

AUDIO TRANSCRIPTION

1

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE) DOCKET NO. P-DR-2017-002
NO. 37-07842 IN THE NAME OF)
THE IDAHO WATER RESOURCE BOARD)
_____)

BEFORE

HEARING OFFICER: GARY SPACKMAN

Date: November 1, 2018 - 10:30 a.m.

Location: Lincoln County Community Center
201 S. Beverly Street
Shoshone, Idaho

TRANSCRIBED BY:

KAMRA TOALSON, CSR No. 756

Notary Public

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2		2 NO.	ADMITTED
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1	INDEX	1	(Beginning of Audio MZ000005.)
2		2	THE HEARING OFFICER: Well, let's go on the
3 TESTIMONY OF MICHELE EDL	PAGE	3	record.
4 Direct Examination by Ms. Blades	25	4	Okay. This is the time and place that's
5 Cross-Examination by Ms. Vonde	72, 103	5	scheduled for a contested case hearing regarding the
6 Cross-Examination by Mr. James	99, 117	6	licensing of Permit No. 37-7842, and challenge to the
7 Examination by The Hearing Officer	164	7	license by a number of cogeneration hydropower owners,
8 Recross-Examination by Ms. Vonde	173	8	on the Little Wood River, as I understand, and perhaps
9 Recross-Examination by Mr. James	175	9	on the land there, as well.
10		10	So the request for a hearing and the objection
11		11	to the license was filed by these owners. I don't know
12		12	that I need to go through their names individually.
13		13	They are named in the record itself.
14		14	So prior to going on the record -- and by the
15		15	way, my name is Gary Spackman. I'm the director of the
16		16	Idaho Department of Water Resources.
17		17	And before we proceed any further, let's have
18		18	the parties introduce themselves. So on behalf of the
19		19	Idaho Water Resource Board?
20		20	MS. VONDE: Ann Vonde on behalf of the Idaho
21		21	Water Resource Board.
22		22	THE HEARING OFFICER: Okay.
23		23	MS. VONDE: I have Wesley Hipke with me here,
24		24	who is also Idaho Water Resource Board staff.
25		25	THE HEARING OFFICER: Thank you.

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1 Mr. James, and then I'll have Emmi introduce
2 yourself.
3 MR. JAMES: Joe James on behalf of the
4 petitioners.
5 THE HEARING OFFICER: Okay. And then Emmi.
6 MS. BLADES: I'm Emmi Blades. I'm the deputy
7 attorney general for the Department of Water Resources.
8 THE HEARING OFFICER: Okay.
9 MS. ENGLISH: I'm paralegal Kimberly English
10 with the Idaho Department of Water Resources.
11 THE HEARING OFFICER: And all other potential
12 witnesses introduce themselves as they're sworn in and
13 as they testify.
14 Okay. We spoke before the beginning of the
15 recording and the making of the record about anything
16 that we should discuss prior to taking testimony in this
17 matter. And I, at least, identified as the hearing
18 officer the need for working through the exhibits.
19 So, Emmi, since you will go first, why don't
20 you talk about the exhibits that you might submit today.
21 MS. BLADES: Okay, Director. Thank you.
22 I have prepared seven exhibits today, all of
23 which are already in the water right file for water
24 right 37-7842, except for Exhibit No. 6.
25 So I don't know if this is an appropriate time

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1 to address maybe official notice of the water right file
2 for 37-7842 and the one other water right we spoke of at
3 our last status conference, 01- -- any of you guys --
4 UNIDENTIFIED SPEAKER: 7050.
5 MS. BLADES: 7050?
6 UNIDENTIFIED SPEAKER: 7054.
7 MS. BLADES: So 01-7054. Mr. James had, I
8 think, requested the director take official notice of at
9 least 37-7842. So I don't know if the director would
10 like to address that request at this time or if you'd
11 like for me to go through my exhibits first.
12 THE HEARING OFFICER: Well, we spoke about the
13 hearing officer taking notice of the file for water
14 right 01-7054, and we spoke about it at the status
15 conference, as I recall. And let me just represent --
16 please correct me if I'm wrong, but it was my
17 understanding that the parties had no objection to the
18 director taking notice of what was characterized as a
19 companion file. This is also a water right for
20 diversion of water from the Snake River for Emmi's jury
21 charge.
22 And these two water rights, at least in my
23 elementary understanding, proceeded sort of parallel
24 through some of the administrative processes. And maybe
25 not all of them. But they became linked together in

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1 some way along.
2 So my understanding was that, based on
3 representations of the parties -- and I can't remember.
4 I think it was you, Mr. James, that mentioned that there
5 may be some crossover in the files and in the material
6 covered. That was not you?
7 MR. JAMES: Well, no, Your Honor. Maybe
8 perhaps some clarification.
9 THE HEARING OFFICER: Yeah.
10 MR. JAMES: I think that initially we
11 submitted our proposed exhibits. And in that
12 declaration, we indicated we were going to ask the
13 director to take notice of the water file in this
14 matter, and it was brought up at pretrial. I don't know
15 if it was -- and Emmi suggested perhaps any companion
16 cases, well, which I think was 01-0754. I indicated
17 that I thought that was appropriate, and I think the
18 parties were in agreement that both matters be allowed
19 to come in.
20 THE HEARING OFFICER: Ms. Vonde?
21 MS. VONDE: Yeah, the Water Resource Board has
22 no objection to both of those being taken official
23 notice of.
24 THE HEARING OFFICER: And so your joint
25 statements are consistent with my understanding of our

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1 discussions at the status conference. So the hearing
2 officer will take notice of the materials in Water File
3 No. 01-7054 and also in the water right file for
4 37-7842.
5 Now, I also asked the parties if there were
6 specific documents on which they wanted to rely in the
7 testimony today, that they mark those specific documents
8 as exhibits so that they're readily available for anyone
9 who's reviewing the record, including the hearing
10 officer and other department staff, and perhaps matters
11 would be much easier for the appellate courts to look at
12 those documents and find them if they're marked as
13 exhibits.
14 Anything further on this particular matter,
15 Ms. Blades?
16 MS. BLADES: Not from me.
17 THE HEARING OFFICER: Okay. And please excuse
18 me as we work through this hearing. I may shift from
19 formal last name address to calling you by your first
20 names. I hope you don't mind. And I may also shed my
21 tie before too long.
22 (Unintelligible.)
23 But, Mr. James, if you want to shed yours,
24 that's fine.
25 Okay. Let's work through the exhibits. Emmi.

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1 MS. BLADES: Okay. Thank you, Director.

2 Let's see. The witness has a copy. The
3 director has a copy. I have a copy. So the first
4 thing --

5 THE HEARING OFFICER: So let me just
6 interrupt. So do the parties have copies of these right
7 now?

8 MS. BLADES: I guess not.

9 MS. VONDE: No.

10 MR. JAMES: No.

11 MS. BLADES: That would have been helpful.

12 THE HEARING OFFICER: All right. Let's do
13 this. I'll give my copy to Joe. Let's get this copy
14 that she has, and then you can all look at them. Then
15 there's no question about what Emmi is referring to.

16 MS. BLADES: Okay. So the exhibit marked as
17 IDWR Exhibit 1 is the water right license that was
18 issued for water right 37-7842 and is the cover letter
19 that accompanied the license.

20 Exhibit No. 2 is the license review memorandum
21 prepared by Michele Edl dated October 29, 2014.

22 Exhibit No. 3 is the original application for
23 permit, and it really is the permit, also, because it is
24 the signed documents signed by Glen Saxton June 2, 1982.

25 And the last page, IDWR page 80 of that

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1 exhibit, is an advertisement for that application. And
2 I believe these exhibits are also in the Idaho Water
3 Resource Board's exhibits.

4 MS. VONDE: Four is the ad?

5 MS. BLADES: Three. Actually, three has
6 the --

7 MS. VONDE: The ad and the --

8 MS. BLADES: The application, and then the ad
9 is the last page, page 80.

10 Four is blank in this binder, because it is
11 this map marked as IDWR Exhibit 4 appearing really for
12 illustrative purposes, just to kind of give the big
13 picture of the area we're looking at.

14 Exhibit 5 is the beneficial use field report
15 submitted to the Department by Gerald Martens dated --
16 or received by the Department November 29, 1993.

17 Exhibit No. 6 is the only one of these
18 exhibits, again, that's not currently in the water right
19 file. And this is -- Michele's probably going to be
20 better explaining this than I am. I'm going to have her
21 go through it in her testimony about how exactly this
22 map is housed in the Department's, I guess, files and in
23 its system.

24 This is an aerial imagery. My understanding
25 is that it contains data from 1980 to 1987, I believe,

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1 several layers on top of each other. Michele will
2 discuss that in her testimony.

3 Exhibit No. 7 is the application for amendment
4 that was submitted to the Department by the Idaho Water
5 Resource Board for water right 37-7842 at licensing for
6 licensing purposes, approved by Shelley Keen July 13,
7 2017.

8 Those are all the exhibits I have, Director.

9 MR. JAMES: Director, if I could interject.

10 THE HEARING OFFICER: Sure.

11 MR. JAMES: Based on our pretrial conference,
12 several avenues were discussed with pre-marking or asked
13 to be marked at the time and assigned numbers. My
14 understanding was that I would have those documents
15 available, online exhibits or in the record, and some of
16 them are duplicative to the exhibits offered by the
17 other parties. I did make sufficient copies of them,
18 but I think it creates some confusion if we pre-admit
19 them prior to hearing testimony and all of a sudden you
20 have two, maybe three, duplicate exhibits.

21 So I simply, Director, am looking to your
22 instruction. I think I have a dozen exhibits that are
23 premarked but not numbered. It is my intent to number
24 them sequentially if they are needed. But, frankly, if
25 Michele gets some of these admitted to where we utilize

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1 them and Michele testifies where some of the exhibits
2 are utilized with the respondent's witness's testimony,
3 I wouldn't intend to readmit them.

4 THE HEARING OFFICER: Well, the purpose for me
5 engaging in this activity right now is to save us the
6 time in offering them individually. And I guess I've
7 found, at least in previous administrative contested
8 cases, that it saves us a lot of time in the offering
9 and in my asking for any objections.

10 So if there are no objections, then I would
11 like to see us stipulate to the admission of these
12 documents. Now, to me, I think it's up to counsel
13 whether counsel wants to offer the same document -- I
14 know it's duplicative -- but offer her own document, for
15 whatever purposes, through reference or can refer back
16 to what's already admitted.

17 So I don't -- I mean, if there's duplication,
18 it seems to me maybe we can -- can we pair those out or
19 carve those out in the end if we want to, or leave them
20 as duplicates? I don't care. So I'll leave that up to
21 counsel. If counsel doesn't want to stipulate, then
22 we'll go through the whole administrative rigor of
23 offering and accepting them or hearing objections to the
24 documents.

25 So I return that one back to the parties. But

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1 at least from my perspective, I find it to be beneficial
2 to at least initially look at the documents and
3 determine whether there's any objection to them or not.

4 So I don't know whether that's helpful to you,
5 Joe, but...

6 MR. JAMES: Well, and, Director, just to
7 clarify, I haven't had any copies of the statutes in
8 play just to provide the witness. And I also premarked
9 them but not numbered them in case the director
10 preferred to have an exhibit. But I'll leave it up to
11 the director as we go through identifying copies of
12 every exhibit I've got.

13 But they're either already in the water right
14 file -- most are already an exhibit, but that's it. I
15 don't have any objection to either the exhibits provided
16 by IDWR or the exhibits previously provided by counsel.

17 THE HEARING OFFICER: Okay. Well, let's look
18 through this set. And then I also want to give the
19 parties and the attorneys any independence in the
20 discussion. If they want to offer them during the
21 normal course of testimony, then you're welcome to offer
22 them individually. I'm just trying to save some time.

23 So let's talk about these exhibits that Emmi
24 has at least worked through verbally. Joe, you don't
25 have any objection to the admission of these documents?

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1 MR. JAMES: No.

2 THE HEARING OFFICER: And, Ann, do you have
3 any objection?

4 MS. VONDE: No.

5 THE HEARING OFFICER: Okay. So the documents
6 that are marked as Exhibits 1 through 8 -- is that
7 correct?

8 MS. BLADES: One through seven.

9 THE HEARING OFFICER: -- seven are received
10 into evidence.

11 (IDWR Exhibits 1 through 7 admitted.)

12 THE HEARING OFFICER: And then let's go in the
13 order of presentation of evidence. So, Ann, do you want
14 to work through yours?

15 MS. VONDE: Sure. I'd be happy to do that.

16 THE HEARING OFFICER: Okay.

17 MS. VONDE: So I have -- I believe there's
18 eight total. And then I have some other documents that
19 we might want to talk about before we get into things.

20 THE HEARING OFFICER: Let's make sure
21 everybody has copies of these. Joe, do you have a copy?

22 MR. JAMES: I don't know if I do.

23 MS. BLADES: There's a copy here.

24 THE HEARING OFFICER: Is it? Okay.

25 MS. VONDE: So Exhibit 100 is a map that was

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1 prepared by our expert, Erick Powell, as Figure 3 to his
2 report. I pulled it out so that it could be referenced
3 independently. I thought that just might be easier to
4 have it as an independent document, but it is identical
5 to what's contained in the report.

6 Exhibit 101 is a photograph taken by Erick
7 Powell, and it is contained in his report as Figure 8.
8 Once again, I just pulled it out for ease of reference.

9 102 is another map, Figure 4 of Erick Powell's
10 report.

11 103 is another photograph that's contained in
12 Erick Powell's report as Figure 9.

13 104 is another photograph, Figure 10 of Erick
14 Powell's report.

15 105 is another map, Figure 5 of Erick Powell's
16 report.

17 106 is a photograph taken by Erick Powell,
18 Figure 11 of his report.

19 Exhibit 107 is an example of the Big Wood
20 Canal Company records. I just pulled the year 1982.
21 This document is also contained in Erick Powell's report
22 as Exhibit -- or Appendix, I believe it's K. So they
23 are duplicative as to what's in the report, but I pulled
24 them out for ease of reference.

25 We also have a map very similar to the one

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1 that's already up there that we put together just for
2 demonstrative purposes so that everybody could get the
3 big picture. I don't know if you want to mark that as
4 an exhibit or if you just want to keep it for
5 demonstrative. It doesn't matter to me particularly.
6 It's in the record, but...

7 THE HEARING OFFICER: Where is the name?

8 MS. VONDE: It's right up here.

9 THE HEARING OFFICER: Okay. The map, is it
10 identical to the map that's posted here?

11 MS. VONDE: No. It is different.

12 THE HEARING OFFICER: I think we need to have
13 it marked as a separate exhibit then, because you may
14 want to illustrate or depict other --

15 MS. VONDE: So this is where we run into that.
16 It might be slightly nonsequential. It will be 109.

17 But Lynn Harmon will testify to that probably before we
18 get to Erick Powell, so...

19 And then 108 is our certified water examiner
20 report. And within that document there are several

21 appendixes, and some of those appendixes probably will
22 be duplicative to some of the things that Emmi is
23 offering. Like the application of permit are in there.

24 Those sorts of things that are from the back file might
25 be duplicative.

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1 I think I might have trouble pulling those out
2 and referencing her documents instead, so I will just --
3 my plan is to just reference Exhibit 108, the appendix,
4 and then the Bates page number that we have on there as
5 a way of getting us to the right spot.
6 THE HEARING OFFICER: And these documents, I
7 have them lettered A through O? At least in my binder?
8 MS. VONDE: I believe that the appendixes go
9 up through K.
10 THE HEARING OFFICER: They go through O.
11 MS. VONDE: They go through O?
12 THE HEARING OFFICER: Yes.
13 MS. VONDE: Oh. I'm not going to reference O.
14 THE HEARING OFFICER: Well, the reason for my
15 question is that these appendixes are cross-referenced
16 in the report itself?
17 MS. VONDE: Correct.
18 THE HEARING OFFICER: And so I think it's
19 important, even though they're duplicative, to have them
20 be a part of it.
21 MS. VONDE: Yeah. My intention is to just
22 offer the report as one big document.
23 THE HEARING OFFICER: Yeah. Okay.
24 MS. VONDE: Yeah.
25 THE HEARING OFFICER: And I might just note,

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1 where are the official exhibits that will go into the
2 record? Are they in a binder?
3 MS. VONDE: One of the copies I provided, I
4 guess, was intended to be -- because I provided three
5 copies to the Department.
6 THE HEARING OFFICER: And the only reason that
7 I'm calling attention to it is that the binders and the
8 punch holes that punch through the exhibit --
9 MS. VONDE: The exhibit numbers.
10 THE HEARING OFFICER: -- aren't interfaced on
11 mine. So I don't have an exhibit number on these. So
12 even though they're premarked, the pre-marking is now
13 not there. And so I think we need to either attach and
14 do that, but we need to attach exhibit numbers to the
15 exhibits themselves.
16 I mean, certainly they're numbered in the
17 binder itself. But if they ever came out or weren't
18 attached, you may have trouble finding or determining
19 what they are. So maybe at a recess or something,
20 Kimberly, we can work through and mark at least this set
21 that's in front of me. And then people can write or do
22 whatever they need to to ensure that the document is
23 identified.
24 Okay. So we've worked through these. I
25 assume, Joe, you've seen these documents previously?

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1 MR. JAMES: I have, Your Honor, and I don't
2 believe I got a hard copy of Exhibits 1 through 8. But
3 I have reviewed them. I don't have any objection to the
4 admission. But when the time comes, I might need an
5 opportunity to have some copies or make some copies
6 here.
7 THE HEARING OFFICER: So you referred to 1
8 through 8. I'm assuming you're referring to 101 through
9 108.
10 MR. JAMES: That's correct.
11 THE HEARING OFFICER: We're not going back to
12 the 1 through 8 that Emmi just talked about.
13 So 101 through 108 you don't object to the
14 admission of these documents?
15 MR. JAMES: No.
16 THE HEARING OFFICER: Okay. All right. And,
17 Kimberly, are you tracking the exhibits that are
18 admitted into the record?
19 MS. ENGLISH: Yes.
20 THE HEARING OFFICER: Okay. So then Exhibits
21 101 -- and these would be Water Board exhibits. 101
22 through 108 are received into evidence.
23 MS. VONDE: 100.
24 THE HEARING OFFICER: I'm sorry. 100. I had
25 that page turned. Sometimes people start with 101, so I

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1 skipped it. So correction. Exhibits 100 through 108
2 are received in evidence.
3 MS. VONDE: And 109, as well? The big map?
4 THE HEARING OFFICER: And 109.
5 And you looked at the map, Joe?
6 MR. JAMES: Yes.
7 THE HEARING OFFICER: Okay. All right, good.
8 (Exhibits 100 through 109 admitted.)
9 THE HEARING OFFICER: All right. Now, Joe, do
10 you want to work through yours?
11 MR. JAMES: We can.
12 THE HEARING OFFICER: I mean, we don't have
13 to.
14 MR. JAMES: What I would suggest, Director, is
15 maybe prior to me putting on my proof -- I believe I go
16 last. I think I can get a number of them and crank it
17 out at that point.
18 THE HEARING OFFICER: Okay. All right. So
19 let's just stall and put off the review of those
20 exhibits. Maybe we can do that when Joe begins
21 presentation of his evidence. Okay.
22 MS. VONDE: I did have one additional thing I
23 wanted to bring up. Based on our conversation in the
24 status conference in an issue that Mr. James brought up
25 at that time, I did some additional document searches

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1 regarding the permit conditions. And so I do have some
2 additional documents that, if necessary -- I don't know
3 exactly what Michele is going to testify to in terms of
4 those permit conditions or if that is even really a
5 subject of this hearing today in terms of whether or not
6 those permit conditions were met, but I am prepared to
7 address that, and that does involve quite a few extra
8 documents.

9 Some are from the back file. Some are from a
10 file that is housed at IDWR for the Lower Snake River
11 Aquifer Recharge District. And they have been disclosed
12 during discovery, but I did not mark them as exhibits.
13 So I don't know if you want to work through that now, if
14 you want to wait until we see Michele's testimony about
15 those permit conditions, what the preference is.

16 THE HEARING OFFICER: Because the Department
17 is actually calling the witness presenting evidence, I
18 would consider the exhibits that you're referring to as
19 rebuttal exhibits and probably not necessary for initial
20 marking --

21 MS. VONDE: Okay.

22 THE HEARING OFFICER: -- because they're not
23 exhibits that will be offered for your case in chief.
24 And so I don't see any need to mark those right now.
25 They could be worked through. You can determine whether

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1 I think Michele is the only witness that the Department
2 intends to offer. Emmi Blades will examine Michele to
3 assist with the presentation of the testimony. And then
4 the parties will have an opportunity to cross-examine
5 Michele. And then we will go through redirect and
6 recross and then be done.

7 And then because of the way in which we
8 structured the burden of proof and the Board's
9 responsibility to bear the burden the proof, as I
10 previously determined, then, Ann, you'll go first in
11 presentation of evidence. And then following your
12 presentation and your case in chief, then certainly,
13 Joe, you'll have an opportunity to cross-examine.

14 And in these administrative hearings, you
15 know, there's some relaxation of normal rules, but we'll
16 follow them generally in that order in examination,
17 cross-examination, redirect, recross, and then be done.
18 I sometimes reserve to myself the opportunity to
19 question witnesses at the end. And if I do, I'll give
20 you each a chance to go after the witness at least one
21 more time. And so, anyway...

22 And Emmi may whisper in my ear, Well, this guy
23 I want to ask a question, so...

24 All right. Any other questions or issues that
25 we need to talk about?

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1 you need to offer those through rebuttal or in larger or
2 rehabilitate, whatever the circumstances are and the
3 testimony is. Is that acceptable?

4 MS. VONDE: That works for me. Thank you.

5 THE HEARING OFFICER: Okay. All right. Well,
6 thanks for working through this exercise. I think it
7 will help us speed up the ultimate presentation of
8 evidence and shorten the hearing.

9 Now, we've talked about the order of
10 presentation of evidence. And to begin with, the
11 Department wants to, because there was at least a
12 partial field exam conducted by Michele Edl -- and I
13 don't refer to it as "partial" as being incomplete,
14 Michele. I just know that there was an examination
15 initially by a certain fine field examiner. And then
16 because of some concerns, at least it's my
17 understanding, on the part of the Department, Michele
18 was asked to further examine what the beneficial use
19 was, the extent of beneficial use, which she did. And
20 so I want to ensure that, Michele, you don't think that
21 I'm referring to something incomplete.

22 So, anyway, part of me felt it was necessary
23 to at least get that information into the record, and I
24 don't have any idea what that presentation will be, but
25 I think it's helpful to all of us. And then from there,

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1 (No verbal response.)

