

DIRECT - REGAN

1 January 8, 1997

2 AFTERNOON SESSION

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

6 THE COURT: Mr. Regan, take the stand again,  
7 please.

8 MR. HAGENS: Your Honor, we were just talking  
9 about this illustrative exhibit and of the type of  
10 projects that the witness had reviewed that indicated  
11 projects that had increased the protection level.

12 We would offer 206.

13 MR. SMART: As long as it's only for illustrative  
14 purposes, Your Honor, I don't care.

15 MR. HAGENS: Fine.

16 MR. ANDERSON: We have no objection, Your Honor.

17 THE COURT: Thank you, 206 will enter.

18 (Whereupon, Plaintiff's  
19 Exhibit No. 206 was admitted  
20 into evidence.)

21 CONTINUED DIRECT EXAMINATION

22 BY MR. HAGENS:

23 Q Mr. Regan, why don't you come down here and see if you  
24 can explain to the jury what you've done here.

25 A This is a cross-section of a river. This is the river  
flowing down -- trying to get it into a

1 three-dimensional drawing. It's difficult to do but --  
2 the water flowing down and out of the paper. A levee on  
3 either side of the river. Low water down in the  
4 channel, high water up. We were talking about a  
5 keyway. We were talking earlier about a keyway. A  
6 keyway is an impermeable barrier, material which is -- a  
7 trench is dug and filled with the impermeable material.

8 In the case of the Skagit, a lot of the documents  
9 I reviewed, it was around 15 feet deep and about four  
10 feet wide. The material is brought in from some source  
11 and put into this trench. The material that was in the  
12 trench is spread out and dispensed on the river bank or  
13 on the levee, wherever. It's not hauled off.

14 Q What goes in the trench?  
15 A Oh, it's an impermeable material, a sandy clay, sandy  
16 silt, anything that will retard the flow from coming  
17 through.  
18 I'll mark on here. What occurs throughout the  
19 keyway, the water will flow through the material. It's  
20 just ground material. It will flow on through and come  
21 up as boils on the back side and has the potential for  
22 failure of the foundation of the levee and the levee  
23 collapsing.  
24 Q Is the material that goes in there compacted in any way?  
25 A It's compacted. It's put in -- the material itself is

1 impermeable and put in with some compaction to try and  
2 get it nice and tight.  
3 What it does, instead of having the full path  
4 near the surface and near the bottom of the levee, now  
5 the water has to -- has to take a much longer path to  
6 get around. By having a longer path, it takes longer  
7 for the water to get to the other side and less chance  
8 of the levee failure due to the foundation -- levee  
9 collapse through the foundation failure.  
10 Q Is this a maintenance project or a change in the  
11 condition?  
12 A This is not a maintenance project, this is a change in  
13 condition to improve basically a design deficiency.  
14 This probably should have been part of the original  
15 design of the levee. Some cut-off channel. What they  
16 normally do, if you're building a levee from scratch,  
17 you don't have the levee here, you put -- this kind of  
18 trench would be back in underneath the levee someplace.  
19 Q Okay. If you continue about the other type of projects?  
20 A Other type of projects are riprap projects. We talked  
21 about that a bunch, basically putting rock on the face  
22 of the levee and on the existing bank to prevent the  
23 river velocities from causing erosion and undermined the  
24 levee so you have a collapse of the levee into the  
25 river.

1 The other is raising. If you raise it any  
2 distance, to maintain the same width on top you have to  
3 strengthen the same on top to strengthen the portion, so  
4 this is a raised and strengthened section. Any time you  
5 raise, you have to strengthen the back side.  
6 Q Is that a change in condition or a maintenance project?  
7 A It's a change in condition. You got a higher levee, you  
8 got a stronger levee. It's a change in condition.  
9 Q Is this reflective of the type of projects that you  
10 viewed that were done over the years to increase the  
11 levee protection level?

12 A That's correct.  
13 Q Now, are you familiar with the 404 Corps of Engineer  
14 permits? Can you tell the jury how those all work?  
15 A 404 permit basically is a federal permit to place  
16 material in the river below what is called the normal  
17 high water. Normal high water is basically a legal  
18 definition. Normal high water is usually fairly low.  
19 It's where, on a natural bank, where the vegetation  
20 stops and the aquatic conditions occur.  
21 You'll see on every river bank, when the river's  
22 low you'll see a definite line. That's normal low  
23 water.  
24 Q And who issues that permit?  
25 A The Corps of Engineers issues that permit.

1 Q Can you do the work without the permit?  
2 A There are some exceptions, depending upon how much  
3 material and who's doing it. The Forest Service has a  
4 blanket permit to do small jobs, say a small riprap job  
5 of no more than a certain amount of riprap.  
6 Q What about a dike district?  
7 A I don't know.  
8 Q I thought we'd take a minute and review just a handful  
9 of these projects to give the jury an idea of --  
10 A Carl, can I get my notes?  
11 Q Oh, sure.  
12 We're not going to go over many of these, but a  
13 few. Would you take a look at Exhibit 131.  
14 A 131?  
15 Q Yes.  
16 A It's not in this book. It's in the other book.  
17 Okay.  
18 Q Can you identify that for the record?  
19 A This is a report by Skagit County Dike District Number  
20 12. It's a report on Skagit River flood control for a  
21 hearing with the Corps of Engineers, United States Army,  
22 February 8th, 1961, Mount Vernon, Washington.  
23 Q Is this one of the reports you reviewed in connection  
24 with the enhancement of the levee protection level?  
25 A It is.

1 MR. HAGENS: We'd offer Exhibit 131.  
2 MR. SMART: Voir dire the witness, Your Honor.  
3 THE COURT: Yes.  
4 MR. SMART: Mr. Regan, this is a report from dike  
5 District 12 commissioners to the dike district itself;  
6 is that correct?  
7 THE WITNESS: It says a Report on Skagit River  
8 Flood Control, Hearing with the Corps of Engineers.  
9 MR. SMART: So the Corps of Engineers met with

10 Dike District No. 12?  
11 THE WITNESS: Yes.  
12 MR. SMART: In February of 1961?  
13 THE WITNESS: Yes.  
14 MR. SMART: To discuss their dikes; is that  
15 correct?  
16 THE WITNESS: That's what I would get from  
17 this --  
18 MR. SMART: That's what the report indicates?  
19 THE WITNESS: Yes.  
20 MR. SMART: And was there also an Army Corps of  
21 Engineers public hearing on flood control of the same  
22 date?  
23 THE WITNESS: I don't know.  
24 MR. SMART: Did you not review a report in that  
25 regard?

1 THE WITNESS: No, I don't believe I did.  
2 MR. SMART: Okay.  
3 MR. SMART: Your Honor, no objection.  
4 THE COURT: All right.  
5 MR. ANDERSON: No objection, Your Honor.  
6 THE COURT: 131 will enter.  
7 (Whereupon, Plaintiff's  
8 Exhibit No. 131 was admitted  
9 into evidence.)

10 Q Let's start with the face plate of this exhibit.  
11 A Okay.  
12 Q And let's start with the title. Would you just briefly  
13 cover that one more time?  
14 A Report on Skagit River Flood Control, Hearing with the  
15 Corps of Army Engineers, United States Army.  
16 Q Okay. And then it shows the dike district  
17 commissioners, does it not?  
18 A Dike district commissioners, Dike District 12  
19 commissioners, [PWAOEBG/], R. H. Schroeder and James  
20 Mapes.  
21 Q If you take a look at the second page of the exhibit,  
22 and I'm interested in a portion after 1965 -- excuse me,  
23 1955, the post-1955 entry, see where it says the --  
24 third sentence starting with "The dike has been raised"  
25 -- under the section --

1 A Yes.  
2 Q -- 1955?  
3 A Right. Says, "The dike has been raised an overall  
4 height of two feet for a distance of approximately two  
5 miles." Then it goes on, "As they continue to build  
6 restrictions into the river below us, narrowing the

7 stream flow, it will be necessary to raise the height of  
8 the dike."  
9 Q All right. And can you explain why that would be so,  
10 why it would be necessary to raise the height of the  
11 dike if they narrow the stream below or restrictions  
12 below.  
13 A I think the restrictions they talk about, building the  
14 new levees. I'm not sure what they mean by  
15 "restrictions", but if you restrict the river below,  
16 it's similar to building -- like we showed on the  
17 exhibit with the overlays, as you restrict the river,  
18 the water surface comes up and that raise in water  
19 surface extends back up stream some distance.  
20 Q Okay. So, meaning what? Why would they have to raise  
21 the levees in Dike District 12.  
22 MR. SMART: Object to the form of the question.  
23 He just said he didn't know what they meant by the  
24 restriction below so it's pure speculation as to why  
25 somebody would have to do something if he doesn't know

1 what it was doing.  
2 MR. HAGENS: He gave his explanation, I thought,  
3 as best he could, and he's here to try to help us  
4 interpret some of these documents.  
5 MR. SMART: Wait a minute. He can tell us what  
6 the document says, but he wasn't there at the time the  
7 document was there and he doesn't know what these people  
8 meant by restrictions. That's his testimony.  
9 MR. HAGENS: But, Your Honor, I think he's  
10 entitled to testify --  
11 THE COURT: You need to rephrase the question  
12 along the line of the objection. I'll sustain it.  
13 Q How do you interpret this business about "As they  
14 continue to build restrictions into the river below us,  
15 narrowing the stream flow, it may be necessary to raise  
16 the height of the dike." How do you interpret that?  
17 A I would continue that, "As they continue to build levees  
18 below us or raise the levees that restrict the river in  
19 some manner."  
20 Q And then if you would take a look at the third page of  
21 the exhibit, it shows projects since 1953. Do you see  
22 that? Do you have that page in front of you, the very  
23 top it shows --  
24 A Page 3?  
25 Q Well, it's the third page of the exhibit.

1 A Oh -- page 2.  
2 Q Page 2, I'm sorry.  
3 A All right. It's a table that talks about projects since  
4 1953 in Diking District 12. It lists what they call

5 unit numbers, which are project numbers, I believe,  
6 total cost for each project, the State contribution in  
7 percent and dollars, the participating county dollars  
8 and percent, and the district percent and in dollars.  
9 Q And --  
10 A And then at the bottom it summarizes each of these  
11 columns.  
12 MR. SMART: Excuse me, Your Honor. In fairness  
13 the whole document should be read, because it also has  
14 the State contribution in dollars.  
15 A I did say that.  
16 MR. SMART: No. He just talked about the  
17 district and county.  
18 MR. HAGENS: All right.  
19 THE COURT: If that's an objection then I'll  
20 sustain it.  
21 Q Did you -- would you go back and repeat the State --  
22 tell the jury whether or not it shows the State  
23 contributions as well as --  
24 A The third column from the left of the document has on  
25 there "State" and "percent". It lists state dollars and

1 the percent of the total con -- of the total project  
2 cost, and the bottom summarizes that.  
3 Q Okay. That's all I have with respect to that exhibit.  
4 The next exhibit, I think it's in the same  
5 notebook, is Exhibit 105. Could you try to find that  
6 exhibit. Could you tell the Court what that is?  
7 A This is a tabulation Titled Flood Control Projects  
8 Listed as to Section, Township and Range, Skagit County,  
9 compiled by Ada B. Welling, dated 9-1-70.  
10 Q Does it cover what period of time?  
11 A Well, in reviewing this document, it appears it goes  
12 back to 1950.  
13 Q And through what period? Would you take a look at the  
14 next to the last page, on the bottom date you'll see an  
15 entry in 1970; is that correct?  
16 A Right. It looks like from about 1950 to 1970. I don't  
17 see anything less than 1950 or anything more than 1970.  
18 Q This is one of the documents you reviewed to familiarize  
19 yourself with the projects that were done on the levee;  
20 is that correct?  
21 A I reviewed this document for that reason, yes.  
22 MR. HAGENS: We'll offer Exhibit 105, Your  
23 Honor.  
24 MR. SMART: No objection, Your Honor.  
25 MR. ANDERSON: No objection.

1 THE COURT: All right. Thank you.  
2 105 will enter.

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(Whereupon, Plaintiff's Exhibit No. 105 was admitted into evidence.)

Q Okay. Maybe we can take a look at a couple of the projects. For instance, on page five of the exhibit, do you have that in front of you?

A Yes.

Q And can you tell us, you see one of the entries there that relates to construction done on Dike District 12. Do you see that? Two or three entries up from the bottom.

THE COURT: Counsel, apparently you need to work a little bit on the focus of that.

MR. HAGENS: Oh, I'm sorry.

THE COURT: It could be the quality of the document. It's just not real good.

Q There's a couple entries up from the bottom on page five. Do you see that entry there?

A Right.

Q Is that one of the projects that is reflected in this exhibit?

A Yes, it's a project in Diking District 12. It gives a section, township and range, and it doesn't describe any

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length. It just describes the date, 1955, says estimate was \$59,516.80, and for dike construction.

Q And do you happen to have any idea what that is?

A I don't know what that means, other than dike construction.

Q What about 1967 entry where it talks about riprap reinforcement. Is that one of the type of projects that --

A Is that the next one up?

Q No, it's several up. It's in 1967. Do you see it up there?

A I see one in '66.

Q Well, why don't you just walk the jury through some of these, and if you would help maybe using this page, you can summarize -- or at least describe generally the type of projects that are reflected in the exhibit.

A This is one in Diking District 12, 600 feet, 1966, \$12,000. They say the final cost was \$162.27, I don't understand that, to realign the dike. My review of this entire document -- it reported 25 projects in Diking District 12 and 12 projects in Diking District 17.

Q Okay. If you take a look at page six, and if you see the entry there under 1959 for Dike District 12, says "raising and reinforcing" and gives a 1959 date. Do you see that?

1 A Yes.

2 Q And are you able to interpret what that might have  
3 been?

4 MR. SMART: Well, I'll object to the form of the  
5 question, Your Honor. He either knows what it is or he  
6 doesn't. He earlier testified he didn't know what the  
7 project was. And, you know, he's referred to 1955.

8 I think Mr. Hagens is attempting to establish  
9 that Skagit County did this. We already know that Dike  
10 District 12 and the State built the 1955 dike, and if he  
11 knows something about this document he should testify.  
12 If not, then this interpretation is pure speculation.

13 MR. HAGENS: Your Honor, I think he's entitled to  
14 give his interpretation of what the exhibit says. I  
15 don't know that the county's going to get up here and  
16 cooperate on this with any of this, or anybody else.

17 Also, I object to him making essentially argument  
18 in the form of an objection, Your Honor.

19 THE COURT: In fact, counsel, let me see you at  
20 sidebar.

21 (There was an off-the-record  
22 sidebar discussion between the  
23 Court and counsel.)

