry, measurements --

22 A. Were made of the pipe flows from the
23 various pipes.

24 Q. Were those two exams made with regard to
25 4148A or were they jointly with some other claims?

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1 A. In 4047. Pardon me, correction. 4074.
 2 Q. On the claim verification form, I'm trying
 3 to understand who made the first cut through this
 4 thing. Maybe you can help me if you've got the claim
 5 verification.
 6 A. Okay.
 7 Q. Page 10, there's a lot of handwritten
 8 numbers and things throughout this report that seem
 9 to be -- to go with a signature that I can't identify
 10 and a date of 9/6/90. And page 10 is maybe the best
 11 example.
 12 A. Okay.
 13 Q. It says, "Reviewed by" -- I'm curious as
 14 to whether you know who that is?
 15 A. The one that's by "reviewed by," that's
 16 Lori White, 9/6/1990. And then below that is
 17 Steve Clelland, 11/27/91.
 18 Q. Could you explain to me the process on
 19 this page. Is this Steve Clelland overruling what
 20 Lori White did, or --
 21 A. Yes.
 22 Q. -- is this something that the department
 23 did at a higher level?
 24 A. It's hard to tell on the copy, but on the
 25 original, there are two different colors of pen, so

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1 information over the months of investigation.
 2 Q. In your particular view of this
 3 verification, was the decision made solely by
 4 Steve Clelland, or is that type of decision made at a
 5 higher level to take out a previous recommendation or
 6 verification?
 7 A. As various agents work on these, what this
 8 comes to is a recommendation made by the final
 9 reviewer as this water right is prepared for
 10 recommendation to the court.
 11 Now, if there's a question on a specific
 12 review, the adjudication supervisor would be
 13 involved. And in this case, I would expect that
 14 Allen Merritt would have been involved in the
 15 process, and he has been involved, somewhat, through
 16 the property. For example, he was involved in the
 17 claim state. I can tell by his handwriting that he
 18 has been involved in this, so -- you would have to
 19 ask Steve and Allen if they were specifically
 20 involved.
 21 Q. I know you haven't been in your present
 22 position very long, but you're fitting into it very
 23 well, delegating these things now. Well, that gives
 24 me a better understand of the claim examination
 25 process.

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1 one can trace -- it's a little easier to trace the
 2 timing. One can see through the colors of the pen
 3 that Lori White made her recommendation on September
 4 6, 1990, and Steve Clelland came back in '91 and
 5 recommended that this right be disallowed. That was
 6 based on his further investigation of this claim as
 7 it relates to the neighboring claims and of the
 8 system.
 9 Q. Was Lori White's recommendation made after
 10 any of the field examinations had been conducted?
 11 MR. KING: Calls for speculation.
 12 A. Well, yes, at least after one of them had
 13 been conducted, but not another one. Because that
 14 9/6/1990, we relate, for example, to the dates of
 15 pipe flow measurement, one measurement was made
 16 before and one measurement was made after that.
 17 Q. BY MR. SEMANKO: It certainly would have
 18 been made, though, after the August 2 and August 30
 19 of 1990 field exams, correct?
 20 A. Yes. So as I would view this, as a
 21 reviewer of the file, I would see that this was the
 22 recommendation of the initial agent review as further
 23 modified by additional review as we put together the
 24 rights of this area. And this is not uncommon.
 25 Particularly the scenario where we receive additional

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1 Historical use, the department's policy on
 2 historical use, Mr. Brown touched on a little bit,
 3 but I'd like to talk about it a little bit, too.
 4 When you determine historical use on this particular
 5 claim, 36-04148A, do you go all the way back to, I
 6 guess, the recommended priority date for the other
 7 part of the water right, 4148B, was 1927, do you go
 8 all the way back to 1927 and look forward, or do you
 9 just go back as far as you need to to find whether
 10 there's a five-year period of nonuse and forfeiture?
 11 Where do you begin? Where does historical use begin
 12 and where does it end?
 13 A. It's a function of the data we have
 14 available and the information of all types, between
 15 aerial photographs, affidavits, old maps. There
 16 isn't a standard answer. Each case is analyzed
 17 separately. In this case, it's a matter -- it's a
 18 function of the data that's been assembled, so it's
 19 our judgment based on these data.
 20 Q. In the 706 report, there's some mention of
 21 documents, information available from Gooding County
 22 in 1964. And there's kind of a conclusion in the
 23 time line that that information, when compared with
 24 other information in the future, aerial photography
 25 and that type of thing, allow a comparison of -- a

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1 conclusion as to what the actual historical use is;
 2 is that correct?
 3 **A. It helps, yes.**
 4 **Q. Am I correct in understanding that there**
 5 **really was no conclusion as to what the beneficial**
 6 **use was of 4148A or any of the other rights prior to**
 7 **1964, no conclusion? I'm not saying no evaluation,**
 8 **but no conclusion as to what the beneficial use was?**
 9 **A. Reaching back further than that is**
 10 **difficult because of lack of photographs.**
 11 **Q. What proof do you have of pre-1964 that**
 12 **exists in the file?**
 13 **A. We have the affidavits, we have the**
 14 **federal -- or the Idaho Power contract. That's the**
 15 **1927 contract. There is a period where we don't have**
 16 **much information.**
 17 **Q. So as to historical use before 1964, the**
 18 **only competent evidence you have are sworn affidavits**
 19 **and the Idaho Power indenture?**
 20 **MR. KING: Vague, question is vague.**
 21 **A. Those are the only elements I recall prior**
 22 **to 1964.**
 23 **Q. BY MR. SEMANKO: Is the patent that was --**
 24 **the patents that were issued on the property part of**
 25 **the evidence that you looked -- the department looked**

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1 generally to uphold those same recommendations as to
 2 expansions and accomplished transfers?
 3 **A. Yes. Now, because we haven't received the**
 4 **word, I suspect that we won't be making additional**
 5 **recommendations. But those for rights where we have**
 6 **already made recommendations, we're not in the**
 7 **process of changing those right now.**
 8 **Q. So where a claim has been recommended**
 9 **without an expansion or accomplished transfer, that's**
 10 **probably not going to change after this ruling?**
 11 **A. Correct.**
 12 **MR. BROWN: Norm, if I might interject here,**
 13 **just because it seems like an appropriate time, one**
 14 **of the questions I wanted to follow up on was how the**
 15 **department would reevaluate this claim in light of**
 16 **the pending status of the amnesty statutes. And the**
 17 **reason I'm asking is, you know, if the department is**
 18 **awaiting a decision, and I certainly think that this**
 19 **is the type of a case where those statutes would**
 20 **apply, I'm a little concerned that we're going**
 21 **forward now without knowing what rules we're going**
 22 **forward under.**
 23 **Can you explain how the department deals**
 24 **with that kind of situation, and particularly, you**
 25 **know, assuming that the facts are that the golf**

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1 at in determining beneficial use?
 2 **A. I don't recall any information that came**
 3 **from the patents that spoke to that.**
 4 **Q. That's fine.**
 5 **A. Oftentimes the patents are silent on**
 6 **water. I don't remember any other information having**
 7 **been gleaned from them.**
 8 **Q. Do you understand what the United States**
 9 **criteria for granting a patent is? Does there have**
 10 **to be some irrigation to get a patent granted?**
 11 **A. I don't know.**
 12 **Q. Same kind of questions as with basin wide**
 13 **No. 10 on expansions and accomplished transfers, the**
 14 **new amnesty statutes, I'm assuming that the**
 15 **department's awaiting a decision from the supreme**
 16 **court on that?**
 17 **A. That's correct.**
 18 **Q. In the meantime, unlike basin wide issue**
 19 **No. 10, I guess, isn't the department relying on**
 20 **previous recommendations on the predecessor statutes,**
 21 **the presumption statutes that basically attempt to**
 22 **accomplish the same thing? In other words, where an**
 23 **expansion or an accomplished transfer has been**
 24 **recommended by the department under the previous**
 25 **statutes, you're relying now on the new statutes**

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1 course was expanded and there was quite a bit of an
 2 expansion before 1988, to which these statutes would
 3 apply. I'm just trying to get a sense of how we
 4 should proceed and the timing under which we should
 5 be proceeding.
 6 **THE WITNESS: From my perspective, some new**
 7 **things are being added to the assessment of these**
 8 **claims. One is the suggestion that a greater rate of**
 9 **flow should be provided for golf course irrigation,**
 10 **as we talked about. And that does need to be**
 11 **considered.**
 12 **Another is the relationship between the**
 13 **rate of flow required for a golf course and a**
 14 **predecessor irrigation. And that's something that**
 15 **I'm not aware of having a precedent with our agency.**
 16 **That is new to me. And how those relate to the**
 17 **expansion might be, in some way, touched upon by the**
 18 **supreme court in the amnesty decision.**
 19 **So what you're saying is something I would**
 20 **agree with, that perhaps further recommendation on**
 21 **these rights should take the amnesty language into**
 22 **account. I understand that's the question, should we**
 23 **consider that language in making our recommendation,**
 24 **and I think that is a good consideration.**
 25 **MR. BROWN: Do you think it would be**

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1 possible -- I mean, can the department -- obviously
2 no one knows what the final determination by the
3 supreme court will be, but do you think we can
4 proceed with these and sort of do alternative
5 recommendations, one applying the amnesty statute and
6 one not applying it, or -- I'm just trying to get a
7 sense of whether we should be pushing these cases
8 forward until we get a decision.

