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**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF LICENSE)
NO. 37-7842 IN THE NAME OF) IWRB'S POST HEARING BRIEF
THE IDAHO WATER RESOURCE)
BOARD)
_____)
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The Idaho Water Resource Board (“IWRB”), by and through its counsel of record, hereby files its post-hearing brief in the above captioned matter.

Introduction

The sole issue before the hearing officer in this matter is the extent of beneficial use that occurred pursuant to Permit No. 37-7842 during the development period of the permit. In the *Order Amending Deadlines; Order Establishing Burdens of Proof; Notice*

of Status Conference; Amended Notice of Hearing, the hearing officer set forth the burdens of proof as follows:

The Department will first present evidence regarding the licensing process and the Department's determination of beneficial use that occurred pursuant to Permit No. 37-7842 during the development period of the permit. The Idaho Water Resources Board will then bear the burden of proving the extent of beneficial use that occurred pursuant to Permit No. 37-7842 during the development period. The Petitioners will bear the burden to rebut evidence regarding proof of beneficial use that occurred pursuant to Permit No. 37-7842.

Order Amending Deadlines at 2. Evidence presented at the hearing established the extent of beneficial use made under permit 37-7842 between 1982 and 1992. Petitioners did not present sufficient evidence rebutting this proof. Therefore, a license for water right 37-7842 should be issued in accordance with the recommendations made in the Certified Water Rights Examiner Report presented into evidence at the hearing. IWRB Exhibit 108.

Argument

The Lower Snake River Aquifer Recharge District ("LSARD") was formed in 1981 for the purpose of recharging the Eastern Snake Plain Aquifer ("ESPA"). IWRB Exhibit 118. Water right application 37-7842 was filed in 1980 and a permit was approved in 1982. IWRB Exhibit 108 at IWRB 00003086–3090. LSARD filed acceptable proof of beneficial use under permit 37-7842 in 1992. IWRB Exhibit 108 at IWRB 00003092–3093. In 1999, water right permit 37-7842 was assigned to the IWRB. IWRB Exhibit 108 at IWRB 00003187–3192. The IWRB placed the permit into the Water Supply Bank. In 2009, the IWRB filed a request for extension of time to continue to develop beneficial use under the permit. That request was ultimately denied in a *Final Order* which adopted the *Recommended Order Granting Petitioner's Motion for*

Summary Judgment and Rescinding Extension of Time dated February 28, 2012. On July 17, 2017, the Idaho Department of Water Resources (“IDWR”) issued a license for water right permit 37-7842. The Petition for Hearing was filed based on the Preliminary Order Issuing the License.

1. The Evidence Presented at the Hearing Should be Viewed within the Context of the 25 Years that Have Elapsed Since the Development Period.

The reasons for the delay in licensing of water right 37-7842 are unclear and no rule or statute provides a deadline or timeframe under which a water right permit must be licensed after an acceptable proof of beneficial use field exam is filed with IDWR. However, when reviewing the evidence presented at the hearing, it is acceptable for IDWR to consider the difficulties of proving beneficial use after a 25 year delay in licensing. The Beneficial Use Field Exam Rules provide:

The examination requirements listed are intended as a guide to establish acceptable standards to determine the extent of application of water to beneficial use. The requirements are not intended to restrict the application of other sound examination principles by water right examiners. The director will evaluate any deviation from the standards herein stated as they pertain to the review of any given examination. Water right examiners are encouraged to submit new ideas which will advance the art and provide for the public benefit.

IDAPA 37.03.02.001.01. In addition, the SRBA Court has recognized the prejudicial effect that such a delay in licensing may have on a water right holder:

The Court acknowledges that a lengthy delay in conducting the field examination can put a permit holder in an untenable position. To the extent the field exam yields results differing from the proof of beneficial use, the current permit holder is put in the position of having to prove up the conditions as they existed years earlier. Irrigation practices may have changed, the permit may have been transferred, the original permit holder as well as other witnesses may no longer be around, etc. All of which potentially result in prejudice to the current permit holder.

Tanner Lane Ranch, LLLP v. Idaho Dept. of Water Res., In the Matter of Permit No. 27-7549, Case No. CV-2017-458, *Memorandum Decision and Order* at 8 (Sept. 14, 2017). Thus, IDWR has discretion to consider the evidence presented at the hearing in light of the difficulties that are inherent in proving beneficial use from the time period of 1982–1992.

2. Evidence Presented at the Hearing Established Both the Big and Little Wood Rivers as the Sources of Water Used under Permit 37-7842 During the Development Period.

The Preliminary Order Issuing Water Right License 37-7842 listed only the Little Wood River as a source of water for water right 37-7842. In her investigation, Michele Edl concluded that commingled water from the Big and Little Wood Rivers could not be used at the Shoshone Recharge site. TR Vol. I pg. 51 ln. 8–53. She also did not consider the Richfield canal as a potential place of use. Rather, her analysis focused on recharge occurring at the Dietrich recharge site. TR Vol. I pg. 57 ln 4–21. ln. 20. She testified she removed Big Wood River water as a source because she determined that, at the time she found recharge use occurring in the Dietrich Canal there was no water flowing out of the Jim Byrns Slough and into the Little Wood River. TR Vol. I pg. 65 ln. 20–pg. 66 ln. 14.

Evidence produced by the IWRB demonstrated the Big Wood River was used as a source of water for beneficial use under water right 37-7842 during the development period. *See infra* Section 3. First, evidence was produced that demonstrated that recharge occurred in the Richfield canal itself. IWRB Exhibit 108 at IWRB 00003055–3057, TR Vol. III pg. 109 ln 16–pg. 121 ln 12. The testimony of Lynn Harmon demonstrated that the Big Wood River flows out of Magic Reservoir and is diverted into

the Richfield Canal at Gage #4. TR Vol. II pg. 8 ln. 4–12. The Richfield Canal splits into the East and West Main Canals and the Jim Byrns Slough. TR Vol. II pg. 9 ln. 25–6. The Jim Byrns Slough carries Big Wood River water and ultimately dumps it into the Little Wood River. TR Vol. II pg. 14 ln. 15–18, pg. 15 ln. 7–11, ln. 22–25. Thus, the only source of water for recharge occurring in the Richfield Canal was the Big Wood River.

Second, evidence produced by the IWRB demonstrated that recharge also occurred at the Shoshone Recharge site during the development period. *See infra* Section 4. The testimony of Lynn Harmon demonstrated that Big Wood River water from the Jim Byrns Slough dumps into the Little Wood River. TR Vol. II pg. 14 ln. 15–18, pg. 15 ln. 7–11, ln. 22–25. Lynn Harmon testified that the commingled Big and Little Wood River Water also continues down the Little Wood River until they reach the bifurcation structure. TR Vol. II pg. 30 ln. 10–14. Evidence presented, both through the testimony of Lynn Harmon and through canal measurements, demonstrated the commingled Big and Little Wood River Water can and did flow into the Milner-Gooding Canal at the bifurcation to be delivered to the Shoshone Recharge site. IWRB Exhibit 108 at IWRB 00003053–3054; TR Vol. II pg. 30 ln. 24–pg. 31 ln. 9, pg. 129 ln. 3–pg. 130 ln. 5.¹ Thus, the evidence produced at the hearing demonstrated Big Wood River water was used in the Richfield Canal and at the Shoshone Recharge site under water right permit 37-7842. Petitioners did not rebut this evidence.

¹ As is demonstrated by Petitioner’s Exhibit 206, it is not unusual for water from the Big Wood River to have a point of diversion at the Richfield Canal, a point of injection into the Little Wood River, and a subsequent point of rediversion from the Little Wood River. *See* Petitioner’s Exhibit 206 (Source is Big Wood River with a “[p]oint of injection into the Jim Byrns Slough that flows into the Little Wood River. Points of rediversion from the Little Wood River.”).

3. Evidence Presented at the Hearing Established Beneficial Use of Water for the Purpose of Recharge Occurred in the Richfield Canal, at the Dietrich Recharge Site, and at the Shoshone Recharge Site During the Development Period.

Evidence introduced by the IWRB at the hearing demonstrated that 634 cfs of recharge occurred under permit 37-7842 in the Richfield canal, at the Dietrich recharge site, and at the Shoshone Recharge site between 1982 and 1992. This evidence was not rebutted by the Petitioners.

a. Recharge Occurred Under Permit 37-7842 Within the Richfield Canal During the Development Period.

Evidence presented at the hearing demonstrated that recharge occurred in the Richfield canal during the development period. Both the advertisement of the application and the water right permit contemplated that the Richfield canal would be used under water right 37-7842. IDWR Exhibit 3 at 1. The advertisement of the application issued by IDWR stated: “Diversion Means: Contract use of Dietrich Canal system and Richfield Canal System.” IWRB Exhibit 108, Appendix B, IWRB00003084. The application/permit provided: “6.a. Description of ditches, flumes, pumps, headgates etc. Contract use of Dietrich Canal Systems and Richfield Canal System.” *Id.* These documents demonstrate that permitted place of use included the Richfield canal.

In Idaho, recharge may occur either through the diversion of water into an off-channel recharge basin or through seepage from a canal system. TR Vol. II pg. 109, ln. 25–pg. 110 ln. 11. In-canal recharge is limited by I.C. § 42-234(5) which provides that “incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for a claim of a separate or expanded water right.” For in-canal

recharge to be considered in this matter it must not be incidental to another water use, such as irrigation. Rather, the in-canal recharge must be occurring at time when other water rights are not being used in the canal.

The analysis outlined by IWRB's expert in this matter for the Richfield canal made clear that only water diversions occurring outside the irrigation season were considered as recharge. IWRB Exhibit 108 at IWRB 00003055–3056. Some irrigation water rights on the Richfield canal have a season of use that extends from March 15th to November 15th. *See e.g.* Petitioner's Exhibit 206. However, as demonstrated by the testimony of Lynn Harmon, the actual irrigation season is May 1st because weather conditions in that area are too cold to start irrigating any earlier. TR Vol. II pg. 35 ln. 2–12; pg. 35 ln. 19–pg. 36 ln. 10. Lynn Harmon also testified that the irrigation season end date on the Richfield canal is generally October 1st, though it can be much earlier. TR Vol. II pg. 36 ln. 20–pg. 37 ln. 9. Thus, the evidence presented at the hearing demonstrated that the irrigation season on the Richfield canal begins on May 1st and end, on average, about October 1st. Petitioners presented no evidence demonstrating that the testimony of Lynn Harmon with regard to the start and end dates of the irrigation season on the Richfield canal were incorrect.

IWRB's expert used May 1st to October 1st in his analysis. IWRB Exhibit 108 at IWRB 00003056. He discounted any data inside the irrigation season because, under I.C. § 42-234(5), losses occurring during the irrigation season would be incidental to irrigation and should not be counted as recharge.

i. Evidence Presented at the Hearing Demonstrated that 63 cfs of Water was Beneficially Used During the Development Period in the Richfield Canal.

To calculate in-canal recharge in the Richfield canal IWRB's expert looked at the canal measurements from April 1–April 30th and after October 1st and subtracted the amount of water measured at the HJB from the amount of water measured at Gage #4. IWRB Exhibit 108 at IWRB 00003056–3057 Table 13; TR Vol. II pg. 117 ln. 5–20. A loss between these two measurement points indicates that water seeped into the ground through the bottom of the canal. *Id.* Even if some of the water seeped through diversions or laterals off the Richfield canal, it would still be appropriate to consider it recharge because the diversion of irrigation water was not occurring during between April 1st and April 30th. TR Vol II pg. 9 ln. 21– pg. 10 ln. 1; pg. 117 ln 19– pg. 118 ln. 7.

Table 13 of IWRB Exhibit 108 demonstrates the calculations made by IWRB's expert for the Richfield canal. The year 1987 was chosen for Table 13 because it demonstrated the year in which the highest quantity of recharge was found in the Richfield Canal, 300 cfs. Table 13 elicited much discussion at the hearing that warrants additional clarification. In his testimony, Lynn Harmon referenced a “domestic run” that occurs on the Richfield canal just after the irrigation season ends. TR Vol II pg. 37, ln. 17–pg.38 ln. 8. He described how the canal company would run 200–300 cfs for a couple of days in late October to early November to fill stockwater ponds. *Id.* On the basis of this testimony Petitioners focused their questioning on the data in IWRB Exhibit 108 IWRB 00003057, Table 13. TR Vol II pg. 62 ln. 20–pg. 64 ln. 10. It was noted that on 11/1/87 an amount of 300 cfs had been calculated as recharge. TR Vol II pg. 62 ln. 20–pg. 64 ln. 10, pg. 173 ln. 21–178 ln. 3. It was asserted that, given Lynn Harmon's testimony regarding a late season domestic run, it was inaccurate to attribute 300 cfs to recharge on that day. TR Vol II pg. 62 ln. 20–pg. 64 ln. 10, pg. 173 ln. 21–178 ln. 3.

Lynn Harmon's testimony regarding a late season domestic run on the Richfield canal should not be construed to render all of the data used in the IWRB's analysis of beneficial use inaccurate. IWRB's expert relied on canal measurements kept by the Big Wood Canal Company ("BWCC") and the Basin 37 Watermaster because, when looking back at beneficial use that occurred 25 years ago, the canal measurements are the most reliable data available. TR Vol II pg. 106 ln. 2-16. Lynn Harmon testified as to the methods used by the BWCC and the Watermaster to collect the measurements used in the IWRB's analysis. TR Vol II pg. 43-pg. 48. He also described methods used to adjust rating curves at each gage throughout the season to ensure the measurements were as accurate as possible. TR Vol. II pg. 47 ln. 12-pg. 48 ln. 7. The methods employed by the BWCC and Watermaster to take the canal measurement were acceptable and accurate for the time period between 1982 and 1992. The Watermaster's canal measurements, found in the "Black Books" are IDWR's official record of water measurements in Water District 37. I.C. § 42-606. *See also* I.C. §§ 42-102, 42-602, and 42-604; TR Vol II pg. 107 ln. 13-pg. 108 ln. 3. The Petitioners provided no evidence to rebut the conclusion that the canal measurements found in the BWCC records and the Water District 37 official record are anything other than valid and accurate.

Lynn Harmon's testimony regarding the late season domestic run on the Richfield canal was new to the IWRB on the day of the hearing. TR Vol II pg. 177 ln. 16-19. If it had been known previously, Table 13 would have been modified to account for that late-season use. It should be noted that, even if Table 13 was modified to remove the 300 cfs as a recharge quantity, it would still be accurate with regard to the recharge amounts ranging between 86 to 291 cfs that were calculated for April 1987. IWRB Exhibit 108 at

IWRB 00003057. Petitioners provided no evidence suggesting that the methods used to calculate recharge for the April time period were inaccurate or incorrect.

In addition, even if the canal measurements from early November 1987 found in Table 13 are discounted the outcome of the IWRB's expert analysis is unchanged. As is demonstrated by Table 15, the IWRB did not rely on *any* of the data from 1987 to calculate a recharge quantity for water right 37-7842. IWRB Exhibit 108 at IWRB 00003058, Table 15. Rather, the quantity of water was based on the canal measurements from 1984. *Id.* The data analyzed showed that recharge calculated to have occurred in 1984 within the Richfield Canal was 63 cfs occurring on April 28, 1984. IWRB Exhibit 108 at Appendix N, IWRB 00003551. This was the quantity that was ultimately relied on, not the 300 cfs. IWRB Exhibit 108 at IWRB 00003058, Table 15.

In addition, no other late-season canal measurements contributed to the IWRB's recharge analysis on the Richfield canal. Besides 1987, late season water use appears only in the canal measurements for 1986 (Nov 5, 300 cfs) and 1989 (Nov. 7, 200 cfs). IWRB Exhibit 108 Appendix N at IWRB 00003562, 00003576. The Appendix N spreadsheets demonstrate that IWRB's expert did not calculate any recharge occurring based on these late season measurements in 1986 and 1989. Thus, IWRB's analysis of recharge occurring on the Richfield canal was limited to early season recharge occurring between April 1st and April 30th.

Petitioners' attempts to rebut evidence showing recharge occurring on the Richfield canal between April 1st and April 30th were unavailing. Petitioner's Exhibit 205 is a copy of the water right report for water right 37-13115 which is held in the name of the Big Wood Canal Company for stockwater from the Big Wood River in the amount of 20 cfs.

The period of use for water right 37-13115 is November 1st to March 31st. *Id.* The November 1st start to water right 37-13115's season of use is inapplicable because, as noted above, the IWRB did not rely on any canal measurements on the Richfield from November. In addition, the March 31st end date to water right 37-13115's season of use is also in applicable because the IWRB's analysis for the Richfield canal relied on canal measurement from April 1st to April 30th 1984. IWRB Exhibit 108 at Appendix N, IWRB 00003551. Diversion of water right 37-13115 outside its season of use would have been a violation of Idaho law. I.C. § 42-201(2). Thus, water right 37-13115 does nothing to rebut the IWRB's analysis on the Richfield canal.

Petitioner's Exhibit 206 is a water right report for water right 37-10343 for 10.67 cfs of irrigation water from the Big Wood River. The period of use for water right 37-10343 is March 15th to November 15th. The testimony of Lynn Harmon made clear that, while the season of use of on the face of many irrigation rights on the Richfield canal begins on March 15th, the actual start of irrigation on the Richfield canal is May 1st. TR Vol. II pg. 35 ln. 2–12; pg. 35 ln. 19–pg. 36 ln. 10. Petitioners presented no evidence demonstrating that Lynn Harmon's testimony regarding the start date of irrigation on the Richfield was incorrect or inaccurate. Therefore, water right 37-10343 does nothing to rebut calculations of recharge occurring on the Richfield canal between April 1st and April 30th.

The IWRB presented evidence demonstrating that 63 cfs of recharge occurred on the Richfield canal in April 1984. Petitioners failed to rebut this evidence. Therefore, at least 63 cfs of recharge should be found to have been beneficially used on the Richfield canal for recharge between 1982 and 1992.

b. Recharge Occurred Under Permit 37-7842 at the Dietrich Recharge Basin During the Development Period.

Evidence presented at the hearing demonstrated that recharge occurred at the Dietrich recharge basin during the development period. Both the advertisement of the application and water right permit contemplated that the Dietrich canal system would be used under water right 37-7842. IDWR Exhibit 3 at 1; IWRB Exhibit 108, Appendix B, IWRB00003084. In addition, the Dietrich recharge site was noted in red on the map that was attached to the application/permit. TR Vol I pg. 57 ln. 4–21. Therefore, it is appropriate to consider the Dietrich recharge basin as place of use under water right 37-7842.

Unlike on the Richfield canal, where the recharge place of use was within the canal itself, recharge on the Dietrich canal occurred in an off-canal recharge basin. Off-canal recharge is not incidental to another water use, such as irrigation, therefore it may occur either inside or outside the irrigation season. The limiting factors on recharge into an off-canal recharge basin during the irrigation season are irrigation demands and canal capacity. Both Michele Edl and IWRB's expert calculated recharge at the Dietrich recharge site by subtracting irrigation demands from the total amount of water diverted into the canal. IDWR Exhibit 2, IWRB Exhibit 108. Both Michele Edl and IWRB's expert found very similar amount of recharge occurring at the Dietrich site, 246 cfs and 276 cfs respectively. *Id.*

The evidence presented at the hearing demonstrated that between April 1 and June 1st of each year the irrigation demand on the Dietrich is low and there is excess canal capacity that can carry recharge water. Lynn Harmon testified that the irrigation season on the Dietrich canal begins, on average April 10–15th. TR Vol. II pg. 38 ln. 13–pg. 39 ln. 6. He stated that during early April and May, irrigation demand on the Dietrich

ranges between 100–150 cfs. TR Vol. II pg. 39 ln. 7–17. By, on average, June 1st the irrigators on the Dietrich begin to demand their “full” irrigation supply which is somewhere between 270–300 cfs. TR Vol. II pg. 39 ln 18–23. The total canal capacity of the Dietrich canal is about 400 cfs. TR Vol II pg. 40 ln. 18–pg. 41 ln. 8. While stockwater rights do exist on the Dietrich canal they go out of priority just before the start of the irrigation season on April 1st. TR Vol II pg. 41 ln. 9–21. Therefore, they would not affect the analysis because they would not be diverted at the same time as recharge. This evidence was not rebutted by Petitioners.

i. Evidence Presented at the Hearing Demonstrated that 276 cfs of Water was Beneficially Used During the Development Period at the Dietrich Recharge Site.

To calculate the quantity of recharge occurring at the Dietrich recharge site during the development period, IWRB’s expert looked at the canal measurements at Gage #11 at the head of the Dietrich canal between April 1 and May 31st of each year during the development period. IWRB Exhibit 108 at IWRB 00003051–3052. He then subtracted 120 cfs as an average early-season irrigation demand. *Id.* He further determined the amount of water, if any, that was draining out of the end of the Dietrich canal through the F-waste. *Id.* Any water in excess of the irrigation demand and the F-waste he attributed to recharge. *Id.* IWRB’s expert found 276 cfs of recharge occurring in the Dietrich canal during May 1984. *Id.*

Under her analysis Michele Edl found a similar quantity of recharge occurring in the Dietrich recharge basin in 1984, 246 cfs. IDWR Exhibit 2 at 6. Michele Edl also used infrared aerial photography to corroborate recharge occurring at the Dietrich site in 1984. IDWR Exhibit 6; TR Vol. I pg.60 ln. 12– pg. 61 ln. 10, pg. 167 ln. 4–22. Thus,

both the analysis of Michele Edl and of IWRB's expert demonstrated that recharge was occurring at the Dietrich site in the spring of 1984.

In an attempt to rebut these analyses, Petitioners asked several questions regarding whether measurements of "rediversions" through laterals and headgates off the Dietrich canal were considered. TR Vol I pg. 149 ln. 25–pg. 150 ln.9, TR Vol II pg. 155 ln. 1–17; pg. 166 Ln7–pg. 167 ln.5. IWRB's expert testified that he asked BWCC for any and all record of canal measurements that it had for the time period between 1982 and 1992. TR Vol II pg. 172 ln. 7–16. The canal measurements IWRB received from both the BWCC and Water District 37 did not include any measurements through laterals or headgates off the Dietrich canal. *See* IWRB Exhibit 108 Appendices J and K, TR Vol II pg. 172 ln. 7–16. If Petitioners believed or knew that additional measurements at specific headgates on the Dietrich canal exist, then they should have produced them at the hearing. Merely suggesting that additional measurements might exist showing additional diversions by irrigators does not rebut the testimony of Lynn Harmon which affirmatively demonstrated that Dietrich canal irrigators were only demanding, on average 120 cfs of water during the early irrigation season.

Petitioners also focused on whether "requests" were made for diversion of recharge water under water right permit 37-7842 into the Dietrich canal. TR Vol II pg. 66 ln. 17–23, pg. 67 ln. 13–19. Petitioners seem to imply that some record or log exists of individual water users asking the BWCC to deliver their water. If such a log or record exists that demonstrates water was not requested under water right permit 37-7842 Petitioners should have produced it at the hearing. Once again, merely suggesting that a request for delivery of water under permit 37-7842 does not exist does not rebut evidence

showing that excess water was diverted into the Dietrich canal over and above irrigation demands. Petitioner must show more than an absence of documentation as rebuttal.

Petitioners also focused on the colloquial designation of the Dietrich basin as a “floodway” in an apparent attempt to suggest that it was not used for recharge. TR Vol III pg. 65 ln. 16–pg. 66 ln. 17. Evidence presented at the hearing demonstrated that the headgate into the Dietrich basin was constructed in 1970. IDWR Exhibit 2 at 16. Prior to the enactment of I.C. § 42-201 in 1971, diverting flood waters into the Dietrich basin without a permit/license would have been permissible. 1971 Idaho Sess. Laws ch. 177. After 1971, a permit or license would have been necessary for diversion of “flood water.” *Id.* (Idaho Code § 42-201(3) denotes several exceptions to the mandatory permitting requirements. Those exceptions do not include “flood control.”). Though it may have been common practice for canal companies and other entities to divert flood waters without a permit, it was not until 2017 that the Director was given the express authority to temporarily approve the diversion of water “to prevent flood damage” without a permit/license. I.C. § 42-202A as amended by 2017 Idaho Sess. Laws ch. 210.

When considering the question of whether water diverted into the Dietrich canal basin was for “flood control” or for “recharge” it is logical to assume that it was diverted pursuant to a permitted water right rather than pursuant to the “practice” of preventing flooding. Diversions under permit 37-7842 were occurring within the irrigation season when the Watermaster was is tasked with administering water in priority. I.C. § 42-602. It must be assumed that permit 37-7842 would have been delivered in priority over other non-water right uses. Thus, Petitioners assertion that the fact the Dietrich basin was, at some point, used as a “floodway” is immaterial.

The IWRB presented evidence demonstrating that 276 cfs of recharge occurred at the Dietrich recharge site. Petitioners failed to rebut this evidence. Therefore, 276 cfs of recharge should be found to have been beneficially used at the Dietrich site for recharge between 1982 and 1992.

c. Recharge Occurred Under Permit 37-7842 at the Shoshone Recharge Site During the Development Period.

Evidence presented at the hearing demonstrated that recharge occurred under water right permit 37-7842 at the Shoshone Recharge site during the development period between 1982 and 1992. IWRB Exhibit 108 at IWRB 00003062 Figure 1, TR Vol II pg. 129 ln. 3–pg. 130 ln. 13. The place of use listed on the advertisement and permit included the Shoshone Recharge site. IWRB Exhibit 108 Appendix C IWRB 00003086–3090. In addition, the original proof of beneficial use submitted by Gerald Martens under I.C. § 42-217 was for recharge occurring at the Shoshone site. IWRB Exhibit 108 Appendix D at IWRB 00003095–3112.

As has already been discussed, the testimony of Lynn Harmon demonstrated that it is possible for Big/Little Wood River water to reach the Shoshone Recharge site through the bifurcation. *See supra* Section 2. The testimony of Lynn Harmon was corroborated by canal measurements at Gage #53 and 56. Gage #53 is located on the Milner-Gooding canal upstream from the bifurcation. TR Vol II pg. 25 ln. 24–pg. 26 ln. 6. It measures Snake River water before it enters the bifurcation. Gage #56 is located on the Milner-Gooding canal downstream from the bifurcation structure. TR Vol II pg. 30 ln. 21–pg. 31 ln. 9. Other than the bifurcation there no other diversions between Gage #53 and Gage #56. TR Vol II pg. 67 ln. 20–25. If the measurement at Gage #53 is lower than the measurement at Gage #56, the only source of water that could account for the increase in

flows in the Milner-Gooding between those two gages is Big/Little Wood River water coming into the canal through the bifurcation. IWRB Exhibit 108 at IWRB 00003053–3054, *see also* TR Vol II pg. 43 ln. 23–pg. 44 ln. 8. Measurement data from 1982–1992 confirmed that water from the Big/Little Wood River did contribute to the flow in the Milner-Gooding Canal between Gage #53 and #56.

Gage #56 is upstream from the Shoshone Recharge site headgate. IWRB Exhibit 105. Gage #57 downstream from the Shoshone Recharge headgate. IWRB Exhibit 105, TR Vol II pg. 31 ln. 21–pg. 32 ln. 2. Thus, to the extent that measurements at Gage #57 are lower than measurements at Gage #56 the water must have been diverted into the Shoshone Recharge site. IWRB Exhibit 108 at IWRB00003053, TR Vol II pg. 43 ln. 9–23. Because there are measurement devices on either side of the Shoshone Recharge site the amount of recharge water entering the site may be calculated without reference to what might be happening with irrigation water on the Milner-Gooding canal.

IWRB’s expert used water measurements from Gage #53, #56, and #57 to calculate the amount of water coming through the bifurcation from the Big/Little Wood Rivers and being delivered to the Shoshone Recharge site during the development period. IWRB Exhibit 108 at IWRB 00003053–3054 Table 11. Petitioners provided no evidence rebutting this analysis.

i. Evidence Presented at the Hearing Demonstrated that 295 cfs of Water was Beneficially Used During the Development Period at the Shoshone Site.

Canal measurements presented at the hearing demonstrate that, in the spring of 1984 there was a gain in water between Gage #53 and Gage #56 and a loss of water between Gage #56 and Gage #57. IWRB Exhibit 108 at IWRB 00003054 Table 11. The

highest diversion rate into the Shoshone recharge site was 295 cfs on April 17, 1984. It is interesting to note that this number almost exactly matches the amount of recharge of Big/Little Wood River water that was found at the Shoshone Recharge site by Gerald Martens in 1992. IWRB Exhibit 108 Appendix D.

Diversions into the Milner-Gooding Canal through the bifurcation were actively achieved. The testimony of Lynn Harmon made clear that, while some leakage occurs around the radial gates of the bifurcation structure under certain circumstances, such leakage is minimal (20–30 cfs). TR Vol II pg. 74 ln 16–25. To achieve a diversion rate of 300 cfs of Big/Little Wood River water into the Milner-Gooding canal it adjustments would need to be made to the radial gates water to flow into the canal and through the siphon. Therefore, the bifurcation structure would have needed to have been actively manipulated to achieve 295 cfs of recharge in spring 1984.

The IWRB presented evidence demonstrating that 295 cfs of recharge occurred at the Shoshone recharge site. Petitioners failed to rebut this evidence. Therefore, 295 cfs of recharge should be found to have been beneficially used at the Shoshone site for recharge between 1982 and 1992.

4. Evidence Presented at the Hearing Established that the Permit Conditions that Were Conditions Precedent to Beneficial Use were Met

Idaho Code Section 42-219(8) requires that, at the time of licensing, IDWR must evaluate whether the permittee has complied with all conditions listed on their permit. In this case, only five conditions (Conditions #1, 2, 7, 8, 9) listed on permit 37-7842 required the permittee to take certain actions prior to putting the water to beneficial use. The remainder of the conditions (Conditions #3, 4, 5, and 6) govern administration of the

right or are informational and need not be addressed. For ease of reference, the conditions were numbered during the hearing on IDWR Exhibit 3.