24 THE COURT: Counsel, I'll overrule the  
25 objection.

1 And, counsel, let me say this. I should have  
2 said this at sidebar. Within certain strictures. We  
3 understand the outer parameters, I think, from our  
4 discussion as to where we're going. The question as  
5 stated is allowable. The answer will be admitted.

6 So, would you restate the question?

7 Q Yes. How do you interpret the term "raising and  
8 reinforcing" with respect to that 1959 project of Dike  
9 District 12 for 26,000?

10 MR. SMART: Same objection. No foundation.

11 THE COURT: Overruled.

12 Q \$26,250. Go ahead, how do you interpret that?

13 A My interpretation is here that for 22,000 plus dollars  
14 they raised and reinforced 2.55 miles of dike.

15 Q Let see if we can find one or two other examples and  
16 then we'll move on. Well, actually, let's just finish  
17 with this exhibit, because we've got one or two to get  
18 through and then we'll go on to another exhibit.

19 Have you got Exhibit 169 in front of you?

20 A Yes.

21 Q And can you tell the Court what this exhibit is?

22 A On the cover page, written in pencil, states "Approved  
23 Flood Control Grant Projects, 1985 through 1991."



24 Q And then are there a series of resolutions attached by  
25 the Skagit County Commissioners?

1 A That's correct.

2 Q And it has Skagit County production numbers on them,  
3 does it not, the SK numbers?

4 A It does, yes.

5 MR. HAGENS: We'll offer Exhibit 169.

6 MR. SMART: No objection, Your Honor.

7 MR. ANDERSON: No objection, Your Honor.

8 THE COURT: Exhibit 169 will enter.

9 Q Let's start with the first -- maybe it's the second page  
10 for you, the Resolution No. 10528. Do you have that in  
11 front of you?

12 A I do.

13 Q And does this show any repairs or any projects with  
14 respect to Dike District 12 that were done -- you'll  
15 have to take a look at the second page -- in 1955 or  
16 thereabouts -- excuse me, 1985 or thereabouts?

17 A It lists nine applications, one of which is Dike  
18 District 12.

19 Q Okay. And does this constitute -- well, can you tell  
20 whether or not these were grants that were made to these  
21 dike districts?

22 A That's what it appears to be.

23 Q Okay. And do you see the amount of the -- the total  
24 amount available for grant sums up there in the very  
25 first paragraph, the "whereas"?

1 A Says \$100,000.

2 Q Okay. Are these some of the documents you reviewed in  
3 assessing the type of projects that were done on the  
4 dikes?

5 A That's correct.

6 Q Let's take a look at one or two more. Take a look at  
7 the second resolution, 10864. Do you have that?

8 A Yes.

9 Q You'll see the third item is another grant to Dike  
10 District 12 in 1986.

11 A That's correct.

12 Q Can you tell -- how do you interpret surface elevation  
13 11,800 feet of dike top. What -- what does that mean to  
14 you?

15 A Means to me they did something on the surface for 11,800  
16 feet on the surface, the top surface of the dike.

17 Q And the amount of the grant that was approved?

18 A \$20,000.

19 Q And that would have been in 19 what?

20 A The grant is dated June, 1986.

21 Q Okay. And do you recall how many grants you found in

22 this particular, Exhibit 169?  
23 A I didn't understand your question.  
24 Q Do you recall how many grants -- well, strike that.  
25 Let's go to Grant 12119. Do you have that in front of

1 you?  
2 A Yes.  
3 Q I would ask you to take a look at the seventh grant  
4 item.  
5 A It's a grant to Diking District 12. Install  
6 approximately a thousand feet of impervious keyway along  
7 the total of the dike, right bank, Skagit River, I-5  
8 Bridge downstream to Bouslog Road, \$17,241.  
9 Q Is that the type of -- you describe keyway, is this the  
10 type of matter that you earlier described in connection  
11 with Illustrative Exhibit 206?  
12 A That's correct. That's the keyway.  
13 Q Did you find many keyways installed in Dike District 12,  
14 in your review?

15 MR. SMART: Object to the form of the question,  
16 Your Honor. There's been no foundation whether this  
17 witness knows whether these projects were ever completed  
18 or done or whatever. This isn't evidence of a project  
19 that was done and there certainly hasn't been a  
20 foundation from this witness that that was done. If Mr.  
21 Hagens wants to lay that foundation he can do so.

22 MR. HAGENS: Your Honor, I asked the witness if  
23 he had any knowledge of how many keyways, if any, were  
24 put on Dike District 12 dikes, and if he'd allow me to  
25 lay the foundation to find out if he has k,knowledge we

1 might be able to take the next step.

2 THE COURT: All right. Go ahead. Lay the  
3 foundation.

4 Q Did your review of the records reflect that more than  
5 one keyway had been installed in Dike District 12?

6 A Yes.

7 Q Over what period of time?

8 A There's one done in Skagit County, recipient of a  
9 Washington State FCAAP grant for doing 1,200 feet  
10 keyway, \$49,000 total job, called the Lower Hopper Road  
11 Keyway Project.

12 Q And when was that project done?

13 A That was October, '91, the Skagit County application for  
14 grant.

15 MR. SMART: Well, Your Honor, I --

16 THE COURT: Just a second, counsel.

17 All right, counsel.

18 MR. SMART: Your Honor, my objection is this.

19 Mr. Hagens is attempting to have the witness testify

20 from a document that is a Skagit County flood control  
21 grant recommended by the Flood Control Committee for a  
22 particular keyway project with a particular date. The  
23 witness is now testifying with respect to something  
24 else, a FCAAP grant in 1991, after the flood in question  
25 from the State of Washington.

1 I'd like to have the foundation laid for his  
2 testimony on this particular document that the counsel  
3 has put before the witness, and so far -- I mean that  
4 document wouldn't have anything to do with our case and  
5 it hasn't anything to do with the foundation of this  
6 document.

7 MR. HAGENS: Your Honor, this is undue  
8 interference with examination of a witness. He asked me  
9 to lay a foundation as to what his knowledge was about  
10 other keyway projects and now he objects when I do it.

11 THE COURT: The objection is overruled.

12 Q All right. Let's go on with -- I just want to ask one  
13 more question about this exhibit. If you take a look at  
14 the 1989 grant, I think it's the next to the last --  
15 third from the last page. Do you have that in front of  
16 you?

17 A Yes.

18 Q Okay. If you take a look at the seventh grant on the  
19 page.

20 A Uh-huh.

21 Q Can you --

22 A Diking District 12?

23 Q Yes, sir.

24 A Application, Diking District 12.

25 Q Yes, sir.

1 A It states the project installed approximately a thousand  
2 feet of impervious keyway along total dike, right bank  
3 Skagit River, right bank downstream to Bouslog Road.

4 Q The amount of the grant?

5 A The grant request was \$20,000. The project estimate was  
6 \$40,000.

7 Q And with respect to that, take a look at the last page  
8 of this exhibit, page -- well, the last page where it  
9 shows -- can you determine from the exhibit whether or  
10 not these grants were, in fact, made?

11 A It says, "Now, therefore, be it resolved that the Board  
12 of the Skagit County Commissioners concurs with the  
13 recommendation of Skagit County Flood Control Committee  
14 and makes these flood control improvement grants as  
15 herein stated."

16 Q Do you have any reason to think they weren't made as  
17 stated in the resolutions?

18 A I have no reason to believe they weren't made, no.  
19 MR. HAGENS: Nothing further on that exhibit,  
20 Your Honor.  
21 MR. SMART: Your Honor, move to strike the  
22 testimony with respect to the original question, which  
23 was does the witness have any knowledge that these  
24 projects were performed. The only testimony elicited by  
25 counsel had to do with whether or not a grant was made

1 by Skagit County. The witness has not testified to any  
2 foundational knowledge concerning whether the project  
3 was performed, nor has he identified any review of other  
4 documents regarding the projects themselves to be able  
5 to testify to the jury that any of this work that was --  
6 the money was granted. That's not the objection.

7 The issue is whether or not he had any knowledge  
8 that the project was performed, and he has elicited no  
9 such information.

10 THE COURT: Would you care then to restate that  
11 question, if that's where you're headed with it?

12 MR. HAGENS: No. My only question was, if the  
13 grant is made, is there any reason to think that the  
14 project wasn't done, Your Honor, and I think there's a  
15 fair inference to be drawn from the fact that Skagit  
16 County, having granted this money --

17 THE COURT: Both of you are engaging in argument  
18 on the point. I'll allow you to ask that question.  
19 That may clear it up. We'll see.

20 Q Do you have the question in mind?

21 A State it again.

22 Q Do you have any reason to think that the grants weren't,  
23 in fact, made.

24 MR. SMART: Object to the form of the question.  
25 Calls for speculation.

1 THE COURT: He's okay on were the grants made  
2 because we have a document from which he was testifying.

3 Q Yes.

4 A According to this paper signed by the three county  
5 commissioners, the grants were made.

6 MR. HAGENS: That's all I have on that exhibit.

7 MR. SMART: My motion is to strike his testimony  
8 with respect to any information concerning work done.

9 MR. HAGENS: Well, Your Honor, I think that the  
10 grants made --

11 THE COURT: Well, grants made are really the  
12 question you've asked.

13 MR. HAGENS: Yes, that's correct, and I don't  
14 think I've asked him about whether the work was done or  
15 not. That's something for cross-examination, and this

16 is undue interference with examination of a witness.  
17 THE COURT: I agree. Overruled.  
18 You may proceed, counsel. That's subject for  
19 cross-examination. That will be an appropriate inquiry.  
20 Q Exhibit 45, please.  
21 THE COURT: I'm sorry, which number?  
22 MR. HAGENS: 45, Your Honor.  
23 THE COURT: That's right. We'd already done 145  
24 but not 45; is that right?  
25 MR. HAGENS: I believe that's correct, Your Honor.

1 Q Have you got that exhibit in front of you?  
2 A I don't have 45.  
3 Q Take a look at this, please, Exhibit 45. Have you got  
4 that in front of you?  
5 A I do.  
6 Q Would you identify it, Mr. Regan?  
7 A It's a State of Washington Department of Ecology  
8 Application for Flood Control Assistance Account Program.  
9 Q Okay.  
10 A It's an application by Skagit County, Department of  
11 Public Works, for Dike District 17. It gives the  
12 address of County Administration Building, the phone  
13 number, the contact person, Donald F. Nelson, Flood  
14 Control Engineer, County Engineer, Jeffrey M. Monsen,  
15 Professional Engineer. Project, Dike District 17,  
16 Project No. 2, Dike Improvement, Skagit River.  
17 Q That's enough.  
18 MR. HAGENS: We'll offer the exhibit at this  
19 time.  
20 MR. SMART: No objection, Your Honor.  
21 MR. ANDERSON: No objection, Your Honor.  
22 THE COURT: All right. 45 will enter.  
23 (Whereupon, Plaintiff's  
24 Exhibit No. 45 was admitted  
25 into evidence.)

1 Q And have you seen several of these Flood Control  
2 Assistance Account Program applications with respect to  
3 both Dike Districts 12 and 17?  
4 A I've seen a few of them, yes.  
5 Q Let's take a look at Exhibit No. 45. And do you know  
6 who prepared this exhibit, by the way?  
7 A I don't know.  
8 Q Do you see where it says, under Department or Division,  
9 who does it list there?  
10 A Under the applicant, it lists contact person as Donald  
11 F. Nelson, Flood Control Engineer.  
12 Q Did you understand him to be the Flood Control Engineer

13 in Skagit County at the time?  
14 A I know he was Flood Control Engineer in Skagit County,  
15 yes.  
16 Q You see, under Item B, it says Department and Division,  
17 Dike District 12. Do you see that?  
18 MR. SMART: Actually it says Dike District 17.  
19 A Under project, it says -- Department and Division,  
20 right, Dike District Number 17.  
21 Q And then if you take a look at the second page of that  
22 exhibit.  
23 A All right.  
24 Q Do you see the project description?  
25 A Project description states, "Regrade and improve dike

1 too from I-5 Bridge upstream about 4,000 feet on the  
2 left bank of the Skagit River."  
3 Q Then it shows the various fees and costs associated with  
4 that; is that correct?  
5 A That's correct. It goes on to list various types of  
6 material and equipment and -- to be used and the total  
7 cost.  
8 Q All right. One or two more and I think we're about done  
9 with these.  
10 Let's take a look at Exhibit 17.  
11 A Carl, it's in none of these books.  
12 Q Oh, I'm sorry.  
13 Can you identify that, please.  
14 A Yes. This is a letter from Skagit County Public Works  
15 Department, letterhead. It's a memorandum on the Skagit  
16 County Public Works Department letterhead to Jerry  
17 Louthain, Department of Ecology, Flood Plain Management  
18 Supervisor, from Dave Brookings, Skagit County Flood  
19 Control Engineer, dated May 21st, 1991, subject, 1991  
20 through 1993 FCAAP priority.  
21 MR. HAGENS: We'll offer this Exhibit 17,  
22 Your Honor.  
23 MR. SMART: Voir dire the witness, Your Honor?  
24 THE COURT: Yes.  
25 MR. SMART: You didn't have anything to do with

1 making this document, did you, sir?  
2 THE WITNESS: Putting this document together?  
3 MR. SMART: Right.  
4 THE WITNESS: No.  
5 MR. SMART: You haven't seen it before it was  
6 given to you by Mr. Hagens.  
7 MR. HAGENS: Object to the form of the question.  
8 THE COURT: Sustained.  
9 THE WITNESS: I've seen the document early on in  
10 this lawsuit.

11 MR. SMART: I guess my question is where did you  
12 originally get it.  
13 THE WITNESS: It came out in the -- what do you  
14 call it.  
15 MR. SMART: You got it from counsel?  
16 THE WITNESS: I got it from counsel.  
17 MR. SMART: And it's relating to -- it's dated  
18 May 21st, 1991; is that correct?  
19 THE WITNESS: It says May 21st, 1991 and then on  
20 the top there it appears to say May 23rd. But it's in  
21 that neighborhood.  
22 MR. SMART: May of 1991.  
23 THE WITNESS: May of 1991, yes.  
24 MR. SMART: It's relating to FCAAP grants from  
25 1991 through 1993; is that correct?

1 THE WITNESS: That's correct.  
2 MR. SMART: Your Honor, I'd object. There can't  
3 be any possible relevance to the damages that were at  
4 issue in 1990 from a document relating to grants that  
5 apparently were made at least a year and possibly three  
6 years later.  
7 MR. HAGENS: Your Honor, this is a course of  
8 conduct testimony. We're obviously trying to get it in  
9 that this was the pattern and course of conduct of  
10 Skagit County in terms of approving the various levees  
11 over time. This is just a continuation of the course of  
12 conduct for the first 25 years. That's the whole  
13 purpose of this, and we went over this in the motions in  
14 limine and they tried to have this artificial date  
15 limitation on it, Your Honor, so I plainly think it's  
16 relevant for that purpose, Your Honor.  
17 MR. SMART: Your Honor, the ruling on the motion  
18 in limine were that there was nothing with respect to  
19 any damages after 1990 that would be relevant to this  
20 case. That's clearly the purpose they're offering it  
21 for.  
22 MR. HAGENS: We're not offering it for damages,  
23 we're offering it to show the strengthening and  
24 improving of the levees over time from time immemorable  
25 to the time we set in court.

