

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

January 7, 1997

(Whereupon, the following
occurred in the
presence of the jury:)

THE COURT: Be seated, please. Counsel.

MR. SMART: Thank you, Your Honor.

May it please the Court, ladies and gentlemen of
the jury, my name is Will Smart. We met before. I
represent Skagit County, along with my partner Dave
Major. Harvey Wolden Skagit, County Commissioner, is
here to represent the county.

I know that you are all anticipating a lengthy
trial. Mr. Hagens has told you how long it might be.
We also appreciate your kind attention to our problem
here and we'll be as efficient as we can in putting it
on.

It is likely to be a long case, and the reason
for that is that you have one of the rare opportunities
of learning about 100 years of history in Skagit County
in this case, and this case focuses largely on 100 years
of diking history in Skagit County. It's not a subject
that everybody is going to learn about, but you will
learn it in detail.

This matter is something that is of extreme
importance to every entity in this courtroom, and

although Mr. Hagens has made a substantial introduction
of his clients, the plaintiffs, and has informed you of
how important they are, I would like you to consider how
important this matter is to the general public, to
Skagit County, to the diking districts, and also to the
State of Washington.

As the Court is going to instruct you at the end
of the case, each party is equal before the law and each
party is entitled to your undivided attention, so I ask
you at the outset of this case to pay close attention
and to try not to make your minds up prior to the time
all the evidence is in.

13 Our case will be some weeks from now before we
14 are able to put it on. The purpose of my statement here
15 is to give you a bit of a road map to what the evidence
16 is that you will hear in the county's case, so when the
17 plaintiffs are putting on their case, I'd like you to
18 harken back to today so that you will be able to reflect
19 on the evidence that's presented by them and anticipate
20 what the other side of the story might be. Because,
21 like many things in life, this case presents more than
22 the story that you heard from Mr. Hagens.
23 Now, what I'd like to start off with is a little
24 bit about the geology of the Skagit River. As many of
25 you know, the Skagit River is the largest river in

1 Western Washington, arising in the North Cascades. In
2 fact, it originates in British Columbia and flows down
3 through areas of Whatcom County prior to the time it
4 gets to Skagit County, and along the way it drains a
5 huge territory encompassing the North Cascades and the
6 Skagit River Valley and basically it flows, after it
7 goes into Ross Lake where it checked by a damn, and
8 Diablo Dam, which many of you are familiar with those
9 dams, proceeds down the valley until it gets to this
10 point here, which is approximately 40 miles from the
11 mouth, and, as you know from our earlier map, we have a
12 river delta.

13 River delta mechanics, you will learn in this
14 case, are not unique to the Skagit River. They have
15 common features with, for instance, the Nile, the
16 Mississippi, all of the major rivers in the country,
17 because what happens in times of high rainfall is that
18 the mountains, the ground, erodes and the waters are
19 laden with silt and sediment that are borne downstream
20 and create this fan-like delta at the mouth of the
21 river.

22 All of this territory comprising the Skagit Delta
23 has been historically flood plain and, over geologic
24 time, has flooded many many times, countless times. The
25 reason why the soil in the Skagit Valley is so fertile

1 is because of these sediments that have been washed down
2 by the operation of erosion and deposited in this fan
3 that you see here.

4 Like many of the other major river deltas in the
5 country, the Skagit is extremely fertile crop land, but
6 it only became farmable after the early settlers diked
7 out the tide from the salt water and made it tillable by
8 turning it from the original muddy bottom of a swamp
9 into bearable farm land by the means of dikes. Similar
10 to dikes in Holland, similar to dikes everywhere, these

11 dikes are essentially -- are extremely important to the
12 existence of the rest of this portion of Skagit County.

13 The entire valley is diked in one fashion or
14 another, and that includes the Nookachamps Basin where
15 the plaintiffs reside. Diking District No. 20 is
16 located on the south bank of the Skagit River in this
17 area but, unlike the remainder of the banks of the
18 river, Diking District 20 has chosen not to build a dike
19 over time.

20 I'll get to the mechanics of dike district
21 formation in a second. However, what I'd like you to
22 recognize at this point is that these -- this natural
23 low area comprising the Skagit River Delta did not get
24 to its geographical or topographical conditions by the
25 operation of man. Rather, it was the force of nature.

1 If you look even at the map that's been placed up
2 here by Mr. Hagens, you will see that the Nookachamps
3 Basin is an extremely low area. It's a bowl-shaped
4 depression, and it didn't get that way because of the
5 operation of any governmental entity.

6 Barney Lake exists at an elevation of 18 feet
7 above sea level, and that's highly significant because
8 Barney Lake is the center of this Nookachamps Basin.
9 The banks of the Skagit River in this location after it
10 proceeds west under the Highway 9 bridge are at
11 approximately 35 to 39 feet. What that means is that
12 when the river escapes its banks, you have an over-land
13 downhill flow of water from this height, elevation of 35
14 feet, down to an elevation of 18 feet at its lowest.
15 You have a relatively steep gradient, and this
16 bowl-shaped area fills with water. It has flooded in
17 the Nookachamps Basin as long as the basin has existed,
18 and it doesn't flood because of the operation of
19 government. It has always flooded. It is the lowest
20 area upstream from the Burlington Northern Bridge and it
21 is a natural depression.

22 Now, why is that important in this case? It's
23 important in this case because the plaintiffs' position
24 is that the county uses the Nookachamps Basin for flood
25 storage. Let's discuss a little terminology. You'll be

1 hearing from a number of hydraulic engineers in this
2 case that talk about the concept of storing flood
3 waters. To a hydraulic engineer, flood water storage is
4 simply any water that's not flowing downstream and being
5 discharged from the system at that particular time, so
6 when a flood engineer talks about storage, he's simply
7 talking about water that hasn't yet been discharged from
8 the system. And it's important to keep the concept of

9 storage in mind in this case because there are a number
10 of ways in which water is stored in the system.
11 First we have the upriver dams which were
12 completed in approximately 1951. You will learn through
13 the evidence in this case that those upriver dams hold
14 and store somewhere between 30 and 40 thousand cubic
15 feet per second of water. A cubic foot per second, I'd
16 like to take just a minute to discuss that concept.
17 A cubic foot of water weighs 67 pounds. If you
18 were sitting on the bank of the Skagit River and watched
19 a flood event, you would see somewhere between 91,000
20 and 400,000 of these cubic feet of water pass by your
21 position every second. It's a huge amount of water, and
22 the energy discharged by that water is amazing. The
23 reason why floods are dangerous is because of the
24 unleashing of that tremendous power of the water.
25 Now, the flooding in the Skagit River has taken

1 place since recorded history, and we even have, through
2 our hydraulic engineers and historians, evidence of
3 floods far exceeding any of the floods that have existed
4 in the modern times back in the 1800s, 1700s. The flood
5 in 1990 at its peak was an approximately 150 to 200,000
6 cubic feet per second. There was evidence of a flood in
7 1815 of 400,000, almost three times the peak flow of the
8 flood in 1990. And we have other floods nearly twice as
9 big in 1956. We have a series of huge floods between
10 1896 and 1921. These floods are extremely important
11 because, as you will learn from the history in this
12 case, every one of these floods flooded the properties
13 that are now occupied by the plaintiffs, and they
14 flooded them to depths greater than the depths of the
15 flood in 1990. In fact, in the 400,000 cubic foot per
16 second discharge in 1815, scientists estimate that there
17 was as much as 40 feet of water in some locations in the
18 Nookachamps Basin.

19 So what -- how do we bring this forward to
20 today? The history that you are going to be learning
21 about in this case isn't simply the geologic or
22 hydrologic history of the Skagit River and how the delta
23 got to be formed to the way it is today, it's also the
24 history involving a chronology of events, and this
25 history of events includes both the settling of the

1 Skagit Valley by citizens and the formation of different
2 kinds of government, and different kinds of governments
3 in this case to perform specific purposes, and one of
4 the main forms of government that you'll be learning
5 about are the diking districts.

6 Diking districts are a special municipal entity,

7 a form of government established by the legislature of
8 the State of Washington. When I'm showing you now on
9 the screen is the statute that sets up the system of
10 diking districts, and what the statute provides is that
11 the Board of Dike Commissioners shall have the exclusive
12 charge of the construction and maintenance of all dikes
13 or dike systems which may be constructed within a
14 district and shall be the executive officers thereof,
15 with full power to bind the district by the acts -- by
16 their acts in the performance of their duties as
17 provided by law.

18 Mr. Hagens, in his opening statement, told you
19 that it was the county that controlled the diking
20 districts. That is not true. This statute, the
21 legislative enactment by the State of Washington,
22 demonstrates conclusively that it's the Board of Dike
23 Commissioners that controls and has the exclusive charge
24 of both construction and maintenance of the dikes, and
25 that is true with the dikes along the Skagit.

1 Mr. Hagens talked to you about Dike District 12.
2 The location of Dike District 12 is right here, down to
3 approximately this area, and includes all of this
4 section of dike above the Burlington Northern Bridge,
5 the choke point that he talked about which is located
6 right here. Dike District 12 was formed in
7 approximately 1906 and has its own elected board of
8 commissioners. Although Mr. Hagens was correct that
9 initially the Board of Commissioners was appointed by
10 the county commissioners, that's simply the mechanism
11 for how the dike district gets going. As soon as the
12 initial commissioners are appointed, they're then
13 elected thereafter by a vote of the constituent property
14 owners within the diking district, and that's the way
15 Dike District 12 has been formed, pursuant to statute,
16 and that's the way it has operated ever since it has
17 been in existence.

18 Now, the purpose of dike districts, of course, is
19 to construct and maintain dikes, and the reason is for
20 the protection of the properties that are within the
21 boundaries of the dikes. That's why they're formed.
22 That's why they exist, and the authority to exist in
23 that fashion is found specifically in the statutes of
24 the State of Washington.

25 This dike, Dike District 12, is really the only

1 important dike for your consideration in this case. Mr.
2 Hagens agreed in his opening statement that without Dike
3 District 12's dike in this location, the water, assuming
4 it got high enough, would flow out to Padilla Bay

5 through this area. And I don't think there would be any
6 dispute among experts in this case that that might be
7 true as long as the water got high enough to come over
8 the bank and exceed whatever other topographical
9 impediments there are in this area, but there are many.
10 There's I-5 located here. There's Highway 99 located
11 here. There's the Burlington Northern Railroad grade,
12 which is an integral part of Dike District 12's dike in
13 this location here, and there is Highway 20 and the
14 railroad together which run in a northeasterly direction
15 through the town of Burlington. All those operate as
16 impediments to the flow of water, and in some places
17 constitute the only impediment to the flow of water off
18 here to the Samish River Basin.

19 The computer model that Mr. Hagens talked about
20 earlier really compares a situation of the existence of
21 a dike here with the existence of no dike, and that's
22 very important and I'll talk about that in a second as
23 to what it means. But I want you to remember throughout
24 the course of the presentation of the plaintiffs' case
25 that the -- all of the figures that you're going to be

1 seeing for water surface elevations, in other words how
2 high the water is under any given flow event, are
3 assuming only two conditions: One, with this dike in
4 place and, two, with it gone, completely gone. So, in
5 other words, the plaintiffs' evidence in this case will
6 assume that the dike districts do not have the power to
7 construct and maintain the dikes in their place, and the
8 damages that the plaintiffs will ask you to award are
9 based on an analysis of taking away Dike District 12's
10 dike and undoing the statutory authority that those dike
11 districts have to construct and maintain their dike.

12 Now, I want to go back to our chronology for a
13 bit. I've talked a little bit about the large floods
14 that took place between 1896, and 1932 was the last
15 really significant flood, maybe 1933, 110,000, before
16 the State became involved in the business of flood
17 control. We have dikes built by citizens and diking
18 districts in this period 1890 to 1910. We have this
19 period of huge floods on the Skagit between 100 and
20 220,000 cubic feet per second during this approximately
21 35 to 40 year period, and then in 1935 we had the
22 passage of another enactment, a statute called the Flood
23 Control Act of 1935, in which the State of Washington
24 determined that, because of these dangerous conditions
25 that had taken place in the early history of the State,

1 that it was time for the State to get involved, and what
2 the State -- the legislature did is it passed an

3 enactment called this Flood Control Act which
4 specifically said that it was the State's concern that
5 the alleviation of recurring flood damages to public and
6 private property, to public health and safety and to the
7 development of natural resources of the state is
8 declared to be a matter of public concern and, as an aid
9 in affecting such alleviation, the State of Washington,
10 in the exercise of its sovereign powers, hereby assumes
11 full regulatory control over the navigable and
12 non-navigable water flowing or lying within the borders
13 of the State, subject also to the federal control of
14 navigation.

15 The act went on to describe the mechanism for how
16 the State was going to implement its policy of flood
17 control, but the important first point to consider is
18 that in 1935, the statute passed a state policy, and
19 this was after the dikes had already been built by Dike
20 District 12.

21 Now, how did the State carry out its policy of
22 flood control? What it did was, first of all, it
23 established the Office of the Supervisor of Hydraulics.
24 This is a little bit of a typo, Commissioner of
25 Hydraulics, I misstated it to my secretary. She typed

1 it in. It should be Supervisor of Hydraulics, that's
2 the term that's used in the 1935 act. And then a system
3 was implemented by the State so that the Supervisor of
4 Hydraulics would review all the plans for diking
5 construction and maintenance and issue permits, as long
6 as the Supervisor of Hydraulics found that the proposed
7 project would be in compliance with the state policy of
8 flood control. Section (3) of the act sets this out.
9 Says "State regulatory control shall be exercised
10 through regulatory orders. The designation of flood
11 control zones and the issuance of permits as hereinafter
12 provided shall be exercised over the planning,
13 construction, operation and maintenance of any works,
14 structures or improvement, private or public, which, if
15 improperly planned, would have an adverse influence on
16 the regimen of any stream or body of water that might
17 affect the life, health or safety of property against
18 damage by flood water.

19 So, we have in 19 -- in 1906 the building of Dike
20 District 12's dike, in 1935 the State policy of flood
21 control where the State assumed full regulatory control
22 over the dikes and the establishment of the Supervisor
23 of Hydraulics, whose function it was to evaluate all of
24 these works so that it could determine, be determined
25 whether or not they fell within the State's policy of

1 flood control.

2 Now, of course, things didn't stay exactly the
3 same. You'll be probably not surprised to learn that,
4 like any governmental entity, there was an evolution
5 over time, so that although it was the Supervisor of
6 Hydraulics in 1935, in 1951 they changed the designation
7 to the Supervisor of Flood Control, essentially a new
8 title for the same job, and then again in that year they
9 put the job of Supervisor of Flood Control under the
10 Department of Conservation and Development, a newly
11 created agency of the State. That name was shortened to
12 the Department of Conservation in 1957. In 1965 they
13 put the same job under the target of Water Resources,
14 and finally in 1970, the State agency evolved into the
15 present day Department of Ecology, which is the agency
16 that now has the same responsibility for evaluating
17 whether or not any flood control structure, if
18 improperly planned, constructed, operated or maintained,
19 would adversely influence the flow of water down any
20 particular stream.