Condition #1 required that the permit holder begin construction of diverting works within one year of the permit being approved. IDWR Exhibit 3 at 5. IWRB Exhibit 110 clearly demonstrated that this condition was removed from the permit and is no longer applicable. Condition #2 requires that a measuring device be installed as part of the diverting works. *Id.* The testimony of Lynn Harmon demonstrated that Gage #4 measures water diverted into the Richfield canal, Gage #11 measures water diverted into the Dietrich Canal, and Gage #53, #56, #57 are used to measure flows into the Shoshone recharge site. TR Vol II. pg. 8 ln. 4–12, pg. 16 ln. 5–14, pg. 25 ln. 24–pg. 26 ln. 6; pg. 30 ln. 15–20; pg. 31 ln. 10–16. These measurement devices allow measurement of recharge water under water right 37-7842 and have been in place since 1982. TR Vol. II pg. 15 ln 16–21, 23 ln. 23–pg. 24 ln. 5; pg. 33 ln. 24– pg. 25 ln. 2. Condition #7 states that the permit shall not be assigned without providing notice to IDWR of the assignment. *Id.* Evidence presented at the hearing clearly demonstrated that IDWR was notified of the assignment of the permit between Thorlief Rangen, John W. Jones Jr. and John LeMoyne and LSARD, and LSARD and the IWRB. IWRB Exhibit 114, 115, 108 Appendix G at IWRB00003187–3192. Thus, the IWRB met its burden of proving conditions #1, 2, and 7 were met. Petitioners failed to put on any evidence rebutting this conclusion.

Condition #8 provides: “Water may not be diverted under this permit until the Board of Directors of the District establish and implement a procedure acceptable to the Director for assuring that the water quality of the Lower Snake Aquifer will not be impaired.” IDWR Exhibit 3 at 5. The IWRB presented IWRB Exhibits 118–125 at the

hearing as demonstration that this condition was met. IWRB Exhibit 118 shows that Gerald Martens first “developed a plan to evaluate ground water impacts of the proposed recharge efforts” in November 1983. IWRB Exhibit 121 demonstrates that a “Lower Snake River Aquifer Recharge Project Impact and Monitoring Program” was submitted to IDWR in March 1984. A follow up letter from IDWR to Gerald Martens demonstrated that the “Impact Evaluation and Monitoring Program for the Lower Snake Plain Aquifer Recharge Project would be acceptable” with several modifications.” IWRB Exhibit 122. Further letters sent by LSARD and Gerald Martens demonstrated that the modification of the monitoring program were acceptable to the permittee and that monitoring was actually conducted in early spring 1984. IWRB Exhibits 124, 125.

At the hearing, the relevance of IWRB Exhibits 118–125 to permit 37-7842 was raised. TR Vol. I pg. 102 ln. 10–pg. 103 ln. 5. Evidence presented at the hearing demonstrated that recharge occurred at the Shoshone Recharge site under permit 37-7842 *See supra* Section 3.c. Given that evidence, IWRB Exhibits 118–125 are relevant to water right 37-7842 and should be considered as evidence that the permittee complied with Condition #8.

Condition #8 does not specify the type of monitoring that must be completed, does not specify the source of water that must be sampled, and does not specify where that sampling must occur. Rather, it simply states that monitoring must occur that is “acceptable” to the Director. IWRB Exhibits 118–125 demonstrate that a monitoring program was developed, was submitted to IDWR, was deemed “acceptable” to IDWR, and was implemented.

Petitioners suggest that the ground water monitoring was not acceptable because it was not done at the Dietrich site. However, Petitioners presented no evidence demonstrating that IDWR considered monitoring to be necessary at the Dietrich site or showing that IDWR considered the submitted monitoring plan to be unacceptable because it did not reference the Dietrich site. Thus, Petitioners failed to rebut the evidence presented in IWRB Exhibits 118–125 which demonstrated an acceptable ground water monitoring plan was submitted to IDWR in 1984.

Condition #9 states: “Plans for recharge facilities and any conveyance works needed shall be submitted to the Department for approval prior to construction.” IDWR Exhibit 3 at 5. Evidence at the hearing demonstrated that the only new recharge facilities built during the permit development period were those at the Shoshone Recharge site. The headgate into the Richfield canal was already in existence in 1982, TR Vol. II pg. 33 ln. 24–pg. 34 ln. 2, as was the headgate into the Dietrich recharge basin which was put in place by the Army Corp of Engineers sometime in the 1970s. IDWR Exhibit 2 at 2, 16, TR Vol. I pg. 157 ln. 8–14. IWRB Exhibit 116 demonstrated that plans for the Shoshone Recharge site diversion works can be found in the backfile for water right 37-7842. Michele Edl testified that their presence in the backfile means they were received by IDWR. TR Vol I. pg. 113 ln. 17–20. IWRB Exhibit 120 further supports the conclusion that construction documents were provided to IDWR. In it IDWR acknowledges “Mr. Martens has provided this office with a blueprint of the proposed Milner-Gooding diversion works. He has indicated that construction of the works is anticipated to begin soon.” IWRB Exhibit 120 at IWRB00002343. These documents clearly demonstrate that Condition #9 was met. Petitioners offered no evidence to rebut this conclusion.

Thus, evidence presented by the IWRB demonstrated that the permittee complied with all relevant conditions on permit 37-7842.

5. Placing a Volume Limit on Water Right 37-7842 is Unnecessary for the Protection of Existing Water Rights and Contrary to the Purpose of a Recharge Water Right.

The Beneficial Use Examination Rules require that a certified water rights examiner include “an annual diversion volume based on actual beneficial use during the development period for the permit” in her report. IDAPA 37.03.02.035.01.j. The report does not need to include a volume limit for certain beneficial uses including, among others, domestic use and run-of-the-river hydropower facilities. IDAPA 37.03.02.035.01.j.i–vii.

The requirement of a volume limit found in the Beneficial Use Field Exam Rules is a *reporting* requirement. IDAPA 37.03.02.035.01.j (emphasis added). The rules do not require that all water right not listed as exceptions *must* ultimately include a volume limit. *Id.* Indeed, IDAPA 37.03.02.035.01.j provides many ways in which a volume limit may be shaped or modified based on additional information, including by taking into account “seasonal variations affecting water use including seasonal variations in water availability.” IDAPA 37.03.02.035.01.j. Thus, the rules do not preclude the issuance of a water right license for the purpose of use of recharge that includes either no volume limit or a volume limit shaped by “seasonal variations affecting water use including seasonal variations in water availability.” IDAPA 37.03.02.035.01.j.

Strictly construing IDAPA 37.03.02.035.01.j’s requirement to “report an annual diversion volume based on actual beneficial use during the development period” has the potential to unduly limit water rights with the purpose of use of recharge. Recharge use

occurs when there is water available over and above what it needed to satisfy senior water uses. In the majority of years there may be little if any recharge water available to fill a recharge water right. If a permittee is unlucky, they may end up with a development period that includes only drought years. Calculating that permittee's recharge volume based on development period that included only drought years would likely result in a volume limit that would make it impossible to use the right during high water events.² Rather, it makes sense to take into account "seasonal variations in water availability" when calculating volume limits for water right 37-7842. IDAPA 37.03.02.035.01.j. Doing so will allow it to take advantage of high water years when high volumes of water are available for recharge.

It is not necessary to place a volume limit on a recharge water right to ensure against enlargement of the right or injury to other water users. IDWR has independent authority to limit the amount of water used under a recharge water right, no matter what quantity or volume is contained on the face of the right. Under I.C. § 42-234(3) "the director of the department of water resources may regulate the amount of water which may be diverted for recharge purposes and may reduce such amount, *even though there is sufficient water to supply the entire amount originally authorized by permit or license.*" (emphasis added). Idaho Code Section 42-234(4) provides "to ensure that other water rights are not injured by the operation of an aquifer recharge project, the director . . . shall have the authority to approve, disapprove or require alterations in the methods employed to

² Idaho Code Section 42-202A was recently amended to allow the issuance of a temporary permit for diversion of water for the purpose of ground water recharge. A temporary permit is not an appropriate mechanism for covering additional volume needed under a ground water recharge right in high water years because temporary approval for ground water recharge "shall only be granted for a use not intended to become an established water right." I.C. § 42-202A(5). Use of recharge water under water right 37-7842 is intended to be continuing, not temporary.

achieve ground water recharge.” These statutory provisions ensure that injury to other water rights, even junior water rights, will not occur if either no volume limit or large volume limits are placed on water right 37-7842. *See also* I.C. § 42-4201(4).

6. The Previous Amendment of Permit Signed by the IWRB Does not Present a Procedural Bar to Additional Amendments to the Permit.

The Application for Amendment of Permit (for Licensing Purposes) signed by the IWRB prior to licensing of water right 37-7842 does not present a procedural bar to additional amendments to the permit. Idaho Code Section 42-211 provides a permittee may request changes to the place, period, nature of use, or may make other substantial changes in the method of diversion of their permit. Such changes may be approved as a matter of course so long as they do not result in the diversion or more water than originally permitted and the rights of others are not affected. *Id.* Idaho Code Section 42-211 also provides that “[p]rotests to the application for amendment may be filed with and heard by the director in the same manner as provided by section 42-203 [42-203A], Idaho Code, for protests to an application for a permit.”

In this case, the changes requested in the Application for Amendment (for Licensing Purposes) were made at the request of IDWR as part of its internal process for issuing the water right license. The application for amendment was “for Licensing Purposes” and not for the purpose of affecting a change independently desired by the IWRB.

Nothing in I.C. § 42-211 precludes the filing of multiple Applications to Amend a Permit. If the hearing officer determines that, based on the proof of beneficial use submitted at the hearing, the licensed elements of water right 37-7842 should be different than those set forth in the Preliminary Order Issuing License, then

another Application for Amendment of Permit may be requested by IDWR as a procedural step in issuing that license. It would not make any sense to preclude the IWRB from filing another Application to Amend the Permit (for Licensing Purposes) if IDWR deems it to be a necessary step in issuing a license after the hearing in this matter.

In addition, while the Application to Amend the Permit (for Licensing Purposes) was not challenged by Petitioners under I.C. § 42-211, the Petitioners did challenge the Preliminary Order Issuing Water Right License 37-7842 pursuant to I.C. § 42-1701A(3). Because the water right elements described in the licensing investigation and the Application to Amend the Permit (for Licensing Purposes) mirrored the water right elements that were ultimately issued in the Preliminary Order Issuing Water Right License 37-7842, the Petitioners essentially challenged both the Application to Amend the Permit and the license at the hearing in this matter. They were able to put on evidence that the changes to the permit made in the Application to Amend the Permit and reflected in the license would “result in the diversion and use of more water than originally permitted” and that the “rights of others will . . . be adversely affected thereby.” I.C. § 42-211. Thus, the Petitioners will not be prejudiced should an additional Application to Amend the Permit (for Licensing Purpose) be filed for water right permit 37-7842 based on the outcome of this hearing.

7. Proof of Beneficial Use Submitted under I.C. § 42-217 does not Preclude Submission of Additional Proof of Beneficial Use under I.C. § 42-219.

When a water right application is approved as a permit, it will include a date by which proof of beneficial use of water under the permit must be submitted to IDWR, usually within 5 years of the date the permit is issued. The submission of proof of

beneficial use at this stage of the permitting process is governed by I.C. § 42-217 and IDAPA 37.03.02. Proof of beneficial use filed under I.C. § 42-217 must be filed by the permit holder “on or before the date set” on the permit. The permit holder may submit a proof of beneficial use form and include a fee so that IDWR can examine the proof of beneficial use. I.C. § 42-217(.6), 42-221(K), IDAPA 37.03.02.025.02, IDAPA 37.03.02.050.01. Or the permit holder may submit a proof of beneficial use form and hire their own water rights examiner who may submit a beneficial use field exam to IDWR. I.C. § 42-217(.6), IDAPA 37.03.02.025.02, IDAPA 37.03.02.035, IDAPA 37.03.02.050.02.

After IDWR receives, either the Proof of Beneficial Use Form and a fee or the Proof of Beneficial Use Form and a Beneficial Use Field Exam Report conducted by a certified water rights examiner, IDWR must review the information provided for sufficiency. IDAPA 37.03.02.035.01.a. If the data or information provided is insufficient for some reason, IDWR may request additional information or an amendment of the proof until it has all the information it needs. Even if additional clarification of the proof submitted is needed, the proof is still deemed acceptable for the purposes of tolling a lapse of the permit under I.C. § 42-218a. *See* IDAPA 37.03.02.035.02.c, *see also* TR p.126 ln.10–23. In this case, the proof of beneficial submitted on July 27, 1992 was deemed acceptable for purposes of tolling the lapse of the permit, even though IDWR requested additional information regarding the proof after that date and the proof forms were amended several times. *See* IWRB Exhibit 108, IWRB00003092. Thus, the proof submitted by the LSARD in this matter was acceptable under I.C. § 42-217 and 42-218a.

Once proof of beneficial use has been filed and found acceptable, the department of water resources must examine the proof and “the person making such examination shall prepare and file a report of the investigation.” I.C. § 42-217(.6), (.2). As mentioned above, there is no timeframe or deadline by which IDWR must issue a license after receiving proof of beneficial use under I.C. § 42-217.

The licensing process is governed by I.C. § 42-219 which provides:

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. (emphasis added).

The Beneficial Use Examination Rules further provide that “for any prior examination, whether conducted by a certified water rights examiner or by department staff, the department may conduct a supplemental examination on its own initiative at any time.” IDAPA 37.03.02.050.01.b. Thus, both I.C. § 42-219 and IDAPA 37.03.02 require IDWR to examine and investigate the proof of beneficial use that is submitted by the permittee under I.C. § 42-217. IDWR is not limited by the proof that is submitted under I.C. § 42-217, but may make any further investigation into proof of beneficial use that it deems necessary to properly license the water right. I.C. § 42-219; *see also* TR p. 127 ln. 22–pg. 128 ln.17.

That is not to say that there are no limits on the changes that may be made to proof of beneficial use at the time of licensing. Under I.C. § 42-211, the place, period, and purpose of use listed on a water right permit may be modified. However, modification to these elements are limited to changes that will not adversely affect the rights of others.

Id. The Director has discretion to provide notice of changes to a permit. *Id.* To the extent changes to the place, period, or purpose of use are made to a permit that go beyond what was originally advertised and that have the potential to affect other water users, advertisement or notice of those changes is likely.

In addition, the quantity of water that is licensed must be “limited to the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works or the amount beneficially used prior to submitting proof of beneficial use, including any statutory limits of the duty of water.” IDAPA 37.03.02.035.01.o. Thus, while I.C. § 42-219 does not limit the proof of beneficial use that may be considered at the licensing stage to only the proof that was submitted under I.C. § 42-217, it is not an open ended invitation to consider any and all additional evidence.

a. Additional Evidence of Beneficial Use Presented at the Hearing was Appropriate under I.C. § 42-219.

In this matter, the IWRB presented additional evidence regarding proof of beneficial use that occurred during the development period between 1982 and 1992. The proof submitted at the hearing made modifications to the quantity of water and the point of diversion. IWRB Exhibit 108; TR pg. 103 ln. 17–18. The additional evidence regarding the quantity of water showed that 634 cfs was put to beneficial use under the right during the development period. This quantity is well within the original permitted amount of 800 cfs. *See* IDAPA 37.03.02.035.01.o. The change in the point of diversion corrected an error in the POD that was recognized early in the water right’s development. Exhibit 108, Appendix H, IWRB 00003194–3195. No evidence was presented suggesting that the “rights of others” would be “adversely affected” by changing the point of diversion.

The places of use and period of use for water right 37-7842 remain the same as were authorized under the permit and as were originally advertised. Thus, while the additional evidence of beneficial use presented at the hearing went beyond what was submitted by LSARD under I.C. § 42-217, it did not exceed the limits of the permit/advertisement or attempt to expand the development period. Therefore, it was acceptable for the IWRB to present this evidence a part of the “final proof” that is required by I.C. § 42-219.

b. The Quantity of Water in Excess of 300 cfs was Not Relinquished by the IWRB.

The issue of relinquishment of any undeveloped portion of permit 37-7842 was raised in the context of a request for extension of time filed by the IWRB in 2009. In that matter, the IWRB requested an extension of time in which to prove beneficial use under water right permit 37-7842. In other words, the IWRB sought to go outside the original proof of beneficial use period (1982–1992) and demonstrate beneficial use that had occurred after 1992. That request was challenged by the Petitioners in this matter.

In his Recommended Order, the hearing officer relied heavily on the statements on the bottom of the proof of beneficial use form in which the permittee affirmed they were relinquishing “any undeveloped portion of the permit to the state of Idaho.” Petitioners Exhibit 201. The hearing officer found: “The Department does not have the power to overcome or reverse the relinquishment of a water right *through the approval of an Extension of Time to Submit Proof of Beneficial Use*. . . . All Department actions on the undeveloped portion of Permit 37-7842 *occurring after July 27, 1992* are void.” *Final Order adopting Recommended Order Granting Petitioner’s Motion for Summary Judgment and Rescinding Extension of Time*, In the Matter of Permit No. 37-7842 in the

Name of the Idaho Water Resource Board at 7 (Feb. 28, 2012). The hearing officer went on to find:

The extent of beneficial use occurring under Permit 37-7842 during the development period is clearly a disputed issue of fact. As part of its filings, IWRB provided affidavits and other data regarding historic diversions under the permit. However, determining the extent of beneficial use taking place under Permit 37-7842 is not required to resolve the current Petition. *The Department will investigate the extent of beneficial use occurring prior to June 1, 1992 as part of the licensing process.* If IWRB or the Petitioners disagree with the Department's determination of beneficial use occurring within the authorized development period, *the proper venue to raise arguments regarding the true extent of beneficial use would be within the licensing process.*

Id. at 7 (emphasis added). Thus, while the hearing officer denied the IWRB the opportunity, in the context of a request for extension of time, to put on additional information regarding proof of beneficial use occurring *outside* the development period, he specifically recognized that IWRB could, within the context of licensing, put on additional evidence regarding proof of beneficial use occurring *during* the development period.

The hearing in this matter is exactly the hearing that was contemplated by the Final Order. *Id.* Thus, while the quantity of water exceeding 300 cfs might have been relinquished for the purposes of a Request for Extension of Time that sought to go beyond the development period of the right, it was not relinquished if it could be shown that 300 cfs underestimated the amount of water put to beneficial use during the development period.

c. The Beneficial Use Rules Contemplate Reexamination of Proof of Beneficial Use After Submission of Proof under I.C. § 42-217.

The IWRB's evidence demonstrated that the original proof of beneficial use filed under I.C. § 42-217 underestimated the amount of recharge occurring under permit 37-

7842 during the development period. Petitioners themselves have recognized that it is appropriate for a permittee to submit additional evidence of beneficial use if it is determined that the original proof underestimated the amount of water put to use in the development period. In their Petition contesting the IWRB's 2009 Request for Extension of Time, the Petitioners asked the hearing officer to "[rule] that [IDWR] cannot consider additional proof of beneficial use *unless the initial proof of beneficial use is withdrawn upon a showing that the submitted proof underestimated the amount of water put to use in the prescribed period . . .*" *Id.* at 2.

This position is supported by the Beneficial Use Examination Rules which provide for the "re-examination" of "permits which have been examined but the license has not been issued due to a request for re-examination by the permit holder." IDAPA 37.03.02.009.03. If, after submission of proof under I.C. § 42-217 but prior to licensing, a permittee discovers that the original proof of beneficial use was in error, the rules allow the permittee to request that the proof be modified. The only logical reason a permittee would ask for re-examination of proof under the permit is if they believed the proof had underestimated or misrepresented the proof that had actually occurred during the development period. Thus, the rules contemplate additional proof of beneficial use may be submitted and considered at the licensing stage.

In this case, the IWRB considers the evidence presented at trial to be a request for re-examination of the beneficial use occurring under water right 37-7842. The expert report submitted at trial encapsulates the IWRB's assessment of the errors contained in the original proof of beneficial use that was submitted by Gerald Martens under I.C. § 42-217. IWRB Exhibit 108. To the extent the original proof of beneficial use must be


“withdrawn” or the request for re-examination formalized in some way the IWRB would be happy to provide that documentation.

Thus, the IWRB is not limited by the proof of beneficial use that was filed for water right permit 37-7842 under I.C. § 42-217 and it is appropriate for IDWR to consider the additional proof of beneficial use submitted at the hearing for the purpose of determining beneficial use under I.C. § 42-219.

Conclusion

The IWRB’s evidence demonstrated that water in the amount of 634 cfs was beneficially used for the purpose of recharge from both the Big and Little Wood Rivers in the Richfield Canal, at the Dietrich Recharge site, and at the Shoshone Recharge site under water right permit 37-7842 between 1982 and 1992. It was appropriate for the IWRB to put on additional evidence of beneficial use under I.C. § 42-219.

DATED December 7, 2018.



ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 7th day of December 2018, I caused to be served a true and correct copy of the foregoing IWRB'S POST HEARING BRIEF by placing a copy thereof in the manner listed below:

1. Original to:

Idaho Department of Water Resources Director Spackman PO Box 83720 Boise ID 83720-0098	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: _____ <input type="checkbox"/> Email: _____
---	--

2. Copies to

Joseph F. James Brown and James 125 Fifth Avenue West Gooding ID 83330	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> Email: joe@brownjames.com
---	--



ANN Y. VONDE
Deputy Attorney General

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

Page 2		Page 4	
1	APPEARANCES	1	EXHIBITS
2		2	NO. ADMITTED
3	For Petitioners:	3	IDWR
4	BROWN & JAMES	4	1-7 15
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18	DEPUTY ATTORNEY GENERAL	18	122 105
19	BY MS. EMMI BLADES	19	123-125 107
20	P.O. Box 83720	20	
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22		22	201 123
23		23	202 163
24		24	203 163
25		25	204 135
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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.

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

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

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

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 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 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 (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

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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

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

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

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 daylights, 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

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.

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

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

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?

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

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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

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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 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

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.

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.

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.)

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

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.

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

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.

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

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?

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

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 rights 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?

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?

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

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,

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?

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?

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

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

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.

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.

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?

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

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

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

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,

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.

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

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

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

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

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

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 recross.

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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

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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

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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 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

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

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

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

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 RE-CROSS-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

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.

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

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 RE-CROSS-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

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

1
 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

 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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<p>250 (10) 28:8;68:19;69:4,11,15;70:20, 22,25;72:1,6</p> <p>27 (1) 125:10</p> <p>27th (1) 125:20</p> <p>28 (3) 35:1;70:13,18</p> <p>29 (3) 10:21;11:16;139:18</p>	<p style="text-align: center;">4</p> <p>4 (16) 11:11;16:9;28:14,15,19;30:7, 23;33:3;40:22;49:6;56:17,20; 84:13;85:1;144:6;147:10</p> <p>40 (6) 83:16,16;171:23,25,25;172:3</p> <p>400 (2) 62:6;171:23</p>	<p>12:3;15:11;40:21,22;63:22; 65:9;68:12;71:24;89:15;92:21; 134:4</p> <p>70 (2) 160:25;161:16</p> <p>7050 (2) 7:4,5</p> <p>7054 (1) 7:6</p> <p>70's (1) 157:14</p> <p>75 (1) 32:23</p> <p>77 (3) 33:18;35:4;57:2</p> <p>79 (6) 77:4;89:3;110:5;114:1; 139:22;142:22</p> <p>7-9-2014 (1) 46:14</p>
<p style="text-align: center;">3</p>	<p>42-217 (4) 120:19;121:4;128:21;129:17</p> <p>42-219 (3) 127:6;131:13;135:5</p> <p>42-4201 (1) 89:8</p> <p>45 (2) 55:11;138:4</p> <p>47 (4) 45:21;46:8,10;47:23</p> <p>48 (1) 47:25</p>	<p style="text-align: center;">8</p>
<p>3 (23) 10:22;16:1;29:18;32:22; 33:1,7,19;48:21;56:25;77:4,4; 82:19;83:22;87:14;89:2;110:6; 114:1;137:21,22;139:22; 142:21,24;174:5</p> <p>30 (5) 40:21;62:18,20;70:16;120:14</p> <p>300 (5) 40:8;41:5;133:7;137:14; 160:2</p> <p>31 (2) 30:13;125:4</p> <p>3186 (3) 92:5,5,25</p> <p>3192 (2) 92:5;93:1</p> <p>322 (1) 41:4</p> <p>325 (1) 62:19</p> <p>33 (1) 171:3</p> <p>34 (1) 171:3</p> <p>35 (1) 28:20</p> <p>350 (3) 161:18;162:4,6</p> <p>37 (11) 37:5,5;54:10;65:21;85:4,14, 14;100:12,15;101:2;144:8</p> <p>37.03.02.03J (2) 115:8,20</p> <p>37-0782 (1) 124:20</p> <p>37-07842 (1) 133:7</p> <p>37-7428 (2) 84:5;87:6</p> <p>37-7842 (20) 5:6;6:24;7:2,9;9:4;10:18; 12:5;27:1,24;29:5;36:10;40:18; 46:15;53:15;64:2;80:20; 100:19;124:9;134:6,11</p> <p>37-7842A (1) 173:18</p> <p>396 (2) 62:8;69:6</p>	<p style="text-align: center;">5</p> <p>5 (21) 11:14;16:15;28:23;35:1,6,25; 37:12,15;39:15;40:1,1,22; 47:23;49:12;73:25;75:17; 85:23;88:8;125:7;140:22; 150:25</p> <p>50 (2) 48:23;70:16</p> <p>500 (1) 50:18</p> <p>51 (1) 49:6</p> <p>53 (3) 40:22;42:2;49:20</p> <p>54 (1) 171:3</p> <p>56 (5) 37:22;41:11,15;141:24; 142:16</p> <p>57 (8) 37:22;41:11,16,17;141:8,24; 142:16,17</p>	<p>8 (18) 15:6;16:7;20:2,8,12;39:14; 41:15;93:5;95:9;98:7;102:14, 21;105:7;113:25;114:2,3,6; 152:4</p> <p>80 (4) 10:25;11:9;33:7;34:17</p> <p>800 (1) 30:11</p> <p>80s (1) 59:19</p> <p>81 (1) 39:11</p> <p>82 (2) 124:19;135:16</p> <p>84 (1) 39:25</p> <p>85 (1) 167:12</p> <p>86 (3) 41:4;44:15;167:12</p> <p>87 (3) 37:15;60:6,23</p> <p>88 (1) 40:12</p>
<p>37-0782 (1) 124:20</p> <p>37-07842 (1) 133:7</p> <p>37-7428 (2) 84:5;87:6</p> <p>37-7842 (20) 5:6;6:24;7:2,9;9:4;10:18; 12:5;27:1,24;29:5;36:10;40:18; 46:15;53:15;64:2;80:20; 100:19;124:9;134:6,11</p> <p>37-7842A (1) 173:18</p> <p>396 (2) 62:8;69:6</p>	<p style="text-align: center;">6</p> <p>6 (10) 6:24;11:17;40:22;57:7; 60:12;88:22;89:4;141:1; 166:15,16</p> <p>60 (1) 120:14</p> <p>600 (2) 137:15;162:6</p>	<p style="text-align: center;">9</p> <p>9 (5) 16:12;39:14,14;94:22;110:4</p> <p>92 (1) 135:16</p>
<p style="text-align: center;">3</p>	<p style="text-align: center;">7</p> <p>7 (11)</p>	

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 2, 2018

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

TRANSCRIBED BY:

KAMRA TOALSON, CSR No. 756

Notary Public

1 Richfield just next to the head of the Dietrich Main.
2 Q. Have you personally visited the sites that are
3 on that map?
4 A. Oh, yes.
5 THE HEARING OFFICER: Is he looking at a map?
6 BY MS. VONDE:
7 Q. Oh, are you on, sorry, Exhibit 100? It's
8 Figure 3, the Richfield Canal conveyance. Flip the
9 other direction. That one, yes. Okay. Let's go
10 through those questions again.
11 Do you recognize what this map depicts, the
12 area this map depicts?
13 A. Yes.
14 Q. And what is it?
15 A. It is a map of the portion of the canal
16 system --
17 Q. Which portion?
18 A. -- which includes most of the Richfield area.
19 Q. Okay. Have you personally visited the sites
20 depicted on the map or some of the sites?
21 A. Yes, I have.
22 Q. Based on your personal knowledge, does this
23 map accurately depict the Richfield Canal system?
24 A. Yes.
25 Q. Okay. I'd like to have you take a look at the

1 demonstrative exhibit, the big poster that's there, and
2 take a look at that and compare it with Exhibit No. 100.
3 Can you show us on the big one the area that
4 is depicted in Exhibit 100 on the big map up there?
5 A. Yeah. The area in question is beginning of
6 the head of the Richfield diversion. It takes in the
7 area of the east-west Jim Byrne Slough and shows the
8 Little Wood River from the end of the Jim Byrne Slough,
9 Dietrich Main, and area.
10 Q. Okay. Great. Thank you. And as we go
11 through this, feel free to refer to that map if you
12 think it will be easier for people to see if you're
13 pointing things out.
14 A. Okay.
15 Q. Okay. So going back to Exhibit 100, where is
16 Magic Reservoir on this map?
17 A. Well, it actually is not shown on this
18 particular map. It would be onto the north of what is
19 depicted as Gauge Station No. 4 there.
20 Q. Okay. And what river flows into Magic
21 Reservoir?
22 A. Big Wood River.
23 Q. And is Magic Reservoir an onstream reservoir
24 on the Big Wood?
25 A. Yes.