1 MR. SMART: With a cautionary instruction to the  
2 jury that it captain be related to damages to the --  
3 THE COURT: Counsel.  
4 MR. ANDERSON: Your Honor, I join in that  
5 objection.  
6 Could I voir dire the witness briefly?  
7 THE COURT: Yes.  
8 MR. ANDERSON: Mr. Regan, do you have any

9 knowledge to whether any of these applications were  
10 approved or any of these projects performed?  
11 THE WITNESS: The FCAAP projects?  
12 MR. ANDERSON: That's correct.  
13 THE WITNESS: I have no knowledge if they were  
14 approved.  
15 MR. ANDERSON: I would object on that basis, Your  
16 Honor. It doesn't reflect anything being done. And he  
17 has no foundation to testify that any of these projects  
18 were completed.  
19 MR. HAGENS: Your Honor, I'm going to object.  
20 Seems to me they're representing that these projects  
21 weren't done with the form of that objection, saying  
22 that indeed they were not done, and I'm not so sure that  
23 that -- that they have a basis to make that objection,  
24 Your Honor. If they have -- want to present that indeed  
25 the projects were not done, I think that might be

1 something else, but I think they're implicitly  
2 representing that these projects weren't done, but  
3 there's reason to believe that these and everyone of  
4 these FCAAP projects were, in fact, done.  
5 MR. SMART: The problem is that Mr. Hagens is  
6 asking the witness to testify to something that the  
7 witness has no knowledge of. He may be able to  
8 establish it through some other witness, but clearly not  
9 this one.  
10 MR. HAGENS: I didn't ask him that question, if  
11 the project was done. I just asked him to identify the  
12 exhibit.  
13 MR. SMART: He couldn't do that either. He has  
14 no knowledge of it.  
15 THE COURT: Going back, the exhibit was  
16 identified as being a memo regarding the 1991 through  
17 '93 FCAAP projects, correct?  
18 MR. HAGENS: Yes, Your Honor.  
19 THE COURT: And, counsel, your first objection to  
20 that what was what?  
21 MR. SMART: First objection is it's after the  
22 1990 flood.  
23 THE COURT: Regarding the timing for damages,  
24 right. And you agree with that?  
25 MR. ANDERSON: I agree with that. Alls this does

1 is set forth a priority. It doesn't establish that any  
2 of these applications were approved by the Department of  
3 Ecology, or any of these applications, that they  
4 received any funding or that any of those projects were  
5 performed.  
6 THE COURT: That goes to weight as opposed to



7 admissibility, and I'll overrule the objection to its  
8 admissibility on that basis. Counsel made a point that  
9 you stipulated to that. We need to make continuously  
10 clear, I suppose, during the course of the case that the  
11 plaintiffs are seeking recovery for damages that  
12 occurred as a result of the events of 1990.

13 MR. HAGENS: That's correct, Your Honor.

14 THE COURT: And not anything beyond that.

15 MR. HAGENS: That's correct, Your Honor. But  
16 we're offering this exhibit to show the course of  
17 conduct.

18 THE COURT: But in terms of actual damages that  
19 are being sought in this case, they are limited to what  
20 arose out of the floods of 1990.

21 MR. HAGENS: That's correct.

22 THE COURT: With that cautionary proviso you may  
23 proceed.

24 Q (By Mr. Hagens) Maybe you can just tell the jury what  
25 this exhibit is as you understand it.

1 A As I understand, David Brookings has prioritized -- as  
2 he says, "I have the full and revised Skagit County  
3 priority list," and he prioritizes 13 different  
4 projects.

5 Q Okay. And it speaks for itself as to the particular  
6 projects, does it not?

7 A That's correct.

8 Q And then in the second page he shows the estimated cost,  
9 together with the title of the project, Lower Hooper  
10 Road Keyway Project A. Do you see that?

11 A That's correct. This is an application to the State of  
12 Washington for Flood Control Assistance Account Program  
13 for Diking District 12 for Lower Hopper Road Keyway  
14 Project A.

15 Q Who signed this application?

16 A Signature of authorized representative was Walker,  
17 Secretary, Diking District 12, and signature of  
18 authorizing representative of the county was Donald E.  
19 Nelson.

20 Q Okay. And do you see any entry under the portion of it  
21 that talks about "Has an environmental determination  
22 (SEPA) been made for this project or for the  
23 comprehensive plan which includes this project." Do you  
24 see any entry there?

25 MR. SMART: Object to the form of the question

1 there. There hasn't been a foundation whether or not  
2 there's a permit required or anything.

3 MR. HAGENS: That was not the question, Your  
4 Honor.

5 THE COURT: Restate the question.  
6 Q Do you see any entry as to whether or not there was an  
7 application made, says, "Has an environmental  
8 determination (SEPA) been made for this project or for  
9 the comprehensive plan which includes this project." Do  
10 you see any entry on either the yes or no portion of  
11 that?  
12 A There's no entry there. That's Item Number 12. There's  
13 no entry.  
14 Q And then if you turn to the next page of the exhibit  
15 where it talks about project description.  
16 A The project description was excavate a four-foot wide  
17 trench 12 feet at the Riverside Toe of the levee and  
18 backfill with impervious material. Project Length 1,500  
19 feet.  
20 Q What kind of a project is that?  
21 A That's the keyway project.  
22 Q Would you take a look at Exhibit No. 77.  
23 Can you identify Exhibit No. 77?  
24 A This is a letter on letterhead of Leonard and Boudinot,  
25 Professional Engineers and Land Surveyors, dated August

1 30th, 1982. Letter to the City of Burlington.  
2 Attention Mr. Stan Kersey, City Supervisor, reference  
3 the Cascade Mall Draft Environmental Impact Statement.  
4 Q Does this letter deal at all with the hundred year  
5 protection level in or about the area of Mount Vernon --  
6 excuse me, Burlington?  
7 A It does.  
8 Q Okay.  
9 MR. HAGENS: I would offer Exhibit No. 77, Your  
10 Honor.  
11 MR. SMART: Objection, lack of foundation.  
12 There's no authentication. It's not a historical  
13 document. There's been no testimony about this witness  
14 has any personal knowledge about it, and it's clearly  
15 hearsay.  
16 MR. HAGENS: Your Honor, that being the case, I  
17 would -- I've --  
18 MR. ANDERSON: Your Honor, just for the record, I  
19 would join in that objection.  
20 THE COURT: All right.  
21 MR. HAGENS: Your Honor, I would --  
22 Q Do you have Exhibit 184 in front of  
23 MR. HAGENS: You. I'm not withdrawing that, I  
24 want to link it up with another exhibit and hopefully --  
25 here's 184 here.

1 Q Can you identify Exhibit 184?  
2 A Yes, this is a letter to Skagit County Commissioners

3 from Larry J. Kunzler, Nookachamps/Clear Lake Delegate,  
4 to Skagit Flood Control Advisory Committee. Subject,  
5 Skagit County Flood Control Committee Proposed Budget  
6 for 1983. And it's signed by Larry Kunzler.  
7 Q Does this letter include an enclosure which contains the  
8 identical language or near identical language as Exhibit  
9 77?  
10 If you'll take a look on the -- on the second  
11 page of the Kunzler memorandum.  
12 A Okay.  
13 Q Second from bottom paragraph. I'm just asking if it  
14 contains such a recital showing that Exhibit 77 was, in  
15 fact, transmitted to Skagit County.  
16 A It says, "I refer you now to enclosure number three."  
17 MR. SMART: Wait a minute, Your Honor. Before he  
18 testifies concerning the document it's got to be in  
19 evidence.  
20 Q Mr. Regan, does this refer to a -- the same language  
21 that you find in Exhibit 77, that is transmitting an  
22 enclosure to Skagit County in 1982, is that contained  
23 language either identical or similar to Exhibit No. 77?  
24 A It's somewhat similar to some of the language in 77,  
25 yes.

1 MR. HAGENS: Your Honor, I would offer, first of  
2 all, Exhibit 184. This was a document sent to Skagit  
3 County and shows a Skagit County receipt, by the way, or  
4 at least a -- a receipt date of 8 November, '92.  
5 MR. SMART: I have a number of responses, Your  
6 Honor. It might be worthwhile taking those up outside  
7 the presence of the jury, but it's got the same  
8 objections. It's hearsay. There's no receipt on this  
9 copy of it. It's -- the witness hasn't authenticated  
10 the document that was apparently written by somebody  
11 else. It's still hearsay, whether it refers to the same  
12 subject matter or not. Two hearsays don't make some  
13 sort of a nonhearsay.  
14 MR. HAGENS: Your Honor, he's not representing  
15 the county didn't get it. He's just saying that he  
16 believes it's hearsay, and I do believe an expert's  
17 entitled to review the documents that reflect the flood  
18 protection level over time and bring them to the  
19 attention of the Court and jury in this case, and that's  
20 why I'm doing this. These are presumed authenticate. I  
21 don't think there's a question of authenticity here, so  
22 it's a question of whether there's some kind of hearsay  
23 problem here, and plainly it shows that the exhibit was  
24 transmitted and goes to the knowledge of Skagit County,  
25 so it's not offered for anything but the fact that they

1 received some information suggesting that the flood  
2 protection level in the Burlington area which, by the  
3 way, is consistent with other exhibits that's been  
4 admitted is up to a substantial level, about a hundred  
5 year flood event, Your Honor.

6 THE COURT: Ladies and gentlemen of the jury,  
7 I'll excuse you now, and it may be that we just go into  
8 the break, I'm not sure yet. We'll see how long it's  
9 going to take, so you'll be excused at this point.  
10 Thank you.

11 (Whereupon, the following  
12 occurred out of the presence  
13 of the jury:)

14 THE COURT: Be seated, please. All right.  
15 Counsel, the objection?

16 MR. SMART: Yeah, Your Honor. There are multiple  
17 objections. The first one is this. Counsel just  
18 represented that the documents are of the same date.  
19 They're not. One is November of 1982 and one is August  
20 of 1982. The one that he contends should be able to  
21 hook up Exhibit No. 77, in other words, 184, he says,  
22 should in some way verify Number 77, refers to an  
23 exhibit, but there's no exhibit attached. Is apparently  
24 making the representation that 77 was some sort of  
25 exhibit to 184, but it's not attached to 184.

1 He hasn't elicited any testimony from this  
2 witness, who couldn't possibly know what Mr. Kunzler  
3 meant in November of '82, as to whether or not there was  
4 an exhibit and, if so, what it was. It's just a gross  
5 attempt to try to -- I don't know what it -- he's trying  
6 to get in documents through some sort of testimony from  
7 a witness who has no knowledge concerning what's in  
8 there, didn't make the documents.

9 Mr. Kunzler's identified as a witness in this  
10 case. There's just no foundation or testimonial  
11 knowledge of this witness with respect to this document  
12 whatsoever. And there's gross hearsay in the document.

13 MR. HAGENS: Your Honor, I notice that counsel is  
14 not representing that the county didn't receive it. I  
15 also want to point out there was no production number on  
16 this exhibit. This looks to like us like one exhibit  
17 that was withheld by Skagit County, although they  
18 received it in 1982 from Mr. Kunzler.

19 If you'll allow me to finish my argument.  
20 And if you'll take a look at Exhibit No. 184,  
21 Your Honor, Page 2, second, section he says, "I refer  
22 you now to enclosure 3 which states that the portions of  
23 the Burlington dike are now two to three feet above the  
24 hundred year flood."

1 on page 18 -- 77, Exhibit 77, the dike was reinforced  
2 after the '75 floods and stands two or three feet above  
3 the hundred year flood contours, the identical  
4 language. Here it says exhibit 3, here it talks about  
5 -- in Exhibit 77, it talks about the statement that it  
6 was two or three above the hundred year flood plain, so,  
7 Your Honor, I think the county's withheld some documents  
8 here, and now we catch them at it and now they want to  
9 keep this out of -- in front of the jury.

10 And I also want to say, Your Honor, that -- have  
11 you got the -- that the Rules of Evidence allow an  
12 expert to testify as to things that might not otherwise  
13 be admissible. That's why you have experts.

14 MR. SMART: First of all, Your Honor, the only  
15 time that an expert can testify to hearsay is if he has  
16 performed some sort of work with the document. This  
17 witness has just testified he doesn't have any  
18 individual knowledge concerning this document, has  
19 performed no independent evaluation as to whether or not  
20 this information is correct.

21 Mr. Hagens is obviously trying to admit the  
22 document for the purpose of having Mr. Kunzler, not this  
23 witness, testify that the dikes have been raised two or  
24 three feet over the hundred year flood level. That  
25 might be Mr. Kunzler's analysis or opinion. If so, Mr.

1 Kunzler can testify to that, this witness can't, and it  
2 would be gross hearsay to admit it for that purpose.

3 Secondly, Mr. Hagens has represented that the  
4 county had received this document in some fashion.  
5 There's nothing on the document that indicates that,  
6 other than that it says to county commissioners, but  
7 there's no proof of receipt. There's no proof of  
8 sending. This witness can't testify in any respect to  
9 the authenticity of the document or to its method of  
10 transmission, or the fact that it was transmitted at  
11 all. There's clearly no foundational testimony for the  
12 admission of this document.

13 MR. HAGENS: Your Honor, it's one of our core  
14 exhibits. Authenticity is presumed. They -- they're  
15 not arguing it's a surprise, they're just arguing they  
16 don't like the hearsay aspects of it, so I really do  
17 object to that argument. What is the purpose of having  
18 the stipulation if you're going to renege on it every  
19 day.

20 THE COURT: That's one of my first questions.  
21 Before you go there, Mr. Anderson?

22 MR. ANDERSON: My fundamental problem is exactly

23 the point that's been made. What it's attempting to do  
24 -- experts are entitled to rely on hearsay in  
25 formulating their opinions. There's been no testimony

1 or evidence that he's relying on this in formulating his  
2 opinion. What he's attempting to do is inject hearsay  
3 testimony in through this witness. The appropriate way  
4 to get this evidence in is to call these people and have  
5 these people testify to it, because you cannot explore  
6 with Mr. Regan what the foundation or where this  
7 information comes from. You have some guy in a letter  
8 that says that the levees are three feet above the  
9 hundred year flood level. That witness isn't here for  
10 us to cross-examine. It's not appropriate to inject  
11 that in through Mr. Regan if he's not relying on it for  
12 the basis of his testimony.