9 THE WITNESS: We can evaluate rates of flow
10 required for a sprinkler system, and more
11 specifically sprinklers for golf courses, for the
12 apportionments under golf course. But before we go
13 beyond that, perhaps the amnesty information would be
14 very useful so we don't have to do it twice. I think
15 we'd be reluctant to provide option A and option B,
16 because likely what we'll receive is option C, as far
17 as guidance in the decision. We can move forward in
18 the preparation of information based on the 706 that
19 we would prepare.

20 MR. SEMANKO: I have a few more questions.
21 This is the time and the place, I guess.

22 Q. BY MR. SEMANKO: Where you've got an
23 existing diversion out of the spring, and it's
24 conveyed to a place of use through a series of
25 ditches, if a person comes in and replaces the

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1 that you could irrigate physically more acres with
2 that water through the pipe than you would have been
3 able to through the ditches, if you're diverting the
4 same -- at the same rate and the same amount of
5 water?

6 A. Well, I don't want to say anything that
7 would be construed to make that acceptable, because
8 as I look at the water rights, we do have all three
9 of those parameters. So I wouldn't want to speculate
10 on what would happen if we took away one of the very
11 important parameters of the water right.

12 Q. And again, I'm not asking what's
13 acceptable, I'm asking what's physically realistic.
14 If a person took the same amount of water that was
15 going in a ditch and put it into a pipe, would he
16 physically be able to irrigate more acres with that
17 water?

18 A. Not with respect to water rights at all,
19 but physically, yes, a person could irrigate more
20 acres, you bet.

21 Q. Where a person irrigates a farm and
22 changes that irrigation, same place use, same point
23 of diverse, to a golf course or a lawn or some common
24 area of irrigated in a residential subdivision, does
25 that require a change in use under the department's

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1 ditches with a pipe system to take it to the same
2 place of use but with the existing point of
3 diversion, is that a change in use that would require
4 a transfer under the department's policies?

5 A. No, it isn't. It would likely reduce the
6 amount of water required for beneficial use, and we
7 would reflect that reduction in our recommendation.
8 But it would not be considered to be a change in
9 nature of use. Its measured use would be related to
10 the irrigation in this case as compared with the
11 delivery system.

12 Q. Under such a scenario, if you retained the
13 same diversion rate, would it be elemental that you
14 would be able to irrigate more acres with that same
15 amount of water if you switched from the ditch to the
16 pipe?

17 A. No, because the consumptive use will
18 remain the same. So if the water right is limited by
19 rate of flow, volume diverted and consumption use,
20 then no additional acres could be irrigated because
21 of that third limitation.

22 Q. Let's say consumptive use is not a factor,
23 and we're just talking physically, not legally. If
24 you took the same amount of water that went into the
25 ditch and put it into the pipe, would it make sense

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1 policies?

2 A. It hasn't historically, because we
3 consider all three to be irrigation, whether golf
4 course, lawn or alfalfa. But I think with the change
5 to golf course, we need to consider some kind of a
6 change in the water right and the nature of the water
7 right. How that's reflected, I don't know at this
8 point. But this process is causing me personally to
9 consider looking at some special nature of the golf
10 course water right because of the timing
11 restrictions. Now, with a person's lawn and alfalfa,
12 I don't see those same restrictions.

13 Q. How about common areas in a residential
14 subdivision that are just grass and trees?

15 A. Well, we have received applications for
16 what we term excessive flow, and that's more than one
17 inch per acre, and we have approved those
18 historically for such common areas.

19 Q. As irrigation?

20 A. As irrigation with excessive rates of
21 flow.

22 Q. Department's policy on beneficial use in
23 residential subdivisions, I'll represent to you that
24 in my experience, the department's policy has been
25 that if a subdivision's water system is, quote,

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1 unquote, stubbed in at the end of a permit
 2 development period, that that will be considered
 3 beneficial use for purposes of licensing. Is that
 4 the department's policy generally?
 5 A. I'm not aware of a written policy on that
 6 issue. However, our common practice has been to
 7 allow the last units in the subdivision to be
 8 included in the licensing process. For example, if
 9 25 out of 30 residences are operational and are using
 10 water and there are five that are not, and the water
 11 right permit shows 30 residences and we're in the
 12 process of licensing, and the last five are stubbed
 13 in, we have, as a rule of thumb, licensed for 30
 14 rather than to exclude those that have not been
 15 developed. That is not, however, a written policy.
 16 And in terms of implementation in the adjudication,
 17 that's one thing that we need to consider, from my
 18 perspective, developing a written policy for. Right
 19 now we don't have one, that I'm aware of.
 20 Q. You are saying, though, that licenses have
 21 been based on that -- granted based on that policy?
 22 A. Some have been, yes.
 23 Q. What is the rationale for that policy, as
 24 you would state it?
 25 A. It has been a rationale in part of

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1 where those lots would be stubbed in but would be
 2 made green over time? Would that be a continued
 3 beneficial use provided there was no forfeiture
 4 period or anything like that in the interim?
 5 A. I believe I understand what you're
 6 saying. And I can see where that's a consideration
 7 in the process, but I'm not aware of the application
 8 of that type of thought process in this procedure.
 9 This is something that I need to learn more about
 10 from the department's perspective, and I believe does
 11 warrant a written policy of some type. But I can't
 12 respond that that has been the approach in the past.
 13 Q. Given the department's existing policy,
 14 whether it's written or not, and the way it's been
 15 put in practice through the licensing process, is it
 16 your opinion that changing from farmland to the next
 17 day stubbed-in lots would be a continued beneficial
 18 use for irrigation?
 19 MR. KING: Asked and answered.
 20 A. I can't give you an opinion on that
 21 today. I hear the question, I understand it. I'm
 22 going to have to do some more research before I can
 23 give you an opinion.
 24 Q. BY MR. SEMANKO: That's fair enough.
 25 Are you familiar at all with the

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1 practicality and convenience, because the effort to
 2 go through the water right process is significant,
 3 and we've considered it to be inappropriate to
 4 require a new licensing process for those last few
 5 homes in a subdivision, for example. However, I'm
 6 not sure that that rule of thumb is correct. And we,
 7 as an agency, need to think through that process.
 8 Q. Is part of the rationale for the policy to
 9 avoid the waste of water in a subdivision? For
 10 example, if the developer knew that if he only
 11 stubbed in and made green 25 lots and left the other
 12 five stubbed in but not green, he would only be
 13 licensed for the five less, would he be prompted to
 14 waste water and make it green before anybody even
 15 bought the lot and moved in? Is it based in part on
 16 avoiding waste of water?
 17 A. That might be an approach.
 18 Q. You're not aware that the department has
 19 had that reasoning for following the policy?
 20 A. It could be that that reasoning has been
 21 there. I have not personally been aware of that.
 22 Q. Established that the department has a
 23 policy on this, is there any reason why it would be
 24 any different if someone was changing from irrigation
 25 on a farm to irrigation of lawns or common areas

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1 residential development out at Clear Lake, 36-4148A?
 2 Let me frame it differently. Did you observe any
 3 residential development yesterday?
 4 A. Yes.
 5 Q. Could you tell me basically what you saw.
 6 A. We saw some homes that have been built and
 7 some lots that have been -- that are still
 8 undeveloped.
 9 Q. Did you observe any irrigation that you
 10 would say is not golf course irrigation but rather
 11 related to the development --
 12 A. Yes.
 13 Q. -- the homeowner development?
 14 A. Yes.
 15 Q. Could you guess how many acres that was
 16 or --
 17 A. No. It was significant in terms of more
 18 than one acre, but I don't know the quantity.
 19 Q. In the 706 report, there was some
 20 reference made to a permit, permit 36-08329, which is
 21 a permit for commercial, domestic and fire protection
 22 in this particular residential subdivision.
 23 MR. SEMANKO: I don't know, counsel, if this is
 24 in the record or not, the approved application for
 25 that permit. It's referred to in the 706 report, but

