

CROSS - REGAN

AFTERNOON SESSION

January 9, 1997

CONTINUED CROSS EXAMINATION

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BY MR. SMART:

Q Mr. Regan, when you were performing your analysis back in October of 1995, which resulted in these exhibits and which you now say was a preliminary examination of the matters, when you went to the before condition -- in other words, you had the after condition that had the dikes and then you had the before condition with no dikes, what dike did you take out?

A All of them.

Q Well, according to your testimony in your deposition, you only took out Dike District 12's dike; is that true?

A If I testified to that, that was not right. We took out 17 and 12, I believe.

Q Handing you your deposition from October 10th, 1995, I'd ask you to turn to page 178.

Do you have it there, sir?

A Yes.

Q On October 11th, 1995, did I ask you these questions and did you give the following answer:

"What structures did you take out of the equation for determining water-surface levels as if the dikes were not there?" ¶

Answer: "The levee on the Diking District 12, I believe."

"Is that it?"

Answer: "Do you have another question?"

Question: "Is that it, is that the only thing you took out?"

"Yes, that's it."

"And how did you account for the effect of the other man-made structures?"

"I didn't."

"Did you study their effect at all?"

Answer: "No."

On that date did I ask you those questions and did you give those answers?

A That's what's here. I'm not sure what led up to that.

Q That was your sworn testimony on that day; is that correct?

A That's correct.

Q Now, assuming you were testifying truthfully on that day, I take it you essentially got the same answer, in

21 other words, that there was two to four feet more water  
22 as a result of taking out Dike District 12's dike as you  
23 currently get by taking out all the dikes, right?  
24 A No. Let me explain something. We talked about two  
25 different preliminary examinations, and I'm not sure ¶

1 which one we were talking about at that time.

2 Q Well, whichever preliminary examination it is, you  
3 essentially got the same answers just taking out Dike  
4 District 12's dike as you did by taking all the others,  
5 two to four feet of extra water.

6 A One examination I made.

7 MR. SMART: Your Honor, may I have the question  
8 answered?

9 THE COURT: I think that particular question can  
10 be answered.

11 Q Isn't that correct, that you got essentially the same  
12 answer the different ways that you looked at it?

13 A We looked at it in two ways and got approximately the  
14 same answers.

15 Q Okay. Thank you.

16 In fact, you looked at it yet another way by  
17 using a gradient, did you not?

18 A It's called slope-area computation.

19 Q Slope-area computation.

20 Showing you Exhibit 982 and 983, Mr. Regan, is  
21 that the slope-area computation that you made to --

22 A These are computations I made.

23 Q All right. And just -- as I understand it, the  
24 slope-area computation that you make takes a known water  
25 level, water surface elevation -- let's say, for ¶

1 instance, at the Burlington Northern Bridge, if you look  
2 at the screen for a second, you've identified where the  
3 Burlington Northern Bridge was, and you take a known  
4 level there and then you figure out how fast the water  
5 surface elevation increases going upstream, correct?

6 A No. That's not correct.

7 Q Well, that's part of what you did is, is it not?

8 A No, it's not.

9 Q You assumed a gradient at .0003?

10 A The gradient came from the topographic maps.

11 Q So what you did is you simply measured the gradient of  
12 how fast the river sloped in this reach of river between  
13 the Burlington Northern Bridge and the Highway 9 Bridge?

14 A I measured the slope. It has not to do with fast. I  
15 measured the slope of the general topography in that  
16 area.

17 Q And assumed the water surface elevation would mirror the  
18 general slope of the land?

19 A That's generally what happens for this type of a  
20 computation.

21 Q I'm not disagreeing with you. I'm trying to figure out  
22 what you did.

23                    That's what you do, you figure out a gradient for  
24                    what the water surface elevation would be, because since  
25                    it's flowing out into Skagit Bay, you know it's flowing ¶

1                    downhill, you want to figure out what the slope is, so  
2                    that you can take a known surface elevation and using  
3                    that gradient you can figure out how high the water  
4                    would be upstream just by using the grade.