1 Q. So the Big Wood flows out of that reservoir;
2 is that correct?
3 A. That's correct.
4 Q. Okay. At the top of Exhibit 100, you've
5 already stated there's a dot marked No. 4. Can you
6 describe what that dot represents?
7 A. It represents the stream-gauge measuring
8 station on the diversion of the Richfield Canal off of
9 the Wood River.
10 Q. So what is the source of water that is
11 diverted?
12 A. That is the Magic Reservoir source. Big Wood.
13 Q. The Big Wood. And so Gauge No. 4 measures all
14 of the water that flows into the Richfield Canal; is
15 that correct?
16 A. That's correct.
17 Q. Using the larger demonstrative exhibit maybe
18 would be easier. Can you describe for us where the Big
19 Wood River flows after Gauge No. 4, downstream from
20 Gauge No. 4?
21 A. Certainly. From Gauge Station 4, it comes on
22 down the natural river channel. It comes through and
23 around Kinsey Butte on down to just north of Shoshone
24 here and then westward toward Gooding.
25 Q. Thank you. Looking back at Exhibit 100, where

1 is the next point of measurement on the Richfield Canal
2 after Gauge No. 4?
3 A. It actually would be what is the -- what we
4 refer to as "The Forks." It's where the Richfield Canal
5 basically ends. It terminates there and splits into the
6 Jim Byrne Slough, the East Main, and West Main Canals.
7 Q. Okay. And I might have you go back up to the
8 demonstrative exhibit again, because on Exhibit No. 100,
9 it might be a little hard to see.
10 But can you describe for us that fork that you
11 just described in terms of how that split actually
12 works? Does the head of the Jim Byrne Slough come off
13 first and then the other two split off? How does that
14 work exactly? If you could describe that, please.
15 A. Yes, that's correct. It actually comes down,
16 terminates here. Jim Byrne Slough goes to the north
17 where it says "HJB." Then you have a short section,
18 probably, maybe 500 yards, and you'll go down, and the
19 West Main comes off, and the East Main proceeds onto the
20 east.
21 Q. Thank you. Are there any diversions off the
22 Richfield Canal between Gauge No. 4 and the HJB
23 measurement gauge?
24 A. There's probably at least four headgates that
25 come off for farm delivery and one old lateral that's no

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1 longer really used.
2 Q. Okay. And we've already talked about this.
3 Below the HJB there are two more green dots. They
4 represent the East and West Mains; is that correct?
5 A. That's correct.
6 Q. So could you please describe what happens to
7 the water flowing in the East and West Mains?
8 A. The East Main goes out and around, of course,
9 the east side of what they call Johnson Butte, and there
10 is seven or eight laterals that feed irrigation water to
11 that area, which would be this area here and coming
12 around down through here. Most of that --
13 Q. And are you indicating there the area between
14 the --
15 A. Between the East Main and the Byrne Slough.
16 Q. Thank you. Go ahead.
17 A. Those laterals tail off, and tail water comes
18 back into the Byrne Slough and actually ends up back
19 here at what they call the mouth of the JB just before
20 it enters Little Wood River. The West Main comes down
21 the west side of the Johnson Butte, waters the area west
22 toward the desert and into the south toward what we call
23 Marley.
24 The two actually do connect on the south side,
25 Johnson Butte, in about this area here. You can see on

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1 the map. And then it will actually come back into
2 Little Wood at what they call Marley, which is another
3 gauge measuring station that the watermaster's office
4 has where they measure that return flow back to Little
5 Wood River.
6 Q. Thank you. Is that place at Marley, is that
7 the only place that those two reconnect to the Little
8 Wood River?
9 A. No. There's at least four other waste streams
10 that come back between the mouth of the Jim Byrne and
11 Marley. I think they're listed on our records as A, B,
12 C, D, and E.
13 Q. Thank you. In your personal knowledge, is
14 water ever diverted into the East and West Mains outside
15 of the irrigation season?
16 A. Not during the time that I was there. Maybe a
17 little stock water for domestic purposes in the fall.
18 Q. Going back up to where the Richfield Canal
19 splits with the HJB, where does the water that goes into
20 the Jim Byrne Slough flow?
21 A. That flow is the primary source of water
22 during the irrigation season for the Dietrich Canal and
23 the irrigation of the Dietrich area project.
24 Q. Are there any diversions out of the Jimmy
25 Byrne Slough between the HJB gauge and the MJB gauge?

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1 A. There is, I think, one private headgate in a
2 small lateral, what we call 253, that -- I think it runs
3 five or six feet now is about all.
4 Q. Are there any inflows into the slough between
5 the HJB and the MJB gauges?
6 A. Yeah. There's seven or eight laterals that
7 come off of that East Main -- and I'm estimating those
8 laterals, I don't know the exact number -- that come
9 back and tail back into the Byrne Slough.
10 Q. Okay. I'm going to have you take a look at
11 what has been marked as Exhibit 101. It should be a
12 photograph. Do you recognize, from your personal
13 experience, where that photograph was taken?
14 A. Yes, I do.
15 Q. Where was it taken?
16 A. That's at the end of the Jim Byrne Slough
17 where it comes into Little Wood River.
18 Q. Okay. So referring back to Exhibit 100, could
19 you please mark on Exhibit 100, just make a little X at
20 the place where the photograph in Exhibit 101 was
21 approximately taken.
22 A. Would you repeat that, please?
23 Q. So I'd like you to mark on Exhibit 101 the
24 approximate location of where -- excuse me, on Exhibit
25 100 the approximate location of where this photograph in

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1 Exhibit 101 was taken.
2 And then next to that, could you just write
3 "Exhibit 101" for me?
4 Thank you. And then would you mind, also,
5 just for everybody's sake, pointing out on the
6 demonstrative exhibit where you made that mark.
7 A. It would be right here next to where they show
8 on this map as Station 11. It kind of overlaps it where
9 the green mark is there.
10 Q. Great. Thank you.
11 MS. BLADES: I'm sorry. Can I interrupt just
12 one second?
13 MS. VONDE: Uh-huh.
14 MS. BLADES: You've got these marked as
15 official exhibits --
16 MS. VONDE: Oh, sure. Do you want to mark on
17 there?
18 MS. BLADES: It would be helpful to maybe
19 transfer that over to the witness right now and give
20 Gary the copy.
21 MS. VONDE: Yeah. I'm going to have him do
22 that a couple more times, though.
23 MS. BLADES: Okay. I'm sorry to interrupt
24 your presentation here.
25 MS. VONDE: No. Thank you.

1 MS. BLADES: Thank you.
2 (Unintelligible.)
3 THE HEARING OFFICER: And, Joe, for your
4 benefit, if you want to approach the witness and see
5 where he's marked...
6 THE WITNESS: So you want me to mark on this
7 copy?
8 MS. VONDE: Yes, please.
9 BY MS. VONDE:
10 Q. Okay. Thank you. Now, going back to Exhibit
11 101, which is the photograph, in the center of that
12 photograph you see a label that says "Jim Byrne Slough
13 flow." Is that label correct to your knowledge?
14 A. Yes.
15 Q. And what is the source of water that is
16 flowing from the Jim Byrne Slough?
17 A. That is water from the Big Wood River and
18 Magic Reservoir.
19 Q. The labels on the left and the right of
20 Exhibit 1 say "Little Wood River flow." Do those labels
21 accurately depict the flow of water in the Little Wood
22 River at this spot?
23 A. Yes.
24 Q. Where is the MJB gauge located in this photo?
25 Where would it be?

1 A. Well, it actually isn't shown in this photo.
2 It is to the right and to the north of this
3 area.
4 Q. And that would be located on the Jim Byrne
5 Slough; is that correct?
6 A. Yes.
7 Q. So it correct to say that the MJB gauge
8 measures Big Wood River water in the Jim Byrne Slough
9 just before it dumps into the Little Wood River?
10 A. Yes. It's a quarter mile probably upstream of
11 where this confluence is.
12 Q. Is it also accurate to say that that Exhibit
13 101 depicts the point at which the big and Little Wood
14 River water commingle?
15 A. Yes.
16 Q. To the best of your knowledge, was everything
17 that is depicted in Exhibit -- sorry. Moving back to
18 Exhibit 100, is everything that is depicted in that map,
19 was that there and in existence between the time period
20 of 1982 and 1992?
21 A. To my knowledge, yes.
22 Q. So given all of this description and your
23 personal knowledge of the system, is it possible to get
24 Big Wood River water into the Little Wood River?
25 A. Yes.

1 Q. Given your personal knowledge of the system,
2 does Exhibit 100, the map, does that accurately depict
3 the Big Wood River/Richfield Canal system?
4 A. Yes.
5 Q. Okay. Let's take a look at Exhibit 102. Do
6 you recognize from your personal experience the area
7 that this depicts?
8 A. Yes.
9 Q. And what area is that?
10 A. This is the -- it shows the Little Wood River
11 flowing toward the top of the page to the left, and then
12 it shows Gauge Station 11, which is the head of the
13 Dietrich Main, and then the Dietrich Main Canal
14 proceeding to the south and west.
15 Q. And could you please point out on the big
16 demonstrative exhibit the area that this map depicts?
17 A. Yeah. It would be commencing here at No. 11.
18 It shows the Little Wood River, the blue line here,
19 going down to the southwest; Dietrich Main Canal coming
20 down here, this white line, and proceeding into the
21 Dietrich portion of the project.
22 Q. Thank you. Okay. At the top of Exhibit 102,
23 you've already addressed this a little bit, the little
24 dot marked No. 11, what does that represent?
25 A. That is the stream-gauge measuring station for

1 flows going into the Dietrich Main Canal.
2 Q. Is Gauge No. 11 located on, I guess it would
3 sort of be the south side of the Little Wood River?
4 A. Yes.
5 Q. There's an area on Exhibit 102 marked with
6 yellow squares. What does this represent; do you know?
7 A. That's what we commonly refer to as the
8 Dietrich floodway.
9 Q. And is there a headgate off of the Dietrich
10 Canal that goes into that basin?
11 A. Yes.
12 Q. To your knowledge, how long has that diversion
13 into that basin existed?
14 A. My understanding, it went in there somewhere
15 in the late '70s.
16 Q. Okay. Continuing back with Exhibit 102, can
17 you please describe where the Dietrich Canal flows past
18 that point of the basin headgate.
19 A. From the floodway, it continues to the south
20 and then onto the west across the upper end of the
21 Dietrich project.
22 Q. There's a dot marked on Exhibit 102 labeled as
23 the "F waste."
24 A. Uh-huh.
25 Q. What does that represent?

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1 A. That is the Water District's measuring station
2 at the end of the Dietrich Main Canal where they measure
3 those outflows that come back to the Little Wood River.
4 Q. So the F waste, is that just before the
5 Dietrich reenters the Little Wood River; is that
6 correct?
7 A. Yes.
8 Q. And how much water, in your personal
9 knowledge, would approximately be flowing through the
10 F waste?
11 A. It will vary between 2 CFS to probably 15 on
12 an average.
13 Q. Are there any other terminuses or exits where
14 water from the Dietrich Canal flows or ends or --
15 A. In the Little Wood?
16 Q. Anywhere.
17 A. There are a couple of areas where we have
18 waste that comes back into the Milner-Gooding, and there
19 is another. The primary one would be at what we call
20 Lateral 1158 which comes in just above the bifurcation
21 on the Milner-Gooding Canal.
22 Q. And how much water would normally be flowing
23 out of those?
24 A. Oh, if you had all of them together, you might
25 end up with 3 CFS, possibly 4.

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1 Q. And when would those normally be flowing?
2 Would it be during the irrigation season or during the
3 winter?
4 A. Primarily during irrigation season.
5 Q. Okay. Let's take a look at Exhibit 103. It
6 should be a photograph. Do you recognize, from your
7 personal experience, where this photograph was taken?
8 A. Yeah. This is located on the Little Wood
9 River just downstream of the confluence with the MJB and
10 the head of the Dietrich Main.
11 Q. Okay. And then taking a look -- I'm going to
12 have you do the same process again. Could you please
13 mark on Exhibit 102, the map, where this photograph --
14 approximately where this photograph would have been
15 taken.
16 A. You mean on 100?
17 Q. Nope, on 102, the map you were just looking at
18 of the Dietrich Canal.
19 A. Oh, okay.
20 Q. If you could just make a little mark
21 approximately where this photograph was taken of the
22 Little Wood check structure.
23 A. Okay.
24 Q. And then if you could please mark that, that
25 mark, label it as Exhibit 103. And then I don't know if

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1 it's helpful, but could you also point it out on the big
2 map, too?
3 A. Certainly. Okay. It's located approximately
4 right in this area just to the west, or it would be to
5 the left of Station No. 11, the gauge that's on this big
6 map.
7 Q. Thank you. All right. Let's take a look back
8 at Exhibit 103, the photograph. You already indicated
9 this is a check structure. What is the purpose of this
10 check structure.
11 A. This is the primary area where we back up
12 water flows to push water into the Dietrich Main Canal.
13 Q. Can water flow around this check structure and
14 continue down the Little Wood?
15 A. There is a -- as you can see in this picture,
16 there are two stock-wall gates there that will pass
17 water there. During irrigation season, they're normally
18 closed, so the only way water goes beyond there is over
19 the weir here, which you indicate on this check
20 structure, or there is a clean-water bypass that was put
21 in in 1998 that actually takes Little Wood water on
22 downstream before the confluence of the Jim Byrne Slough
23 comes in.
24 It was done for water quality purposes
25 because, at that point in time, prior to that, when

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1 things were not as much sprinkler irrigation taking
2 place, a lot of mud and return-flow water would come in,
3 and it was bad for the fishery, so they actually put in
4 the clean-water bypass to take the clean Little Wood
5 water on downstream for fishery and the irrigation
6 water, which went on down into the Dietrich Canal.
7 Q. Okay. Let's take a look at Exhibit 104,
8 another photograph. Do you recognize where that
9 photograph was taken from your personal experience?
10 A. Yes.
11 Q. And where is that?
12 A. This is where the Little Wood River and the
13 Jim Byrne Slough meet on the south side of the river
14 across from that confluence, and flow goes to the
15 Dietrich Canal.
16 Q. Can you mark on Exhibit 102 the approximate
17 location where this photograph was taken.
18 A. Yes. Good thing they're approximates.
19 Q. Yeah, it's approximate. And then could you
20 label that mark as Exhibit 104, please.
21 A. Okay.
22 Q. Okay. Going back to Exhibit 104, the
23 photograph, there's a label in the upper left-hand
24 corner that says "Little Wood River flow." Does that
25 label accurately depict the flow of the Little Wood

1 River at this spot?
2 A. Yes.
3 Q. And we also see a label on the lower left
4 corner of the exhibit that says "Jim Byrne Slough flow."
5 Does that label accurately depict the flow of water
6 coming from the Jim Byrne Slough and into the Little
7 Wood River at this spot?
8 A. Yes.
9 Q. Then on the middle right of the photo we see a
10 label that says "Dietrich Canal flow." Does that label
11 accurately depict the flow of water going into the
12 Dietrich Canal at this spot?
13 A. Yes.
14 Q. It may not be visible, but where approximately
15 would Gauge No. 11 be in this photograph?
16 A. It would be from the mark on the map that says
17 "Dietrich Canal flow" probably 200 yards to the right of
18 this photo downstream the canal.
19 Q. And where's the check structure that is
20 depicted in Exhibit 103 located in relation to the photo
21 taken in 104?
22 A. It is located to the left of this photo
23 downstream on Little Wood River just below where the
24 Byrne Slough comes in.
25 Q. Okay. So I'll just touch on this. The grated

1 change. They did replace the diversion structure on the
2 Little Wood there. It takes water -- backs the water
3 up, but it's still in the same location, so...
4 Q. So they just rebuilt it?
5 A. Just rebuilt it.
6 Q. So based on your personal knowledge of the
7 system and everything we've just discussed, is it
8 possible for water from the Big Wood River to flow into
9 the Dietrich Canal?
10 A. Yes.
11 Q. And based on your personal knowledge of the
12 system, is it also possible for water from the Little
13 Wood River to flow into the Dietrich Canal?
14 A. Yes.
15 Q. Would you describe those two sources as
16 commingled at that point?
17 A. Yes.
18 Q. All right. Let's move onto Exhibit 105. Go
19 through the same process here. Do you recognize, from
20 your personal experience, the area that this depicts?
21 A. Yes, I do.
22 Q. And what area is that?
23 A. It is the area where Little Wood River comes
24 in below F waste toward the bifurcation, and the
25 Milner-Gooding Canal comes in from the south toward the

1 structure in the middle of the photograph, what is that?
2 A. That is the clean-water bypass that was
3 installed to take the cleaner water from Little Wood on
4 downstream for fishery purposes.
5 Q. So the check structure that you described in
6 Exhibit 103, does it serve the purpose of backing up
7 Little Wood water so that it can flow into the Dietrich
8 Canal?
9 A. Yes.
10 Q. And does it also serve the purpose of pushing
11 Big Wood River water from the Jim Byrne Slough into the
12 Dietrich Canal, as well?
13 A. Yes.
14 Q. So in Exhibit 104 here, this photograph, does
15 this depict Little Wood River water commingling with Big
16 Wood River water and it being pushed into the Dietrich
17 Canal?
18 A. Yes, it does.
19 Q. Okay. I'd like to go back to Exhibit 102
20 again just briefly. That's the map.
21 To the best of your knowledge, was
22 everything -- is everything that is depicted on this
23 Exhibit 102, was it in existence during the time period
24 between 1982 and 1992?
25 A. No, it was basically the same. There was one

1 Little Wood River and the bifurcation area.
2 Q. Does this -- can you show us on the big
3 demonstrative exhibit where this Exhibit 105 portion is
4 located?
5 A. It would be in this area from approximately
6 just upstream at 53 across through the lattice where the
7 Milner-Gooding hits Big Wood and Little Wood flows on
8 toward Gooding.
9 Q. Thank you. Okay. Let's take a look at
10 Exhibit 105. On the far right, you've indicated we see
11 an indication for the F waste. And is that where the
12 Dietrich Canal empties into the Little Wood River?
13 A. Yes.
14 Q. And the Little Wood River is depicted on
15 Exhibit 105 in what color?
16 A. Blue. It's dark blue.
17 Q. So following the blue Little Wood River line
18 from right to left on Exhibit 105, there comes a point
19 where we see a green line with kind of a black middle.
20 What does that represent?
21 A. That is the Milner-Gooding Canal.
22 Q. And where does the Milner-Gooding Canal begin?
23 A. It begins at Milner Reservoir.
24 Q. On the Milner-Gooding Canal, we see a dot
25 marked No. 53. What does that depict?

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1 A. That is the stream-gauging station on the
2 Milner-Gooding Canal just upstream of the area of the
3 bifurcation where flows are measured coming from Milner.
4 Q. And so what would be the source of water
5 that's being measured there?
6 A. Snake River.
7 Q. The map then just north of 53 contains a label
8 that says "bifurcation." What does that represent?
9 A. That is where the Milner-Gooding water,
10 actually a portion of it commingles with Little Wood
11 water and is taken to Gooding.
12 Q. So is the bifurcation located at the crossing
13 of the Little Wood River water and the Milner-Gooding
14 Canal?
15 A. Yes.
16 Q. All right. Let's take a look at Exhibit 106.
17 It should be a photograph. Do you recognize where this
18 photo was taken and what it depicts?
19 A. Yeah. This is a picture of the bifurcation
20 structure where the water from the Milner-Gooding meets
21 the Little Wood River.
22 Q. And does it accurately depict the bifurcation
23 structure?
24 A. Yes.
25 Q. So I'm going to have you do again what we've

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1 done before. If you could please use Exhibit 105 and
2 mark on Exhibit 105 the location of the bifurcation that
3 is depicted in Exhibit 106.
4 A. You want that labeled as "106"?
5 Q. Yes, please. And then if you could please
6 point that out on the big demonstrative exhibit where
7 you put that mark.
8 A. It would be in this point right here where it
9 meets the Little Wood River.
10 Q. And are you indicating just before, just
11 upstream on the Milner-Gooding before Gauge No. 56?
12 A. Yes.
13 Q. Thank you. All right. So let's go back to
14 Exhibit 106, the photograph. So we see a label on that
15 photograph on the right-hand side that says
16 "Milner-Gooding flow." What is the source of water that
17 is coming from that direction?
18 A. Snake River.
19 Q. And is that label accurate as to the direction
20 of flow where it's coming from?
21 A. Yes.
22 Q. All right. And the general flow of water in
23 Exhibit 106 is from the right-hand side of the
24 photograph to the left-hand side of the photograph; is
25 that correct?

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1 A. Yes.
2 Q. In the upper middle of Exhibit 106, there's a
3 label that says "siphon flow." Does that accurately
4 depict the flow of water entering the siphon in the
5 bifurcation?
6 A. Yes.
7 Q. And where does water entering the siphon go?
8 A. It goes on down toward Station 56 and proceeds
9 across where it flumes over Big Wood and delivers
10 irrigation water to North Shoshone and North Gooding.
11 Q. So the siphon actually takes water underneath
12 the Little Wood River; is that correct?
13 A. Yes.
14 Q. And then in this photo, is the Little Wood
15 River located just off the edge of the left-hand side of
16 the photo where we can't quite see it?
17 A. Well, it's just at the top edge of that. It
18 would be at the top of that photo.
19 Q. At the top, okay. In the middle of Exhibit
20 106, water appears to be flowing out of the
21 Milner-Gooding Canal and toward the photographer; is
22 that correct?
23 A. That's correct.
24 Q. If you could see under that cascade of water
25 coming towards the photographer, what would be

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1 underneath there?
2 A. There's a concrete wall probably approximately
3 five foot high that sits across there.
4 Q. On the left-hand side of Exhibit 106, there's
5 a label that says "flow to the Little Wood River." Does
6 that accurately depict that water can flow from the
7 Milner-Gooding Canal and into the Little Wood?
8 A. Yes.
9 Q. So is it accurate to say that in Exhibit 106,
10 Snake River water flowing in the Milner-Gooding Canal is
11 both going into the siphon and also dumping into the
12 Little Wood River?
13 A. Yes.
14 Q. Is it possible for the reverse to happen? In
15 other words, can Little Wood River water back up and
16 into the Milner-Gooding Canal and go through the siphon?
17 A. Generally during irrigation flow, not.
18 However, in the spring of 2017, I observed a flow in the
19 Milner-Gooding of somewhere in the neighborhood of 300
20 CFS. Little Wood was running probably about five, and
21 we actually had water that was coming, upgrading through
22 that channel, under the radial gate, and around it going
23 down on down to the north toward Station 56 through the
24 siphon.
25 Q. So you have personally witnessed water backing

1 up from the Little Wood River into the Milner-Gooding
2 Canal and flowing down the Milner Canal?
3 A. Yes. And then during the off-season, if you
4 do not put a cofferdam in below this radial gate, which
5 you see at the bottom right of the Exhibit 106, water
6 from the Little Wood will actually come out and flow and
7 go down -- will proceed north through that siphon. They
8 have to go in every year and put in an earthen cofferdam
9 to keep that water out of the canal.
10 Q. Okay. So water flowing in the Little Wood
11 that reaches this point, is it -- in your experience, is
12 that water a commingling of both Big and Little Wood
13 River water?
14 A. It can be, yes.
15 Q. All right. Let's go back to Exhibit 105.
16 There's a green dot there marked No. 56. What does that
17 depict?
18 A. That is a stream-gauge station where
19 measurements of the flow is recorded going on up the --
20 well, downstream to Milner-Gooding north of Little Wood.
21 Q. And the Gauge No. 56 is downstream or north of
22 the bifurcation; is that correct?
23 A. Yes.
24 Q. So what are the possible sources of water that
25 could potentially be measured at Gauge No. 56?

1 A. Depending on the time of year, it could be
2 Milner-Gooding flow, it could be Little Wood flow. And
3 if there's return flow coming from Big Wood through the
4 Richfield portion of the system, it could also include
5 some Big Wood water.
6 Q. So that would be Snake River water, Little
7 Wood River water, and Big Wood River water; is that
8 correct?
9 A. Correct.
10 Q. And then there's a number -- a green dot
11 No. 57 on the map. What does that represent?
12 A. That is another stream-gauging station. That
13 one was installed at the time that the Lower Snake River
14 Aquifer Recharge District's diversion was put in on the
15 canal taking water into the recharge area there north of
16 Shoshone.
17 Q. And the yellow hash marks indicated on the map
18 there, what, to your knowledge, does that represent?
19 A. That is commonly referred to as the Lower
20 Snake River Recharge District's recharge site.
21 Q. And there is a headgate off of the
22 Milner-Gooding Canal into that site; is that correct?
23 A. That's correct.
24 Q. And where is that headgate into the recharge
25 site located?

1 A. It's just upstream of the Station 57 just
2 maybe 50, 60 feet.
3 Q. So could you please mark on Exhibit -- make a
4 mark on Exhibit 105 as to the approximate location of
5 that Shoshone recharge site diversion structure. And if
6 you could just please label that mark "Shoshone site
7 headgate" or something like that.
8 And then if you could please, just for
9 everybody, indicate on the big demonstrative exhibit
10 where you put that mark.
11 A. On this map, it would be right here just
12 upstream of the indicator for the Station 57 measuring
13 gauge.
14 Q. Thank you. Okay. Are there any diversions,
15 headgates, or other structures between Gauge No. 53 and
16 the bifurcation?
17 A. There are at least three headgates.
18 Q. Are there any diversions, headgates, or other
19 structures between the bifurcation and Gauge No. 56?
20 A. There is one.
21 Q. Other than the Shoshone recharge site
22 headgates, which we already talked about, are there any
23 diversions, headgates, or any structures between No. 56
24 and No. 57?
25 A. There is one there.

1 Q. Besides the Shoshone?
2 A. Yes.
3 Q. Okay. So given your personal knowledge of the
4 system and everything we talked about, could Snake River
5 water be diverted at the Shoshone recharge site?
6 A. Yes.
7 Q. And how would that happen?
8 A. Well, it would proceed from the -- through the
9 Milner-Gooding Canal under the siphon under Little Wood
10 River -- through the siphon under the Little Wood River
11 and on down through past Station 56 to the diversion of
12 just above Station 57.
13 Q. And given your personal knowledge of the
14 system, could Big -- I'll call it Big/Little Wood River
15 water, be diverted at the Shoshone recharge site?
16 A. Yes.
17 Q. And how would that --
18 A. Well, you would bring it from Little Wood back
19 into the Milner-Gooding Canal and on down the
20 Milner-Gooding Canal to the north of Little Wood River
21 in the same manner that you did with the Snake River
22 water. It would go from 56 down to 57 and discharge at
23 the recharge area.
24 Q. Okay. So, to the best of your knowledge, is
25 everything that is depicted in Exhibit 105, was it in

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1 existence at the time period between 1982 and 1992?
2 A. Yes.
3 Q. Okay. So now we have the lay of the land.
4 Let's talk about -- let's go back to the Richfield
5 Canal, and you can certainly look at Exhibit 100, if
6 that's helpful. But to your knowledge, are there any
7 year-round stock-water rights diverted through the
8 Richfield Canal? Or were there -- let me rephrase that.
9 Strike that. Let me rephrase it.
10 Were there any year-round stock-water rights
11 diverted through the Richfield Canal between 1982 and
12 1992 to your knowledge?
13 A. No.
14 Q. Are there any other types of water rights on
15 the Richfield Canal that, to your knowledge, would have
16 had a year-round season of use during that time period?
17 A. Yeah. The normal seige that comes from Magic
18 Reservoir out of the toe drains at the dam and some
19 spring inflow from just downstream of the dam flows
20 year-round and is diverted on into the Richfield Canal,
21 and it flows there year-round.
22 Q. And how much would that be?
23 A. Depending on the height of the reservoir,
24 anywhere from 7 to 20 feet.
25 Q. CFS?

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1 A. Yes.
2 Q. In your personal experience with the Richfield
3 Canal, when does irrigation demand usually being on the
4 Richfield?
5 A. May 1st.
6 Q. And how do you know that?
7 A. It's actually in the bylaws of the company.
8 At one point, they had it established that way. But it
9 historically is usually May 1st.
10 Q. And is that an average May 1st? Could it be
11 earlier or later, or is that a pretty normal start date?
12 A. That's pretty normal. We have started it,
13 during the time I was there, as early as the 24th of
14 April a couple of years. You know, they had a high
15 water year, a lot of water. And they went ahead --
16 rather than waste it, they put it to use.
17 Q. That would be unusual?
18 A. Yes.
19 Q. Many of the irrigation water rights in
20 Richfield Canal have a season of use that starts on
21 April 15th on the face of the water right.
22 Why, in your experience, does the irrigation
23 season usually actually begin later than April 15th?
24 What is it about the Richfield?
25 A. Usually weather conditions. It's usually a

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1 little bit too cold for growing conditions in that area
2 to start irrigating that early.
3 Q. Okay. So to the extent that you saw measured
4 diversions on the Richfield at Gauge No. 4 before May
5 1st, would you say, in your personal experience, that
6 those were for irrigation?
7 A. Before May 1st?
8 Q. Before May 1st.
9 A. No. I would not imagine they were for
10 irrigation, no.
11 Q. Would those diversions be for stock water?
12 A. A good possibility it could be stock water.
13 Q. And did you say before that there were no
14 stock-water diversions on the Richfield year-round?
15 A. There are no recorded rights that I'm aware
16 of.
17 Q. Okay. So there's no water rights for stock
18 water on the Richfield?
19 A. Not that I'm aware of, no.
20 Q. So in your personal experience, when does the
21 irrigation season usually end on the Richfield Canal?
22 A. Generally 1st of October.
23 Q. And how do you know that?
24 A. That was historically what the company listed
25 as their irrigation cutoff date.

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1 Q. So is it sometimes earlier and sometimes later
2 than October 1st?
3 A. Depending on the water supply, it's been as
4 early as June. Generally, you know, through some of the
5 drought areas, it was scattered anywhere from mid August
6 to like early September. Generally, I would say between
7 the 15th of September and the 1st of October, if it was
8 going to be early, unless it was something out of their
9 control.
10 Q. So to the extent you saw measured diversions
11 into the Richfield Canal at Gauge No. 4 after October
12 1st, would you say that those were likely for irrigation
13 or likely not for irrigation?
14 A. After October 1st, it would be probably
15 stock-water flow or just a leak coming through the
16 system.
17 Q. And when you say "stock-water flow," there are
18 no water rights for stock water on the Richfield; is
19 that correct?
20 A. No. But the canal company will have what they
21 call a domestic run. They did it for years. They would
22 come on after the 1st of October, probably anywhere
23 between the last week in October to the first week or so
24 of November, and run a small flow for a few days to fill
25 stock ponds for livestock watering for the fall pasture.

1 Q. So would that have been a fairly short
2 duration?
3 A. Three or four days usually is about all.
4 Q. And how much water would that have been?
5 A. Oh, they would run 2- or 300 CFS.
6 Q. Just for a couple of days?
7 A. Yeah, just for a few days. Kind of fill the
8 system right quick and shut off.
9 Q. Okay. Is any portion of the Richfield Canal
10 or the Jim Byrne Slough lined with concrete or in some
11 other manner?
12 A. No.
13 Q. All right. So let's move onto the Dietrich.
14 In your experience, when does irrigation demand usually
15 begin on the Dietrich Canal?
16 A. Oh, it's somewhere around probably about the
17 10th of April.
18 Q. And how do you know that?
19 A. From historic records and from practical
20 experience running the system.
21 Q. Why does irrigation on the Richfield -- or,
22 excuse me, the Dietrich Canal begin slightly earlier
23 than on the Richfield Canal?
24 A. It's a little lower elevation. It becomes
25 warm earlier, and the crop planting starts a little

1 earlier, and the demand for water comes on earlier.
2 Q. When you say that April 10th, April 15th an
3 average start date for irrigation on the Dietrich
4 system, in some years it might be a bit earlier, and in
5 some years it might be a bit later?
6 A. It varies a little bit, yeah.
7 Q. Okay. When the irrigators begin taking water
8 an April 10th, April 15th, on average, are the
9 irrigators usually getting a full supply of irrigation
10 water at that time?
11 A. They'll get the full supply that is due at
12 their headgate. It will not be the full supply that we
13 run for the summer. Probably, maybe half. 100 to 150
14 CFS would be all.
15 Q. So early season -- we'll call it early-season
16 irrigation demand on the Dietrich Canal is about 100 --
17 A. It will range between 100 and 150 CFS.
18 Q. Okay. So when would the irrigators on the
19 Dietrich Canal usually begin to manage their -- I'll
20 call it their full irrigation supply -- what they really
21 need to get going for the summer? At what --
22 A. Somewhere around the 1st of June. Between the
23 15th of May, 1st of June.
24 Q. Okay. So on May 31, June 15th, that average
25 time period, sometimes it will be a little earlier, and

1 sometimes it will be a later?
2 A. Yes.
3 Q. So between approximately April 10th, April
4 15th, and June 1st, would it be fair to call that an
5 early irrigation season on the Dietrich?
6 A. Yeah, probably.
7 Q. And you stated that the demand during that
8 time period would be between 100 and 150 CFS; is that
9 correct?
10 A. Yes.
11 Q. Okay. And how do you know that that's the
12 demand?
13 A. Just from running the system for 20 years and
14 looking at what the demand is.
15 Q. So, generally, that's what people are needing
16 at that time?
17 A. That's generally about where we were at, yes.
18 Q. Okay. So on June 1st, approximately, when
19 people start to want their full amount of water, how
20 much water is that normally?
21 A. Oh, it will go on up to peak of somewhere
22 around 270. It has been as high as 305, but the average
23 usually is about 270.
24 Q. Okay. So what is the total canal capacity of
25 the Dietrich Canal?