21 I might mention at this time that during the
22 1960's, the 1935 act was fleshed out by a Washington
23 Administrative Code regulation. An administrative code
24 regulation's basically a rule established by the State
25 to implement the statute, and the statute, again being

1 the 1935 act, which has been updated into a statute
2 known as RCW, 86.16 which you'll learn much more about
3 as we go along. The modern day version of the Flood
4 Control Act of 1935 has now been fleshed out so that the
5 Department of Ecology has, in addition to the
6 responsibilities under the act, it has the
7 responsibility of determining whether any structures or
8 works would adversely influence the regimen or body of
9 water by restricting, altering or hindering or
10 increasing the flow of water in the floodway or flood
11 channel expected during a one-hundred year flood. And
12 if you look at this parenthetical, this is very
13 important, "In consideration of this provision, the
14 Department," that's the Department of Ecology now, shall
15 "determine whether the structures, either alone, alone
16 or in conjunction with any other existing or future
17 similar works, could adversely influence the efficiency
18 or the capacity of the floodway and adversely affect the
19 existing drainage courses or facilities."

20 So, in this point in our history we have this
21 construction of the dikes by the Diking District with
22 the power to maintain them. We have the establishment
23 of the State Supervisor of Hydraulics and subsequent
24 agencies, and we have the designation specifically by
25 the 1935 act and by the Washington Administrative Code

1 regulation of the responsibility to the Department of
2 Ecology to determine what the effect is going to be,
3 either alone or in conjunction with any of the other
4 works or structures that have been constructed in the
5 floodway.

6 Now, how did these dikes go about getting from
7 their initial form when they were built originally in
8 1906 to the form that they now exist in? They got there
9 by a system of permits, because when the Supervisor of
10 Hydraulics was given the function in 1935 to evaluate
11 all of these dikes, they did so. Surprising thing. The
12 government agency went out and did what it was supposed
13 to do, it evaluated these dikes that had already been
14 built, and you will learn through the course of this
15 case that they then issued permits.

16 This first permit that I'm showing you here, this
17 first permit here, Number 111, which you'll see is a
18 permit issued to Diking District 12 for this dike here,
19 although this dike wasn't located in exactly this
20 position in 1936 when this permit was issued, but it's a
21 permit by the State of Washington for Dike District 12
22 to reconstruct because the dike had been damaged in a
23 flood event, to reconstruct and to maintain in
24 perpetuity, meaning forever, a dike along the west bank
25 of the Skagit River between Burlington and the Riverside

1 Bridge. These permits constitute legal permission by
2 the State of Washington to the Diking District in order
3 to construct and maintain their dikes.

4 Okay. And that was what was done in this case is
5 Dike District No. 12 and Dike District number 17, in
6 fact, all the other dikes along the river, have received
7 these permits from the State of Washington to construct
8 and to maintain these dikes in perpetuity, and the
9 reason is -- harkening back to the 1935 act, because the
10 State of Washington and its Supervisor of Hydraulics and
11 subsequent agents determined that these dikes would be
12 needing to meet the State policy of flood control which
13 was articulated in the 1935 act.

14 Now, again, a permit for Dike District 17 to
15 maintain a dike in perpetuity issued in 1937 by the
16 Supervisor of Hydraulics, same permission.

17 Now, let's talk about a more modern change to the
18 diking system. Dike District 12 used to exist somewhat
19 closer to the City of Burlington and it did not extend
20 as far upstream as it currently does. Mr. Hagens has
21 alluded to the fact that the dike has changed over
22 time. It did in the early days. It had some buildup
23 between 1906 and 1955, but in 1955 the last major change
24 to Dike District 12's dike was implemented, and it was

implemented again by a permit, which is this permit

1 here, Number 7144 signed on August 2nd, 1955 by Gregory
 2 Hastings, who was then the State Supervisor of Flood
 3 Control, and what Mr. Hastings did was he followed his
 4 statutory duties. He evaluated the proposal, which was
 5 an earth-filled dike, which is a relocation and
 6 extension of the existing dike to be located south
 7 easterly and east of Burlington, in other words, in this
 8 location here, and he determined that it met the State
 9 policy of flood control to issue this permit so that
 10 Dike District 12 could reconstruct its dike in 1955 to
 11 where it currently is located, and it's currently
 12 located in essentially the exact same location,
 13 essentially the same height and essentially the same
 14 general configuration. There have been a few changes.
 15 There have been keyways added so it doesn't wash out.
 16 There's a road on top of it now that didn't used to
 17 exist. There's riprap that have been replaced over
 18 time, because all of these dikes are damaged during
 19 times of high water, but in terms of its location and
 20 its height, it's in essentially the same exact condition
 21 as it was in 1935 when it was permitted to exist in
 22 perpetuity by the State of Washington. And, again, the
 23 testimony in this case will show you that when the State
 24 granted the right for Dike District 12 to construct and
 25 maintain its dike in perpetuity, it expected it to do

1 it.

2 Let's talk a little bit about dike maintenance.
 3 Mr. Hagens made a big deal -- he always makes a big deal
 4 in this case -- about maintaining dikes, making them
 5 stronger. What you'll learn in this case about the
 6 maintenance of dikes is this. Every time you have high
 7 water, a high water event, the hydraulics of the flood
 8 damage the dikes, and the reason for that is because
 9 they're basically earth-filled dikes, and what you have
 10 is you have a dike that, say, is at this level here.
 11 Water comes go up here. As the water rises, it exerts
 12 hydraulic pressure against the toe of the dike and the
 13 dike begins to fail in different ways. If it's porous,
 14 the water will seap through and it will erode the dike
 15 by having it be undermined by seams and boils. If it's
 16 excessive rainfall, it will be eroded from the top.

17 And there are other problems that can exist with
 18 dikes. For instance, cattle often graze on dikes and
 19 will wear trails, and once a trail has started, you have
 20 excessive rainfall, you get erosion from the top.
 21 Sometimes the dikes aren't maintained because the grass
 22 dies and that also supports further erosion, but in

23
24
25

order to have a dike, which every expert and every governmental official and probably even the plaintiffs agree, if you're going to have a dike, it might as well

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

work.

In order to have a dike work, it has to be maintained, and that is why these permits from the State of Washington say that the permit is issued to construct and maintain the dike in perpetuity. So that when Mr. Hagens and the plaintiffs in this case complain about the maintenance of dikes, they're really complaining about something that was made in a decision a long time ago to allow this dike to exist. And our position in this case, and it's a defense in this case, is that Dike District 12 acquired the right to legally have its dike in its current location, at its current height, essentially all of its same features in 1955. The entity that had control over the construction and maintenance of that dike by statute is the Diking District. The entity that granted it permission to do that in perpetuity is the State of Washington. The county, of course, has some responsibilities and, of course, has some relationship, as you would expect, between government in any county where it's located. There are a number of relationships that exist and they're important relationships.

The county acts as a liaison between governmental entities. It does the bookwork for the diking districts. It's required to by statute. Your

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

legislature, the State of Washington, set forth procedures so you don't have a redundancy in government, but that doesn't mean that the entity that has complete charge of construction and maintenance of the dikes is the county instead of the diking districts, and the plaintiffs understand and agree with this.

In fact, in this case, prior to this trial, the plaintiffs sued the diking districts and alleged in this case the very things that I'm telling you now and the very things that they're complaining about the county about. They said in this case that the Diking District defendants, that's Diking District 12 and 17, maintain a continuous wall of dikes and levees -- excuse me a wall of levees in the flood channel of the Skagit River.

In 1990 this system operated precisely as intended and caused water to be diverted onto the plaintiffs properties. River water that should have been flowing towards Padilla Bay and Puget Sound to the west instead was diverted onto plaintiffs' property in a unnaturally great amount. Those are the words of the

21 plaintiff in this lawsuit prior to today. They're
22 making the same contentions and the same allegations
23 that the county is saying, that we don't believe that a
24 taking occurred, because in order to have a taking you
25 have to have damage that was unexpected or unanticipated

1 or part of the bundle of rights of a property owner, and
2 I'll get to that in a second, but if a taking occurred,
3 the county's position is that it wasn't the county that
4 built the dike and took the property, the county hasn't
5 built these dikes, and it wasn't the county that
6 permitted them to be constructed and maintained in
7 perpetuity, rather that was the Diking District, and
8 that's exactly what the plaintiff said prior to the time
9 they brought this lawsuit solely against the county.

10 Now, again, you will learn that not only did Mr.
11 Hastings permit this dike to exist in perpetuity, he
12 followed the statute and the predecessor of the
13 Administrative Code Regulation and performed a thorough
14 examination of the plans of the proposed work.

15 Here's a letter that Mr. Hastings wrote to Mr. B.
16 J. Bournes, the Secretary Treasurer of the Sterling Dike
17 Association in August of 1955. The Sterling Dike
18 Association was a citizens group that had some
19 objections or some concerns about the extension of this
20 dike, the dike extension of Dike District 12, and they
21 had a communication and correspondence with the State
22 about whether it was a good idea. What Mr. Hastings
23 said, again, the Supervisor of Flood Control, is he said
24 that upon a most thorough examination of the plans and
25 specifications of the proposed work on the ground, I

1 find that the proposed dike extension will not adversely
2 affect the normal regime of the river's flood channel
3 and is consistent with both the comprehensive plan and
4 development of both the district and the county.
5 Therefore, in accordance with this -- the provisions of
6 Chapter 18.16 -- remember, that's the statute that's the
7 modern day version of the 1935 act -- a permit has been
8 issued, and not only was a permit issued, but the State
9 agreed to fund the dike and pay for 40 percent of it, so
10 that this last major change to the dike, Dike District
11 12's dike, was funded 60 percent by the Diking District
12 and 40 percent by the State and not at all by Skagit
13 County.

14 Now, I'd like to switch gears here for a little
15 bit and, instead of talking about dike districts and
16 dikes, I'd like to talk to you about the plaintiffs.
17 Mr. Hagens has given you some tags on this map of where
18 the plaintiffs live. What I've done is I've created a

19 chart that shows where the plaintiffs' properties are,
20 because these pins here identify residences. The
21 properties, many of them are large farms, and these
22 farms are farms that -- many of them have existed for a
23 long period of time. They're farms located here because
24 that's what the land is good for. It's low. It's
25 subject to flooding. It's good farm land. It's

1 inundated by silts. That's why people located for
2 farms.

3 You'll notice by Mr. Hagens' map, when plaintiffs
4 or their predecessors wanted to locate residences, they
5 generally did it on the perimeter of this area. Why
6 would they do that? The evidence in this case will show
7 that they did that because they knew that in times of
8 high water this area flooded and they didn't want to
9 place their houses where the flood waters are.

10 As part of its responsibilities in order to
11 evaluate flood hazards, the State of Washington asked
12 the Army Corps of Engineers to generate a report, and
13 the report which was done in 1967, 30 years ago, prior
14 to the time that many of the plaintiffs were even adults
15 is, called the Flood Plain Information Study for the
16 Skagit Basin, and what I'm showing you here is a summary
17 report of that Flood Plain Information Study.

18 This study is an extremely important piece of
19 evidence in this case for the reason that it sets forth
20 what the plaintiffs or their predecessors could have
21 learned if they had bothered to study the properties
22 that they sought to purchase. Now, not only was the
23 flood plain information published in this form by the
24 Army Corps of Engineers, it was given to various
25 governmental entities like Skagit and like the

1 Department of Conservation, this State entity, and it
2 was available for anybody to review, so if you were a
3 plaintiff or a prospective property owner in 1967 or
4 thereafter, you would have had access to this
5 information.

6 Mr. Hagens says there was no information
7 available to people moving into the Nookachamps area to
8 determine whether or not it flooded, but that's not
9 correct because not only was this Flood Plain
10 Information Study widely disseminated, it was published
11 verbatim in the newspaper, and what was it that was
12 published in the newspaper? This is a copy of the Puget
13 Sound Mail from May 25th, 1967. What was published was
14 the very same information that was in the Flood Plain
15 Information Study, and it's very important to this case
16 to determine what was available, if somebody had wanted

17 to learn about these properties and what had happened.
18 Really, what we're dealing with is we're dealing
19 with human nature. Because there had not been a big
20 flood in the Skagit Valley between 1951 and 1975, a
21 period of approximately 24 years, people started to move
22 back into the valley. They forgot about the danger of
23 the floods and, in fact, they had a remarkable period
24 between 1951 and 1990 where there was only one big
25 flood, in 1975. Many of the plaintiffs experienced

1 that. It wasn't a huge flood, but it was a flood in
2 conjunction with the 1951 that easily could have put
3 people on notice of the potential danger and the
4 potential power of these floods. And the newspaper
5 pointed this out.

6 It says, "As the Skagit Valley has not
7 experienced even a moderate flood since 1959," remember,
8 this is in 1967 when this is being written, "there is a
9 tendency among some of the valley residents to disregard
10 the flood problem. The much larger flood of 1951 is
11 even less well remembered," only 16 years after it took
12 place. "The flood of 1921, which had more than twice
13 the peak discharge of 1959, is practically forgotten.
14 However, recent disasters in floods in other parts of
15 the nation clearly illustrate that a long flood-free
16 period is no assurance of future immunity to flooding.
17 In view of the lack of recent flood experience, there
18 has been an increase of occupancy of the flood plain."

19 People moved in, not doing the research to
20 determine what they might be facing. That's not all the
21 flood plain information shows though. The Flood Plain
22 Information Study had a specific description of how the
23 flood operates in the Skagit Basin, and this is very
24 important. What was published in the study and in the
25 newspaper is this description: It says, "When the river

1 overflows its banks, a sheet of water quickly spreads
2 across the flood plain. The water is generally shallow
3 at the beginning and some inundated roads remain
4 passable. However water may stand several feet deep in
5 old river channels and other depressions. As the flow
6 increases towards the peak of the flood, water expands
7 to the outer limit of the flood plain and rises to
8 greater elevations. The normal river banks may
9 disappear from sight, submerge beneath a mile-wide
10 expanse of water. Vehicles being driven along drowned
11 roads are endangered as the force of flowing water may
12 be enough to carry cars and trucks off the pavement into
13 ditches and fields. Homes in the flood plain may be
14 inundated, furniture water-logged, basements filled with

15 silt and degree. With greater depth and force of
16 flowing water, buildings may be moved off their
17 foundation or undermined."