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1 I'm not sure -- if it's not, maybe we want to mark
2 this as --

3 **A. We have a copy of that. I've reviewed**
4 **that permit.**

5 Q. BY MR. SEMANKO: Do you have that handy?

6 **A. Yes.**

7 Q. Looking at item 4, it talks about water
8 will be used for the following purposes. It says .7
9 for domestic, .2 for commercial, 1.5 for fire
10 protection, for a total of 1.5 cfs. Then on item 9,
11 the X's marking the place of use indicate at the
12 bottom that domestic and commercial and fire
13 protection are the purposes for which those acres are
14 going to be utilized. Then under No. 10, it says,
15 describe any other water rights used for the same
16 purposes as described above, and states none, but
17 other rights cover irrigation use, in parentheses,
18 36-4148 and 36-4149. Also under 6-A, proposed
19 diverting waters, it states that a 15 by 30 collector
20 pipe to diversion box which will deliver via a
21 12-inch pipeline to a 15,000-gallon storage tank,
22 then drawn via pipeline network to various places.

23 When you look at all of that, what is your
24 understanding -- this was filed in 1987, approved in
25 1988 -- of the relationship between this permit and

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1 come from the same -- through the same pipeline and
2 into the same network --

3 **A. No --**

4 Q. -- two separate water rights?

5 **A. And it does occur when the source is**
6 **potable. For example, with groundwater.**

7 Q. What is the reason for No. 10? Why does
8 the department want to identify other existing water
9 rights used for the same or other purposes on the
10 same place of use? Why is that question asked on the
11 application for permit, in your view?

12 **A. It demonstrates the connection between**
13 **this proposed appropriation and any existing water**
14 **rights.**

15 Q. In view of this particular permit, if the
16 developer were to build -- was going to build this
17 pipeline to deliver the domestic, commercial and fire
18 protection water to the place of use, and wanted to
19 take the irrigation right that previously it existed
20 through ditches and convey it through the same pipe,
21 does it make sense that that irrigation wouldn't show
22 up until the pipeline from the domestic and
23 commercial and fire protection uses showed up?

24 MR. KING: Calls for speculation.

25 Q. BY MR. SEMANKO: If it was all one system,

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1 36-4148A? Just generally, what is the relationship
2 between those two?

3 **A. It appears that the intent, from my**
4 **perspective, is for 36-4148 and 49 to provide for the**
5 **irrigation use for this application to provide for**
6 **the in-home domestic and commercial uses.**

7 Q. In your experience -- and I know you've
8 had some experience in the Boise area, is it unusual
9 to have an irrigation water right separate and
10 distinct from the domestic portion of the
11 development, the domestic water right in a
12 residential subdivision? Is that unusual?

13 **A. No.**

14 Q. Is it common?

15 **A. Yes.**

16 Q. Where is it common? What type of area?

17 **A. In ag land that's being developed for**
18 **residential purposes.**

19 Q. Is it unusual to have both water rights
20 conveyed through a single system or through a single
21 pipeline?

22 **A. That is unusual, because in most cases**
23 **where this occurs, the irrigation water is from a**
24 **nonpotable source.**

25 Q. Would it be unbelievable that it could all

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1 does it make sense that irrigation water wouldn't get
2 there until the domestic and commercial water got
3 there?

4 **A. Yes.**

5 Q. Is it true that a person applying for a
6 permit is not allowed to develop that permit until
7 the permit is approved?

8 **A. Yes.**

9 Q. So in this particular case --

10 **A. Well, let me correct that. A person**
11 **applying for a permit is not allowed to divert water**
12 **until the permit is approved. The system can be**
13 **installed prior to that.**

14 Q. So in this case, the developers would not
15 have been able to divert water for domestic,
16 commercial and fire protection purposes through the
17 pipeline that they planned to build until the permit
18 was approved; is that true?

19 **A. That's correct.**

20 Q. This permit was applied for, I believe, in
21 1987?

22 **A. Yes.**

23 Q. Do you know what date? June 2, 1987,
24 received by the department.

25 **A. Yes.**

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1 Q. And was approved by former director
2 Higginson on the 3rd of August of 1988?
3 A. Yes.
4 Q. So there's no way the developer could have
5 began commencement of the pipeline for the purposes
6 of the permit until August 3, 1988; is that true?
7 A. **Water could not have been diverted for**
8 **this purpose through this water right until that day.**
9 Q. Through the pipeline. In your opinion,
10 does this permit encompass irrigation use? Keeping
11 in mind that this permit was issued during the
12 moratorium period.
13 A. I've read the file on this matter, and
14 I know that a letter was sent by Glenn Saxton on
15 this matter. I believe I have a copy of it. My
16 copies don't include a copy of the letter from
17 Glenn Saxton. I do have a letter from Gary Slette
18 asking if this water right can include irrigation.
19 And in the response, my recollection is that
20 Glenn Saxton stated that, yes, there are occasions
21 when a domestic water right can include irrigation
22 of a half acre per household.
23 Q. Can you tell me what the date of that
24 letter was.
25 A. I don't have that with me. That's not

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1 Q. Is it your understanding that the
2 nine-hole course overlaps completely onto the 18-hole
3 course, or there's some areas that don't overlap with
4 the 18-hole course?
5 A. I'm not acquainted enough with the place
6 of use to answer that.
7 Q. Fair enough.
8 You stated in response to a question by
9 Mr. Brown that there's approximately 90 acres
10 irrigated out at the old ranch, including the golf
11 course. Is that just the golf course, or did you
12 observe more than 90 acres of irrigation between the
13 three rights out there? The three -- the place of
14 use covered by the three rights out there?
15 A. It appears that with the development
16 that's taking place, that additional acres are being
17 added as time goes on, so it would be 90-plus at this
18 point, but I don't have a better figure.
19 Q. Is it possible that some of those acres
20 that you're saying are being added were previously
21 stubbed in but not green yet?
22 A. It is possible.
23 Q. To the naked eye, though, it would look as
24 if there was no irrigation if it was stubbed in but
25 not green?

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1 included in my copies. It is in our file.
2 Q. Is it your recollection that that letter
3 was sent to Mr. Slette of our law firm sometime after
4 it became apparent that 36-4148A was going to be
5 disallowed as a recommendation of the department?
6 A. I had not connected that time frame.
7 Q. You said earlier -- and correct me if I'm
8 wrong -- but that the general intent reflected in
9 this permit -- I'm looking at the application, I'm
10 looking at all the elements -- was that 4148 and 4149
11 would serve as the irrigation component. Is that
12 true?
13 A. In looking at the face of this application
14 as it was proposed, that's what the application
15 appears to me to say.
16 Q. That's what the intent looks to be in
17 1987?
18 A. When the application was proposed, that's
19 correct.
20 Q. I'll stay off that track.
21 Just real quickly, do you understand that
22 the old nine-hole golf course that used to be out at
23 Clear Lake pre-1987 was configured as a nine-hole
24 golf course?
25 A. Yes.

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1 A. That would be possible.
2 Q. You folks have a map of the general area
3 out there. I wonder if you're familiar enough with
4 looking at the area yesterday -- generally this is
5 phase one of the development lots 1 through 24.
6 A. Yes.
7 Q. This is phase two out through here. And
8 generally speaking, phase one, of course, was done
9 before, and there's more homes on phase one than
10 there are on phase two. Do you have any recollection
11 of where the irrigated acres were out there in
12 general within the home site itself?
13 A. My only recollection is that this phase
14 one area was more developed, and over on the east
15 side of the property was less developed. Beyond
16 that, I really can't add to that.
17 Q. When you say "more developed," do you mean
18 it was -- there were lawns and homes or --
19 A. Yes.
20 Q. And in phase two, there were not any lawns
21 or fewer lawns or --
22 A. There seemed to be more areas nonirrigated
23 on the eastern side. That's about as much as I can
24 say.
25 MR. SEMANKO: That's all the questions I have.