13 THE COURT: Is Mr. Kunzler going to testify in  
14 this case?

15 MR. SMART: He's been identified as a witness.

16 MR. HAGENS: I'm not going to represent that  
17 we're going to call him. I will tell you this, the  
18 business about Mr. Kunzler can come identify it and say  
19 -- the witness is entitled to give his opinion and  
20 explain what he's relying on in his opinion, and this is  
21 one of the documents that he's reviewed, to tell the  
22 jury that the protection level has been substantially  
23 increased over time. This is 1982.

24 THE COURT: Okay. On that issue, limited to  
25 that, I will rule that you're correct, he can, because

1 if that, in fact, is his expert opinion that that has  
2 been performed, that, in fact, the dikes have been  
3 raised and improved past 1955, or whatever year the  
4 State and the county claim was the last major work done,  
5 and in order to arrive at that opinion he has relied  
6 upon this particular information. That's fine. That's  
7 a whole different thing than having the document itself  
8 admitted into evidence in this case.

9 The rule, the rule doesn't make an inadmissible  
10 document admissible because it's relied upon by an  
11 expert.

12 MR. HAGENS: That's true.

13 THE COURT: But the expert can still opine based  
14 upon that what his opinion is. That I'll allow you to  
15 do. Beyond that the point is well made as an objection.

16 MR. SMART: Assuming he lays the appropriate  
17 foundation.

18 THE COURT: Yes, assuming e he lays the  
19 appropriate foundation.

20 THE COURT: I haven't stated that that's been

21 done yet. Right.  
22 MR. HAGENS: I've got one other problem. We want  
23 to use Exhibit 194. It's the Mark Honeywell exhibit.  
24 It deals with -- I know there's going to be a fight over  
25 it so we might as well do it in the absence of the

1 jury.

2 THE COURT: Okay.

3 MR. HAGENS: And this is the exhibit, Your Honor  
4 -- and 194, does Your Honor have 194 in front of you?

5 THE COURT: I actually don't have the exhibits  
6 right in front of me at this moment.

7 MR. HAGENS: 194, Your Honor, is the Honeywell  
8 exhibit. You said, well, I couldn't mention insurance,  
9 so I've deleted the identification of the defendants in  
10 the action. I've talked about how -- it's self-serving,  
11 it's a declaration of an attorney for Skagit County  
12 in a Snohomish County Court, declaration made under  
13 penalty of perjury under the laws of the State of  
14 Washington, wherein he claims he's reviewed a number of  
15 projects, and from the period '55 through 1990. And he  
16 says he doesn't contend or believe my review to be  
17 exhaustive but I was able to identify many documents  
18 which would arguably support such a proposition, the  
19 proposition being a suit to determine whether there was  
20 any documentary evidence that the county had, directly  
21 or indirectly, alone or with Dike District Number 12 and  
22 17, and the modification, repair or augmentation of the  
23 Skagit River Dike System. He testifies then -- provides  
24 this declaration under oath.

25 This is how they got the 30 million of

1 insurance. Now they don't want the thing to see the  
2 light of day in front of the jury. Why? Because they  
3 don't want an officer of the court, an attorney,  
4 authorized representative of Skagit County statement  
5 coming in that he had reviewed it and found that the  
6 dikes had been augmented over time, more specifically  
7 between '55 and 1990, particularly when counsel  
8 represented to the jury that there was no change in the  
9 dikes -- and the condition or change in the dikes. He  
10 made that statement to the jury.

11 THE COURT: That's one point and that's one  
12 thing. The other concern, though, that I have is -- let  
13 me stop for a second. If what you are doing with this  
14 witness relative to this document is asking this  
15 witness, "Now, do you have an opinion as to whether or  
16 not, even though the county and the state claim  
17 otherwise, as to whether or not the diking -- the dikes  
18 in this area have been augmented or improved or

19 elevated, or whatever term you want to use, between 1955  
20 and 1990?" "Yes, I do have an opinion." "What's that  
21 opinion based upon?" And he says, "Well, one of the  
22 things I reviewed is a letter by their own lawyer, for  
23 crying out loud, and he says they did," and then you go  
24 on -- and whatever else you have for foundation for  
25 that, then he can give his opinion, even though this is

1 rank hearsay and otherwise inadmissible if it were, and  
2 I'm not saying that it is.

3 It doesn't matter. The rule doesn't qualify. It  
4 says evidence that might otherwise be inadmissible.  
5 That's fine. He can have an opinion. That's a  
6 different kettle of fish than you trying to actually  
7 admit the document it through this witness.

8 MR. HAGENS: I do understand that. I understand  
9 that, Your Honor, but I think -- I think I get by any  
10 hearsay problems when you have an in-court declaration.  
11 It's no longer hearsay.

12 THE COURT: I understand with this particular --  
13 I just picked hearsay as an example. There could be  
14 inadmissible for any number of reasons. The rule makes  
15 no distinction as to why it's inadmissible.

16 MR. HAGENS: No, you're absolutely right. I  
17 don't dispute that.

18 MR. SMART: I'd like to address the declaration  
19 of Mark Honeywell.

20 First of all, Your Honor, Mr. Hagens has made a  
21 substantial point in this case of keeping out pleadings  
22 from other cases. This document has nothing to do with  
23 this case. This document is a document filed by Mr.  
24 Honeywell in an insurance coverage case that's a  
25 different matter filed in a different department of the

1 Snohomish County Superior Court. It's a different cause  
2 number. What Mr. Honeywell's declaration says is that  
3 he has reviewed documents that were produced in  
4 discovery. Just reviewed them. He can't authenticate  
5 them. He doesn't know what they are, but he says that  
6 the documents produced in discovery might indirectly or  
7 directly be evidence, they might be evidence of claims  
8 of improvement of the dike district.

9 That declaration was submitted in the coverage  
10 case for the purpose of determining what an insurance  
11 company's duty to defend would be. As I'm sure Your  
12 Honor knows, the rule is if there is arguably a basis  
13 for coverage then they have the duty to defend. There's  
14 nothing about Mr. Honeywell's declaration that  
15 authenticates any documents, that vouches the  
16 information in there and, in fact, if you look at these



17 things, what he says is he's reviewing documents that  
18 were created or prepared by a bunch of other people.  
19 And so what Mr. Hagens would like to do is have  
20 Mr. Honeywell say here are documents created by other  
21 people that say certain things. He has no testimonial  
22 knowledge, and this document would be hearsay about what  
23 those other people said, which, in turn, would be  
24 hearsay, and there's no -- it would be one thing if Mr.  
25 Regan went to these documents and said, yeah, they

1 formulate the basis for my opinion, but it's completely  
2 improper for him to say that in a coverage matter where  
3 there is an allegation concerning whether there should  
4 or shouldn't be coverage based on some pleadings in this  
5 case which are not proved or unproved at the time when  
6 the coverage matter comes up, to say that Mr. Honeywell  
7 is saying that these documents exist has anything to do  
8 with this case or a foundational ability of this witness  
9 to use this document to form an opinion -- he might be  
10 able to use the underlying documents, and if he did,  
11 then we'd get to that, but he clearly can't submit an  
12 affidavit filed in another case, especially when Mr.  
13 Hagens has said, hey, pleadings aren't allowed from  
14 other cases.

15 THE COURT: Mr. Anderson?

16 MR. ANDERSON: I have nothing to add on this  
17 particular issue, Your Honor.

18 MR. HAGENS: Your Honor, one, he told the jury  
19 that there had been no changes in these dikes since  
20 1955. His counsel got \$30 million worth of insurance  
21 coverage to cover his fee, bring in all these boxes and  
22 boxes and binders of exhibits, and all the other money  
23 he's spent on this case, did it on the strength of this  
24 declaration, Mr. Honeywell's declaration. Now it's time  
25 to pay the piper for having made this representation in

1 court under oath under penalty of perjury.

2 And sometime or other this comes in to evidence,  
3 Your Honor. It may be, and I think the Court is right,  
4 it is right on this, that this witness might not be able  
5 to get the declaration in, but I'm going to tell you  
6 that I'm going to get this exhibit in before this case  
7 is over, because they don't have the right to get \$30  
8 million worth of insurance coverage by giving --  
9 submitting a declaration like this and then pretend it  
10 doesn't exist by saying it's under an another caption.

11 THE COURT: The point I'm making -- I've heard  
12 enough. We need to move on.

13 The point I'm making is that this particular  
14 witness lacks the capacity to provide the elemental

15 foundation for admission of some of these documents.  
16 That's all I'm saying.  
17 Now, again, he's free, absolutely free of my  
18 interpretation. It's a very liberal interpretation of  
19 the expert rule, and I've actually been upheld on  
20 appeal, that if he can say in all good conscience that  
21 he's relied upon a certain document in making and  
22 forming his opinion, he's free to go ahead and do that,  
23 but -- so to the extent that there is a objection on  
24 those other grounds they're sustained.  
25 MR. HAGENS: But you will reserve on the question

1 of this declaration?

2 THE COURT: Absolutely. Absolutely. I'm not  
3 ruling it out of bounds at all. I'm simply saying that  
4 you don't have the proper witness at the moment.

5 MR. HAGENS: I understand. I do appreciate the  
6 Court's ruling. I want the Court to understand where  
7 I'm coming from on the Honeywell declaration.

8 THE COURT: Your focus is narrowed to did you  
9 rely on this, did it influence your opinion, walking the  
10 dikes, as to whether or not they're different than they  
11 were in 1955, fine. He's allowed to render that opinion  
12 if all the other foundation is laid.

13 MR. HAGENS: Can we take a break then?

14 THE COURT: The document can't come in, and since  
15 the document can't come in at this point in time without  
16 that other foundation, he isn't free to sit here and  
17 read from it and have the benefit of its admission  
18 without the foundation.

19 MR. HAGENS: I understand.

20 THE COURT: Okay?

21 MR. HAGENS: Thank you.

22 Can we take ten minutes or so.

23 THE COURT: Let's do take ten minutes. That's a  
24 good idea. Thank you.

25 (Recess was )taken.

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

4 Q (By Mr. Hagens) Okay, Mr. Regan, let's try to sew this  
5 up.

6 You told the jury the number of documents you  
7 reviewed relating to projects over the years, and you  
8 talked about the increase in protection level over the  
9 years, the evolution of the protection level. My  
10 question to you is, do you have an opinion, based upon  
11 that review, whether the dikes and levees in Skagit

12 County are in the same condition now, or in 1990 I  
13 should say, as they were in 1995?  
14 A It's my opinion that they're a better set of dikes now  
15 than they were in 1995.  
16 Q In what respect are they a better --  
17 A They appear to be a -- in 1975, the levees in 1975  
18 flood, the levees were really stressed to contain the  
19 1975 flood. The 1975 flood was around a 12, 13 year  
20 event. The 1990 event, the big one in 1990, which was  
21 reported to be someplace, 25 to 30 to 40 year event,  
22 depending on whose report you look at, and the levees  
23 held up reasonably well except way downstream at Fir  
24 Island. This indicates to me that something has been  
25 done to strengthen these levees.

1 Q And what do you understand has been done to strengthen  
2 the levees? What do you base your opinion on that  
3 they've been changed in condition?  
4 A I base my opinion on review of a lot of projects that  
5 were done out there. I reviewed documents that totalled  
6 about 35 projects in Diking District 12 and 16 projects  
7 in Diking District 17. This was in close agreement with  
8 another list of projects that was done by a declaration,  
9 list in a declaration by an attorney from --  
10 MR. SMART: Object to the form. Object to his  
11 testimony, Your Honor.  
12 MR. HAGENS: He gets to say what he relied on,  
13 Your Honor.  
14 MR. SMART: He's just doing what we -- my  
15 objection was sustained on.  
16 MR. HAGENS: We haven't offered the exhibit yet.  
17 MR. SMART: He can't testify about a document  
18 that's not admitted.  
19 THE COURT: Sustained.  
20 Q What else have you relied on in arriving at that result?  
21 A I have this declaration of Mark G. Honeywell, who was an  
22 attorney working for --  
23 MR. SMART: Objection, Your Honor.  
24 THE COURT: Sustained.  
25 Q Let's talk about the other exhibits that you've relied

1 on. Did you see any engineer reports that you relied on?  
2 A Yes, I saw an engineer report that was done -- written  
3 report by Leonard and Boudinot, Professional Engineers  
4 and Professional Land Surveyors. The letter was  
5 dated --  
6 MR. SMART: Objection, Your Honor.  
7 MR. HAGENS: He's entitled to testify to what he  
8 relied on.  
9 MR. SMART: The document's not in evidence, Your

10 Honor.  
11 MR. HAGENS: That's true.  
12 MR. SMART: If it's going to be offered or any  
13 testimony about it, I need to voir dire the witness.  
14 MR. HAGENS: Your Honor, it's not offered. I'm  
15 asking what he relied upon.  
16 MR. SMART: He can't testify about it.  
17 THE COURT: Just a minute, counsel.  
18 All right, counsel, my understanding of the rules  
19 and my recollection of case law on the point, that there  
20 is still a foundational question needed to be posed to  
21 the witness with respect to the underlying data that he  
22 may be relying upon before the Court could allow him to  
23 discuss the data.  
24 Q Okay. Did you review the report of an engineer in 1982  
25 that discussed the protection level in the Burlington

1 area?  
2 A I did.  
3 Q In or about 1982?  
4 A I did.  
5 Q How did you use that data in arriving at your opinion  
6 that the condition of the dikes have been changed since  
7 1955?  
8 A That was a small part of my -- many documents that I  
9 used to arrive at my opinion.  
10 Q So it was one of the numerous exhibits?  
11 A Right, yes.  
12 Q But it was part of your review, was it not?  
13 A That's correct.  
14 Q And what -- what did that particular -- how did you use  
15 that in arriving at your opinion, that particular  
16 exhibit, for instance?  
17 A Used it -- one reason I used it, I put -- I put quite a  
18 bit of weight on it. It's done by a professional  
19 engineer and a professional land surveyor. I don't  
20 believe that they would be saying things that were not  
21 true. They went out and actually surveyed the levee and  
22 compared it to the hundred year profile and there was  
23 their opinion. I had no reason to believe that it was  
24 not correct.  
25 MR. HAGENS: Your Honor, I think I'm entitled to

1 chase the balance of that information, Your Honor.  
2 MR. SMART: Voir dire, Your Honor?  
3 THE COURT: Yes.  
4 MR. SMART: Your Honor, at this point I'd like  
5 to publish Volume 1 of Mr. Regan's deposition.  
6 MR. HAGENS: Your Honor, if this is going to be  
7 cross-examination I'm going to object to it. It sounds

8 like this is where we're headed.  
9 MR. SMART: I asked the witness specifically what  
10 he relied on forming his opinion. This witness's  
11 testimony was subject to a discovery cut-off. We asked  
12 specifically what documents he relied on. He told us in  
13 the deposition what documents he relied on in  
14 formulating his opinion. This document that Mr. Hagens  
15 is attempting to inject apparently is from -- the  
16 witness reviewed it sometime between his deposition and  
17 now, it is not one of those documents, and I intend to  
18 establish that.  
19 THE COURT: All right. You may proceed.  
20 MR. SMART: Hand you your deposition, sir. Were  
21 you deposed on October 10th, 1995, 1:30 p.m. in Seattle,  
22 Washington?  
23 THE WITNESS: It was around about that date,  
24 yes, sir.  
25 MR. SMART: I'd like you to turn to page 19 of

1 the deposition, sir.  
2 THE WITNESS: Page what?  
3 MR. SMART: 19, sir. On October 10th of 1995,  
4 sir, I asked you what documents you had relied on in  
5 formulating your opinion, did I not, sir?  
6 THE WITNESS: It doesn't say that. I can't see  
7 it in here, but generally you asked that question.  
8 MR. SMART: Well, I asked you if there was  
9 anything you relied on with respect to formulating your  
10 opinions and you referred to a Rule 26(b)(4) statement  
11 regarding expected opinions of plaintiff's expert  
12 witnesses, correct? And that document is this  
13 document --  
14 THE WITNESS: Are you reading from the same page  
15 I am?  
16 MR. SMART: Page 19, sir.  
17 THE WITNESS: Uh-huh.  
18 MR. SMART: I asked you, "Anything else that you  
19 relied on, other than Exhibit No. 1, which was the  
20 Stewart report," correct?  
21 THE WITNESS: That's right. And I went on to  
22 answer.  
23 MR. SMART: And you said that you relied on  
24 numbers 1, 6, 7, 8, 9 and 10.  
25 THE WITNESS: That's correct.