18 Mr. Hagens made a big point of telling you that
19 his information will be that the plaintiffs suffered
20 dirty silt-laden smelly awful water in their houses, and
21 they did, and we sympathize with that. There's no
22 question that they've had a difficult time in these
23 floods, everybody does during a disaster, but the
24 question in this case isn't whether they had a problem
25 with the floods. Everybody had a problem with the

1 floods in 1990. The issue is whether or not they could
2 have known this in advance, and here's a newspaper
3 article published 30 years ago that specifically said if
4 you're going to build in the flood plain, you may have
5 your water -- your basement water-logged, your furniture
6 water-logged, your basement filled with silt and debris,
7 and you may even have your house removed from its
8 foundations.

9 Now, let me show you some graphic depictions of
10 what this is likely to be like, a mile wide swath of
11 water. Looking south, published in the Seattle Post
12 Intelligencer, February 10th, 1951, these are the
13 properties out here that are owned by the plaintiffs who
14 are seeking compensation from you in this case against
15 Skagit County. This is the mile wide swath of water.
16 Dike District 12's dike is at least a mile over in this
17 direction over here. Anyone who wanted to purchase
18 property in the Nookachamps area after 1951 could have
19 looked at this photograph after '67, could have looked
20 at the Flood Plain Information Study, and not only did
21 the Flood Plain Information Study publish the
22 description, but it had a specific map of where the
23 flood plain is located. This is the Nookachamps Basin.
24 This green as shown here in the Flood Plain Information
25 Study isn't the hundred-year flood plain, it's the

1 50-year flood plain. It's the flood plain for a flood
2 that's expected to occur at least once in every 50
3 years, and you will see that each of the plaintiffs'
4 properties is located in that 50-year flood plain. It
5 doesn't mean that it will only flood every 50 years, but
6 what it means is that you can expect, if you are a
7 property owner or prospective property purchaser, to
8 have a flood at least once every 50 years.

9 Now, what I've also done is I've taken this map
10 showing the property owners and I've superimposed on top
11 of it this 50-year flood plain, and what you can see, if
12 anybody took the time to look or to investigate prior to

13 the time they bought property in the Nookachamps area,
14 is that every one of the plaintiffs' properties is
15 located, with the exception of some of Mr. Lundvall's
16 and some of Mr. Cheeks' property which didn't flood in
17 1990, within the 50 year flood plain. Every one, and
18 this information was readily available to them, readily
19 available to anybody who wanted to read the newspaper or
20 pick up a copy of the Flood Plain Information Study, so
21 that when the plaintiffs come before you in this case
22 and say we didn't know, we couldn't have known, the
23 county didn't tell us, what are they really telling
24 you? They're really telling you that they did not take
25 even the most basic steps to investigate where their

1 properties were and what influence the flood plain would
2 have on their properties prior to the time they bought
3 them.

4 Mr. Hagens told you that Mr. Loeb was a
5 particularly sympathetic plaintiff because he had a
6 greenhouse operation, and he located his greenhouse
7 operation in approximately this area here. Mr. Loeb's
8 property is the Summer Sun Greenhouse, and it's located
9 right here, and he suffered some damage to his
10 greenhouse. Mr. Loeb didn't buy his property until the
11 early 1970s, 13 years at least after the publication of
12 the Flood Plain Information Study, and 13 years after
13 all of the information concerning damage to floods was
14 published. Because not only did the Flood Plain
15 Information Study have the description of the flood, not
16 only did the newspapers have pictures of the various
17 flood events that took place, but also it had a specific
18 description of the flood flows in thousands of cubic
19 feet per second, and it had a estimate of the damage
20 that was caused to the area by each of the floods. All
21 of this information was available to the plaintiffs if
22 they'd only chosen to use it.

23 Now, it doesn't stop with this. The information
24 in this case will demonstrate that the flooding on the
25 Skagit River has been extraordinarily well documented.

1 We'll present evidence in this case, and I'm showing you
2 a few photographs here of the various floods that have
3 taken place. And here's the 1909 flood in LaConner with
4 people standing in boats outside their houses. Here's a
5 picture of the 1918 flood in Burlington. You can see
6 the water running down the street and getting into
7 buildings. Burlington, remember, is supposedly
8 protected by the dikes, Dike District No. 12. Here's a
9 picture again of the 1909 flood showing Mount Vernon and
10 the mile wide or more, looks to me more in this

11 photograph, expanse of water. In 1917 and 1918, another
12 flood, again, published photographs of the damage that
13 existed to the houses where they're knocked off their
14 foundations.

15 The newspapers were replete with examples of
16 barns floating away in these floods, people who had
17 moved in back there, locating too close to the river,
18 having their livestock drown, their barns tipped over,
19 floating away, and the pictures of this damage makes for
20 very interesting damage, and obviously it's not a
21 subject of levity, but it's an intent historical record
22 of the trouble that residents in the Skagit Valley have
23 always had and will always have as long as there's a
24 natural force of precipitation and as long as people
25 want to build and live in the flood plain.

1 As far back as 1898 we have photographs showing
2 the damage. Here's a photograph of Hamilton, Washington
3 where whole buildings along a city street have been
4 wiped out by damage by flood waters. Here's the 1909
5 flood in LaConner. Here again is the 1917 and 1918
6 flood in Mount Vernon. Here's a picture of people
7 rowing their boats to their house in LaConner in 1917
8 and 1918. Here's the 1921 flood.

9 Remember I talked about the power of the 1921
10 flood coming over a road? You can see the telephone
11 poles about to be washed away and, again, at least a
12 mile wide expanse of water heading out to a stranded
13 house in the flood plain. 1921 and 1932, similar
14 mile-wide expanses of water showing the devastation of
15 these floods. All of these pieces of historical
16 information could have been learned by intelligent
17 prospective property owners who did not want to
18 voluntarily move into the Nookachamps.

19 But, as I indicated earlier and as Mr. Hagens
20 indicated or alluded to in his opening remarks, people
21 like the Skagit Valley. They like living in an area
22 that is pastoral, that is pretty, that doesn't have a
23 lot of other people around it. People make a choice
24 when they move there, but in order to make that choice
25 they have to take the good with the bad.

1 You will learn that from the evidence in this
2 case that there were some individuals who did make
3 choices to protect themselves from the flooding. There
4 are dairy farmers who are currently plaintiffs in the
5 case, or former plaintiffs in the case, who established
6 or who had their parents establish barns that had
7 facilities for the cattle to exist on the second floor
8 in the Nookachamps Basin. Mr. Johnson, whose farm is

9 located in this area right here, he's no longer a
10 plaintiff in the case but he was originally a named
11 plaintiff in the case, has a barn that has stanchions
12 for cows on the second floor. A Stanchion is a device
13 to hold a cow in place while it can be milked. Probably
14 many of you know this. It took this case for me to
15 learn that but, anyway, the only possible purpose for
16 having stanchions on the second floor of a barn is to
17 have cattle on the second floor of the barn during times
18 of high water.

19 Now, if you're going to build a barn that has
20 stanchions on the second floor, why do you do that?
21 It's because you know that there is a chance of
22 flooding. You build your barn in the Nookachamps Valley
23 with the expectation that it's going to flood. And
24 that's true of other plaintiffs in this case. Bertha
25 Torgeson who is a plaintiff in this case has testified

1 that she had a barn on her farm that floated. And the
2 poor lawyer taking this deposition said, "The barn
3 actually floated?"

4 "Yes, on logs, and then it would go up and
5 down."

6 "Was that here when you bought the place?"

7 "Yes, it was here. And then one time, Alsworth,
8 they went over there and they went and cut the cable and
9 it floated over to my dad's place so when he had to tear
10 it apart and build it back, and then we built the barn
11 up."

12 "Did your husband discuss the fact that the
13 property flooded before you bought it?"

14 "Oh, he knew it flooded."

15 That would be the testimony of Mrs. Torgeson in
16 this case with respect to her floating barn and whether
17 or not she knew the property flooded prior to the time
18 she and her husband bought it.

19 The testimony in this case will also show that
20 prospective property owners could have consulted with
21 the old timers. Mr. Hagens mentioned the Austins. The
22 Austins lived through the 1951 flood. They're no longer
23 plaintiffs in the case. They had flood waters in their
24 living room during the 1951 flood and again in 1990. It
25 was not news to them. Whether or not the plaintiffs in

1 this case consulted with the Austins between the time of
2 1951 and when they bought their property is unknown at
3 this point, but you will probably learn whether they did
4 when the plaintiffs testify.

5 Judge Ward, who is a resident of the -- excuse
6 me, of the -- of Francis Road, Francis Road being

7 located approximately in here, Judge Ward, no longer
8 being alive but being a foresightful person in Skagit
9 County, built his house ten feet off the ground in order
10 to accommodate the flood waters.

11 This is a house built by somebody who anticipated
12 the problems of flooding in the area. This house is now
13 owned by Mrs. DeVries. She is a plaintiff in this
14 case. Her property is located in here and Judge Ward's
15 house is located in this approximate location here. She
16 is a person who will come before you asking for
17 compensation because flood waters have invaded their
18 property. Judge Ward knew flood waters were going to
19 invade the property and that's why he built this house
20 in this location in this configuration in the 1950s.

21 Now, I want to switch gears again for just a
22 minute before closing. The plaintiffs' position in this
23 case is that the activity of Skagit County has caused
24 their problem. We will demonstrate through the evidence
25 in this case that it isn't Skagit County that's caused

1 the problem and, in fact, the computer model presented
2 by the plaintiffs in this case which demonstrates a
3 condition of the dike system as it currently exists
4 versus no dike, demonstrates that for at least the last
5 40 years, at least since the last change to Dike
6 District 12's dike, there has been no substantial change
7 in the configuration of the dike as it affects the
8 Nookachamps area.

9 There are other ways to prove this same
10 proposition. What I'm showing you now is a rating
11 curve, and I want you to spend a little bit of time on
12 the concept of rating curves because it will be an
13 important piece of evidence. They're a little bit
14 difficult to understand but simple when you get the hang
15 of it.

16 A rating curve, for the purpose of this case, is
17 a chart that shows the relative height of water on one
18 axis, that's the vertical axis in this case, and the
19 flood flow on the horizontal axis, and what you see here
20 is a rating curve that will be an exhibit in this trial
21 from the Riverside Gauge. The Riverside Gauge is an
22 United States Geological Survey device that's located
23 downstream of the Riverside Bridge in this location
24 right here and its purpose is to calculate how much
25 water flow there is for any given flood. That's the

1 horizontal axis, and remember we talked about cubic feet
2 per second before. The rating curve shows how many
3 thousands or hundreds of thousands of cubic feet per
4 second there is flowing by the gauge during any given

5 flood, and the points on the curve represent the peak
6 flow for any given flood, and I have some of them marked
7 here.

8 They're a little hard to see so I'll blow it up
9 here for a second. These peaks here, 1990, 1975, 1990,
10 1951. These are all points for the flow on the rating
11 curve at the USGS gauge, and what this -- you'll learn
12 what these ratings curves show is that there has been no
13 change in the ability of this system to pass water since
14 at least 1951. Here's the '51 rating curve point and
15 you can see that it's on exactly the same curve as 1990,
16 1975, 1951 and the other 1990 flood. If there had been
17 a difference in the ability of the system to pass water
18 between different floods, you would have expected, as a
19 hydraulic scientist, to get a skattering of points at
20 different locations than on the curve, but because we
21 have the USGS station there, we know that the rating
22 curve -- we know that the floods for each of the floods
23 over at least the last 40 or 50 years have all fit on
24 exactly the same curve so that there has been no change
25 in the ability of this system to pass water.

1 What does that mean in this case? It means that
2 the last major change in 1955 to this dike hasn't -- it
3 means that the dike itself has no greater or lesser
4 ability to restrict the flow of water towards Padilla
5 Bay than it ever had, at least since the State permitted
6 that last major change to exist, and the evidence in
7 this case will demonstrate through the testimony of Mr.
8 Hastings and others that even that change was very
9 minimal relative to the overall system.

10 Mr. Hastings estimates that the change from 1955
11 to what preexisted that had zero effect on the flood
12 waters and the amount of flooding to be expected in the
13 Nookachamps area, and he'll so testify by video tape
14 deposition because he is elderly and is ill.

15 Now, I have only a few minutes left, but I want
16 to say just a few words about the county's case against
17 the State of Washington. As I indicated to you before,
18 the county believes that it will demonstrate,
19 correspondingly that the plaintiffs will fail to
20 demonstrate there's been any taking of property by
21 Skagit County. We believe that is a solid proposition
22 because of the things that we pointed, because of the
23 history of the dikes, that Skagit County didn't have the
24 statutory authority to construct and build the dikes and
25 it didn't construct and build the dike. It didn't make

1 a change to Dike District 12's dike in 1955 and it
2 didn't permit those dikes to exist in perpetuity. It

3 just didn't do that. It had have some responsibility
4 later on for maintaining the dikes. It did fund some
5 dike maintenance by making funds available to all dike
6 districts and cities and towns who also have the right
7 to maintain dikes in Skagit County through a program
8 called a Skagit County Grant Fund Program, but what Mr.
9 Hagens didn't tell you about the existence of those
10 programs is what the county did when they made those
11 funds available was that it appointed a citizens
12 advisory committee called the Skagit County Flood
13 Control Committee. Some of the plaintiffs have served
14 on that committee. It's that committee, not the county,
15 that prioritizes the needs of the various entities,
16 including cities, towns and diking districts, for the
17 money and it's that committee that puts in the request
18 to the county for these funds in the priority that is
19 established by the Flood Control Advisory Committee.

20 The testimony in this case will be that there has
21 not been any instance since the Flood Control Advisory
22 Committee came into effect in approximately 1980 when
23 the priority requested by the committee was overturned
24 or undermined or changed by the Skagit County
25 Commissioners and, again, the evidence will show that

1 the funds that were made available by Skagit County were
2 in the order of \$100,000 per year for most years,
3 whereas the State made available the FCAAP fund, Flood
4 Control Assistance Account Program, FCAAP, and you'll
5 hear a lot about that. The State did the same thing.
6 It made available funds to the county or to dike
7 districts or to states or cities or whoever had a
8 project that was allowed to be permitted by the state,
9 again exercising its regulatory control to assist these
10 entities in maintaining dikes and flood control
11 structures that fit within the state policy of flood
12 control.

13 You'll hear about FCAAP, you'll hear about the
14 county grant program, but the important thing is that
15 these were funding mechanisms that were made available
16 and they were coordinated with a citizens advisory
17 committee, a flood control committee which included
18 representatives from all of the areas, including both
19 Sterling and Nookachamps, and on whose committees some
20 of the plaintiffs sat, so when the plaintiffs say the
21 county has never done anything for these people,
22 they've appointed an advisory committee. They've
23 allowed people to serve on it, and they made funds
24 available to serve the needs of the community in this
25 area.