1 A. We've run as high as 400 CFS at least as far
2 down as the floodway. Below that, we couldn't handle
3 that much.
4 Q. Okay. And how do you know 400 CFS? How do
5 you know that?
6 A. We've measured that kind of flow down the
7 system on the years that we actually put water into that
8 floodway.
9 Q. Are there any stock-water rights diverted
10 through the Dietrich Canal?
11 A. Yes. There is a 75 CFS winter stock-water
12 right that is assigned to the Big Wood Canal Company.
13 Q. And when is that stock-water right diverted?
14 A. It usually commences shortly after irrigation
15 season. I don't think, and I'm not positive on that
16 date, but I think it's around the 1st of November that
17 that right comes into effect.
18 Q. And when does it go out of priority?
19 A. It usually terminates somewhere around the 1st
20 of April, and then there's an irrigation right that
21 kicks on shortly right in that same time frame.
22 Q. Okay. So is there an overlap in time period
23 where both the stock water and the irrigation rights
24 would be diverted at the same time?
25 A. I believe so, yes.

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1 Q. And when would that time period be?
2 A. Generally spring, probably, rather than in the
3 fall. Because the fall, usually, the irrigation season
4 ends before that stock-water right comes on.
5 Q. So did you say that the stock-water right
6 usually goes out about April 1st?
7 A. Yes.
8 Q. But the first irrigation right doesn't start
9 diverting until approximately --
10 A. Approximately the 10th. But they'll start
11 flushing canals and whatnot. There will be some water
12 brought in for that purpose.
13 Q. Okay. All right. Let's go back to Exhibit
14 105, which is the map of the Milner-Gooding system.
15 So Gauge No. 53 on the map, you stated that
16 that measures Snake River water flowing in the
17 Milner-Gooding Canal; is that correct?
18 A. Yes.
19 Q. And Measurement Device No. 56 is also on the
20 Milner-Gooding Canal just north of bifurcation; is that
21 correct?
22 A. Correct.
23 Q. Okay. In your experience, if you saw that
24 there was a gain in the amount of water between Gauge
25 No. 53 and Gauge No. 56; in other words, Gauge No. 56 is

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1 reading higher than Gauge No. 53, where would you
2 conclude the water from that would have come from?
3 A. My first thought would be it would have to
4 come from the Little Wood River.
5 Q. Why is that?
6 A. Because there's really no other indicators, no
7 other place for it to flow into the canal from at that
8 point.
9 Q. Okay. The Shoshone recharge diversion
10 headgate is located between Gauge No. 56 and Gauge
11 No. 57; is that correct?
12 A. Yes.
13 Q. Given your experience, if you saw that flows
14 measured at Gauge No. 57 were lower than flows measured
15 at Gauge No. 56, what would you conclude would be the
16 cause of that loss between those?
17 A. Well, my first thought would be to go out and
18 check and see if there was an error in reading the
19 gauges. Then, the rest of it, if it's lower, I would be
20 looking for potential leaks in that canal, unless we
21 were just strictly running recharge water, in which case
22 the canal would be dry at 57, and you'd have flow at 56.
23 Q. Okay. Let's take a look at Exhibit No. 107.
24 Do you recognize what this document is?
25 A. Yes.

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1 Q. And could you please describe it.
2 A. Well, the very first one here that you have
3 the exhibit number on is just a blank piece of paper,
4 but the following page reads from May of 1982. It lists
5 the gauge stations across the top of the page, and the
6 columns indicate gauge readings and flows, water
7 elevations, and corresponding flows.
8 Q. Okay. So let's back up to the blank page.
9 A. Okay.
10 Q. Is there a tab on that page that says "1982"?
11 A. Yes.
12 Q. Okay. And what does that 1982 indicate? What
13 does that mean?
14 A. That would be the water year.
15 Q. The water year, okay. And then flipping to
16 the following page, which is Bates No. 3290, let's take
17 a look at the column headings at the top of the page.
18 Well, first of all, let's take a look at the
19 very top heading that says "May 1982." What does that
20 indicate?
21 A. That indicates that it was the month of May in
22 the year 1982.
23 Q. Okay. And then the column on the far left
24 that has the numbers 1 through 31, what do those numbers
25 represent?

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1 A. Those are the dates of the month.
2 Q. Okay. Dates of the month. And then going
3 back up to the column headings at the top of the page,
4 we see one labeled "Magic," one labeled "No. 3,"
5 etcetera. What do those represent?
6 A. Those are the names of the individual
7 stream-gauging stations.
8 Q. So, just as an example, let's follow Magic
9 down. There are two columns under Magic. Can you
10 describe what is represented in that first column with
11 the number 931.5?
12 A. The first column is the elevation reading on
13 the reservoir. And it's a little bit misleading,
14 because there's actually a four that's supposed to be in
15 front of that 931, but they never put it down on those
16 elevations.
17 The other one is the acre-foot capacity of the
18 reservoir at that elevation.
19 Q. Okay. And then for an example, the next
20 column, No. 3, can you describe what those numbers
21 represent?
22 A. Those are the -- that is the elevation of the
23 Big Wood River below Magic on the USGS stream gauge
24 there that indicates a level and a corresponding flow.
25 Q. So, for example, under Gauge No. 3 on May 3rd,

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1 we have a 7.76. Is that, I guess, the staff-gauge
2 measurement?
3 A. That is a staff-gauge measurement at that
4 station.
5 Q. And then I believe it's a 3680?
6 A. Yes, 3680. That would 3,680 CFS.
7 Q. That CFS corresponds to a staff-gauge
8 measurement; is that correct? Is it calculated from the
9 staff-gauge measurement?
10 A. Yes. There's an established rating table that
11 corresponds the elevation to that flow.
12 Q. Okay. So can you sort of describe for us how
13 these numbers are placed into this ledger. Does someone
14 go out look at the staff gauge? Can you just describe
15 that sort of the process that Big Wood Canal Company
16 goes to collect these measurements.
17 A. Generally, in the case of Magic, it's the dam
18 tender. In the case of these others, many of them are
19 the ditch riders, or the watermaster on the rivers, what
20 he calls his river riders, go out and take the reading
21 every morning.
22 Some of these we double-check against the
23 visual reading and the one that's recorded in up through
24 USGS or through automated gauging that has started to be
25 put in over the last few years. At this point in time,

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1 it would all have been visual, other than the No. 3
2 gauge station.
3 Q. So once these measurements are put together by
4 the Big Wood Canal Company, what happens to them?
5 A. We record them in our ledger. The watermaster
6 records them for the Little Wood and Big Wood River,
7 records them in his records, and they are further
8 established and recorded in the water -- the "Black
9 Book," as they call it, that the watermaster's office
10 prints out every year of the stream-gauging flows and
11 irrigation flows.
12 Q. Okay. So between this handwritten ledger and
13 the Black Book that the watermaster produces, could
14 adjustments have been made to flows? Is there feedback
15 there in terms of errors, or how does that work?
16 A. Yes. There's some possibility of some errors.
17 And every two weeks, as a general rule, they go in and
18 they will remeasure at each of these stations what the
19 flow is and make adjustments, according to the rating
20 curve that was established at that gauge station, so
21 that the corresponding gauge station and the flows are
22 correct, because you have a constant issue of either
23 sedimentation or mossing or someone went out and cleaned
24 the canal or there was something done that varied the
25 channel, and any changes in that channel will affect the

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1 corresponding flow. So you have to adjust those rating
2 curves periodically to match.
3 Q. So the flows recorded in this document,
4 Exhibit 107, would be as accurate as you can get, given
5 what you have to work with?
6 A. It's probably as accurate as they had at that
7 time, yes.
8 Q. Yeah, okay. Might there be Big Wood Canal
9 Company -- might the Big Wood Canal Company keep
10 measurements in its ledgers, its handwritten ledgers,
11 that the watermaster would not keep?
12 A. It's possible. Generally, the watermaster was
13 right there off the river when these readings were
14 recorded. So they usually get together every morning,
15 and he comes over to the office, and he goes through the
16 whole process.
17 Q. Okay. Is the watermaster mostly concerned
18 with the irrigation season?
19 A. Yeah. They have not been in the habit of
20 recording any off-season flows during a non-irrigation
21 season. They probably should, but they have not.
22 Q. Okay. All right. I think those are all my
23 questions. Thank you.
24 THE HEARING OFFICER: Thank you, Ann.
25 Okay. Joe, do you want to start

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1 cross-examination? Do you want to break?
2 MR. JAMES: Let's take just about five minutes
3 is all, really quick.
4 THE HEARING OFFICER: Let's take about ten.
5 (Recess.)
6 THE HEARING OFFICER: We're recording again
7 after the morning recess. Joe, you may cross-examine
8 the witness.
9 MR. JAMES: Thank you, Director.
10 CROSS-EXAMINATION
11 BY MR. JAMES:
12 Q. Lynn, when would you say that you started with
13 the Big Wood Canal Company, American Falls?
14 A. It would have been January 6th of 1997.
15 Q. And there's been a lot of testimony and
16 questions saying "to your knowledge" or "your personal
17 knowledge," and I want to define that a little bit. In
18 my mind, personal knowledge is something you observe
19 with your own senses.
20 Did you have any familiarity with the Big Wood
21 Canal Company, American Falls District 2 system prior to
22 January of '97?
23 A. No, not really.
24 Q. You had never visited the head of the Jim
25 Byrne Slough prior to your employment?

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1 A. No. I did a little fishing on the Richfield
2 Main. But I had never been there, no.
3 Q. So the testimony, as far as your experience in
4 all the years you were there, your personal experience
5 would be limited to that after January of '97?
6 A. Yes.
7 Q. It's my understanding the Big Wood Canal
8 Company has various rights on the Big and Little Wood
9 River and that those would include, at least on the Big
10 Wood site, storage rights?
11 A. Uh-huh.
12 Q. And you've got the irrigation from storage
13 rights?
14 A. Yes.
15 Q. And you have irrigation rights from natural
16 flows?
17 A. Yes.
18 Q. And you have stock-water rights from natural
19 flows?
20 A. Yeah, there is one. You pointed it out to me
21 at the break. It's one I forgot.
22 Q. And we'll just take care of this real quick.
23 I think I'm at No. 205.
24 Lynn, if you could take a look at that for a
25 minute. And, Lynn, what is that document?

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1 A. It's a copy of the Department of Water
2 Resources' Water Right No. 37-1315 for stock water.
3 Q. And the owner of that water right?
4 A. Is the Big Wood Canal Company.
5 Q. And the source of the water?
6 A. It says Big Wood (unintelligible).
7 Q. If you look at the initial diversion point, do
8 you recognize that?
9 A. Well, there's a number of them, but yes. I
10 remember the particulars on this one because it was a
11 very late filing that occurred late in the adjudication
12 due to some stockholders going in to try to file on the
13 leak coming from the dam.
14 Q. And it looks -- the initial diversion pointing
15 to Blaine County, that would be the head of the
16 Richfield Canal?
17 A. Yes.
18 Q. It looks like the 1909 priority date?
19 A. Yeah. They list the old priority date. That
20 was the time of the installation of the dam, so that
21 would have been about the time that they somewhat
22 created this right from the seepage out of the dam.
23 MR. JAMES: Director, I'd move for the
24 admission of Exhibit No. 205.
25 THE HEARING OFFICER: Ann?

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1 MS. VONDE: I'll object to the extent that
2 this was not disclosed during discovery.
3 MR. JAMES: In response --
4 MS. VONDE: I haven't seen it before this
5 right now.
6 MR. JAMES: In response, Director, this is
7 rebuttal based on Lynn's testimony that there was no
8 stock-water right out of the Richfield Canal. My only
9 attempt to introduce it is to rebut his prior testimony.
10 THE HEARING OFFICER: Objection overruled.
11 The document marked as Petitioner's Exhibit 205 is
12 received into evidence.
13 (Petitioner's Exhibit 205 admitted.)
14 MR. JAMES: Thank you, Director.
15 BY MR. JAMES:
16 Q. Lynn, at the beginning of the irrigation year
17 on the Big Wood side, does the company use natural flows
18 to provide irrigation?
19 A. On years that natural flow is available, yes.
20 Q. Okay. And it looks like the majority of Big
21 Wood Canal Company's irrigation rights run from April
22 1st to October 31st; is that correct?
23 A. You know, I don't remember all of them
24 exactly, but that's probably pretty close.
25 Q. Well, can you list any natural-flow irrigation

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1 right that has a period of use starting after April 1st?
2 A. Well, I could bring it to mind there could,
3 but actually there's so many of those rights that was
4 filed on that it's hard to bring them all to mind.
5 Q. Would reviewing the permit details from the
6 Idaho Department of Water Resources refresh your
7 recollection?
8 A. Well, I haven't looked at those rights in
9 quite some time, all of them, so...
10 MR. JAMES: Director, at this time, I'm not
11 marking these, or it's not my intent to ask they be
12 admitted. I'm just simply using them to see if they'll
13 refresh Mr. Harmon's recollection of the period of use
14 for the Big Wood Canal Company's rights.
15 BY MR. JAMES:
16 Q. Lynn, have you had an opportunity to review
17 the documents that were provided? Did you get a chance
18 to look at them?
19 A. Yes.
20 Q. Do they help you recall when the Big Wood
21 Canal Company's irrigation right of period of use
22 commences?
23 A. Yes.
24 Q. And when is that?
25 A. April 1.

1 Q. And Big Wood Canal Company's irrigation rights
2 typically terminate on October 31st?

3 A. That's what is on the face of the water right.

4 Q. And you talked earlier about a stock-water
5 right through the Little Wood River?

6 A. There is a winter stock-water right, I
7 believe, at 75 CFS.

8 Q. And the period of use on that right would
9 typically be --

10 A. As I remember, and like I say, this is off of
11 memory, it's somewhere around November 1 to April 1.

12 Q. And that's my question. Lynn, you have
13 stock-water rights that basically abut, that come up to
14 the commencement of your irrigation rights. Is that
15 true?

16 A. The face of the right says that's the way it
17 is. As I say, there's a lot of those rights. To
18 remember them all, I don't know if you've ever looked
19 through all of them, there's a lot of rights.

20 Q. And I guess the adjudications help clear some
21 of that up, some on consolidation and some --

22 A. Yes. There's been a number of changes from
23 what it was originally.

24 Q. Other than the Big Wood Canal Company, are
25 there other decrees that divert water from the Big Wood

1 excuse me, Big Wood River rights?

2 A. Yes.

3 Q. Okay. And they would be delivered through the
4 Richfield Canal?

5 A. Yes.

6 Q. And on some of those decree holders, those
7 rights are diverted through the Richfield Canal to the
8 Jim Byrne Slough, injected into the Little Wood, and
9 then re-diverted out of the Little Wood?

10 A. That's correct.

11 Q. Okay. And that would be -- that would include
12 delivery west of Shoshone and west of the bifurcation?

13 A. I believe there are a few, yes.

14 Q. Lynn, do you recall when the priority date on
15 Big Cottonwood water is?

16 A. No, I don't, off the top of my head.

17 Q. Do you recall when the period of use for the
18 Big Cottonwood water is?

19 A. You know, I don't. Usually those rights were
20 administered by the State's watermaster, and they varied
21 with individual users. So to tell you all those,
22 without having records to go through, I don't remember,
23 primarily because the watermaster for the river you see
24 administered all those, so they just sent over decree
25 slips, and we delivered according to those dates.

1 River at the head of the Richfield Canal?

2 A. There are a number of decree rights that
3 belong to individual stockholders of the canal company,
4 that the canal company delivers those rights under the
5 purview of the river watermaster's guidance to --
6 through their system to those users.

7 Q. Okay. And I guess to ask the question another
8 way or to clarify, the watermaster is in charge of
9 monitoring those rights, but he does so with the
10 assistance of the Big Wood Canal Company?

11 A. That's correct.

12 Q. And vice versa. He may also -- I take that
13 back.

14 Are you familiar with what's commonly known as
15 the "Big Cottonwood rights"?

16 A. I know there was Big Wood Cotton -- Big
17 Cottonwood Canal Company ceased to exist, and a lot of
18 those rights were bought up by the Big Wood Canal
19 Company or transferred over to the Big Wood Canal
20 Company.

21 Q. And some of those rights were either purchased
22 or retained by individual shareholders?

23 A. There are some that belong to individuals,
24 yes.

25 Q. And those are Little Wood River rights -- or,

1 Q. Lynn, do you remember Kenny Leonard's
2 (phonetic) place?

3 A. I know where it's at, yes.

4 Q. And do you recall if that had Big Cottonwood
5 water on it?

6 A. Boy, you know, I don't.

7 Q. Let me ask you another question. You talked
8 about decree users which have their own decree rights
9 out of the Big Wood River and that the Big Wood Canal
10 Company facilitates that diversion through the Richfield
11 Canal; is that correct?

12 A. Not all of them go through the Richfield
13 Canal. Some of them come down through the Shoshone Main
14 and deliver the other direction.

15 Q. Well, do any come through the Richfield Canal?

16 A. Yes.

17 Q. Okay. Do any of those have a period of use
18 from March 15th to November 15th for irrigation?

19 A. You know, I don't recall on those individual
20 rights.

21 Q. Is it possible?

22 A. I'm sure it's possible.

23 Q. Whatever those rights would be would be within
24 the records of the Department?

25 A. They should be, yes.

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1 Q. So, anyway, there's at least a possibility
2 that irrigation right is on the commencement of the
3 period of use in mid March?
4 A. There is that possibility. But as I
5 mentioned, there's a 1936 court case on a lot of those
6 individual rights that were on the river prior to the
7 canal company. And according to that lawsuit, if the
8 water that was in the river was not adequate to deliver
9 those rights below the dam, then those rights could all
10 be stored.
11 So, primarily, those rights are all delivered
12 during the normal irrigation season along with the canal
13 shares.
14 Q. All right. My memory of that litigation was
15 based on measurements of inflow into the reservoir, as
16 well as calculated river loss --
17 A. Yes.
18 Q. What was the figure? 60 CFS?
19 A. I think it was 70 CFS coming into the
20 reservoir. If it was above that, then use can be
21 deliverable.
22 Most of the people that had those rights were
23 more than happy to have that water right stored, because
24 it made a lot better water right for them than to try to
25 have it delivered in the off-season.

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1 Q. So to step back, one thing at a time, other
2 times in -- has there been years, to your knowledge,
3 that flows into the Magic Reservoir on March 15th is 70
4 CFS or better?
5 A. Years that it was?
6 Q. Yeah.
7 A. Yeah. There were several years that it was.
8 Q. And the decree holder can either choose to
9 allow Big Wood Canal Company, if they weren't covered by
10 the -- let me step back.
11 The decree users could either choose the water
12 to be stored in the Magic Reservoir or, if the
13 conditions were met, as far as inflow, demand delivery?
14 A. Yeah, I don't know if anybody ever did.
15 Q. And, again, your personal knowledge begins
16 in --
17 A. '97.
18 Q. -- '97. Now, I want to switch gears a little
19 bit. When the Big Wood Canal Company is looking to
20 commence the irrigation system -- or irrigation season,
21 is there a process of charging the system and filling
22 the canals?
23 A. Well, there should be, but there really isn't.
24 Due to the extensive number of short years, they have
25 got to -- they just basically bring the water in and

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1 pretty much bring it up to what the early-season demand
2 is in a matter of about two days, and you're there.
3 They have gotten away from doing it otherwise.
4 Q. Okay. And that's on the Big Wood side?
5 A. On the Big Wood side.
6 Q. How about the Little Wood side?
7 A. Well, the Little Wood, if there's water in the
8 river, it will go into that Little Wood right, and
9 they'll start water to Dietrich at a little bit slower
10 pace than that, but...
11 Q. But I guess to follow-up, delivery isn't
12 instantaneous? As you indicated, two days sometimes?
13 A. There's areas the system will take three or
14 four days to get totally through the system.
15 Q. Okay.
16 A. It's a big system scattered out over a lot of
17 miles.
18 Q. Looking at the Richfield Canal and the Jim
19 Byrne Slough, from the head of the Richfield Canal to
20 the mouth of the Jim Byrne Slough, how long is it?
21 A. Oh, roughly, canal miles, it's around 24 miles
22 we figured.
23 Q. And how long would it take water to make that?
24 A. About 48 hours, if we've got water in the
25 system.

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1 Q. And back to the question of charging the
2 system, if you're trying to charge a blank canal, how
3 long would it take?
4 A. Well, with the volume that they bring in, it
5 doesn't take much longer than 48 hours to push it
6 through.
7 Q. Lynn, to clarify, Gauge No. 4, where is that?
8 A. What's that?
9 Q. Gauge No. 4?
10 A. It's there at the head of the Richfield Main
11 Canal.
12 Q. Okay. If 300 CFS was diverted into the
13 Richfield Canal, approximately how long would it take to
14 get to the East Canal?
15 A. You can put it through there in probably about
16 six to eight hours.
17 Q. Okay. And that would be the same for the West
18 Canal?
19 A. To the head of it, yes.
20 Q. And that would also be the same for the head
21 of the Jim Byrne, six to eight hours?
22 A. Yeah.
23 Q. So I guess if an individual went to the head
24 of the Richfield Canal and turned out 300 CFS and got in
25 his pickup and measured what he was doing with his daily

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1 measurements and drove from the head of the Richfield
2 Canal to the head of the East Canal, measurements very
3 well could be zero?
4 A. If you drive straight through, well, it won't
5 be zero, because a little bit of the wintertime flow
6 could be there. But if you drive straight down there,
7 it's not going to be down there the minute you get
8 there. It's going to take -- it takes a few hours.
9 Q. Okay. Lynn, would you look at Bates No. 3057.
10 A. Okay.
11 THE HEARING OFFICER: Which exhibit?
12 MR. JAMES: 108, Director.
13 THE HEARING OFFICER: Page what?
14 MR. JAMES: Page 18 of 3057.
15 THE HEARING OFFICER: Thank you.
16 BY MR. JAMES:
17 Q. Lynn, on the upper table, do you see a portion
18 that's highlighted?
19 A. Uh-huh. Yes, I do.
20 Q. And you see the measurement of 300 CFS at
21 Gauging Station No. 4?
22 A. On the 27th?
23 Q. No, on 11-1-87.
24 A. Oh, okay. Yeah, I see it.
25 Q. Could it be that that was the date the water

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1 was turned in?
2 A. You know, I do not know.
3 Q. The previous day on October 31, '87,
4 everything was zero, including Gauge 4; is that correct?
5 A. That's what the sheet says.
6 Q. So it would have to have been turned in at
7 some point?
8 A. That's true.
9 Q. And the first indication of there being water
10 turned in was on the following day, November 1, '87.
11 A. Okay.
12 Q. And you see the next measuring is at the East
13 Canal and zero?
14 A. Well, if they've got the gate closed, it's not
15 going to go down the East Canal. There is a gate there
16 that would prevent water from going down the East Canal.
17 Q. Okay. Would that be a circumstance of the --
18 it would all stay where?
19 A. It would all stay in the -- it would all go
20 into the HJB. If the East Main is closed off,
21 everything will go down to the Byrne Slough.
22 Q. Well, doesn't it also indicate that the Byrne
23 Slough was at zero?
24 A. Yeah.
25 Q. And then the very next day it appears that

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1 there's water all along the waterway?
2 A. My assumption is that they turned the 300 in,
3 and they listed it as going to be a recharge flow, even
4 though it did not reach through to those points. And
5 the next day, if you'll notice, it had reached through
6 in the various canals.
7 Q. So that would indicate to me that the
8 explanation is that it was turned in and hadn't reached
9 those individual stations yet?
10 A. It's a possibility.
11 Q. Lynn, I want to ask about return from the
12 Dietrich Canal into the Little Wood River. You
13 indicated that there was a return. Are there also
14 several laterals that return from the Dietrich Main into
15 the --
16 A. There are three or four laterals that come off
17 of the Dietrich system that return into the
18 (unintelligible) Canal.
19 Q. Okay. Are there any laterals other than --
20 are there any laterals that return into the Little Wood?
21 A. Other than the F waste, no, not as far as off
22 the Dietrich system.
23 Q. Okay. And then how many laterals off the
24 Dietrich Canal return inflow to the Gooding River?
25 (Unintelligible.)

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1 BY MR. JAMES:
2 Q. How many laterals off the Dietrich system have
3 returns into the Gooding-Milner?
4 A. There's four or five.
5 Q. Is there any mechanism to measure that return?
6 A. There are some weirs at the tail end of part
7 of those. At that time, I think there was probably at
8 all of them. But since that point in time, some of
9 those do not return due to pipelines and changes in
10 irrigation practices.
11 Q. In the period from 1980 to 1992, was there --
12 and if you don't have any knowledge of this, don't say
13 it. But do you have any knowledge of whether there was
14 measuring devices on those?
15 A. I don't.
16 Q. Lynn, also, you testified earlier about the
17 Dietrich floodway. What is that?
18 A. The Dietrich floodway?
19 Q. Uh-huh.
20 A. It was put in there by the Army Corps of
21 Engineers, to my knowledge, in the late '70s. The main
22 purpose of its installation was to alleviate flooding on
23 downstream on the Little Wood River. High water years,
24 the river gets high enough, and it floods outside its
25 banks, and it was to protect Shoshone and Gooding from

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1 floods.
2 Q. Okay. And in time of flood, a water permit
3 isn't necessary to divert it into that floodway; is that
4 correct?
5 A. We were always asked to do that.
6 Q. Okay. And who were you asked by?
7 A. The watermaster, a lot of times, asked us to
8 divert that. The Corps of Engineers in 2006 came in and
9 requested it, as I recall.
10 Q. I'm assuming there was probably a request in
11 2017, as well?
12 A. We released water in there. Yeah, I don't
13 remember a request, but I know we released water into
14 that.
15 Q. And what was the purpose of that release?
16 A. It was to help cut down flooding downstream.
17 Q. Okay. Are you aware of any requests either by
18 the Lower Snake -- hold on a second.
19 Are you aware of any requests made by the
20 Lower Snake River Recharge District or by the Idaho
21 Water Resources Board to divert water through the
22 Dietrich floodway?
23 A. I don't recall any.
24 Q. And you talked earlier about split duties
25 between the canal company and the watermaster. It's my

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1 understanding that floodway, there's a headgate on the
2 Dietrich Canal with 1970 written on it?
3 A. I don't remember the exact date, but I know it
4 was sometime in the '70s.
5 Q. Okay. Is that the headgate that would divert
6 water from the Dietrich Canal? Is that the floodway
7 you're talking about?
8 A. Yes.
9 Q. Okay. Who's responsible for that headgate?
10 Is it the canal company or the water --
11 A. The canal company goes out and operates the
12 actual facility, yes.
13 Q. And if there was a request by the Lower Snake
14 River Recharge District to deliver their recharge water,
15 would there be a record of that within the canal
16 company?
17 A. There might be. I can't say for sure. There
18 was not a lot of records kept on some of that stuff, not
19 early on.
20 Q. And then on the Gooding-Milner Canal -- you
21 might have answered this question and I didn't get it.
22 On the Gooding-Milner Canal between Station 53 and
23 Station 56, are there any diversions?
24 A. I was thinking there was one. In hindsight,
25 there is not. I had to think about that later. That

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1 old diversion does not exist anymore.
2 Q. Okay. And when did it cease to exist?
3 A. It was either just barely before I started or
4 just after.
5 Q. So that would be calendar year '96 to '97?
6 A. Yeah. And it was just a small diversion.
7 Q. Okay. So in the period 1980 through 1992,
8 there was a diversion there?
9 A. As I recall, I believe that's correct.
10 MR. JAMES: I think that's all I have,
11 Director.
12 THE HEARING OFFICER: Redirect, Ann?
13 MS. VONDE: Yes. Thank you. I have just a
14 couple of things.
15 REDIRECT EXAMINATION
16 BY MS. VONDE:
17 Q. And I'll be happy to toot your horn a little
18 bit here, which you probably know how to do, but you've
19 worked for the Big Wood Canal Company for 20 years.
20 Would you say there's anyone living, and I don't mean to
21 be crass, but anybody living who has a better knowledge
22 of the system and how it operates and how it works than
23 you?
24 A. Of the individuals there in the management
25 portion of it, as far as managers and assistant

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1 managers, they're all deceased.
2 Q. So you're the institutional knowledge for the
3 Big Wood Canal Company. Is that fair to say?
4 A. I guess.
5 Q. Whether you want that or not.
6 So you were handed some water rights to take a
7 look at, and those water rights have the season of use
8 on the face of the water right; is that correct?
9 A. Yes.
10 Q. And do all water rights have the season of use
11 listed on them? Do all water rights have a season of
12 use listed on them?
13 A. Yes.
14 Q. And in your experience, do water right holders
15 always use their water in exact accordance with the
16 season of use on the face of their water rights?
17 A. They're not required to, as long as they don't
18 start before that season of use or after that season of
19 use. They can start and stop anytime in between.
20 Q. So what sort of variables might affect start
21 and stop dates for irrigation?
22 A. Water supply, weather. Those are two things
23 that come to mind, initially.
24 Q. So when you testified earlier about the
25 average start dates for irrigation seasons of use, that

1 was based on some of those variables. Is that fair?
2 A. That was based on my knowledge and then
3 looking at historic records for the canal company.
4 Q. Okay. And then I guess just one more
5 question. Do you have any personal knowledge about
6 whether water sinks into the basin off of the Dietrich
7 Canal? Does water drain through it?
8 A. It will sink out there. It takes it a while,
9 but it does soak in.
10 Q. Okay. I think that's all I have. Thank you.
11 THE HEARING OFFICER: Recross, Joe?
12 MR. JAMES: Just a couple. Lynn through me
13 this bone, so I have to ask.
14 RE-CROSS-EXAMINATION
15 BY MR. JAMES:
16 Q. Was Joe Paplico (phonetic), Sr., on the board
17 for American Falls Reservoir District 2?
18 A. Yeah, I believe he was on both boards at one
19 time.
20 Q. So on the question of any living person that
21 might have more institutional knowledge, is that a
22 possibility?
23 A. I don't know for sure what Joe has and
24 retained. My statement was management and assistant
25 managers that understood the day-to-day operations. We

1 the bifurcation structure.
2 A. Okay.
3 Q. So you referred to a concrete wall, a concrete
4 seal, that's about five feet tall that divides the
5 channel that delivers water to the Little Wood River and
6 the flow path for the siphon?
7 A. Yes.
8 Q. And that's five feet?
9 A. That's an estimate on height. But there is a
10 wall that goes across there. It may not be quite that
11 tall, but there is a wall that goes across there.
12 Q. And that wall is a fixed wall?
13 A. It is a fixed wall, yes.
14 Q. It's irremovable then?
15 A. Yes.
16 Q. And so how do you control the amounts of water
17 that flow into the siphon versus the amount of water
18 that is discharged to the Little Wood River?
19 A. You cannot see it, but at the very bottom of
20 this photo, if you can see, there's a gearbox there for
21 another radial gate. So there's a radial gate that sits
22 at that point, plus there's a radial gate that sits at
23 the head of the siphon. So regulations are done through
24 those radial gates to adjust the additional flow.
25 The other is just kind of -- as you order

1 have a lot of directors that have sat on that board that
2 could not tell you how to get water from point A to
3 point B, not trying to downgrade their knowledge, but
4 they do not understand the general system.
5 Q. That was a little attempt at levity. I think
6 Joe is 97 now? 98?
7 A. And my understanding is his memory is still
8 pretty clear.
9 Q. So do you know of any testing that was done on
10 the floodway, or the basin where the floodway enters
11 into, as to where the water goes from there?
12 A. I'm not aware of the permeability studies, no.
13 MR. JAMES: No further questions, Director.
14 THE HEARING OFFICER: Okay. Lynn, I have a
15 few questions.
16 EXAMINATION
17 BY THE HEARING OFFICER:
18 Q. And what I want to focus on is the operation
19 of bifurcation. I want to understand how it actually
20 works. I had visited the bifurcation a couple of times,
21 many years ago. And then a couple of years ago I think
22 we were there -- I don't recall if any of you were, but
23 I think we visited with Kevin Lakey at the site.
24 And so I want you to just generally -- if
25 you'll refer to Exhibit 106, which is a photograph of

1 water into the system, before you make the adjustments
2 on that gauge, it gives it a place to spill over, and
3 instead of overtopping your canal, you actually overflow
4 that into the Little Wood River and then make the
5 adjustment back. But, generally, we always leave a
6 little bit of water over that wall just as normal
7 operations so it cuts down on the amount of time with
8 any fluctuation.
9 Q. So there is a flow path --
10 A. Under the radial gate.
11 Q. -- under the radial gate, and that flow path
12 is in the direction from the bottom right of the
13 photograph to the top left?
14 A. Yes.
15 Q. And then as additional water contributed to
16 the Little Wood River, that flows over top of the
17 five-foot wall?
18 A. Yes.
19 Q. And then you can control the amount of
20 backwater -- I suppose I can call it backwater -- by
21 adjusting two radial gates then and refining that
22 adjustment and determine how much water flows to the
23 siphon and the Little Wood River?
24 A. That's correct.
25 Q. And can you tell me approximately what the

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1 difference in head is between the Little Wood River,
2 elevation and the (unintelligible) above the radial
3 gates?
4 A. Boy, you know, I do not -- I know it's fairly
5 close to surface elevation, and the floor of that canal
6 below that radial gate are very close to equal. But
7 I've never shot those elevations to know exactly what
8 they are.
9 Q. Now, tell me again what you think is
10 approximately equal.
11 A. The surface lateral in the river, at low
12 flows, is just about the same elevation as the floor of
13 that canal. So, you know, if there's any bouncing
14 around, usually it's -- I'm trying to figure out how to
15 word this so it's correct.
16 For instance, with a flow of maybe 60 CFS in
17 that river, you'll get 20 to 30 of it flow back into
18 that canal if there's no water in that Milner-Gooding
19 Canal.
20 Q. And that's with a radial gate?
21 A. Even with the radial gate closed, it will leak
22 that much. Those seals just do not hold.
23 Q. So it leaks past the radial gate?
24 A. Yeah. It will leak right underneath and
25 around that radial gate.