5                    A                    That's correct.

6                    Q                    That's what you did?

7                    A                    That's basically what was done here, yes.

8                                       MR. SMART: I'd offer 982 and 983.

9                                       MR. HAGENS: No objection, Your Honor.

10                                       MR. ANDERSON: No objection.

11                                       (Whereupon, Defendant's  
12                                       Exhibit No. 982 and 983 were  
13                                       admitted into evidence.)

14                    A                    But it's my recollection I had more sheets than this.

15                    Q                    Not for the computation on this particular --

16                    A                    I think there was one more sheet but -- this -- this  
17                                       does it, but I think I had one more sheet that went with  
18                                       it. This covers it all right, but --

19                    Q                    If this covers it, let's stick with this.

20                    A                    I looked at these the other day.

21                    Q                    You did some other computations for downstream by Avon.

22                                       But I was talking about upstream.

23                    A                    There's another one that was a back check on this data,  
24                                       as I remember.

25                    Q                    Now, did you review the deposition testimony of Mr. ¶

1                                       Mapes, Dike District 12 Commissioner, in this case?

2                    A                    I've read his deposition, not in total, but in -- I  
3                                       reviewed it I believe well enough.

4                    Q                    You must have learned then that Mr. Mapes testified that  
5                                       the height of Dike District 12's dike had not changed  
6                                       since 1955, correct?

7                    A                    That's what he said.

8                    Q                    Mr. Walker's another Dike District 12 Commissioner,  
9                                       correct? Did you read his deposition?

10                    A                    I did not read his deposition.

11                    Q                    With respect to Mr. Mapes' testimony, did you believe it  
12                                       or not believe it?

13                    A                    He did it under oath.

14                    Q                    So did you assume that it was true?

15                    A                    I have to assume that -- hopefully he was telling the  
16                                       truth.

17                    Q                    And I take it then that you agree that the factual  
18                                       testimony in this case, some of the assumptions that you  
19                                       have to base your opinions on are that there had not  
20                                       been a change in elevation of the Dike District 12's  
21                                       dike since 1955, at least not one that would be material  
22                                       to your calculation.

23                    A                    The top of the elevation had nothing to do with the

24 calculations. It didn't make any difference one way or  
25 another if it had changed. ¶

1 Q To you it didn't?

2 A To me, it didn't make any difference, for those  
3 calculations we're talking about.

4 Q But you did assume Mr. Mapes testified truthfully it  
5 didn't change.

6 MR. HAGENS: Your Honor, that's been asked and  
7 answered. He doesn't get to ask it --

8 THE COURT: Sustained.

9 Q You didn't investigate Mr. Walker's testimony; is that  
10 correct?

11 A I didn't have time to get through his.

12 Q Now, is that -- did you want to? Is that something that  
13 you wanted to investigate but just doesn't have time?

14 A I didn't have time to do it.

15 Q With respect to the elevation of Dike District 12's --

16 A Excuse me, I did peruse it, but I didn't read it in  
17 detail, and I didn't read it well enough to answer your  
18 one question one way or another, but I have seen it.

19 Q So it was information that was provided to you by  
20 counsel?

21 A Yes.

22 Q But you didn't read it in sufficient detail to recollect  
23 what was in it.

24 A That's correct, yes.

25 Q Do I take then that you weren't interested in whether ¶

1 Mr. Walker testified that the Dike District 12 levee had  
2 not been raised since 1955?

3 A I didn't say that. I just didn't have -- the time was  
4 not available to get to it.

5 Q So you were interested, but you didn't have enough time;  
6 is that correct?

7 A If I had the time I would have read it.

8 Q All right. Just so I understand correctly then, any  
9 change in elevation on Dike District 12's dike between  
10 1955 and 1990 doesn't make any difference to you because  
11 you analyzed the dikes as they existed in 1990 versus  
12 the situation with no dikes at all; is that right?