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1 Thank you.
 2 MR. BROWN: If I could just follow up on some
 3 of the things Norm brought up. Hopefully I can do it
 4 quickly.
 5
 6 FURTHER EXAMINATION
 7 BY MR. BROWN:
 8 Q. He first asked you about the concepts of
 9 resumption and intervening rights. You said that
 10 those -- you said that when a resumption occurs, the
 11 department, you know, has to look at the intervening
 12 rights first, and second has to look at whether it's
 13 post-1971. Can you explain to me that latter
 14 concept? What is significant about 1971 in a
 15 resumption situation?
 16 A. Well, of course, prior to 1971, no
 17 application was required by a water user, so the one
 18 case I'm acquainted with that allowed the resumption
 19 of the right was for a case prior to 1971, so the
 20 mandatory permit statute was not an issue. So in
 21 that case, the resumption took place and wasn't a
 22 problem.
 23 When the mandatory permit statute came
 24 about in '71, that raised additional questions about
 25 resumption that I'm not personally acquainted with a
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1 directly related to the transfer statute, since there
 2 really doesn't constitute a change.
 3 Q. Okay.
 4 A. Under the definition of 42-222.
 5 Q. Let me ask you. Norm was discussing
 6 ownership of a right and how that related to the
 7 appurtenance of a right to a piece of ground. My
 8 question is this. Does it matter to the department
 9 who owned the right if it is already appurtenant to a
 10 piece of ground? When the right becomes appurtenant
 11 to a piece of ground -- and I'm talking specifically
 12 about 41 and 48, the parties agreed to split the
 13 right in half, but I think the facts are going to
 14 show that the use didn't correspond with the paper
 15 split. And I think what the facts are going to show
 16 is that there was an agreement that the golf course
 17 would use as much of the ranch's right as it needed
 18 while the ranch was getting its system put in.
 19 My question is, does it matter to the
 20 department in making its recommendations who owned
 21 the right, as long as it was being used on
 22 appurtenant land?
 23 MR. KING: Calls for speculation, assumes facts
 24 not in evidence, foundation.
 25 A. The response to your question, I think
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1 resolution of at this point. I know that's a
 2 question mark. I'm not sure that we have resolved
 3 that. It could be that we have and I'm not aware of
 4 it. But that is a consideration for resumption from
 5 my perspective.
 6 Q. Okay. With the understanding that you're
 7 not familiar with the particulars, whether the
 8 department has a final policy on that, do I correctly
 9 understand that the general concept is that if you've
 10 not used a water right, you must apply for a permit
 11 to resume the use as if you were getting a new water
 12 right? Is that --
 13 A. Well, the resumption aspect without a
 14 mandatory permit scenario was confirmed to be
 15 acceptable if there were no intervening users in the
 16 case that I'm acquainted with. To resume the right
 17 was not a problem. But that case was silent on the
 18 mandatory permit requirements, so I would just have
 19 to say I'm not sufficiently acquainted with
 20 resumption to say what the department policy is on
 21 that point.
 22 Q. Do you know whether it pertains to the
 23 mandatory permit statute or the transfer statute or
 24 both?
 25 A. I have never considered resumption to be
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1 relates to my response to the question about what if
 2 we find the place of use has migrated somewhat, where
 3 do we recommend the right. We generally try to find
 4 the place of use of the water right even if it's
 5 migrated somewhat. Now, if it's migrated across
 6 property ownership boundaries, that becomes a
 7 difficulty that should be negotiated with the
 8 parties. If that is the case here, then that's
 9 something that needs to be reviewed. It's possible
 10 through the -- that through the years, the place of
 11 use of a right has migrated slowly, and we
 12 accommodate for that in our recommendation process.
 13 Does that answer your question, though?
 14 Q. BY MR. BROWN: Let me see if I can
 15 follow-up. Does it matter who owns it as long as --
 16 who owns the right, as long as it's being -- the land
 17 it's being used on is with permission?
 18 MR. KING: Vague and ambiguous.
 19 MR. SEMANKO: Maybe I can ask a question. In
 20 determining actual beneficial use, does it matter who
 21 owns the property? Just in -- I know ownership is an
 22 element of the right, obviously it matters. But in
 23 determining whether beneficial use has existed and
 24 continued to exist, does it matter who owned the
 25 right, or just the fact that it's been irrigated?
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1 THE WITNESS: I think we have some flexibility
2 in that, if there's an agreement between the
3 parties. But I think we have some limitations in
4 that if all of a sudden a neighbor is using the
5 right, I think it would be difficult to track that
6 migration of the right. So ownership change makes
7 more difficult the assessment, but agreements between
8 the parties could have some impact, from my
9 perspective.

10 MR. SEMANKO: How about a long history of
11 circumstances? And I'm just thinking here that the
12 golf course was established -- I don't know --
13 without being tied to the facts, somewhere around the
14 1940s or whatever. And it was -- that property was
15 rented, as I understand it, from the original owner,
16 we'll call it the ranch, all the way through. And
17 there was an agreement, another lease agreement in
18 1968, and always they were using the ranch's water
19 rights on the leased land. And then suddenly in
20 1987, decide we're going to sell it, split it in
21 half, but it's all within the original place of use.
22 But the water continued to be shared. Is that
23 something that would factor in besides a written
24 formal agreement, the custom of use between two
25 owners or two entities over time, over a 40-year

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1 parameter, in your opinion?
2 A. For many years as the department has
3 evaluated applications for transfer, we have looked
4 at all three parameters, rate of flow, volume and
5 consumptive use, as have other states. So from my
6 perspective, I don't know of a start time, but for
7 many years we have viewed consumptive use to be a
8 parameter.

9 Q. And I presume that's under the enlargement
10 criteria in the transfer statute?

11 A. Yes.

12 Q. But my question is, I guess, more
13 directed. Is there some other source of information
14 that says a farmer cannot put in a -- convert from a
15 ditch to a pipe and water more acres if he's had that
16 right since 1900?

17 A. It's the enlargement statute. I think
18 that's what we're getting at in terms of defining
19 what a water right is. I think all three parameters
20 define the water right.

21 Q. Okay. Let me ask you, in response to
22 Norm's question about if you put in a pipe so you no
23 longer have a ditch, obviously you're not going to
24 have the same extent of conveyance loss, or
25 presumably you're not. That saved water. Is it your

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1 period?

2 THE WITNESS: We have traditionally been more
3 concerned about number of acres than who has the
4 ownership. So if a solution were developed between
5 the two parties that was acceptable with the two
6 parties, then as long as the number of acres is
7 acceptable to us, we have historically been
8 accommodating on where that acreage is placed.

9 So in the scenario that has been painted,
10 if the parties agreed that a certain number of acres
11 should be under one ownership as compared with
12 another, as long as the total number of acres don't
13 change, that's something that the department can work
14 with, and has traditionally.

15 MR. SEMANKO: I'm sorry, Pat.

16 Q. BY MR. BROWN: Okay. Let me ask you in
17 response to the series of questions Norm asked about
18 changing from a ditch to a pipe, you said that
19 consumptive use was a parameter of a right. And I
20 guess implicit in that, in my mind at least, is that
21 it's some sort of limitation. Did you intend to
22 convey that you considered consumptive use to be a
23 limit on a change of right?

24 A. Yes.

25 Q. And since when has that been a limiting

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1 opinion that the owner has to go apply for a new
2 permit to use that saved water?

3 Let me do a hypothetical just so we can
4 speak more clearly. I have a water right for one
5 foot of water, and I have a ditch, and I lose 30
6 percent of it getting it to my property. Now, I put
7 a pipeline in, and my loss is zero. So at my field
8 I'm now getting a full cfs instead of .7. I don't
9 increase my diversion out of the creek, simply put in
10 a pipe and save, if you will, .3 cfs. Is it the
11 department's position that that farmer would have to
12 apply for or get some sort of permission from IDWR in
13 order to irrigate additional acres?