1 MR. SMART: In formulating your opinions in this  
2 case.  
3 THE WITNESS: That's correct.  
4 MR. SMART: Exhibit No. 1 to your deposition,  
5 sir.

6 MR. HAGENS: Your Honor, this is plainly  
7 cross-examination, Your Honor. I think -- he certainly  
8 may be entitled to do this on cross but I don't think  
9 he's entitled to do this now.

10 All experts don't stop on the day of their  
11 deposition. Even if it was a later document, Your  
12 Honor, I think he's entitled to testify as to what he's  
13 -- what he's basing his opinion on, and this business  
14 about -- this is nothing more than impeachment of the  
15 witness at a time when it's inappropriate, Your Honor,  
16 or attempted impeachment I should say.

17 MR. SMART: How else are we supposed to discover  
18 whether he relied on it before the discovery cut-off or  
19 not? We were clearly entitled to be informed by counsel  
20 what documents were. He's trying to inject a new  
21 document into the record, and clearly violates the  
22 Court's earlier orders on discovery.

23 MR. HAGENS: That is not the case, Your Honor.  
24 This is a document that we believe Skagit County had for  
25 the reasons I've already made clear to the Court.

1 THE COURT: Well, counsel, Mr. Regan's statement  
2 a moment ago was he had relied upon this document in  
3 arriving at his conclusion; is that correct?

4 MR. HAGENS: That's correct, in part.

5 THE COURT: I realize that. And your specific  
6 question is?

7 MR. SMART: I asked this witness, Your Honor, in  
8 a deposition, prior to the discovery cut-off, Your  
9 Honor, what documents he relied on. He relied on the  
10 Stewart report and these documents here, a 1978 Army  
11 Corps of Engineers General Design Memorandum, a 1993  
12 Army Corps draft report, an USGS Quadrangle Map, Army  
13 Corps topographical maps, survey notes from a survey of  
14 levees and the 1991 memo from Brookings. Those were the  
15 only documents disclosed by this witness in discovery  
16 that he relied on.

17 MR. HAGENS: Your Honor, that doesn't mean that  
18 other exhibits don't exist in the universe that would  
19 relate and support his opinion, Your Honor.

20 MR. SMART: Your Honor --

21 THE COURT: So your question is whether or not  
22 that was his answer at the time of his deposition.

23 MR. SMART: Certainly, and prior to discovery  
24 cut-off, and it's never been disclosed to us that he had  
25 some other documents he was relying on, and clearly

1 counsel is required to disclose that per your court's  
2 order.

3 MR. HAGENS: The Rule 26 says he's looked at the

4 record and file here in this entire proceeding, and I do  
5 think it's much broader than the half dozen he  
6 mentioned.  
7 THE COURT: That may be an issue. That may be  
8 properly an issue for cross-examination.  
9 So, restate your question.  
10 MR. SMART: Did I not ask you, sir, which  
11 document you relied on in your deposition of October --  
12 THE WITNESS: Yes.  
13 MR. SMART: -- 10th of 1995, and you told me  
14 that you relied on numbers 1, 6, 8 9 and 10.  
15 THE WITNESS: It says 7 on here, too.  
16 MR. SMART: Okay. You're right, 1, 6, 7, 8, 9  
17 and 10, and haven't I correctly identified what those  
18 reports were? The Stewart report, 6, 7, 8, 9 and 10 on  
19 page -- on Exhibit No. 1 of your deposition.  
20 MR. HAGENS: I'd also like to ask what opinion  
21 he's talking about. This witness has expressed several  
22 opinions, so when he talks about an opinion, which  
23 opinion are you referring to?  
24 MR. SMART: You've only asked him about one  
25 opinion.

1 MR. HAGENS: I've asked him several times in the  
2 course of his testimony here today his opinions.  
3 THE COURT: All right. Maybe we relate back to  
4 the question what opinion it was that you were --  
5 MR. SMART: The question was relating to the  
6 raising of the levees, Your Honor.  
7 MR. HAGENS: Okay. Maybe I could see that then  
8 in the transcript where you were talking about the  
9 raising of the of levees.  
10 THE COURT: Counsel.  
11 MR. HAGENS: Page 15, for instance, Your Honor,  
12 asked what was -- talked about the preliminary  
13 calculation of increased flooding in the Nookachamps,  
14 and this -- was in response to the increased flooding.  
15 This has to do with the raising and strengthening of the  
16 dikes, Your Honor.  
17 MR. SMART: That opinion, Your Honor, is included  
18 in the statement, the 26(b)(4) statement and was  
19 directly relevant to the questions asked to Mr. Regan on  
20 October 10th, 1995. And in fact, these documents, 1, 6,  
21 7, 8, 9 and 10 are the only documents he relied on for  
22 any of his opinions, according to his testimony on that  
23 date.  
24 MR. HAGENS: That's his interpretation of the  
25 testimony. He can develop that in cross-examination.

1 MR. SMART: That's the testimony right here, Your

2 Honor, in his deposition.  
3 THE COURT: All right. Mr. Regan has answered  
4 the question. Do you have any other questions on voir  
5 dire?

6 MR. SMART: No, Your Honor.

7 THE COURT: You may proceed.

8 MR. HAGENS: Thank you.

9 CONTINUED DIRECT EXAMINATION

10 BY MR. HAGENS:

11 Q So how did you take into account the Boudinot report  
12 then?

13 MR. SMART: Same objection.

14 THE COURT: Overruled. You may ask it.

15 A I took it as one piece of the puzzle.

16 Q And what did you understand from the Boudinot report  
17 that was one piece of the puzzle, Mr. Regan?

18 A Well, his report stated that there was a certain section  
19 of the Diking District 12 levee that was raised -- that  
20 was above -- two to three feet above the hundred year  
21 contour, hundred year flood contour.

22 Q All right. Let's move onto another area, if we could.

23 Let's talk about -- I want to talk a little bit  
24 about your work at the -- on the Army Corps -- while you  
25 were at the Army Corps of Engineers in connection with

1 the history of failures of the dike system. Do you  
2 recall -- were you personally involved in analyzing the  
3 failure history of the levees in Skagit County?

4 A That's correct.

5 Q And can you tell the jury what the county did -- excuse  
6 me, what the Corps did in connection with this analysis  
7 of the failure likelihood in connection with the 1979  
8 lower -- General Design Memorandum?

9 A We knew by actual ground surveys we -- what height the  
10 levees were around 1975, '76, '77 year when we surveyed  
11 them, actually had surveyors out on the ground  
12 determining the top elevation of the levees. Knowing  
13 this information and knowing hydraulic characteristics  
14 of the river, we were able to put together a computer  
15 model which we were able to see -- or tell us where the  
16 first low spot was in the levee. When the water got  
17 within a certain elevation of the top of the dike, we  
18 said when it's that close the levee would fail. It  
19 wasn't an overtopping, but when it got very close to the  
20 top of the dike that there would be a levee failure.

21 We went through this procedure and throughout a  
22 50, 100 and a 500 year flood, a hypothetical flood to  
23 come up -- find locations where the levee would fail,  
24 and that is -- and at what discharge at Mount Vernon  
25 these failures would occur at.



1 Q This is something you personally did back in 1978-79  
2 time frame?  
3 A Right, I was the responsible person in charge for doing  
4 that.  
5 Q Was a chart or graph prepared of this?  
6 A Right. There is a chart in the General Design Memo and  
7 which we have made a blowup of.  
8 Q Let's get a copy of that and show it to the jury.  
9 THE CLERK: Exhibit 207 marked.  
10 Q Can you identify Exhibit 207.  
11 A Right. This is a blowup of an exhibit that's in the  
12 General Design Memo showing levee failures and the  
13 sequence of when they would happen, going from 1 through  
14 13 to 14 and so forth.  
15 Q This was a product of a model that you were involved in  
16 putting together?  
17 A Right. The product of a hydraulic river model, computer  
18 model.  
19 Q Okay.  
20 MR. SMART: Voir dire the witness, Your Honor?  
21 THE COURT: Yes.  
22 MR. SMART: Mr. Regan, do I understand it  
23 correctly that this is some sort of a document that you  
24 prepared in 1979 or thereabouts regarding some sort of  
25 predicted failures of levees --

1 THE WITNESS: That's correct.  
2 MR. SMART: -- along the Skagit? You're not  
3 contending that any levees failed in 1975, are you?  
4 THE WITNESS: No, there was no levee failures in  
5 '75.  
6 MR. SMART: Okay. So what was this diagram  
7 based on in terms of a --  
8 THE WITNESS: It was based on the actual survey  
9 of the levee elevations, a continuous survey of levee  
10 elevations on both sides of the river from one end of  
11 the levee to the other. It was then based upon a  
12 computer model that actually computed water surface  
13 elevations in the river for the various events.  
14 Q If you also computed other scenarios that did not  
15 envision failures of levees in that time period --  
16 MR. HAGENS: Your Honor, this doesn't seem to  
17 have much to do with the exhibit.  
18 MR. SMART: I want to know if that's on here,  
19 too.  
20 THE WITNESS: What is on there the failure  
21 locations for a 50 year event, a hundred year event and  
22 a thing called the Standing Project Flood, which is  
23 about a 500 year flood.  
24 MR. SMART: My question is, didn't you also go

25

through other scenarios in that time frame that

1 envisioned that levees wouldn't fail?

2 THE WITNESS: No, not for analyzing existing  
3 conditions.

4 MR. SMART: The 1975 flood and the 1990 flood  
5 were not 50 year events, correct?

6 THE WITNESS: That's correct.

7 MR. SMART: And, as I understand it, the levees  
8 tend to fail when the water hits high on the levee; is  
9 that right?

10 THE WITNESS: That was the basis of this chart,  
11 yeah.

12 MR. SMART: I don't have any objection, Your  
13 Honor.

14 MR. ANDERSON: No objection, Your Honor.

15 THE COURT: All right. 207 will enter.

16 (Whereupon, Plaintiff's  
17 Exhibit No. 207 was admitted  
18 into evidence.)

19 Q (By Mr. Hagens) Would you come over here and explain what  
20 was done with this particular exhibit, 207.

21 A Again, a map of the of the Skagit Delta area, from Sedro  
22 Wooley through Burlington, through Mount Vernon on down  
23 to Skagit Bay. The blue is just to indicate where the  
24 river is, the river channel, the river channel proper.

25 On here you'll see a number of boxes with numbers

1 on them and arrows beside them. The boxes are colored  
2 in yellow. What these indicate are sequence of levee  
3 failure.

4 The first levee failure would have occurred under  
5 the 50 year flood or 100, or even the large flood, would  
6 have occurred at number one location. Another failure  
7 would have occurred slightly there afterwards as the  
8 river continued to rise at Mount Vernon.

9 Q What flow rates are you talking about?

10 A At the 150 year flood, our computer -- 150 year flood,  
11 our computer model indicated we'd have a failure in this  
12 location at around 106,000 CFS at Mount Vernon.

13 Q 160 CFS?

14 A 106. Over two here you would have a failure when the  
15 flow that got to 125,000, and number three, it would be  
16 about 126,000 right here.

17 Q And that would be what area?

18 A Actually into Mount Vernon. Now, this is based on the  
19 assumption there was absolutely no flood fighting. No  
20 one's out there putting sandbags on the levee. Stood  
21 back and just let it go. That's the assumption that had

22 to be made. Once you interject a flood fight into this  
23 thing and people protecting various locations, you can't  
24 simulate them.  
25 Q Three is, again, how many CFS?

1 A Three was about -- was 100 -- about 126,000.  
2 Q Then the flood, highest flood of 1990 was what?  
3 A 154, 153.  
4 Q Go on.  
5 A Now, looking for number five here. Five, five is -- not  
6 a levee failure. The levee stops right about here.  
7 There's a low spot in the road and then the railroad  
8 that goes along here, Highway 20 and the railroad, but  
9 that's on a large flood. This allows flood to go out  
10 into this area. This is traditionally an area that's  
11 flood fight and the river is contained in here. 1990, a  
12 very large flood fight in this area with only a small  
13 amount of water getting past this, point but you have  
14 overtopping at number five about 135,000, which is about  
15 the 1975 flood.  
16 Q And we're talking where?  
17 A Out of the river, over tops the road and close down into  
18 the Samish River Valley.  
19 Q What number was that?  
20 A About 134,000.  
21 Q And the number, maximum level CFS was what?  
22 A 153.  
23 Q Okay.  
24 A Number six is -- here it is, Fir Island. That has --  
25 again, about a 136,000 CFS. It was right in this area

1 here where the 1990 flood did fail, someplace between  
2 six and seven, and it was -- number seven -- number six  
3 is 136,000 and number seven is 138,000, so we did have a  
4 failure in this location.  
5 Number 8 is upstream from Mount Vernon, flooding  
6 into the inside of the Avon bypass area, Number 8 and  
7 Number 9. Those occur at about 142, 145,000 CFS.  
8 Q Again, are the CFS, number 24, 1990 was?  
9 A 153,000.  
10 Q All right.  
11 A Number ten, ten is another failure in west Mount  
12 Vernon. That would have been at 146,000.  
13 Q The one protecting Burlington here?  
14 A The one protecting Burlington. That would have been  
15 about 150,000 would have had a failure there.  
16 Q That's what your model predicted in 1979, was it?  
17 A Before '79, but this was published in '79, based on the  
18 surveys that were done on these levees.  
19 Q Now, was there a failure at point in 1990?