13 MR. HAGENS: Objection as to the form of the  
14 question. Didn't make any difference to him in what  
15 respect?

16 MR. SMART: In his work. I think he just  
17 testified it didn't make any difference.

18 THE COURT: You can answer.

19 A I did a computation with and without dike. What  
20 condition the dike was in had -- was irrelevant to the  
21 computation. There was a dike there. Water didn't get  
22 over it in 1990, so it was irrelevant to the  
23 computation.

24 Q Okay.

25 A What condition, if it had be raised, lowered, had ¶  
1 nothing to do with it.  
2 Q Similarly, you never studied what effect, if any, any  
3 activity on the part of Skagit County had with respect  
4 to whether or not the dike was raised between 1955 and  
5 1990. It was irrelevant, right?  
6 A As far as these computations are concerned.  
7 Q All right.  
8 MR. SMART: Can I have 512, Sally, please.  
9 Q Showing you Exhibit No. 512, sir, can you identify what  
10 that is?  
11 A It's a Flood Plain Information Study, Skagit River  
12 Basin, Washington, Technical Report, prepared at the  
13 request of the Washington State Department of  
14 Conservation, done by the U.S. Army Corps of Engineers,  
15 Seattle District, Washington.  
16 Q And that was done in April of 1967; is that correct?  
17 A Yes. Right.  
18 Q You were a member of the Army Corps of Engineers at that  
19 time?  
20 A That's correct.  
21 Q You earlier testified you started in 1961, right?  
22 A That's correct.  
23 Q This is one of the documents you reviewed in your  
24 examination of this case?  
25 A I've seen this document many times. ¶

1 MR. SMART: Move for the admission of 512, Your  
2 Honor.  
3 MR. HAGENS: Your Honor, I'm trying to get my  
4 hands on a copy of it.  
5 MR. HAGENS: Not to slow things down, we don't  
6 object. Go ahead.  
7 THE COURT: All right. 512 will enter.  
8 MR. SMART: Are we admitted then?  
9 THE COURT: Yes.  
10 MR. SMART: All right.  
11 THE COURT: I'm sorry, counsel. Do you have an  
12 objection?  
13 MR. ANDERSON: Your Honor, I guess I have an  
14 objection to a portion of the exhibit, and that portion  
15 is the -- designated as ACOE 6335 to 6341, which is a  
16 letter from the Department of Conservation and  
17 Development. I don't think it's appropriate. I don't  
18 know that this witness can testify as to the contents of  
19 that. It constitutes hearsay, and I don't know if it's  
20 been established that that's a portion of this report  
21 that he relied on, so I would object to that portion of  
22 the document coming into evidence.  
23 MR. SMART: Certainly establishes a portion of  
24 the document, and I'll do that right now.  
25 THE COURT: All right. ¶

1 Q Could you turn to page -- the pages are numbered at the  
2 bottom.  
3 MR. ANDERSON: Your Honor, could we do that  
4 without showing it to the jury?  
5 THE COURT: Yes.  
6 In fact, we shouldn't be showing any of it at  
7 this point.  
8 Q Could you turn to ACOE 6335, sir?  
9 A I see it, yes.  
10 MR. HAGENS: Counsel, one moment please. We  
11 don't see to have a copy in the documents you provided  
12 us, for whatever the reason is.  
13 THE COURT: All right, counsel.  
14 Do you have it now, Mr. Hagens?  
15 MR. HAGENS: Yes, I do. Thank you, Your Honor.  
16 Q Now, the way a study such as this study is initiated is  
17 that someone makes a request to the Army Corps of  
18 Engineers in order to perform this Flood Plain  
19 Information Study; is that correct?  
20 A I don't believe that's the way it was done at this time.  
21 Q Well, would you look at --  
22 A It may well have been, but I don't believe it was.  
23 Q Would you look at 6335.  
24 A Okay.  
25 Q Can you tell us without reading it what that is? ¶