14 A. Yes.

15 Q. And that would be under what authority?

16 A. The water right that the farmer had was
17 only for the consumptive use of the original number
18 of acres. The .3 cfs loss was mostly just seepage
19 and was still in the system. By far, the largest
20 portion of loss in a conveyance system is through
21 seepage as compared with evaporation, so that water
22 is still available to other water users. If the
23 farmer begins to use the additional flows to irrigate
24 more acres, then the consumptive use increases.
25 That's an enlargement that is -- that can be

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1 **injurious to juniors.**
2 Q. I understand the department would consider
3 that an enlargement under the transfer statute. In
4 other words, since 1971. Before that, was
5 consumptive use an element of the right?
6 **A. From my perspective, the transfer statute**
7 **was a codification of the elements, some of the**
8 **elements of the right, but those elements have always**
9 **existed in the water rights, whether or not they were**
10 **earlier codified.**
11 Q. Are you familiar with the line of cases
12 that say an owner of a water right is allowed to stop
13 wasting water provided he puts it to some beneficial
14 use and no one can prevent him from doing that?
15 MR. KING: Calls for speculation, vague and
16 ambiguous, no foundation.
17 **A. I can say from our -- administratively,**
18 **from the department's standpoint, I'm not aware of us**
19 **ever allowing an extension of a system based on an**
20 **improvement of efficiency in the diversion systems.**
21 **That has not been allowed, to my knowledge, in Idaho.**
22 Q. BY MR. BROWN: What I'm trying to do is
23 understand how the department views that line of
24 cases, the cases on the doctrine of waste, and the
25 right of the owner to cease wasting, provided he

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1 department's policy position that that person has
2 lost the amount of water, the .3 cfs that was saved
3 by the installation of the pipe?
4 **A. When we make our recommendation to the**
5 **court for a water right to be decreed, we are limited**
6 **to the extent of beneficial use that we find and the**
7 **amount of water diverted to provide for that**
8 **beneficial use. So if we come out and measure the**
9 **system and find that, in the example you gave, .7 cfs**
10 **is now diverted in place of 1 cfs, then that's the**
11 **limit that we would recommend.**
12 Q. So in answer to my question, I think what
13 you're saying is, yes, the amount saved by the
14 installation of the pipe is lost?
15 MR. KING: Asked and answered.
16 Q. BY MR. BROWN: Is that correct?
17 **A. That's correct.**
18 Q. Okay. Now, explain to me the timing
19 involved here. I mean, if somebody runs out and puts
20 in a pipe the day before you show up, has he lost his
21 right --
22 MR. KING: Calls for --
23 Q. -- because you made the recommendation the
24 day after he put in his new pipe?
25 MR. KING: Calls for speculation, assumes facts

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1 beneficially uses the saved water with the various
2 other statutes, transfer statutes and mandatory
3 permit statutes.
4 MR. KING: The question is ambiguous. What --
5 MR. BROWN: I haven't asked my question yet,
6 counselor.
7 Q. BY MR. BROWN: Given that setting, can you
8 explain to me how the department used those
9 interplays, or have you already done it? Is it just
10 the department's position that there's an increase in
11 consumptive use, there's an increase in a right and
12 always has been?
13 MR. KING: Compound question.
14 **A. As far as the department's position on**
15 **increasing consumptive use, I'm not aware that we**
16 **have allowed that in recent times. I am aware that**
17 **there are some cases that have allowed an irrigator**
18 **to use water that is saved. But in my understanding,**
19 **those are the exception rather than the rule, and**
20 **those don't form the basis of our administrative**
21 **determinations.**
22 Q. BY MR. BROWN: Let me ask you about the
23 flip side of that. If the farmer puts in the pipe,
24 as you said, less water may be necessary to irrigate
25 the same acres than was necessary before, is it the

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1 not in evidence.
2 **A. Yes. I really can't respond to that. We**
3 **would have to look at each case on a case-by-case**
4 **basis.**
5 Q. BY MR. BROWN: Let me give you a
6 hypothetical where -- the same hypothetical. The guy
7 has a right to 1 cfs of water. He puts in his pipe
8 and saves three-tenths of a cfs in conveyance loss.
9 He does that the day before the department conducts
10 its investigation in 1990. Does that person have the
11 right, in the department's opinion, to 1 cfs or to
12 .7?
13 **A. In the situation that you present, my**
14 **assessment would be it would be .7. We would**
15 **recommend that as the amount diverted and applied to**
16 **beneficial use.**
17 **Now, the question follows, what would**
18 **happen to the other .3 cfs? And that .3 cfs had a**
19 **rate of flow associated with it and a volume, but no**
20 **consumptive use. So that .3 cfs wasn't something**
21 **that the water user could have conveyed to another**
22 **use anyway.**
23 Q. But he never loses the right on that day
24 he installs and saves this .3?
25 **A. That would be my interpretation.**

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1 Q. Well, that's part of what I'm trying to
2 understand here, is when this occurs, it's an
3 instantaneous loss when he converts, correct?
4 MR. KING: Vague and ambiguous.
5 A. I haven't thought through the timing on
6 that.
7 Q. BY MR. BROWN: Does the department --
8 A. Don't know.
9 Q. -- have any policies on that?
10 A. Not that I'm aware of.
11 Q. Does it have any rule of thumb? Does it
12 have any way that a field agent can know what to do
13 in that type of situation?
14 A. Well, our procedure has been to report
15 what we measure and find. And in this situation, our
16 procedure would be -- under the theoretical that you
17 proposed, would be to recommend the .7.
18 Q. Okay. Now, let's say that the same
19 hypothetical, come out and investigate the day after
20 it's put in, the next day there's a windstorm and the
21 pipe's all blown out, and the guy goes back to using
22 1.0 through his ditches. Would the department change
23 its recommendation back to 1.0 cfs?
24 MR. KING: Calls for speculation. Well, I
25 withdraw that.

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1 recommend?
2 A. Well, we have made a practice of modifying
3 our recommendations, our original recommendations, in
4 light of new information.
5 Q. So would you consider that new information
6 which made the right amenable to a 1.0 cfs
7 recommendation?
8 A. I don't know, because it does -- another
9 factor that comes to play here is the reasonableness
10 of the old system in light of new technology. Is it
11 reasonable to go back from a leveled field to a
12 nonleveled field? Is it reasonable to decrease
13 efficiency from a higher efficiency to a lower
14 efficiency? That's where we'd have to make a
15 judgment.
16 Q. Well, what criteria do you apply to make
17 that reasonable judgment?
18 A. I don't know that we have done that. I
19 can't give you a track record of one that we've
20 pursued that with.
21 Q. Have you ever listed the criteria?
22 A. There are some criteria listed in the
23 report prepared by Jeff Peppersack for reasonableness
24 of flood irrigation.
25 Q. And can you be more particular about what

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1 A. If we had not yet made our recommendation
2 to the court, if it's an adjudication, I would say
3 that we would -- we can reconsider a recommendation.
4 If we've already made our recommendation, then it
5 might be up for the court -- up to the court to
6 decide. But the facts of the specific case do have a
7 bearing on what the recommendation is.
8 Q. BY MR. BROWN: Okay. The department, what
9 would the department do? Are you saying that if a
10 recommendation had been filed, the department would
11 not change it back from .7 to 1.0?
12 A. If we were in the position of being able
13 to -- well, I guess I would have to say in response
14 to that, I don't know what we would do. We're -- I
15 understand your question, and I don't know what our
16 response could be in that situation.
17 Q. Let me follow up with a hypothetical. You
18 made the recommendation for the .7. The next day the
19 system -- the wind blew it away or whatever, it was
20 destroyed, and the guy went back to his ditches.
21 You've made your recommendation, and the court says,
22 I want you to file a 706 report using the best
23 information now available to you and recommend this
24 right according to that best information now
25 available to you, what would the department

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1 report that is?
2 A. That was submitted relative to computing
3 rates of flow for irrigation across the state that
4 was submitted in conjunction with the 706 report
5 submitted with the Hagerman area summary judgment
6 reports. It's dated 1 July '96.
7 Q. Does the department have a policy to take
8 any action outside the adjudication when that type of
9 situation occurs, where the guy puts in a pipe, only
10 needs .7 now because his pipes haven't blown out,
11 we've got a pipe that's still in, the department goes
12 out in '90, makes its recommendation, .7, has the
13 department done anything by way of administration to
14 restrict use to .7 on any of the right holders in
15 that type of situation?
16 MR. KING: Vague and ambiguous.
17 A. In my experience, I have not seen that
18 happen. In my experience, when an irrigator goes to
19 a more efficient system, there hasn't been
20 backtracking to go to a less efficient system.
21 Q. BY MR. BROWN: Has the department ever
22 considered whether it should take action in that type
23 of situation?
24 A. Not to my knowledge.
25 Q. You've had no discussions with other

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1 personnel about whether the department should
2 administer under the new -- under the recommendation
3 or not?