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1 Q. And so the purpose of constructing a
2 cofferdam --
3 A. Is to keep the river in the river.
4 Q. And the cofferdam then prevents that leakage
5 from flowing upstream into the canal?
6 A. That's correct.
7 Q. And has it been the practice, at least while
8 you've been managing the canal, to construct that
9 cofferdam to prevent that leakage?
10 A. Yes, it has.
11 Q. And is that true every year that you've
12 managed the canal?
13 A. Yeah. We put one in every year.
14 Q. And you referred to the year 2017 as a year
15 when you observed flow in the Milner-Gooding Canal
16 during the non-irrigation season.
17 A. Uh-huh.
18 Q. And as I recall your observation, it was that
19 you observed about three minutes CFS?
20 A. Yeah. The flow -- no, it's during irrigation
21 season. I do need to correct that. The flow was
22 somewhere in the neighborhood of 300 CFS. The river was
23 probably running between five and six. And the head
24 pressure was great enough that that water was actually
25 flowing upstream under that radial gate against the

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1 Milner flow and going around and down that siphon.
2 Q. So it was during the irrigation season?
3 A. Yeah, just the very start of irrigation
4 season.
5 Q. And what kind of year would you characterize
6 2017 being?
7 A. It was a high water season. We had high
8 water. I did not witness the previous high water years.
9 I don't think I was even out there at those points in
10 time. But I'm going to assume that a similar occurrence
11 could have taken place on other high water years when
12 flows were of a similar nature.
13 Q. And would it be an incorrect statement for me
14 to characterize the conditions on the lands at Magic
15 Valley as being a wash in floodwaters?
16 A. Yeah, there was a lot of water around. I
17 don't know if it was a wash, but...
18 Q. Well, were there floodwaters that actually
19 flowed into the Milner-Gooding Canal from lands that
20 were inundated in and around the canal itself?
21 A. Prior to irrigation. Most of that runoff had
22 occurred prior to irrigation season.
23 Q. Okay.
24 A. Across the desert.
25 Q. Okay. Thank you. I have a better

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1 understanding of the operation of bifurcation. I don't
2 have any further questions. Anybody want to follow-up?
3 MS. VONDE: No, thank you.
4 THE HEARING OFFICER: Joe?
5 (No verbal response.)
6 THE HEARING OFFICER: Okay. Thanks. Thank
7 you.
8 MS. VONDE: Thank you.
9 THE HEARING OFFICER: Do you want to move that
10 this witness be excused, Ann?
11 MS. VONDE: Yes, please.
12 THE HEARING OFFICER: Do you want a break, or
13 do you want to just forge ahead?
14 MS. VONDE: Maybe just a five-minute bathroom
15 break.
16 THE HEARING OFFICER: That will be fine. Five
17 minutes.
18 (Recess.)
19 THE HEARING OFFICER: We're recording again
20 after a morning recess. Ann, your next witness.
21 MS. VONDE: I'd like to call Erick Powell,
22 please.
23 THE HEARING OFFICER: Mr. Powell, if you would
24 come forward.
25 GEORGE ERICK POWELL,

1 having been called as a witness by the Respondent and
2 duly sworn to tell the truth relating to said cause,
3 testified as follows:
4 THE HEARING OFFICER: You may examine the
5 witness.
6 MS. VONDE: Thank you.
7 DIRECT EXAMINATION
8 BY MS. VONDE:
9 Q. Mr. Powell, could you please introduce
10 yourself and spell your name for the record.
11 A. Absolutely. My name is George, G-e-o-r-g-e;
12 Erick, E-r-i-c-k; Powell, P-o-w-e-l-l.
13 Q. What is your formal education?
14 A. I have a bachelor's and master's degree in
15 civil and environmental engineering, and a PhD in
16 agricultural engineering.
17 Q. And what professional licenses do you hold?
18 A. I am a registered professional engineer in the
19 State of Idaho, Utah, and Oregon.
20 Q. And are you also a certified water rights
21 examiner in the State of Idaho?
22 A. I am a certified water rights examiner.
23 Q. What is involved in becoming a certified water
24 rights examiner?
25 A. The Code spells out that you must be a

1 A. We pay the State a \$50 fee. I believe it's
2 \$50.
3 Q. Okay. What previous job experience do you
4 have that you feel is applicable to your work as a
5 certified water rights examiner?
6 A. I did a lot of work as a graduate student on
7 measuring surface-water flow. That was in Ohio. And so
8 I have extensive experience in measuring surface-water
9 flow.
10 As a professional engineer, I've measured
11 pipe-flow ease, morphosis, and meters. And so we
12 measure a lot of enclosed systems but also measure
13 surface flow with different flow meters, as well.
14 Q. Do you have any publications or other
15 accreditations that you think are applicable to your
16 work as a certified water rights examiner?
17 A. No publications. I've written lots of
18 reports. I've done a lot of water right analysis
19 transfers, expert witness for water right proceedings,
20 but nothing that's published.
21 Q. Okay. Where are you currently employed?
22 A. I am employed at Brockway Engineering in Twin
23 Falls, Idaho.
24 Q. And what are your duties there? What do you
25 do?

1 professional engineer or a professional geologist and
2 have experience with measuring water flow.
3 Q. And what is your understanding of the
4 statutory rule of water rights examiner? Where do they
5 come into the water rights process?
6 A. So when a water right is first applied for for
7 the State, the State, if they approve that, issues a
8 permit. A permit phase includes the development of a
9 water right to bring that water to the beneficial use.
10 During that development period end, the
11 applicant or the permit holder is required to file a
12 proof of beneficial use statement. And at that time
13 they can either have the Department of Water Resources
14 come out and do a beneficial field exam, or they can
15 hire a certified water rights examiner to do that exam
16 to speed up the process.
17 Q. Is your certified water rights examiner
18 accreditation up to date?
19 A. It is.
20 Q. I don't know if it ever expires, but...
21 A. Yeah, every year.
22 Q. Does it expire?
23 A. Every year we have to renew that
24 certification.
25 Q. And how do you renew it?

1 A. I'm a professional engineer dealing with a
2 variety of water-related issues. Our firm specializes
3 in water, water engineering, water resource engineering,
4 hydrology, hydraulics. I include water rights -- I'm a
5 project engineer so I receive a variety of projects
6 throughout the whole State of Idaho.
7 Q. And so in addition to engineering work, I
8 guess, is your engineering work sometimes geared towards
9 the water rights process and transfers acquiring water
10 rights, that sort of thing?
11 A. Yes. Some of it is.
12 Q. While employed with Brockway Engineering, have
13 you worked on any other water right cases as a certified
14 water rights examiner?
15 A. I have.
16 Q. And what were those?
17 A. They are a variety of different ones. The
18 most recent one was a domestic heating and cooling
19 system that was up in the Sawtooth Valley, in the
20 Stanley Basin.
21 Q. And did you provide a beneficial use field
22 report for that?
23 A. I did do the beneficial use field exam and
24 provided, yeah, the scope of what was necessary to get
25 that water right permit licensed.

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1 Q. How many times have you testified as a
2 certified water rights examiner in an administrative
3 water rights case?
4 A. Does that include being an expert witness on
5 any case? Or does it have to be geared towards just as
6 a certified water rights examiner?
7 Q. Right now I'm just asking about certified
8 water rights examiner, and then we can talk about just
9 expert, in general.
10 A. Okay. I don't think I've ever served as an
11 expert witness for any water right permit through the
12 licensing exam. It has never gone that far.
13 Q. Okay. And then how many times have you just
14 testified as an expert in an administrative hearing or
15 even a court trial?
16 A. I think about four. I think I've done this
17 four times.
18 Q. Okay.
19 A. So this would be the fifth.
20 Q. And what were those generally?
21 A. Two of them were -- actually, no, I take that
22 back. One was a permit application for recharge in the
23 Albion Basin. I served as a witness for opposition to
24 permit applications in the Big Wood Valley, transfer --
25 groundwater transfer also in the Albion Valley, and then

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1 I was an expert witness in a civil court case. And that
2 was just outside of Jerome.
3 Q. And what was the general content of your
4 expert testimony in those cases? Was it as a certified
5 water rights examiner? Was it as an engineer? What was
6 your --
7 A. It definitely included water rights,
8 heavy-dosed water rights in every one of those cases.
9 But my expertise as an engineer also came into play,
10 whether that was groundwater modeling or surface
11 measurements or, you know, just the scope of my
12 education and experience.
13 Q. So, did I ask you to provide a certified water
14 rights examiner analysis of the beneficial use of water
15 made between 1982 and 1992 for water right 37-7842?
16 A. You did, yes.
17 Q. So let's take a look at that report, which is
18 Exhibit 108. Are there any documents that you reviewed
19 in preparation of this report but did not include in the
20 report?
21 A. Yes. I did look at a variety of things that I
22 thought were interesting but not really entirely real
23 relevant, including weather data and just historical
24 evidence that's found as public information that's
25 available on the internet.

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1 Q. Did you review the back file for water right
2 37-7842?
3 A. Yes.
4 Q. And did you review the back file for water
5 right 01-7054?
6 A. I looked at that briefly. I did not review
7 that in as much detail as I looked at the water right in
8 question of 7842.
9 Q. So the documents that you reviewed and
10 ultimately did not include in your report, was that
11 because you just did not find them relevant to your
12 analysis?
13 A. Or they were redundant or they just, yeah,
14 were outside the scope of what I felt was germane to the
15 hearing.
16 Q. Okay. So when you were presented with water
17 right permit 37-7842 to review, how did you begin to
18 narrow the scope of what you were going to do your
19 analysis on?
20 A. Well, I started with the water back file to
21 try to get an understanding of what had been done, why
22 we were in the situation we're in. And so I definitely
23 reviewed the documents that were available from the
24 State in that water right back file.
25 I also used heavily, and we'll get into this a

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1 little bit later on, but the records from the Big Wood
2 Canal Company that were handwritten that led to the
3 development of the watermaster annual diversion book
4 that's been referred to several times already in this
5 hearing.
6 Q. Okay. Did you look at the application for
7 37-7842, the application document itself?
8 A. Yes, and that's part of the back file. And
9 that's where I started.
10 Q. And did you look at -- and I guess that
11 application is also, in this case, the permit for the
12 water right; is that correct?
13 A. Yes. When the permit was approved, there were
14 some other conditions that were added on. But that's
15 the permit.
16 Q. Okay. And did you also review the
17 advertisement --
18 A. I did.
19 Q. -- that was the original one that was sent out
20 on this water right?
21 A. Yes.
22 Q. Okay. Let's flip to Appendix B and C. Let's
23 take a look at, well, B first. Do those appendixes
24 include the application, that advertisement, and the
25 permit for water right 37-7842?

1 A. Appendix B includes the application and the
2 advertisement. The actual permit, I believe, is in
3 Appendix C.

4 Q. Okay. So we'll go back to -- let's look at
5 Appendix B, the application for permit, and just discuss
6 this again. I believe Michele already touched on this.

7 But this is a little bit different than what
8 we would normally see. There aren't two documents.
9 There's not a permit and an application. In this case,
10 they are one in the same documents; is that correct?

11 A. Correct. Yes.

12 Q. So when you were looking at the elements of
13 determining what the permit said, what did you consider
14 to be the elements of the permit?

15 A. So I considered the elements of the permit,
16 those that were applied for and approved by the
17 Department of Water Resources. So do you want to go
18 through all those?

19 Q. Not -- you don't have to right now.

20 A. Okay.

21 Q. But just in terms of -- the application itself
22 sets forth those elements; is that correct?

23 A. Absolutely.

24 Q. Yeah, okay. And then the permit addendum,
25 which is on Water Resource Board page No. 3090 is simply

1 Martens, the certified water rights examiner, in 1993,
2 which was requested by the Department after the original
3 materials were submitted in 1992.

4 And then, as was discussed yesterday in great
5 detail, Appendix E on page 3114, is the memorandum that
6 was prepared by Michele Edl regarding this permit
7 evaluation from IDWR staff, and her, specifically.

8 Q. And did you review those documents?

9 A. I did.

10 Q. Did you feel that your analysis of beneficial
11 use needed to or should be constrained by what was in
12 those documents?

13 A. I did not, because I was given the instruction
14 to take a look at this permit application with kind of
15 fresh eyes, not be constrained about what was done
16 previously. And so I viewed this and approached this as
17 I was looking at a brand new permit application for
18 beneficial use during the development period.

19 Q. So I guess it's fair to say maybe that the
20 permit and advertisement created sort of bookends
21 regarding the elements of the water right? Is that a
22 fair characterization of how you approached the
23 analysis?

24 A. Yes. That's a fair process for any permit
25 application, I would say.

1 an approval of those elements as set forth in the
2 application, and then did it also add some conditions,
3 as well?

4 A. Correct. And so this is the approval of the
5 permit application that was filed.

6 Q. Did the information contained in the
7 application permit and the advertisement help you to
8 develop a biogs or framework or sort of bookends for
9 your analysis?

10 A. It did.

11 Q. And how did it do that?

12 A. So a permit, when it's applied for, is the
13 maximum amount of water, kind of the big picture,
14 everything that they would like to develop during that
15 period. And so that puts constraints on what can be
16 developed.

17 Q. Okay. So can you take a look at Exhibit 108,
18 Appendix D, which starts on page -- well, the actual
19 document starts on page 3095.

20 A. Yes.

21 Q. And then you can just kind of flip also to
22 Appendix E, which starts on page 3114. What are those
23 two documents?

24 A. These documents, Appendix D on page 3095, is
25 the additional information that was provided by Gerald

1 Q. Okay. Did you also need to put some bookends
2 on the dates that you were going to look at in terms of
3 the development period for this water right?

4 A. Yeah. There definitely was a lot of
5 additional information that was after 1992 that I did
6 not consider because of the reinstatement order that
7 kind of set the parameters from the approval of the
8 permit on June 2nd of 1982 through June 1st of 1992.
9 And so that's why I focused my investigation during
10 those periods.

11 Q. Okay. So can you take a look at Exhibit 108,
12 and can you see -- and we'll start on page 3090, which
13 contains the approval, the permit portion of the
14 application.

15 A. Okay.

16 Q. And then if you could just walk through that
17 document and the ones after it and describe what you
18 gleaned from those documents in terms of the development
19 period.

20 A. All right. So on page 3090 is the approval of
21 the permit with the proof date for the permit listed as
22 June 1, 1987. And then the following page, which I
23 don't see a page number, but I presume it's 3091, is a
24 request by the Lower Snake Aquifer Recharge District to
25 extend the development period from June 1, 1987 through

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1 June 1st of 1992.
2 Q. Was that approved, that request?
3 A. It was approved, yes.
4 Q. And to what date was it extended?
5 A. It was extended -- it was approved to June 1,
6 1992.
7 Q. Okay. And then does the reinstatement order
8 confirm those dates of the development period?
9 A. Yes, it does.
10 Q. Okay. So based on all these documents, what
11 did you conclude was the development period for this
12 water right?
13 A. So based on all the information, looking in
14 the water right back file, the development period was
15 from June 2, 1992 through June 1st of 1992.
16 Q. Okay. Have you ever tried to reconstruct
17 beneficial use on a water right from that long ago
18 before?
19 A. I have done some forensics hydrology
20 previously, and it's not an easy task. It's not an easy
21 task to evaluate what water was done or used for
22 beneficial use. I have tried to recreate a lapse permit
23 and develop a license exam for that. Unfortunately, I
24 don't recall the number for that, but it was off of the
25 Snake River. But there was -- I've actually done it

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1 twice, in addition to this work, on trying to recreate
2 historical beneficial use.
3 Q. Okay. What challenges or concerns does just
4 trying to recreate beneficial use that far -- what does
5 that pose for you?
6 A. It's just lack of information, lack of
7 records, especially diversion rates are very difficult
8 to determine and verify, not to mention the relying on a
9 lot of information that may be spot information, like
10 aerial photography that was taken on one snapshot one
11 day in time as opposed to continuous records of
12 information.
13 Q. Do you find that there are often holes in
14 documentation that long ago? Maybe people didn't
15 document things as thoroughly as we might do them now?
16 A. Absolutely. Absolutely.
17 Q. So we have to work with what we have to work
18 with. Is that fair?
19 A. Yes.
20 Q. So in your opinion, does a delay in trying to
21 do a beneficial use exam like this, does that kind of
22 put the applicant at a disadvantage in terms of
23 demonstrating beneficial use?
24 A. Yes. I would feel, you know, it makes it
25 difficult for all parties involved, whether it's the

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1 applicant, the Department, to evaluate that and protest
2 it. I mean, it's really hard to just, you know, try to
3 recreate that data.
4 Q. All right. So let's take a look at sticking
5 with -- are we still on Exhibit C? Yeah, sticking with
6 Exhibit 108, Appendix C, and let's look at the Bates
7 page 3086, which is the first page of the application.
8 When you looked at the face of the
9 application, what did that tell you about who owned this
10 water right?
11 A. So the applicant was actually a group of four
12 individuals that, upon reading the back file,
13 additionally, were the group that were originally going
14 to form the Lower Snake Aquifer Recharge District. But
15 they were doing this proactively so they could get a
16 better priority date.
17 Q. So when you looked at that and you saw that
18 the Water Resource Board was not the original owner, did
19 you try to go back and recreate the ownership chain of
20 this water right?
21 A. I did. I tried to figure out how it went from
22 the applicants to the Lower Snake Aquifer Recharge
23 District and then that assignment eventually to the
24 Idaho Water Resource Board.
25 Q. Can you take a look at the same exhibit,

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1 Appendix G, Bates No. 3187 to 3192. And can you just
2 please walk me through those documents and what they
3 have to say about ownership of this water right?
4 A. Absolutely. So Appendix G talks about the
5 assignment of the permit from Dan McFadden, who was the
6 chairman of the Lower Snake Aquifer Recharge District,
7 and assigned a permit to the Idaho Water Resource Board
8 in 1999, so that was after proof was filed and the
9 beneficial use exam by Gerald Martens was done.
10 The following documents that's Bates No. 3188,
11 3189, going on to the end of that appendix, 3192, are
12 documents, first of all, agreeing -- the first three are
13 agreeing to the assignment of that permit by the Water
14 Resource Board.
15 I'm sorry. That's an agreement from between
16 the Board and the Snake Aquifer Recharge District. Then
17 the last page is the resolution by the Board to accept
18 the permit assignment.
19 Q. And based on those documents, what did you
20 conclude with regard to the ownership of this water
21 right?
22 A. So based on those documents, I concluded that
23 the Department correctly -- the ownership shifted from
24 or changed from the Lower Snake Aquifer Recharge
25 District to the Idaho Water Resource Board.

1 Q. Okay. Let's go back to Exhibit -- or Appendix
2 C, please. And you can just reference this as needed.
3 But what did the permit and advertisement
4 indicate to you with regard to the scope of the sources
5 of water that could be used under permit 37-7842?
6 A. So both the permit application and the permit
7 approval and the advertisement of the permit application
8 list the source of water as the Big Wood and Little Wood
9 Rivers.
10 Q. And what do those same documents indicate to
11 you with regard to the scope of the quantity of water
12 that could be used under the permit?
13 A. So the request was made for 800 CFS from
14 either or both sources.
15 Q. And what did those documents indicate to you,
16 with regard to the scope of the purpose of use, that
17 water right 37-7842 could be put to?
18 A. The purpose was for recharge, groundwater
19 recharge.
20 Q. And what did they indicate with regard to the
21 points of diversion?
22 A. There is one point of diversion that was
23 listed and advertised in the southwest and southeast
24 quarter, Section 24, Township 4 south, 19 east.
25 Q. Okay. Taking a look at Exhibit 108, Figure 1,

1 map?
2 A. I did include the place of use, and those are
3 highlighted in yellow, I believe. All the township and
4 ranges that were requested on the application map, there
5 is some discrepancy from the map that was included in
6 the application material and actually what was
7 advertised. And so I used the map application, because
8 that's what was approved.
9 Q. Okay. And then did you also include the canal
10 systems that were indicated on the face of the permit?
11 A. I did. So the canal systems are also showing
12 delivery of water from the Big Wood/Little Wood Rivers,
13 the Richfield Canal, the Dietrich Canal, and then the
14 Milner-Gooding Canal with water delivery from the Snake
15 River.
16 Q. And why did you include those canal systems in
17 the POD?
18 A. The canal systems were included because they
19 were included in the application material that was on
20 No. 6 talking about the description of the delivery of
21 that water, use of that water to the POU.
22 Q. And was that same description also contained
23 in the advertisement?
24 A. It was.
25 MS. BLADES: Can I interpret you just for a

1 which is on Bates page 3062, did you create this map?
2 A. I did create this map.
3 Q. Okay. And how did you create it?
4 A. Using RJIS and information that was available,
5 public information, aerial photography, data from the
6 Department of Water Resources for river systems and
7 canal systems, and then identifying aspects of the
8 permit, place of use, and point of diversion as
9 identified in the permit application, advertisement, and
10 approval.
11 Q. So you looked at the permit and the
12 advertisement and placed the POD on this map?
13 A. Correct.
14 Q. And can you point out where that POD was
15 located?
16 A. The POD is Township 4 south, Range 19 east.
17 It's shown -- my map is in black and white, so I don't
18 know what color it is.
19 Q. Yeah. Mine is, too.
20 A. I don't remember what colors.
21 Q. Is it magenta or green? Magenta.
22 A. On that one?
23 Q. Okay, yeah. So when you -- and then did you
24 also look at the permit application in terms of the
25 place of use and also indicate that place of use on this

1 second?
2 MS. VONDE: Sure.
3 MS. BLADES: If you have a color version of
4 this, would you be able to put it actually in the
5 exhibits? He's referring to colors, and the official
6 color we have is black and white.
7 MS. VONDE: Yeah, all of mine are black and
8 white, too.
9 (Unintelligible.)
10 BY MS. VONDE:
11 Q. Is that the only map that you can get printed
12 in color?
13 A. No, none of them are in color.
14 Q. None of them are in color?
15 A. I have colored copies in my stuff, as well.
16 Q. Okay.
17 A. Mine are hole-punched in that binder, so...
18 THE HEARING OFFICER: It would be better if
19 the witness refers to color that the exhibits also
20 exhibit color, if not for me, for somebody else looking
21 at them.
22 MS. BLADES: Maybe just as we go, if we're
23 referring to color (unintelligible.)
24 MS. VONDE: Sure. They should be in the other
25 exhibits.

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1 THE WITNESS: Okay.
2 BY MS. VONDE:
3 Q. Is there anything else that we didn't talk
4 about that went into your initial determination of the
5 scope of what you're going to be sort of analyzing with
6 this water right, in terms of the elements of the water
7 right?
8 A. Not that I can think of off the top of my
9 head.
10 Q. So the permit was the starting point for your
11 analysis. What was your next step to gain familiarity
12 with what was going on on the ground in this area?
13 A. So the next step that I undertook was to
14 review the previous work that was done just to see what
15 was available in terms from Mr. Martens and Ms. Edl on
16 that information that was provided.
17 Q. Did you conduct any interviews to get an
18 understanding of the canal system and the physical --
19 sort of the physical geography of this area?
20 A. I talked to -- most specifically I talked to
21 Lynn Harmon several times on the phone and got, you
22 know, inside information with his expertise of the canal
23 system operation. Also, just in our office, I talked to
24 both Chuck Brockway, Sr., and Chuck Brockway, Jr., who
25 have extensive knowledge of that whole area, as well.

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1 Q. Did you do any site visits?
2 A. I did do a site visit to look specifically
3 again at the bifurcation and the diversion from the
4 Little Wood into the Dietrich Canal system. Years ago I
5 visited the diversion into the Richfield system, and I
6 didn't think it was warranted to go back and look at
7 those.
8 Q. And did you take the photographs that are
9 attached to the report?
10 A. I did.
11 Q. And did you then put together some maps based
12 on what you found in terms of on the ground, geography
13 of the system?
14 A. I did put together the maps. I obviously did
15 not walk or drive the entire length of all the canals.
16 And so I relied on the Department and the information
17 that was provided by the Department on the location of
18 those canals.
19 Q. And did Lynn Harmon testify to the content of
20 those maps?
21 A. He did.
22 Q. Okay. So you've already stated that the
23 permit and advertisement contemplated that water from
24 both the Big and Little Wood Rivers could be used under
25 water right 37-7842; is that correct?

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1 A. That's correct.
2 Q. Based on your review of the Richfield, the
3 Dietrich, and the Milner-Gooding Canal systems, in all
4 the research you did, what did you conclude with regard
5 to the sources of water that could have been used in the
6 place of use listed on the permit application and
7 advertisement?
8 A. I'm sorry. Can you restate that for me?
9 Q. What did you conclude with regard to the
10 sources of water that would have been used and were used
11 under this water right permit?
12 A. Under this permit, I determined that water
13 from both the Big Wood and Little Wood water -- Little
14 Wood River waters could be delivered -- could be
15 diverted and delivered for use of recharge.
16 Q. So is it possible to get Big Wood water into
17 the Richfield Canal?
18 A. It is possible to get Big Wood water into the
19 Richfield Canal.
20 Q. And did you find recharge of Big Wood River
21 water in the Richfield Canal? And you don't have to get
22 into the details at the moment, but...
23 A. Yes, I did.
24 Q. Okay. Is it possible to get Big and Little
25 Wood River water into the Dietrich Canal?