20 A No failures on the entire system, except for down in Fir  
21 Island.

22 Like I said, there was a small amount of water  
23 got past here. There was a very hard fought flood fight  
24 in this area, but they did get some water around it.

25 Q Now, if there were no failures at the point you

1 indicated on this Exhibit 207, does that indicate to you  
2 one way or the other whether the levees have been  
3 increased or strengthened since 1977?

4 A It indicates to me that, based upon our assumptions for  
5 this failure scenario, that there is something different  
6 now in 1990 than there was in 1970's, and that the  
7 levees have either been raised, strengthened or  
8 something. Something has occurred out there.

9 Q And you saw projects on the levees since 1975, did you  
10 not, in your review of the various projects?

11 A Yes, the various projects. A lot of projects I reviewed  
12 that had strengthening keyways and so forth in Diking  
13 District 17 and Diking District 12.

14 Q Okay. Take the stand.

15 Do you have an opinion as you sit here today,  
16 Mr. Regan, of the likelihood of levee failure  
17 overtopping during the November 24 and 25 floods if the  
18 levees were in the same condition as they were in 1975,  
19 and assuming no projects that you have found that were  
20 done since then and assuming no flood fight?

21 A It's my opinion that the levees in 19 -- the flood of  
22 1990 should have failed a lot more of the levees had  
23 they been in the same condition, same height as was in  
24 mid 1970's when we surveyed the levees and did that  
25 study.

1 Q What's your degree of confidence in that opinion?

2 MR. SMART: Object to the form of the question.

3 THE COURT: Sustained.

4 MR. SMART: He's given his opinion. He can't  
5 validate it.

6 Q What was the effect of levee failure over time on the --  
7 in the area of the Nookachamps, for instance? Is there  
8 any effect in the Nookachamps area?

9 A Definitely. If a levee failure occurred, especially  
10 upstream from Mount Vernon, that would result in a --  
11 quite a remarked lowering of the water surface in the  
12 Nookachamps area right after the levee failed and the  
13 water started draining out into the flood plain where  
14 the levee failure occurred. If the levee failure was  
15 way downstream there wouldn't be as marked an effect.

16 Q Were there instances in the past where the levees had  
17 failed that you found in your historic review?

18 A Yes.  
19 Q And do you recall -- let's see. Can we take a look at  
20 Exhibit 193. Whoops. Wrong exhibit.  
21 A It's right here.  
22 Q Can you identify that? Just identify it for the record,  
23 Mr. Regan?  
24 A Okay. This is a U.S. Geological Survey Water Supply  
25 Paper Number 1537, entitled Floods in Skagit County

1 River Basin by James E. Stewart and Lawrence Bodhaine.  
2 Q Mr. Stewart is who?  
3 A James Stewart is the man who authored the 1923 report  
4 which I believe was Exhibit 2.  
5 Q Okay. And does this report contain a listing of some of  
6 the failures that occurred over time dating back to the  
7 early 1990s and continuing right up through '50, '51, in  
8 there?  
9 A It provides a map in the back of the report that lists  
10 failures, all the levee failures that they knew about in  
11 the early 1900s, even the late 1800s, on up to 1951.

12 MR. HAGENS: Okay. We would offer Exhibit No.  
13 193, Your Honor.

14 MR. SMART: No objection, Your Honor.

15 MR. ANDERSON: No objection, Your Honor.

16 THE COURT: 193 will enter.

17 (Whereupon, Plaintiff's  
18 Exhibit No. 193 was admitted  
19 into evidence.)

20 Q Okay. Let's go to that map if we can, Mr. Regan.  
21 A This is going to be hard to focus because it's not  
22 focused on this page even.  
23 Q It's a very old map. Is that better?  
24 Okay. What I've tried to do with the fancy  
25 equipment we have here is point out where the breaks

1 were that are -- let's start with the top ones. Maybe  
2 they'll be a little bit more helpful.  
3 Maybe you can take the jury through this and give  
4 them your interpretation of what this map depicts, if  
5 you would, please.  
6 A Okay. Basically it is a -- shows a little arrow and a  
7 date beside it, and that date is the date of the flood  
8 that caused the failure at that location where that  
9 arrow is pointing. Some places there's numerous ones.  
10 Upstream from Burlington it shows four of them. These  
11 are just levee failures. This does not depict the water  
12 getting around the upper end of the levee I just  
13 discussed on the previous exhibit on the board, where  
14 water got around the upstream end of the levee and

15 flowed down into the Samish Basin. These are just levee  
16 failures.  
17 Q So the jury can track with you, maybe you ought to talk  
18 about the four events you're talking about which were  
19 actually failures.  
20 A One is 1908, 1917, 1932, 1935. Further down -- it's  
21 very difficult to read on here, 1921 is one.  
22 Q Maybe if you come over here, I've got it blown up pretty  
23 well, Mr. Regan. This might help you actually.  
24 A Sure.  
25 There's one here but I can't tell the date. It

1 might be 1917. It might be 1921. This is where the  
2 levee used to be. Back in this area. The levee now is  
3 out in this area. It's altogether different, but back  
4 in those days the levee was back in here so there was a  
5 lot of failures. 1909, 1921. Just bunches of failures  
6 all the way down the river in that era.  
7 Q And, of course, there were no failures in that area in  
8 1990, were there?  
9 A No.  
10 Q And were there any failures or out-flanking in 1951 that  
11 your historical review showed?  
12 A Yes. I've had eye witnesses tell me that there was an  
13 out-flanking of the levee in 1951 that got water out  
14 through here. In 1990, the big event in 1990, there was  
15 a big flood fight along this road here. However, water  
16 still got out around it. There was eye witnesses told  
17 me about both of those.  
18 Q Let's talk a little bit some other aspects of the design  
19 memo and then we're going to be almost through here.  
20 What was -- at the time you started the General  
21 Design Memorandum, were you the head hydraulic engineer  
22 with all these other engineers working under you?  
23 A I was the head hydraulic engineer, yes.  
24 Q Do you recall what the event protection level was at  
25 that time in the mid-seventies, or '78, '77, '78?

1 A For the levees?  
2 Q Yes, sir.  
3 A They held in the 1975 flood. The 1975 flood did not  
4 break out. That doesn't mean they were safe. They were  
5 far from safe in '75. Water was very close to the top  
6 of the levees in all cases. The '75 flood was about a  
7 13, 14 year event.  
8 Q And in -- what was the -- first of all, who sponsored  
9 the General Design Memorandum, what governmental agency?  
10 A Skagit County.  
11 Q And can you tell the jury how it came -- started, how  
12 the Corps of Engineers starts a major project like that?

13 A Similar to what we talked about this morning, I believe  
14 where the county asks for assistance in helping them  
15 with their flood problems. They write a letter to the  
16 Corps. If there is authorization to study in that basin  
17 and there's funding available, the Corps moves on with  
18 it.  
19 Q What did the project come up with in terms of  
20 recommended alternatives to be undertaken?  
21 A There was a -- one -- it all boiled down to one final  
22 recommendation, which included raising and strengthening  
23 the levees in Skagit Bay up to a point downstream from  
24 Mount Vernon to a 50 year level. Above that point and  
25 on upstream through the more urban areas of Mount Vernon

1 on up into Burlington, they were raised to the hundred  
2 year level, except for in the town of -- City of Mount  
3 Vernon, it was designed to protect Mount Vernon, a small  
4 portion of Mount Vernon that's in the flood plain, to  
5 the standard project flood level, or basically the 500  
6 year event.  
7 Q Okay. Who came up with that as the goal of the General  
8 Design Memorandum?  
9 A That was -- there's more to it than that, excuse me.  
10 Q Okay.  
11 A Once we got upstream from Burlington, we did some --  
12 there was some protection provided through the  
13 Nookachamps area. There were two small levees, one that  
14 protected a -- most of the town of Clear Lake area and  
15 the Nookachamps area, which is to the -- I want to call  
16 it the southeast of Clear Lake, which is a small part of  
17 the Nookachamps Basin. That whole area was protected.  
18 However, the area that's to the north and to the west of  
19 the town of Clear Lake there was no protection for.  
20 Q Okay. I'm trying to get at who came up with the goal of  
21 the hundred year protection for urban areas, maybe a  
22 little bit more in some areas of Mount Vernon.  
23 A Basically the goal, the protection is based on urban  
24 economics. I had nothing to do with coming up with how  
25 high the levee is, how much protection was going to be,

1 but generally the levees, a design of this type is --  
2 costs you so much to do it, how many dollars does it  
3 protect. As long as the dollars it takes -- that it  
4 protects are more than the dollars it takes to do it, in  
5 other words you benefit, the cost ratio is greater than  
6 one, that is what they usually go for.  
7 Q Was that standard policy --  
8 A I couldn't hear you.  
9 Q Was that policy followed in connection with the cost  
10 ratio that you just described?

11 A I would say it's basically right, yes. Like I said,  
12 that wasn't my area of expertise on that.  
13 Q Okay. I wonder if you would take a look at Exhibit No.  
14 11. I think it's in front of you.  
15 I'm getting a little bit ahead of myself. Did  
16 the Corps analyze what the effect of raising the levees  
17 in the -- to this hundred year protection level you  
18 talked about, maybe a little bit higher for Mount  
19 Vernon, and the 50 year protection for rural area, did  
20 the Corps study what the impact of that would be in the  
21 Nookachamps/Clear Lake part of Washington?  
22 A Yes.  
23 Q What conclusions were drawn by the Corps with respect to  
24 what raising those levees, just raising them, not the  
25 existing levees, just raising the levees would be?

1 A The difference between the existing condition, which  
2 meant the existing levees, and the new levees or the  
3 proposed project, increased the water surface in the  
4 Nookachamps area one to two feet.  
5 Q Was that then raised with or disclosed as part of the  
6 public debate of whether this project should go forward?  
7 A It was, yes.  
8 Q Okay. And was a brochure prepared and circulated  
9 through the county or made available in the county that  
10 dealt with that subject?  
11 A Yes.  
12 Q Do you have Exhibit 11 in front of you?  
13 A Uh-huh.  
14 Q Would you identify that, please?  
15 A Exhibit 11 is a copy of the Corps of Engineers document  
16 which is called a Public Workshop held on Wednesday, 20  
17 December, 1978, at the new county administration  
18 building in Mount Vernon.  
19 Q Okay. And does this, in fact, discuss some of the  
20 effect of the raising the levees in the  
21 Nookachamps/Clear Lake area portion. And you might take  
22 a look at page 11 of the exhibit. It should be  
23 Alternative 3E.  
24 A This is Alternative 3E, yes. Without showing the  
25 Nookachamps protection.

1 Q We'll come to that in a minute.  
2 A Right. This is an early on 3E, yes.  
3 Q And --  
4 MR. HAGENS: We'll offer this exhibit before we  
5 have anymore testimony on it, Your Honor.  
6 MR. SMART: Voir dire, Your Honor.  
7 THE COURT: All right.  
8 MR. SMART: Mr. Regan, this project, the 1978



9 project was never built; is that correct?  
10 THE WITNESS: That's correct.  
11 MR. SMART: In order to -- as I understand your  
12 testimony, this document informs the public that the --  
13 if the project had been built, the Nookachamps area  
14 would have suffered one to two feet additional flooding;  
15 is that correct?  
16 THE WITNESS: I believe that's in here. I don't  
17 see it right at the moment but --  
18 MR. SMART: That was your testimony just a  
19 moment ago?  
20 THE WITNESS: That was my testimony, yes.  
21 MR. SMART: That was determined by the Army  
22 Corps of Engineers?  
23 THE WITNESS: That's correct.  
24 MR. SMART: In order to determine that one to  
25 two additional feet would have been added by this

1 project that was never built, they had to determine what  
2 the level would have been before that, correct?  
3 MR. HAGENS: Your Honor, this is  
4 cross-examination. I'm going to object.  
5 MR. SMART: I'm just asking if this is in the  
6 document.  
7 MR. HAGENS: Then let's get the document in  
8 evidence.  
9 THE COURT: Right, I agree. All right.  
10 That's not proper -- that is proper cross-examination.  
11 MR. HAGENS: We'll offer Exhibit No. 11, Your  
12 Honor.  
13 THE COURT: Anything specific to --  
14 MR. SMART: I'd like to know if that information  
15 is in the document, what the level was beforehand,  
16 before the project.  
17 THE WITNESS: In this document?  
18 MR. SMART: Yes.  
19 THE WITNESS: I don't believe it is.  
20 MR. HAGENS: Your Honor, we'll offer Exhibit No.  
21 11.  
22 MR. SMART: I don't have any objection, Your  
23 Honor.  
24 MR. ANDERSON: No objection.  
25 THE COURT: All right. 11 will enter.

1 (Whereupon, Plaintiff's  
2 Exhibit No. 11 was admitted  
3 into evidence.)

4 Q (By Mr. Hagens) Would you turn to page 11 of the exhibit.

5 A I'm there.

6 Q Do you see where it says "effects"?

7 A Uh-huh. Right.

8 Q Would you read that Flood Damage Reduction, would you

9 read that portion under that section into the record,

10 please?

11 A Flood Damage Reduction, 40,000 acres of land would be

12 provided -- would be provided rural protection (50 year)

13 and 11,800 acres of land would be provided urban

14 protection (100 years). The project would raise the

15 hundred year water surface elevation in the

16 Nookachamps/Clear Lake area by about one foot."

17 Q Was there public reaction to that disclosure that you

18 witnessed?

19 A Oh, yes. Yes.

20 Q And tell the jury what that -- first of all, where did

21 you witness this reaction?

22 A Well, subsequent to this it was another -- there was a

23 meeting in the Nookachamps area where people were very

24 vocal about this additional flooding that would be

25 caused -- by this proposed project.

1 Q Okay. And did you perceive them to be in support of or

2 opposed to it?

3 A They were definitely opposed to it.

4 Q So were there discussions then between the Army Corps of

5 Engineers about the subject of flows would be raised?

6 A Yes.

7 Q Do you recall what the substance of those conversations

8 were, at least -- were you a party to those?

9 A I went to that meeting in the Nookachamps area. I don't

10 remember every -- everything that was said, but flowage

11 easements were discussed.

12 Q Maybe you ought to tell the juror what a flowage

13 easement is.