2 THE HEARING OFFICER: All right. Let's begin.
3 Call your witness.

4 MS. BLADES: Director, I'd call Michele Edl to
5 the stand.

6 THE HEARING OFFICER: Okay.

7 MICHELE EDL,
8 having been called as a witness by IDWR and duly sworn
9 to tell the truth relating to said cause, testified as
10 follows:

11 THE HEARING OFFICER: Please be seated. And,
12 Emmi, you may question the witness.

13 MS. BLADES: Thank you, Director. And thank
14 you, Michele.

15 DIRECT EXAMINATION

16 BY MS. BLADES:

17 Q. Again, I'm Emmi Blades, attorney for the
18 Department. If you can't understand any question I ask,
19 please feel free to ask me to restate it. Or if you
20 can't hear me, or if Kimberly says anything and you
21 can't hear, let me know, and I'll try to speak up and be
22 clear.

23 So, Michele, will you please state your full
24 name and spell it for the record.

25 A. My name is Michele Edl. It's spelled

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1 M-i-c-h-e-l-e, E-d-l.
2 Q. Thank you. And, Michele, what is your current
3 job title?
4 A. My title is water resource agent, senior.
5 Q. And how long have you worked in your current
6 position for the Department?
7 A. Since April of 2014.
8 Q. Okay. Did you work for the Department prior
9 to that?
10 A. Yes. I was hired in June of 2007.
11 Q. Okay. How many license reviews have you
12 conducted for IDWR since 2007?
13 A. A few hundred.
14 Q. Okay. What is your education?
15 A. I have two bachelors' degrees from the
16 University of Wyoming. My first degree was in music.
17 It's a Bachelor of Arts in music. My second degree is
18 in civil engineering.
19 Q. Thank you. Do you understand why you're here
20 today?
21 A. Yes.
22 Q. And the director sort of spoke to this
23 earlier, but could you please explain your understanding
24 of why you're here today.
25 A. This hearing is for discretion of the

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1 beneficial use found under permit 37-7842. And I did
2 the review for the licensing of that right.
3 Q. So you completed the license review for this,
4 this permit. Now, could you just briefly describe a
5 big-picture review of the Department's review license
6 process.
7 A. When a permit comes to fruition and we have a
8 field exam that has been completed on that permit, my
9 job at licensing is to compare what the field examiner
10 found with the conditions and the elements of the permit
11 and recommend what I see is consistent from what the
12 field examiner found and what is consistent with the
13 initial permit.
14 Q. Okay. Do you understand that the primary
15 question in this hearing is about the extent of
16 beneficial use that occurred pursuant to this permit?
17 A. Yes.
18 Q. Okay. Michele, would you please turn to IDWR
19 Exhibit 1 on page 2. Have you seen this document
20 before?
21 A. Yes.
22 Q. And what is it?
23 A. This is the water right license for Water
24 Right No. 37-7842.
25 Q. Okay. And who was the license issued to?

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1 A. The license was issued to the State of Idaho,
2 Idaho Water Resource Board.
3 Q. Okay. And the purpose of use?
4 A. Groundwater recharge.
5 Q. And what is the source?
6 A. The source is Little Wood River.
7 Q. And the diversion rate?
8 A. Maximum diversion rate is 250 CFS.
9 Q. And the annual diversion volume?
10 A. The maximum diversion volume is 13,900
11 acre-feet.
12 Q. And what about the point of diversion?
13 A. A single point of diversion is located in Lot
14 4, southwest quarter of the southeast quarter, Section
15 25, Township 4 south, Range 19 east, Boise-Meridian,
16 Lincoln County.
17 Q. Thank you. And what's the place of use?
18 A. The place of use is within two township range
19 sections, four government lots total; two in Township 4
20 south, Range 19 east, Section 35, in the southeast
21 quarter.
22 The other two are government Lots 1 and 2 in
23 Township 5 south, Range 19 east, Section 2, in the
24 northeast quarter.
25 Q. Okay. Thank you. Michele, will you turn now,

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1 please, to IDWR Exhibit 2. And have you seen this
2 document before?
3 A. This is the license review memo that I drafted
4 to document my review process and my findings in this
5 water right 37-7842.
6 Q. Okay. Now, let's walk through how you
7 determined the beneficial use that occurred during the
8 development period for this permit.
9 First, was that development period June 2,
10 1982 to June 1, 1992?
11 A. Yes.
12 Q. And was that development period confirmed by
13 an order issued in this case?
14 A. Yes. James Cefalo issued an order in November
15 of 2011.
16 Q. Okay. Thank you. Now, let's talk about the
17 original application for the permit itself.
18 Michele, would you please turn to Exhibit 3 in
19 the binder. And have you seen these documents before?
20 A. Repeat that. I'm sorry.
21 Q. Have you seen these documents before?
22 A. Yes, I have.
23 Q. And what are they?
24 A. This is the application for permit, and the
25 final page I believe is the notice of publication, how

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1 it appeared in the local paper. The application for
2 permit in those days, once this document was signed,
3 also became the permit. So the application and the
4 permit are, in essence, the same document.
5 Q. Okay. Thank you. Now, let's go through this
6 permit. What is the purpose of use for the permit?
7 A. The purpose of use is listed in number 4 on
8 the first page as "GW recharge," which I understood to
9 mean groundwater recharge.
10 Q. Okay. And what is the diversion rate?
11 A. The applicant requested 800 CFS.
12 Q. Okay. And for what period of time?
13 A. Year-round January 1 through December 31.
14 Q. Okay. What are the sources for the permit?
15 A. In number 2 on the application, first page of
16 the application, the source of water supply, Little Wood
17 and Big Wood are listed to return to Snake. Those, I
18 understand, are the Big Wood River and the Little Wood
19 River.
20 Q. Those give you a chance to stand up for a
21 second, if you want.
22 So just we've got this map marked as IDWR
23 Exhibit 4. I thought it might be helpful just for
24 Michele, if you would please stand up and maybe point
25 out the Big Wood and the Little Wood River on the map

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1 that are identified as the sources for the permit.
2 A. The Big Wood River begins somewhere in the
3 middle of this map. Just we don't have Magic Reservoir
4 included. We just have the southernmost shore of Magic
5 Reservoir.
6 Big Wood River begins at Magic Reservoir and
7 proceeds roughly south on most of this map, and then it
8 heads to the west. It's in a soft blue color on this
9 map. I don't know how old, reproduced, otherwise.
10 The Little Wood River begins in the upper
11 right-hand corner and proceeds southeast across the map,
12 and it's in a little bit darker shade of blue.
13 Q. Thank you. Michele, while you're up there,
14 would you discuss what the proposed diverting works were
15 and point those out on the map.
16 A. The proposed diverting works were the
17 Richfield Canal, which comes from early on in the Big
18 Wood. It takes water from the Big Wood, and it carries
19 it to the south and east. The Richfield Canal becomes
20 or is joined to the West Main Canal, the East Main
21 Canal, and the Jimmy Byrne Slough, which is kind of a
22 light green color in this. They form -- well, honestly,
23 it looks like a Christmas wreath. I guess that's the
24 time of year that we're doing this.
25 The Jimmy Byrne Slough dumps into the Little

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1 Wood River.
2 Q. And was the other proposed diverting works --
3 A. The other conveyance that was listed on the
4 permit was the Dietrich Canal, which begins from the
5 Little Wood and proceeds south and then eventually
6 rests, and it's kind of a beige color.
7 Q. Okay.
8 A. So there's a lot of territory that gets
9 covered by this map.
10 Q. Okay. Thank you. While you're up there,
11 would you please point out the point of diversion, the
12 permitted point of diversion on that big map.
13 A. The Department didn't get --
14 Q. If you can just point it out quickly, then we
15 can sit down and talk about that.
16 A. Okay. The best guess was a nominal shape in
17 the middle of this quarter-quarter as the place, the
18 point of diversion for the application. We did not get
19 a map that showed that's where it was.
20 Q. Okay. Go ahead and sit down, and we can talk
21 further about that. Thank you.
22 Let's look back. We're at IDWR Exhibit 3,
23 still. You're on page 75. And can you just describe
24 what the description is of the point of diversion on
25 this application?

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1 A. The point of diversion is Item No. 3 on that
2 first page. It's described as the southwest quarter of
3 the southeast quarter of Section 24, Township 4 south,
4 Range 19 east, Boise-Meridian, Lincoln County.
5 Q. And is that how the point of diversion was
6 advertised, if we went to the last page of IDWR Exhibit
7 3, page 80?
8 A. Yes. It was basically advertised as it had
9 been applied.
10 Q. Okay. Thank you. Is that point of diversion
11 there either the Big Wood River or the Little Wood
12 River?
13 A. No. Although the application that requested
14 surface water from the Little Wood River and the Big
15 Wood River, that point of diversion is not really
16 located near either river. It's especially distant from
17 the Big Wood.
18 Q. Okay. Thank you. Now, let's turn to page 77
19 of this Exhibit 3 here and talk about the place of use.
20 What can you tell us about the place of use for this
21 permit?
22 A. Again, the Department did not get -- the
23 preferred is a land list. A map that's attached to --
24 referred to help us make sure that we got the land list.
25 In this case, we did not get a land list from the

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1 applicant. We got a map, and I have a black and white
2 version of that in front of me.

3 The map displays the Lower Snake Aquifer
4 Recharge District, the boundaries of the district, and
5 nine amorphous sites that are numbered. Seven is the
6 most difficult to read. It's cut off a little bit in
7 our exhibit.

8 I found that the Department was somewhat
9 confused. They appeared to be somewhat confused about
10 the place of use, maybe because we didn't get a land
11 list, we just got a map.

12 So what was advertised was a list of township
13 and range that cover the Lower Aquifer Recharge
14 District. The land list for the advertisement lies
15 nicely across the boundaries of that district.

16 Q. And that advertisement you're looking at, I'm
17 sorry, is that page 80 there of the exhibit?

18 A. Yes.

19 Q. Okay. Thank you.

20 A. So the advertisement says this is the place
21 and use, and it lists the township and range within the
22 Lower Snake Aquifer Recharge District. It also lists a
23 second land list, a shorter list, and prefaces it with
24 "possible sites for rechargeable water are within the
25 following described lands" and lists Sections 15, 16,

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1 21, 22, 28 in Township 5 south, 19 east. So there were
2 sort of two places of use advertised.

3 Q. Okay. And if you look back to the map on page
4 77, I guess, which of the recharge sites of the one
5 through seven, I guess, or nine, excuse me, that are
6 identified on the map fall within that Township 5 south,
7 Range 19 east?

8 A. The only one is the site numbered six.

9 Q. Okay.

10 A. And on the original document that site has --
11 the hash marks carried through, but the hash marks are
12 red. It's the only red-identified site in the file.

13 So with that identification and with the land
14 list for possible recharge sites, I honed in on sites
15 that were in that township and range, in particular, to
16 try to come to this area.

17 Q. Okay. Thank you. Let's turn to the
18 beneficial use field reports you reviewed. So in your
19 memorandum, you say that there were two beneficial use
20 field reports submitted by a certified field examiner,
21 Gerald Martens --

22 A. Yes.

23 Q. -- that you looked at the license review for
24 this permit.

25 Would you please turn to IDWR Exhibit 5. Have

Page 36

1 you seen this document before?

2 A. Yes. This is the beneficial use field report
3 that the Department received in November of 1993, which
4 was the latter of the two exams.

5 Q. Okay. And you reviewed this as part of your
6 licensing review?

7 A. Yes.

8 Q. Let's talk about this field report a little
9 bit. Did Gerald Martens' report, the report, only
10 address permit 37-7842?

11 A. No. He lists another permit. That permit
12 number is 01-7054.

13 Q. Could you briefly explain maybe why Gerald
14 Martens included that in this report.

15 A. As I understood it, the same parties were
16 pursuing a permit that was in the same stages of
17 development, started at the same time, proceeding
18 through the development steps at the same rate, and it
19 was water from a different source, and that would have
20 been the major difference between the two.

21 Q. Okay. And what sources did the report
22 identify?

23 A. The beneficial use field report lists sources,
24 the Snake River and the Big Wood River.

25 Q. For your license review purposes, was the

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1 Snake River something you were considering?

2 A. No.

3 Q. Okay.

4 A. My assignment was to review the report with
5 reference to 37, based on 37, and that means the Little
6 Wood River and the Big Wood River, not the Snake River.

7 Q. Okay. Thank you. And what point of diversion
8 did the report identify?

9 A. Mr. Martens listed a single point of diversion
10 that's slightly in the wrong column, but I think he
11 intended it to be the southeast quarter of the northeast
12 quarter of Section 22, Township 5 south, Range 17 east,
13 in Lincoln County.

14 Q. Okay. Let's look at the map that was attached
15 to this report, and that's at page 87 in IDWR Exhibit 5.

16 Can you describe what this map made you think
17 about the examiner's recommended point of diversion?

18 A. On this lined map are two leaders, engineering
19 leaders. One is labeled "recharge site." The other
20 leader is labeled "diversion structure."

21 "Recharge site" is pointing to or ending at
22 the Milner-Gooding Canal between Stations 57 and 56. My
23 concern with that -- and that does match the land list
24 that he gave us for the point of diversion. My concern
25 was that the Milner-Gooding Canal is not a natural

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1 waterway. Points of diversion are expected to be taken
2 from a natural waterway.

3 So what appeared to me as the point of
4 diversion that he had listed actually may have been
5 something I would have characterized at that point of
6 re-diversion.

7 Q. So did this map raise questions for you then
8 about what the source -- or, I'm sorry, what the source
9 could be for this recharge site?

10 A. Yes. The Milner-Gooding Canal -- my
11 understanding of the water carried typically in the
12 Milner-Gooding Canal comes from Milner and the Snake
13 River.

14 Q. So this raised questions for you right away
15 about what the source could have been?

16 A. Yes.

17 Q. And did this -- you mentioned that it
18 identifies the diversion structure?

19 A. Yes.

20 Q. Is that the structure you currently understand
21 to be the bifurcation?

22 A. Yes. And it is at the crossing of the Little
23 Wood River with the Milner-Gooding Canal. And it wasn't
24 obvious from the map how those two flows cooperated; if
25 they commingled or if they crossed and were separated.

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1 The map is not clear. And I learned that the structure
2 that makes that happen was called the bifurcation.

3 Q. Okay. And looking at this map, I guess, and
4 having this diversion structure identified, did that
5 lead you to wonder how the river structure worked --

6 A. Yes.

7 Q. -- and lead you to go out and visit it to
8 understand how it worked or at least figure out how it
9 worked?

10 A. (No verbal response.)

11 Q. Okay. Let's look at page 81 again in this
12 exhibit, and we'll talk about the place of use that the
13 report identified. Go ahead.

14 A. The place of use is 9 -- 8, 9 -- course in
15 Section 22, Township 5 south, 17 east.

16 Q. Would you be able to point that out just on
17 the large map up here? I think you can just describe
18 it --

19 A. Yes. We plotted those, and they appear as
20 the -- it's labeled "Shoshone CFE, place of use." When
21 we created the place-of-use shape or recreated the
22 place-of-use shape, it overlapped considerably the site
23 that we know as the Shoshone recharge site. And CFE is
24 certified-for-exam place of use.

25 Q. Thank you, Michele. Would you turn to page 84

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1 of Exhibit 5, IDWR Exhibit 5. And we'll just finish up
2 our talk here in a little bit about this report.

3 What beneficial use did the report recommend?

4 A. He recommended groundwater recharge.

5 Q. Okay. And during what period?

6 A. Year-round.

7 Q. And at what rate of diversion?

8 A. 300 CFS.

9 Q. Did you have concerns about this recommended
10 rate of diversion?

11 A. Yes, I did.

12 Q. Let's explore why. If you can look at page 88
13 of the report. Did this table raise concerns for you?
14 And can you describe what the table is?

15 A. Yes. This is a summary provided by the field
16 examiner. It was an attachment to his report. It's
17 titled "Summary of Recharge Records for Lower Snake
18 River Recharge, Permit No. 1-7054 and 37-7842."

19 So he considered this for both permits. It
20 has a table with dated rows. The dates are from April
21 7, 1986 through April 30, 1986. The columns are labeled
22 "JBS 14, 53, -4, -5, -6, -7" and a special column headed
23 "Recharge." And the farthest columns are labeled
24 "Possible Recharge from the Big Wood" and "Possible
25 Recharge from the Snake River."

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1 When I saw this table the first time and
2 compared it to what he had recommended as the rate, I
3 found a disconnect. The column that's headed "Recharge"
4 on April 18, '86, he has documented 322 CFS, but he
5 recommended only 300. And that was my first puzzle.
6 Usually it's at least equal to what the field examiner
7 found. So that was my first question.

8 He has put some footnotes on this table that
9 indicate these were not just measurements. They were
10 also calculations. And the calculation for recharge,
11 that column that I just mentioned, is 56 minus 57. So
12 one of the first things I did was to try to duplicate
13 that simple formula and come up with his numbers, and
14 that was my second concern.

15 Beginning Row 2, April 8, 1986, Column 56 has
16 nothing in it. Column 57 has. And the recharge has the
17 same as in 57. There is no subtraction happening. It's
18 just that number moved over.

19 So it didn't follow the formula that he gave
20 me. There are a couple of rows that are like that that
21 made me pause. Most of the time I was able to come up
22 with a number relatively close, just using his numbers
23 at face value and using that simple calculation.

24 Then a third concern, I couldn't duplicate
25 those measuring station numbers. I couldn't find them

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1 in the watermaster's books. I could find the stations.
2 I could find the Station 53. I could not find those
3 numbers, those flow numbers. And I have the published
4 versions of the watermaster's book.

5 This report was written in, I understand, 1993
6 on data that was from 1986. And so I was puzzled about
7 why the Black Book, the watermaster's Black Book
8 numbers, the published numbers, were not used in this
9 table.

10 And maybe last, but not least, in addition to
11 those other concerns, my understanding of what the Big
12 Wood system does at this location versus what the Snake
13 River does at this location, those two columns on the
14 right-hand side didn't make sense. The quantities
15 didn't make sense for me. So I had quite a few
16 questions about the data in the table.

17 Q. Okay. And so based on this review, you had
18 some questions. Were you satisfied that this report
19 accurately reflected what the beneficial use was?

20 A. No. There were too many questions.

21 Q. And I guess based on that review, did you
22 decide you needed to visit the bifurcation --

23 A. Yes.

24 Q. -- for your licensing?

25 A. Yes. It was important to understand what that

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1 structure did.

2 Q. Okay. Let's talk about your trip to go see
3 the bifurcation. Who did you arrange to meet with?

4 A. I spoke with Lynn Harmon, who was then manager
5 of the Big Wood Canal Company, and asked in particular
6 if he had drawings, interior drawings of the
7 bifurcation, and if he had clearer ledger pages from the
8 year that was the review year for the field examiner.

9 Q. What year was that?

10 A. 198- -- watch me get it wrong. 1986? We
11 didn't -- as a department, did not have any engineering
12 drawings. We didn't seem to have any photos. I asked
13 around. I did a search before launching on a field
14 trip. We had neither readily available photos or copies
15 of the engineering drawings or flow-rate occurs or
16 things that would help me understand what happened with
17 that location.

18 So I made some phone calls. One of them was
19 to the watermaster, the current watermaster, and another
20 to the Big Wood Canal Company. And Lynn Harmon agreed
21 to meet with us. I think my memory says that he stated
22 he had copies of the engineering drawings, and I didn't
23 quite jump for joy, but it was pretty close. I was very
24 interested in seeing those. So we made arrangements to
25 come to his office and, if possible, get copies.

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1 Q. Okay. And when did that visit occur,
2 approximately?

3 A. July. Early July in 2014.

4 Q. Okay. And at that visit, did you then
5 actually obtain documents?

6 A. Yes. He was very generous with his time and
7 with his staff's time. He provided me a copy of the two
8 pages that I thought were most critical of the
9 engineering drawings for the bifurcation and provided me
10 copies of the ledgers, the handwritten ledgers from the
11 watermaster's reports.

12 I don't remember as well as I'd like if I
13 asked for which years. I know which years he gave me.
14 I think I asked for a clearer copy of what we had in the
15 water right file for '86, but I also was interested in
16 what I knew were big water years, and so we settled on
17 getting some copies of the ledgers from 1984.

18 Q. Okay. Why don't you take a drink there.

19 A. Yeah, I'm losing my voice.

20 Q. Did Mr. Harmon act as your guide to the
21 bifurcation that day?

22 A. He did. He was very generous with his time.
23 He guided us. There was no way I would have been able
24 to find it through the canal roadways. He took us to
25 the bifurcation and to the head of the Dietrich Canal.

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1 And then his time didn't allow, so he left us. And the
2 "us" was Shelley Keen, at that time manager of the
3 section, and myself.

4 Q. Okay. Let's talk about the bifurcation itself
5 now when you were out there seeing it. Would you mind
6 just pointing it out on the big map there. It's
7 labeled.

8 A. Bifurcation is right where the Milner-Gooding
9 Canal in yellow is crossing. And the Milner-Gooding
10 Canal flow is flowing, typically, from south to
11 northwest.

12 The Little Wood is the other river that's at
13 that intersection. And the Little Wood is flowing, as I
14 stated earlier, from the right-hand corner to the
15 left-hand corner.

16 Q. And the bifurcation is marked right there at
17 the intersection it goes to?

18 A. Yes.

19 Q. Okay. Thank you. Now, let's look at your
20 memo and IDWR Exhibit 2. And you have some photos of
21 when you were out there, and those start at page 47 in
22 Exhibit 2. Are you there?