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1 A. It is possible, yes.
2 Q. And did you find recharge of Big and Little
3 Wood River water in the Dietrich Canal?
4 A. Yes.
5 Q. And is it possible to get Big and Little Wood
6 River water into the Milner-Gooding Canal?
7 A. It is possible.
8 Q. And did you find recharge of those sources at
9 the Shoshone site?
10 A. I did find recharge there.
11 Q. So let's take a look at Exhibit 108, Figure 1
12 again, the map.
13 A. Okay.
14 Q. That figure depicts the location of the point
15 of diversion that we've already mentioned is in magenta.
16 When you looked at that point of diversion a little bit
17 closer, what did you notice about it?
18 A. That it is not on any of the water courses.
19 It's on the Big Wood River or the Little Wood River.
20 Q. And so did that cause you to think you needed
21 to investigate the point of diversion a little bit more?
22 A. Absolutely. And there's also references in
23 the back file on notes that that point of diversion was
24 incorrect.
25 Q. So let's take a look at Exhibit 108, Appendix

1 H, which begins on Bates No. 3193.
2 A. Yes.
3 Q. Are those the documents that you referred to?
4 A. They are. Uh-huh.
5 Q. And what do those documents indicate?
6 A. It just indicates that the point of diversion
7 that's described in the application appears to be an
8 error and that the point of diversion appears to be in
9 the same quarter-quarter, just in Section 25 of the same
10 township and range.
11 Q. Okay. So it was recognized fairly early on
12 that that probably wasn't a correct location?
13 A. Yeah, in 1981.
14 Q. Okay.
15 A. And then there's another note saying that
16 Glen's notes are correct.
17 Q. So you recognized at that point the diversion
18 was likely incorrect. What do you think, even though it
19 was maybe -- where do you think it should have been?
20 Where do you think they meant for it to be, and what
21 were they trying to incapsulate with that point of
22 diversion probably back in the day?
23 A. So I would agree with the notes in the back
24 file, that it's the same quarter-quarter, just in a
25 different section on the same township and range, and

1 uncommon.
2 Q. And is there a statutory process for changing
3 a point of diversion that's listed on a permit?
4 A. There is an amendment process. Often times
5 that will have to be re-advertised.
6 Q. All of the points of diversion that you
7 ultimately ended up recommending in your report, are
8 they still within the original permitted advertised
9 place of use?
10 A. Yes, if you include the canal delivery
11 systems.
12 Q. So your analysis of where the points of
13 diversion would be, was that based also in part on where
14 you ultimately found indications of recharge?
15 A. Correct. Yes.
16 Q. All right. Let's take a look at -- so, yeah.
17 Let's take a look at Exhibit 108, Figure 7, which starts
18 on Bates page 3068.
19 Does your recommended place of use that you
20 depict here -- is this the right one? No, not the right
21 one. Yes. Sorry. That is correct.
22 Does this -- does the recommended place of use
23 that you depict here, does that exactly overlap the
24 place of use that was described in the permit and
25 application or advertisement?

1 that location is where the Jimmy Byrne Slough
2 confluences with the Little Wood River.
3 And so with the application, I tried to figure
4 out why it was so limited -- the application is limited
5 to one point of diversion in the application. So I
6 think that they were trying to describe the source of
7 both waters from the Big Wood and the Little Wood coming
8 together and being diverted at that location, so...
9 Q. So that's not how points of diversion would be
10 recommended today --
11 A. No.
12 Q. -- for a water right like this? Do you
13 recommend that the points of diversion -- was it your
14 conclusion that they should match the point of diversion
15 that was listed on the permit and advertisement, or
16 should they be different?
17 A. So I recommended that the point of diversion
18 is different than what's listed on the application.
19 Q. And in your experience, is it unusual for a
20 point of diversion to change locations from what was
21 contemplated on the permit?
22 A. Not always. Usually they try to stay within
23 the same quarter-quarter, but it's often times they do
24 change those points of diversion, especially with wells
25 for a variety of different reasons, but it's not

1 A. The place of use described here is much
2 smaller than the applied place of use in the
3 application.
4 Q. Why --
5 A. Significantly smaller.
6 Q. And why did you end up reducing the POU?
7 A. The original application contemplated recharge
8 throughout the entire Lower Snake Aquifer Recharge
9 District boundary, which was numerous township and
10 ranges throughout the whole area, and I did not find any
11 records that recharge occurred any other location
12 besides along the Richfield Canal at the Dietrich
13 recharge site and the Shoshone recharge site.
14 Q. So based on that, you decided to reduce the
15 place of use?
16 A. Correct.
17 Q. And is that unusual, for a permitted place of
18 use to be reduced?
19 A. No, especially -- you know, they threw the net
20 very wide during this application. And so that's not
21 unusual.
22 Q. All right.
23 A. Sorry. Not to interrupt, but if we're going
24 to do this one, do you have a copy?
25 Q. Yes. Thank you for reminding me.

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1 A. Thank you.
2 Q. When you began to analyze the quantity of
3 water used under permit 37-7842, you decided to focus on
4 canal measurements; is that correct?
5 A. That is correct.
6 Q. And why did you just decide to look at canal
7 measurements?
8 A. That's the only data I could find from the
9 development period that I could rely on.
10 Q. Why was that the most reliable?
11 A. Because the Big Wood Canal Company does have a
12 lot of quality control associated with measurement of
13 data, and they do the best job they can, and then they
14 provide that to the watermaster who further evaluates it
15 and refines it, and then it's submitted to the
16 Department as the official record of what was delivered.
17 Q. So let's take a look at Exhibit 108, Appendix
18 K, which begins on Bates page 3288. Lynn Harmon has
19 already testified to at least a portion of these
20 documents. So let's have you briefly describe what
21 documents are contained in Appendix K.
22 A. So I made a request to the Big Wood Canal
23 Company for all the measurement data that they had on
24 record from 1982 through 1992 for the area in question.
25 And so these are all the records they provided, which

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1 usually include some sort of measurement reading,
2 whether that's elevation or staff-gauge measurements,
3 and then the equivalent, especially for Magic Reservoir
4 the storage volume, or through the canal systems the
5 flow rates that were measured.
6 Q. And then can you please take a look at Exhibit
7 108, Appendix J, which begins on Bates page 3199.
8 That's not correct. I don't think I got that Bates page
9 correct.
10 A. Yeah, that's correct.
11 Q. Is that correct?
12 A. Yeah. That's the appendix title, 3199.
13 Q. All right. Can you please describe what these
14 records are and how you obtained them.
15 A. So these are the measurement records from the
16 watermaster as part of his official annual report to the
17 Department of Water Resources that are again from 1982
18 through 1992 on the measurements for the same canal as
19 our study area. And I got those either from the books
20 themselves that we have in our office, or the ones that
21 we do not have, I got those from Kevin Lakey's office
22 directly.
23 Q. And were these -- would those books be what
24 Lynn Harmon referred to as the "Black Books"?
25 A. The Black Books, yes.

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1 Q. And to your knowledge, are watermaster records
2 public documents?
3 A. They are.
4 Q. So looking at -- let's just take the first
5 page there, Idaho Water Resource Board 3200, just as an
6 example. Can you just run us through quickly what data
7 is included on that document?
8 A. Absolutely. So the first describes what water
9 district we're in. This is information for Water
10 District 37, 37M. It describes that these are
11 discharges in second feet or CFS for the Jimmy Byrne
12 head canal, or what we have always labeled JBH, for the
13 area September 30, 1982.
14 Across the top the columns are the months, and
15 then the day is listed in rows on the left-hand side, 1
16 through 31, and then each individual day. So the first
17 entry, looks like May 4, is 29 CFS that was recorded on
18 that day.
19 On the bottom they have 24-hour CFS values
20 that they have included. And they have a mean-flow rate
21 for the month, and then they have data-feet volume for
22 the year, and then they total up the yearly mean and the
23 total acre-feet volume delivered.
24 Q. When you were doing your analysis, did you
25 rely equally on both the Big Wood Canal Company

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1 handwritten documents and the watermaster measurements,
2 or how did you work with both these sets of documents?
3 A. So I relied on the watermaster records
4 primarily. But the handwritten documents from the canal
5 company had a lot more information that was outside of
6 what is published by the watermaster. This only ends --
7 all this data ends September 30th every year and often
8 times does not start when the first measurements were
9 actually measured.
10 Q. So would it be fair to say that you used the
11 watermaster documents first as being sort of the
12 official record and then went to the Big Wood Canal
13 Company documents to fill in any gaps?
14 A. Yes, to see what other additional information
15 was available for each year.
16 Q. Okay. So you've already testified that you
17 limited your review of water use to 1982 to 1992.
18 Between those dates, are you aware of whether or not
19 there was a recharge basin off of the Richfield Canal?
20 A. To my knowledge, there's not a recharge basin
21 off of the Richfield Canal.
22 Q. Is there a recharge basin off of the Richfield
23 Canal now, to your knowledge?
24 A. To my knowledge, no.
25 Q. So if there was no recharge basin off of the

1 Richfield Canal at the time, why did you still consider
2 the Richfield as a possible place of use for this water
3 right?

4 A. So the Richfield Canal, I think, was
5 contemplated always to deliver Big Wood River water to
6 the basins for delivery. My experience in the State of
7 Idaho is that water that seeps in a canal during the
8 non-irrigation season and when irrigation water is not
9 delivered is considered recharge, as well. And so
10 that's why I included the Richfield Canal as a place of
11 use.

12 Q. So having determined that you were going to
13 look for possible in-canal recharge on the Richfield
14 Canal, you already stated that you looked just outside
15 the irrigation season; is that correct?

16 A. That's correct.

17 Q. And that is because -- and can you explain
18 just once again why that is?

19 A. So I did not include the irrigation season
20 because that is -- when irrigation water is being
21 delivered and used, the State hasn't recognized any
22 seepage in a canal system as recharge, and so I was
23 limiting my scope to outside in the shoulder seasons,
24 and that irrigation season was described by Mr. Harmon
25 previously.

1 Mr. Harmon -- what did Mr. Harmon indicate to you was
2 the approximate average beginning of the irrigation
3 season on the Richfield Canal?

4 A. He said it never started before May 1st. And
5 often times it ended in the middle of September. So I
6 used my brackets for my irrigation season on the
7 Richfield from May 1st through September 30th.

8 Q. So having determined what were the average
9 irrigation season dates on the Richfield, how did you go
10 about calculating the amount of recharge that might have
11 been occurring within the canal during the development
12 period?

13 A. So I started with the diversion from the Big
14 Wood River into the Richfield Canal at Gauge No. 4. And
15 I originally started looking at what -- actually, let me
16 back up a little bit.

17 The other thing that Mr. Harmon told me is
18 that a real good indication is if irrigation is
19 occurring is if water is delivered or diverted into the
20 East and West Main Canals. And if water is not
21 diverted, if there's no record of water being diverted,
22 then you can pretty much guarantee that no irrigation is
23 occurring on the Richfield Canal.

24 And so based on that, I mean, I looked at the
25 data, and if there was water being diverted into the

1 Q. So let's get to that a little bit. How did
2 you determine what the irrigation season was on the
3 Richfield?

4 A. I determined that by asking Mr. Harmon when
5 irrigation water was delivered, and so he indicated that
6 that was typically -- May 1st was when irrigation water
7 was first delivered and that the irrigation season
8 usually ended middle of September toward the end of
9 September.

10 Q. Did you look at the face of some irrigation
11 water rights that divert off the Richfield to see what
12 the season of use was on this condition?

13 A. I have looked at those previously, and in a
14 lot of cases I know that water is delivered well past
15 the start of the irrigation season.

16 Q. So you looked at the face of the water rights
17 and then you talked with Lynn Harmon who said that the
18 irrigation season often starts later. Why did you feel
19 it was reasonable to rely on Mr. Harmon's assessment of
20 when the irrigation season started on the Richfield?

21 A. Because, I mean, just practicality. He knows
22 when that irrigation water is delivered and called for
23 by the farmers, and that irrigation water never was
24 delivered before that May 1st date.

25 Q. And you just indicated, but what did

1 West or East Canals, I considered that as irrigation
2 demand and did not include that in my analysis.

3 I started looking at the difference or the
4 seepage that occurred, the change in flow measurements
5 from Station No. 4 to the year the mouth of the Jim
6 Byrne Slough intersects with the Little Wood River.

7 But as I was looking at the data closer, I
8 noticed that there were some anomalies, and rare, but
9 they did occur, that there was an increase in flow from
10 the HJB to the head of the Jim Byrne Slough, to the
11 mouth of the Jim Byrne Slough, which indicated that at
12 some times it was a gain reach for some reason. Often,
13 most of the time it was not.

14 But in order to eliminate that as a potential
15 -- and to be more conservative, I took the recharge
16 amount from Station No. 4 to the head of the HJB or the
17 head of the Jim Byrne Slough.

18 Q. So between the HJB and the MJB you sometimes
19 found that that was a gain reach. What would that mean
20 in terms of determining an amount of recharge? Would
21 that give you a higher amount of recharge or a lower
22 amount of recharge?

23 A. If it was gaining during that reach, it would
24 give us a lower amount of recharge. If the MJB was less
25 than the HJB, which it is most of the time, it would

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1 give us more recharge than what I calculated.
2 Q. So by not looking at that reach, because of
3 those gains in the slough, did that give you a more
4 conservative number of quantity of recharge, or a larger
5 quantity of recharge?
6 A. It gave us a smaller number throughout the
7 development period, to be more conservative.
8 Q. Okay. And so what you did to discount that
9 possible false number was to go up and just look at the
10 gauges between No. 4 and the HJB; is that correct?
11 A. That's correct.
12 Q. So when you saw losses in the canal between
13 Gauge No. 4 and the HJB outside of the irrigation
14 season -- you saw a diversion at Gauge No. 4 and a loss
15 between No. 4 and the HJB outside the irrigation season,
16 what did you conclude -- where did you conclude that
17 water must have gone?
18 A. So I concluded the water seeped into the
19 canal, into the canal bed and recharged the aquifer.
20 Q. Is there anywhere else, to your knowledge,
21 along that reach that it could have gone?
22 A. Not to my knowledge.
23 Q. So in your opinion, why is it reasonable to
24 conclude that that water, that lost water, was recharge?
25 A. So during that period, my understanding is

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1 that that's the only right that was on for delivery. It
2 was this permit. So water was diverted out of the Big
3 Wood River into the Richfield Canal system as part of
4 this permit. And any loss of that water, as it was
5 delivered to the other places of use, was also
6 considered recharge.
7 Q. Let's take a look at Exhibit 108, Bates page
8 3057. There are two tables on this page, Table No. 13
9 and Table No. 14. Can you please describe what these
10 tables are and what they're telling us.
11 A. So Table No. 13 is just an example of, I
12 believe, the next end, which is all the data. But I
13 just picked out half of April and half of October into
14 November of delivery and the measurement data associated
15 with the Richfield Canal.
16 So Table 13 has the date, the flow and Station
17 No. 4, East Canal, West Canal measurements, the head of
18 the Jim Byrne Slough, and then the recharge value, which
19 was the difference between the flow in No. 4 and the
20 head of the Jim Byrne Slough.
21 Q. Okay. So let's back up just one step. This
22 table is just representative of some of the data that
23 you collected; is that correct?
24 A. Correct, yes.
25 Q. And why did you choose these sets of data from

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1 1987 to put into this table?
2 A. Because it included the peak flow rates
3 calculated during the development period.
4 Q. So this the table includes the year where you
5 found the highest loss between Gauge No. 4 and the HJB;
6 is that correct?
7 A. Correct.
8 Q. Okay. So let's just talk through the table a
9 little more carefully. We have the Gauge No. 4 flow; is
10 that correct?
11 A. That's correct.
12 Q. And we have the East Canal flow; is that
13 correct?
14 A. That's correct.
15 Q. And the West Canal flow?
16 A. Correct.
17 Q. And do we have the HJB?
18 A. Correct, also.
19 Q. Okay. Why did you include the East Canal and
20 the West Canal measurements?
21 A. To illustrate the comment that Mr. Harmon
22 made, that if water was diverted into the East and West
23 Canals, then that was an indication of irrigation
24 occurring.
25 Q. So anytime that you saw in the data that the

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1 East and West Canals had a measurement showing that
2 water was going into those canals, did you basically
3 just discount those days?
4 A. Absolutely.
5 Q. Okay. So the calculation that you did in this
6 table is fairly simple. You took Gauge No. 4, the
7 measurement at Gauge No. 4, and you subtracted the
8 measurement at the HJB; is that correct?
9 A. That's correct.
10 Q. And that resulted in the calculated number,
11 which is in the recharge column; is that correct?
12 A. That's correct.
13 Q. So once again, when you saw these numbers come
14 out from that calculation that are listed in the
15 recharge columns of this table, what did you conclude
16 about that? What does that represent?
17 A. So I concluded there was a loss of water that
18 was diverted into the Richfield Canal, and that water
19 was lost -- I couldn't find any evidence that it was
20 lost to any other diversion except for recharge.
21 Q. And did Mr. Harmon indicate that there are
22 other diversions?
23 A. He did not indicate that to me. In his
24 testimony, he alluded to some small ones, and I don't
25 recall. I don't know the system nearly as well as he

1 did. And I don't remember where those are, but he
2 alluded to a lot more diversions than he ever alluded to
3 me on the phone.
4 Q. But when we are looking at this table, this is
5 outside of the irrigation season, so would those
6 diversions really even be a factor?
7 A. They should not be, no.
8 Q. And then let's take a look at Table No. 14 on
9 the same page, please. Can you describe what that table
10 indicates?
11 A. Absolutely. So the year -- the development
12 period, excuse me, from 1982 to 1992 are shown in the
13 first column, and then the maximum flow rate observed in
14 each of those years is identified in the second column
15 as the max flow CFS column.
16 Q. So is it fair to say that what you did was
17 basically take the analysis of Table No. 13 and do that
18 for each of the development period years based on the
19 measurements that you have, and then you translated that
20 into Table No. 14; is that correct?
21 A. It's correct in terms of Table 13 is just a
22 small subset of the entire data set for 1987. So, you
23 know, I replicated every year from 1982 to 1992, which
24 is in Appendix N, and then found the highest flow given
25 those parameters that we've discussed, yes.

1 Q. So when we see 1982 max flow, 110 CFS, in
2 Table 14, does that kind of correspond for 1982 to the
3 highlighted 300 CFS that you found in 1987? It would be
4 the same number, I guess.
5 A. Yeah. It might be on a different day. I
6 mean, chances are it definitely was on a different day,
7 usually in the spring as opposed to November. But yes.
8 The math would be the same.
9 Q. The math would be the same?
10 A. Yeah.
11 Q. Okay. And so what does that Table 14 indicate
12 in terms of which year had the highest loss between
13 Gauge No. 4 and the HJB?
14 A. So the highest loss was observed or calculated
15 in 1987.
16 Q. And so you used that loss number then to say
17 that was the quantity of water recharged in the
18 Richfield; is that correct?
19 A. Correct.
20 Q. Are there any uncertainties inherent in this
21 analysis that you did for the Richfield Canal?
22 A. Yes.
23 Q. What are some of those uncertainties?
24 A. There's a lot of uncertainty relying on data
25 that I did not measure specifically for the permit

1 license exam. So we rely on third-party information as
2 best as we can, as much as we can rely on it. You know,
3 it's not new data measured specifically for this
4 purpose.
5 There's a lot of assumptions. Mr. James
6 talked about travel time, and we did not incorporate
7 travel time into any sort of analysis just because that
8 adds a lot more uncertainty in a lot of cases. And so
9 those are, I think, the two big ones.
10 Q. And then the irrigation start and end dates
11 that you used are averages; is that correct?
12 A. I don't know if I'd call them averages. I
13 would call them -- like those were basically the extent
14 of when the irrigation season begins and ends according
15 to the manager, former manager.
16 Q. Yeah, and I guess maybe average isn't -- those
17 irrigation start and end dates, they might move a few
18 days here and there every year --
19 A. Right.
20 Q. -- depending on water variability?
21 A. Correct.
22 Q. So, you know, we've talked about this before,
23 but when you go back and do this kind of analysis 30
24 years later, are those uncertainties somewhat inherent
25 in what you're doing?

1 A. Absolutely. And a lot of them can be.
2 Q. And so why do you consider that your analysis
3 with the Richfield is reasonable, even given all of
4 those uncertainties?
5 A. Well, there definitely is a trend. I mean,
6 the data is there to support that water was diverted
7 during the non-irrigation season or when the irrigation
8 demand was not present based on the lack of delivery to
9 the East and West Canals. Water was delivered into the
10 Richfield system, which appears to be shepherded down to
11 the Little Wood River, and there was definite loss that
12 was calculated in the canal system itself.
13 Q. Okay. So let's move onto the Dietrich. Was
14 there a recharge basin off the Dietrich Canal in
15 existence during the development period, to your
16 knowledge, or that you researched?
17 A. Yes. To my knowledge, there was an existing
18 basin that was diverted, and water was diverted into
19 that basin.
20 Q. And was that recharge basin listed as a place
21 of use on the permit?
22 A. Yes, with some qualifications. The place is
23 slightly different in the application. But, to me, it
24 looked like that was the intent of the application.
25 Q. And when you say it was slightly different in

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1 the application, slightly different from what is
2 actually on the ground or --
3 A. Yes.
4 Q. Okay.
5 A. Slightly different than what's on the ground.
6 Q. And just -- was it like just a couple of
7 sections off?
8 A. Yeah, it was a little bit south of where
9 evidence of recharge actually does occur.
10 Q. Okay. So because there was a recharge basin
11 off the Dietrich Canal, did you limit yourself to only
12 canal measurements outside the irrigation season?
13 A. No. I included data that was within the
14 irrigation system, as well.
15 Q. Okay. And so why did you do that on the
16 Dietrich? Why did you include irrigation season
17 measurements?
18 A. Because we weren't considering in-channel
19 recharge -- or in-canal recharge. This was actually
20 diverted water out of the canal system into a basin that
21 was dedicated for recharge.
22 Q. So, once again, how did you determine what the
23 irrigation season was on the Dietrich Canal?
24 A. So, again, relying on Mr. Harmon's evaluation
25 or knowledge of the system, he indicated that the

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1 Dietrich Canal irrigation season starts on April 15th
2 and continues through the irrigation season. But he
3 also indicated that there usually is not any excess
4 water that's diverted, that any water after May 31st is
5 dedicated all for irrigation.
6 And so I limited my evaluation to April 15th
7 through May 31st as potential times that recharge could
8 happen, or after the irrigation season into October and
9 November, if data was there.
10 Q. And is that because the capacity of the canal
11 after May 31st, really, there wouldn't be any room to
12 carry extra water above and beyond irrigation water at
13 that point; is that --
14 A. Yeah. It would probably not be worth fussing
15 with it.
16 Q. Right.
17 A. You know, there's probably capacity but just,
18 you know, not the volume that they want to get.
19 Q. So just as a refresher, what dates did you use
20 for the early irrigation system on the Dietrich?
21 A. So I used between April 15th and May 31st on
22 the Dietrich Canal.
23 Q. So if you could just walk through your
24 analysis of how you determined the quantity of water
25 that was recharged in the Dietrich system.

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1 A. Absolutely. So Ms. Edl, in her testimony,
2 talked about the irrigation demand in that early part of
3 the irrigation season as being 150 CFS. My conversation
4 with Mr. Harmon indicated that while there might be some
5 maximum diversion during that time of 150, he felt that
6 120 was a much more reasonable value on an average
7 demand for the Dietrich Canal during that period.
8 And based on my experience in Idaho, April and
9 May, when my kids play soccer, it's not very warm,
10 usually. And so the demand -- I could agree with
11 Mr. Harmon. The demand is probably not very high.
12 And so I used 120 as the average demand during
13 that irrigation -- that early irrigation season. And so
14 I looked at the measurements from the -- the measurement
15 data and the watermaster data from Station No. 11 that
16 was diverted into the Dietrich Canal. And then I
17 subtract off the top, through every day, 120 CFS to look
18 at what was the potential flow available for recharge.
19 I also looked at what was returned from the
20 system in the F waste back to the Little Wood River.
21 And if there was water being delivered or measured in
22 the F waste, I also subtracted that from the analysis.
23 And then the resulting data is how much recharge water
24 potentially was available.
25 Q. So let's take a look at Exhibit 108, Tables 9

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1 and 10, which are on Bates page 3052 and going over to
2 3053.
3 A. Okay.
4 Q. Let's take a look at Table 9, and walk me
5 through once again what this table represents, please.
6 A. Okay. So this is, again, a small subset, one
7 month, the month of May, 1984, which walks through the
8 same math that I just tried to describe. And so the
9 first column is the date of the month of May, and this
10 table is actually split up into two different sections
11 right by themselves.
12 But we have the dates from May 1st through May
13 31st, the flow measured in Station No. 11, the average
14 demand for irrigation through just the average of that,
15 as I described, any measured F waste flow that was
16 reported, measured and reported, and then the recharge
17 amount was Station No. 11 minus the demand minus any
18 flow that was coming through the F waste.
19 Q. Did you account for any possible stock-water
20 usage, and if not, why not, when you did your
21 calculations?
22 A. I did not include any stock water. Mr. Harmon
23 indicated that 120 demand was all the water, so maybe
24 calling it just irrigation could probably -- maybe it
25 had been a misstatement on my part, but any demand from

1 the system was that 120 value.

2 Q. So let's take a look at Table 10. If you
3 could describe what that table does.

4 A. So that table, Table 10, is the annual maximum
5 flow rate calculated, as described in Table 9, for each
6 of those years, and the maximum flow value that was
7 calculated.

8 Q. And when was the maximum flow rate that you
9 found for recharge off the Dietrich?

10 A. So the maximum flow rate I found was the same
11 as Ms. Edl. It was in 1984 at 276 CFS.

12 Q. So are there uncertainties in here in the
13 analysis that you did for the Dietrich? And what are
14 they?

15 A. Absolutely. The biggest uncertainty for the
16 Dietrich Canal is the seepage in my mind. So canal
17 seepage does occur. I don't have data to support what
18 that seepage might be. That was outside the scope of
19 what I was asked to do, if I would measure seepage. And
20 so that definitely is a large uncertainty, especially
21 with that.

22 Q. So you're talking about -- are you talking
23 about canal seepage that might have occurred before the
24 water got to the recharge basin and therefore wasn't
25 accounted for in your calculations; is that correct?

1 sense.

2 There's definitely evidence, visual evidence,
3 that water has been routinely diverted into that basin
4 through aerial photography, and so that area has
5 obviously seen water on a regular basis. And so the
6 evidence points to water that is diverted there. And so
7 trying to quantify how much is there, what's the
8 parameters, how much can we reasonably deduce that water
9 was diverted, it seemed like it was a reasonable
10 defensible approach.

11 Q. And is it your opinion, when you see water
12 diverted and lost, that it's reasonable to assume that
13 that went into the ground and was recharged in this
14 particular instance?

15 A. In this particular instance, I don't see any
16 other place for it to go.

17 Q. All right. So this might get a little bit
18 repetitive. I apologize. I'll try not to be too
19 repetitive, but let's take a look back at Exhibit 105,
20 Water Resource Board Exhibit 105, which is the map. We
21 could probably use the demonstrative one.

22 A. What was the number again?

23 Q. 105. It should be the Milner-Gooding map.

24 So can you describe, using this map, the
25 methodology that you used to determine the amount of

1 A. Or, yeah, it was lost in the canal. You know,
2 we're attributing that all to the recharge area, and
3 that loss may have occurred somewhere else in the canal
4 system.

5 Q. On the Dietrich Canal, are there gauge
6 measurements on either side of the recharge basin?

7 A. No.

8 Q. So, did that pose any issues for you?

9 A. Absolutely. Obviously, it would have been
10 better -- I mean, the more data -- I'm an engineer. I
11 like data. So the more data we have, the better off
12 we're going to be. So if we had one upstream and
13 downstream of the diversion, we can know exactly what
14 was diverted into that basin. We don't have that
15 situation here, and so...

16 Q. Did you use the F waste to try and --

17 A. To account for some of that? Yes.

18 Q. So given all of what we've talked about, why
19 do you consider that your analysis of recharge on the
20 Dietrich is reasonable and accurate, given everything
21 that we know?

22 A. Well, to me, it's reasonable because, you
23 know, it first reflects similar to the analysis that was
24 done by the State, and so it was in the same kind of
25 parameters that were already established, and it makes

1 recharge that could have been occurring at the Shoshone
2 recharge site?

3 A. Yes. So there are measurement data associated
4 with Station 53, which is flow from the Snake River in
5 the Milner-Gooding Canal as it flows north. You have
6 also measurements at Station 56, which is on the
7 downstream side of the Milner-Gooding Canal after the
8 bifurcation.

9 And so we have a measurement that's not that
10 far distant on either side of the Little Wood River.
11 And typically we saw a decrease in flow. So there was
12 more water at Station 53, and water was lost when I
13 looked at Station 56. And so there was loss of water in
14 the Milner-Gooding Canal, which makes sense that
15 obviously most of that water is diverted at the
16 bifurcation into the Little Wood River.

17 However, there were times, regularly, that we
18 would see an increase in flow and not just a small
19 increase but a substantial increase, that Station No. 53
20 and 56 would see a jump. And so it wasn't just once
21 that would indicate some sort of measurement error, but
22 there was kind of -- that would occur on a frequent
23 basis.

24 And so the only real source of water,
25 especially on that scale, was the Little Wood River.

1 And so water -- and according to the testimony and the
2 conversations that I had with Lynn Harmon, he told me
3 that that does happen on a regular basis, including the
4 times that they have to cofferdam off that bifurcation
5 to prevent that from happening.

6 So I concluded that, on a regular basis, water
7 from the Little Wood River did enter the Milner-Gooding
8 Canal to flow underneath the siphon towards the recharge
9 basin. There is a measurement just downstream of the
10 headgate to the Shoshone recharge basin. And so the
11 difference between Station 56 and 57 indicate how much
12 was lost or was used for recharge and diverted for
13 recharge at that place of use.

14 Q. Okay. So let's look at -- let's go back to
15 Exhibit 108, Table 11, which is on Bates page 3054.

16 And can you describe what Table 11 indicates
17 and is trying to demonstrate?

18 A. Okay. So, again, Table 11 is a small
19 one-month subset of April 1984 from the entire
20 development period, which is, I think, Appendix M.

21 This shows the measurement flow at Station 53
22 for every date in the month of April of 1984, so the
23 measurements at Station 53, which is downstream of the
24 bifurcation -- sorry, upstream. I was thinking south.
25 It's upstream from the bifurcation, what's coming from

1 the Snake River into the bifurcation.

2 Q. The measurements of flow at No. 53, that would
3 be Snake River water; is that correct?

4 A. Correct, uh-huh.

5 Q. Okay.

6 A. Measurement at Station 56, which is on the
7 downstream side of the bifurcation, and so that is after
8 the water -- the Milner-Gooding Canal goes through the
9 siphon at the bifurcation, and then measurement No. 57,
10 which is the measurement at the other side of the
11 recharge basin. The total recharge column is the
12 difference between Station No. 56 and 57.

13 Q. And what would that total recharge column --
14 what sources are included in those numbers, what sources
15 of water?

16 A. Okay. The total recharge includes water from
17 the Snake River, Little Wood River, Big Wood River. So
18 it's inclusive. It's total recharge that's occurring.

19 And then the column, Big Wood River and Little
20 Wood River recharge is the difference between the
21 measurement Station 56 on the north side of the Little
22 Wood River and Station No. 53, which is the measurement
23 on the south side of the Little Wood River, which is
24 Snake River water. And so there's a substantial
25 difference of those measurements, which that water had

1 to come from, from the Little Wood River, was my
2 determination.