1 Now, getting back to the issue of the case
2 against the State. We believe that when you get to the
3 end of this case you will determine, as we have, that
4 there has been no taking of the plaintiffs' property by
5 Skagit County. In fact, the county has simply done what
6 responsible government are supposed to do. They're
7 supposed to listen to the needs of all the citizens and
8 all the entities and governmental entities in the
9 county, including the diking districts, which have and
10 do have the right to legally maintain these dikes, and
11 they respond in an appropriate fashion, both during the
12 planning and funding mechanism for maintaining these
13 important public facilities and also in times of high
14 water and emergencies when people find themselves in
15 trouble because they have moved into the flood plain.

16 We believe you'll find that no taking has
17 occurred, but if you determine that a taking has
18 occurred, it's our position, number one, that it was the
19 dike districts who constructed and maintained the dikes
20 and who had the exclusive right under state statute to
21 construct and maintain those facilities, and in the
22 event that you determine that a taking has occurred,
23 that you should pay attention to the statutes and
24 regulations that say that it was the exclusive province
25 of the State of Washington to make an determination as

1 to whether or not these structures that have been
2 permitted to exist in perpetuity have an adverse
3 influence on the floodway.

4 That's what the statutes do, they articulate a
5 State policy of flood control and they give the State
6 the responsibility to do this.

7 Another statute that you will hear about, 86.24,
8 it's the last portion of the 1935 act that I'd like to
9 talk about, and it is a portion of the statute -- if I
10 can find it here -- it's a portion of the statute that
11 says that in the event where counties operate together
12 with the state -- I'm going to flow it up here, again a
13 portion of the 1935 act, Section 163, what it says is
14 "That a county or counties acting jointly in order to
15 take action in matters related to flood control act for
16 the State when it performs such activities under this
17 provision of the statute."

18 I'd like to read it to you in its entirety. "The
19 State Director of Conservation and Development, in
20 cooperation with the Secretary of War acting through the
21 Corps of Engineers of the United States Army, and any
22 other agencies of the United States, and in cooperation
23 with any official agency or institution of the State and
24 any flood control district created under the laws of the
25 State and any county or any counties acting jointly

1 pursuant to Chapter 54 of the Session Laws of 1913," and
2 here's the important part, "shall act for the State in
3 the formulation of plans for the control of floods in
4 the several flood areas of the State."

5 The county has always taken some measures with
6 respect to flood control. It has to. It has to do the
7 bookwork, for instance, of the dike district. It has to
8 cooperate for its interlocal agreements with the diking
9 districts and with the State and with the federal
10 government and the Army Corps of Engineers. When it
11 does that, it is acting pursuant to the terms of this
12 1935 act as an agent of the State. It says "it shall
13 act for the State," and that's an agency relationship,
14 ladies and gentlemen.

15 At the end of the case the judge will instruct
16 you on the law relating to agency, but I want you to
17 harken back at that time to determine whether or not
18 these acts by the county were for the formulation of
19 plans for flood control, because if they were pursuant
20 to the state policy of flood control, the 1935 act and
21 it's modern counterparts, those acts are solely for the
22 State. They're not for the county, they're not for
23 other purposes, it's for the State policy of flood
24 control.

25 So, ladies and gentlemen, we think that you will

1 find that there has been no taking of the property. We
2 think if you find that there is a taking, you will
3 correctly allocate that responsibility to the diking
4 district who own the dikes and the State of Washington
5 who articulated the policy of flood control. Certainly
6 the county has responsibility. Certainly the county
7 does certain things. What they didn't do is build the
8 dike. They didn't build Dike District 12. They didn't
9 have the power or the right under state law to maintain
10 that. That lies exclusively with the diking districts,
11 and to the extent that they did acts at all, they acted
12 for the State of Washington.

13 Thank you very much for your patience. I know
14 I've been long-winded. I'm likely to get hoarse. I
15 apologize.

16 Thank you for your attention.

17 THE COURT: Thank you, counsel.

18 THE COURT: At this time I'm going to give you an
19 afternoon break. The State is anticipating an opening
20 statement that they think will be in the 45 minute --
21 they anticipate between 45 minutes, an hour, something
22 of that sort, for them to explain their anticipation of
23 how the case will develop, so we'll take a break now so
24 we can all get a stretch and a breath of fresh air,

25

whatever we need to do between that period of time.

1 That should allow us some time this afternoon to begin
2 actually with testimony in this case, depending on how
3 everything works itself out, so with that, we'll take a
4 15 minute recess then.

5 (Recess was taken.)

6 (Whereupon, the following
7 occurred in the
8 presence of the jury:)

9 THE COURT: Mr. Anderson.

10 MR. ANDERSON: Thank you, Your Honor.

11 May it please the Court, opposing counsel, ladies
12 and gentlemen of the jury, as you know, I'm Assistant
13 Attorney General Glen Anderson and I'm the Assistant
14 Attorney General that's been assigned to represent the
15 State in this case.

16 I'd like to introduce at this time Mr. Tim
17 D'Acci. Mr. D'Acci is the State Coordinator for the
18 National Flood Insurance Program and he also has
19 responsibility for the FCAAP program which you've heard
20 a little bit about but you'll hear more about from me,
21 and perhaps you'll hear some testimony from Mr. D'Acci
22 about it later on in this case.

23 The issue in this case is very simple from the
24 State's perspective. The issue in this case is who
25 should bare the risk of the damage caused by flooding on

1 the plaintiffs' property in November of 1990. Now,
2 there's no dispute that the plaintiffs' property
3 flooded. That's not the problem. The question is who
4 should bear that risk. Should it be the plaintiffs who
5 purchased the property in the flood plain and who, based
6 on their property in the flood plain, could expect it to
7 be flooded, or should it be the dike districts who own
8 the dikes.

9 And it's undisputed in this case, let me point
10 that out at this point in time, it's undisputed in this
11 case that the dike districts constructed and own the
12 dikes which the plaintiffs contend caused their
13 damages. Should it be they who pay? Should it be the
14 county who, as the plaintiffs contend, has based --
15 based on the county's participation in assisting the
16 dike districts in maintaining the levees, or should it
17 be the State based on the State's regulation of the dike
18 district's activities, and it's the State's position in
19 this case, if it is anyone other than the plaintiffs
20 that should bare this risk it should be the dike
21 districts.

22 And I'm going to be right up front with you. I'm
23 going to tell you that if anyone is responsible for
24 these levees it's the dike districts, and they're not
25 here, but we're asking you to put that responsibility on

1 them because the dike districts are the ones that
2 created the levees, they're the ones that constructed
3 the levees, they're the one that own the levees, they're
4 the one that maintain the levees, and they are the
5 individuals who benefit from the levees, and those who
6 benefit from something that causes damage ought to be
7 the ones who pay if that structure causes damage. It's
8 a simple proposition and that's the proposition we're
9 relying on in this case.

10 Before I talk about the evidence you're going to
11 hear in this case, and I will apologize at this point
12 because I'm going to repeat some of the things you've
13 already heard. I'm going to try not to repeat too much
14 of it but I feel the need to do that, because part of
15 it needs to go in the flow of my explanation and my
16 statement and why I think the responsibility lies with
17 the plaintiffs and the dike districts, but before I do
18 that I want to talk a little bit about the posture of
19 the case, and you've already heard it from me before,
20 but the plaintiffs are not suing the State in this
21 case. They have not brought any claims. They are suing
22 the county, and so it's their burden to prove that the
23 county has caused their damages, that is but for what
24 the county did the plaintiffs wouldn't have suffered any
25 damages. And so first the plaintiffs have to prove

1 their cause of action against the county, and you've
2 already heard some of the defense that Mr. Smart has or
3 some of the things that the county has argued to defend
4 against that claim.

5 It's only if you find that the county is
6 responsible for the damages caused to the plaintiffs
7 that you have to worry about the county's claim against
8 the State. The reason for that is that the county's the
9 only one making a claim against the State, and their
10 claim, as you heard Mr. Smart, is that the county, to
11 the extent that it may do anything on the levees, acts
12 as the State's agent. That's what their claim is. They
13 say if we did anything, we did it on behalf of the
14 State, and in order to carry their claim on that, the
15 county is required to prove that that they were required
16 to act or they acted at the instance of the State and
17 that they acted under the direction and control of the
18 State.

19 Now, the evidence in this case will show that the

20 State has done nothing to require the county to do the
21 things they do related to the levees. The State does
22 not require the county to participate in levee making.
23 The State has never required the county to construct or
24 maintain levees, and I just -- I want to briefly address
25 not having any evidence to establish that this State

1 requires the county or has required the county to
2 participate in levee maintenance.

3 Mr. Smart, at the end of his argument, pointed
4 out a statutory provision, RCW 86.24, actually he refers
5 to the 1935 act but it's codified now in RCW 86.24 of
6 the State statutes, and Mr. Smart represented to you
7 that this statute -- and he had it highlighted and up
8 there on the screen, too -- for the proposition that to
9 the extent that the county did anything, they acted on
10 behalf of the State, and that's what Mr. Smart says the
11 statute says.

12 The State does not agree that that's what the
13 statute says, and the State's position is that any
14 reasonable reading of that statute indicates that the
15 State Director of Conservation acts on behalf of the
16 State in cooperation with all these other agencies.
17 Under Mr. Smart's reading of the statute, the United
18 States Army, the Corps of Engineers, the counties,
19 anybody else that's mentioned in this statute, the long
20 list he read off, acts as the State's agent, and that's
21 simply not the case.

22 Now, what the testimony and evidence in this case
23 show, the testimony and evidence, you've already heard a
24 little bit of this, is that the Skagit River has
25 historically flood odd numerous occasions. It's flooded

1 41 times this century. It's exceeded 100 cubic feet per
2 second at the Mount Vernon gauging station, which is
3 considered to be significant flooding, more than 20
4 times in recorded history. And in each of these
5 instances, the Nookachamps area where the plaintiffs
6 lives floods. That fact has been identified as early as
7 1923 in a Army Corps of Engineers study. The Army Corps
8 of Engineers did a flood reconnaissance study of the
9 Skagit River and they reported during significant
10 flooding events, even lower than 100 feet cubic feet per
11 second, that the Nookachamps area flooded and it filled
12 up with water. That study and that finding has been
13 repeated throughout the years.

14 The Army Corps of Engineers has done a number of
15 studies in the thirties, in the fifties, in the sixties,
16 and even in 1979 recording that fact. Consistent with
17 that reality, the evidence in this case is going to show

18 that the plaintiffs' property has flooded historically.
19 Mr. Smart has talked about that to you and I won't
20 repeat a lot of that, but the evidence, for example, is
21 going to show Mrs. Torgeson's property has flooded on
22 several occasions to the extent that her barn floated
23 away. The evidence is going to show that an individual
24 named Madison Parker, when he purchased his house, was
25 told that the house had flooded before, that it had had

1 up to two feet the water in the living room on prior
2 occasions. And you'll hear similar testimony from other
3 residents, all showing, as you might expect, that if you
4 live in the flood plain you can expect to be flooded.

5 Now, the plaintiffs in this case complain and
6 they allege that the floods are higher than they were
7 before. And the evidence, testimony and evidence in
8 this case is going to show you that there are a number
9 of reasons for that, but that the most significant
10 reason is that there simply was more water. The factors
11 which combine to cause a flood or make a large flood
12 are, more than anything else, functions of nature. You
13 have snow melt-off, you have warm temperatures, you have
14 rain that previously saturated the ground, you have high
15 tides, and when all of these things come together they
16 cause a large flood event, and that's what occurred in
17 November of 1990. And, in fact, the flood in November
18 of 1990 was the largest flood as you can see, November
19 11th of 1990, the flood at that point in time was
20 142,000 cubic feet per second measured at the Mount
21 Vernon discharge point, gauging station.

22 If you look at February 11th of 1951, the
23 discharge was 144,000. The flood in November of 1990
24 was the largest flood measured at Mount Vernon since the
25 flood of 1951.

1 Now, the significance of this, there's two
2 things. First of all, let me refer to the fact that
3 also if you look at the flood elevation in 1990 at Mount
4 Vernon, and that's measuring the flood elevation of the
5 river, how high is the river at Mount Vernon, I think
6 you can see that in 1990 it was at 36.6. If you refer
7 back to 1985 when the flood -- or 1951 when the flood
8 was 144,000 feet per cubic second, 2,000 cubic feet per
9 second more than it was in 1990, the flood elevation is
10 36.85. Those numbers are fairly consistent. And what
11 that establishes is that when the flood comes down the
12 river, that the flood flow was the same in 1990 as it
13 was in 1951, has roughly the same flood elevation in
14 Mount Vernon, and consequently we expect the same type
15 of flooding.

16 One of the reasons that there was no significant
17 -- that there was this long a period of time from 1951
18 to 1990 between large flood events of this type is that
19 in 1959, the dams on the upper Skagit River were
20 completed. The Upper Baker Dam and the Ross Reservoir,
21 the dams were completed up there. And those dams are
22 significant because the Army Corps of Engineers uses
23 those for flood storage, and the evidence in this case
24 will show that after the 1990 flood in 1991, the Corps
25 of Engineers, in a document called the Flood Summary

1 Report on the Nookachamps and Skagit and Snohomish River
2 Basins, did a study, and part of their study was to
3 determine what effect the flood storage that the
4 up-river dams had on the flood downstream, and the Army
5 Corps of Engineers concluded that as a result of the
6 water that they were able to withhold from the river,
7 from the flood during the flood event, resulted in the
8 flood level being three feet lower at Mount Vernon than
9 it would have otherwise. That is if the dams had not
10 been there and they had not had that storage capacity,
11 the flood levels would have been at 39 feet in Mount
12 Vernon instead of at 36 feet. Consequently, the flood
13 elevations on the plaintiffs' property would have been
14 higher.

15 The reason that's significant is for two
16 reasons. One is that is partly responsible for the fact
17 that there were no large floods or that that resulted in
18 a diminishment of the flood sizes between 1959 and 1990,
19 leading to what Mr. Smart referred to as a sense of
20 security on behalf of people that the valley wouldn't
21 flood. The other is that that compensates, if you take
22 out the levees as the plaintiffs allege, and you attempt
23 to remove the levees and pretend like they're not there,
24 then you also have to remove the up-river storage by the
25 dams. And when you do that, you end up with roughly the

1 same situation in the 1990 flood whether the dams and
2 the levees are there or whether they're not. The flood
3 levels are going to be roughly equivalent, so the
4 evidence in this case is going to show that these
5 plaintiffs could expect to be flooded, that they could
6 expect to be flooded, and that, in fact, they could
7 expect to be flooded to even levels worse than this
8 because they live in the hundred year flood plain. And
9 this wasn't a hundred year flood event, and when you
10 move into the hundred year flood plain, if you know that
11 you can be flooded and you know that you're subject to
12 the 100 year event, then you know that you can be
13 subject to a flooding that is worse than this.

14 Because of this flooding people have been
15 building dikes on the river since the 1800s, as counsel
16 mentioned to you. As they both have mentioned to you,
17 the first dikes were built by farmers, and they were
18 primarily dikes that were intended to protect the crops
19 from the summer floods. They were mounds, as counsel
20 describes. They were small and they met with limited
21 success.