1 A It's a letter.  
2 Q Okay. And the letter is from who?  
3 A State of Washington, Department of Conservation.  
4 Q Okay. And is that -- is it related to the application  
5 of August 30th, 1960 for Flood Plain Information Study  
6 under the provisions of Public Law 8645?  
7 Have you got the right page here?  
8 A I believe I do. You're talking about right in here.  
9 Q Yeah.  
10 A I'm reading it. Okay.  
11 Q Isn't that correct?  
12 A Yeah.  
13 Q And so what was done was under the authority of the  
14 governor, in this case the signator --  
15 MR. ANDERSON: Your Honor, I object. There's  
16 lack of foundation. He hasn't established anything  
17 other than the witness has looked at this. There's no  
18 personal knowledge for what's been done, other than what  
19 he's going to read from the letter.  
20 MR. SMART: I'm just trying to get who the  
21 signator on the letter is, Your Honor.  
22 THE COURT: All right. You may proceed.  
23 Q The signator on the letter is Earl Coe, the Director of  
24 the Department of Conservation, correct?  
25 A That's right. ¶

1 Q And basically the purpose of the letter is he's writing  
2 on behalf of the governor, asking the District Engineer

3 of the U.S. Army Corps of Engineers in Seattle to  
4 perform a Flood Plain Information Study for the  
5 Department of Conservation, isn't that right?  
6 A Yes.  
7 Q Isn't that correct?  
8 A Yeah.  
9 Q Then this letter was included in the report itself as  
10 part of the record, correct?  
11 A I believe it was.  
12 Q And that's the way you --  
13 A It's in here now.  
14 Q That's the way your document is?  
15 A Yeah.  
16 Q You reviewed it many times, and it was in the document  
17 when you reviewed it?  
18 A The thing is, I don't remember seeing this in here. It  
19 may well have been.  
20 MR. SMART: Your Honor, I would offer the entire  
21 report, which includes the record of the request by the  
22 Department of Conservation to have the report  
23 performed.  
24 MR. ANDERSON: Your Honor, the objection  
25 remains. The witness has no personal knowledge that ¶

1 this letter was a part of the document. It was just  
2 testified that he doesn't remember seeing it in here.  
3 There was no foundation laid for that.  
4 I also object to the inclusion of this have  
5 letter because it contains a number of legal conclusions  
6 by the author of the letter which are hearsay and I  
7 don't think are proper to be put in front of the jury.  
8 MR. SMART: Two responses, Your Honor. In the  
9 first place, he's already referred to this document as a  
10 document that forms the basis of some of his opinions.  
11 The letter is a part of the document and refers  
12 specifically to the report, as included in the report.  
13 If Mr. Anderson disputes that, he could establish that  
14 it wasn't part of the report by some other evidence, but  
15 it clearly is. It's sequentially numbered from the Army  
16 Corps documents and it's part of the report.  
17 With respect to the legal aspects, we're not  
18 offering it for proof of what the law is, we're simply  
19 offering it for proof of what the State said the  
20 authority was back in 1967, and it's clearly a  
21 historical document so it comes in the historical  
22 records exception in any event.  
23 THE COURT: Counsel.  
24 MR. ANDERSON: Your Honor, I disagree. The  
25 witness hadn't testified that he's relied on this for ¶

1 purposes of his testimony.  
2 THE COURT: In fact, he's testified to the  
3 contrary.  
4 MR. ANDERSON: We went through this yesterday,

5 and, in addition, the contents of the document are  
6 hearsay, so it doesn't properly come into evidence, at  
7 least not through this witness.

8 MR. SMART: He just testified it was one of the  
9 documents that he reviewed and studied in his --

10 THE COURT: I thought his testimony was he  
11 doesn't remember if it was in there or not. That's my  
12 -- so I'll sustain the objection at this point.