3 Q. So the Big Wood/Little Wood River recharge
4 number indicates the total amount of water that would
5 have been added to the Milner-Gooding flow from the
6 Little Wood River; is that correct?

7 A. Correct.

8 Q. And so how does that number relate to the
9 total recharge number? Which number did you recommend
10 be the quantity and why?

11 A. So I recommended if the Big Wood/Little Wood
12 River recharge column was greater than recharge, I only
13 recommended the recharge, total recharge value. I don't
14 recall that ever occurring. I think that the increase
15 in flow from 53 to 56 was always less than the total
16 recharge.

17 And so I recommended all that water diverted
18 under -- or from the Little Wood River as recharge
19 water, because there's no other -- there was no other
20 permit application being diverted, or water right.

21 Q. And then let's take a look at Table 12, which
22 is on the following page, Bates page 3055.

23 Can you talk us through that table, as well?

24 A. Absolutely. So this table is, again, the
25 development period from 1982 through 1992 and the

1 maximum flow for each of those years that was calculated
2 using that same process that we talked about in
3 Table 11.

4 Q. So were there as many uncertainties for you in
5 this analysis as in some of the others?

6 A. Well, my first main question and concern that
7 I had was, was there any sort of other diversion from
8 the Little Wood River into the Milner-Gooding Canal?
9 Was there any other sort of increase in flow? And
10 during my site visit, I did not determine that there was
11 any.

12 And so I had questions about could the
13 bifurcation function reverse, opposite of what it was, I
14 think, originally designed to do. And based on the
15 testimony from Lynn Harmon and evidence that, yes, that
16 could occur, I have not seen it personally.

17 Q. So why do you consider your analysis of
18 recharge at the Shoshone site to be reasonable and
19 accurate?

20 A. Again, there's definitely evidence that water
21 has been diverted for recharge. And so the question is,
22 is it possible that water from the Big Wood and Little
23 Wood Rivers could be diverted for part of that recharge
24 use. And based on the measurement data available, yes,
25 that is possible and likely had to occur.

1 Q. Based on the canal measurements, you could
2 demonstrate that it did occur?

3 A. Yes.

4 Q. Okay. So let's save the same exhibits. Let's
5 go to Table 15, which is on page 3058. So can you walk
6 us through this table, please.

7 A. So this table is basically all those other
8 tables that we had discussed previously during the
9 development period of 1982 through 1992, all the max
10 diversion rates for each of those three analyses that
11 were performed, and then total of those based on annual
12 diversions that were calculated.

13 Q. So the maximum diversion on the Dietrich, the
14 first column there, did those numbers come from the
15 previous table in the Dietrich section that we just
16 talked about?

17 A. Yes, that was Table 10.

18 Q. Table 10? So those are the same numbers as
19 are in Table 10?

20 A. Correct.

21 Q. And then the same for each of the following
22 columns?

23 A. Right. The Shoshone site is the values in
24 Table 12, and the Richfield site are the values in
25 Table 14.

1 Q. And so then you just took the lines across for
2 each year and added them up to come up with the total
3 diversion rate for the whole place of use, all of the
4 possible places of use?

5 A. Correct.

6 Q. And then you have 1984 highlighted there. Why
7 did you choose 1984?

8 A. I chose 1984 because that was the highest
9 total diversion rate that was calculated.

10 Q. In a single year?

11 A. In a single year.

12 Q. Okay. So let's flip to Appendix F,
13 Exhibit 108, which starts on page 3182. What is this
14 document?

15 A. So this is the beneficial use building report
16 form that I filled out to accompany this analysis that I
17 did. So this is the form that you use for any sort
18 of -- or any beneficial use exam done for the Department
19 by a certified water rights examiner.

20 Q. And could you just -- so does this form
21 contain basically all of your conclusions that we just
22 talked about in terms of all of the elements of what
23 this water right should be?

24 A. Correct.

25 Q. Okay. Can you just, you know, quickly walk us

1 through what those elements -- what you concluded those
2 elements should be?

3 A. Absolutely. So the general information is the
4 owner contact information, the examiner's name, my name,
5 when the exam date was done, who accompanied the
6 representative over the field exam, the examiner in the
7 field and what their relationship is to the owner,
8 contact information, what the source of the water that
9 was put to beneficial use, what source that is, and what
10 the surface water with that source is tributary to.

11 Q. So let's stop there. What did you recommend?
12 What was your conclusion about what the beneficial
13 use -- what sources were beneficial use between 1982 and
14 1992 for this water right?

15 A. So I calculated and determined that water from
16 both the Big Wood and Little Wood Rivers were used for
17 beneficial use for recharge.

18 Q. And are those two sources -- would you
19 recommend that those would be used interchangeably with
20 each other?

21 A. With the exception of the Richfield Canal,
22 which is just Big Wood River water, so any seepage that
23 occurs along that canal during the non-irrigation
24 season. Once the Big Wood River water interjects and
25 injects into the Little Wood River, then they're

1 interchangeable.

2 Q. So the sources of water that could be used in
3 the Dietrich place of use, for instance, are both the
4 Big -- could be both the Big and Little Wood River water
5 commingled, or it could be just Big Wood River water or
6 just Little Wood River water; is that correct?

7 A. Correct.

8 Q. And the same thing for the Shoshone site?

9 A. Correct.

10 Q. Okay. I'll let you continue with the -- would
11 you please just start again with overlap review.

12 A. Okay. Section B talks about overlap review,
13 other water rights with the same place of use.

14 The only water right that shares the place of
15 use that I recommended was water right permit 1-7054,
16 which we've alluded to before in these proceedings. But
17 there are no other recharge rights that have the same
18 place of use, and so that's the only one that exists.

19 Number 2 of the overlap review is any rights
20 that have the same source or the same point of
21 diversion. And so I do list the table that has all the
22 water rights that have the same point of diversion and
23 the same source, and that is Table 3 on Exhibit 108,
24 page number 3045, that has all those water rights there.

25 Q. So let's talk about the recommended points of

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1 diversion. I think we touched on this earlier but maybe
2 didn't fully describe them. It might help to refer back
3 to Figure 6 of your report, which is Bates No. 3067.
4 What were your ultimate recommendations in
5 terms of the points of diversion that should be on this?
6 A. So I recommended that the Big Wood River would
7 have a point of diversion just downstream at Magic
8 Reservoir, which is the start of the Richfield Canal.
9 And that's 67. So then that's shown in yellow. That's
10 in Township 2 south, Range 18 east, the start of the
11 Richfield Canal, and that would be the Big Wood River
12 point of diversion.
13 The Big Wood River then would have a point of
14 injection, which would have the same -- well, it would
15 be -- the point of injection should be where the Jim
16 Byrne Slough enters the Little Wood River. And that's
17 my understanding how the Department views them. The
18 point of injection is when you inject or divert a water
19 right back into a natural water system. And so you have
20 a point of injection into the Little Wood River.
21 In that same quarter-quarter is where the
22 Dietrich Canal is diverted. And so there would be a Big
23 Wood River point of re-diversion at that location and a
24 Little Wood River point of diversion into the Dietrich
25 Canal to the Dietrich recharge site.

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1 At the Shoshone site there would be another
2 Big Wood River point of re-diversion and a Little Wood
3 River point of diversion.
4 Q. And would that last one you just described at
5 the Shoshone site, would that be approximately where the
6 bifurcation is?
7 A. Where the bifurcation is, exactly.
8 Q. Okay. Is there anything else in that you
9 wanted to point out?
10 A. Just on that figure itself, you know, the
11 original permit point of diversion is shown, also, which
12 is just that one section that I think was acknowledged
13 as a typo on the original application.
14 Q. Okay. So let's move back to Appendix F on
15 3182. Well, maybe let's not.
16 What is the -- what is the next portion of
17 that field report?
18 A. So the next point is Section C, which is
19 delivering a diversion delivery system. And so the
20 first numbered points of diversion are the ones that I
21 just outlined; the point of diversion for the Big Wood
22 River, point of injection, point of re-diversion for the
23 Big Wood River, and then the Little Wood River point of
24 diversions on both the Dietrich Canal and at the
25 bifurcation.

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1 Q. And then how about the place of use, what was
2 your final determination of that?
3 A. So my determination for the place of use was
4 really using remote sensing data and then determining
5 where the Richfield Canal extended from the point of
6 diversion through the system until it injected back into
7 the Little Wood River -- until it injected into the
8 Little Wood River, and so the entire length of the
9 Richfield Canal, not including the East or West Main
10 Canals, because that was indication that irrigation was
11 occurring.
12 Q. And sorry to interrupt. Would it help you to
13 refer back to the recommended place of use?
14 A. Figure 7?
15 Q. Figure 7. Do you have a colored copy of that?
16 A. Yes, I do.
17 Q. Would that -- sorry. Would that help you to
18 refer back to where your recommended place of use would
19 be?
20 A. Yes. So the Richfield Canal system just
21 mimics the canal path as it moves from the Big Wood
22 River down the Little Wood River through the course of
23 that path that's been explained.
24 The Dietrich recharge site is off of the
25 Dietrich Canal. And I identified that, using aerial

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1 photography, evidence that water has been there on a
2 regular basis. And you can see that visually on the
3 aerial photography.
4 The recharge site for Shoshone was done the
5 same way with aerial photography.
6 Q. Okay. So your overall conclusions with the
7 place of use were the Richfield Canal system in the
8 canal itself, not including the East and West Mains; is
9 that correct?
10 A. That's correct.
11 Q. And then the Dietrich recharge basin; is that
12 correct?
13 A. That's correct.
14 Q. And the Shoshone recharge basin; is that
15 correct?
16 A. Correct.
17 Q. Okay. Let's flip back to Exhibit F. And
18 let's go to the next page, 3183. Is there anything --
19 you want to describe this page and what is written on
20 it?
21 A. So question number 3 asks for a delivery
22 system diagram. That's basically Figure No. 7 that was
23 in my report, so I didn't recreate that here.
24 Number 4 is not included. Section D is
25 recorded flow measurements. Since we were light on the

1 IDWR accepted measurement data for those canals, that's
2 discussed in my report, so there's nothing else that I
3 need to elaborate on that page.

4 Q. Okay. And could you please continue on to the
5 next page, 3184.

6 A. 3184 talks about the narrative. I think
7 that's covered fairly well in the report on where I got
8 the conclusions.

9 And then the second part of the narrative
10 talks about has the permit holder met all the conditions
11 of the permit approval. And most of those discuss
12 IDWR's acceptance of things, and so those were outside
13 kind of my scope of what I was able to evaluate. But
14 especially the fact that IDWR issued a permit, I
15 concluded that those conditions were all met.

16 Q. So you relied on IDWR's conclusions regarding
17 the condition?

18 A. Correct.

19 Q. Whether the conditions of the permit had been
20 met?

21 A. Correct.

22 Q. And you didn't investigate those things
23 further yourself; is that correct?

24 A. I did not, no.

25 Q. And then if you could just flip to the last

1 calculations in Appendix O. But the point of recharge
2 is to divert water when it's available during high flow
3 events, which are seasonally very -- they're very
4 variable. They vary extremely.

5 And so on page 3059, I discuss just very
6 briefly just something really quick, recurrence interval
7 flows based on the development period, and the highest
8 recurrence interval that existed downstream -- this was
9 using the USGS gauge on the Big Wood River below Magic
10 Dam near Richfield. It has a fairly long period of
11 record. The highest flow rate that we saw there
12 occurred in 1984, which corresponded to a 17-year
13 recurrence interval event.

14 Q. And what is recurrence interval event?

15 A. It's really a statistical evaluation at how
16 frequent that flow will occur. And so we typically
17 refer to as a hundred-year event being the max flood,
18 and that's what FEMA designs everything to, is that
19 hundred-year event, which has the probability of
20 occurrence at .01 or a one-percent occurrence over a
21 hundred-year period. And so the recurrence interval
22 just says, you know, approximately this flow will occur
23 once every 17 years.

24 Q. And you were looking at the flow below Magic;
25 is that correct?

1 page, 3185, and discuss the conclusions that were
2 memorialized there.

3 A. All right. So Section F talks about flow
4 calculations, on where the total flow came from. That's
5 discussed in the report and the table that we've
6 outlined. And that was Table 15?

7 Q. Fifteen, I believe.

8 A. So, yeah, Table 15 is a cumulative summary of
9 that. The volume calculations -- I don't know how much
10 you want to go into volume right now.

11 Q. Yeah. So let's just say, what was the
12 beneficial use that you recommended?

13 A. So I recommended recharge because that's the
14 only fate of that water I could determine.

15 Q. And period of use?

16 A. I left as applied for from January 1st through
17 December 31st.

18 Q. And what was the rate of diversion that you
19 concluded was --

20 A. Was that maximum diversion rate calculated in
21 1984, 634 CFS.

22 Q. Okay. And then the annual volume, which you
23 pointed out has been left blank, can you discuss with us
24 why that is left blank?

25 A. I left that blank but included some

1 A. Correct, on the Big Wood River, which
2 definitely has impounds of Magic Reservoir, as well.

3 And so I just wanted to get some sort of
4 quantification on the variability that, you know,
5 limiting a groundwater recharge right only to the volume
6 available during the five- or ten-year development
7 period really hampers the ability to divert and recharge
8 water when those extreme events do occur.

9 And I included just some other dates, 2006 and
10 2017, which were 21-year events, and 2006 as a 54-year
11 event, and 2017. If we would limit the volume of just
12 what was diverted during the development period for
13 recharge, it would really prevent us from capturing
14 those events when they occur.

15 On the flip side, the development period from
16 '82 to '92 included six years that had a recurrence
17 interval of 1.5 years or less, or very low flows. And
18 so there were only a few years that we even have had the
19 opportunity to recharge a large amount of volume.

20 And, you know, typically, runoff events are
21 fairly flashy. When they do occur is when those low
22 events or frequent events occur. They're not a long
23 duration. So we don't have a chance to really capture a
24 large volume.

25 And so given the rules that exist in the IDAPA

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1 Code that talks about the seasonal variability, it seems
2 like hampering a recharge right only during the
3 development period artificially limits that recharge
4 volume if it's occurring -- when it's there under large
5 events.
6 Q. So in a large year like 2017, using this water
7 right, what might occur if you were limited to say
8 13,000 acre-feet in terms of volume? What might occur
9 with that right?
10 A. That the right could still be on in priority.
11 There would still be volume available for recharge, but
12 you would have to cease recharging because you met some
13 arbitrary threshold of the volume. Even though there's
14 still flood concerns, you still have all those other
15 things that are occurring, the concern would be that the
16 right would have to be shut off for recharge under that
17 volume.
18 MS. VONDE: All right. I think that's all I
19 have on direct.
20 THE HEARING OFFICER: Okay. We're into the
21 lunch hour. What are the desires of the parties? To
22 break for lunch?
23 MR. JAMES: Let's break for lunch, Director.
24 We'll still get done today, I think.
25 THE HEARING OFFICER: Okay. Let's reconvene

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1 at what, 1:30? Is that acceptable? That gives us just
2 a little over an hour.
3 MS. VONDE: Yeah.
4 THE HEARING OFFICER: All right. Let's come
5 back at 1:30.
6 (Lunch recess.)
7 THE HEARING OFFICER: We're recording.
8 Joe, I assume you worked all through lunch?
9 MR. JAMES: No. I went and ate.
10 THE HEARING OFFICER: I didn't want to hear
11 your stomach growling on the record.
12 All right. After lunch, you may cross-examine
13 the witness, Joe.
14 MR. JAMES: Thank you, Director.
15 CROSS-EXAMINATION
16 BY MR. JAMES:
17 Q. Erick, I want to refer you back to the Table
18 3. I don't have a Bates page. It's page 6 in the
19 expert report.
20 A. Table 3 you said? Or on page 3?
21 Q. No, page 6, Table 3.
22 A. Oh, okay. All right.
23 Q. And the caption there, you testified somewhat
24 regarding that these water rights have the same point of
25 diversion. And just to be clear, that isn't the point

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1 of diversion listed on the permit; is that correct?
2 A. They are the points of diversion or points of
3 re-diversion that I identified in my report.
4 Q. Okay. So when you say the same source, it's
5 either the Little Wood or Big Wood but not the same
6 point of diversion as the permit?
7 A. No. So I identified points of diversion or
8 points of re-diversion, and this table indicates the
9 water rights that have the same source and those same
10 points of diversion that I identified.
11 Q. And I think we're on the same --
12 A. Okay.
13 Q. So these are the same source as the points of
14 diversion that you identified?
15 A. Correct.
16 Q. Okay. And not the same point of diversion as
17 listed on the permit?
18 A. No.
19 Q. Okay. And what did you use those water rights
20 listed for in the research?
21 A. These are rights that have the same point of
22 diversion based on IDWR's database.
23 Q. And what did you use them for in your
24 analysis? What was the point?
25 A. That's one of the items requested in the field

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1 exam, just any point of diversion that has the same
2 source and the same point of diversion.
3 Q. And what would the purpose of that be?
4 A. I don't know. The Department requested it.
5 Q. Would those water rights possibly have the
6 same period of use as the subject water right?
7 A. They could definitely have the same period of
8 use.
9 Q. And it may be appropriate then to kind of look
10 at any overlap or potential volume in the stream flows
11 using that water right information?
12 A. What the Department does with that
13 information, I'm not sure. I'm not sure what sort of
14 internal analysis they do on that.
15 Q. Well, let me ask you another question. Would
16 those rights have specific periods of use?
17 A. They would have a period of use, yes.
18 Q. And it could include irrigation?
19 A. I'm sorry?
20 Q. The rights could also be for irrigation?
21 A. There definitely are irrigation rights
22 associated with that.
23 Q. And was part of your analysis based on the
24 irrigation season?
25 A. Yes.

1 Q. Okay. And so --
2 MR. JAMES: And, Director, I'm going to ask
3 you to take official notice of the Department's water
4 right files regarding those rights listed on Table 3.
5 And, Director, I'd make further comment. As
6 indicated by the witness, they're required to be
7 included on the field exam for the Department's benefit,
8 so the Department would have access to look at those
9 permit details. And for the State to review any
10 license, I think the Department should still have the
11 authority to look at those details.
12 THE HEARING OFFICER: All right. Here's what
13 I'll do. Rather than -- and I guess I could say I'm
14 taking notice of them without making them part of the
15 record. Thoughts, Ann?
16 MS. VONDE: Yeah, I guess that would be my
17 thought. The Department always has access to those fact
18 files or those water rights. I don't know that they
19 need to become part of the official record of this
20 proceeding in order for you to have access to that
21 information.
22 MR. JAMES: My response to that, Director, is
23 I think if the Department can take official notice if it
24 becomes part of the record, I mean, that's the --
25 MS. VONDE: I guess I don't see the value of

1 having them in the record.
2 THE HEARING OFFICER: Well, my question is, if
3 this matter is appealed, it goes up, do I then have to
4 include copies of all of these water right files and
5 everything that's a part of it? I don't want to have to
6 do that. I think that's too expansive.
7 I think what I'll say is, I'll take notice of
8 these particular files. And if there's germane
9 information in those files that bear on the decision,
10 then I'll specifically refer to those documents as
11 important, one way or another.
12 And it may be that the licensing and the
13 identification for point of diversion in the license for
14 a subsequent decree might be valid. I don't know. And
15 if we limit it to the documents that are actually
16 referenced in the decision, I think that limited number
17 of documents will have to be included in the record.
18 So is that a reasonable compromise?
19 MR. JAMES: I think that's fine, Director.
20 MS. VONDE: That's acceptable.
21 THE HEARING OFFICER: Okay.
22 BY MR. JAMES:
23 Q. Sir, is it possible that those rights listed
24 specifically as out of the Big Wood River and for
25 irrigation purposes have a period of use commencing as

1 early as March 15th?
2 A. On the face of the water right, I'm sure that
3 there are a variety of different periods of uses.
4 Q. Did you review any of the water rights listed
5 on Table 3 as part of your analysis?
6 A. I looked at a few of them, and I don't recall
7 which ones. I relied on Lynn's testimony that
8 irrigation water was not delivered until May 1st.
9 Q. And let's step back. If I recall Lynn's
10 testimony, it was: Not typically. Is that the
11 information he relayed to you, as well?
12 A. He told me water was not delivered until after
13 May 1st, and the watermaster records usually confirm
14 that volume or high flow rates associated with
15 irrigation not delivered until after May.
16 Q. Okay. Were you present when Lynn testified?
17 A. I was.
18 Q. And did you hear him talk, delivery -- in his
19 recollection there was delivery as early as April 24th?
20 A. He did say that, yes.
21 Q. And do you recall him saying that the
22 irrigation typically commences on May 1st?
23 A. I don't remember him using those exact words,
24 but May 1st is the date for sure.
25 Q. Is the date you utilized?

1 A. Yes.
2 Q. Okay. In your analysis -- and I guess I'll
3 start with the Richfield Canal -- you used actual data
4 entered to calculate water in the stream or the stream
5 channel; is that correct?
6 A. Yes.
7 Q. And then in estimating any outlet for that
8 water, what did you look at?
9 A. The measurement at the headgate of the Jim
10 Byrne Slough.
11 Q. And what I'm talking about is just -- okay.
12 Let's move onto the Dietrich Canal.
13 A. Okay.
14 Q. Same thing. Did you use the actual
15 measurements from Gauge Station 11 for the input to the
16 Dietrich Canal?
17 A. Correct.
18 Q. Okay. And then how did you calculate the
19 outflows from the Dietrich Canal?
20 A. Measurements at the F waste gate.
21 Q. And did you look at any another laterals
22 coming off?
23 A. The laterals, in my conversation with Lynn,
24 those only flow during the peak irrigation season, so
25 July/August time frame. And so if there is water that's

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1 there, it's not very much, and it's only when the
2 canal's at full distribution. And so I did not include
3 any other laterals.
4 Q. So if you're not using -- I'm just not
5 understanding.
6 A. No, that's fine.
7 Q. So if there's -- if irrigation commences in
8 May --
9 A. The Dietrich starts in April.
10 Q. Okay. And I think you testified to this. In
11 your calculations, what date did you use as a start
12 date?
13 A. In the Dietrich on April 15th.
14 Q. 15th, okay. And you used a figure of 120 CSF;
15 is that correct?
16 A. Uh-huh.
17 Q. And that was for water that was being diverted
18 out of the Dietrich?
19 A. Correct.
20 Q. For irrigation purposes?
21 A. Correct.
22 Q. Okay. What I'm asking you is, did you look at
23 the headgate information or the diversion records out of
24 the Dietrich, or did you just use an estimate?
25 A. I just used an estimate.

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1 Q. Did you inquire of Kevin if those headgate
2 records were available?
3 A. So Kevin doesn't manage the Dietrich. He
4 diverts water out of the Little Wood into the Dietrich
5 Canal. The Dietrich then is managed by the Big Wood
6 Canal Company, is my understanding.
7 Q. Okay.
8 A. And I asked the canal company for the records
9 they had. So I did not evaluate any individual headgate
10 diversions.
11 Q. Did you ask -- one question at a time. Did
12 you ask -- so you didn't ask the watermaster if he had
13 any records of diversions out of the Dietrich Canal.
14 Did you ask Big Wood Canal Company if they had
15 any headgate measurements or records for diversions out
16 of the Dietrich Canal?
17 A. I did not.
18 Q. Okay. And you chose just to use an average or
19 an estimate?
20 A. An estimated average.
21 Q. Okay. And I guess that's kind of twofold.
22 It's an estimated average?
23 A. Uh-huh.
24 Q. Okay. So in your analysis, you're looking at
25 actual stream flows and channel flows as to what's in

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1 the river and then estimating on average what would come
2 out on a meter; is that correct?
3 A. Yes. I would say that that's correct.
4 Q. And I guess the point being that, maybe
5 another way to look at it, you came out with the
6 recommendation based on the max grade of diversion in
7 1984; is that correct?
8 A. I believe that '84 is right for the Dietrich
9 Canal.
10 Q. Well, let's look at what exhibit is your field
11 exam.
12 A. This is 84 on page 13 of my report.
13 Q. Well, I want to look -- let's go to your --
14 we'll probably go back to where the appendix is at, and
15 you have Bates stamps on these, but it would be the last
16 page of the exam, Bates stamp 3185. And you came up
17 with a total rate of diversion of 634 CFS; is that
18 correct?
19 A. That's correct.
20 Q. Okay. And that was based on a date in 1984?
21 A. That was the calculated maximum diversions
22 from all three sites in 1984.
23 Q. Did it come from a specific date?
24 A. It did not.
25 Q. So how did you -- did you take the highest --

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1 well, explain to me, how did you come up with that max
2 rate if you didn't look at specific data?
3 A. The maximum rate for each of those sites was
4 calculated, as discussed previously.
5 Do we need to go through each one of those,
6 Mr. James?
7 Q. No.
8 A. Okay. So I went through each individual site
9 and determined maximum diversion rate per year, and then
10 each of those diversion rates per year is in Table 15 of
11 my report, which is on page -- Bates page 3058.
12 And so for the maximum diversion for 1984 for
13 the Dietrich site, for the Shoshone site, and for the
14 Richfield Canal, the total diversion rate recommended is
15 the sum of those three in 1984.
16 Q. And that's my question. Looking at Table 15,
17 1984, from the Dietrich, you listed a max diversion of
18 276; is that correct?
19 A. That's correct.
20 Q. Okay. And then you take those on across the
21 table, including the Shoshone recharge site and the
22 Richfield Canal, and come up with 634?
23 A. Uh-huh.
24 Q. Okay. My question -- those are cumulative.
25 Were those -- was the diversion at the Dietrich Canal

1 for the 276 diversion at the same time as the diversion
2 from Shoshone?
3 A. They were on different dates within 1984.
4 Q. So you're allowed to be cumulative? You can
5 take data on this date and divert this much, and I
6 stopped diverting, and the next day I diverted another
7 amount, and I add those together?
8 A. In my experience -- and I speak most recently
9 on a recharge site that we did a license exam in the
10 Bellevue Triangle, we put HOBO transducers in
11 measurement flumes, and we measured those every 15
12 minutes, and the State said we can evaluate and pick the
13 largest diversion rate measured at all those sites and
14 that we weren't limited to a certain date. And so we
15 have historic -- you know, historical evidence that, you
16 know, the State evaluates those.
17 Q. So step back, though. You installed some
18 equipment to measure certain flows?
19 A. Uh-huh.
20 Q. Okay.
21 A. Yes.
22 Q. And you received data from that?
23 A. Uh-huh. Yes.
24 Q. Is that correct?
25 A. Yes.

1 what the average outtake from the Dietrich Canal was in
2 the prove-up period?
3 A. I was not.
4 Q. And you indicated, I think several times in
5 your testimony, that this permit could be the only basis
6 for water in a particular system, and that would be the
7 Richfield Canal or the Dietrich Canal.
8 How did you do that calculation? How did you
9 determine that?
10 A. I'm not understanding the question.
11 Q. Well, did you eliminate the other permitted
12 water sources?
13 A. Well, I mean, walk through each of those. So
14 the Richfield Canal, I was told by Mr. Harmon that their
15 irrigation season did not start until May 1st, that the
16 stock-water rights are off on the 31st of March, and so
17 they're not active in April. And so if there's water
18 being delivered in April, the only permit that is really
19 valid is that.
20 Q. And that's my question, the only permit that's
21 valid. Did you investigate those other permits listed
22 on Table 3 and see if they were possibly or could be
23 utilized?
24 A. They definitely had a period of use that
25 covers that same time, I think, if that's what you're

1 Q. So when you said that they didn't -- was it
2 more than one permit or one license you were doing a
3 field exam on in that case?
4 A. It was a combined system, and water was
5 diverted three different directions, and it was the
6 maximum diversion rate for that year.
7 Q. And not to get so off track, but in this case
8 you're literally saying, we took this much on a certain
9 day in 1984, and then at some other point we took this
10 much from a different source on a different date and
11 then added those together in three different
12 measurements to come up with the total of 634?
13 A. Yes.
14 Q. Do you know what the max diversion at any
15 particular point in time for water right 37-7842 was?
16 A. I have not calculated that.
17 Q. And I also want to verify, you -- and, again,
18 we'll start with the Dietrich Canal. You took your
19 estimate of 120 CFS as being utilized for irrigation
20 demand from a statement from Lynn; is that correct?
21 A. That's correct.
22 Q. And that was based on Lynn's experience since
23 he's been manager of the Big Wood Canal Company?
24 A. Correct.
25 Q. Were you able to gather any information on

1 asking. But the management of the canal was that that
2 water was not delivered during that period of time.
3 Q. But my question is, basically you're just --
4 other than Lynn saying that now this is when the
5 irrigation season starts, that's your only information
6 that you used to obtain your estimates?
7 A. That's the best information that I had.
8 Q. Okay. Well, would the permits have been
9 another source of information?
10 A. The water rights?
11 Q. Uh-huh.
12 A. You know, there's lots of water rights that
13 have periods of use that are not delivered until later
14 within that period. And so that's standard practice,
15 and I didn't question that too much.
16 Q. Well, let's step back. Lynn testified that,
17 other than the Big Wood Canal Company, there are other
18 decree holders downstream that can call for delivery of
19 their water during their period of use, and that can be
20 in the spring before May 1st or after October 1st.
21 And if you recall, he mentioned the agreements
22 for that, and he mentioned the court case, that
23 basically his testimony was that if there's 70 CFS flow
24 into the Magic, they can call for delivery of that
25 water.

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1 A. I didn't see any evidence in the watermaster
2 records, especially in the East and West Canal, to
3 support that irrigation water was delivered.
4 Q. And your testimony is that's where irrigation
5 water would be delivered, would be those two -- if you
6 had Big Wood water through the Richfield Canal, if it
7 was for irrigation purposes, it would have to go through
8 the East and West Main?
9 A. Yes. And, again, that's from Mr. Harmon.
10 Q. And so I've handed you the water right detail
11 for Water Right No. 37-10343. That's one of the rights
12 listed on Table 3. Do you recognize that?
13 A. Yes. Well, I have not looked into this water
14 right before.
15 Q. Okay. You looked at the source of water?
16 A. It's from the Big Wood River.
17 Q. Okay. And you notice the various points of
18 diversion, which also include off the Big Wood River in
19 Blaine County?
20 A. There is a point of injection in Blaine
21 County. The point of diversion is in Lincoln County.
22 Q. Oh, okay. Do you recognize that point of
23 injection into Blaine County?
24 A. I'm trying to locate that. I can see the
25 township and the range section.