22 In the 1890s, legislature passed a statute which
23 authorized the formation of dike districts. That's been
24 referred to, too. Dike districts are not state
25 agencies, and I don't want you to be misled. They're

1 independent governmental entities. They're like school
2 districts, they're just like fire districts, they're
3 just like cities, they're just like towns. The
4 legislature passed a statute authorizing their
5 formation. That doesn't mean they're a state agency.
6 Dike districts are independent governmental entities.
7 They have the power to tax. They have the power to
8 condemn land. They have the power to buy land, to sell
9 land, to lease land, to enter into contracts, to sue and
10 be sued, all the same things that any other governmental
11 entity has, and these dike districts exist for the sole
12 purpose of constructing and maintaining dikes. And, in
13 fact, as counsel pointed out, the dike districts have
14 the sole responsibility for the sole charge of dike
15 construction and maintenance in their dike districts,
16 and these commissioners that are elected by the members
17 of that dike district are responsible to the members of
18 the dike district and their duty is to insure that the
19 dikes are constructed and maintained in order to protect
20 the people behind them.

21 The independence, as I referred to, that the dike
22 district has the exclusive responsibility, exclusive
23 charge for the construction, has long been respected by
24 everybody, including the State of Washington.

25 I want to show you an excerpt from the same

1 letter that Mr. Smart showed you to Mr. B. J. Bournes,
2 referring to the dike relocation on Dike District 12 in
3 1955, and if you read -- let's see if I can get this all
4 on here. I don't know if everybody on there can read
5 it, but what this letter says, after approving the dike
6 district's project, after agreeing to grant them a
7 permit, which I'll discuss in a minute, Mr. Hastings,
8 the State Supervisor of Flood Control, stated, "The
9 extension program now in progress is in direct
10 conformance with district law and the district's
11 ultimate comprehensive plan for flood control within

12 their financial ability to carry out such a program.
13 Neither this office nor any other authority can
14 interfere with the affairs of the district as are deemed
15 feasible and advisable by the diking commissioners who
16 represent that district."

17 So, in 1955, Greg Hastings is telling Mr.
18 Bourne, who is complaining about this extension, that
19 you can write a letter to me and you can complain but
20 there's nothing I can do about it because if the diking
21 district is conforming with the law and they're doing
22 what they can, then I can't interfere with them.

23 Pursuant to the statutes I've referred to, as
24 you've already heard, Dike District 12 and Dike District
25 17 were formed in the early 1990s. These dike

1 districts, Dike District 17, is on what I would call the
2 south side of the river. I think of it as you're
3 driving up I-5, you get there and look upstream towards
4 the Cascades, Dike District 17 is on the south side of
5 the river, Dike District 12 is on the north side of the
6 river. These two dike districts constructed the dikes
7 that are there today. They maintained the dikes.
8 They've operated the dikes and they've done everything
9 in regard to the dikes. They've constructed them,
10 operated them and maintained them since that time.

11 Evidence will show that to this day the dike
12 districts continue to make all major decisions about the
13 dikes. They decide what repairs to do, they decide
14 whether to raise the levees, they decide whether to
15 riprap them, whether to put roads on top of them.
16 They're their dikes and they decide what they want to do
17 with them and nobody else interferes in that.

18 Along that line that will be the testimony of the
19 dike districts commissioners that come in here. That
20 hasn't been mentioned to you, but there are dike
21 district commissioners like Pete Walker who is a
22 commissioner of Dike District 12 from sometime in the
23 1950's 'til I think in the mid 1970's, I can't recall, a
24 long time. Gerald Mapes, another dike district
25 commissioner from Dike District 12 for a long period of

1 time both will come in here and tell you that decisions
2 that are made as to the construction, maintenance and
3 operation of these levees are made independently by the
4 dike districts free of any influence from the state,
5 free of any influence from the county, free from any
6 requirement. They will both tell you that they are not
7 aware of any requirement by the State that they
8 construct or maintain levees. State witnesses will tell
9 you the same thing. We haven't gone out and we haven't

10 told anybody that they have to construct or maintain
11 levees.

12 Now, the reason these levees are constructed and
13 the reason that these people act in the fashion that
14 they do, and I'm referring to the dike district
15 commissioners, is because the whole purpose of the dike
16 is to protect the people that are behind the dikes. The
17 people that the dike district commissioners tax and the
18 people that elect the dike district commissioner,
19 that's their constituency. That's who they're
20 responsible to. Their interest is to maintain that dike
21 and that's why they do it.

22 Now, what is the State's role in all of this? Up
23 until 1935 the State had no role in flood control. They
24 had no role whatsoever. They didn't build dikes, didn't
25 regulate dikes, didn't do anything, and up until that

1 time, so what we had prior to that was all these dike
2 districts, independent people, private citizens out
3 there building dikes, and the evidence in this case will
4 show that the result of that was you had a lot of levees
5 being built that were improperly constructed, that
6 weren't safe, that were put in improper locations on the
7 river and, in essence, you had a lot of levees being
8 built that caused more harm than good, either because
9 they caused flooding where they shouldn't. They didn't
10 make sense because you had a levee here and a levee here
11 and no levee in between, or you had levees that were
12 failing during even minor floods.

13 And in 1935 the legislature looked at this, and
14 in the exercise of its wisdom, the legislature said we
15 need to regulate this. If people are going to be out
16 there building these levees and representing that
17 they're going to protect the public, then we need to
18 regulate it and we need to insure that that is done in a
19 workmanlike fashion, that sound engineering principles
20 are used so that we can insure the public safety and
21 health, so that we don't have dikes that fail every time
22 there's a flood, so we don't have dikes that are being
23 built in a position where they cause more harm than
24 good, and the legislature passed the act that Mr. Smart
25 referred to earlier. And that act gave the State

1 regulatory control over all navigable waters. It didn't
2 give the State control over the flood control
3 stretches. It didn't remove the dike districts and put
4 the State into their position, it didn't put the State
5 into the position of developing a plan or having a
6 policy of what flood control would be. It didn't give
7 the State the right to impose upon the local government

8 what they wanted -- what the State's will would be as
9 opposed to what the local government will would be when
10 it came to flood control. And what it gave the State
11 the right to do was to have essentially what amounts to
12 building -- or construction standards, and it gave the
13 State the authority to reject applications to construct
14 levees if they, number one, didn't meet sound
15 engineering principles, weren't built safely or weren't
16 planned to be constructed in a safe manner and, number
17 two, if they were going to be put in such a position
18 that they caused more harm than good by increasing the
19 flooding in other places.

20 Now, these same rules that were passed by the
21 legislature in 1935 applied to all construction on a
22 navigable water. They applied to the construction of
23 levees, they applied to the construction of bridges,
24 they applied to the construction of dams and they
25 applied to both private and public parties. Didn't

1 matter whether it was Dike District No. 12, Skagit
2 County, the State of Washington, Department of
3 Transportation or Boise Cascade or some other private
4 individual. It didn't matter if it was Joe Smith that
5 wanted to build a levee. Everybody had to conform to
6 those same regulations, and the way that this was
7 administered was that you filled out an application. If
8 you wanted to build a levee, if you wanted to engage in
9 some type of other major reconstruction, as Dike
10 District 12 did in 1955 when they relocated their levee,
11 you filled out an application. And not surprisingly
12 when these dike districts filled out these applications,
13 and this is one again that Mr. Smart showed you earlier,
14 they sought -- the dike districts or whoever, somebody
15 building a dam, and, interestingly, you'll see evidence
16 in this case if you wanted to construct a home in the
17 flood zone you had to get one of these permits, and this
18 kind of makes the point.

19 These people, when they sought the permits, they
20 sought them in perpetuity because they wanted the right
21 to construct the dike and leave it there. They didn't
22 want to come back to the State and ask can I have a
23 permit to keep my levee here, and we can all agree that
24 that would be a bureaucratic nightmare if you had to
25 come back and get a permit to maintain your home, so

1 these people applied for the permits in perpetuity.

2 As was the case in 1955 when Dike District No. 12
3 rye located their dike, if they met the standards, if
4 the levee met sound engineering standards and the levee
5 was not going to increase flooding or alter the regime

6 of the stream, the State was required to issue a
7 permit. That is what we would all expect. If you're
8 going to have regulatory requirements, if you have a
9 building code and if you think of it like a building
10 code, if you meet the standards the State can't say to
11 you or the county or whoever issuing the building code,
12 they can't say to you, no, I'm not going to give you a
13 permit, they've got to be able to tell you you didn't
14 meet the standards, but in the cases where they did, the
15 permits were issued and they were issued in perpetuity,
16 because that's what was asked for.

17 And something that's interesting about these
18 permits is if you turn them over on the back, and every
19 one of them has this language, and this is really small
20 so I don't know if you'll be able to see it, these
21 permits state that no property rights are granted
22 herein, nor does this permit absolve permittee from
23 liability for any damages which may be suffered to life
24 or to -- to life or to property, public or private, by
25 reason of works, structures and improvements authorized

1 hereunder. So when the State is issuing this permit, the
2 State is telling Dike District 12 or the individual
3 building the dam or the individual building their house
4 that they're not being relieved of any liability, that
5 the State's not accepting that responsibility. All the
6 State is doing is saying you met the regulatory
7 requirements so you can do what you want to do. That's
8 what the permit system is about.

9 Now, one comment I wanted to make about that, Mr.
10 Smart made the comment that when this permit was issued
11 that this certified that the levee or whatever other
12 flood control structure was in compliance with the State
13 policy on flood control. Now, when the legislature
14 mentioned the State policy on flood control, they didn't
15 come out, and there's going to be no evidence in this
16 case of any policy or any plan indicating that people
17 should or should not build levees, where they should be
18 built or anything of that nature and, in fact, the
19 permit does not indicate compliance with the state
20 policy on flood control. What the testimony in this
21 case will be is that the permit indicates that the
22 person met the regulatory requirements and they were
23 entitled to receive the permit.

24 Now, the State had another role which has been
25 mentioned, and that is that over the years the State's

1 administered the FCAAP program, and that's the Flood
2 Control Assistance Account Program, and that is a
3 program whereby the State has made available funds,

4 assuming the legislature appropriates them, and in some
5 years you will hear testimony the legislature has not
6 appropriated money for these purposes, but over the
7 years when the legislature has appropriated these funds,
8 the State has money which they make available to the
9 local government to construct and maintain these type of
10 facilities.

11 These funds are available on a voluntary basis.
12 Nobody's required to apply for them, nobody's compelled
13 to apply for them, but they're available to cities,
14 towns, counties, dike districts, drainage districts, any
15 entity that maintains some type of flood control
16 structure, whether it be a levee, whether it be tide
17 gates, pump houses, things like that. This money is
18 available to them and they apply for the money. It's a
19 grant program.

20 Essentially what the State is doing is giving
21 away money to the locals, and they do it based on
22 applications received from the local government. The
23 projects, the Dike District Commissioners in this case,
24 even on their FCAAP projects, they're initiated at the
25 local level. They decide what they want to do on the

1 levees each year and then they decide which of their
2 projects are important enough to them that they want to
3 try and apply for State grants, because this state fund
4 covers the whole state and it's competitive, and I'll
5 tell you there's not a lot of money.

6 Mr. D'Acci will tell you when he testifies that
7 the applications for these funds far exceed the
8 available funds, and so it's competitive, and so the
9 dike districts make their decisions about which projects
10 they want to apply for. Some of them they receive money
11 for, some of them they don't. Funding for each project
12 is limited to 50 percent from the State, and the
13 testimony you will hear is that a lot of the projects
14 don't receive funding from the FCAAP program, either
15 because they don't apply or because the project
16 application is denied because there's not money, there's
17 other priorities that are more important, because what
18 happens is these are funneled up through the county.
19 The applications are submitted to the county and the
20 county engineer prioritizes them on a county-wide basis
21 and then they go up to the State and the State looks at
22 it and prioritizes them on a state-wide basis, and it's
23 an allocation of limited funds and you try and decide
24 what is the best way to spend the money, and the
25 evidence will show that a lot of projects are done by

1 the dike district without any speciousness by the State

2 because money's not available.

3 Evidence will also show that when the State
4 participates, it acquires no ownership interest and
5 there's no requirement that the levees continue to be
6 maintained. Maybe there should be but there's not.

7 And this is in contrast to a program that you'll
8 hear about called PL99, and PL99 is a program
9 administered by the federal government, by the Corps of
10 Engineers, and it's a similar grant type of program
11 except it's a little more direct. If your levee breaks
12 in a flood, which they frequently do, or if there's
13 severe damage to it, the dike districts can apply to the
14 Corps of Engineers to have the Corps of Engineers come
15 in and repair the levee, and the Corps of Engineers will
16 come in and do that on a participating basis, where they
17 will provide the work and they will provide the majority
18 of the funding and they will take care of your problem
19 for you, and the evidence in this case will show that
20 the dike districts, in particular Dike District 12 and
21 Dike District 17 in this case, have, on several
22 occasions, sought the assistance and received the
23 assistance of the Corps of Engineers under PL99. As a
24 condition of receiving PL99 funds, the local sponsors
25 have to agree, the dike districts, have to agree to

1 maintain the dikes to Army Corps of Engineers standards,
2 and they have to agree to that before they receive the
3 funds, and if after they receive the funds they do not
4 maintain the dikes to Army Corps of Engineers standards,
5 the Army Corps of Engineers position is they're not
6 eligible to apply for PL99 funds anymore, and that's
7 pretty significant and pretty important to these dike
8 districts because when their dikes get damaged in
9 floods, they need help in maintaining them and the Corps
10 of Engineers is the number one group to assist them.

11 Now, one other thing that you'll hear is called
12 flood plain management, and the State has been involved
13 in flood plain management and now it's involved under
14 the National Flood Insurance Program, and flood plain
15 management is kind of a fancy euphemism for regulating
16 development in the flood plain. Under the National
17 Flood Insurance Program, local government, if they
18 regulate development in the flood plain and qualify, the
19 whole county, so, for example Skagit County, if they
20 regulate development in the flood plain, can qualify
21 under the National Flood Insurance Program for reduced
22 rates of insurance, and they qualify for insurance so
23 that residents in the flood plain can purchase flood
24 insurance at reduced rates, and the requirements of that
25 program are that the county adopt an ordinance and that

1 the State is the kind of coordinating agency between the
2 federal government and the county on that. The county
3 adopts an ordinance which limits development, basically
4 either prohibiting development in the hundred year flood
5 plain or conditioning it so that buildings are
6 constructed to be above the hundred year flood plain.