13 MR. SMART: Your Honor, whether or not he relies  
14 on it or not, I'm entitled to explore with the witness  
15 whether or not he reviewed all of the historical  
16 documents. I'm offering it only as a historical  
17 document. It doesn't need to be authenticated further,  
18 as other documents have come in for the same purpose,  
19 and I'm entitled to question the witness about the  
20 contents of the documents for the purpose of determining  
21 whether or not --

22 THE COURT: That may well be true, but I'm not  
23 satisfied that you've met even that threshold in terms  
24 of what he -- in fact, that he knows anything about the  
25 letter. He just read to you who it was signed by ¶

1 because he's seen it maybe for the first time. I don't  
2 know, so --

3 MR. SMART: Whether or not this witness has  
4 looked at or seen or understands the letter is not --  
5 does not bear on its admissibility in this court. It  
6 comes in as a historical document, and then whether or  
7 not he can testify concerning its contents is something  
8 different, but it's certainly admissible. It's part of  
9 the report.

10 MR. ANDERSON: I don't agree with that at all,  
11 Your Honor. The document -- just because we call a  
12 document a historical document doesn't automatically  
13 give it some admissibility as far as I'm aware. He's  
14 got to lay some kind of foundation. He's got to  
15 establish that the document itself is admissible. It's  
16 hearsay at this point.

17 THE COURT: I agree. Objection is sustained.

18 MR. SMART: All right. I'll establish the  
19 foundation.

20 Q What was with the purpose of the Flood Plain Information  
21 Study, sir?

22 A To provide information to the people in the flood plain  
23 as to floods.

24 Q Okay. And the report was performed by the Army Corps of  
25 Engineers, correct? ¶

1 A It was the first one ever performed by the Corps of  
2 Engineers.

3 Q And it was performed specifically in response to a  
4 request from the State of Washington, correct?

5 MR. ANDERSON: Objection, Your Honor. Lack of  
6 foundation.



7 THE COURT: Would you restate the question.  
8 Q It was performed specifically in response to a request  
9 from the State of Washington. In other words, if you  
10 hadn't had the request, the Corps wouldn't have  
11 performed the study; is that right?  
12 A I can't answer that one way or another. I wasn't in a  
13 position to make those decisions at that time.  
14 Q Showing you the title page of the report, what does it  
15 say -- whose request does it say it was prepared in  
16 response to?  
17 A Says it was prepared at the request of the State of  
18 Washington.  
19 Q All right. Now, the information that is contained in  
20 the document is what?  
21 A Well, like I said, it's information of flood plain --  
22 flood plain information on the Skagit River.  
23 Q Okay. And does that include hydrologic information?  
24 A I'd have to review it. It may well.  
25 Q Please review it. ¶

1 A It talks about -- in the index it shows that has to do  
2 with floods, precipitation, streamflow and floods.  
3 Talks somewhat about hydraulic information, yes.  
4 Q Is this report authoritative? Did it correctly state  
5 what the Flood Plain Information information was in  
6 1967?  
7 A I didn't do the report.  
8 Q It was done by the Army Corps of Engineers, and like the  
9 other documents that you studied, do you assume that it  
10 is correct?  
11 A It's probably reason as correct as it could have been at  
12 that time.  
13 MR. SMART: Your Honor, it's admissible. And I  
14 offer it.  
15 MR. ANDERSON: Your Honor, my only objection was  
16 to the portion that contained the letter, and this  
17 witness hasn't established -- there hasn't been any  
18 foundation for the admissibility established through  
19 this witness.  
20 MR. SMART: Your Honor, it's a report that's done  
21 pursuant to a request by the State of Washington. Just  
22 because Mr. Anderson doesn't like a portion of the  
23 report doesn't mean it's not admissible.  
24 THE COURT: Counsel, we don't need to get into  
25 whether he likes it or not. He's made a legal objection ¶