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1 Q. Is it correspondent with any known diversions?
2 A. It looks like this water right has a
3 description of a point of injection from the Richfield
4 Canal into the Jim Byrne Slough.
5 Q. Okay. So that would come from the -- and
6 what's the purpose of that right?
7 A. It's for irrigation.
8 Q. And the period of use?
9 A. From March 15th to November 15th.
10 MR. JAMES: Your Honor, I'm going to move for
11 the admission of Exhibit 206.
12 THE HEARING OFFICER: Ann?
13 MS. VONDE: Yeah, I'll just make this
14 objection as to 205 (sic). I haven't seen this document
15 before today.
16 THE HEARING OFFICER: What's the basis?
17 MS. VONDE: I haven't seen this document. It
18 wasn't disclosed in discovery.
19 MR. JAMES: In response, Director, he just
20 testified from his knowledge that no water diverted from
21 the Richfield Canal into the Jim Byrne Slough for
22 irrigation. He said it all went to the East or West.
23 THE HEARING OFFICER: Yeah, this is
24 cross-examination. Offered for rebuttal. Objection
25 overruled. I'll receive the document marked as 206.

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1 It's not marked Petitioner's Exhibit, but I
2 think it is in consecutive order, so we'll refer to it
3 as Petitioner's Exhibit No. 206 as received into
4 evidence.
5 (Petitioner's Exhibit 206 admitted.)
6 BY MR. JAMES:
7 Q. And I guess your information from Mr. Harmon
8 may have been incorrect as to irrigation water through
9 the Jim Byrne Slough?
10 A. I wouldn't go that far. I mean, I would trust
11 Mr. Harmon's experience and his knowledge. I don't have
12 any evidence this water right was delivered. And so on
13 the face of the right, I can say that it could have
14 been, but I have no knowledge that it was.
15 Q. And to step back, I'll have you look at 206
16 again. And the current owner, as well as the original
17 owner, neither one is the Big Wood Canal Company; is
18 that correct?
19 A. That's correct.
20 Q. So this isn't a water right held by the Big
21 Wood Canal Company?
22 A. It's in combination with water from the Big
23 Wood Canal Company. It's Condition No. 6.
24 Q. Yeah. But this right isn't held by the Big
25 Wood Canal Company, is it?

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1 A. That's right. It is not.
2 Q. And this water right has a priority date of
3 1899?
4 A. It does.
5 Q. And it looks like it was at least a valid
6 water right through the prove-up period?
7 A. What do you mean by "prove-up period"?
8 Q. The period in which the permit holder had the
9 time to submit proof of beneficial use specifically on
10 that 37-7842.
11 A. Yes.
12 Q. And it appears -- looks like in the upper left
13 corner there's a printout date. Do you see that?
14 A. Oh, of today's date?
15 Q. Is it today's date?
16 A. Yeah.
17 Q. And so, anyway, there's no indication that
18 that water right has been forfeited or it's not a valid
19 right and it was in existence during the prove-up
20 period?
21 A. There's no indication that it was -- yes.
22 Q. And if it hadn't been used for a period of
23 time, it would have been subject to forfeiture?
24 A. That's for the Department to decide, not me.
25 Q. You don't know anything about forfeiture?

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1 A. Well, I know about forfeiture, but I can't
2 declare forfeiture, you know, for these last rights that
3 haven't been used for numerous years that are still
4 valid on the face of the rights, so...
5 Q. Even after the adjudication?
6 A. In some cases, yes.
7 Q. Okay. When talked to Mr. Harmon regarding
8 this water right, did you inquire if there was any
9 records with the Big Wood Canal Company regarding a
10 delivery request by this permit holder?
11 A. I did not ask that question.
12 Q. And did you inquire of the Lower Snake River
13 Recharge District if they had ever made a demand for
14 delivery of that recharge water?
15 A. Of the permit in question?
16 Q. Yeah.
17 A. I did not ask the Lower Snake Recharge
18 District that question.
19 Q. And you conducted this field exam on behalf of
20 the Idaho Water Resources Board?
21 A. Correct.
22 Q. Okay. And did you go through their records to
23 see if there was a request or a demand for delivery?
24 A. No. I'm not sure there's a formal request for
25 delivery form.

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1 Q. Do you know if you called anybody? Did you
2 find any record of any type for any request for
3 delivery?
4 A. I have lots of delivery -- or lots of
5 measurement data from the canal company.
6 Q. Again, I'm showing you Exhibit 201. And, sir,
7 that was previously admitted. I believe it was admitted
8 yesterday. And do you recognize what this is?
9 A. Yes.
10 Q. And what is it?
11 A. It's a proof of beneficial use form submitted
12 by Gerald Martens.
13 Q. And on this subject? Water right?
14 A. For the water right in question, 37-7842.
15 Q. And in that, Mr. Gerald Martens indicates the
16 full extent to which the permit had been developed?
17 A. Yes.
18 Q. Okay. And so we do have a statement as to at
19 least what the permit holder perceived to be his use of
20 the water?
21 A. That's what the proof form is, yes.
22 Q. Okay. I think earlier on direct you were
23 talking about the basin off the Dietrich Canal, and the
24 question was regarding, in effect, where the water went,
25 if it went into the aquifer. I believe your response

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1 was: No other place to go. Is that correct?
2 A. That appeared to me to be the logical place
3 for it to go, yes.
4 Q. Okay. So did you go physically view the site?
5 A. I have been to the diversion. I did not go
6 down to the actual recharge basin.
7 Q. Okay. And how far away from the canal was the
8 basin?
9 A. The headgates on the canal?
10 Q. Uh-huh.
11 A. So adjacent to the canal.
12 Q. Okay. At the time you viewed it, was there
13 any water going through the headgate, the headgate from
14 the Dietrich Canal into the flood basin?
15 A. No. I have not been to that location.
16 Q. Okay. So you don't know how long water stands
17 or if it evaporates or if it's consumed by vegetation?
18 Or you don't have any personal knowledge as to how that
19 water dissipates from that area?
20 A. I don't. We've never done any recharge
21 studies there. We have done recharge studies in other
22 locations in the same area, so I have an idea of how it
23 will function. But no.
24 Q. And so I think, you know, Lynn testified -- he
25 referred to it as a "flood basin." I've heard it

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1 equally referred to as a "recharge basin."
2 What's that based upon if there has been no
3 recharge studies done at that location?
4 A. I don't think there's an official, like, name
5 on it.
6 Q. So it's kind of privy to the person that's
7 talking?
8 A. Yeah. It was originally developed as a way to
9 spill excess water in a flood event. And so, you know,
10 back in the '70s, I think that's what they built it for.
11 You know, recharge water is flood water. You know, a
12 1980 surface water right isn't on except during a flood
13 event. And so whether they call that a "flood basin" or
14 a "recharge basin," to me, it's the same water being
15 diverted.
16 Q. Well, and I guess it kind of gets back to the
17 point it could be diverted for flood control out of the
18 Dietrich Canal through that headgate and not on demand
19 or request for diversion from this particular permit
20 holder?
21 A. But there is a valid permit that they can
22 divert water for that purpose, too.
23 Q. They can, but that doesn't necessarily mean
24 that is why it was diverted.
25 A. Yeah, and I don't know. I don't know. I

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1 wasn't there at that time, so I can't say definitively,
2 yes, they diverted it for this purpose. But I can say
3 that the evidence points to the water disappearing to
4 some degree.
5 Q. And that's true on all the diversions that you
6 listed as recharge in the report. You don't know the
7 basis of that diversion, why it was diverted?
8 A. That's true. But I don't have any evidence
9 that it wasn't diverted for that reason either.
10 MR. JAMES: I think that's all I have,
11 Director.
12 THE HEARING OFFICER: Redirect? I'll give you
13 a moment. Should we take ten minutes?
14 MS. VONDE: Yes, please. That would be
15 welcomed.
16 THE HEARING OFFICER: Okay.
17 MS. VONDE: Thank you.
18 (Recess.)
19 THE HEARING OFFICER: Okay. Are we ready?
20 We're recording again after a brief recess. Ann.
21 MS. VONDE: Yeah, I'll just have a couple of
22 questions on redirect.
23 REDIRECT EXAMINATION
24 BY MS. VONDE:
25 Q. You've gotten some questions about whether or

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1 not there was a request made for the diversion of
2 recharge water under this permit.
3 To your knowledge, is that how diversions are
4 made, by some sort of formal request on a piece of paper
5 that's handed to somebody?
6 A. No.
7 Q. Can diversions be done informally?
8 A. Usually people, individuals, water right
9 holders will call the watermaster and ditch rider and
10 just say, I need X number, I need my water, and then the
11 water is delivered.
12 Q. So it could have been a phone call back in
13 1984 for all you know; is that correct?
14 A. It could have been.
15 Q. Does the lack of documentation, especially
16 paper documentation, in your opinion, mean that
17 something didn't occur?
18 A. No.
19 Q. That's all I have.
20 THE HEARING OFFICER: Joe?
21 MR. JAMES: I'll just follow-up on that.
22 RECROSS-EXAMINATION
23 BY MR. JAMES:
24 Q. So you'd call an informal call to the ditch
25 rider, and it's administered by the canal company or the

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1 watermaster, correct?
2 A. Correct.
3 Q. And then the watermaster will note that
4 delivery in his logbook and so will the ditch rider.
5 So I'm asking you, did you request those
6 records from Lynn?
7 A. I requested the measurements made of the canal
8 on the canals. I did not request any other records.
9 Q. Okay. And to clarify, there's all sorts of --
10 you know, there can be a delivery priority cutoff, more
11 water that, again, calls for delivery or demand for
12 delivery, and that can all be done informally, but it's
13 logged.
14 So that's my question. Have you seen any logs
15 or delivery records for this permit?
16 A. No.
17 Q. And regarding -- and that's the same question
18 you were asked earlier. Regarding the other diversions
19 from the Dietrich Canal, did you look at any of those
20 delivery records?
21 A. No.
22 Q. No further questions.
23 THE HEARING OFFICER: Okay. Erick, I have a
24 couple of questions.
25 EXAMINATION

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1 BY THE HEARING OFFICER:
2 Q. So I want to just look at the three summaries
3 there that are in the main body of your report. You
4 have -- I think we start at Table 9, page 2052; and
5 there's Table 10, which lists the two-column table, and
6 that's years '82 through '92; and Table 11, which is a
7 summary of calculations to determine recharge of the
8 Shoshone site; Table 12, which was the years similar to
9 the previous tables; and then Table 13 and Table 14.
10 Just as a general question -- so these tables
11 are labeled as Example Recharge Flow Calculation. So I
12 just want to point out, to begin with, that Table 9 is
13 an example recharge flow calculation for what year?
14 A. For 1984.
15 Q. Okay. And Table 11 is a sample (sic)
16 calculation for what year?
17 A. Also 1984.
18 Q. And then I turn to Table 13, and it is a
19 sample calculation for what year?
20 A. 1987.
21 Q. And so just out of the chute, why are you
22 calculating and presenting example recharge flow
23 calculations for 1984 for two of the proposed recharge
24 sites but the third one you don't use 1984 but instead
25 you present 1987 data? Why is there a departure?

1 A. That's a good question, and the reason why is
2 I decided to select the month and year that had the
3 highest flow calculation. And so for the Dietrich and
4 Shoshone site, that was both 1984. For the Richfield
5 Canal, that occurred in 1987.
6 And so I actually went back and forth
7 internally in my own mind, should I keep it 1984? But I
8 decided to use the maximum calculation value that I
9 determined during the development period.
10 Q. Okay. So I want to focus on Table 13, and you
11 have listed a maximum recharge of 300 CFS during that
12 year. And I'm interested, because the maximum recharge
13 occurred on November 1, 1987 for one day. Is that the
14 way you read the table?
15 A. That's the way I read the table.
16 Q. So it was recharged for one day, and then what
17 happened on the 2nd?
18 A. Well, so it goes back to logic on how I
19 approached this. I was told by Mr. Harmon that any
20 diversion to the East or West Canal indicated that that
21 was irrigation.
22 Do I think that someone was actually
23 irrigating on November 2, 1987? No, I don't think they
24 really were. I think it was probably excess flow that
25 they were just trying to get rid of. But based on the

1 A. That definitely could be the case.
2 Q. And so let's go back to November 1st, which it
3 appears then that No. 4 gauging station -- and as I
4 understand it, that's the head of the Richfield Canal,
5 right?
6 A. That's correct.
7 Q. And Mr. Harmon testified about the time that
8 it takes for water to reach and fill the canals down the
9 canal. And that period of time was somewhere in
10 between, I think, eight hours and 24 to 48 hours; is
11 that correct?
12 A. It varies. It will.
13 Q. So, yeah, a reading of 300 CFS at Gauge No. 4
14 and then an allocation or a crediting to recharge of 300
15 for a single day, knowing the time frame that it takes
16 for delivery of that water to fill the canal -- and I
17 guess I ask the questions.
18 Is this number even reasonable to list as a
19 maximum recharge value, given the short period of time,
20 given the testimony of Lynn Harmon about the time that
21 it takes to actually fill the canal?
22 A. So his testimony regarding kind of shocking
23 the system at the end of the season, that was new to me.
24 So I would maybe question this data as fulfilling that
25 approach.

1 logic on how I approached it, I had to assume that that
2 was zero recharge.
3 Q. So you listened to the testimony of Lynn
4 Harmon about diversion of water that leaked for a brief
5 period of time. Do you remember his testimony?
6 A. That they kind of shocked the system almost?
7 Q. Yeah. As I recall, and maybe I can
8 paraphrase, but they sent water down through the
9 system -- and I'm paraphrasing -- to fill the existing
10 stock ponds for people, and it was for a short period of
11 time, and then they shut the water off.
12 A. I do recall that, yes.
13 Q. And so you cease this analysis on 11-2. Was
14 there a reason for the cessation of the analysis on
15 November 2nd?
16 A. It actually just filled the lines of the
17 table. There was no rhyme or reason.
18 Q. But were there continued diversions into the
19 East and West Canals?
20 A. There were a few more dates of diversion data.
21 Q. And then did they turn to zeros?
22 A. They just stopped recording.
23 Q. So would this be a possible illustration of
24 Lynn Harmon's testimony about delivering water late in
25 the season?

1 If we look in April on that same table, just
2 one on the left-hand side, we have a recharge value of
3 291 on April 30th. And so, you know, is the 300 exactly
4 right? Well, if that one's not, we have a value that's
5 also pretty close in that same ballpark, in that same
6 area.
7 Q. And I'm acting a little as if this is
8 cross-examination.
9 A. Sure.
10 Q. But my question was, is it reasonable to use
11 the 300 CFS value on November 1st for one day when we
12 know that it takes time to fill the canal? That's the
13 question, not whether 291 is a reasonable value or not.
14 Is this number that you listed a reasonable
15 value, given Lynn Harmon's testimony?
16 A. I would probably go back and look at that a
17 little closer, given his testimony again. That I get a
18 shocking system at the end of the season, that was brand
19 new to me today.
20 I viewed this, when I was looking at this data
21 specifically, that for some reason there was excess
22 water in the system, and they were trying to get rid of
23 it as soon as they can, and so that's why they opened up
24 both the East and West Canals.
25 Lynn never conveyed to me, upon my questioning

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1 of him, that they flood the system at the end. And I
2 didn't see that on a regular basis in the data.
3 Q. Okay. I want to go back to this same table,
4 Table 13, and work through the numbers.
5 A. Okay.
6 Q. So on 4-21, given Lynn Harmon's testimony
7 again, we have 122 CFS diverted at No. 4, which is the
8 head of the Richfield Canal, right?
9 A. Correct.
10 Q. And then there's zeros diverted out of the
11 East Canal, zero in the West Canal, zero at the head of
12 the Jimmy Byrne, and so you credited the entire 122 CFS
13 to recharge.
14 Now, given what we just talked about, is the
15 credit of that 122 a reasonable number, knowing that it
16 takes time to charge the system?
17 A. So I did not go through and incorporate any
18 sort of travel time or charging delay on any of this
19 data.
20 Q. Well, I don't think you answered my question.
21 My question is, is it reasonable to assume that that
22 entire 122 CFS should be credited to recharge?
23 A. Probably not.
24 Q. Okay. So then we see two days of consistent
25 numbers that seem to be the same. And then on 4-24

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1 there's a departure, and I have 172 CFS diverted into
2 the Richfield but only 86 CFS measured at the head of
3 the Jim Byrne Canal.
4 And so you've determined then that recharge
5 occurred where? Where did the other 86 CFS -- where did
6 it go?
7 A. Through the canal system. Through the bed of
8 the canal system. I don't have any record of where that
9 water was delivered.
10 Q. So the assumption is that the remainder or the
11 loss all occurred between the head of the Richfield
12 Canal and the head of the Jim Byrne Slough, correct?
13 A. That's correct.
14 Q. And then the same thing would be true as we
15 work down through the rest of the numbers?
16 A. Correct.
17 Q. I want to look at 4-24, the numbers, and it
18 appears that the head of the Jim Byrne Canal was
19 measured at 86 CFS, and so the difference is 86.
20 Does it seem odd to you that those two numbers
21 are exactly the same?
22 A. It does seem odd.
23 Q. And then I come to the next study, and it says
24 4-25-87, and I end up with 93 at the head of the Jim
25 Byrne and 93 for recharge.

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1 Does it seem odd to you that those two numbers
2 are exactly the same?
3 A. It does.
4 Q. In consecutive days?
5 A. Uh-huh.
6 Q. And that each of those numbers is half, as I
7 look at it, of what the measured flow is at No. 4?
8 A. I'm sorry. Was that a question?
9 Q. Well, if it's equal, some of those numbers
10 should be the flow at No. 4, right?
11 A. That's correct.
12 Q. So they're exactly half of the flow measured
13 at No. 4, and they're exactly the same. Does that give
14 you pause looking at the data, two in a row?
15 A. It's a little suspect.
16 Q. Okay. And then 4-26, it's not exactly split,
17 not identical, but they're very close.
18 Okay. Now, I think you also heard Lynn Harmon
19 talk about the present method of delivering water
20 through the Richfield?
21 A. Yes.
22 Q. This shows a span of delivery through the
23 Richfield of -- you know, if I ignore, and I'm tempted
24 to -- the 4-21-87 number for recharge. But even if I
25 assume that the two numbers and the data that we talked

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1 through are correct, I have about seven days of recharge
2 that was occurring.
3 And you heard Lynn Harmon testify about the
4 period of times in which they fill the Richfield Canal
5 and deliver water. And do you recall what his answer
6 was?
7 A. Not verbatim.
8 Q. Well, do you remember approximately a period
9 of time?
10 A. Forty-eight hours.
11 Q. Yeah. That's what I remember. And they don't
12 slowly fill the system. Now, he said it might be a good
13 thing and do, as I recall.
14 But do you think that this pattern right here
15 is the pattern that he would follow in delivering water
16 into the Richfield?
17 A. He very well could do that for sure.
18 Q. And the last question that I have is, do you
19 have any idea about whether this water was being
20 delivered from the Big Wood?
21 I'll withdraw that question.
22 I assume that in your calculations and in
23 looking at these tables and deriving numerical values
24 from Table 12 -- I'm sorry, 10, 12 and 14, that you
25 accumulated and calculated similar numbers for each of

1 these (unintelligible). In other words, you calculated
2 a similar sample calculation for each of the three
3 recharge areas?

4 A. Yes. Appendixes L, M, and N have all those
5 calculations.

6 Q. Well, I thought there were some of them in the
7 appendixes, but I wasn't sure. I didn't -- I got
8 spreadsheet calculations of Dietrich site flows in L.

9 A. Yeah.

10 Q. I don't know whether these calculations
11 contain that information.

12 A. Yeah. So that's all the period of development
13 period record, especially calculations for the Dietrich
14 site in L.

15 Q. By year, that would compare to the --

16 A. Yes.

17 Q. -- sample calculations of Table 9, 11, and 13?

18 A. Yes.

19 Q. Okay. And then I have -- in the appendixes, I
20 also have Appendix M, which also is a spreadsheet
21 calculation of the Shoshone site flows. And this
22 particular appendix would also correspond at least to
23 the calculations for Shoshone that are depicted in
24 Table -- sorry, Table 11?

25 A. Correct.

1 THE HEARING OFFICER: So if it's in the
2 original exhibits and the appendix, then that's fine. I
3 don't want to go through in detail. But I want to make
4 sure I can look at those and say: Is '87 an anomaly?
5 What's happening in all of those years?

6 I think it's important, for me at least. And
7 I'm just saying now -- I'm not asking a question -- but
8 for me at least, I look at what's happening in the
9 Richfield. And I go, I think it's really suspect. But
10 I'll look at all those calculations.

11 Okay. I don't have any more questions.

12 Now, have I raised some, Ann?

13 MS. VONDE: No, I don't think so.

14 THE WITNESS: The data is the data, so...

15 MS. VONDE: Yeah, it's all there for you to
16 look at.

17 MR. JAMES: And, Director, just to clarify.

18 RE-CROSS-EXAMINATION

19 BY MR. JAMES:

20 Q. Erick, you were -- when Lynn testified on
21 cross about charging the system to start up, he
22 specifically testified on that line item 11-1-87 on
23 Table 13. Do you recall that?

24 A. I don't recall him directly referring to that
25 table.

1 Q. But I don't have a corresponding calculation
2 for Richfield.

3 A. That's Appendix N.

4 Q. It is?

5 A. Yes.

6 Q. Appendix N in my binder is blank. I have
7 nothing in the three-ring binder, and that may be just a
8 mistake.

9 MS. VONDE: If it was a mistake, it was
10 probably mine in making copies.

11 THE HEARING OFFICER: Do we have M somewhere?

12 Okay. Is it in yours?

13 THE WITNESS: Yes.

14 THE HEARING OFFICERS: Okay. All right.
15 That's helpful, because I have no -- nothing. I just
16 wanted to know where they were, because I've spent quite
17 a bit of time looking at the Richfield, and I wanted to
18 see, year by year, what period of time that recharge is
19 even happening. And Lynn Harmon is saying that's not
20 typical. Maybe it was typical back during the
21 development period. But without the information, I
22 can't determine that, so...

23 MS. VONDE: Do you have it in your binder,
24 Erick?

25 THE WITNESS: It's in this binder, yeah.

1 Q. Yeah. And you reviewed -- that was the basis
2 of the question.

3 The other thing I'd point out on charging the
4 system, if you dump the water there might be an
5 absorption that's recaptured underground. And I note
6 that both on 11-2-87, the following day, there's
7 actually more going out of the Richfield Canal than was
8 going in, and the same is true on 4-22-87. The day
9 after the water is put in, there's actually -- the next
10 day there was actually more coming out than going in on
11 both occasions; is that correct?

12 A. That's correct.

13 Q. Okay.

14 THE HEARING OFFICER: Well, I want to tell
15 you, I look at the appendixes for -- let's see. What's
16 the first one? Appendix L, I guess. L, M and N. So
17 I'm going to look at what's happened with the data in
18 those.

19 Okay. More witnesses, Ann?

20 MS. VONDE: No, not from us.

21 THE HEARING OFFICER: Okay. Let's talk
22 about -- Erick, I guess you're excused.

23 THE WITNESS: Thank you.

24 THE HEARING OFFICER: Okay. Let's talk about
25 where we go from here. I'm not asking for oral

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1 argument. I think usually oral argument turns out to be
2 a review of the information that's already been
3 presented, and I think we'd be taking up time that's
4 unnecessary.
5 Do the parties want to brief, file posterior
6 briefs?
7 MS. VONDE: Yeah, in terms of oral argument at
8 the end, I do think it might just become a repetitive
9 review of what's already been said today, so I'm okay
10 with that.
11 I guess I don't necessarily -- I'm not
12 requesting posterior briefing, unless there's something
13 specific that you would like to see from us, and then I
14 would be, of course, happy to oblige.
15 THE HEARING OFFICER: Okay. Well, let me just
16 talk through some issues that I guess I will
17 be interested in. And I to do this with some backlash,
18 but I think it's important for the parties, and
19 sometimes when I write a decision, the attorneys will
20 say, Well, wait a minute, we've been blindsided. We
21 didn't know the director or the hearing officer was
22 looking at these particular issues or these subjects,
23 and we didn't have an opportunity to address this.
24 And this won't be a complete or a
25 comprehensive list of issues. But one of them, I can

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1 tell you right out of the chute, is that I am concerned
2 about the passive or latent nature of the recharge and
3 its relationship to then assert that there's been a
4 diversion in placing water to beneficial use, because
5 for me, at least, everything that I've heard today has
6 not been an active and overaction on the part of the
7 permit holder to divert water and put it to beneficial
8 use.
9 And I just thought I'll say -- and maybe this
10 is for Wes' benefit or for Ann or whoever else -- my
11 understanding, at least in looking at this, and it's not
12 the same thing, but the Water Board, honestly, is
13 expecting out of people who are conducting recharge very
14 careful measurements about how much water is being
15 diverted and how much is being put into the canal.
16 There isn't any additional water. And if there is,
17 there has to be a very, very exact accounting and an
18 exact accounting of how much water is going back into
19 the river.
20 And so I sort of look at this and say to
21 myself, Well, based on the passive nature of this, what
22 am I supposed to do here? And then I look at it, as
23 well, and I look at the data. And I can tell you, at
24 least for at least two of the three, I think the data is
25 suspect related to any reasonable standard of

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1 measurement in determining quantity.
2 And that's -- and I'll tell you, that's the
3 Richfield and that's the Dietrich, because I have my
4 (unintelligible) estimates backing into those. And I
5 guess I look at it and say, I'm not sure that's an
6 appropriate standard. So you can argue those things.
7 I'm not sure what I'd do with it.
8 The Shoshone site, in my opinion, as I look at
9 it, has a more exact measurement. But it is -- it
10 relies on a structural relationship. It's a structural
11 hydraulic relationship between water levels in the Wood
12 River -- in the Little Wood River and the elevations of
13 water in the Milner-Gooding Canal, and it relies on
14 those relationships during the irrigation season, not
15 during the non-irrigation season.
16 So because of that relationship and because
17 that's the way the water is passively delivered and
18 delivered to a dedicated recharge site, I have greater
19 comfort in looking at that particular site. But because
20 of the reliance on an existing structure and passive
21 nature again of the diversion, I'm concerned that if
22 there's an authorization of this recharge, without
23 limitation, that water right will be enlarged beyond
24 what the beneficial use was.
25 In other words, the period of time within

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1 which -- and this is my take. The period of time within
2 which the recharge water in the Little Wood River would
3 contribute some water to the Milner-Gooding Canal would
4 be limited, and it would be within the irrigation
5 season, not within a non-irrigation season, because
6 there was a cofferdam that's built there.
7 So perhaps there's an opportunity for a
8 quantity and a flow rate. But to just say the volume,
9 any volume can be diverted with that flow rate over the
10 course of the entire wintertime recharge period, I'm not
11 sure that's helpful for me to reference.
12 So all of those issues, I guess, are out
13 there, as well as the issue about lending the recharge
14 right to a particular party. Anyway, to me, that's a
15 central concern that I have in looking at this. And
16 there are some other procedural concerns. I don't know
17 whether they're significant or not, so let me just talk
18 about them.
19 What's the effect of an amendment that's
20 signed by the Board that designates where the point of
21 diversion will be and where the place of use will be?
22 Does it have some sort of effect of saying, This is what
23 we have and this is all that we have?
24 And the second question is raised and related
25 to the filing of the proof of beneficial use. I know,

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1 Joe, you referred to language on proof of beneficial
2 use, and a decision by James Cefalo relied on a
3 signature that says, We hereby relinquish the remainder
4 of the water to the State of Idaho.
5 So is that effective as against the Board in
6 limiting this particular water right? I don't know the
7 answer, but I know what the processes are for requiring
8 that licensing amendment, and I know that the Department
9 essentially says, Sign this or else you won't get a
10 license.
11 And so I also know that there's some equities
12 there that I think are not fair, but I suppose that's an
13 issue. And I don't know whether there are other
14 procedural issues in this, but I think I've voiced my
15 main concern in looking at all of the data and the
16 presentation that's been presented.
17 So I don't know that I have anything else. Do
18 you guys? Do you want to mention anything?
19 MS. VONDE: I don't think so.
20 THE HEARING OFFICER: Okay. All right.
21 So now my question is do you want to prepare
22 briefs?
23 MR. JAMES: Director, Ann and I talked
24 beforehand. I said yesterday I wasn't really inclined
25 to brief it but today I was, and I kind of didn't spend

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1 a lot of -- or tried not to spend a lot of time talking
2 too much today, because I assumed we'd have an
3 opportunity to brief it, in other words. And so I think
4 briefs would be appropriate. I've got a trial next
5 week, so I'd ask for some time.
6 MS. VONDE: Yeah, I'm happy to brief.
7 THE HEARING OFFICER: Okay.
8 MS. VONDE: Do you envision an order asking us
9 for certain things that you want to see from us, or do
10 you want us to just go for it?
11 THE HEARING OFFICER: No, just go for it.
12 MS. VONDE: All right.
13 THE HEARING OFFICER: But I thought, verbally,
14 that I had to at least express those concerns so you
15 know at least what made me central to some of them.
16 Okay. Well, how do you want to do it? Thirty
17 days to submit an initial brief, or maybe we ought to
18 make it multiple, the 28th and 14th? So the 28th,
19 initial briefing, and then the 14th for any kind of
20 response? Is that okay?
21 MS. VONDE: What does that put us out to?
22 THE HEARING OFFICER: Christmas, probably.
23 MS. VONDE: Christmas?
24 THE HEARING OFFICER: Well, not quite.
25 MR. JAMES: I think both Thanksgiving and

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1 Christmas.
2 THE HEARING OFFICER: It will be the middle of
3 December.
4 UNIDENTIFIED SPEAKER: November 30th is 28
5 days for the initial brief.
6 THE HEARING OFFICER: Yeah, so the 14th of
7 November or the 13th -- or December.
8 UNIDENTIFIED SPEAKER: The 14th of December
9 for responses.
10 THE HEARING OFFICER: And, you know, if you
11 want the holidays to write briefs, that's okay with me.
12 We can make it the first of January. Anybody?
13 MR. JAMES: I'm fine with the 14th, if we can
14 get another week on the initial.
15 MS. VONDE: Do the week before Christmas?
16 UNIDENTIFIED SPEAKER: Do you want until
17 December 7th? That would put you at December 7th and
18 then December 21st for responses.
19 MR. JAMES: That would be fine.
20 UNIDENTIFIED SPEAKER: So December 21st?
21 December 7th for initial briefs and December 21st for
22 responses.
23 (Off the record.)
24 (The hearing was concluded.)
25 (End of Audio MZ000008.)

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1 REPORTER'S CERTIFICATE

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 5th day of December, 2018.
15
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25


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My commission expires May 23, 2024

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