4 **A. Through the years this question has come**
5 **up, but I have learned of no department policy about**
6 **this. And the reason I say that through the years**
7 **the question has come up, it has come up in a**
8 **hypothetical manner. But as a practical matter, I**
9 **haven't seen a situation where this actually**
10 **happened, so I don't know that a decision has ever**
11 **been made on it. Discussions have been made, but no**
12 **actual experience with this, to my knowledge.**

13 **Q. Well, let's talk about this case. The**
14 **department determined the maximum allowable combined**
15 **use for the golf course, based on 64 acres, was 1.28**
16 **cfs, an inch per acre. The department has measured**
17 **3.3, 3.4 cfs being used on more than one occasion.**

18 **MR. KING: Calls for --**

19 **Q. Does the department intend to take any**
20 **action to restrict the use to 1.28 cfs?**

21 **MR. KING: Assumes fact not in evidence,**
22 **mischaracterized his prior testimony.**

23 **A. We have many situations statewide where**
24 **the measured rates of flow are in excess of what we**
25 **are recommending to the court that the rights be**

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1 grounds of privilege.

2 **MR. BROWN: Then, Mr. King, are you withdrawing**
3 **your proffer of Mr. Tuthill as an expert with regard**
4 **to those matters?**

5 **MR. KING: You'd have to define which matters,**
6 **Mr. Brown.**

7 **MR. BROWN: Where he gets his information,**
8 **whether it comes from attorneys or not, is irrelevant**
9 **if he's being proffered as an expert.**

10 **MR. KING: As far as which area?**

11 **MR. BROWN: As far as the question I just**
12 **asked.**

13 **MR. KING: Maybe you could repeat the question.**

14 **MR. BROWN: Please read back the question.**

15 **(Record read.)**

16 **MR. KING: Once again, you'd have to define**
17 **what "these situations" mean before I could tell you**
18 **whether I was withdrawing Mr. Tuthill as an expert or**
19 **not.**

20 **MR. BROWN: "These situations" means where the**
21 **department has recommended 1.28 cfs, but has also**
22 **measured 3.3 or 3.4 being utilized, and whether it**
23 **intends to take action with respect to restricting**
24 **use to its recommendation.**

25 **MR. KING: No, I don't intend to withdraw**

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1 **decreed at, so there will be many situations where I**
2 **suspect in the long-term, action will be taken to**
3 **restrict rates of flow to comply with established**
4 **rates of beneficial use.**

5 **With this particular case, we've discussed**
6 **here this morning some potentials for review that the**
7 **department is willing to take a look at through the**
8 **706 report writing process. Because of the unique**
9 **nature of watering times on a golf course, this is**
10 **something that we need to consider relative to these**
11 **water rights, in my opinion. If we find in the long**
12 **term that some reduced rate of flow is necessary or**
13 **is adequate for either these rights or some other**
14 **rights, I am presuming that in the long term, the**
15 **department will take action to reduce rates of flow.**
16 **That's part of what I envision the adjudication to do**
17 **as a final outcome. But on these, we have the**
18 **opportunity to further investigate the rates of flow.**

19 **Q. BY MR. BROWN: Has the department had any**
20 **meetings or spoken amongst itself or with its**
21 **attorneys about how it should handle these types of**
22 **situations?**

23 **MR. KING: As far as the question concerns**
24 **privileged conversations between IDWR attorneys and**
25 **its client, the department, I would object on the**

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1 **Mr. Tuthill's status as an expert in that area.**

2 **A. I have not heard any such discussions.**

3 **Q. BY MR. BROWN: Are you aware of any that**
4 **have taken place?**

5 **A. I'm not at this point aware of any.**

6 **Q. Have you ever had discussions with the**
7 **agents, Mr. Clelland or others, or Mr. King or**
8 **Mr. Spencer or anybody else, about the problem where**
9 **the situation of this being a golf course and using**
10 **water only half -- or only a third of the day?**

11 **A. Yes.**

12 **Q. And what was discussed?**

13 **A. The fact that perhaps this water right, to**
14 **the extent it's used for specialized uses, might be**
15 **eligible for an increased rate of flow on a per acre**
16 **basis.**

17 **Q. Has the department -- and by the**
18 **department, I mean anyone within the department, made**
19 **a plan on how they will consider this or analyze it**
20 **or --**

21 **A. We will assess this in conjunction with**
22 **our 706 report.**

23 **Q. When did you first have these**
24 **conversations?**

25 **A. Yesterday.**

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1 Q. Do you know whether Mr. Clelland or
2 Mr. Merritt or anyone else has had discussions about
3 this prior to that time?
4 **A. I don't know.**
5 Q. Do you know whether Mr. King or
6 Mr. Clelland or Mr. Merritt have informed anybody in
7 the department that it's a problem that they need to
8 look at before yesterday?
9 **A. I don't know.**
10 Q. It's never been brought to your attention
11 before yesterday?
12 **A. That's correct.**
13 Q. Has it been brought to your attention with
14 regard to any other golf courses?
15 **A. No. My experience with this matter has**
16 **been via the regional office, and as I mentioned**
17 **earlier, we have done this on certain types of**
18 **parcels.**
19 Q. So that would be in western Idaho?
20 **A. Yes.**
21 Q. You have no experience in the southern
22 region?
23 **A. That's correct.**
24 Q. When you visited this site yesterday, did
25 you see any evidence of overirrigation anywhere on

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1 that were taken out were part of the historical place
2 of use up until the time they were taken out?
3 **A. That was my impression as I reviewed the**
4 **file.**
5 Q. In reviewing the file, are you aware what
6 happened to the 5.4 acres? Did this not become part
7 of the recommendation because for whatever reason, or
8 do you know what became of that 5.4 acres in the
9 recommendation?
10 **A. I would expect that Steve Clelland will**
11 **know, but I don't know.**
12 Q. Are you aware of an agreement between the
13 Clear Lake ranch interest and Clear Lake Trout
14 Company from 1983, Clear Springs?
15 **MR. BROWN: Clear Springs Foods.**
16 Q. BY MR. SEMANKO: From 1983 wherein
17 basically the trout company took over the spring --
18 the food company took over that portion of the
19 property and turned it into -- are you aware of that
20 1983 agreement?
21 **A. I understood that an agreement had taken**
22 **place. I haven't seen that agreement in our file. I**
23 **haven't noticed it.**
24 Q. I'll represent to you that there's some
25 language in that agreement that talks about the food

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1 those properties?
2 **MR. KING: Objection, vague and ambiguous.**
3 **A. I didn't see marshlands on the irrigated**
4 **portions of the property.**
5 Q. Do you have any reason to believe that any
6 of those properties are being overirrigated?
7 **A. No.**
8 **MR. BROWN: I have nothing further. Thank**
9 **you.**
10 **MR. SEMANKO: Counsel, I have just two items on**
11 **my checklist.**
12
13 **FURTHER EXAMINATION**
14 **BY MR. SEMANKO:**
15 Q. Going back to the 706 report, maybe we can
16 get that thing out. Page 7, going back to the time
17 line again, just a few things I want to try to
18 clarify. Page 7, under 1987, it states an ASCS
19 aerial map was available for this year showing some
20 changes in historical irrigation pattern.
21 **A. Yes.**
22 Q. Fairways on golf course are under
23 construction, per the ASCS map, and .54 acres of
24 irrigation are taken out to construct fish raceways.
25 Is it your understanding that from that the 5.4 acres

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1 company cooperating and allowing up to 3 cfs to go
2 through the existing ditches south and east of the
3 property that existed at that point. To you, is that
4 any evidence of intent that that 5.4 acres was to be
5 conveyed off of that property to another portion of
6 the ranch?
7 **MR. KING: Assumes facts not in evidence.**
8 **A. I don't know.**
9 Q. BY MR. SEMANKO: Let's get the 1983
10 agreement out. Well, let's skip that.
11 You stated earlier that if you can find a
12 place of use for something, you're not going to stick
13 strictly to lines if you can find a place to put it
14 as long as the water was beneficially used
15 somewhere.
16 **A. Within reasonable limits of ownerships.**
17 **And that's why we have to be the mind -- we have to**
18 **be mindful of ownerships as we look at the migration**
19 **of a water right to ensure that the migrate doesn't**
20 **migrate to another owner with no agreement between**
21 **the owners. But some migration of the water right**
22 **location is very typical.**
23 Q. Does it seem reasonable for someone who's
24 selling a piece of property that has a water right on
25 it to convey that water right to some other portion

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1 of their property when the person buying the other
2 portion of the property has his own water rights for
3 his own purposes? Is that a strange scenario for
4 someone to move a portion of their water right from
5 one part of the property when they sell it to another
6 part of the property?