14 A Flowage easement is like an easement on your road. They

15 can drive over your property because it's an easement on

16 your road, he has an easement to do that. Flowage

17 easement is an easement to put water on your land. The

18 government actually buys the right and it becomes part

19 of the title that that land can be flooded and that

20 person is compensated.

21 Q Did the Corps have a policy with respect to under what

22 circumstances they would require flowage easements.

23 MR. SMART: I object to the relevance, Your

24 Honor. What the Corps does for a project that was never

25 built has no possible relevance to this case.

1 MR. HAGENS: Your Honor, we're putting this in

2 because it shows that our people, when it was disclosed,

3 opposed, and that's the purpose of this testimony and --

4 counsel knows full well that there was never any  
5 disclosure that the existing levees were causing any  
6 problems by Skagit County or anybody else, so we're  
7 putting this to show that if our people were informed  
8 they would react, and that's the purpose of this.  
9 THE COURT: But his objection is to the Corps  
10 policy on flowage easements. How that relates to it I'm  
11 unclear. I'll sustain the objection.  
12 MR. HAGENS: Well, I'm not sure I understand the  
13 Court's ruling.  
14 THE COURT: If I recall correctly, your question  
15 essentially was what was the Corps general -- generally  
16 what was their policy regarding the acquisition of or  
17 treatment of flowage easements.  
18 MR. HAGENS: Yes, that's correct Your Honor.  
19 THE COURT: The objection was that whatever the  
20 Corps' particular policy was on flowage easements is  
21 irrelevant presently to this particular case.  
22 MR. HAGENS: Let's see if I can lay a little bit  
23 more foundation.  
24 Q In connection with the increased flooding that you've  
25 just read from Exhibit No. -- what was it -- 11 I think

1 it was, did the Corps devise an approach to deal with  
2 people who were going to receive any increased  
3 flooding?  
4 MR. SMART: Same objection, Your Honor. It  
5 wasn't a foundational argument, it was a relevance  
6 argument.  
7 MR. HAGENS: Well, Your Honor, I think we're  
8 entitled to show that this was a matter that was  
9 discussed, ultimately learned by Skagit County that  
10 there were -- flowage easements were going to be  
11 required. It's part of the record. The county knows  
12 that this is induced flooding they have to acquire  
13 flowage easements.  
14 MR. SMART: Your Honor, this is a speech.  
15 THE COURT: Sustained. Objection sustained.  
16 It's on the basis of relevance is the objection.  
17 He's --  
18 Q Was the county a participant to any discussions or --  
19 and it was advised that if there was going to be  
20 increased flooding in a particular area it would have to  
21 acquire flowage easements?  
22 MR. SMART: Same objection, Your Honor. Whatever  
23 the Corps' policy is it's --  
24 THE COURT: I think that makes it relevant, if  
25 the witness knows if the county was privy to those

1 discussions.

2 A Oh, yes. At this meeting -- I know Mr. Don Nelson was  
3 at the meeting. I'm not sure who all the other county  
4 people were but there is a list of who was at the  
5 meeting, and I can't -- like I say, I can't remember all  
6 the people, but I know Don Nelson was there and he was a  
7 county employee.

8 Q What was the nature of the discussion with Mr. Nelson  
9 about the requirement to require flowage easements if  
10 there was going to be additional flooding?

11 A I believe what was brought out in the meeting.

12 MR. SMART: Just a second, Your Honor, what he  
13 believes is not relevant. If he had a discussion with  
14 Mr. Nelson he can testify to that.

15 THE COURT: Fine.

16 Q What was the subject matter of the meeting with Mr.  
17 Nelson on that subject as it related to flowage  
18 easement?

19 MR. SMART: Your Honor, excuse me. Objection.  
20 This witness has testified that he doesn't remember the  
21 specific discussion, so what might have been told to Mr.  
22 Nelson --

23 THE COURT: I don't think he has said that. You  
24 were right a moment ago when you objected. The  
25 beginning of his response was I believe such and such.

1 We're not asking the witness to speculate. He needs to  
2 tell us what it is he does remember.

3 Q That's correct. Do you recall what Mr. Nelson was told  
4 with respect to the requiring flowage easements?

5 A Mr. Nelson was in the audience and he was told the same  
6 thing as everyone else was told. A man named Mr. Vernon  
7 Cook, who was the project manager, ran the meeting for  
8 the Corps, was the spokesman for the Corps, and flowage  
9 easements were discussed with everyone.

10 Q And do you recall what circumstances that they would be  
11 required? Was that discussed with Mr. Nelson?

12 A Any land that would have been flooded over and above  
13 what would have normally been flooded under existing  
14 conditions, existing conditions being as it sat in the  
15 seventies, flowage easements would have to be required  
16 for that.

17 Q Okay. And was there a -- subsequently agreement that  
18 was entered into between the Board of County  
19 Commissioners of Skagit County and the Army Corps of  
20 Engineers with respect to the acquisition of those  
21 flowage easements under those circumstances?

22 A That's correct. There's a letter agreeing in principle  
23 to providing all managed easements and right-of-ways.

24 Q Would you take a look at Exhibit No. 208, please?

25 A No. 208 is a letter from Skagit County Board of

1 Commissioners to Seattle District Corps of Engineers  
2 dated July 17, 1979, and signed by all three county  
3 commissioners, Bud Norris, Howard Miller and Jerry  
4 Mansfield.  
5 Q And did this become part of the General Design  
6 Memorandum?  
7 A This was an exhibit in the General Design Memo.  
8 MR. HAGENS: We would offer Exhibit 208, Your  
9 Honor.  
10 MR. SMART: Voir dire, Your Honor?  
11 THE COURT: All right.  
12 MR. SMART: As I understand your testimony, sir,  
13 this relates to flowage easements for a project that was  
14 never built; is that correct.  
15 MR. HAGENS: Your Honor, we've already  
16 established this. This is again cross-examination.  
17 THE COURT: I agree. That question is properly  
18 reserved for cross.  
19 MR. SMART: Well, Your Honor, the document  
20 specifically speaks, as I understand it --  
21 MR. HAGENS: It isn't in evidence. I don't know  
22 how he can talk about it if the witness can't.  
23 MR. SMART: Well, all right. This document  
24 relates to a project that was never built; is that  
25 correct?

1 MR. HAGENS: That's been established several  
2 times, object.  
3 MR. SMART: Do they stipulate to that?  
4 MR. HAGENS: Objection. I'm not stipulating to  
5 anything when the county asks us to.  
6 THE COURT: I sustained Mr. Hagens' objection to  
7 that question. I think that's an improper question.  
8 MR. SMART: The flowage easement referred to by  
9 yourself with respect to this document and the previous  
10 document were not required unless the project was built,  
11 is that your understanding of the document, sir?  
12 MR. HAGENS: Object to the form of the question.  
13 It's already been established that the project wasn't  
14 built.  
15 MR. SMART: I'll trying to find out if there's  
16 any relevance to the document, Your Honor.  
17 THE COURT: All right.  
18 MR. HAGENS: Well --  
19 THE COURT: Counsel, that's all right. You may  
20 answer the question.  
21 THE WITNESS: State the question again, please.  
22 MR. SMART: As I understand it, sir, this  
23 document relates to potential flowage easements which  
24 would not have been required unless the project were

25

built; is that correct?

1 THE WITNESS: That's correct.

2 MR. SMART: And the project wasn't built,  
3 right?

4 MR. HAGENS: Objection, Your Honor. We've been  
5 over this have a zillion times.

6 MR. SMART: Well, Your Honor, clearly if it's  
7 relating to flowage easements for a project that wasn't  
8 built and there's a Corps policy, there's no relevance  
9 to this document to this litigation. It's a relevance  
10 objection just the same.

11 MR. HAGENS: It does have to do with relevance in  
12 terms of the county being on notice if they're going to  
13 flood people, they have to acquire flowage easements.

14 THE COURT: Objection's overruled. It goes to  
15 notice.

16 MR. HAGENS: We'll re-offer Exhibit 208, Your  
17 Honor.

18 THE COURT: I'm assuming that the county objects  
19 to its admission for the same basis.

20 MR. HAGENS: The State.

21 THE COURT: The county first of all.

22 MR. SMART: I made my objection, Your Honor.  
23 It's relevance.

24 THE COURT: All right. That's continuing with  
25 respect to this document.

1 MR. ANDERSON: No objection, Your Honor.

2 THE COURT: 208 will be admitted.

3 (Whereupon, Plaintiff's  
4 Exhibit No. 208 was admitted  
5 into evidence.)

6 Q All right. Let's take a look at this exhibit. And I  
7 want you to first of all read the second paragraph -- I  
8 don't know if the folks can see that very well or not.  
9 I'm not sure I can get it any clearer there for whatever  
10 the reason.

11 Would you read the second sentence in the first  
12 paragraph, please.

13 A "Please be advised that Skagit County has no objection  
14 to either of the two sets of conditions and expresses  
15 its support to continue with the project at this time."

16 Q Okay. And if you'd take a look at the conditions, Roman  
17 Numeral No. II, and read the first -- well, ask you to  
18 read the whole paragraph, because it's one solid  
19 paragraph, 2, 2A.

20 A Condition 2A, "Provide without cost to the United States  
21 all lands, easements and right-of-ways, including

22 interior ponding areas, borrow areas and excavated  
23 material disposal areas determined suitable by the chief  
24 of engineers and necessary for construction of the  
25 project."

1 Q And then if you take a look at Item I on the third page  
2 and read that to the jury.  
3 A Okay. "Provide a share of the cost of all nonstructural  
4 measures, acquisitions, rear locations, floodproofing,  
5 flowage easements, et cetera, in accordance with the  
6 cost sharing provisions contained in Section 73(b) of  
7 the Water Resources Development Act of 1974.  
8 Q And this is signed by whom?  
9 A County Commissioners, Bud Norris, chairman; Howard  
10 Miller, Commissioner, and Jerry L. Mansfield,  
11 Commissioner.  
12 Q Let's set that aside.  
13 Now, you mentioned earlier that there was a  
14 proposal to dike off -- sorry -- that there was a  
15 proposal to dike off in the Nookachamps/Clear Lake area;  
16 is that correct?  
17 A That's correct.  
18 Q Was that in response to what?  
19 A That was in response to this document when it was put  
20 out, Exhibit 11, Public Workshop Notice.  
21 THE COURT: I'm sorry, it's called the what?  
22 A Exhibit 11, the Public Workshop Notice.  
23 Q Okay. And was it -- do you know if it was in response  
24 to the public reaction of the people in the  
25 Nookachamps/Clear Lake area?

1 A That's correct.  
2 Q And so an alternative was developed that dealt with  
3 that.  
4 THE CLERK: Exhibit 209 marked.  
5 Q An alternative was developed to -- strike that. Was an  
6 alternative developed to try to meet some of the  
7 concerns of the people in the Nookachamps/Clear Lake  
8 area?  
9 A That's correct.  
10 Q I'll hand you Exhibit No. 209 and ask you if that was  
11 the alternative that was developed in that regard?  
12 A This is Alternative 3E of a later -- no, this came out  
13 of the General Design Memo, I believe, which shows some  
14 alternative, some features in the Clear Lake area to  
15 prevent flooding.  
16 Q Okay. I'm just going to put this up on the screen  
17 and --  
18 MR. SMART: It hadn't been admitted.  
19 MR. HAGENS: I'm sorry. I'll offer the exhibit,

20 Your Honor.  
21 MR. SMART: Was this alternative ever adopted in  
22 the final plan, or don't you know?  
23 THE WITNESS: This was the final plan.  
24 MR. SMART: This is the final plan?  
25 THE WITNESS: This is the plan that is shown in

1 detail in the design drawings that are in the design  
2 memo.  
3 MR. SMART: And what was the date of its adoption?  
4 THE WITNESS: The design memo was published in  
5 July of '79.  
6 MR. SMART: What was the date of the adoption of  
7 this alternative?  
8 THE WITNESS: I believe that the date it was  
9 published would be the date of the adoption. I can't  
10 say.  
11 MR. SMART: Do you know?  
12 THE WITNESS: I can't say what date this  
13 actually came out.  
14 MR. SMART: Okay. Do you know what the date is  
15 in relation to Exhibit 208?  
16 THE WITNESS: What's 209?  
17 MR. SMART: The letter that you just --  
18 MR. HAGENS: I'm not sure that this has anything  
19 to do with the admissibility of the exhibit, Your  
20 Honor.  
21 THE COURT: What is the exhibit number that we're  
22 discussing right now?  
23 MR. HAGENS: I'm talking about Exhibit 209, Your  
24 Honor.  
25 THE COURT: That would make sense. Okay.

1 Counsel, anything else? I'm not sure this goes  
2 to the admissibility of it either.  
3 MR. SMART: I'm just trying to figure out whether  
4 or not this was some preliminary proposal or some --  
5 THE COURT: Except that he's already said that it  
6 was the final proposal.  
7 MR. SMART: Obviously if it wasn't -- if it  
8 wasn't in relation to what the county agreed to, it  
9 can't have any relevance to these proceedings. The only  
10 purpose for which 208 was offered was some sort of  
11 notice with respect to apparently the counsel's  
12 contention of flowage easements. I'm trying to figure  
13 out whether there's any relevance. It was never built.  
14 THE COURT: These go to weight as opposed to  
15 admissibility.  
16 Any other admissibility objection, Mr. Anderson?  
17 MR. ANDERSON: No, Your Honor.



18 THE COURT: All right. 209 will be admitted.  
19 (Whereupon, Plaintiff's  
20 Exhibit No. 209 was admitted  
21 into evidence.)

22 THE COURT: And would you -- I have this in front  
23 of me but just so it's a matter of the record -- no, I  
24 don't. Would you describe what the document is. Don't  
25 tell me what's in it, just what are you calling it?

1 THE WITNESS: Are you talking 209?

2 THE COURT: Yes.

3 THE WITNESS: 209 is another map of the Skagit  
4 Delta. Basically that's what it is.

5 MR. HAGENS: It's Alternative 3E, is it not,  
6 isn't that what it's characterized at the top?

7 THE WITNESS: Alternative 3E.

8 Q (By Mr. Hagens) I'm going to show this on the board and  
9 ask you to explain. You might go over by the television  
10 set, I think it might be easier for them to have you  
11 explain how this was done in response to the people that  
12 were complaining in the Nookachamps/Clear Lake area.

13 A The Nookachamps/Clear Lake area -- the area that's  
14 enclosed in the dotted line here with the dots in it  
15 inside the enclosure --

16 THE COURT: Sir, just a moment, Mr. Regan.

17 A Prior to the inclusion of a levee near the town of Clear  
18 Lake -- here's Clear Lake here. The town is between  
19 the --

20 THE COURT: Mr. Regan.

21 MR. SMART: Excuse me, Your Honor, in my book  
22 I've got a different document that's 209, so it may have  
23 been mismarked, and before we get too far down the road.