23 A. Yes, I'm there.

24 This first photo, this photo that was my log
25 of the other photos that I took, this is a bird 's-eye

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1 view of the bifurcation in action.
2 The Milner-Gooding Canal is at the bottom
3 right. The flow is flowing from the bottom to the top
4 of the page. The Little Wood is flowing from the upper
5 right-hand corner to the lower left-hand corner.
6 Have you found it?
7 THE HEARING OFFICER: So just for
8 clarification, we're looking at page 47?
9 THE WITNESS: Yes.
10 MS. BLADES: It's marked as IDWR 47 in Exhibit
11 2, and we're looking at it. Michele is viewing it as
12 she discusses it in a landscape kind of view.
13 So the bottom, there's a label. It says
14 "Bifurcation," and then it's dated 7-9-2014, photo
15 location, water right 37-7842.
16 THE WITNESS: Are we there? Okay. You're
17 okay?
18 Okay. Again, this is the bifurcation, and the
19 Little Wood is flowing from upper right to lower left.
20 The Milner-Gooding is flowing from the bottom to the
21 top. And the bifurcation is somewhat in the middle of
22 that page.
23 BY MS. BLADES:
24 Q. Can you describe how the Milner-Gooding Canal,
25 how water flows through the siphon and then that white

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1 area that we see and then daylight again on the other
2 side? Can you describe that?
3 A. Yes. The bifurcations are really a unique
4 structure. It has dual purpose. One purpose is flow
5 control, and the other is a siphon. The turnout lane is
6 seen best as the whitest water heading from the
7 Milner-Gooding Canal into the Little Wood. That's the
8 turnout lane.
9 The siphon begins at what looks like an empty
10 box or a black box. That's where the head of the siphon
11 is. And the water in that siphon goes underneath the
12 Little Wood River to cross to the other side of daylight
13 again as the Milner-Gooding Canal.
14 We don't see the crossing as well as I'd like.
15 I've got trees shadowing the intersection a little bit.
16 You can't see exactly where it daylight, but it's
17 there.
18 So we have flow -- a single flow lane coming
19 into the bifurcation and two flow lanes going out. One
20 goes underneath the river and crosses to the other side,
21 and the other joins the river, the Little Wood River.
22 Q. Okay. Thank you. Let's walk through Photos 1
23 through 5, specifically, and they just follow on page 47
24 sequentially.
25 So if we turn to IDWR page 48, that Photo

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1 No. 1, could you please describe this?
2 A. This is a photo taken close to where the
3 buttress is. The concrete buttresses begin at the
4 bifurcation. So it's looking downstream, down canal,
5 from above to look at the bifurcation. So this is the
6 flow going in.
7 Q. And this is the Milner-Gooding Canal?
8 A. This is the Milner-Gooding Canal.
9 Q. And let's look at Photo 2. Could you please
10 describe this photo, what it shows?
11 A. Photo 2 is near the catwalk that we saw
12 looking at this photo. It shows the water splitting.
13 At least some of it shows it splitting. There's a
14 spillway where the water becomes whiter, is oxygenated,
15 and it becomes much whiter and bubblier. That's the
16 water headed into the turning lane.
17 You can see the top lintel of the siphon box
18 on the right-hand side. That's where the water is
19 splitting. We're still looking down the canal towards
20 the Little Wood.
21 Q. Okay. Now, let's look to Photo No. 3. Can
22 you please describe what this photo shows. It's on IDWR
23 page 50.
24 A. This photo is looking upstream, up canal, from
25 a place close to where the hoist, the second hoist, the

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1 gate hoist is. It also shows the spillway of the water.
2 So water behind that spillway goes into the siphon.
3 Water that cascades across that spillway goes into the
4 turn lane.
5 Q. Okay. Now, let's turn to the next page, page
6 51, and this is Photo 4.
7 A. This is a narration of the same location
8 somewhat. You can see the water. The nearest water is
9 the turnout lane water. Farther back in the photo is
10 the edge of the siphon.
11 Q. Okay. Now, let's look to the last photo,
12 Photo No. 5. Could you please describe that photo.
13 A. This is a photo of the Little Wood River. As
14 the water from the siphon joins it, you can see the
15 frothier, whiter water entering the Little Wood in the
16 lower right-hand corner.
17 Q. Okay. Thank you. Now, let's look at the
18 engineering drawings that you got from Lynn Harmon
19 en route on your visit. They're on the next page, IDWR
20 page 53. Can you describe what these drawings show and
21 tell us what they told you about this structure?
22 A. The most interesting for me were the two top
23 drawings, the plan and the elevation of this. So the
24 sections that are below were of less interest than the
25 plan and the elevation.

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1 The first, the topmost, is the plan. So we're
2 looking again, from above, at the bifurcation structure
3 as it was built. These are as-built plans.

4 The left side is the entrance. The right side
5 is the exit back to across the river. And in between is
6 the turnout lane. The section right below that is how
7 we would see it if we were looking at it edge-long, and
8 it shows against the same length, but it shows that the
9 canal begins on the left-hand side, dips down -- the
10 siphon is the thinnest part in the middle -- and then
11 rises back up towards the right.

12 This helped me understand how it was intended
13 to operate. This is the design conditions. There's one
14 entrance and two exits. The other thing that I noted
15 when I saw the full scale, and it's hard to see, was the
16 hydraulic properties. The design properties for this
17 were close to splitting the flow in half. It was
18 designed to send 500 CFS down the turnout lane and
19 approximately the same amount down the siphon.

20 Q. Okay. So did you have discussions with
21 anybody about whether -- let me back up.

22 So did these drawings, I guess, lead you to
23 believe that water from the Milner-Gooding Canal would
24 flow just through into the Little Wood River?

25 A. It was designed to flow from left to right

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1 across the page.

2 Q. Okay.

3 A. The time that we were out there, that's the
4 direction it was flowing. I believe because of the flow
5 rates that the examiner lists, that that was likely the
6 direction it was flowing when he was documenting his
7 beneficial use.

8 Q. Okay. Did you discuss with anybody whether
9 Little Wood water could back up and get into that siphon
10 and then end up in the Milner-Gooding Canal?

11 A. I did, because I needed source clarification,
12 how we could get sources that were quite distant to the
13 recharge site that had been identified for us. I asked
14 is it possible. I don't remember if I asked,
15 point-blank, Lynn. But I know I asked point-blank to
16 Kevin Lakey, the watermaster: Can water go upstream
17 basically? Or can it go in the reverse direction?

18 The design direction is as I've stated. I
19 asked if flow could go in reverse. And at least I
20 remember Kevin saying yes. But his disclaimer was that
21 the Milner-Gooding Canal would have to be empty or
22 nearly empty at the same time that the Little Wood River
23 is flowing.

24 So, yes, he believed that Little Wood water
25 could back up into the siphon and proceed down the

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1 Milner-Gooding Canal from this location.

2 Q. Okay. And when would that be a possibility,
3 or what was your understanding of when that would be a
4 possibility?

5 A. My understanding of the operations of the
6 Milner-Gooding Canal is that it's emptied in the
7 wintertime. The data that I was able to retrieve off
8 the Bureau of Reclamation's website, the HydroNET, there
9 is nothing but zeros in the wintertime.

10 That could mean that it's flowing at a rate so
11 small that it's not recording anything. It could mean
12 the recorders aren't working. But it was several years
13 of zeros. Typical for the Milner-Gooding Canal flow
14 rates in the wintertime.

15 Of course, the Little Wood doesn't stop in the
16 wintertime. It flows in the wintertime. So it would be
17 possible in the winter to have flows from the Little
18 Wood back up sufficiently, go over the spillway
19 structure, and continue down the Milner-Gooding Canal.
20 It's possible.

21 Q. Okay. Did you have the data to -- I guess you
22 didn't. Did you feel you had the data to be able to
23 determine whether Little Wood water could have gotten
24 into the Milner-Gooding Canal and traveled to the --

25 A. The data that I found was either watermaster

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1 records for the Milner-Gooding or the Bureau of
2 Reclamation records for the Milner-Gooding, and they
3 both discontinued. There are no wintertime records kept
4 in the watermaster books. In the watermaster books.

5 The field examiner found water flowing in what
6 I would call a spring month, not a winter month.
7 Certainly when I went out there, it was summertime. It
8 was flowing. So I didn't have the support. I didn't
9 see it happen. I didn't find the data that said it
10 happened.

11 Q. Okay. So based on your visits and documents
12 you obtained, your discussions with the watermaster,
13 current Watermaster Kevin Lakey, what did you conclude
14 about the field examiner's recommendation for the
15 Shoshone recharge site for permit 37-7842?

16 A. I concluded that he likely found beneficial
17 use at the Shoshone site but that the water that was the
18 source of that beneficial use was the Snake River
19 through the Milner-Gooding Canal, not the Big Wood
20 River.

21 So I eliminated -- I also eliminated the Snake
22 River as a source of water, for my purposes, knowing
23 that the bifurcation didn't send the water directions
24 against gravity.

25 Q. Okay. And so you also eliminated the Little

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1 Wood River as a source --
2 A. I did.
3 Q. -- as a potential region to that Shoshone
4 site. So, ultimately, you didn't recommend the Shoshone
5 site in calling it as a place of use for this water
6 right?
7 A. Give that to me again.
8 Q. You didn't recommend the Shoshone site that
9 the field examiner had?
10 A. No. To be consistent, based on the 37 water
11 right number, I needed to have the source of water to be
12 the watersheds of either the Little Wood River or the
13 Big Wood River, and I did not find that to be the case
14 with the field examiner's report, that he identified
15 water arriving at the site. Because he did not provide
16 a trace, and the point of diversion was a point of
17 re-diversion, it was difficult to know what sources he
18 had recommended until I could see the bifurcation and
19 how it was intended to operate.
20 Q. Okay.
21 MS. BLADES: Director, I'm just going to note
22 the time. It's noon. I don't know if there's -- I'm
23 going to transition now into Michele's recommendations
24 for the license, and I don't know if it's a good time
25 to -- if we're all good to go and ready to push through,

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1 then I am.
2 I'm just raising it as a -- since we started
3 today a little bit later, the time is what it is. So I
4 just open that to you, I guess, for any comment or
5 suggestion or anything.
6 THE HEARING OFFICER: I'm happy to continue
7 the examination. But what are the wishes of the
8 parties? Ann?
9 MS. VONDE: Emmi, do you have an estimate on
10 how much longer you think you'll be?
11 MS. BLADES: I'd say another 45 minutes.
12 MS. VONDE: I might welcome a break, just a
13 short break.
14 THE HEARING OFFICER: Joe, where are you?
15 MR. JAMES: Oh, I'm fine with either route.
16 THE HEARING OFFICER: Okay. Let's take a
17 ten-minute break.
18 (End of Audio MZ000005.)
19 (Recess.)
20 (Beginning of Audio MZ000006.)
21 THE HEARING OFFICER: Okay, Emmi.
22 MS. BLADES: Okay. Thank you, Director.
23 BY MS. BLADES:
24 Q. Michele, we just left off with the conclusion
25 that after your trip out to the bifurcation and looking

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1 at the engineering drawings and your discussions with
2 the watermaster and with Lynn Harmon, that you
3 ultimately decided not to recommend the Shoshone site as
4 a place of use for the license?
5 A. That's true.
6 Q. Instead you recommended a site off the
7 Dietrich Canal as a licensed place of use?
8 A. Yes.
9 Q. Just real quick, let's point on the big map to
10 where this licensed place of use is.
11 A. The licensed place of use?
12 Q. Yes, please.
13 A. I have indicated on this map -- it's difficult
14 to see at this scale. It's located right here, and
15 we've got it labeled "the Dietrich site place of use."
16 Q. Okay. Thank you. And to get an up-close
17 version of this, let's look at IDWR Exhibit 1 on page 4.
18 This is just the attachment to the water right license.
19 I guess I'll let you explain that, Michele.
20 Sorry. What is this on page 4?
21 A. Okay. This shows the point of diversion from
22 the Little Wood River and the place of use in a much
23 closer perspective.
24 Q. Okay. You can sit down, if you'd like.
25 Let's turn to Exhibit 3, which again is the

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1 application for the permit itself, and there's a map on
2 page 77. Again, we've referred to this already here in
3 this hearing today.
4 Can you tell us a little bit about why you
5 looked at that Dietrich site?
6 A. There were several reasons. The first was the
7 map, that indicated this site numbered 6 and red hash
8 mark, was of particular interest or particular attention
9 to the Department. It is also the only one that was
10 within the advertised place of use -- one of the
11 advertised places of use.
12 The other blobs, the other eight sites, were
13 not advertised as the same as this site in the
14 advertisement. This one is covered under -- it's in the
15 same township and range as was advertised for places for
16 recharge water.
17 Q. Were there other reasons that you looked to
18 the Dietrich site?
19 A. Yes. The application itself states that the
20 conveyance structures will be either the Dietrich Canal
21 system or the District Canal system.
22 Q. And did Lynn Harmon and Kevin Lakey mention
23 this site in your discussions with them?
24 A. I believe they both did in the sense that they
25 knew there was another location that might have them

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1 consider recharge. I don't believe either one could
2 quote a year that it was used, but, yes, there's this
3 existing site, constructed site on the Dietrich Canal,
4 and that perked my interest in what might be there.

5 Q. I'm going to pause for just a second while
6 Wesley closes that door. Thank you, Wesley.

7 A. Thank you, Wes.

8 Q. So you went to visit the Dietrich site, I'll
9 call it, the same day that you went out to visit the
10 bifurcation?

11 A. Yes. Lynn showed us the bifurcation first,
12 guided us to the bifurcation, and then guided us to the
13 site where the Dietrich Canal headgate is off of the
14 Little Wood River. And then his time was limited, and
15 he went back to his office and left us to try to locate
16 the constructed site that he had mentioned, the other
17 site that he had mentioned.

18 Q. And when was this site constructed?

19 A. Where?

20 Q. When and by who?

21 A. From records I pulled from the Lincoln County
22 Commission, they were able to document for me, and with
23 me, that the concrete had some etching in it that dated
24 it at 1970. The date I went out there, the canal was
25 flowing quite high. I didn't go to the other side to

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1 see where it was etched. Just a few days later, the
2 canal was empty, and it was easier to get a photo.

3 I asked for information about who constructed
4 it, did we have plans, and I was told that the Corps of
5 Engineers had constructed it and that no plans were
6 available locally but that the Corps of Engineers may
7 have plans for that constructed site somewhere in one of
8 their offices. I did not pursue that any further.

9 Q. Okay. Thank you. So, again, you ultimately
10 recommended this Dietrich site as the place of use for
11 the license. And what information did you look at to
12 begin -- or to determine whether water had reached that
13 site or could have reached that site for recharge?

14 A. I believe I had an idea of which water years
15 within the development period were big water years that
16 there would have been excess water. So my pursuit of
17 use of this site was limited to the years that excess
18 water was available.

19 There were several years in the '80s, which
20 were within the development period, and so I started to
21 see if I could locate any data as my witness of the
22 event in that time frame, and I was able to find two
23 information sources that seemed to confirm that site.

24 Q. Was the first source aerial photography that
25 you went to?

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1 A. Because --

2 Q. Can we -- sorry.

3 A. Because I benefit from a gifted group of
4 people in the GIS section in the creation of ArcMap
5 layers, I used a patchwork-quilt layer of aerial
6 photography. It's got 1980 through '87 on a single
7 layer. It's a patchwork quilt. We would have to
8 identify what year the patch was in, but it contained
9 one layer with all of the years of interest to me, so I
10 did not have to go in and out of several layers to look
11 for use.

12 Q. Would you like to turn to IDWR Exhibit 6.

13 A. Yes, please.

14 Q. Can you describe what that shows and how you
15 used it here.

16 A. This is a map of the Dietrich Canal just south
17 of the City of Richfield. The colors are unusual for
18 imagery because it's infrared photography. The red
19 indicates water use, vegetation, evapotranspiration. It
20 indicates water is in the picture. The grey is not much
21 water use.

22 I had one image in front of me with all of the
23 years, 1980 through '87, and I began at the head of the
24 Dietrich Canal and traveled down the canal looking for
25 sites that had water use in the year or the years of

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1 interest to me, and I found the Dietrich site. It
2 popped out because it's red among this grey.

3 So that was one confirmation that this site
4 had been used; spread water, water discharged,
5 something, water use in that site. And when I queried
6 up what year this photo was, this patchwork photo, it
7 was 1984.

8 Q. Okay. So was this aerial photography what led
9 you to focus in on 1984?

10 A. Yes.

11 Q. Okay. In addition to this 1984 aerial
12 photography, did you look to other information to see
13 what other Dietrich Canal water could have gone to this
14 Dietrich site?

15 A. Yes.

16 Q. Let's turn to IDWR Exhibit 2 at page 13.

17 And for the parties' reference, this is --
18 well, I'll let Michele explain what this is, because
19 this is this table, if you'd like to get to it in your
20 binders.

21 I'm sorry. This is the information that you
22 looked at, and what does it show?

23 A. My table is constructed of transcription of
24 the Dietrich Canal data, which is on the following page,
25 put into a spreadsheet so I could work with the numbers.

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1 The Dietrich Canal No. 11 is the data that's on the
2 left-hand side of that page.
3 From just that data, I recognized that 1984
4 was a pretty good year in that it was approaching the
5 capacity of the canal, which I knew or had heard from
6 both Kevin and Lynn that it was approximately 400 CFS,
7 so it was flowing well that spring. The highest date is
8 the 18th of -- no, the 17th of May at 396 CFS.
9 The table on the right-hand side is my table
10 of differences, and that was constructed to eliminate
11 the quantities of water that would have been used by the
12 irrigators or the canal members.
13 I understood from Kevin Lakey, I believe
14 primarily, that there was an early-season demand in the
15 Dietrich Canal of approximately 150 CFS. And in 1984,
16 which is the year of this data, the flow begins to be
17 recorded April 1, and it's in the tens to the thirties,
18 10 to 30 CFS, up to April 19th, when suddenly the flow
19 increases to an order of magnitude more at 325 CFS, and
20 it continues. It doesn't drop back down to 30 CFS. It
21 continues in the hundreds of CFS for several more days.
22 My and table of differences takes what was
23 available on the left-hand side, subtracts that demand,
24 that 150 CFS demand off of the published data for this
25 site, and so this is the remainder we have. On my

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1 table, there are highlighted, yellow highlighted cells
2 that demonstrate excess of 150 CFS, cells that have less
3 than -- we couldn't subtract 150 CFS -- are empty. So
4 the first couple of weeks in April are empty
5 deliberately.
6 Q. So this table shows, during the period April
7 through September of 1984, and subtracting 150 that you
8 understood to be the demand out of that canal on the
9 right-hand side, that there was excess water in the
10 Dietrich Canal that could have gone into this Dietrich
11 recharge site; is that correct?
12 A. Yes.
13 Q. Okay. And, again, it sites that site that you
14 ultimately recommended as a place of use for the
15 license?
16 A. Yes.
17 Q. And you also determined that this excess water
18 diverted into this site constituted groundwater recharge
19 pursuant to the permit?
20 A. Yes.
21 Q. Okay. Michele, could you please turn to IDWR
22 Exhibit 7 at this point. Have you seen this document
23 before?
24 A. Yes.
25 Q. What is it?

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1 A. It's the application for amendment for
2 licensing purposes of the water right 37-7842.
3 Q. Did IDWR approve this application for
4 amendment?
5 A. Yes.
6 Q. And on what date?
7 A. Shelley Keen signed it July 13, 2017.
8 Q. Okay. Did this application for amendment
9 request to amend the current place of use to the one you
10 recommended off the Dietrich Canal?
11 A. Yes.
12 Q. And was the place of use you recommended the
13 place of use licensed --
14 A. Yes.
15 Q. -- for the water right?
16 A. Yes.
17 Q. Okay. Let's talk about the point of diversion
18 you recommended. You can point it out on the map, if
19 you'd like to, just quickly.
20 A. You may recall that we had a nominal shape for
21 the application for permit in, I believe it was Section
22 24. It was recognized pretty early on that that might
23 not be correct, because it's not adjacent to any of the
24 other water sources that were listed. In fact, the
25 water right file has a note from Glen Saxton saying -- I

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1 think we met this, and this should have been in 25, in
2 Section 25.
3 So the location that I chose as the point of
4 diversion from the source -- not the point of
5 re-diversion, the point of diversion from the source,
6 the Little Wood River -- is the Dietrich headgate off of
7 the Little Wood.
8 Q. Okay. Thank you. Did the application for
9 amendment that we looked at here in IDWR Exhibit 7, did
10 that request to amend the permitted point of diversion
11 to the one that you recommended then --
12 A. Yes, it did.
13 Q. -- off of the Little Wood River?
14 A. Yes.
15 Q. Okay. And was that point of diversion that
16 you recommended the one that was licensed?
17 A. Yes.
18 Q. Okay. Thank you. What did you recommend as
19 the source for this license?
20 A. I recommended the Little Wood River only. To
21 be consistent with the Basin 37 water right, it had to
22 be either the Big Wood or the Little Wood watersheds.
23 The Big Wood is some distance away. And the years that
24 I looked at, I did not see the data that I needed to see
25 that would show water could be conveyed from the Little

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1 Wood -- I'm sorry, from the Big Wood. I did not have
2 that supporting data.
3 In fact, the year I was looking at, there was
4 absent -- there was no data from the Jimmy Byrne Slough
5 on the first couple of weeks that I was believing, based
6 on the Dietrich Canal flow data, that there was excess
7 water. So the Jimmy Byrne Slough didn't have any flow
8 in it, or it didn't have any records of flow in it the
9 first couple of weeks of the event that led me to
10 conclude recharge of water was available.
11 Q. Was that in April?
12 A. In April.
13 Q. 1984?
14 A. 1984.
15 Q. Would it be helpful to point to the map to
16 explain why you eliminated the Big Wood River as a
17 source for this license?
18 A. The discussions I had with the watermaster,
19 and I believe Lynn mentioned this, as well -- Lynn
20 Harmon mentioned this, as well -- said that there is a
21 possibility of bringing water from the Big Wood to this
22 site and other sites. There's a possibility.
23 And the Big Wood starts, as I said, in the
24 middle of our map. And the structures, the conveyance
25 structures that were mentioned in the advertisement,

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1 included the Richfield Canal, which is this green canal,
2 the first one.
3 Then the Richfield Canal empties in or joins
4 up with East Main and West Main Canals and the Jimmy
5 Byrne Slough, which makes a semicircle around an area
6 with lots of laterals, and empties into the Little Wood
7 River, or appears to, at least.
8 Kevin Lakey is the current watermaster. I
9 discussed this with him. I said, Kevin, is it
10 possible -- can you shepherd water this distance from
11 the Big Wood to the Richfield Canal down the Jimmy Byrne
12 Slough to the Little Wood and therefore into the
13 Dietrich Bay?
14 And he said, Yes, it's possible but not easy,
15 not likely. It's possible.
16 My main reason for eliminating -- or one of
17 the main reasons I had for eliminating the Big Wood is,
18 my training was such that when a water is tributary to
19 another water, it doesn't keep its old name so that the
20 Big Wood becomes these canal names. The Jimmy Byrne
21 Slough is now Jimmy Byrne Slough water. It's not Big
22 Wood water in my mind. And when the Jimmy Byrne Slough
23 empties into the Little Wood River, it becomes Little
24 Wood River water.
25 My training taught me that that's how we

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1 describe it. We don't try to describe it as a piece of
2 the Big Wood water coming all the way down. It becomes
3 the Little Wood River.
4 So the Big Wood River was eliminated for
5 several reasons. I didn't have the data to support the
6 Jimmy Byrne Slough the entire time that I needed it.
7 And most importantly, I was trained that once a
8 tributary joins the main river, it becomes that river.
9 The Snake River doesn't become the Snake River-Columbia
10 River. It becomes the Columbia River.
11 Q. Okay. Thank you. Let's look at this exhibit,
12 IDWR Exhibit 7 again. Did the application for amendment
13 request that the permitted source be just the Little
14 Wood River?
15 A. Yes.
16 Q. And was the Little Wood River the only source
17 that was licensed?
18 A. Yes.
19 Q. Okay. You recommended a diversion rate of 250
20 CFS?
21 A. Yes.
22 Q. Okay.
23 A. Yes.
24 Q. Okay. Let's talk about how you determined
25 that recommended diversion rate. Let's look at your

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1 spreadsheet again. And that's, again, Exhibit 2, page
2 13. We were just looking at that.
3 Does this explain how you reached your
4 conclusion to recommend a 250 CFS diversion rate?
5 A. As I noted earlier, the highest flow rate that
6 was recorded that year occurred in May, and it was 396
7 subtracting 150 CFS. My table is shown at 246 CFS.
8 There is an error in the measurements that I recognize.
9 Plus or minus 10 percent would be easy to justify.
10 Given that, and that I'm allowed to round, I rounded
11 this one up to 250 CFS from 246.
12 Q. Okay. So is there a department policy that
13 addresses rounding that you applied?
14 A. Yes. I believe it's an administrative memo.
15 Q. Okay. So that's how you reached your 250 CFS?
16 You just rounded up?
17 A. Yes.
18 Q. Okay. You also recommended an annual
19 diversion volume for this license, correct?
20 A. I did. There are very few uses that are
21 exempt from the requirement for volume, and aquifer
22 recharge is not one of them. Groundwater recharge is
23 not exempt from a volume requirement. So I had to find
24 a method for determining a volume for the license.
25 Q. Okay. And that exemption from volume

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1 requirement is found -- where is that found?