1 to its admissibility.  
2 I think he's right. That particular portion of  
3 the letter, just because you have a large report doesn't  
4 mean that automatically every portion of that report  
5 somehow becomes admissible. I mean there are still  
6 basic foundational requirements that are required for  
7 the admissibility of documents of this sort, and there  
8 is no "historical document" exception that somehow you

9 can put everything you want in there and it becomes  
10 admissible. That's not the way I read the rule, so I  
11 think we still lack in foundation with respect to that  
12 letter. So --

13 MR. SMART: What I'll do --

14 THE COURT: I'll say for the record, the reason I  
15 say that, my interpretation of what the witness has said  
16 is he doesn't recall if the thing was in there or not.  
17 That's what I heard him testify to.

18 MR. SMART: What I'll do then is I'll take out  
19 pages 6335 to 6341 and we'll address it later, so that  
20 we can --

21 THE COURT: That's fine.

22 MR. SMART: Sally, would you mind marking that in  
23 a fashion that we can have it later, please.

24 THE COURT: All right. Thank you.

25 Counsel, that will just be marked 512A. ¶

1 MR. SMART: Now, I take it that the rest of the  
2 document then will be admitted.

3 THE COURT: I don't understand there to be any  
4 other objections to the document. So that's fine. 512  
5 is admitted in that form.

6 (Whereupon, Defendant's  
7 Exhibit No. 512 was admitted  
8 into evidence.)

9 Q Now, showing you 512, sir, can you turn to page --  
10 Section Number 1, which would be the --

11 MR. HAGENS: Page what, counsel? I'm sorry.

12 MR. SMART: Well, the Army Corps document number  
13 will be 6294 on the bottom right-hand -- and could you  
14 read me paragraph two there where it says the "Scope of  
15 the Study."

16 A "Scope of study, the report contains a record of past  
17 flooding on the Skagit and Samish River systems. The  
18 report describes physical features of the river basins,  
19 weather conditions which create extremely heavy  
20 precipitation and flooding, existing flood control  
21 facilities, current efforts by local residents to  
22 control floods, and possible future floods."

23 Q Then will you turn, sir, to the flood profile chart,  
24 file number -- let's see it's sheet three of eight at  
25 the back, please. ¶

1 A I'm not sure exactly where it is. How far in the back  
2 is it?

3 Q Can you tell me what sheet three of eight is, sir?

4 What I'm going to doing for the jury is I'm going  
5 to show them the whole graph like this.

6 A It's a profile of a water surface elevation between  
7 River Mile 16 and 35.

8 Q Again, that was performed by the Army Corps of Engineers  
9 at what time period, sir? Approximately 1967 when the

10 report was done?  
11 A It's cut off here. It says 1960 -- and I think the  
12 last --  
13 Q The report was dated 1967; is that correct?  
14 A It was in that era anyway.  
15 Q Similar to the other reports, they would have done this  
16 work prior to the time the report was published, correct?  
17 A It was done before the report was published, yeah.  
18 Q Now, sir, if you would refer to the bridge there, you  
19 see where it says the old Highway 99 Bridge and the U.S.  
20 99 Bridge on the left-hand side of the page?  
21 A Okay. Yeah.  
22 Q Can you tell me, sir, what the flood elevation would be  
23 for a flood of approximately 230,000 cubic feet per  
24 second as shown by this chart?  
25 A 230,000? ¶

1 Q Yeah.  
2 A You can't get that off of here. It's not on here that I  
3 can see.  
4 Q This shows 275,000 to 215,000, and the lines are almost  
5 identical at that point, are they not?  
6 A It shows the 1951 flood, 144,000. And it shows a 50  
7 year flood and it shows a 275,000 CFS flood at Sedro  
8 Wooley.  
9 Q And the fifty year flood is approximately 210,000; is  
10 that correct, according to this chart?  
11 A At River Mile 31.25 it's showing 210,000, which is at  
12 the upstream end of the paper.  
13 Q So if it's at the downstream end it's more like 200,000;  
14 is that right?  
15 A 192, yeah.  
16 Q And the flood surface elevation for those floods is  
17 essentially the same, isn't that right, at the bridge?  
18 A They're basically the same.  
19 Q So it doesn't matter whether it's a hundred year flood,  
20 a fifty year flood, or 150,000 cubic feet per second  
21 like the 1951 flood, at the bridge down by U.S. 99,  
22 which is in this location here, the elevation would be  
23 the same. Isn't that what you read from that chart?  
24 A The chart says -- that would not be my opinion.  
25 Q This was the Army Corps of Engineers study that was done ¶