7 The National Flood Insurance Program and the
8 flood plain management has nothing to do with the
9 maintenance of levees. There may be some suggestion
10 made in this case, there may be some inferences made in
11 this case that it has something to do with levee
12 maintenance, but when you get right down to it, it has
13 absolutely nothing to do with levee maintenance because
14 when they map the hundred year flood plain, and you'll
15 see this, you've seen it already, the hundred year flood
16 plain goes around the levees, and the federal government
17 says unless you have a levee that's certified to
18 withstand a hundred year flood, which one none of the
19 levees in Skagit County are certified to, the federal
20 government acts as if they are not there in mapping the
21 hundred year flood plain, and they treat a house that's
22 on the protected side of the levee the same as the house
23 on the unprotected side of the levee is treated in terms
24 of insurance rates and mapping and all of the
25 requirements that they apply. The county has to

1 regulate development the same inside the levee as
2 outside the levee, and so it has nothing to do with
3 levee maintenance.

4 Those are the primary functions performed by the
5 State, or historically performed. I should mention, and
6 I missed this point. The State no longer issue flood
7 control zone permits, the permits I showed you earlier.
8 The State stopped issuing those in Skagit County in 1981
9 because Skagit County requested that be delegated to
10 them and the flood permit program was abolished in 1987
11 by the legislature, so those are what the State does.

12 The evidence in this case -- there's going to be
13 no evidence that the State owns these levees, that the
14 State construct these levees, that the State maintains
15 these levees or that the State required that they be
16 built or maintained. There's going to be absolutely no
17 evidence about that. There's also not going to be any
18 evidence of any grand state plan or any state policy
19 where it is set forth and dictated to the local
20 government what they're going to do. The State has
21 never taken that position. The State has never gone up
22 to Skagit County and told Skagit County to build
23 levees.

24 Now, the last thing I want to talk about is the

county and what the county does, and you've already

1 heard some of this but since 1907, so even before the
2 State had any authority in this area, the county has had
3 authority to engage in flood control if they so
4 desired. In this particular case they don't own any of
5 the levees and they didn't construct any of the levees.
6 You've already heard Mr. Smart talk about the programs
7 that they administer. They administer the local county
8 river fund, they administer a rock riprap fund where
9 they provide riprap to the dike districts. Those
10 programs are administered by choice by Skagit County,
11 and that's an important point. Those are voluntary
12 programs of the county. They're not required by the
13 state and you're not going to hear any testimony that
14 they're required by the state.

15 The county has also, on several occasions,
16 numerous occasions provided assistance of various forms
17 to the diking district. A lot of this is based on
18 intergovernmental agreements where they agree to provide
19 some service to the diking district and the diking
20 district agrees to reimburse the county for this
21 service. Those services are provided on a voluntary
22 basis. That's a decision of the Skagit County
23 Commissioners or the Skagit County government as to
24 whether to provide that or not. It's not required by
25 state law. It's not required by any state employee

1 going up and telling Skagit County that they've got to
2 do that.

3 The one instance that there is some requirement
4 is under the FCAAP program, and the county engineers, as
5 I've already indicated to you, are required to
6 prioritize projects on a county-wide basis. They're
7 also asked to supervise the construction and to inspect
8 it. They don't initiate the programs. They're not
9 required to initiate the projects. They're not required
10 to participate in the projects. They're required
11 basically to be the State's ears and eyes on the ground
12 to make sure that the project, if the State puts money
13 into it, make sure that the project's done properly and
14 to make sure when the project is done, that the money
15 has been spent for what it's been requested, and that's
16 not a real complicated proposition.

17 The State sends an inspector out there to do the
18 same thing. If Dike District 12 applies for \$20,000 to
19 repair some aspect of their -- some damage to their
20 levee, then they're required to submit plans. The plans
21 have to be approved to insure that it makes sense to
22 spend the money, and then after the project is done,

23 somebody wants to go look at it to make sure it was done
24 the way it should have been done and to make sure that
25 the money was spent for what it was intended to be

1 spent.

2 The county has also, over the years, developed a
3 number of plans to in, essence assist, the dike
4 districts or guide the dike districts in what they do.
5 These plans are primarily the result of work of
6 committees established by the county commissioners. For
7 example, as early as 1968 the County Commissioners
8 appointed a Water Resources Advisory Committee and the
9 charge to the Water Resources Advisory Committee was to
10 develop a comprehensive plan for flood control on the
11 Skagit River. That committee recommended a plan which
12 included as an aspect of it the lower levee system,
13 which refers to the area that we are talking about, and
14 the plan referred to these levees would be raised
15 pursuant to the plan developed by the Corps of
16 Engineers, authorized by Congress and the 1966 Flood
17 Control Act. That plan was eventually adopted by the
18 county.

19 In 1980 another committee was appointed, the
20 Skagit River Flood Control Committee was established,
21 and -- this is a document that will be entered into
22 evidence. It's a County Commissioners' resolution
23 establishing that committee, and that committee -- the
24 charge again to that committee was to develop a
25 comprehensive plan for flood control on the Skagit River

1 and again, a plan was recommended.

2 In 1989, finally in 1989 the county adopted the
3 Comprehensive Flood Control Management Plan. That plan
4 undoubtedly will come into evidence and you will see
5 that plan. That plan was funded in part by the state
6 through the FCAAP program and the county adopted it
7 pursuant to the FCAAP program. Under FCAAP there is a
8 requirement that for the continued participation in the
9 FCAAP program, there has to be a comprehensive plan.
10 And that's part of the State's response to the fact that
11 money was going out to the counties and was being spent,
12 for lack of a better term, willy-nilly and the State
13 wasn't necessarily getting the best deal for its money
14 and, as most governments learn, the best way if you're
15 going to start giving money away is to require the local
16 government to have a plan before you give the money to
17 them, and so in response to that need, the State put in
18 the FCAAP program a requirement that in order to remain
19 eligible the counties had to adopt comprehensive flood
20 control management plans.

21 The testimony in this case, first of all, if you
22 didn't want to adopt a plan you didn't have to. Alls
23 that meant was you didn't get FCAAP funds. Second of
24 all, the testimony in this case will establish that what
25 went into the plan was the decision of the county or the

1 people developing the plan. The State didn't dictate
2 what the plan was. The State said that the plan had to
3 consider certain alternatives but that the selection of
4 the plan was up to the local government. That's what
5 the evidence in this case will show, and the evidence in
6 this case will show that Skagit County, consistent with
7 their prior plans, and there will be plenty of testimony
8 about that, adopted a plan which included levee
9 maintenance, and what's interesting about this plan is
10 that the plan lists as one of its goal here on the
11 executive summary "maintain local control of flood
12 control works." And if you look on page -- chapter
13 four, which is where the goals and objectives for area
14 of coverage are included, short-term goal number four,
15 or number five on page -- short-term goal number five
16 is to maintain local control of flood control works.

17 And that's exactly what I've been talking about
18 is what local government wants is to maintain local
19 control. They don't want things to be dictated to them
20 by somebody upstream, and that's what the county
21 engineer, the flood control engineer Don Nelson, who was
22 the flood control engineer at the time that this was
23 adopted in 1989, will tell you in his testimony. He was
24 the flood control engineer from 1975 until he retired in
25 1991, and he will tell you that this referred to the

1 diking districts wanting to maintain control. They
2 didn't want somebody further upstream taking over their
3 responsibilities and telling them what to do. They
4 wanted it to remain the way it had always been.

5 Another thing, and as I'm getting close to the
6 end here, another thing that's interesting that Don
7 Nelson will tell you to you is that the State -- that
8 there's nothing that the State does that requires the
9 county to maintain the levees. His testimony is
10 consistent with what he said in his deposition
11 testimony, his prior testimony. He will testify in this
12 Court that the county is not required by the State nor
13 does there exist any State requirement that requires the
14 county to do anything in regard to the levees. Remember
15 that I mentioned earlier that the dike district
16 commissioners will testify along those same lines, that
17 they act independently and they don't act in response to
18 any State requirement, and that's important because what

19 the county is claiming and what the county, in terms of
20 the State is that the county is required to do the
21 things which the plaintiffs allege caused their damages,
22 and the evidence is not going to support that.

23 Now, I want to thank you for listening to me.
24 This is going to be a long trial. Some of us wish it
25 wouldn't be, but there's a lot of evidence that's going

1 to be put in. Because of the order of the case, as I've
2 discussed, because of the burdens of proof, it may be a
3 long time before you see me again. When we get to the
4 end there may not be any evidence left for me to
5 produce. All the witnesses may be called, all the
6 witnesses may testify and I may have to elicit testimony
7 from them during the plaintiffs' case or during the
8 county's case, and so it very well may happen that at
9 the end of the case I'll stand up and say, "We don't
10 have any witnesses to present, Your Honor."

11 I don't want you to think if that happens or, as
12 we go through the case, I don't want you to think that
13 the State doesn't have a case, because the State does
14 have a case. The State's case is that these people at
15 the local level, the diking districts, made their
16 decisions and they chose their destiny. It wasn't
17 dictated to them by the State. The fact that we don't
18 call any witnesses at the end of the case doesn't change
19 that, and I'm going to have to rely on you to listen to
20 the evidence throughout the case, to listen to that, to
21 recall that evidence, because it may not come in all in
22 a nice little package like perhaps the plaintiffs' case
23 is going to be. My case is probably going to be spread
24 out all over time but I want you to recall this theme,
25 and at the end I think the evidence -- you'll agree that

1 if there is a verdict against anyone, it should not be
2 against the State of Washington.

3 Thank you.

4 THE COURT: Thank you, Mr. Anderson.

5 THE COURT: Counsel.

6 MR. HAGENS: Call Mr. Mr. Regan.

7 THE COURT: All right, sir, if you'd raise your
8 right hand.

9 RICHARD P. REGAN called in behalf of the
10 plaintiff, being first duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. HAGENS:.

14 Q Would you state your name and address, and please spell

15 your name, if you would?
16 A My name is Richard P. Regan, R-e-g-a-n. I live at 26050
17 Southeast 159th Place, Issaquah, Washington.
18 Q By whom are you employed currently?
19 A I'm employed by Northwest Hydraulic Consultants, which
20 our office is in Tukwila, Washington.
21 Q What capacity are you employed?
22 A I'm senior hydraulic engineer with the firm.
23 Q Who do you report to?
24 A I report to a fellow by the name of Mr. Jerry Mutter.
25 Q What is his capacity?

1 A He is the principal of the firm and senior owner.
2 Q Okay. Now, let's talk about your profession, hydraulic
3 engineer. Are you licensed as such in the State of
4 Washington?
5 A Yes, I'm a licensed professional hydraulic and civil
6 engineer in the State of Washington. My certificate
7 number is 10210.
8 Q And what kind of training, if any, do you have to have
9 to be a licensed civil engineer and hydraulic engineer?
10 A My training started out in Wentworth Institute in
11 Boston, Massachusetts. I started in mechanical
12 engineering, which is before I went into the Air Force.
13 After leaving the Air Force I went to the University of
14 Washington, studied civil engineering. Subsequent to
15 the University of Washington, I went to Colorado State
16 University and the Corps of Engineers Hydroelectric
17 Engineering Center and studied additional hydraulic
18 engineering.
19 Q What did you do after going to Colorado State?
20 A The additional courses I took at Colorado State during
21 the time I was employed by the U.S. Army Corps of
22 Engineers. My employment with the Corps of Engineers
23 started in 1961 and terminated at my retirement in
24 1987. I spent 27 years with the Corps of Engineers as a
25 hydraulic engineer, and the last ten years was Chief of

1 Hydraulic Engineering.
2 Q What did you do as Chief of Hydraulic Engineering your
3 last ten years with the Army Corps of Engineers?
4 A Okay. My principal assignment during that period of
5 time was I was in charge -- during that time as Chief of
6 Hydraulic Engineering, my assignment was to -- I was in
7 charge of all hydraulic engineering done within the
8 Seattle District.
9 Q And that was during what period of time?
10 A That was from about 1978 to 1988. At that time I had as
11 many as eight or ten employees and other times it was
12 down like four or five, depending upon the work load.

13 Q Were those engineers as well?
14 A They were all engineers -- no, they weren't. There was
15 one technician. All the rest were engineers.
16 Q Did you retire from the Corps, Mr. Regan?
17 A Yes, I retired -- I had -- with my military time I had
18 over 30 years of time with the federal government, and I
19 retired and went to work -- after I retired I went to a
20 firm name of Klohn, Leonoff, principally a Canadian
21 company that had a small office in the Seattle area. I
22 worked at that firm between 1988 and 1991. In October,
23 I believe it was of 1991, I went to work in the -- in my
24 present capacity as senior engineer, Northwest Hydraulic
25 Consultants.

1 Q Have you ever taught dam design or anything of that
2 nature?
3 A Yes, I've had a number of experiences. I've lectured at
4 more than five different courses at the Corps of
5 Engineers Training Center in Pittsburgh, Mississippi.
6 During my tenure with the Corps of Engineers I was a
7 member of the Corps of Engineers Channel Stabilization
8 Committee. I was on that committee for ten years. That
9 committee looked at -- it was a committee of about ten,
10 twelve people, and all engineers that looked at most
11 serious problems that the Corps of Engineers had
12 throughout the United States. We looked at two or three
13 different projects, problems every year.

14 Also during my time with the Corps of Engineers I
15 was a -- I was a member of a team that went to the
16 People's Republic of China in 1980. That trip to China,
17 we were there for two reasons. One to assist the
18 Chinese engineers with a very large dam that they were
19 proposing to build. Another purpose of the trip was a
20 -- to teach, to provide technical transfer of all types
21 of -- all dam design. Each person on the team was an
22 expert in certain phases of dam design. My phase was
23 hydraulic engineering.

24 Q And have you also served as a consultant with the Corps
25 of Engineers in connection with the Mount Penatubo

1 eruption?

2 A Yes.

3 Q Tell us what your experience was.

4 A During my time right after I went to work for Northwest
5 Hydraulics, the Corps of Engineers of the Portland
6 District hired me as a consultant to a team that they
7 sent to the Philippines to look at the river channel and
8 sedimentation problems that had arose from the Mount
9 Penatubo eruption.

10 Q All right. So you went to the Philippines then; is that

11 right?
12 A Yes, I spent two or three weeks, I believe, over in the
13 Philippines, and worked afterwards in office work after
14 we came back.
15 Q Who typically hires your services or the services of
16 your company?
17 A Okay. Our company is hired by all different types of
18 clients. We have quite a bit of work going for the
19 Corps of Engineers. We have quite a bit of work going
20 for the State of Washington. We are hired by county
21 governments, city government. We also have some private
22 clients.
23 Q Okay. What is the sorts of things that you as a
24 hydraulic engineer do, Mr. Regan?
25 A Okay. My work is in water hydraulics as opposed to

1 machinery hydraulics, water hydraulics having to do with
2 anything having to do with rivers, river run-off, the
3 sedimentation in the rivers, erosion. Basically that
4 probably covers everything. I probably could think of a
5 few more if I was more serious about it.