2 A. It's in the Beneficial Use Exam Rules. I'm
3 sorry. I can't quote that.

4 Q. That's okay. It's in the requirements of
5 Beneficial Use Field Examination Rules, okay.

6 Well, let's talk about how you determined that
7 annual diversion volume then. And, again, I'm just
8 going to look back at your spreadsheet here on page IDWR
9 13, Exhibit 2.

10 Can you explain how you calculated your
11 diversion volume?

12 A. Back again to the highlighted cells, I counted
13 those cells. That's 28 days where flow was more than
14 the demand, the early-season demand in the Dietrich
15 Canal. Twenty-eight days. I excluded days where it was
16 within the error range. So 30 CFS, 50, no, I didn't
17 count those as part of the volume.

18 My volume count was based on 28 days. I took
19 advantage of the error in the measurements and said,
20 Okay, the maximum that I am recommending is 250 CFS. If
21 there's an error in these measurements, it could have
22 been 250 CFS any of those days, especially the days that
23 were 230. There's a margin of error.

24 So I multiplied. It's a simple
25 multiplication. Twenty-eight days times 250 CFS times

1 of 250 CFS?

2 A. Yes.

3 Q. And an annual diversion volume of 13,900
4 acre-feet?

5 A. Yes.

6 Q. And were the 250 CFS diversion rate and 13,900
7 acre-foot annual diversion volume the rate and volume
8 that were licensed?

9 A. Yes.

10 Q. Okay. That's all I have. Thank you, Michele.
11 And thank you, Director.

12 THE HEARING OFFICER: Okay. Should we break
13 for lunch? How much time do you want? An hour? Should
14 we come back at two? It gives us a little more. A good
15 plan?

16 MS. VONDE: Sure.

17 THE HEARING OFFICER: Okay.

18 (Lunch recess.)

19 THE HEARING OFFICER: All right. We're
20 recording again after the lunch break.

21 Let's see. You finished your examination of
22 Michele. Ann, your turn.

23 MS. VONDE: Okay.

24 CROSS-EXAMINATION

25 BY MS. VONDE:

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1 the conversion factor from the CFS days to acre-feet
2 yielded 13,884.5 CFS. We are -- there is a policy that
3 eliminates some of the digits in this or the numbers in
4 this. We need to present three significant figures. So
5 I rounded this up to 13,900 acre-feet, and that's what
6 appears on the license.

7 Q. Thank you. And just for clarification, you're
8 looking at April, May, June, July, August, September.
9 Why didn't you look to other months of that year in
10 1984?

11 A. In the records that I had, the published
12 watermaster books didn't include wintertime months. It
13 didn't include any months outside of the standard
14 irrigation season.

15 Q. And was the date you obtained from the
16 watermaster on the page that just follows your table
17 here? It's IDWR 14.

18 A. Yes. This came -- this is a copy of the
19 published book. I call it the "Black Book," the
20 watermaster's book. The official title is much longer.
21 But that's where that page comes from, and I transcribed
22 that page into my spreadsheet table.

23 Q. Okay. Thank you. So we'll turn back again to
24 this Exhibit 7, this application for amendment. Did
25 that application for amendment request a diversion rate

1 Q. Hey, Michele. This will be pretty brief,
2 so...

3 A. Okay.

4 Q. Did you recommend the Dietrich site as a place
5 of use in part because that site wasn't within the
6 permitted and advertised place of use?

7 A. Yes. In part, yes.

8 Q. And did you also recommend the Dietrich site
9 as a POU, in part, because you found canal measurements
10 that demonstrated recharge at the site?

11 A. There was excess water in the same year as the
12 aerial photography, and I put two and two together,
13 basically.

14 MS. VONDE: I'm sorry. I'm going to use your
15 exhibits, Emmi.

16 MS. BLADES: Do you want the binder? That
17 might be helpful for you.

18 MS. VONDE: I think this will be the only one
19 I refer to. Actually, it is cut off. What is the
20 exhibit number?

21 MS. BLADES: Two.

22 MS. VONDE: Two, okay.

23 BY MS. VONDE:

24 Q. So, if you could please take a look at Exhibit
25 No. 2, page 5. The third paragraph down, you have a

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1 paragraph that talks about other conditions.
2 In that paragraph, were you analyzing whether
3 or not the conditions of the permit had been met for
4 purposes of licensing?
5 A. One of the requirements in a licensing review
6 is to compare what an examiner found at the time with
7 what was on the permit. And, yes, these two conditions
8 were on the application which became the permit.
9 Q. Okay. Did you review all of the conditions
10 that were on the permit?
11 A. Yes.
12 Q. Okay. And did you find that all the
13 conditions had been satisfied or met for the purposes of
14 licensing?
15 A. Not perfectly in that plans had not been
16 provided before the water was discharged at the site.
17 In my inquiries, I believed that both the
18 engineering plans and the plans for the water quality
19 might be available in that there was evidence in -- not
20 so much in this file but certainly in the companion
21 water right file that Brockway Engineering had been
22 hired or visited with the health department -- I'm
23 sorry, I've lost the name, district health, maybe --
24 about the water quality.
25 This particular file did not have that

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1 companion information. It was only in the Basin 1,
2 water right 1-7054. But because these projects were not
3 quite locked at the hip, but they were on the same
4 timeline, same people were involved, the same examiner
5 was recommended for both, I was reasonably comfortable
6 that we could get them after the fact.
7 Q. To clarify, to get what after the fact?
8 A. The plans for the site, the engineering plans
9 for the site, and the plan for the water quality or the
10 implementation plans for using sites on the district's
11 land or land in this area for recharge.
12 Q. Did you then go and did you get those
13 documents?
14 A. No. I only found traces, some evidence that
15 they might exist. I did not get the actual plans.
16 Q. Okay. In your memorandum on that same page we
17 just referenced, page 5 of Exhibit 2, you mentioned that
18 that was going to go up to the management level, your
19 questions about those conditions.
20 A. Uh-huh.
21 Q. Did it go up to the management level?
22 A. I'm unsure if Shelley Keen, my manager at that
23 time, had questions about it. I don't remember that he
24 questioned me about that.
25 He signed this license. If he had questions,

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1 he would have been comfortable coming to me with those.
2 Maybe I laid out enough groundwork that it was something
3 that he could see as a possibility, that we could get
4 these plans retroactively rather than, in this case,
5 certainly not before the water was discharged. Am I
6 making sense? You're --
7 Q. So Shelley Keen ultimately signed the license?
8 A. (No verbal response.)
9 Q. Sorry. Was that a yes, just for the
10 recording? Shelley Keen ultimately signed the license;
11 is that correct?
12 A. Yes.
13 Q. In signing the license, did Shelley Keen
14 affirm that the license was as it should be and that the
15 permit conditions had been met?
16 A. That's how I understand it.
17 Q. And you never had any direct conversations
18 with Shelley about the permit conditions?
19 A. No.
20 Q. Okay. Well, let's do this. Can you please
21 take a look at -- let me find the right IDWR exhibit.
22 MS. VONDE: Which one is the permit, the
23 application permit?
24 MS. BLADES: Three.
25 MS. VONDE: Three?

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1 MS. BLADES: Yes.
2 BY MS. VONDE:
3 Q. Okay. So if you could take a look at Exhibit
4 3, IDWR Exhibit 3, and go to page 79. If you could take
5 a look at that permit.
6 And I'm not sure how you're going to let me do
7 this, Director.
8 But could you make a notation on the exhibit
9 of each of the conditions that are listed there, and
10 could you just put a number by each of the conditions?
11 I think that will make it easier for us to reference.
12 So just handwrite on whichever exhibit is going to
13 become the official one; one, two, three, four, five,
14 down the list.
15 A. Oh, okay.
16 Q. Would that be --
17 UNIDENTIFIED SPEAKER: You can write on that
18 one, and I can switch it out.
19 THE WITNESS: Okay. So under 1-D, "other,"
20 those are the conditions that you're considering needing
21 renumbering or --
22 BY MS. VONDE:
23 Q. Correct. Yeah.
24 A. Okay.
25 Q. Not renumbering. Just numbering so that we

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1 can reference them. So one would be next to "permit
2 builder shall commence," and then just on down the line.
3 A. Okay. Two is beginning the measuring device?
4 Q. Correct.
5 A. And three.
6 Q. Three is the issuance.
7 A. Okay. I think I've got it.
8 Q. Okay. So let's take a look at the one that --
9 the permit condition you just marked as number one.
10 Could you please read that for us?
11 A. "Permit holder shall commence the excavation
12 or construction of diverting works within one year of
13 the date this permit is issued and shall proceed
14 diligently until the project is complete."
15 Q. Okay. Did you do an analysis of whether or
16 not that permit condition was met?
17 A. Because I found that the site I recommended
18 had been constructed before this permit had been issued,
19 this condition appeared moot.
20 Q. Okay. So can I --
21 MS. VONDE: I'm not sure how you want to do
22 this, Director. Sorry. I have a bunch of documents
23 here I'd like to try and get into the record. Some of
24 them are from the IDWR back file. Some are not. Some
25 are things that were disclosed but not disclosed as

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1 exhibits. Do you want me to introduce them?
2 THE HEARING OFFICER: You don't have --
3 MS. VONDE: Then do objections and --
4 THE HEARING OFFICER: I'm sorry. Go ahead.
5 MS. VONDE: And then do objections and then
6 mark them?
7 THE HEARING OFFICER: Well, let's mark them
8 right now. Do you know how many you want to offer?
9 MS. VONDE: Well, I will probably offer all of
10 these. So it's several.
11 THE HEARING OFFICER: Let's just mark them.
12 Let's mark them in consecutive order starting with 110.
13 Is that the next number?
14 MS. VONDE: That's correct. Yes.
15 THE HEARING OFFICER: So let's just mark them
16 in numerical order.
17 UNIDENTIFIED SPEAKER: How many are there?
18 MS. VONDE: I don't actually know. I'd have
19 to count. Sorry.
20 THE HEARING OFFICER: And you don't need to
21 necessarily offer all of them. If you want to work
22 through those documents and offer some and not offer
23 others, that's up to you.
24 UNIDENTIFIED SPEAKER: Is 113 these two pages,
25 or are they separate?

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1 MS. VONDE: Yeah. Sorry, some of those have
2 been mislabeled, but I think they are separate. Yeah,
3 those are two separate.
4 THE HEARING OFFICER: Is everything stapled
5 that should be stapled then?
6 MS. VONDE: In those, they should be stapled,
7 yeah.
8 BY MS. VONDE:
9 Q. So let me just re-ask the question. Can you
10 reread Permit Condition No. 1, please, for us.
11 A. "Permit holder shall commence the excavation
12 or construction of diverting works within one year of
13 the date this permit is issued and shall proceed
14 diligently until the project is complete."
15 Q. Thank you. Can you please take a look at
16 what's been marked as Exhibit 110. Do you recognize
17 that document?
18 A. I believe I've seen it before, yes.
19 Q. Okay. Would it help if I represented to you
20 that it came from the back file for water right 37-7842?
21 A. And that's probably where I've seen it, yeah.
22 Q. Okay. Could you take a moment to review that
23 document.
24 A. The order, in essence, removes a condition on
25 the permit.

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1 Q. And what condition on the permit does it
2 remove?
3 A. Commencement of -- it says, "therefore ordered
4 that the condition of approval of this permit related to
5 the commencement of excavation or construction within
6 one year of the date that the permit was issued be
7 removed."
8 Q. Does that help you determine whether or not
9 Permit Condition No. 1 was complied with or is no longer
10 valid?
11 A. Yes.
12 MS. VONDE: Can I offer Exhibit 110?
13 THE HEARING OFFICER: Yes.
14 MS. VONDE: It's already in the back file.
15 THE HEARING OFFICER: Exhibit 110 has been
16 offered for admission into evidence, Mr. James. Joe, do
17 you have an objection?
18 MR. JAMES: No objection.
19 THE HEARING OFFICER: Okay. Then the document
20 marked as Exhibit 110 is received into evidence.
21 (Exhibit 110 admitted.)
22 BY MS. VONDE:
23 Q. Okay. Michele, could you please read what you
24 have previously marked as Condition No. 2 of the permit,
25 please?

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1 A. "A measuring device of a type approved by the
2 Department shall be permanently installed and maintained
3 as part of the diverting works."

4 Q. Do you know whether a measurement device or
5 devices were installed?

6 A. I believe that the headgate to the Dietrich
7 Canal is the measuring device. It's where the
8 measurements are taken.

9 Q. So there is a measurement device there --

10 A. Yes.

11 Q. -- at the Dietrich?

12 A. As I -- yes.

13 Q. Okay. Does that help you to make a conclusion
14 about whether or not Permit Condition No. 2 was met?

15 A. It did.

16 Q. What is your conclusion on that?

17 A. That the condition was met.

18 Q. Okay. Thank you. Can you please read what
19 you have marked as Condition No. 3 of the permit.

20 A. "The issuance of this permit in no way grants
21 any right-of-way or easement across the land of
22 another."

23 Q. Did you make an analysis in regard to that
24 permit condition?

25 A. I did.

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1 Q. And what was your analysis?

2 A. Although the place of use did not appear to be
3 properly in the name of the Lower Snake Aquifer Recharge
4 District, it appeared to be in the name of, I believe,
5 the BLM that our parcels identified, I believe, as
6 Bureau of Land Management land.

7 Q. And if you could please take a look back at
8 IDWR Exhibit No. 2, which is your memorandum, page
9 number 24. Is that the grant of right-of-way to which
10 you just referred?

11 A. Page 24?

12 Q. Page 24. Nope. Sorry, not 24.

13 THE HEARING OFFICER: What's the exhibit
14 number?

15 MS. VONDE: Exhibit 2. Oh, here it is.

16 Excuse me, page number 40. Page number 40. Sorry.

17 BY MS. VONDE:

18 Q. Is that the document that you referred to in
19 your previous answer?

20 A. Yes. That was a piece of the puzzle that I
21 needed to recognize that the conditions were met.

22 Q. Specifically Condition No. 3 about
23 rights-of-way across the land of another, correct?

24 A. Yes.

25 Q. Can you please take a look at Exhibit No. --

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1 what I've marked as Exhibit No. 111? Do you recognize
2 this document?

3 A. I believe I have seen it before.

4 Q. Would it help if I represented to you that
5 that came from the back file 37-7428?

6 A. Yes, that might help. My concentration in
7 this case was years between 1980 and 1992, less focused
8 on more recent information, though recognizing that
9 there would be a need to have permission from the
10 landholder to use the land for recharge purposes. They
11 would have had to have sought that, and this
12 demonstrates that they did.

13 Q. Can you please take a look at Condition No. 4
14 on the permit?

15 MS. VONDE: Oh, excuse me, I'm sorry. Yeah,
16 I'd like to offer that as an exhibit into the record.
17 Exhibit No. 111.

18 THE HEARING OFFICER: Any objection?

19 MR. JAMES: No.

20 THE HEARING OFFICER: The document marked as
21 Exhibit 111 is received into evidence.

22 (Exhibit 111 admitted.)

23 BY MS. VONDE:

24 Q. Michele, could you please read -- going back
25 to the permit, could you please read what you have

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1 marked as Condition No. 4?

2 A. "Use of water under this permit is subject to
3 control by the watermaster of State Water District No.
4 37, Big Wood River."

5 Q. And is that a condition of the permit he has
6 to comply with, per se, or is that just more for
7 information purposes?

8 A. I'm not sure how this -- it certainly
9 identifies the water district and that the watermaster
10 would have this added to his roster of rights. But it
11 doesn't have a pass/fail sort of -- honestly, I don't
12 know. I don't know.

13 I treated this as part of the data entry,
14 recognized this was in 37, the watersheds of 37, that it
15 would be controlled by the watermaster, and notify the
16 watermaster, if nothing else, of our entering it as a
17 new license in our database.

18 Q. So this condition doesn't impose an obligation
19 on the permittee exactly. It's more probably for data
20 entry purposes on your end of things?

21 A. That's how I see it, yeah.

22 Q. Okay. Can you take a look at Permit Condition
23 No. 5, please, what you've marked as five, and please
24 read that for us.

25 A. "Permit shall be secondary to all prior water

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1 rights, including rights held by any privately-owned
2 electrical-generating company, to appropriate waters in
3 the reaches of the Snake River downstream from the
4 Milner diversion for purposes of hydroelectric power
5 generation."
6 Q. Did you do any analysis with regard to that
7 permit condition?
8 A. Yes, I did.
9 Q. And what was your analysis?
10 A. My initial recommendations kept an updated
11 condition on the license which subordinated recharge.
12 After completing the review and closing in on meeting an
13 amendment to the license to make some -- amendment to
14 the permit, excuse me -- to make corrections to it so
15 that it could be licensed, I took my amendment to be
16 signed.
17 Ryan Patton signed the amendment. He looked
18 at the conditions before he signed and recognized that I
19 still had a subordination condition on it and asked me
20 why that condition was still on there, and I explained
21 that there had been discussions between Idaho Power and
22 the Water Resources Board to eliminate subordination as
23 a condition of this water right.
24 Q. Okay. Can you take a look at those marked as
25 Exhibit 12.

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1 A. Okay.
2 Q. Do you recognize that document at all? Take a
3 minute to review it.
4 A. I'm sorry. I don't remember seeing this one.
5 Q. Okay. Would it help if I represented to you
6 that this came out of the back file for 37-7428?
7 A. Okay. We received it in 2006 then.
8 Q. Would you mind reading that, please. And,
9 yeah, just take a moment to review it for me.
10 A. Based mostly on the cover letter, I would say
11 that this agreement, this stipulation, removes the
12 subordination condition from the permit.
13 Q. And was the -- take note back at IDWR Exhibit
14 1, which is license page numbers 2 and 3. Was that
15 condition ultimately removed from the license?
16 A. Yes. I believe I'd have to draft a second
17 amendment to remove it. And before the amendment for
18 licensing could be signed, it was removed.
19 MS. VONDE: I'd like to offer Exhibit 112 into
20 the record.
21 THE HEARING OFFICER: Joe?
22 MR. JAMES: No objection.
23 THE HEARING OFFICER: The document that's been
24 marked as Exhibit 112 is received into evidence.
25 (Exhibit 112 admitted.)

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1 BY MS. VONDE:
2 Q. And could you also take a look at what's been
3 marked as Exhibit 113?
4 A. Uh-huh.
5 Q. Do you recognize that document?
6 A. I do. I do. I generated this one.
7 Q. Okay. And what were your conclusions
8 regarding that Condition No. 5, and what needed to
9 happen with that condition?
10 A. That contrary to what I was carrying forward,
11 the subordination condition should no longer be on the
12 permit.
13 MS. VONDE: I'd like to offer Exhibit 113 into
14 the record.
15 THE HEARING OFFICER: Joe?
16 MR. JAMES: No objection.
17 THE HEARING OFFICER: The document marked as
18 Exhibit 113 is received into evidence.
19 (Exhibit 113 admitted.)
20 BY MS. VONDE:
21 Q. Michele, could you please take a look at
22 Permit Condition No. 6 and read that for us, please?
23 A. I'm sorry. I lost my place.
24 Q. That's okay.
25 A. Give me the page number again.

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1 Q. It is Exhibit No. -- oh, goodness. I've lost
2 my place, too. Exhibit No. 3, I believe, page number
3 79.
4 A. Thank you. Condition No. 6 --
5 Q. Yes, please.
6 A. -- states, "the director may regulate or
7 reduce the rate of diversion under this permit pursuant
8 to the requirements of 42-4201 hydrocode."
9 Q. Did you do any analysis with regard to that
10 condition?
11 A. Yes. I treated this condition more as an
12 informative condition, as well, letting the right holder
13 know that the director still had authority.
14 Q. Okay. Thank you. Can you take a look at
15 Condition No. 7 and read that for us, please.
16 A. "The permit shall not be assigned or sold
17 without first securing the written approval of the
18 Department of Water Resources."
19 Q. Did you do any analysis with regard to that
20 permit condition?
21 A. Yes. This is old language. I believe the
22 statute has been updated and says something different
23 now.
24 Again, we had assignment of this permit not
25 once but more than once, and the Department was aware of

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1 it. And I believe, again, this was important that the
2 right holder -- to make sure the Department understand
3 that they were making this arrangement to sell -- assign
4 the permit.

5 Q. So in your mind, had this permit condition
6 been met?

7 A. Yes.

8 Q. Now, take a look at what's been marked as --
9 are we on 114; is that correct? Is that what's on
10 yours?

11 A. It's May 20.

12 Q. May 20, 1982?

13 A. Yes.

14 Q. 114. Do you recognize that document?

15 A. I do.

16 Q. And --

17 A. It's a cover letter drafted by the Department
18 of Water Resources and addressed to the board of
19 directors of the Lower Snake Aquifer Recharge District,
20 in particular, the chairman at that time, John LeMoine.
21 Forgive me if I mispronounce his name. Acknowledging --
22 the letter acknowledges the assignment of the permit.