24 MR. HAGENS: Can we have it remarked?

25 MR. SMART: It's okay by me.

1 THE COURT: Did you show Mr. Hagens the one that  
2 you had as 209?

3 MR. SMART: It's in his book, Your Honor.

4 THE COURT: There isn't a 209 in any binder that  
5 I'm aware of.

6 THE CLERK: It wasn't one of the core exhibits.

7 THE COURT: This is one of the numbers that we  
8 kept for additional exhibits.

9 MR. HAGENS: I don't think it's been used it yet.

10 THE COURT: It should be 209. That's the next  
11 sequential number. That's in that gap that I show on  
12 the list as 197 to 500 being open for additional  
13 exhibits, so 209 is the number you put on it, right,  
14 Sally?

15 THE CLERK: Right.  
16 THE COURT: 209 is it.  
17 Q I forgot where we were.  
18 Can you go back and explain to the jury what  
19 these projects were to meet the opposition of the people  
20 in the Nookachamps/Clear Lake area?  
21 A The levee across the area right directly to the  
22 northwest of Clear Lake, from high ground to high  
23 ground. Nookachamps Creek comes through this little  
24 area. This high ground here, this is high ground.  
25 Nookachamps Creek comes through this little area. This

1 was a closure structure with gates that during a flood  
2 on the Skagit these gates could be closed. Granted,  
3 water coming down the Nookachamps would pond in this  
4 area, but the sequence of flooding is such that if you  
5 have a flood on the Nookachamps, it doesn't coincide  
6 with the flood on the Skagit. That flood in -- coming  
7 off the hills in this area would belong gone before the  
8 big flood came down, so this was not considered a  
9 problem, the small amount of ponding. This was a gated  
10 structure that closed. You have a big flood on the  
11 Skagit, you closed the gate here. You have the levee  
12 here, and that protected the town of Clear Lake and the  
13 area in behind it to the southeast of Clear Lake.

14 The area outside of this levee to the northwest,  
15 to the west, showing with all the little dots, as shown  
16 on the exhibit, would be an area we call nonstructural  
17 alternatives would be required in that area.

18 Q What are the nonstructural alternatives?

19 A Nonstructural alternatives are things like raising your  
20 house, providing cattle mounds so the cattle can get up  
21 on a mound out of the flood area.

22 Q Would it include buying people out?

23 A Buying people out, easements, anything that makes --  
24 gets the people in that area out of the hundred year  
25 flood.

1 Q Okay. And this project, as counsel has pointed out many  
2 times, was never passed; isn't that correct?

3 A This project was never built.

4 Q Okay. And it was put to vote, was it not, and -- do you  
5 recall?

6 A That's correct. After the -- all the design work was  
7 done, the levee reports were put out, the county's share  
8 would have been ten million dollars, I believe in that  
9 area.

10 Q Of a total amount of what?

11 A Of around \$55 million in 1979 money. The county  
12 commissioners thought it appropriate to put it to the

13 vote of the people, a public vote, and the people voted  
14 it down and that was the end of the project.  
15 Q All right. And do you know if that --  
16 THE COURT: Counsel, let me just ask a question.  
17 And this was a vote taken on a county-wide basis?  
18 MR. HAGENS: A bond issue, I believe.  
19 THE COURT: Is that what you were saying?  
20 THE WITNESS: Yes, it was county wide. It was  
21 in the general election, I believe.  
22 THE COURT: This wasn't some restricted district  
23 of population in terms of those voting?  
24 THE WITNESS: No, I know that it wasn't because  
25 on the ballot at the same time there was the -- the

1 county -- Puget Power wanted to put a nuclear plant up  
2 in there and it was on the same ballot, and both were  
3 voted on, and it was a county-wide.  
4 Q Okay. Now, to your knowledge, has -- have you seen  
5 anything in your review that reflects any structural  
6 protection for the people of Nookachamps or even  
7 nonstructural protection for the people of Nookachamps?  
8 MR. SMART: Objection. It's right here in 3E.  
9 Q But this wasn't passed, as counsel's pointed out many  
10 times.  
11 THE COURT: The question is whether or not  
12 anything has ever been done.  
13 Q Done for the people of Nookachamps.  
14 MR. SMART: I object. Done by who?  
15 MR. HAGENS: Done by Skagit County. Who else?  
16 THE COURT: That's a fair objection. Be more  
17 specific.  
18 Q By Skagit County, are you aware of anything that Skagit  
19 County has done for the people of Nookachamps?  
20 A I have no knowledge of anything being done.  
21 Q You've indicated and many of these documents has talked  
22 about a storage area. You've been over a half dozen of  
23 those documents. Could you tell the jury how that  
24 storage area operates a benefit during significant flood  
25 events?

1 A I believe we went over that, Carl, but basically the  
2 flood comes down past Sedro Wooley, water flows into the  
3 Nookachamps area and reduces the height, and can reduce  
4 the height of the flood, of the peak of the flood  
5 downstream, giving some relief to the people downstream  
6 of the levees. In other words, the levees don't have to  
7 be as high to contain the flood if the Nookachamps  
8 wasn't there.  
9 Q Okay. That's all I had. Thank you, Mr. Regan.  
10 MR. SMART: Do you want me to get started, Your

11 Honor?

12 THE COURT: Well, sure, go ahead. You can spend  
13 five minutes.

14 Actually, counsel, I'm thinking better of that.  
15 We'll have you start first thing in the morning with Mr.  
16 Regan. I don't know how many people -- there may be  
17 more people who want to go celebrate the arrival of the  
18 U.S.S. Lincoln, which is now docked in Everett, which  
19 many people in the community are excited about and  
20 others may not be quite as excited about, but it's  
21 certainly a red letter day for the City of Everett,  
22 regardless of what your opinion on the Navy being here  
23 is or not, so with that we'll take our leave for the  
24 day.

25 Again, ladies and gentlemen -- and, sir, you may

1 step down, thank you.

2 THE WITNESS: Thank you.

3 THE COURT: Please do not discuss this case when  
4 you get home. Do not try to search out any evidence or  
5 law on the subject, do not remain within hearing of  
6 anyone so discussing it. If there's any media coverage  
7 at all, which I haven't seen yet but there may well be  
8 as the case progresses, obviously a topical issue right  
9 now for lots of people. Please do not obviously listen  
10 to that.

11 Again, as we said before, it's a fundamental  
12 principle that we cannot have a fair trial in this case  
13 until all the evidence has been heard, and obviously  
14 we're a long way from hearing everybody's side to this  
15 case, so every effort we can make to make sure we don't  
16 compromise that impartiality that we have at this point,  
17 I would appreciate you keeping that first and foremost  
18 in your mind when you think about what you're saying and  
19 what you're thinking about the case.

20 Counsel, anything else that you can think of  
21 before the jury would be dismissed?

22 MR. HAGENS: Nothing else, Your Honor, from the  
23 plaintiffs.

24 MR. SMART: We might take the time after they're  
25 dismissed just to publish these depositions.

1 THE COURT: With that hope you have a pleasant  
2 evening, and we do have A nine o'clock matter, so we'll  
3 start at 9:30, so if you'll be in the jury room at 9:25  
4 so we'll be ready to proceed.

5 (Whereupon, the following  
6 occurred out of the presence  
7 of the jury:)

8 THE COURT: Be seated. Counsel.  
9 MR. SMART: Your Honor, I'd just like to publish  
10 the depositions of Mr. Regan so we don't have to do that  
11 in the morning and waste time on it, Volume 2, and then  
12 there's an excerpt.  
13 MR. HAGENS: Has he had an opportunity to read  
14 and sign them, counsel?  
15 MR. SMART: Pardon?  
16 MR. HAGENS: Has he been given an opportunity to  
17 read and sign them?  
18 MR. SMART: Sure. By the Court Reporter.  
19 THE COURT: There should be that page in the back  
20 of the deposition.  
21 MR. SMART: I don't control the originals,  
22 counsel.  
23 MR. HAGENS: Let's see if we can find a  
24 certification.  
25 THE COURT: Take a look at that real quickly,

1 because that should be -- it's usually in the back.  
2 MR. SMART: Says certification of transcription.  
3 MR. HAGENS: We don't want to take the Court's  
4 time with this.  
5 MR. SMART: If he's got an objection I'd like to  
6 know about it.  
7 MR. HAGENS: We'll have it resolved by tomorrow  
8 morning, Your Honor, one way or the other.  
9 MR. MAJORS: Before we conclude, there's one  
10 other matter, we talked about the jury view and the  
11 transportation method and there was some discussion  
12 about how it was going to be done, and I think we said  
13 we would investigate that if necessary. Has the Court  
14 found out whether it is necessary for Skagit County to  
15 provide transportation for that?  
16 THE COURT: Apparently it is. We don't have any  
17 methodology for taking care of that.  
18 MR. MAJORS: What about a lunch? Break. Is  
19 Skagit County's assistance required with respect to  
20 providing any bag lunch or anything for the jurors?  
21 THE COURT: Well, my gut reaction to that is  
22 going to be yes. Well, I mean, given the fact that --  
23 in all honesty, we're all -- we're all hooked into this  
24 thing.  
25 MR. SMART: Your gut reaction?

1 THE COURT: I'm sorry, that was a lousy pun,  
2 unintended but still lousy none the less. I would  
3 assume it. I haven't gotten the indication that the  
4 County of Snohomish is willing to spend a whole heck of  
5 a lot more money on this case than it's already costing

6 us to house this and take care of it here, so to the  
7 extent that we can avoid my having to ask for those  
8 things, I'd certainly appreciate it. If we get into a  
9 jam, I mean we can do that.

10 MR. HAGENS: Your Honor, I'm not sure.

11 THE COURT: What are we thinking we're going to  
12 do? Is this going to be -- what are your thoughts on  
13 how this will actually work out?

14 MR. MAJORS: We're going to investigate the  
15 availability of a bus to be here at 9:30 on the 16th,  
16 and to load up all the jurors and we'll go up, and I  
17 imagine Your Honor would like to attend, and we will  
18 have a --

19 THE COURT: I'm not so sure that I'm real excited  
20 about it but I think I have to be there. There's no way  
21 I can let the jury go off without a judicial officer  
22 being present.

23 MR. HAGENS: I believe you have to be there as  
24 well. I was wondering if we could do it in the  
25 afternoon and give you some time in the morning to do

1 some -- get some testimony in.

2 THE COURT: Well, I don't think so.

3 MR. HAGENS: Do you want to do the whole day?

4 MR. SMART: When we talked before, we decided  
5 that --

6 THE COURT: We're not going to try and jam this  
7 in.

8 MR. HAGENS: That's fine. That's fine.

9 THE COURT: And the intended --

10 MR. HAGENS: Just asking.

11 THE COURT: Have you all worked on what the  
12 intended route of this will be?

13 MR. MAJORS: We have not had as yet, but we'll  
14 work on that.

15 THE COURT: Are you thinking generally we're  
16 going to go up to the high water, up as far as Ross and  
17 Diablo and any of that?

18 MR. MAJORS: I don't think that's feasible in  
19 this situation.

20 MR. SMART: Just the Nookachamps.

21 Your Honor, if there's an objection on these  
22 depositions, the originals of which have just been  
23 opened by the clerk, then I'm going to need to call the  
24 Court Reporter, so I need to know if there is that  
25 objection.

1 MR. HAGENS: Well, if you tell me what the  
2 certification is, I'll be happy to tell you whether  
3 there's an objection.

4 MR. SMART: If the certification isn't in with  
5 the original -- I don't keep the certification, Karl.  
6 That's the Court Reporter's responsibility.  
7 THE COURT: The originals need to contain those  
8 certifications.  
9 Are these separate depositions?  
10 MR. SMART: No, one is Volume 2.  
11 MR. HAGENS: Listen, if there's not a  
12 certification for depositions I want to use, are you  
13 going to raise that as an objection?  
14 MR. SMART: If he waives -- let's see whether he  
15 waived.  
16 THE COURT: If it's more than one volume, it may  
17 be just in the back of one of them as opposed to --  
18 MR. HAGENS: Your Honor, if they waive any  
19 certification problems for us, I'm sure we'll be  
20 prepared to waive them for them. They pulled every  
21 objection in the course of this case and I don't want it  
22 to be a one-sided deal.  
23 MR. SMART: Your Honor, I'm sure that these are  
24 copies of the depositions that we have.  
25 MR. HAGENS: I don't say they're not copies of

1 the deposition.  
2 MR. SMART: I want to know if that's in issue,  
3 because I'm going to call the Court Reporter to  
4 establish that that they are if there's an objection. I  
5 don't know what the problem is that Mr. Hagens is  
6 eluding to in the future. If there is a technical  
7 problem with a deposition, I mean -- we can't know that  
8 until it comes up. But with these --  
9 MR. HAGENS: Yes, we can. If you're asking me to  
10 waive a certification, I can -- I can say yeah, I'll  
11 waive it, but I don't want to run into the same problem  
12 with you later in life.  
13 MR. SMART: Carl, as long as they're just copies  
14 of the depositions we've all got, then I don't have a  
15 problem with that.  
16 MR. HAGENS: Then I don't have a problem with it  
17 either, Your Honor?  
18 So maybe we just solved the problem.  
19 MR. SMART: But I don't know what depositions  
20 you're going to bring up and so if there is a problem, I  
21 don't know about it yet.  
22 MR. HAGENS: What does that mean? Are you making  
23 the deal or not? I mean, what is he, one minute he  
24 makes it and the next minute he says he's not making a  
25 deal.

1 MR. SMART: I'm not making a deal about a problem

2 that I don't know exists.  
3 MR. HAGENS: There is no certification.  
4 MR. SMART: I'll call the Court Reporter.  
5 THE COURT: We don't have a stipulation and  
6 that's fine.  
7 MR. HAGENS: I would like to have an opportunity  
8 to discuss this with him on a more rational basis,  
9 rather than fighting it in front of Your Honor.  
10 MR. HAGENS: One other question, Your Honor, we  
11 gave you a copy of Exhibit --  
12 THE COURT: 179.  
13 MR. HAGENS: Yeah, it's a big chart. I wonder if  
14 we could have a copy of that made by the clerk. And is  
15 that a possibility? Just so we get a copy of it, Your  
16 Honor. We don't have a copy of it in his book.  
17 THE COURT: Mr. Regan will be delighted to know  
18 that I used my highlighter, however, to highlight the  
19 Nookachamps area.  
20 MR. SMART: All right.  
21 MR. HAGENS: All right.  
22 THE COURT: So when I'm looking at it I can more  
23 quickly look at it --  
24 THE COURT: All right. Anything else, counsel?  
25 MR. ANDERSON: No, Your Honor.

1 THE COURT: Great. Thank you.  
2 (Court was adjourned.)  
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