7 **A. We would look for that kind of a change to**
8 **be explicit. If it's not explicit, then it makes it**
9 **more difficult to assess. Perhaps one could develop**
10 **an argument of how that happened, but if it's not**
11 **explicit, then it would be up to the water users to**
12 **put the change together on how it had happened.**

13 **Q. So language in an agreement would be**
14 **relevant? You would look at that in terms of the**
15 **intent of transferring?**

16 **A. I would say that we would consider that as**
17 **part of a package. Language in an agreement is often**
18 **helpful in discerning water rights.**

19 **Q. One other set of questions. One of our**
20 **biggest problems in looking at this is that it was**
21 **disallowed basically without a thorough evaluation of**
22 **all the elements, because basically it was found that**
23 **there was no point of diversion, the ditches had all**
24 **been run over in 1987, and apparently there was --**
25 **even though it seemed now that maybe part of the**

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1 are being developed. So it's not uncommon to have a
2 water right that's in the development process that's
3 outside the purview of the SRBA.

4 **Q. In your estimation, does the approved**
5 **application for permit -- or for the permit 36-0829**
6 **reasonably reflect an intent to put that water right**
7 **and the irrigation right in the same pipeline to the**
8 **place of use, as we discussed previously?**

9 **A. I think there is opportunity for the**
10 **claimant to demonstrate some difference to that.**
11 **This is the information that we have before us**
12 **that -- this is the analysis that we've made based on**
13 **the information that's been brought to us. If there**
14 **are other agreements that are germane here, if there**
15 **are other considerations, we can certainly consider**
16 **those. We are to do that through the 706 process,**
17 **and we can certainly be -- well, we are willing to**
18 **review changes in what you've come up with, if those**
19 **changes can be documented and substantiated.**

20 **Q. Do you have a copy in front of you of the**
21 **amended claim dated August of 1990 for 36-04148A?**

22 **A. That's the SRBA claim?**

23 **Q. Yes, for 36-04148A. I believe the amended**
24 **claim was August of 1990.**

25 **A. Yes. It was filed? See, what I show is**

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1 historical place of use was owned by the ranch,
2 somehow there was no diversion to get the water
3 there, so I have to ask you a couple of questions
4 about diversion.

5 **On this same page at the bottom, page 7,**
6 **the last sentence beginning on that page, "This**
7 **pipeline was believed to be developed under water**
8 **right permit 36-08329." We've talked about that**
9 **permit.**

10 **A. Yes.**

11 **Q. And it's assumed that the pipeline was**
12 **developed under that water right. Continues, "which**
13 **was not claimed in the SRBA." Then it goes on later**
14 **to say, "Since the pipeline is thought to be**
15 **developed under a permit that was not claimed in the**
16 **SRBA, and since the permit process has its own field**
17 **exam, an investigation procedure, no investigation on**
18 **this pipeline is performed for purposes of the**
19 **adjudication." What does that mean? Is there a**
20 **diversion out there that goes to the subdivision or**
21 **is there not?**

22 **A. Well, there is, it goes to the**
23 **subdivision, but we do allow the water right**
24 **appropriation process to continue within the SRBA**
25 **area, not always investigating those new permits that**

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1 it was filed -- yes, okay, August of 1990, yes, we
2 have that.

3 **Q. Can you describe to me what the diverting**
4 **works on that claim, amended claim, were?**

5 **A. It shows concrete head box, pipe and**
6 **sprinklers.**

7 **Q. So it showed a pipe being claimed as part**
8 **of the diverting works in August of 1990. That's**
9 **previous, isn't it, to most if not all the**
10 **examinations that occurred, field examinations that**
11 **occurred?**

12 **A. August -- well, it's about the time period**
13 **of some -- your August 30.**

14 **Q. Is there some reason why, when the amended**
15 **claim says there's a pipe, that in reading pages 7**
16 **and 8 of the report, the pipeline was not**
17 **investigated as part of the claim but rather only as**
18 **part of the permit?**

19 **MR. KING: Calls for speculation.**

20 **Q. BY MR. SEMANKO: Is that standard**
21 **procedure where something is claimed as a diverting**
22 **work, you'll not inspect the diverting work that**
23 **exists out there that matches the description in the**
24 **claim? Is that standard practice?**

25 **A. Well, let's see here. I'm not sure why**

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1 **that was not investigated.**

2 Q. Is that standard procedure not to look at
3 something that was mentioned in the claim if it
4 exists on the site, knowing that it existed on the
5 site, per pages 7 and 8, to not examine it as part of
6 the claim?

7 **A. There was likely a reason for that, but**
8 **I'm not sure of it.**

9 MR. SEMANKO: That's really all the questions I
10 have. Thanks.

11 MR. KING: I just have one or two clarifying
12 questions.

13
14 EXAMINATION

15 BY MR. KING:

16 Q. Mr. Tuthill, you've been --

17 MR. BROWN: I'm going -- Brent, at this point,
18 let me object to the asking of questions by IDWR, as
19 they're not a party to this case.

20 MR. KING: I think that we do have the right to
21 clarify some of the questions that were asked in this
22 case. That's all I'm simply doing.

23 MR. BROWN: Let me just make this a continuing
24 objection so I don't have to interrupt.

25 MR. KING: Thank you, counsel.

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1 **A. Have I taken -- can you restate that**
2 **question?**

3 Q. It's going to be your opinion the
4 department has correctly recommended these claims
5 based upon the information it had, correct?

6 **A. From my perspective, we are seeking**
7 **additional information relative to these claims. And**
8 **we will be considering modifying our recommendation**
9 **on these claims through the 706 reporting process.**
10 **And I feel that many of the items discussed this**
11 **morning need to be considered as we go through that**
12 **process. And I'm not prepared to say that our final**
13 **recommendation will be exactly as the existing**
14 **recommendation.**

15 Q. Are you prepared to say, as you sit here
16 today, that in your opinion the department has
17 correctly recommended these claims?

18 MR. KING: Asked and answered.

19 **A. The scenario that we have today in 1996 is**
20 **different from the scenario that existed when the**
21 **claims were originally recommended. And as we**
22 **proceed with the adjudication, we attempt to**
23 **incorporate additional information and modified**
24 **techniques, and we need to be cognizant of those**
25 **techniques as we make our final recommendation.**

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1 Q. BY MR. KING: Mr. Tuthill, you've been
2 asked to review files for the three water rights that
3 we've been here today on; is that right?

4 **A. That's correct.**

5 Q. Now, how much time have you spent on those
6 files?

7 **A. Limited time. A few hours.**

8 MR. KING: Thank you. That's all the questions
9 I have.

10
11 FURTHER EXAMINATION

12 BY MR. BROWN:

13 Q. Mr. Tuthill, you've been asked to testify
14 about any of the elements of these rights, correct?

15 **A. That's correct.**

16 Q. You've been asked to support the
17 department's opinions, correct?

18 **A. Yes.**

19 Q. And yet you've only spent a couple hours
20 reviewing these files, correct?

21 **A. I would say a few hours.**

22 Q. Okay. Based upon what you've heard today
23 and based upon your review of the files, have you
24 taken a position about the accuracy of these files
25 before you reviewed them?

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1 Q. BY MR. BROWN: As you sit here today, is
2 it your opinion that the department has correctly
3 recommended these rights?

4 MR. KING: Asked and answered.

5 MR. BROWN: It hasn't been answered, counsel.

6 MR. KING: I believe it has, counsel.

7 Q. Either they have or they haven't.

8 **A. I would say that we have been provided**
9 **more information by the claimants since these claims**
10 **were originally filed, and we need to incorporate**
11 **that information. So I don't know if they have been**
12 **correctly filed -- correctly recommended. I think**
13 **that the department will continue its practice of**
14 **adjusting recommendations as more information is**
15 **analyzed.**

16 Q. How is it that a claimant is supposed to
17 know that more information is needed?

18 MR. KING: Calls for speculation.

19 **A. We notified the claimants of the proposed**
20 **recommendations. And the claimants objected to our**
21 **findings. Since that time, much study has gone into**
22 **these findings, and we need to reflect what's come**
23 **out of that in our recommendations.**

24 Q. BY MR. BROWN: Let me try it from a
25 different approach. Part of the problem of the

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1 claimants is they need to know what information they
2 need to give to the department in order to get their
3 rights recommended as claimed and as used. And the
4 answer I seem to be getting generally is, you've got
5 to give us more information and we'll analyze it.
6 But we don't know what quantity of information or
7 what character of information we need to give. You
8 know, so we're not -- we don't know what to do in
9 order to avoid the litigation.