23 Q. And between which parties does the letter
24 acknowledge assignment of the permit? I'm sorry. Which
25 party was assigning it to which party in this letter?

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1 A. Oh, from the original permit holders, several
2 gentlemen, if I remember right, to the district, to the
3 Lower Snake District. So it went from an individual --
4 a group of individuals to an entity.

5 MS. VONDE: I'd like to offer Exhibit 114 into
6 the record.

7 THE HEARING OFFICER: Joe?

8 MR. JAMES: No objection.

9 THE HEARING OFFICER: Document marked as
10 Exhibit 114 is received into evidence.

11 (Exhibit 114 admitted.)

12 BY MS. VONDE:

13 Q. I'd like to have you take a look at what's
14 been marked as Exhibit 115. Do you recognize that
15 document?

16 A. Yes. I believe I have seen this. I
17 recognize --

18 Q. You know what? I'm going to withdraw that
19 question. I don't think we need this. I'll withdraw
20 it.

21 A. I didn't see it.

22 Q. Yeah, that's fine. That's okay. We'll skip
23 that one.

24 A. Okay.

25 Q. But I will have you take a look at Idaho Water

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1 Resource Board Exhibit 108, which is our expert report
2 in the big binder.

3 A. Okay.

4 Q. And take a look at Appendix G, Bates number
5 page 3186 and following. So 3186 through 3192, if you
6 could just take a look at those documents.

7 MR. JAMES: Ann, did you say Appendix G?

8 MS. VONDE: Appendix G as in "George."

9 BY MS. VONDE:

10 Q. Do you recognize this document?

11 A. I do. I do. I have seen this before.

12 Q. And can you tell me what those documents are?

13 A. They are the assignment of the permit from Dan
14 McFadden to the Idaho Water Resource Board and the
15 resolution from the Board to accept the assignment.

16 Q. And was that assignment from the LSARD
17 District itself to the board?

18 A. Yes.

19 Q. Okay. So given that document and previous
20 Document No. 114, did you draw any conclusions about
21 whether Permit Condition No. 7 was complied with?

22 A. I concluded that this also was part of the
23 compliance for that permit condition, that the
24 Department be notified.

25 Q. Those documents in Exhibit 108 between 3186

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1 and 3192 were submitted to the Department; is that
2 correct?

3 A. Yes. I'm sorry.

4 Q. No, that's okay. Can you take a look at
5 Permit Condition No. 8, and please read that for us.

6 A. "Water may not be diverted under this permit
7 until the board of directors of the district establish
8 and implement a procedure acceptable to the director for
9 assuring that the water quality of the Lower Snake
10 aquifer will not be impaired."

11 Q. Thank you. And let me see. Sorry. Just a
12 second.

13 MS. VONDE: 116?

14 THE HEARING OFFICER: Yes.

15 BY MS. VONDE:

16 Q. Okay. Can you please take a look at the
17 document I've marked Exhibit 116. Do you recognize that
18 document?

19 A. I do.

20 Q. And if you could review that document, and I
21 might direct you to the final page where the submitter
22 is the last "It is further hereby ordered"...

23 THE HEARING OFFICER: Hang on. We're not
24 matching.

25 MS. VONDE: Oh, we're not matching? Sorry. I

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1 skipped around on you.
2 THE WITNESS: Which one would you like me to
3 look at?
4 BY MS. VONDE:
5 Q. Look at --
6 THE HEARING OFFICER: 116 is the next --
7 MS. VONDE: I'm on that one. And then is 117
8 this kind of like --
9 THE WITNESS: "Conversation memorandum."
10 THE HEARING OFFICER: Yes.
11 BY MS. VONDE:
12 Q. Sorry, Michele. Strike that. Could you
13 please take a look at Exhibit 118. 118, Michele.
14 A. 118?
15 Q. 118, sorry. I confused you.
16 A. The proposed memorandum decision and order?
17 Q. Correct, yes.
18 A. Okay.
19 Q. And in your review, I'm going to direct you to
20 the third page of that exhibit right before the date and
21 signature line, "It is further hereby ordered"..
22 A. The date of the order is November 9, 1981.
23 More?
24 Q. And can you just read for the record that
25 paragraph preceding the date.

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1 A. "It is further hereby ordered"?
2 Q. Yes.
3 A. "That before any water is diverted by the
4 district, the board of directors of the district must
5 establish and implement a procedure for monitoring water
6 quality that is acceptable to the director of the Idaho
7 Department of Water Resources."
8 Q. And does that language mirror the language in
9 Condition No. 8?
10 A. It does. It's very similar.
11 Q. And in your review of this document, do you
12 know what this document did or ordered or created?
13 A. In the creation of the recharge district, at
14 that time, the hearing officer, Norm Young, directed the
15 parties to implement a procedure for monitoring the
16 water quality.
17 Q. Thank you.
18 MS. VONDE: Can I offer Exhibit 118 into the
19 record?
20 MR. JAMES: No objection.
21 THE HEARING OFFICER: The document marked as
22 Exhibit 118 is received into evidence.
23 (Exhibit 118 admitted.)
24 BY MS. VONDE:
25 Q. All right. I would like to direct you to what

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1 has been marked as Exhibit, I think it's 119. Yes, I
2 think I'm on that one. Document 119, do you recognize
3 that document?
4 A. Yes, I believe I've seen this.
5 Q. Okay.
6 A. In the water right back file.
7 Q. And do you need a second to review it?
8 A. The engineer who drafted this, Gerald Martens,
9 is addressing the Department of Health and Welfare in
10 Twin Falls and is identifying planned steps that he and
11 probably his construction team were intending to
12 implement, if they had not already.
13 Q. And I think you referred to this earlier. The
14 Department of Health and Welfare, were they involved at
15 the time because they were involved with water quality
16 at the time of this?
17 A. Yes. That is my understanding, yes.
18 MS. VONDE: I'd like to offer Exhibit 119 into
19 the record.
20 THE HEARING OFFICER: Joe?
21 MR. JAMES: This was a back file?
22 MS. VONDE: This one was not in the back file.
23 This one is from the LSARD file. No, excuse me. I
24 think this one is in the back file.
25 MR. JAMES: Yeah. We have no objection.

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1 THE HEARING OFFICER: Okay. The document
2 marked as Exhibit 119 is received into evidence.
3 (Exhibit 119 admitted.)
4 BY MS. VONDE:
5 Q. Okay. I'll have you take a look at what has
6 been marked as Exhibit 120. Do you recognize this
7 document?
8 A. It's missing the letterhead, but I think I've
9 seen it. Yes, I believe I have seen this.
10 Q. Is it a letter dated December 1, 1983?
11 A. December 1, 1983, yes.
12 Q. Okay, yeah. Thank you.
13 A. To John R. LeMoine, chairman of the Lower
14 Snake River Aquifer Recharge District, and it was sent
15 by Glen Saxton, then Chief of the Operations Bureau for
16 the Department of Water Resources. That's why I don't
17 see -- I don't know why I don't see the letterhead. He
18 did not copy --
19 Q. It's on like this weird yellow paper. You can
20 see it better on --
21 A. Oh, okay.
22 Q. I don't think it was on letterhead.
23 A. It wasn't on letterhead?
24 Q. I don't think so.
25 A. Okay.

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1 Q. And what is this letter about?

2 A. Glen Saxton had either personal concerns or
3 had received concerns from the public with respect to
4 the water quality for recharge in the Lower Snake
5 aquifer. He quotes, I believe, "Water may not be
6 directed under this permit."

7 He quotes the part D, No. 8 condition of the
8 permit, and mentions conversations with the Office of
9 Health and Welfare and with Chuck Brockway, a senior
10 probably at that time, about the monitoring plan, the
11 water quality monitoring plan that they were developing.

12 Q. And does this letter request that that be
13 provided to the Department?

14 A. Oh, indeed it does. In fact, it's underlined,
15 "Approved prior to the diversion of water for recharge
16 purposes" in the second to the last paragraph.

17 Q. Thank you.

18 MS. VONDE: I'd like to offer Exhibit 120 for
19 the record.

20 THE HEARING OFFICER: Joe?

21 MR. JAMES: None. No objection.

22 THE HEARING OFFICER: The document marked as
23 Exhibit 120 is received into evidence.

24 (Exhibit 120 admitted.)

25 BY MS. VONDE:

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1 Q. Okay. I'd like to have you take a look at
2 what's been marked as Exhibit 121. Do you recognize
3 this document?

4 A. Yes. I believe I have seen this.

5 Q. And if you would take a minute to review it.
6 What does this letter do and attach?

7 A. It was attached to a draft of the Lower Snake
8 River aquifer recharge project impact and monitoring
9 plan. It appears to also document the operation's
10 cooperation with the Bureau of Land Management in a
11 geological survey.

12 Q. Is this a monitoring plan for groundwater --
13 water quality monitoring for recharge of --

14 A. Yes. It appears to be more focused on the
15 water diverted from the Milner pool than from the water
16 diverted from Magic Reservoir. It mentions water
17 quality in the Snake River in the records and in the --
18 Table 1 is water quality in the Snake River, is not
19 water quality in other rivers.

20 MS. VONDE: I'd like to offer Exhibit 121 into
21 the record.

22 THE HEARING OFFICER: Joe?

23 MR. JAMES: Maybe some voir dire.

24 THE HEARING OFFICER: Sure.

25 CROSS-EXAMINATION

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1 BY MR. JAMES:

2 Q. Michele, prior to today, have you ever seen
3 what's marked as Exhibit 121?

4 A. I don't remember seeing it in the file that is
5 our primary water right of discussion today. I don't
6 remember seeing it -- I do remember seeing it. It may
7 have been in the other -- the companion water right
8 file.

9 Q. Did you review both this file, as well as the
10 companion file, to see if there was a water quality
11 monitoring plan?

12 A. I focused most of my attention on the Basin 37
13 water right. But because there was a requirement for a
14 monitoring plan, I was looking for a monitoring plan.
15 There are traces in the Basin 37 water right file that
16 says something to the effect that a plan is in the
17 works. But as far as actually being submitted to the
18 file, I don't remember seeing this in the water right
19 file for 37-7842.

20 Q. In reviewing the monitoring programs on the
21 second-to-the-last page, it looks like it deals
22 specifically with a recharge from the Milner-Gooding
23 Canal. Is that correct?

24 A. Second-to-the-last page, let's see. Yes. It
25 appears -- I'm not seeing mention of any of the other

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1 water sources.

2 Q. And anything from Basin 37?

3 A. No, not specifically. I would have been
4 willing to accept some of the estimates of hydroelectric
5 conductivity, because the basalt layer extends so far in
6 this area that I would have been willing to accept not
7 just that portion of the system as being a certain
8 permeability. I would have accepted that, not a more
9 global regional scale, but the water quality
10 measurements, they're quoting them from the
11 Milner-Gooding Canal, not from other sources.

12 I believe the USGS takes water samples from
13 the other sources, as well. I don't know the period of
14 sampling.

15 Q. And just a couple of questions. On the well
16 monitoring construction on the last page, it looks like
17 the well monitoring was in -- it's an underlined
18 section. One monitor of those plans for construction in
19 the spring of 1984, this well will be located south of
20 the recharge area in the direction of the City of
21 Shoshone.

22 I guess I know that there's two rivers between
23 that proposed monitoring and the place of use where you
24 indicated use was confirmed. So it would appear that
25 this deals with Snake River water north of the Wood

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1 River?

2 A. Yes. I believe that that's the focus of this
3 document.

4 Q. And then, also, do you have any information
5 whether this information was ever provided to the
6 director?

7 A. I have no information. But if a similar
8 document would have been filed that it was provided
9 separate to the director at the time, I don't know.

10 MR. JAMES: And, Director, I'll just make an
11 objection based on relevancy to these proceedings.

12 THE HEARING OFFICER: Ms. Vonde?

13 MS. VONDE: I think these documents are
14 relevant to these proceedings. Condition No. 8 doesn't
15 talk specifically about any one site or any one source
16 of water. It says "a monitoring plan and procedure
17 acceptable to the Department."

18 The documents I am submitting are to show that
19 a monitoring plan was submitted and that it was
20 acceptable to the Department. I think that's relevant
21 to Condition No. 8.

22 THE HEARING OFFICER: Okay. I will receive
23 the document into evidence with qualification that it
24 appears to be that the document and the plan is related
25 to the Snake River recharge water right and not to the

1 Q. I'll have you look at 122. Do you recognize
2 that letter?

3 A. I'm sorry. This does not look familiar.

4 Q. I will represent to you that this document
5 came from the IDWR file with regard to the Lower Snake
6 River Aquifer Recharge District.

7 A. Okay.

8 Q. It has been certified as being a record of the
9 Department.

10 A. Okay. I would have to say this looks like
11 water quality discussion, and it's between the engineer
12 of one of the recharge projects and the then
13 administrator of the Department of Water Resources. I
14 don't remember seeing this one before.

15 Q. And could you just read that first sentence?

16 A. The first sentence?

17 Q. Yes.

18 A. "After consulting with my staff, I have
19 concluded that Mr. Brockway's impact evaluation and
20 monitoring program for the Lower Snake Aquifer Recharge
21 Project would be acceptable with the following
22 modifications." And he has several. Six modifications
23 are identified.

24 MS. VONDE: I'd like to offer 122.

25 THE HEARING OFFICER: Joe?

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1 water right under the permit that was issued for the Big
2 and Little Wood Rivers. And so it goes to the weight of
3 the evidence. So it's received into evidence.

4 And maybe there's some additional information
5 you want to offer, Ann.

6 (Exhibit 121 admitted.)

7 MS. VONDE: And I can continue with my
8 documents. They go to this plan stating this plan is
9 acceptable. So I can certainly go through that.

10 THE HEARING OFFICER: What document are you
11 referring to?

12 MS. VONDE: The documents that have not been
13 submitted yet.

14 THE HEARING OFFICER: Oh, okay.

15 MS. VONDE: So I can finish out what I'm doing
16 here.

17 THE HEARING OFFICER: Okay.

18 MS. VONDE: Okay. So 121 was admitted; is
19 that correct?

20 THE HEARING OFFICER: It is.

21 MS. VONDE: Okay.

22 THE HEARING OFFICER: Received.

23 MS. VONDE: Okay.

24 CROSS-EXAMINATION CONTINUED

25 BY MS. VONDE:

1 MR. JAMES: Your Honor -- or excuse me.

2 Director, I'll make the same objection. I think this is
3 related to 121 and the Shoshone recharge site.

4 THE HEARING OFFICER: Ann?

5 MS. VONDE: I'll just state my same response.

6 I don't think the condition is -- I don't think that
7 Condition No. 8 states specifically what water has to be
8 sampled. It just says "a proposed monitoring plan."

9 THE HEARING OFFICER: Okay. Well, it's
10 unfortunate that these letters written by the Department
11 did not refer to a water right permit, even though it
12 references an impact evaluation monitoring program.

13 I have looked all the way through the document
14 to determine its locations that are being identified and
15 the testing that's being conducted. At least my
16 precursory review of it leads me to believe that it's
17 referring back to the approved plan as a plan that was
18 submitted and has been received in evidence as Exhibit
19 121.

20 So I'll receive Exhibit 122 into evidence with
21 the same qualification; that is that the relevance issue
22 will go to the weight of the consideration of the
23 hearing officer who will get this particular document.
24 (Exhibit 122 admitted.)

25 MS. VONDE: And if it would be helpful in

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1 terms of objections, I will represent that the next
2 three exhibits are in line with the same sequence of
3 letters as what we just submitted.
4 So do you want to just do them all?
5 MR. JAMES: Yeah. And I'd just make a record
6 and then she can ask for the admission. And what
7 numbers are you looking for?
8 MS. VONDE: So that's 123, 124, and 125 are
9 all really in sequence. And I'm submitting them only to
10 say that the conditions set forth in the one that was
11 just admitted are accepted by the water recharge
12 district and that they did actually implement
13 monitoring, so...
14 MR. JAMES: And, Director, I'd just make the
15 same objection with the qualification that I think that
16 the conditions on a permit are specific to the permit.
17 The permit is for diversion and use of water, a specific
18 place of use and applicable plan. The condition on that
19 permit would be for that place of use.
20 So the same objection as far as relevancy,
21 Director.
22 THE HEARING OFFICER: So are you offering --
23 do you want to offer these exhibits, Ann?
24 MS. VONDE: Yeah. I mean, we can just
25 complete out the sequence. I think it just completes

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1 the train of thought of the letters.
2 THE HEARING OFFICER: Joe, you've voiced your
3 objection. And I'll receive these into evidence. They
4 are documents of the Department. I haven't reviewed
5 them carefully.
6 But, again, it appears to me, in skimming the
7 documents, that they would refer back to the original
8 plan that was submitted. At least my understanding of
9 the original plan was that it was related to the Snake
10 River recharge water right and monitoring water quality
11 related both to surface water and groundwater for this
12 recharge and water delivered for recharge from the Snake
13 River and not the Wood River.
14 Okay. So Exhibits 123 through 125 are
15 received into evidence with the stated qualifications.
16 (Exhibits 123 through 125 admitted.)
17 MS. VONDE: I guess I can just leave them in
18 the regular order.
19 THE HEARING OFFICER: Leave?
20 MS. VONDE: I mean, I can have Michele go
21 through and read them. Would that be helpful?
22 THE HEARING OFFICER: Whatever you desire at
23 this point.
24 MS. VONDE: Okay.
25 THE HEARING OFFICER: So you want to examine

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1 her related to Exhibits 123 through 125?
2 MS. VONDE: I can do that, certainly. Yeah,
3 we'll run through them real quick.
4 THE HEARING OFFICER: Okay.
5 BY MS. VONDE:
6 Q. So taking a look at Exhibit 123, do you
7 recognize that document?
8 A. No.
9 Q. I'll represent to you that this is the same,
10 and it came from the LSARD.
11 A. Okay.
12 Q. Could you just read the second sentence of the
13 first paragraph. Second and third sentences. Nope --
14 yes, second and third sentence. No, wait. Sorry. One,
15 two, the third and fourth sentences beginning "At that
16 time."
17 A. "At that time, Mr. Martens indicated that the
18 recharge district could accept the conditions of your
19 March 16, 1984 letter. Also, he indicated your letter
20 of confirmation would be sent."
21 Q. And this letter was sent to John LeMoine,
22 chairman of the Lower Snake River Aquifer Recharge
23 District; is that correct?
24 A. I'm sorry?
25 Q. Was this letter sent to John LeMoine, chairman

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1 of the --
2 A. Lower Snake Aquifer Recharge District, yes,
3 that's who's on the letterhead.
4 Q. Okay. And then Exhibit 124, once again, could
5 you just read the first sentence.
6 A. "Please be advised that the Lower Snake River
7 Aquifer Recharge District will conform to all initial
8 testing requirements as specified in your letter.
9 "Mr. Charles Brockway has been directed to
10 include the requirements in the monitoring plan that
11 will become part of the cooperative agreement."
12 Q. And then the Exhibit 125, can you take a look
13 at that.
14 A. This appears to be a letter from the Lower
15 Snake Aquifer Recharge District. No, forgive me. It's
16 from Gerald Martens to John LeMoine of the Lower Snake
17 Aquifer Recharge District. It itemizes monitoring and
18 testing work that had been accomplished in 1984. But it
19 does not appear to identify the sites where the
20 monitoring was planned. So I would have to tie this
21 back into other information to make the best sense of
22 it.
23 Q. And this pertains to groundwater and water
24 quality monitoring --
25 A. Okay.

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1 Q. Is that correct?
2 A. It appears, yeah.
3 Q. Based on the letter, okay. Thank you.
4 Okay. Last one. Moving onto Condition No. 9
5 for the permit, which is on IDWR page number 79, IDWR
6 Exhibit 3.
7 A. "Plans for recharge facilities and any
8 conveyance works shall be submitted to the Department
9 for approval prior to construction."
10 Q. Did you do an analysis in regard to that
11 permit condition?
12 A. The plans for the Shoshone site were included
13 in -- I remember seeing them in -- actually in both
14 files, in both water right files. So I know we had
15 received them for the Shoshone site.
16 The site that I recommended, I asked for plans
17 and learned that they weren't available locally, though
18 they might be available from the Corps of Engineers.
19 And I did not pursue which office of the Corps of
20 Engineers would have that in their library. I just
21 assumed that we -- when the time became important for us
22 to get them, we could.
23 But the Department has issued permits with two
24 projects that were already existing, issued permits for
25 water right use on projects that were already existing.

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1 I had experience with that. And getting the plans after
2 the fact was one way to move forward with the water
3 right at licensing. Getting the plans beforehand was
4 not always provided.
5 Q. The headgate at the Dietrich Basin --
6 A. Yes.
7 Q. -- went in in 1970; is that correct?
8 A. I believe so. It was certainly before this.
9 Q. So your analysis wasn't at that -- the designs
10 for that headgate were not necessary because it existed
11 at the time this permit was put into place?
12 A. Yes.
13 Q. And is it unusual for a recharge water right
14 or other water rights to use somebody else's headgate to
15 divert?
16 A. No, not unusual at all.
17 Q. Okay. I'll have you take a look back at
18 Exhibit No. 120. It's the December 1, 1983 letter.
19 A. Oh, yes.
20 Q. And if you could please look at the second
21 page, the first full paragraph, first sentence of that
22 paragraph.
23 A. "Mr. Martens has provided this office" --
24 which is the Operations Bureau Office of the Department
25 of Water Resources -- "Mr. Martens has provided this

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1 office with a blueprint of the proposed Milner-Gooding
2 diversion works."
3 And considering how much this was after the
4 headgate to the Milner-Gooding, I would assume that this
5 was actually the re-diversion works rather than
6 diversion works. So maybe that's a small point, but I
7 believe the headgate to the canals were constructed
8 considerably before 1983. And the discrimination
9 between re-diversion works and diversion works is one we
10 struggle with to this day.
11 Q. The Shoshone recharge site was -- the headgate
12 into the Shoshone recharge site off the Milner-Gooding
13 Canal was not constructed at the time the permit was
14 issued; is that correct?
15 A. Not to my knowledge.
16 Q. Is it likely that this sentence was referring
17 to that headgate?
18 A. Yeah.
19 Q. And then I will refer you to Exhibit 116. Do
20 you recognize this document?
21 A. Yes, I do. I saw this several times.
22 Q. And can you describe what the document is?
23 A. These are plans and profiles of engineering
24 drawings for the Shoshone diversion site off of the
25 Milner-Gooding Canal and a survey on the first page and

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1 then the concrete design and plan of elevations on the
2 second page. Oh, okay.
3 (Unintelligible.)
4 It's in here twice. Maybe it's in the file
5 twice. I remember seeing this set of documents more
6 than once and in more than one file.
7 Q. And I will represent to you that this did come
8 from the back files. So either I copied it twice or
9 that's how it is in the back file.
10 MS. VONDE: I'd like to submit Exhibit 116
11 into the record.
12 MR. JAMES: No objection, Director.
13 THE HEARING OFFICER: Okay. The document
14 marked as Exhibit 116 is received into evidence.
15 (Exhibit 116 admitted.)
16 BY MS. VONDE:
17 Q. And, Michele, that document does appear in the
18 back file. If it appears in the back file, does that
19 mean that it was submitted to IDWR?
20 A. Yes.
21 Q. Okay.
22 A. I seem to remember seeing it in both; the
23 Snake River water right and the Little Wood water right,
24 so I've seen it multiple times.
25 Q. I guess we'll go back to Condition No. 8 just

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1 briefly, the permit, IDWR Exhibit 3, page IDWR 79,
2 Permit Condition 8.