6 Q Have you had any experience on actual dam projects as
7 such?

8 A Yes, I have been a designer on a number of dam
9 projects. The largest one that I have worked on was the
10 Libby Dam which was designed in the late sixties and
11 early seventies, and proceeded into the mid-seventies
12 really. Libby is a dam in northwestern Montana. It's a
13 450 foot high concrete gravity dam and it's basically
14 half a mile across the top. It stores water in the
15 reservoir, as I remember, five million acre field of
16 water, and backs water up for about 90 miles upstream
17 from the dam.

18 I've worked on modifications to the Chief Joseph
19 Dam on the Columbia River. During that time we designed
20 a complete rebuild of the spillway, and raising of the
21 dam. I worked on the Lower Monumental Project on the
22 Snake River. Worked -- I did all the hydraulic design
23 on the Willapa River outside Grays Harbor. And
24 presently I've been working with the Portland District
25 on their four dams on the lower Columbia River,

1 Bonneville, The Dalles, John Day and -- yeah, and
2 McNary.

3 Q Okay. Do you have any familiarity with the Skagit River?

4 A Yes. Yes.

5 Q Would you tell the jury what that familiarity is?

6 A I'm quite familiar with the Skagit River. During my
7 tenure with the Corps, I was hydraulic engineer in
8 charge as being -- of the design team of the Corps of

9 Engineers project that came up in 1979 for raising and
10 strengthening the levees on the Skagit River.
11 Prior to that I had been involved in the Skagit
12 River to some extent during flood fight activities, and
13 subsequent to that I got myself abreast on what was
14 going on in the Skagit River for my own edification.
15 Q Okay. Have you had any work in the Skagit River in
16 connection with any activities that FEMA has been
17 involved with?
18 A Yes. During my time with the Corps we did some work for
19 FEMA, Federal Emergency Management Agency. We did look
20 at flooding in the -- basically from Sedro Wooley
21 downstream, and I believe we did some flood studies
22 upstream to Concrete.
23 Q Okay. And how were those flood studies used, Mr. Regan?
24 A They were to be used with the flood insurance program,
25 to develop rate maps and to develop maps that will

1 assist the regulatory people, the county or cities as to
2 where buildings could be built and how high above --
3 where the flood profile would be in various agency areas
4 so you would build the houses high enough.
5 Q Can you tell the jury during what period of time you did
6 this FEMA work.
7 A I can't really remember. It had to be after 1979.
8 Q Let's talk a little bit about general data and
9 definitions. Does the Skagit River drain a large area?
10 A Yes. Skagit River drains, if you're at Mount Vernon,
11 say the highway, upstream from highway I-5 bridges,
12 about 3,050 square miles of drainage.
13 Q Do we have a map with us that shows the actual drainage
14 area of the Skagit River?
15 A Yes, I do.
16 Q Where did you obtain this map?
17 A That map is a reproduction, a blowup of an exhibit that
18 is in the Corps of Engineers July, 1979, General Design
19 memo, Skagit River, Washington, General Design
20 Memorandum of Levee Improvements.
21 Q Was that the project you were chief engineer on?
22 A I was chief hydraulic engineer on that project, yes.
23 MR. HAGENS: We would offer Exhibit No. 197 at
24 this time, Your Honor.
25 THE COURT: Counsel.

1 MR. SMART: No objection, Your Honor.
2 MR. ANDERSON: No objection, Your Honor.
3 THE COURT: 197 will enter.
4 MR. HAGENS: Your Honor, I don't know how this
5 thing works.
6 Your Honor, may the witness just approach the

7 board?
8 THE COURT: Again, as I say before, if you'll
9 have him testify from your side, therefore keeping the
10 line of sight open with the Court Reporter as much as
11 possible.
12 Q Sure. Mr. Regan, I wonder if you just describe
13 essentially what this exhibit is and what it depicts.
14 A This is a map basically of the Skagit River drainage
15 area which is outlined in blue. Also on this sheet is a
16 small inset at the upper right-hand corner of the State
17 of Washington, showing the Skagit drainage basin shaded
18 in yellow.
19 Q And the red or lettering you put in here are what?
20 A Now, I've outlined the Skagit Basin in blue, which at
21 the Mount Vernon gauge the U.S. Geological Survey says
22 it's about 3,050 square miles of drain upstream from
23 that. The basin extends some 20, 30 miles up to Canada.
24 It also extends basically the same amount of distance
25 into Snohomish County. It covers a vast area of the

1 Skagit County.
2 Q Does it include the Western Cascades, in that region, or
3 not?
4 A A large portion of the Western Cascades. Basically the
5 ridge, the crest of the Cascades, would fall on this
6 blue line here.
7 I have outlined on here a number of other things
8 for reasons you'll see later. As I pointed out, the
9 Concrete gauge. We'll be talking about discharges at
10 the Concrete gauge. That's the U.S. Geological Survey
11 gauge at Concrete. There is -- there was another gauge,
12 U.S. Geological Survey gauge, at Sedro Wooley. I
13 pointed to that one. That gauge is no longer in
14 existence. In fact, it was only in existence for a
15 short period of time. There isn't a lot of record on
16 that gauge. There is a gauge, newer gauge at Mount
17 Vernon. The Geological Survey saw fit to move the Sedro
18 Wooley gauge down to Mount Vernon, and it's on the old
19 Highway 99 bridge, and that's why I showed Mount Vernon
20 gauge at that location.
21 Also shown on here, the town of Mount Vernon. I
22 outlined it. The Nookachamps Creek, the Nookachamps
23 area here. Burlington is right in this area. It gets
24 so confusing. I got it underlined here but you can't
25 see it because it's so small. Burlington is right in

1 this area.
2 There are five dams on the Skagit River, the
3 largest being Ross Dam. Down below Ross is a small dam
4 called Diablo and another one downstream is called

5 Gorge. Those were built in the 1930s era and they're
6 owned by Seattle City Light. There are two dams on the
7 Baker River, the Upper Baker Dam and the Lower Baker
8 Dam. Those are owned by Puget Power. Upper Baker Dam
9 is used for some flood control and Ross Reservoir is
10 used for some flood control, and they were not designed
11 for flood control projects but they are regulated in a
12 manner that they do provide some flood control to the
13 lower river.

14 Q Okay. I want to ask you about the gauges. Maybe you
15 can just tell the jury briefly what they measure on
16 these gauges at Mount Vernon and Concrete?

17 A I might as well use the microphone.

18 Q Sure.

19 A The Geological Survey establishes gauges on rivers.
20 Just about all the major rivers have one or more gauge.
21 The gauge is a method of determining how much flow, how
22 much water is passing that point.

23 THE COURT: Sir, can I interrupt for a minute.

24 We're getting our feet wet. How is that
25 sounding? Is it too loud, not loud enough? Are we

1 okay?

2 Again, as I said in the beginning of this case,
3 if you have difficulty hearing a witness, seeing a
4 witness, anything like that, obviously your perspective
5 is different from mine, would you just let me know right
6 away so we don't continue to have problems, difficulty
7 with hearing or -- believe me, in this courtroom at some
8 time or another we're going to get a witness positioned
9 with a chart or something that is going to be out of --
10 it's not going to be comfortable for you, so let me know
11 that and we'll stop and try to make corrections for that
12 as we move along.

13 I'm sorry, sir.

14 A As I was stating, the Geological Survey establishes
15 these gauging locations, the purpose being to measure
16 how much water is going past that point and their
17 continuous measurements. There is a little gauge
18 house. Maybe some of you have seen those. They're
19 normally quite frequently along side of a bridge at
20 someplace, a little house about four foot square, and it
21 sits right on the river bank, quite often painted
22 green. There's also in the immediate vicinity the cable
23 way that usually will extend across the river itself.

24 The process of determining how much water is
25 passing a gauge, the gauge is actually measuring how

1 high the water gets. There's mechanical equipment in
2 there that's doing that. It measures it continuously

3 and puts it onto a chart or a tape, and nowadays it's
4 getting into -- electronically on a computer-type
5 apparatus. Periodically the Geological Survey people
6 will come out and they'll go across on this cable way.
7 There will be a little cart. They'll go out on the
8 cart. They'll have a meter and put it in the water, and
9 that meter, by doing a procedure where they go section
10 by section across the river, they can -- they get
11 information on how fast the water is moving. They're
12 able to mathematically come up with how much water is
13 passing that point. And normally that is in cubic feet
14 per second. In other words, how many cubic feet, one
15 foot by one foot by one foot passes that point in every
16 second, how many cubic feet per second is passing that
17 location.

18 Q Okay. How large is the Skagit River in comparison to
19 other regions, both in the state and outside the state?

20 A Skagit River is the biggest river in the Puget Sound
21 region. In discharge, it's as -- it falls in the top
22 ten, maybe 15 in the United States. In discharge, but
23 not in area.

24 Q You mean drainage area?

25 A In drainage area. There are many areas much bigger in

1 drainage area but they don't have the discharge, the
2 large discharges that Skagit does.

3 Q This case is about floods. Do you have some knowledge
4 as a hydraulic engineer as to what causes floods?

5 A Yes. You don't have to live in the Northwest very long,
6 you don't have to be much of an engineer to realize what
7 causes a flood. Basically here in the Northwest a flood
8 is caused by heavy rain falling over -- usually over a
9 snow pack in the mountains. Snow will build up a week
10 or two weeks, a month, and then there will be a very
11 warm spell come balming in from the Pacific Ocean loaded
12 with water and dumps water very heavily on the basin,
13 and especially in the head waters of the basin it melts
14 all the snow and it all comes down the river as flood.

15 Q Okay. Can you give the -- you've talked about CFS. Can
16 you give the jury some idea or sense of like how many
17 CFS the Skagit River would have, say, during a summer
18 month when the river might be down, and then perhaps
19 contrast it with some of the events in November of 1990.

20 A I reviewed some of the Geological Survey records. I
21 didn't look at all of them, but it's obvious that you
22 got five or 6,000 CFS in August-September era. It could
23 be as high as 20,000 CFS at that time. It just depends
24 on the Skagit, what the dams are doing, if they're
25 releasing more water or less water, but it falls in that

1 neighborhood, five to 20,000 and that is way below the
2 river banks. It's well within the channel.
3 Q And contrast that, if you will, for, like, the November
4 24, 25 event, how many CFS was that?
5 A November 24 and 25, 1990 event was about 150 thousand
6 CFS.
7 Q Do you remember what the November event was?
8 A It was around 140,000.
9 Q The November 30th, 1995, event?
10 A About 135 thousand.
11 Q And all those readings taken from the USGS data?
12 A Those all came from the U.S. Geological Survey data.
13 Q I have another -- Mr. Regan, have you -- can we get this
14 marked as an exhibit, please.
15 Mr. Regan, are you familiar with the New York
16 Times article of -- Science Times article on July of
17 1993 that tended to depict some of the terminology that
18 is used commonly in hydraulic engineering?
19 A I've seen the article, yes.
20 Q Does it have a map or at least a schematic of the
21 various sectors of a flood plain and floodway and the
22 like that you think might be helpful to the jury
23 understanding some of the language in this case?
24 A It certainly does. It's a very good depiction of a
25 flood plain and river system.

1 Q Just illustrative; is that correct?
2 A Yes. It's just illustrative. It doesn't predict any
3 river particular, it's just a -- illustrative.
4 Q Is Exhibit 198 the document you had in mind?
5 A That's correct.
6 MR. HAGENS: Your Honor, we would like to use
7 this for illustrative purposes only for terminology
8 purposes. It's not intended for scale or anything at
9 all.
10 MR. SMART: May I voir dire the witness on the
11 document?
12 THE COURT: Yes.
13 MR. SMART: Mr. Regan, you're only using it for
14 the purpose of identifying terminology?
15 THE WITNESS: Floodway, I mean floodway, flood
16 plain, left bank, right bank.
17 MR. SMART: You explained that many times in
18 your courses without the use of this document, haven't
19 you?
20 THE WITNESS: Yeah.
21 MR. SMART: You know how to explain the
22 terminology without the use of a document?
23 THE WITNESS: The document makes it a lot
24 easier, that's all.
25 MR. SMART: The document doesn't have anything

1 to do with the Skagit River?

2 THE WITNESS: No. It's a document that came out
3 of the New York Times, Science Times.

4 MR. SMART: I object. It doesn't have anything
5 to do with this flood, this river system. The
6 terminology, you don't need a document to explain the
7 definition of terminology.

8 THE COURT: Counsel -- Mr. Anderson?

9 MR. ANDERSON: No objection.

10 THE COURT: Objection's overruled. You may
11 proceed.

12 (Whereupon, Plaintiff's
13 Exhibit No. 198 was admitted
14 into evidence)

15 Q Mr. Regan, would you come up here to Exhibit 198, which
16 we'd offer for illustrative purposes only, and explain
17 to the jury some of the terms and expressions that are
18 commonly used in describing the floodway and the flood
19 plain, whatnot, and I'd ask you to do that using Exhibit
20 198 for illustrative purposes.

21 A We're going to look at the upper portion of the
22 picture. What it shows here is a river coming out of
23 the mountains, so there's a lot of rain up in the
24 mountains here flowing down through the valley. As all
25 the rivers do, they're narrower at the headwaters and

1 get wider and wider and get down to the flood plain.

2 What we've done in the picture is cut it right
3 off so it's a cross section of the end. Dotted little
4 speckled area down here, basically the ground. The line
5 at the top of the speckled area is the ground surface.
6 On there is showing the channel and showing a wobble
7 line on there being the water surface at the channel,
8 and that's basically channel fall. Also showing on here
9 a thing called the floodway, which I'll get to in a
10 moment, and the floodway fringe on each side, but the
11 entire width across the valley is actually called the
12 flood plain.

13 Now, within the flood plain you can see you have
14 flood fringe on both sides. This normally occurs.
15 Basically this is storage. Water goes into it and it
16 stores and then comes out as the flood drops down. The
17 water isn't -- in the storage isn't moving downstream,
18 it's just sitting there waiting 'til the water moves on
19 and then it moves out of the storage and goes
20 downstream.

21 In the floodway area, this water in this area,
22 the floodway is actually moving downstream. If you
23 stood on the -- at a point where you can watch, you'd

24 see some current through there. It's not very fast, but
25 there's water actually moving downstream in the floodway

1 area and, of course, in the channel, and the channel is
2 considered part of the floodway.

3 Q Okay. Can you tell the jury on this exhibit where the
4 flood plain might be as distinct from some of these
5 other terms.

6 A I did say that, Carl, but the flood plain is the entire
7 -- everything that is flooded, the flood fringe and the
8 floodway and the left flood fringe, right flood fringe
9 and the floodway. That's the whole thing is the flood
10 plain.

11 Q Okay. And then the bottom just shows the typical levee
12 arrangement?

13 A Right. What this is showing is -- from here, it
14 squeezed down in between levees, and the article had a
15 discussion on levees. I thought this was a good picture
16 up here and kind of depicted everything that you need to
17 know about the terminology on the river.