10 And my question is, how can we find out
11 what information the department needs in order to
12 recommend these rights as claimed? And we've asked
13 for that before, but I don't think I've gotten any
14 answer to it yet. We can go out and generate the
15 affidavits. We've told the department again and
16 again that there are affiants, there are handfuls of
17 affiants who have been out there since the 1930s who
18 can all testify. But we don't know what we need to
19 do to establish that that right was 3 cfs before. We
20 provided the department with agreements. And
21 certainly I think you would agree that Clear Springs
22 Foods would have no reason to give more water away
23 than it wants to be taking. It's the junior right
24 holder out there and wanted the water for its
25 hatchery. Did agree to 3 cfs. So we assumed that

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1 Q. BY MR. BROWN: In other words, my
2 understanding is you have some photographs, and based
3 on those, you're saying all we can say is 64 acres.
4 What kind of evidence do we need to give the
5 department to show, I think it was the highest number
6 we have is 163 acres were irrigated out there. What
7 do we need to do? You know, we've submitted the
8 affidavits of the guys saying these acres were
9 irrigated. If the guy says a particular quantity of
10 acres were irrigated, is that sufficient?

11 MR. KING: Calls for speculation.

12 Q. Or do we need something else?

13 MR. KING: Calls for speculation.

14 A. Information that we highly rely upon is
15 aerial photographic information, where it's
16 available. That has been a persuading bit of
17 information in our historic evaluations. If
18 additional aerial photographs are available, they
19 would be excellent. As far as --

20 Q. Let's assume they're not. I don't think
21 we're going to be able to generate or find aerial
22 photographs from the '20s or '30s, '40s.

23 A. Another type of information that can be
24 available that's useful is records where the county
25 considered certain land to be irrigated, certain

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1 would be enough evidence.

2 But I think you see our dilemma. And my
3 question is, how do we know what we have to give the
4 department by way of evidence in order to support
5 these claims?

6 MR. KING: Calls for speculation.

7 A. Well, we have asked for some information
8 that I understand is going to be submitted, so we can
9 review the recommendations through the 706 reporting
10 process. Beyond that information, if we find
11 additional information that we need, we can request
12 it. However, we have acquired significant
13 information in this case, so I'm not aware of any
14 lacking information beyond what we've already
15 requested at this point.

16 Q. BY MR. BROWN: Okay. Let me go through
17 them one by one then. I'm talking about the
18 historical rate, the pre-'87 expansion right. I
19 believe you testified earlier about some photographs
20 the department has which reflected irrigated
21 acreage. What evidence does the department need to
22 receive in order to overcome that so that we can get
23 back up to the full 90 acres on the golf course and
24 the other water on the ranch?

25 MR. KING: Calls for speculation.

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1 numbers of acres to be irrigated. If there's
2 taxation procedures, that's a good indicator. Those
3 are two that come to mind.

4 Q. Is there anything in the department's mind
5 that affidavits are not sufficient, you know, if they
6 were to say a particular number of acres?

7 (Allen Merritt comes into the room.)

8 MR. KING: Calls for speculation.

9 A. Affidavits are often subjective in terms
10 of quantities, whether it be quantity of flow or
11 quantify of acres. Experience has shown that aerial
12 photographs provide better quantification of acreages
13 than affidavits. And some -- it's difficult for a
14 party to remember how many acres were irrigated.

15 Now, for example, harvest records of
16 alfalfa harvest is a more objective record to
17 quantify acres.

18 What we're seeking is objective
19 quantifications of acres irrigated. Regardless, I
20 guess, if the experience of an affiant, his
21 quantification of acres could always be called
22 subjective, I guess, even though he may -- you know,
23 maybe he's a farmer or a real estate business or
24 surveyor or whatever, you know, and has experience in
25 estimating acreage.

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1 Q. BY MR. BROWN: What I'm trying to get at
2 is whether we're wasting our time if we go out and
3 get a whole bunch of affidavits. Are you telling me
4 that affidavits by nature are subjective and
5 insufficient unless supported by other documentation,
6 or --
7 A. If the affidavits are all we have, then
8 they're useful, and affidavits can provide
9 information many times on dates of priority, types of
10 crops, that type of thing. But in quantification,
11 whether it be rate of flow or acreage, it's difficult
12 to base our quantification on affidavits. If we have
13 an aerial photograph that appears only to show
14 limited irrigation, it's hard to overcome that type
15 of evidence with affidavits.
16 Q. Let me ask you about the information for
17 quantification of flow. Obviously aerial photos
18 aren't going to quantify flow for you. What kind of
19 information would the department look to in
20 establishing the flow right? Because I understand
21 here one of the problems seems to be that the
22 department does not let, at least at this time,
23 accept the conclusion that 3 cfs were always diverted
24 historically. And I guess my question is, what kind
25 of evidence does the department look to to establish

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1 of flow.
2 Q. BY MR. BROWN: Let me read you part of the
3 claimant report. It goes through an analysis of --
4 this is by Steve Clelland -- of the various
5 measurements that are theoretical flow rates, the
6 flow rates, and then it -- I don't know if you have
7 that page (indicating).
8 A. Yes. I've seen that one. It's in the
9 file.
10 Q. What he concludes is he comes up -- and
11 then he says essentially -- and I'm paraphrasing --
12 if I assume the spring had a ditch loss of 50 percent
13 in the old system, and I give 50 percent of that plus
14 an inch an acre, basically he comes up with 1.85 cfs.
15 Then he states, "This figure is close to the amount
16 standard for use on 90 acres as expanded. However,
17 the system uses almost twice that amount and has
18 increased the original diversion rate to accomplish
19 the change in irrigated acres." Why would language
20 like that be in the claim investigation file if that
21 weren't an important point to make?
22 MR. KING: Calls for speculation, assumes facts
23 not in evidence.
24 A. I don't see that as a limiting factor on
25 what we recommended.

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1 that, especially where you have, you know, older
2 beneficial use rights?
3 MR. KING: Calls for speculation.
4 A. Well, our records show that we went out
5 and measured greater than 3 cfs. So as far as
6 establishing the capability to provide for greater
7 rate of flow, we've established that through our
8 measurements.
9 Q. BY MR. BROWN: Okay. My understanding
10 from the claim file is that there's a problem with
11 the fact that the old ditches have been taken out,
12 and the department can't go back and see that the
13 3 cfs were historically diverted before the new
14 system was put in. And that's, I guess, what we're
15 trying to address.
16 MR. KING: I'm not sure if there was a
17 question, but I'll object on speculation grounds.
18 A. As far as identifying what was there prior
19 to the existing system, I'm not sure that we can
20 incorporate that in our recommendation anyway. Let's
21 say that the claimant was to be able to demonstrate
22 that the previous ditch would hold 5 cfs. From my
23 perspective, it would be difficult to incorporate
24 that kind of information in our recommendation. The
25 limiter appears to be acreage as compared with rate

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1 Q. BY MR. BROWN: Let's assume that they did
2 not increase the original diversion rate and it's
3 always been 3 cfs. Isn't that important to know in
4 determining whether or not an expansion can be upheld
5 or not?
6 A. If we find something much different, based
7 on additional information that's submitted, if we
8 were to find something vastly different in acres
9 irrigated, then that measurement could be germane.
10 But as it is now, it really isn't, to my view. The
11 limitation of the ditch rate is really not a limiter
12 that appears in our recommendation. It's not the
13 rate limiting step on our recommendation.
14 Q. If I understand correctly what you're
15 saying is that because you, the department, views it
16 as 64 acres being used and then it jumps to 90, and
17 therefore the limiting factor would be the
18 consumptive use of the 64 acres?
19 A. Yes. The 64 acres is the limiting factor
20 from my perspective in this recommendation.
21 Q. And is that as it pertains to the
22 consumptive use of the 64?
23 A. As the delivery system is set up right
24 now, it's not only consumptive use but also rate of
25 flow. We might find that something more than an inch

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1 STATE OF IDAHO } 2 COUNTY OF _____ } ss: VERIFICATION 3 4 I, DAVID TUTHILL, 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 8 141, that I have read the said deposition and know 9 the 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 DAVID TUTHILL 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 Page 142	1 REPORTER'S CERTIFICATE 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 August, 1996. 19 20 21 Connie Stone 22 CSR Number 353 23 My commission expires 4/5/99 24 25 Page 143
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