3 Does Condition No. 8 say specifically where
4 monitoring must take place?

5 A. No, it doesn't.

6 Q. Does Condition No. 8 say that the monitoring
7 must occur from a certain water source?

8 A. No, it doesn't.

9 Q. Thank you. That's all I have.

10 THE HEARING OFFICER: Okay. Before we move
11 on, let's work through the exhibits now. I'll hand
12 these over to Kimberly. Let me just check or
13 double-check with you, Kimberly. I have Exhibits 110 --
14 by the way, some of these are loose. Let's work through
15 these.

16 So I have Exhibits 110, 111, 112, 113, 114,
17 116, 118, and then 119 through 125 received into
18 evidence. Is that consistent with your records?

19 MS. ENGLISH: Uh-huh. That's correct.

20 THE HEARING OFFICER: So let me hand these to
21 you. I think there are two additional marked exhibits.
22 I guess I can return those to Ann and not have those in
23 the files.

24 MS. VONDE: Thanks.
25 (Unintelligible.)

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1 THE HEARING OFFICER: Pardon me?

2 MS. VONDE: I had one more question. Sorry.

3 THE HEARING OFFICER: No, we won't grade you.
4 BY MS. VONDE:

5 Q. It's just one more question. When you did
6 your water volume calculation for licensing --

7 A. Yes.

8 Q. -- did you review IDAPA 37.03.02.03J in doing
9 that? And if you would like --

10 A. I believe that's the --

11 Q. -- I can provide you a --

12 A. -- Beneficial Use Exam Rule that requires a
13 volume for --

14 Q. Yes.

15 A. -- all, but I believe three uses are exempt
16 from the volume requirement. And that was part of the
17 reason why I needed to come up with a volume for this
18 license, because our rules require it.

19 Q. And good memory on that IDAPA rule. And that
20 IDAPA Rule 37.03.02.03J, in the third sentence,
21 provides, "The annual diversion volume shall account for
22 seasonal variations and factors affecting water use,
23 including seasonal variations in water availability."

24 Did you take into account these seasonal
25 variations when calculating the water volume for this

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1 right?

2 A. The data that I had was irrigation season
3 only, with the exception that I believe the Little Wood
4 Rivers and the Big Wood Rivers, they were year-round.
5 But without both sets, without both the canal data and
6 the river data, it's hard to know that any water from
7 the river went into the canal system. That doesn't mean
8 that it didn't. It just means there aren't records.

9 The records I saw were April through September
10 for the most part. And querying from the sites that are
11 my typical data sites, USGS websites and the Bureau of
12 Reclamation websites, I didn't find canal-flow data in
13 the wintertime seasons.

14 And I think I mentioned this earlier. There
15 may have been flow. There may have been flow in the
16 wintertime, and either the gauges were not being
17 maintained during the winter, because I saw conditions
18 that they may have pulled the gauges, or it was not
19 being measured by a watermaster in the wintertime, so
20 those daily readings didn't happen, or it was below the
21 level that the gauges could measure.

22 So there are a couple of reasons why there
23 might not be anything. But, primarily, I went for
24 respectable data, as in published, if at all possible,
25 so that it had been reviewed by statisticians, if

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1 nothing else. And the published data that I had
2 available to me was for the canal system, only the
3 irrigation season. So I did not have the full season
4 for most of the years of interest to us.

5 Q. So what does seasonal variations and water
6 availability mean to you in terms of what we just
7 stated?

8 A. Well, that there are times of the year where
9 there's water in excess maybe of the demand that would
10 be flowing through the canals, that there are times of
11 the year where there would be insufficient water to
12 serve all of the potential clients needing water from
13 that canal.

14 Q. Thank you. That was my last question.

15 THE HEARING OFFICER: Okay. Thank you. Shall
16 we break for ten minutes?

17 THE WITNESS: Please. I need a refresher.
18 (Recess.)

19 THE HEARING OFFICER: Okay. We're recording
20 again after an afternoon recess. Joe, your turn to
21 cross-examine.

22 MR. JAMES: Thank you, Director.

23 CROSS-EXAMINATION

24 BY MR. JAMES:

25 Q. Michele, I want to start with going over some

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1 questions on the application and licensing process. The
2 director, in his opening comments, indicated you had
3 conducted a field exam. Then on questioning, most of
4 the questions were directed towards licensing review.
5 There's a difference between the two; isn't that
6 correct?

7 A. Yes. Most of the time the Department has an
8 exam and a report done and is accepted and completed
9 before I start the review process.

10 Q. And the field exam requirement is part of the
11 proof of beneficial use process; is that correct?

12 A. If the Department does the exam, we are
13 signaled to make the inspection, come out and schedule
14 the inspection and conduct the inspection, after they
15 submit a document that we call "Proof of Beneficial Use
16 Statement." If the right holder chooses, they may hire
17 an independent certified water rights field examiner.
18 And in this case, the permit holder at the time hired a
19 certified water right examiner.

20 Q. And let me step back a little back. I don't
21 want to get ahead.

22 Who has a duty to submit the beneficial use
23 form? Is that the permit holder?

24 A. I would say yes in most cases. The cases
25 where a field report comes in at the same time as the

1 understanding?

2 A. Yes.

3 Q. So stepping back on the first part of that,
4 specifically the proof of beneficial use form or
5 statement, whose duty is that to provide?

6 A. I believe it's the permit holder.

7 Q. And if I'm understanding correctly, there is a
8 deadline for submission of proof, but that may be
9 extended in certain circumstances?

10 A. If they are able to submit a completed package
11 -- if the permit holder and the representative for the
12 permit holder are able to submit a completed package
13 within a reasonable amount of time -- I try and
14 remember. Is it 60 days or 30 days? At any rate, there
15 is a time where it just tolls against their priority
16 date. That's the penalty that they pay as their
17 priority date becomes less senior.

18 MR. JAMES: And, Director, I have a copy of
19 Idaho Code Section 42-217, and maybe we should question
20 the witness on it. I can either mark it as an exhibit
21 or just provide copies.

22 THE HEARING OFFICER: I don't know that
23 there's a need to mark statutory things as an exhibit.
24 But you're free to do so.

25 MR. JAMES: Director, may I approach?

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1 proof statement is usually when an independent examiner
2 has conducted the field examination. So no fees are
3 required. If the proof statement is submitted without
4 fees and with a completed field exam, we would move
5 forward on it.

6 Q. As I understand the process, the permit holder
7 has to submit proof of beneficial use prior to the
8 expiration of the prove-up period; is that correct?

9 A. Yes.

10 Q. And also in the same time frame, prior to the
11 end of the prove-up period, he either has to submit a
12 field exam completed by a licensed examiner or pay the
13 Department a fee to conduct the exam. Is that --

14 A. That is my understanding, as well.

15 Q. Okay. So the proof of beneficial use form and
16 the accompanying either fee or exam statement, that has
17 a set date on it; isn't that correct?

18 A. Yes. There are penalties when you have
19 (unintelligible), if you want to call it that, if you
20 miss your proof date. But after several weeks, we send
21 a lapse notice if we've received nothing.

22 Q. And that's the procedure that was followed in
23 this case. There was a notice due, a lapse issued, and
24 then subsequently a proof of beneficial use and
25 (unintelligible) was provided. Is that your

1 THE HEARING OFFICER: Sure.

2 BY MR. JAMES:

3 Q. And, Michele, I'll represent to you that I've
4 provided you a copy of Idaho Code Section 42-217. And
5 would you read the first paragraph on that statute?

6 A. "On or before the date set for the beneficial
7 use of water appropriated under the provisions of this
8 chapter, the permit holder shall submit a statement that
9 he has used such water for the beneficial purpose
10 allowed by the permit."

11 And then it lists several items that the
12 statement should include.

13 Q. And so back to my earlier question, it would
14 appear the burden is on the permit holders to submit
15 proof of beneficial use; is that correct?

16 A. Yes.

17 Q. And then also -- and you don't have to read it
18 out loud. If you could just review the paragraph
19 towards the bottom that starts with "Such written
20 proof." Could you review that. And just tell me when
21 you're done.

22 A. I'm ready.

23 Q. Okay. And that's what we discussed earlier.
24 So also at the time or before expiration of the prove-up
25 period, the permit holder has to submit a field exam by

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1 a certified examiner or pay a fee for the Department to
2 do it; is that correct?
3 A. That's correct.
4 Q. And in this case, the permit holder never paid
5 the Department a fee; is that correct?
6 A. Not to my knowledge. It's usually coded in
7 the documents.
8 Q. Well, I think the simplest way is he
9 provided -- the permit holder provided the initial
10 beneficial use form?
11 A. Yes.
12 Q. And accompanied it with a field exam?
13 A. Yes.
14 Q. And I'd refer you to the Department's Exhibit
15 No. 2, which is your license review memorandum.
16 A. Got it.
17 Q. And in that report you indicated you reviewed
18 two beneficial use field reports; is that correct?
19 A. There were two submitted signed different
20 dates, if I remember right, both by Mr. Martens. And I
21 also remember that one seemed more complete than the
22 other.
23 Q. Michele, do you recognize that document that
24 I've marked as Exhibit No. 201?
25 A. Yes. I have seen this.

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1 Q. And is that the proof of beneficial use form
2 along with the first beneficial use field report?
3 A. Yes. This is the proof of beneficial use form
4 that was submitted at that time and is attached to the
5 1992, July of 1992 exam, by Mr. Martens.
6 Q. Okay.
7 MR. JAMES: And, Director, I've ask for the
8 admission of Exhibit 201.
9 THE HEARING OFFICER: Ann?
10 MS. VONDE: No objection.
11 THE HEARING OFFICER: The document marked as
12 Petitioner's Exhibit 201 is received into evidence.
13 (Petitioner's Exhibit 201 admitted.)
14 BY MR. JAMES:
15 Q. Michele, do you recognize what I've handed to
16 you that is marked as Exhibit 202?
17 A. Yes, I do. I have seen this.
18 Q. And that was contained in the Department's
19 file, as well?
20 A. Yes.
21 Q. And you reviewed it in your licensing review
22 process?
23 A. Yes.
24 Q. Regarding Exhibit 201, it's my understanding
25 this was submitted upon the previous lapse being

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1 removed, and the permit was reinstated; is that correct?
2 A. That's the sequence of events as I remember.
3 There was a lapse issued on this permit, and then it was
4 reinstated.
5 Q. Michele, I'll represent that this is the
6 reinstatement order from the Department's file in this
7 matter. Have you had a chance to review that?
8 A. I have seen this before. And it referenced
9 both the 01-7054 water right and the 37-7842 water
10 right. Apparently, at that time, they were still
11 working through the path towards licensing or towards
12 vesting at the same rate. So the Chief of the
13 Allocation Bureau at that time, Glen Saxton, reinstated
14 both of these with a single order. And his order is
15 dated December 1, 1993.
16 Q. Okay. And that's what I'd like to go over
17 with you briefly, Michele, are the dates. Paragraph 2
18 deals with the subject permit and indicates, as we know,
19 that on June 2, '82, the Department issued Permit No.
20 37-0782; is that correct?
21 A. Yes.
22 Q. And proof of beneficial use was originally due
23 on June 1, 1987?
24 A. June 1, 1987, yes. I'm tracking with you now.
25 Thank you.

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1 Q. And then that was extended -- proof of
2 beneficial use was then extended to June 1st of 1992?
3 A. Yes.
4 Q. And on March 31, 1992, the Department sent
5 notice of proof for each permit?
6 A. Yes.
7 Q. And subsequently on June 5, 1992, the
8 Department sent a lapse notice.
9 A. Yes.
10 Q. Okay. Subsequently on June 27, 1992, the
11 permit holder filed the proof of beneficial use form
12 along with the field report?
13 A. Yes.
14 Q. And on August 12, 1993, that proof was to be
15 filed in both cases; is that correct?
16 A. Yes.
17 Q. And the order doesn't mention the second
18 beneficial use field report marked Exhibit 202. It
19 looks like the order just references the first proof of
20 beneficial use field report submitted on July 27th?
21 A. Yes.
22 Q. Okay. And the Department, it appears,
23 reinstated the permit based on the submission of the
24 initial field report and proof of beneficial use; is
25 that correct?

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1 A. Yes.
2 Q. So having proof of beneficial use along with
3 the field report -- well, let me step back.
4 So the permit is in lapse, and the permit
5 holders submit the proof of beneficial use and a field
6 report, and it's reinstated. Thereafter, there's no
7 longer a prove-up period.
8 Why did the Department consider the second
9 field report?
10 A. As I understand it, if we get a field report
11 that has filled in all the blanks, we would acknowledge
12 that. And when we have time to more than acknowledge,
13 when we can review it, and if, although the blanks are
14 filled in, the information supporting what's been
15 submitted is inadequate or illegible, we have the
16 privilege or the duty to ask for clarification.
17 That doesn't mean that the permit and the
18 proof statement aren't accepted. It just means that we
19 need clarification on what you've submitted to us.
20 And in this case, I remember seeing at least
21 one letter in the file directed to Mr. Martens after his
22 first report was submitted to provide some
23 clarification.
24 Q. Okay. But at that point, once the proof of
25 beneficial use form is submitted and a field exam is

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1 submitted, then you're no longer in the proof of
2 beneficial use, but you're starting the review process;
3 is that correct?
4 A. True.
5 Q. So the review process is set forth in Idaho
6 Code 42-219?
7 A. I'm going to trust you. My memory for code
8 numbers is --
9 Q. I'm not going to mark this.
10 A. -- less than perfect.
11 Q. Just for convenience, I'll provide you a copy.
12 A. Thank you.
13 Q. It indicates that, "Upon receipt by the
14 Department of Water Resources and all the evidence in
15 relation to such final proof, it will be the duty of the
16 Department to carefully examine the same"?
17 A. Yes.
18 Q. And so the phrase "such final proof," would
19 that be the beneficial use form along with the field
20 examination?
21 A. Yes. That's how I understand it.
22 Q. Okay. It's not the Department's place to go
23 beyond the -- extend the use for the proof provided in
24 the beneficial use field report or the beneficial use
25 form?

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1 A. I have been allowed to bring in the resources
2 as needed to clarify points that still needed
3 clarification if I found a field exam report was still
4 not clear enough for me to issue a license. It's our
5 duty to get the best possible information and support.
6 And sometimes the field examiner doesn't know what we
7 need to see.
8 And in this case, this one was submitted
9 really such a long time ago that I made no attempt to
10 contact Mr. Martens to ask him to clarify points that I
11 was unsure of. I wasn't sure he was still alive, to be
12 honest.
13 But I have the duty to collect information, if
14 I need information, to make this the best possible. And
15 in my case, rather than going back to Mr. Martens and
16 asking for information this many years after, I chose to
17 collect clarified information on my own.
18 Q. I'm just trying to clear up the process at
19 this point.
20 A. Okay.
21 Q. 42-217 clearly puts the burden on the permit
22 holder to submit proof and submit -- either submit a
23 field exam or pay for a field exam.
24 A. True.
25 Q. And then the licensing process is under 219,

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1 and it indicates "after the Department has, upon receipt
2 of such final proof" ...
3 Does that "final proof" refer to the
4 beneficial use form and the field exam?
5 A. The end date of the development period is the
6 date that we receive the proof statement or the
7 completed package.
8 Q. And we might go back a little bit. But,
9 first, 219 clearly states, it says, "the Department
10 shall carefully examine the same as the proof
11 submitted," correct?
12 A. I believe so, yes.
13 Q. Michele, would you look at Exhibit 201 again,
14 specifically page 1, the proof of beneficial use. I
15 take that back. Let me go a little farther back.
16 A. Okay.
17 Q. Idaho Code Section 42-217 requires the permit
18 holder to include in his statement of proof of
19 beneficial use with the extent the water has been put to
20 use.
21 A. Yes.
22 Q. And looking at Exhibit 201, it indicates that
23 the Department of Water Resources considers this form as
24 a statement that the permit holder has completed the
25 development that will occur under this permit, and the

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1 water has been in accordance with the provision of the
2 permit.

3 A. Yes.

4 Q. So the beneficial use provides the full extent
5 of the use of the water. And then later when I refer to
6 Number 10 on Exhibit 201, that indicates that the
7 information in the proof is a true statement of the
8 extent to which the above-numbered permit has been
9 developed and further relinquishes any undeveloped
10 portion to the State of Idaho.

11 A. That's true.

12 Q. So the beneficial use would say, This is it.
13 Anything that's not included in the beneficial use is
14 relinquished?

15 A. That's true.

16 Q. In looking at the proof of beneficial use,
17 again, in Exhibit 201, where was the source of the
18 water?

19 A. The source of water listed on this is the
20 Snake River only. But the numbers, the permit numbers,
21 indicate that it's from two different sources. I
22 recognize those numbers as meaning two different --

23 Q. And just to clarify, the permit is the
24 authorization to divert water?

25 A. True.

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1 Q. And that says the place where the water can be
2 diverted and the nature and purpose of the use and the
3 place of the use?

4 A. True.

5 Q. And then the proof of beneficial use is where
6 the water was used, correct?

7 A. Yes.

8 Q. And where the source of the water was?

9 A. Yes.

10 Q. And anything beyond this would have been
11 relinquished?

12 A. Yes.

13 Q. Michele, Idaho Code 42-219 limits the review
14 of such proof submitted by the permit holder. Is there
15 other authority to look outside that proof, to your
16 knowledge?

17 A. Not to my knowledge, no. The permit holder is
18 responsible for submitting the proof of beneficial use
19 statement unless he's authorized someone else and we
20 have records in that file that someone else can act as a
21 power of attorney or something else that would give him
22 or her that responsibility.

23 Q. And to your knowledge, the proof of beneficial
24 use form, the first page on Exhibit 201, that was never
25 withdrawn?

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1 A. It's signed by Gerald Martens, and he is
2 signing it as project manager, not permit holder. I
3 don't remember seeing a power of attorney.

4 Q. And I'm not asking the question on that.

5 A. Okay.

6 Q. What I'm asking is, this proof of beneficial
7 use form wasn't submitted in the prove-up period but was
8 submitted in a reasonable time to let the Department
9 reinstate the permit; is that correct?

10 A. Yes.

11 Q. And after that, the prove-up period was gone,
12 correct?

13 A. True.

14 Q. And the proof of beneficial use is the only
15 one in the file that was never withdrawn --

16 A. True.

17 Q. -- or substituted out?

18 A. Right.

19 Q. Okay. And the second, Exhibit 202, was after
20 the prove-up period and after the reasonable extension
21 thereof?

22 A. True.

23 Q. And just to clarify, when you did your license
24 review process, did you go beyond the beneficial use
25 form and the field examination report?

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1 A. I sought additional information, yes.

2 Q. And ultimately that additional information was
3 from which you formed your opinion for approval of the
4 license?

5 A. Yes.

6 Q. So in this present case, the extent of the
7 development of water right 37-07842 was 300 CFS from the
8 Snake River?

9 A. That's what the proof of beneficial use
10 statement says, and it contradicts itself, but I have
11 mentioned that both water rights were listed.

12 Q. And to clarify, in reviewing your statement,
13 one beneficial use form was submitted in both this
14 matter, as well as the recharge water right out of the
15 Snake River?

16 A. True.

17 MR. JAMES: Director, I believe we're on 203,
18 which would be the next number.

19 THE HEARING OFFICER: That was 203.

20 THE WITNESS: Yes. Reinstatement order.

21 THE HEARING OFFICER: Exhibit 204. 203 was
22 the reinstatement order.

23 BY MR. JAMES:

24 Q. Michele, do you recognize what's been marked
25 as 204?

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1 A. I have seen this before, yes.
2 Q. And what is it?
3 A. It's a memorandum drafted by Sharla Cox,
4 maybe, dated October 7, 1999, and it's regarding
5 recharge projects. In particular, it's directed to the
6 file 37-7842. And it contains documentation of her
7 initial review of these two files and the examiner's
8 field report. It looks like she only posted it to the
9 one file. But, regardless, she's mentioning two files.
10 And she was confused about the groundwater recharge that
11 was taking place under 37-7842.
12 Q. And in it, it also included a conversation
13 with Dan McFadden of the Lower Snake River Aquifer
14 Recharge District?
15 A. Yes. She mentions that she had a conversation
16 with him.
17 Q. And he, in that, indicates that the potential
18 recharge from the Dietrich Canal was for flood control?
19 A. That's how Lee Peterson, apparently,
20 characterized it.
21 MR. JAMES: I'd move for the admission of 204.
22 THE HEARING OFFICER: Ann?
23 MS. VONDE: I believe that's part of the map
24 there. No objection.
25 THE HEARING OFFICER: Document marked as

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1 Petitioner's Exhibit 204 is received into evidence.
2 (Petitioner's Exhibit 204 admitted.)
3 BY MR. JAMES:
4 Q. And part of the license review process under
5 Idaho Code 42-219 is also to confirm that all
6 requirements have been completed?
7 A. Yes.
8 Q. And the reason I asked that, Michele, is
9 earlier there was some testimony that it was limited to
10 beneficial use, but you actually reviewed whether the
11 legal requirements were completed?
12 A. I accepted the limitations that were handed to
13 me as the period of development that James Cefalo had
14 set out in his order. So I limited my review to
15 information that was relevant to this site dated 1992 or
16 earlier. Between '82 and '92.
17 Q. Okay. Now, I want to switch gears a little
18 bit. There's an application before a permit was filed.
19 That doesn't give any right to divert until the permit
20 is approved; is that correct?
21 A. Yes.
22 Q. And once a permit that is issued or approved,
23 that defines and provides the authority as to what water
24 may be diverted?
25 A. Yes.