18 Q Okay. Now, are you familiar with where the flood plain
19 is with respect to the Skagit River and the delta area?

20 A The flood plain you say?

21 Q Yes, sir.

22 A Yes. Definitely the flood plain is the entire area of
23 the Skagit from high ground to -- on the north to
24 basically high ground on the south.

25 Q Okay. And would it include the cities of Mount Vernon

1 and Burlington?

2 A Cities of Mount Vernon, Burlington, and all areas in
3 between.

4 Q Now, the floodway that you've mentioned, are there
5 different types of floodways?

6 A Their definitely is. There's two types. One is
7 basically what you see on the exhibit there. A floodway
8 being, as I described the area, wherein the flood water
9 is flowing downstream. There's another floodway that is
10 called a regulatory floodway, and this gets into the
11 flood insurance program.

12 The flood insurance program saw fit to, in their
13 program, to come up with what they call a regulatory
14 floodway. What that did, and I'll show it on this
15 exhibit, there's a procedure to determine the water
16 surface profile in a river, a mathematical procedure.
17 Knowing that -- you can do that on a computer system.
18 You don't have to do it by computer, you can do it by
19 hand but nowadays it's much easier on a computer. You
20 can compute the water surface elevation up the river.

21 Now, regulatory floodway, FEMA defines it as how

22 much of this natural floodway can you pull in towards
23 the channel but you do not raise the water surface on
24 the -- above the natural water surface more than a foot,
25 and that's what they call the regulatory floodway.

1 Q And that's to contrast with the natural floodway, which
2 is what?

3 A The natural floodway doesn't raise the water surface
4 anything because that's the way -- it's just the way it
5 is, but the regulatory floodway eliminated all here --
6 eliminates flow out in these areas are so the water has
7 to do something. As you eliminate flow out here, the
8 water surface will go up some and you bring those sides
9 in of the regulatory floodway so you don't exceed one
10 foot over the natural water surface.

11 Q You mentioned you worked for FEMA and developing flood
12 maps. What are those maps used for and how are they
13 used?

14 A It's my understanding there's two uses for them. One is
15 to -- to provide insurance people with a method of
16 determining flood rates, actuarial tables and so forth.
17 Another method -- another use of them is for the local
18 government agencies to use in their planning and
19 building permits and that type of activity.

20 Q Do you know if the FEMA flood maps ignore or -- entirely
21 levees unless they provide the hundred year protection?

22 A That's true. When FEMA's requirement is the levees, to
23 be considered in the flood insurance program, levees
24 have to provide a hundred year flood protection plus
25 three feet of free board. In other words, they got to

1 be three feet higher than the computed hundred year
2 water surface elevation. If they don't, then the maps
3 are produced as if the levees weren't there.

4 Q What about the levees in Skagit County, are they at the
5 hundred year plus three feet of free board levees?

6 A No.

7 MR. SMART: I'll object to the form of the
8 question, Your Honor, unless Mr. Hagens identifies which
9 levees he's talking about.

10 Q Any of the levees, any of the levees in Skagit County,
11 are you familiar with any of them being at the hundred
12 years plus three feet of free board?

13 A During the time I did the work in 1979 design memo we
14 surveyed the entire length of every levee on the Skagit
15 Valley. None of them were above the hundred year flood.

16 Q When are rivers deemed to be at flood stage, Mr. Regan?

17 A Basically rivers at flood stage any time the water in
18 the surface of the channel exceeds the top of the
19 channel bank.

20 Q Is there a particular number at which the Skagit River
21 is deemed to be at flood stage?
22 A It varies at various locations along the river but,
23 generally speaking, it's in the neighborhood of 75 to
24 80,000 CFS.
25 Q Now, was your firm retained by us in early 1982?

1 A 1990.
2 Q Excuse me, early 1992; is that correct?
3 A Yes.
4 Q What were you asked to do by our firm?
5 A Okay. Our initial request from Hagens & Berman was to
6 go out and look at the levees, look at the system, look
7 at the Skagit County, look at the Nookachamps area and
8 the Sterling area, Burlington area, make a general
9 appraisal of the area, and then to do some preliminary
10 type computations to determine if we felt that the
11 levees were causing any problem in the Nookachamps area.
12 Q What --
13 THE CLERK: Exhibit 199.
14 Q I'm going to show you, Mr. Regan, Exhibit 199. Can you
15 just tell us what it is without describing it?
16 A Okay. That's a figure out of the General Design Memo
17 that shows boundaries of the hundred year flood, shows
18 all the diking districts and it shows all the levees.
19 Q Was this part of your work back in 1978 and '79?
20 A That's correct.
21 MR. HAGENS: Your Honor, we'd offer Exhibit 199.
22 MR. SMART: No objection, Your Honor.
23 MR. ANDERSON: No objection, Your Honor.
24 THE COURT: All right, thank you.
25 THE COURT: 199 will enter.

1 (Whereupon, Plaintiff's
2 Exhibit No. 199 was admitted
3 into evidence.)
4 Q Mr. Regan, I wonder if you can come over here and
5 describe to the jury -- this is getting a little
6 confusing here -- actually if I take these down. If you
7 could describe for the jury what Exhibit 199 depicts.
8 THE COURT: Actually, let me ask, jurors number 6
9 and 12, you're kind of in the heart of it, would it help
10 you to have the board turned a little bit more for you.
11 JUROR NUMBER SIX: How about a longer stick,
12 with something longer than a pencil.
13 MR. SMART: My suggestion would be to move it
14 back a little more.
15 MR. HAGENS: This is my first effort at this,
16 Your Honor, so bear with me a little bit.

17 Q Okay. Mr. Regan, maybe you can describe to the jury
18 what this exhibit is all about. Maybe this is -- maybe
19 you could, using this as well as your chart over here,
20 you could describe for the jury what this exhibit is.
21 A Okay. This is a map of the Skagit delta area,
22 basically from Sedro Wooley downstream to Skagit
23 Bay/Padilla Bay. It shows on here all of the diking
24 districts by number, 17, 12, 20, 21, so forth. It also
25 shows in the dotted line right here basically the

1 outline of the hundred year flood plain. It also shows
2 on here the heavy black line is the existing levees.

3 They start basically upstream of Burlington,
4 follow down on the northwest side of the river, the
5 whole way through the bay, and basically have -- the
6 upstream edge of Mount Vernon --

7 Q Is that where the Burlington Northern Bridge is?

8 A That's right. The Burlington Northern Bridge is on an
9 alignment like that. The levees start at the Burlington
10 Northern Bridge on the southeast side and follow the
11 entire way down to the bay. There's also a levee that
12 encircles the entire Fir Island, which is composed of a
13 number of dike districts.

14 Q Does --

15 A There's also some other levees that go along the bay to
16 keep tidal flooding out, these heavy lines, and there's
17 also another levee that runs along the edge here, and
18 that's to contain a stream that comes down in here, and
19 it carries that stream down and dumps it into the river
20 at a location about here.

21 Q Were these the levees that you went out and did the
22 field inspection on early on in your assignment?

23 A That's correct. All those levees were surveyed in the
24 mid 1975, '78, in that era.

25 I have personally walked almost every one of the

1 levees that are adjacent to the river. I have not been
2 out on a lot of these tidal levees, but the ones that
3 were adjacent to the river that were pertinent to our
4 study walked just about everyone of them.

5 Q Our assignment was to determine what, if any, flooding
6 may have been caused by these levees. Were any
7 restrictions put on that assignment, that is things you
8 were not to study?

9 A No.

10 Q Did anybody tell you how to do your work?

11 A No. We had a free hand to do what we felt was necessary.

12 Q And what was your hourly rate for this work?

13 A It's varied since we started, but it's -- my rate --
14 that we charge to Hagens & Berman is something like \$125

15 an hour.
16 Q What was your particular role in the assignment to
17 determine whether or not the levees were causing any
18 flooding in the Nookachamps/Clear Lake area?
19 A I had two roles. As I stated before, I was involved in
20 doing a preliminary look at it to see if there really
21 was a problem and what the magnitude of that problem
22 was. Another part of my role was to oversee the
23 computer modeling that our firm had done and act as a
24 consultant to that work, and also I reviewed and looked
25 at a lot of reports and data that pertained to the

1 levees.
2 Q What was the purpose of the reports and data that you
3 reviewed that pertained to the levees?
4 A We felt that we should know what the levees really are
5 accomplishing out there, how big they are, how strong
6 they are, how they fit into the system, just information
7 that you need to have to proceed into a detailed study.
8 Q And was this a normal assignment for your firm?
9 A Somewhat normal. We're doing another study similar to
10 this, flooding study, on the Kalama River down in
11 Woodland.
12 Q Did you do any preliminary estimates to determine
13 whether or not a further study of the effects of these
14 levees was justified?
15 A Yes.
16 Q Would you tell the jury what you did in that regard.
17 A Basically they were some preliminary computations as
18 opposed to a detailed computer model, where I looked at
19 what would happen in the Nookachamps area if the levees
20 weren't in position against what was going on and how --
21 and the flooding that occurs with the levees in places
22 they are today.
23 Q And what did your preliminary calculation tell?
24 A There could be around three foot of difference.
25 Q Let's talk about your historic review. Where did you

1 observe these reports that you indicated that you --
2 A A lot of these reports that I looked at go back, in
3 fact, to the 1920's. I've known about them and had seen
4 them while I was working at the Corps of Engineers doing
5 the general design level work. Some other reports were
6 brought out in the discovery portion of this case.
7 Q And can you give the jury -- were any of those reports
8 relating just to the Nookachamps area, the Nookachamps/
9 Clear Lake area, Exhibit 199?
10 A There was no report per se on the Nookachamps area, but
11 I looked at -- let me refer to my reports here -- and I
12 looked at 12 different documents that date from 1922 to

13 1993, and basically they all say the same thing. They
14 say that the Nookachamps area acts as a large storage
15 area that reduces flood heights in the surrounding and
16 lower districts. If you can sum it up in just a few
17 words, that's basically what they say.
18 Q Did that comport with or was that contrary to your
19 preliminary finding?
20 A Repeat that.
21 Q Was that consistent with or inconsistent with your
22 preliminary findings or your computations?
23 A Very consistent with my findings and my understanding of
24 the system.
25 Q Okay. I want to go through a couple of these exhibits.

1 Let's start with Exhibit No. 1, Plaintiff's Exhibit No.
2 1. I'm going to hand you Exhibit No. 1 and ask you to
3 identify it.
4 A This is a report done by an engineer, hydraulic engineer
5 James E. Stewart who worked for the U.S. Geological
6 Survey. It's dated I believe 19 -- my notes say it's
7 dated 1923. I don't see it right on the cover. It's a
8 report that was done in accordance with an agreement
9 between Skagit County and the United States Geological
10 Survey.
11 Q Is this part of the historical record that you reviewed
12 in connection with this case?
13 A I reviewed this document a number of times, not only
14 this time but in the past, yes.
15 MR. HAGENS: Your Honor, we'd offer Exhibit No.
16 1 at this time.
17 MR. SMART: No objection, Your Honor.
18 THE COURT: Counsel?
19 MR. ANDERSON: No objection, Your Honor.
20 THE COURT: Number 1 will enter.
21 (Whereupon, Plaintiff's
22 Exhibit No. 1 was admitted
23 into evidence)
24 Q I'd ask you to turn to page 17 of that report if you
25 would, and the bottom paragraph, paragraph No. 2 of page

1 17.
2 A I have it, yes.
3 Q Have you got it?
4 A Uh-huh.
5 Q Did you review this paragraph as part of your work?
6 A Yes. Along -- I read the whole report.
7 Q Okay. Maybe you could just read the bottom portion of
8 paragraph -- the one that says under paragraph 2 on page
9 17, if you'd read that into the record.

10 A Paragraph two on page 17 is titled Delay Diking Off the
11 Nookachamps District. That's the heading of the
12 paragraph. Goes on to state, "The Nookachamps District
13 in its present condition acts as a storage reservoir and
14 thus reduces the flood height in the surrounding and
15 lower districts. This storage reservoir has been of
16 material benefit in the past and has undoubtedly
17 decreased the number of breaks for the larger floods and
18 prevents breaks for the lower floods."
19 Q Okay. I wonder if you'd read the next sentence, too,
20 going onto the next page.
21 A "According to a Mr. Robert Hersome, Assistant Engineer
22 with the Great Northern Railroad, the reservoir capacity
23 of the Nookachamps District and other adjacent lands is
24 a flow of 150,000," he calls it "second feet", but
25 that's an old term for cubic feet per second, "for five

1 hours."

2 Q Now, you know this is a historic document. Where did
3 you have the opportunity to review it?

4 A I reviewed it when we were doing the general design
5 memo. It was brought out, and I believe through a --
6 literature search or was in our library at the Corps of
7 Engineers, but I don't know exactly where it came from.

8 Q Is this exhibit generally available to the public or not?

9 A Not unless the public does a lot of searching. I mean
10 you just don't walk in the library and say, hey, let me
11 have this book. It's not that kind of a document.

12 Q All right.

13 MR HAGEN: I wonder if now would be a perhaps a
14 good time.

15 THE COURT: Now is as good a time to break.

16 THE COURT: Sir, you may step down.

17 All right, ladies and gentlemen. We will be
18 recessing for the evening. We have a sentencing set for
19 the morning at -- unless -- it's still on our calendar
20 so we will be reconvening this matter at 9:30. If
21 you'll be in the jury room at 9:25 and ready to proceed
22 on this case.

23 And, again, I have to admonish you, and I know
24 we'll all get tired of you going through this drill but
25 it's something that I really am required to do, and

1 especially the early stages. You're advised not to
2 discuss this case with anyone upon your retiring this
3 evening and going home. Please do not indicate or
4 attempt to, I should say, locate any information about
5 this case. If you should hear any sort of media reports
6 of any kind about this case, you are to ignore those and
7 not be present around anyone else who might be listening

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

to such reports and who might be discussing the case.
Please come in and go directly to the jury room
to -- leave directly from the jury room, come directly
into the jury room as much as possible to avoid
conversations that might be taking place in the hall.
There are any number of plaintiffs obviously in this
case, 60 some, and any number of other parties and
people associated with this case, many of whom might
fail to recognize you as a juror and you might fail to
recognize them as a party and thereby inadvertently
overhear some sort of discussion about the case. It's
central to a concept of a fair trial that the only
evidence you make your decision on ultimately comes from
the witness chair and through the exhibits that are
admitted into evidence in this case. And that you keep
an open mind in this case until you've heard all the
evidence in this case. And then and only then begin to
make your deliberation until that portion of the case

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

has been reached, which will be sometime down the road
from now.
With all those considerations in mind, I hope you
have a pleasant evening and we'll see you in the morning
tomorrow morning. Again 9:25 in the jury room, please.
Thank you.
(The matter was concluded.)