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1 Q. Including where it may be diverted from?
2 A. Yes, with the exception that I know that we
3 can amend a permit to show the actual development within
4 the development period. If it was not completely stated
5 on the application, we can amend the permit before we
6 issue a license. The license has to match the final
7 permit before we can issue a license.
8 Q. Okay. And that's --
9 A. So we amend the --
10 Q. The approved permit is the authority to divert
11 water; is that correct?
12 A. Yes.
13 Q. And that includes the place of diversion?
14 A. Place of diversion? Yes. Usually it's
15 described on the --
16 Q. Well, let me ask you then a hypothetical. If
17 it doesn't provide the place of diversion, you can
18 divert the unappropriated waters anywhere in the State
19 of Idaho if you have a permit?
20 A. We expect to know what source is the intended
21 source, and we issue the permit with a number that
22 coincides with that water source, that basin,
23 administrative basin, as the water right number
24 preceding the hyphen. That's the basin number.
25 So before we can issue a permit, we would need

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1 to know what the intended source is.
2 Q. But what I'm asking is, basically, the permit
3 is the granted authority to divert water?
4 A. Yes.
5 Q. And it says how much water can be diverted,
6 correct?
7 A. Yes.
8 Q. And where it may be diverted from?
9 A. Yes.
10 Q. And where it may be used?
11 A. Yes.
12 Q. And the amount or rate of diversion, as well?
13 A. The proposed diversion rate, yes.
14 Q. Well, if you have a permit for 300 CFS, you
15 can't go out and divert 600 CFS, can you? That would be
16 a violation of the permit, wouldn't it?
17 A. True.
18 Q. In this particular permit -- and I don't know
19 if it will help you, Michele, but you can look at it
20 while you're talking.
21 A. I think we have it as Exhibit 3.
22 Q. That's right. IDWR Exhibit 3.
23 And in this particular case, that permit sets
24 forth the source of the water as the Little Wood and Big
25 Wood River?

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1 A. Yes.

2 Q. And provides the location of the point of
3 diversion in the southwest corner of the southeast
4 quarter, Section 24, Township 45, Range 19 east, of the
5 Boise-Meridian in Lincoln County?

6 A. Yes.

7 Q. So that was the authorized point of diversion?

8 A. Yes.

9 Q. And it's impossible to divert from either the
10 Little Wood or the Big Wood at that location?

11 A. I did not see any system that would bring
12 water directly to that location from either river, so I
13 would say this point of diversion --

14 Q. Well, let me ask -- I mean, just to speed
15 things up, you talked earlier, testified, regarding
16 points of diversion and points of re-diversion. If this
17 would be a diversion point, it would either have to be
18 on the Big or Little Wood River?

19 A. True.

20 Q. And neither the Big or the Little Wood River
21 divert through that section or flow through that
22 section?

23 A. It's not a point of diversion from either
24 river. It's off of both of them. It's away from both
25 of them.

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1 Q. And I don't want to confuse you, Michele. I
2 don't think that's the section where the diversion from
3 Gooding-Milner is.

4 A. No.

5 Q. I think we're talking about a different spot.
6 We're talking upriver. And I think that mistake was
7 noticed early on in the application process. Is that
8 your recollection, as well?

9 A. Yes.

10 Q. Okay.

11 A. I remember it being dated after it was
12 advertised. So it was advertised a couple times, and
13 then the notes from, I believe it was Glen Saxton, and
14 what I remember was that it was after the advertising,
15 so he saw a problem with the POD at that point.

16 Q. And just going through the back file, it looks
17 like there was a note to the file indicating the wrong
18 point of diversion on December 29, 1981. Does that
19 sound about right to you?

20 A. Yeah.

21 Q. And referring back to the Department's Exhibit
22 No. 3, the last page, page number 79, what date was the
23 permit approved?

24 A. June 2, 1982.

25 Q. And so that was after the discovery that that

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1 was the wrong point of diversion. In the application
2 process prior to the approval of the permit, was the
3 application ever modified to include another point of
4 diversion?

5 A. Not to my knowledge. It doesn't look that
6 way.

7 Q. And without an amendment, it was never --
8 there was no publication of that point of diversion?

9 A. True. We basically published the point of
10 diversion as it appeared on the application.

11 Q. And subsequent to that, to your knowledge, was
12 the permit ever amended, or was there an application for
13 amendment filed during the prove-up period?

14 A. I don't remember seeing one. I don't believe
15 there was an amendment to the permit.

16 Q. And I think you testified earlier that
17 diversion works for this description, ditches, flumes,
18 pumps, and headgates, etcetera, would be contracts of
19 the Dietrich Canal system and the Richfield Canal
20 systems. So that was the conveyance method.

21 Okay. In the field report attached to Exhibit
22 201, paragraph 5, indicating points of diversion, this
23 is -- was this the item you testified to earlier as far
24 as being a point along the Milner-Gooding Canal?

25 A. That's how I translated this, yes.

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1 Q. And the place of use on Item 6, that was the
2 recharge site north of Shoshone?

3 A. That's what we know now.

4 Q. The measuring devices for flow measurements
5 were measuring stations on the Gooding-Milner Canal; is
6 that correct? That would be Item D1.

7 A. Yes. I believe the map -- help me identify
8 which stations. I think you mentioned Station 57.

9 Q. Well, I'll refer to you the first paragraph,
10 D1, which talks about flow measurements and measuring
11 stations.

12 I apologize. Okay. Michele, if you can look
13 to Exhibit 202.

14 A. Okay.

15 Q. It's the exhibit attached thereto which shows
16 the Lower Snake River aquifer recharge.

17 A. Yes.

18 Q. And that's the map that was attached to the
19 second field exam?

20 A. That's my memory, as well, yes.

21 Q. That map, does it note measuring stations
22 along the Gooding-Milner Canal?

23 A. Yes.

24 Q. And that would include Station 56 and 57?

25 A. Yes, as I learned.

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1 Q. And you denote on the map there's a mark where
2 it indicates recharge site?
3 A. Yes.
4 Q. Going to that, the measurement devices that
5 are located on the first field report attached to the
6 beneficial use form was along the Gooding-Milner Canal?
7 A. Some of them, yes. I would say the headgate
8 of the Milner Canal would also be a measuring device.
9 Q. And, Michele, going back to Exhibit 201, the
10 first field report, I think this is what -- starting on
11 paragraph D1, the field report had listed measuring
12 devices?
13 A. Flow measurements, Section D?
14 Q. Do you see it now?
15 A. Yes. The Milner-Gooding Canal measuring
16 Stations 56 and 57.
17 Q. And 57. That measuring device is for the
18 Dietrich Canal on initial field reports?
19 A. True.
20 Q. And, Michele, I refer you to the Department of
21 Water Resources Exhibit 3 again, an application, Bates
22 stamp -- excuse me, page 79.
23 A. Yes. The conditions of approval.
24 Q. On what was previously Item No. 3, conditions
25 of approval?

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1 A. "The issuance of this permit in no way grants
2 any right-of-way or easement across the land."
3 Q. And that's simply a statement that it doesn't
4 grant? They have to obtain easements; is that correct?
5 A. The Department cannot grant.
6 Q. They're not using it for anything?
7 A. Right.
8 Q. In your earlier testimony, you discussed that
9 right-of-way had been obtained from the BLM?
10 A. Yes.
11 Q. And I believe that was Respondent's Exhibit
12 111. You don't have to look at it.
13 A. Okay.
14 Q. There was proof that -- do you know if there
15 were any agreements between the Big Wood Canal Company
16 and the permit holder to use the Dietrich Canal for
17 conveyance of water?
18 A. I remember a document that stated they were in
19 the process of getting permission to use one of the
20 canals. I'm sorry. I don't remember specifically which
21 canal.
22 Q. And I guess another way to put it, you don't
23 grant easements through the issuance of a permit?
24 A. No.
25 Q. And you don't know if there was any permission

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1 granted to use the Dietrich Canal?
2 A. No. And with that unknown, we tend to put
3 that back on the right holder. You'll have to get
4 authorization to use this site. We can't give it to
5 you.
6 Q. And regarding Condition No. 4, which I believe
7 was the use of water, it's subject to control by the
8 watermaster by the State Water District No. 37?
9 A. Yes.
10 Q. I think you testified earlier the purpose of
11 that condition was for data entry. It appears that it
12 goes beyond that. It's to clarify that the watermaster
13 can administer that water with priority notes?
14 A. If it's identified for him as a water right,
15 vested water right, with a certain priority date, then
16 it's his job to deliver water based on the priority
17 date. But as a permit, he wouldn't have to regulate a
18 permit. It would have to be a vested water right.
19 Q. And that's what I'm saying. The condition is,
20 even -- this condition on the permit means use of the
21 water under this permit will be subject to monitoring by
22 the watermaster.
23 A. True. It's just that he wouldn't have
24 everything he needs to be able to regulate.
25 Q. And I would assume that one of those things he

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1 might need to regulate would also be a measuring device;
2 is that correct?
3 A. Yes.
4 Q. And you indicated that the measuring device
5 you deemed appropriate was the measuring device located
6 where the Dietrich Canal diverts from the Little Wood
7 River; is that correct?
8 A. Yes. That's, as I understand it, Station 11,
9 I believe is the number.
10 Q. Yeah. And the Dietrich Canal, to your
11 knowledge, has laterals and diversions and re-diversions
12 off of it; is that correct?
13 A. Yes. It would -- certainly the watermaster
14 told me there were early season. If nothing else, there
15 would have been those that he mentioned.
16 Q. And so without a measuring device on the point
17 of re-diversion from the Dietrich Canal, how would the
18 watermaster monitor priority?
19 A. He would -- without a measuring device on the
20 point of re-diversion, how he -- it would be difficult.
21 Q. And I'm not trying to trick you, but Station
22 11 is the measuring device at the head of the Dietrich
23 Canal. The Dietrich Canal has numerous laterals,
24 diversions, what you would call re-diversions, off of
25 it. It would seem to me the condition on the permit for

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1 measuring device would include the re-diversion off the
2 Dietrich Canal?

3 A. It's not clear. If I had had above and below
4 that diversion structure, that would have been ideal. I
5 did not have that information. I had above only. I
6 could not find information from the station below. They
7 may exist. I couldn't find it.

8 Q. When you calculated the rate of diversion in
9 your licensing memorandum, how did you come up with that
10 figure as far as measurements?

11 A. It was a relatively simple calculation.
12 Knowing that there was a measurement at the head of the
13 canal and that I was unable to find flow measurements at
14 the tail end of the canal, at the end of the Dietrich
15 Canal, and taking out what I knew was the demand, leaves
16 a certain quantity of excess water that had to go
17 somewhere.

18 Q. And it's my understanding the Dietrich Canal,
19 at the end of it, diverts into laterals that ultimately
20 discharge back into the Little Wood River. Is that your
21 understanding, as well?

22 A. I know that is somewhat the case now. They
23 call it the "F waste." At the time I did this review, I
24 was tracing the Dietrich Canal, and it ends in a field.
25 The end of that canal doesn't go back directly to the

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1 Little Wood.

2 I've learned since that there are some waste
3 channels that have been developed just very near to that
4 terminating field that begin to drain the area of water,
5 and those waste channels discharge into the Little Wood
6 River.

7 Q. So there was no measurement devices on --
8 well, let me step back.

9 Referring to Idaho Department of Water
10 Resources Exhibit 4, it looks like those laterals or
11 waste channels are depicted at the end of the Dietrich
12 Canal; is that correct? Do you want to take a look?
13 A. How I understand it is -- how I now understand
14 it, I really believed at the time that I did my review
15 that there was no more water left in the Dietrich Canal
16 beyond that terminating field. That was it. That
17 farmer got it all or whatever was left, that there was
18 no other excess water.

19 And I looked for flow measurements at the tail
20 end of the Dietrich Canal, and there wasn't a station
21 number or anything that said this is the discharge of
22 the Dietrich Canal into the Little Wood River or the
23 discharge of the Dietrich Canal into any other source.

24 So I assumed that the Dietrich Canal ended
25 where our maps indicate, the traces on our maps, which I

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1 displayed for you. The Dietrich Canal terminates above
2 the Little Wood River.

3 Q. But it's your understanding now --

4 A. Yes.

5 Q. -- that there's a --

6 A. That there is waste channels in that area that
7 might be the intermediaries between the Dietrich Canal
8 and the Little Wood River. I can't say I can confirm
9 that.

10 Q. So did you take into account the discharge
11 from the Dietrich Canal back into the Little Wood River
12 through those waste channels, or any other lateral, in
13 your calculation of the rate that was put to beneficial
14 use?

15 A. I used the rough estimate that I had been
16 given from the watermaster, which was generous, I
17 understand now. 150 CFS was the early-season demand.
18 That's what I knew would need to come from the Dietrich
19 Canal.

20 He did not share with me, and I didn't ask,
21 which locations on the Dietrich Canal. I assumed,
22 because it's pretty lava-wasteland sort of territory,
23 that it was more towards the bottom end or the southern
24 end of the Dietrich Canal that that water was dedicated
25 to go. And I looked for discharge back to the Little

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1 Wood River, and I didn't find -- I thought I knew what I
2 was looking for. I didn't find what I was searching
3 for.

4 So to answer your question thoroughly, did I
5 take out a discharge back to the Little Wood River, no,
6 I didn't -- was not able to find out how much that
7 discharge would have been.

8 Q. And you stated you did take out early-season
9 demand?

10 A. Yes.

11 Q. And those figures came from where?

12 A. The watermaster. The current watermaster.

13 Q. And just some more definitions, meaning that
14 the rights, the other rights, in the Dietrich Canal
15 early season?

16 A. Yes. Because there are water rights that are
17 quite senior to the one that we were discussing, those
18 would certainly have had water shepherded to them in
19 priority over any of these.

20 Q. Did you -- and I'll represent, just so you
21 understand, I know on early-season years, often times
22 I'm delivered to my farm twice my allotment because
23 they're trying to get rid of water.

24 A. Okay.

25 Q. Did you go through those re-diversions off the

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1 Dietrich Canal and check any measurements as to what was
2 actually --
3 A. No, I did not.
4 Q. So you don't know actually what was being
5 diverted --
6 A. True.
7 Q. -- to the other right holders out of the
8 Dietrich Canal?
9 A. True.
10 Q. You don't know how much was being re-diverted
11 of that into the Little Wood River?
12 A. True. I couldn't find evidence. I couldn't
13 find documentation.
14 Q. You don't have any measurements from the Corps
15 of Engineers headgate that was diverting water or water
16 was going out for recharge? You don't have any
17 measurements from there?
18 A. No.
19 Q. And, Michele, there's no indication -- water
20 at the end of the canal has to go somewhere. There's no
21 indication that these drainage channels or channels back
22 into the Little Wood River were added after the prove-up
23 period for this permit?
24 A. True.
25 Q. I want to visit Condition No. 5, which was the

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1 condition secondary to all prior water rights, including
2 rights owned by any privately-owned
3 electrical-generating company. Okay.
4 This permit doesn't mention the Swan Falls
5 litigation. That condition isn't regarding the Swan
6 Falls litigation?
7 A. True.
8 Q. That condition doesn't specify statutory
9 amendments or legislation resulting from the Swan Falls
10 litigation?
11 A. True.
12 Q. It doesn't mention the Swan Falls agreement?
13 A. No, it does not.
14 Q. It doesn't limit the privately held
15 power-generation company to Idaho Power?
16 A. No, it does not.
17 Q. Okay. It would have been simple if it was
18 simply limited to Idaho Power. It could have been
19 placed in there by hand?
20 A. I agree with you there. It would have been
21 simpler. But it's general.
22 Q. Yeah. So, to your knowledge, are there other
23 privately held hydro-generation companies on the Little
24 Wood River?
25 A. I believe there are.

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1 Q. Are you aware of any wages from those
2 individuals?
3 A. No. No.
4 Q. Okay. And Condition No. 8, which is the
5 condition dealing with procedures to guarantee water --
6 A. Yes.
7 Q. That deals specifically with this permit,
8 correct?
9 A. Yes. There is a very similar condition, if I
10 remember right, on the Snake River right.
11 Q. This one says water may not be diverted under
12 this permit.
13 A. True.
14 Q. So there may have been procedures provided to
15 the director regarding the north Shoshone site, correct?
16 A. True.
17 Q. But that site, based on your review, was
18 determined to be Snake River volume?
19 A. Yes.
20 Q. So on your alternate point of use off the
21 Dietrich Canal, are you aware of any plan or procedure
22 to guarantee water quality in the Snake River aquifer
23 for recharge off the Dietrich Canal?
24 A. No. No. I inferred from the traces of
25 evidence that are in this file that there was a plan in

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1 the works, but I did not find that plan in this water
2 right file.
3 Q. And, also, did you find any action on the part
4 of the director approving a water quality plan for
5 recharge off the Dietrich Canal?
6 A. I don't remember seeing anything like that in
7 the file.
8 Q. And I guess, you know, in way of explanation,
9 again, the plan, the proof of beneficial use submitted,
10 was for recharge at the north Shoshone site?
11 A. He submitted proof of beneficial use for both
12 water rights. It's stated a couple of times. I'm sorry
13 he was confused, but one proof statement or one field
14 exam really shouldn't be applied to multiple locations,
15 multiple sources. But that's what was in front of us,
16 and that's what I had to work with.
17 Q. Michele, I want to refer you to your license
18 review report. And that would be Exhibit 2, page 10.
19 And under the conclusion in the top half of the page,
20 you indicated that --
21 A. Oh, I'm there. Thank you.
22 Q. -- the site is not currently approved for
23 managed aquifer recharging. What did you mean by that?
24 A. The Department did not, at the time that I did
25 this review, have a policy, have guidance, available to

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1 IDWR personnel in order to review and confirm this
2 particular use. So I took it upon myself to learn what
3 I could about what constituted recharge, what
4 constituted managed aquifer recharge, and did what I do
5 for most research projects, is Google it.

6 I found some good resources that helped me
7 define the types, the conditions, for aquifer recharge.
8 And one of those documents gave me categories of aquifer
9 recharge. And one of those categories was unmanaged.
10 Another one of those categories was managed aquifer
11 recharge. I used that information to inform my decision
12 about did this qualify as aquifer recharge.

13 Groundwater recharge wasn't defined in the
14 application or the permit as managed or unmanaged. It
15 was just groundwater recharge. We didn't have then, and
16 may still not have much, in the way of guidance to help
17 us understand and confirm that aquifer recharge occurred
18 and in what quantities.

19 Based on my research, I believed that this
20 event constituted aquifer recharge, but it was not
21 managed aquifer recharge. The water was diverted -- was
22 managed as a diversion -- it had to have been -- shunted
23 down the canal and put in a place of use that had no
24 water coverage other than this use. And although it
25 couldn't be defined by the categories that I was using,

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1 in the same way, it informed me enough that, although
2 this might not be a managed aquifer recharge incident,
3 it was an aquifer recharge incident.

4 Q. Well, let me ask: Why wasn't it a managed
5 aquifer recharge?

6 A. My understood distinction between the two,
7 managed and unmanaged, was mostly the intent to retrieve
8 the water after it had been stored in the aquifer, that
9 unmanaged aquifer recharge is mostly due to a need to
10 get rid of water, dispose of water, excess water. Get
11 it out of the way.

12 Q. So it didn't meet your definition because the
13 diversion into the Dietrich Canal wasn't for the purpose
14 of recharge?

15 A. No. I believe that it was diverted
16 deliberately down the Dietrich Canal, that this site was
17 the site in mind, that it had been used for an
18 infiltration basin before. It had been designed and
19 used as an infiltration basin by the Corps of Engineers.

20 I trusted their engineering enough to believe
21 that they had investigated this site somewhat, that it
22 wouldn't flood basements right away, that it would do
23 what was intended, which was to relieve the canal system
24 of some water, put it in a place where it would not be a
25 hazard or a nuisance condition.

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1 And although the infiltration basin that was
2 provided may not have been designated an aquifer
3 recharge, a managed aquifer recharge basin, it was
4 certainly an infiltration basin.

5 Q. And I guess that's what I meant, is, was it
6 put down the Dietrich Canal for flood control, or was it
7 put down there for the purpose of recharging the
8 aquifer?

9 A. I don't know the intent. I only know that
10 there was excess water that was within the development
11 period of this permit. The watermaster may have
12 recognized we have excess water, we have a permit, we
13 can provide evidence of this use. I don't know the
14 intent.

15 All I know is that there appears to have been
16 a managed diversion from the Little Wood into the
17 Dietrich Canal and that this particular infiltration
18 basin was used to re-divert water out of the Dietrich
19 Canal. Otherwise, there was no authorization, flood
20 control or otherwise, to use water in this area. And my
21 aerial photography shows that this basin was used in
22 1984.

23 Q. It was used in 1984?

24 A. Uh-huh.

25 Q. And it had been used -- do you have any

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1 knowledge that it was used prior to 1984?

2 A. I was told that it had been used in past
3 years, but I did not investigate those. Those were
4 outside of the development period.

5 Q. So, basically, prior to the issuance of the
6 permit?

7 A. Yes.

8 Q. Okay. So we have the -- and I'll call it a
9 "flood basin" off the Dietrich Canal that was used
10 sometime prior to the permit being offered, correct?

11 A. I believe so. The county commissioners's
12 office and Lynn Harmon both mentioned that they believed
13 it had been used in the -- I think they quoted me in the
14 70's. That was one trace, one bread crumb, that I
15 followed to find out, okay, there were other sites
16 listed on the original permit. Where were the other
17 sites, and were they ever used?

18 The primary focus for my intention was the one
19 that appeared to have been advertised that appeared to
20 have been the focus of this permit. So there were
21 certainly other sites. Initially --

22 Q. Well, and let's back up. So are you aware of
23 any agreements between the City of Gooding and the City
24 of Shoshone, Gooding County, Lincoln County, for use of
25 the Dietrich Canal in the Army Corps of Engineers

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1 diversion for flood control?

2 A. I don't know that I've seen the agreement. I
3 was told there was an agreement.

4 Q. Okay. And you don't -- you said that the
5 watermaster turned it down, the Dietrich Canal, but you
6 don't know for what purpose?

7 A. True.

8 Q. You don't know if it was pursuant to this
9 permit?

10 A. I don't.

11 Q. And you don't know if it was for flood
12 control?

13 A. I don't.

14 Q. Have you received any information -- or in
15 your licensing review process, did you receive any
16 information from the permit holder that they had
17 diverted water under this permit through the Dietrich
18 Canal?

19 A. At the time that it was done, or at proof,
20 neither. No. I did receive information from the permit
21 holder that this site had been used. It was a proposed
22 site. But I did not have evidence from the permit
23 holder that they had actually used it in the development
24 period.

25 Q. Why did -- so you have no information from the

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1 permit holder. Their field reports and as well as the
2 proof of beneficial use form do not indicate that they
3 ever sent it down the Dietrich Canal.

4 Why did you say, Hey, this isn't flood
5 control, it's recharge? Why did you go that way?

6 A. I wanted to cover that water use with the
7 water right, and that was a water right that I was
8 investigating. As I was reviewing the imagery, and not
9 having witnessed it myself, and not having really anyone
10 else witnessing this particular event, I had to use
11 evidence other than eye witnesses to piece together and
12 say, Yes, there was excess water. Yes, it was
13 deliberately diverted down the Dietrich Canal.

14 They could have put it somewhere else, I
15 suppose. But as I saw it, there was a deliberate use of
16 the Dietrich Canal. They put it in a location that was
17 not covered by any other water right in quantities that
18 would have required a water right from surface water in
19 the time frame that this merit authorized development.

20 Q. And I'll try to be brief on this. I know that
21 you concluded that recharge under this permit didn't
22 occur at the north Shoshone site, but there was recharge
23 occurring during that time; is that correct?

24 A. Yes.

25 Q. On the Basin 1 permit. And it's my

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1 understanding, based on the beneficial use form, that
2 the Department basically accepted 300 CFS on both the
3 Snake River and the Little Wood River?

4 A. It appeared that way to me.

5 Q. And have you researched the capacity of the
6 North Shoshone recharge site?

7 A. Not such that I'd be able to quote.

8 Q. My memory is you went to a conference and
9 somebody was speaking on recharge.

10 A. Oh.

11 Q. Do you recall that?

12 A. The Mike McVay seminar. Yes. Thank you for
13 refreshing me. We have Mike McVay doing a lot of
14 research on what areas of the state would be good
15 candidates for aquifer recharge. And he's gone so far
16 as to quantify and prioritize sites that would be
17 better, maybe, locations for recharge than others. And
18 when I asked him if this area would be an area that
19 would be considered, he gave me his best estimate of
20 what he felt the site would handle.

21 Q. And do you recall what it was?

22 A. I'm sorry, no. I believe it's in my field
23 exam report. I'm just starting to fade.

24 Q. I'll try to be real quick.

25 A. Recharge capacity. It's IDWR page 70 of our

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1 Exhibit No. 2.

2 Because I had been assigned this water right
3 and given the proof of beneficial use period to work
4 within, and the location, I wanted to find out if there
5 were sufficient circumstances, sufficient conditions, to
6 make aquifer recharge possible in this area, and one of
7 the resources I used was Mike McVay who is a technical
8 hydrogeologist from the state office of IDWR.

9 He presented a seminar at that time and
10 informed the Department and the public about the
11 availability and the likelihood and the prioritization
12 of aquifer recharge sites in the state. And I asked him
13 specifically about this area. I may have asked him
14 about the Shoshone site. I don't know if I phrased it
15 that way.

16 Q. At the end of that page 70, it indicates --

17 A. Oh, here's the infiltration rate. Yes, he
18 estimated the infiltration rate at approximately 350
19 CFS, at most.

20 Q. Okay. And the permit out of Basin 1 is still
21 in the licensing review process?

22 A. I believe so. That one has not been assigned
23 to me yet.

24 Q. Okay. And so if ultimately the director
25 determines that there was recharge through the North

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1 Shoshone site in this matter, then that would probably
2 also be taken into consideration as to how much CFS
3 could have been used from the Snake River.

4 In other words, if the total was 350 and
5 you're in the process and you say we have this event
6 where each one is allocated 350 CFS for a total of 600
7 CFS, that just isn't possible, based on Mr. McVay's
8 statement?

9 A. I don't know how that would be viewed. I only
10 had the one water right.

11 Q. And a couple of things. After reviewing your
12 licensing review report and the questions you were asked
13 today, is it still your conclusion that regarding the
14 bifurcation, that it could not be a source -- that the
15 Little Wood River could not be a source of water during
16 the recharge event in the field examinations?

17 A. That is still my recommendation, that it was
18 not Little Wood water.

19 Q. And then -- and I think that's it.

20 MR. JAMES: Director, can I ask what exhibits
21 have been admitted? I think I gave --

22 THE HEARING OFFICER: Are you tracking those,
23 Emmi? Why don't you just tell me.

24 MS. BLADES: Joe, I believe -- and, Kimberly,
25 please correct me if I'm not on track here -- but you

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1 offered Exhibits 201, and that was admitted. You did
2 not offer 202 or 203. You offered 204, and it was
3 admitted.

4 MR. JAMES: So, Director, I'd offer Exhibits
5 202 and 203.

6 MS. BLADES: Is that correct, Kimberly?

7 MS. ENGLISH: Uh-huh.

8 THE HEARING OFFICER: Ann?

9 MS. VONDE: No objection to 202. No objection
10 to 203.

11 THE HEARING OFFICER: The documents marked as
12 Petitioner's Exhibit 202 and 203 are received into
13 evidence.

14 (Petitioner's Exhibits 202 and 203 admitted.)

15 MR. JAMES: That's all I have.

16 THE HEARING OFFICER: All right. Let's map
17 out our time here. So do you have further questions,
18 Emmi?

19 MS. BLADES: No further questions.

20 THE HEARING OFFICER: How long, Ann?

21 MS. VONDE: For what?

22 THE HEARING OFFICER: Well, I'll give you an
23 opportunity for some.

24 MS. VONDE: Oh, I wasn't prepared for that. I
25 didn't know we could recess.

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1 THE HEARING OFFICER: I think I indicated that
2 at the outset.

3 MS. VONDE: Did you?

4 THE HEARING OFFICER: Yeah. Do you want a
5 five or ten-minute break? I have a few questions.

6 MS. VONDE: Yeah, I guess I could put
7 something together in the break. It wouldn't be very
8 long.

9 THE HEARING OFFICER: And I can ask mine at
10 the end. The problem when I do that is, then everybody
11 may want another shot at it.

12 MS. VONDE: Come back at it.

13 THE HEARING OFFICER: So why don't I just ask
14 my questions, and then you can follow. You want to take
15 a break for five minutes and then come back, and I'll
16 just ask my questions?

17 Okay. I think we need a break.

18 (Recess.)

19 THE HEARING OFFICER: We're recording again
20 after an early evening recess.

21 Okay, Michele, I just have a few questions for
22 clarification.

23 EXAMINATION

24 BY THE HEARING OFFICER:

25 Q. In the documents, particularly I think in the

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1 table, or a couple of tables that are part of your
2 report in Exhibit No. 2, the numbers of the table on top
3 refers to the Dietrich Canal, and then it says number
4 11, and I don't -- I think the answer to my question was
5 partially revealed through the examination of Joe.

6 But what was the significance of the number
7 11? What is that?

8 A. I don't know what 11 means to anybody in the
9 Big Wood Canal Company. They had number systems on
10 their measuring stations that were not obvious to me
11 when I was doing the review. In fact, the map from the
12 field examiner, Gerald Martens, provided me some of the
13 best information to know which station was located where
14 and on which stream.

15 Q. Well, let me cut to the question again. The
16 number 11, is it in reference to the diversion in the
17 canal itself, or is it a number that refers to
18 sub-portions of that canal? Because I often see various
19 laterals and various subparts of a particular canal
20 referred to as -- for instance, a Dietrich Canal lateral
21 number one, number two, number three.

22 So is it a site number that identifies the
23 Dietrich Canal point of diversion, or does it refer to
24 something else?

25 A. I understood it to refer to the headgate where

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1 the Dietrich Canal diverts from the Little Wood River,
2 and that's where their measuring station is located, and
3 it's called Station 11.

4 Q. Okay. And I want to talk about the site where
5 the water is discharged from the Dietrich Canal to some
6 sort of basin, and I think you said in your testimony
7 that the site and the structures at the site were
8 constructed by the Corps of Engineers?

9 A. That's as I understood it.

10 Q. And approximately in 1970?

11 A. Yes.

12 Q. And do you know the purpose of the
13 construction?

14 A. No, I don't know the purpose.

15 Q. Okay. I want to refer to Exhibit No. 6.

16 A. IDWR Exhibit 6?

17 Q. Yes. And this is a map?

18 A. Yes.

19 Q. And it's a map that depicts infrared
20 reflectance, and the intensity of that reflectance, as I
21 understand it, is shown by various shades of red?

22 A. Red indicates vegetation, evapotranspiration
23 water use, water being utilized.

24 Q. And I also understood from your testimony that
25 at the site of the -- or at the location of the Dietrich

1 likelihood. If this was not taken at the same time that
2 the water was discharged, that it was actually a
3 combination of a flush of growth from vegetation that
4 was provided additional water or evapotranspiration off
5 of the water surface, not just water itself, it can mean
6 multiple things.

7 Q. Okay. I want to refer to your report. This
8 would be Exhibit 2. And I think I want to turn to page
9 13, which is the table. I think it's the table, or are
10 there two tables?

11 A. One is a copy of the watermaster's records
12 from the Dietrich Canal No. 11. And the previous page
13 is my transposing of those records into a spreadsheet.

14 Q. Okay. And I want to refer specifically to the
15 table that you created or you referred to as a
16 transposition. And what I want to focus on is the
17 highlighted term that says "excess of 150."

18 A. Okay.

19 Q. I'm assuming 150 you're listing here is the
20 150 CFS that you spoke about was the early-season
21 demand --

22 A. Yes.

23 Q. -- in the Dietrich Canal?

24 A. Yes.

25 Q. And in determining or asking about the demand,

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1 site headgate there was, at least from your testimony,
2 some red that caught your attention?

3 A. Yes.

4 Q. And do you have any idea of what the value of
5 that reflectance or that red is on the map?

6 A. I didn't follow that path. I searched for the
7 month that this infrared imagery was generated, and I
8 could not locate the month. It does appear to be
9 sometime in the summer, because the adjacent fields are
10 so active in their water use.

11 But what -- this patch in this patchwork quilt
12 of imagery was 1984. If it had been '85, '86, I would
13 have searched for data to corroborate was there excess
14 water in the Dietrich Canal in those years, and would
15 that explain why I am seeing this red basin.

16 In fact, what I saw was image that was dated
17 in 1984. And here is this red area that was uncovered
18 by a water right, didn't have a water right covering it.
19 It was coincident to the location, the application, the
20 years, the sources. I had enough small pieces to say
21 this may have been it. This site was constructed to
22 take water, and it took water at this time.

23 Q. So would you attribute the red reflectance to
24 vegetation?

25 A. Yes and no. I would say there is a

1 is this 150 CFS, is it an average of numerical values
2 that have been delivered during this period of time?

3 A. Good question. I remember asking the
4 watermaster and Lynn Harmon what was the irrigation
5 requirement or the stock-water requirement in the
6 Dietrich Canal and the quantity. And I got estimates
7 from both gentlemen. I did not get a clarification
8 about what that was based on, if that was based on a
9 known sum of the delivery that year or if it was an
10 average overall. I understood it to be typical. This
11 is typically what they need.

12 Q. But you would admit that, at any given
13 irrigation season, that demand may be higher or lower
14 and significantly higher --

15 A. True. True.

16 Q. -- than 150 CFS?

17 A. True. And I would say in a year where there
18 was excess water available in the spring, my thinking
19 was that they would, in those years, potentially need
20 less from the canal system. They had been getting it
21 from the sky. But if the water right authorizes and
22 they have a place to put it, water could be delivered,
23 even in a wet year, to their site, their diversion. And
24 it may be less.

25 But I believe the watermaster doesn't

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1 discriminate and would deliver water at the priority
2 dates, unless they didn't want it. I don't know. Can
3 you refuse water? I suppose you can.
4 Q. Okay. And then in this table you've
5 highlighted a number of values.
6 A. Yes.
7 Q. And they all exceed 100 CFS?
8 A. Yes.
9 Q. I don't understand why we are excluding any
10 that are less. And maybe you explained it.
11 A. I tried to explain it. And knowing there's an
12 error in the measurements and that these are once-a-day
13 readings, they're not daily averages, though they're
14 treated as daily averages, as I understand it, in the
15 watermaster books -- they make these once-a-day
16 readings, and it becomes a daily average for that
17 station. But there is some error.
18 And because there is error, I chose not to use
19 the days that appeared too close to the margin of error.
20 So when I do my subtraction from the table on the left
21 to yield numbers, the table on the right, those numbers
22 that were excluded from the yellow highlight were
23 between -- in particular, in May, between two periods
24 where flow was higher.
25 Flow gets reduced below 100 CFS, and that

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1 approaches the margin of error. And I could not --
2 because these readings were daily average spot readings,
3 I could not say, yes, definitely, that 33 or 34 or 54
4 CFS was actually in the location that I wanted it to be.
5 I could say that the days before and the days after
6 there was enough excess water beyond the 150 CFS that it
7 had to go somewhere. And it appears that it had gone to
8 this location to be shunted off of the canal.
9 There was no demand for it -- or less demand.
10 This was a wet year, a wet spring. There was less
11 demand for water from the typical users in the canal,
12 and therefore I concluded we got excess water. It was
13 delivered to the headgate. I could not find evidence
14 that it reappeared at the Little Wood River from a waste
15 stream. I couldn't find it.
16 So I assumed anything above 150 CFS had to go
17 somewhere, and it went to the canal system in this site.
18 Q. So is there a consistent percentage or number,
19 numerical factor, that you applied to these flow rates
20 and then you paired to determine when the margin of
21 error would be a significant factor so that you could
22 ignore these differences? Or did you just --
23 A. I remember thinking 10 percent of 400 is 40
24 CFS. And if I avoid using or making conclusions on
25 numbers that are 40 CFS or lower -- too close to 40 CFS

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1 I would not use in my recommendation. They are just too
2 close to the margin of error.
3 Q. Well, do you have any of them above 40? As I
4 go down through it --
5 A. My end of the season, my end of the early
6 season, I believe I was using -- I did not assume that
7 the early season went into the end of May.
8 When the flow rates dropped to what was maybe
9 a more typical range, I assumed those are being
10 delivered to the people who called for it, and it's not
11 available for recharge.
12 Q. So in addition to margin-of-error factor, you
13 also truncated or discontinued the analysis at the end
14 of May?
15 A. Yeah. Actually earlier than the end of May.
16 I looked at the data and recognized that there's a chunk
17 that's quite a bit bigger in the way of excess water in
18 between two sets of days where there's less water.
19 So, yes, I can't say I stopped at the 15th,
20 because I didn't. So I went past the mid of May, but I
21 did not go to the end of May as an early season, though
22 I believe the irrigation season in this area begins
23 April 1 and goes -- is it November 1 now? I should not
24 guess.
25 So this was certainly within the standard

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1 season.
2 Q. But could I assume, just looking at this, that
3 you truncated the analysis on the 21st day of May?
4 A. Yes.
5 Q. Given that no values are highlighted after?
6 A. Exactly. Yes.
7 Q. All right.
8 THE HEARING OFFICER: That's all the questions
9 I have. Ann?
10 MS. VONDE: Yeah, I'll just do a couple.
11 RECROSS-EXAMINATION
12 BY MS. VONDE:
13 Q. I'd like to refer you back to Petitioner's
14 Exhibit 201. And just that first page, the proof of
15 beneficial use form that's attached there, to your
16 knowledge, is that the only version of that proof of
17 beneficial use form that exists in the back files?
18 A. I remember seeing one where the 37-7842A was
19 crossed off. I don't remember which file that would
20 have appeared in, but it was in the same hand. It
21 would, in my opinion, have been another copy that was
22 strike -- there was a strikeout added to a copy.
23 Q. Thank you. And then my second question, and I
24 think we might need to follow-up there, is going to
25 be -- and I apologize, I no longer have IDWR's exhibits

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1 in front of me, but I think it's Exhibit 2 is your
2 memorandum; is that correct?
3 A. (No verbal response.)
4 Q. So I'll have you look at page 2 going on to
5 the top of page 3. And I apologize, I don't have the
6 IDWR page numbers in front of me.
7 A. I believe that's nine and ten.
8 Q. So this is where you discuss the definitions
9 of recharge. And the footnote -- excuse me, not
10 Footnote 1. Footnote 2 on, I think, page 10 references
11 a document?
12 A. Yes.
13 Q. What document is that?
14 A. It's a document that was prepared by the
15 Australian government, their national water commission.
16 They have a Waterlines Report series, and this
17 particular document was informative to me about how
18 other agencies, other entities, define, describe,
19 catalog recharge.
20 Q. Is that the document that you got the
21 definitions one, two, and three, "unintentional,"
22 "unmanaged," and "managed recharge" that you list there
23 at the top of that page? Is that --
24 A. They're not exact quotes. But, yes, the idea
25 came from this document.

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1 Q. Okay. Do those definitions, "unintentional,"
2 "unmanaged," and "managed recharge," are those set forth
3 anywhere in Idaho Code?
4 A. No.
5 Q. Are they set forth anywhere in the IDAPA
6 Rules?
7 A. No.
8 Q. Are they set forth anywhere in any IDWR
9 policy, document, or memorandum?
10 A. No, not to my knowledge. That was information
11 I needed to find for myself.
12 Q. Okay. Thank you. That's all I have.
13 THE HEARING OFFICER: Joe, further questions?
14 MR. JAMES: Just a couple.
15 RECROSS-EXAMINATION
16 BY MR. JAMES:
17 Q. On the director's question, you indicated the
18 red in the exhibit caught your attention and that it was
19 an indication of vegetation and what else?
20 A. As I understand infrared photography, it
21 indicates vegetation, water, as in kind of standing
22 water, evapotranspiration from that vegetation, so it's
23 water use. It demonstrates more water use than just
24 water presence. It's water use.
25 Q. Okay. And so it reflects surface water, plant

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1 growth, and other reflective qualities, all that being
2 on the surface?
3 A. True.
4 Q. So what caught your attention was water on the
5 surface, so that was an indication that there was
6 moisture or water on the surface, correct?
7 A. True.
8 Q. And did you conduct any calculations as to
9 whether any of that would have reached the aquifer?
10 A. No. I needed to confirm that the flow rate I
11 was estimating would fit within the boundaries of a
12 basin in that area, and I did that. I assumed that the
13 basalt layer underneath would be the same basalt layer
14 that was underneath most of the area.
15 I also assumed that the Corps of Engineers had
16 done some soil-coring, some other measurements to
17 provide them a space or a location that would do what
18 they were proposing to do, which, with their structure,
19 was to handle quite a bit of water for several days at a
20 time and not cause nuisance conditions to the neighbors.
21 They, to my knowledge, did not -- to my
22 knowledge, they did not drill a monitoring well to see
23 if what they put out on the surface went to the aquifer
24 and in what quantity. But the infiltration rates that
25 appeared to be available in this area indicate that it

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1 would take quite a bit of water without becoming an
2 overflow or...
3 Q. Well, and I guess, as indicated, a basin that
4 would take volumes of water that were being diverted,
5 that could be a basin that's an evaporation pond.
6 A. True.
7 Q. And that would be reflected in the infrared;
8 is that correct?
9 A. True. I believe some of this water
10 evaporated.
11 Q. And when you say "the area," well, you
12 certainly can't dump water anywhere in the area and
13 anticipate it will make the aquifer; is that true?
14 A. Could we put it just anywhere? No. I believe
15 there would be places that would be better to receive
16 the water. And if the water stayed in the basin for
17 the -- it would have been developed as a farm field if
18 it had been a good place to retain water. If they're
19 losing water in the quantities that I could foresee --
20 Q. Well, I guess the (unintelligible) are known
21 for their farm production.
22 A. True.
23 Q. But first I'd start with that.
24 A. Yeah.
25 Q. Second, it seems like the location of the

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1 depression is more situated to the canal being there.
2 A. Uh-huh.
3 Q. They simply could have been looking for a
4 large basin to hold the water. They certainly -- you
5 know, they were looking for a different purpose than
6 recharge, the Army Corps of Engineers.
7 A. I have no evidence that -- because I couldn't
8 get their plans. I couldn't determine what their intent
9 was. It appeared to be a previous size diversion
10 structure that was going to handle a lot of water. The
11 basin that they identified as a potential basin appeared
12 significant. It wasn't just a 10-by-10 pond.
13 Q. It's a big area?
14 A. Yeah. Yeah.
15 Q. And but, anyway, you have no quantification of
16 any water reaching that site to that aquifer?
17 A. True.
18 Q. You made some indication on less demand on a
19 high water year. But in the case of a flood event,
20 you're not talking about present precipitation. You're
21 talking about --
22 A. Early.
23 Q. Yeah. You're talking about runoff. And a
24 high runoff year can also indicate a high temperature
25 year.

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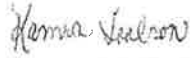
1 A. Uh-huh.
2 Q. Which would also -- a high temperature year
3 may also increase it?
4 A. True.
5 Q. You indicated in your testimony that you
6 didn't quantify a return from the Dietrich Canal into
7 the Little Wood River.
8 A. Right.
9 Q. Did you look at any discharge from the
10 Dietrich Canal into the Gooding-Milner Canal?
11 A. No. As I said, my trace -- the trace that was
12 available to me of the Dietrich Canal doesn't get to the
13 Milner-Gooding.
14 Q. Well, let me ask you, did you look at any
15 laterals or channels or drainage channels from the
16 Dietrich Canal that would dump into it?
17 A. Not any that I know of. No.
18 Q. No further questions.
19 THE HEARING OFFICER: Okay. Everybody's had a
20 chance to ask many questions of Michele, and I'd like to
21 excuse her. Do you anticipate any need to have her
22 tomorrow as a witness?
23 MS. VONDE: Not from us, no.
24 MR. JAMES: No.
25 THE HEARING OFFICER: Okay. All right.

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1 Thanks for all of your answers, Michele.
2 All right. We will recess and we will start
3 again tomorrow morning. Thank you.
4 (Recess.)
5 (End of Audio MZ000006.)
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REPORTER'S CERTIFICATE

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2
3 I, KAMRA TOALSON, CSR No. 756, Certified
4 Shorthand Reporter, certify:
5 That the audio recording of the proceedings were
6 transcribed by me or under my direction.
7 That the foregoing is a true and correct
8 transcription of all testimony given, to the best of my
9 ability.
10 I further certify that I am not a relative or
11 employee of any attorney or party, nor am I financially
12 interested in the action.
13 In witness whereof, I set my hand and seal this
14 26th day of November, 2018.
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KAMRA TOALSON, CSR NO. 756
Notary Public
Post Office Box 2636
Boise, Idaho 83701-2636
My commission expires May 23, 2024

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