1 in 1961, correct?  
2 A Army Corps done in 1966.  
3 Q I take it you disagree with the Army Corps study.  
4 A I disagree with this map, yes. I know how it was done,  
5 so I can disagree with it.  
6 Q Let's just get down here what the documents say, sir.  
7 What is the flood surface elevation that is shown for  
8 are the -- for a flood of 230,000 cubic feet per second  
9 by this document?  
10 A Where?  
11 Q At the bridge.

12 A What bridge?  
13 Q U.S. 99, which in '67 was this bridge here, was it not?  
14 A It says 37. 36 and a half, 37.  
15 Q Okay. And then the elevation at the I-5 Bridge would  
16 have been about a half mile downstream, would that be  
17 correct?  
18 A No, it wouldn't be a half a mile. It would be a little  
19 ways downstream, and it would be -- if I was to guess,  
20 it would be 36 plus a little bit.  
21 Q Okay.  
22 A On this chart, yeah.  
23 Q So 36 feet plus at the I-5 Bridge, according to the 1967  
24 report, correct? Is that right, sir?  
25 A Yeah. ¶

1 Q Now, if you follow the chart upstream, the U.S. Army  
2 Corps of Engineers chart for the Highway 9 Bridge, do  
3 you see that located on the chart here, sir?  
4 A Yeah.  
5 Q Turn it sideways. You can point to the Highway 9  
6 Bridge.  
7 And what is the elevation then for a flood of  
8 230,000 cubic feet per second at the Highway 9 Bridge in  
9 1967, according to this document?  
10 A There's no 230,000 on here.  
11 Q Sure, there's 275,000, correct? That's the top line for  
12 the bigger flood, correct? And there's an a fifty year  
13 flood, which in this area is approximately 210,000 cubic  
14 feet per second, correct?  
15 MR. HAGENS: Objection. According to the author  
16 of this map, Your Honor.  
17 Q Isn't that what the document shows, sir?  
18 A At the bridge.  
19 Q Yes.  
20 A At around the -- River Mile 23 to 24.  
21 Q Yes.  
22 A It's 205,000.  
23 Q Okay. And so a 230,000 cubic foot per second flood  
24 would be almost exactly in between the levels of the  
25 205,000 cubic foot per second flood and the 275,000 ¶

1 cubic foot per second flood?  
2 A I could guess it could be. It's going to be reasonable.  
3 Q So what elevation then does this document show that the  
4 elevation for 230,000 cubic foot per second flood would  
5 be in 1967 at the Highway 9 Bridge?  
6 A It would be about 46 -- November, excuse me. Yeah, 46,  
7 right.  
8 Q Let me mark in on our document 46 feet, the Highway 9  
9 Bridge.  
10 Now, sir, we can put that one away?  
11 A I'd like to explain one more thing on this chart.  
12 Q I'm sure Mr. Hagens will be happy --  
13 MR. HAGENS: I think he should be given an

14 opportunity to explain now.  
15 THE COURT: There's no question before the  
16 witness.  
17 Q All right. Now, you brought with you here today, sir,  
18 your copy of the General Design Memorandum, correct?  
19 A That's correct.  
20 Q Would you like me to hand you Volume 2 of the -- Carl,  
21 Volume 2 of the Design Memorandum.  
22 MR. HAGENS: Both volumes.  
23 Q Now, Volume 2 of the General Design Memorandum for the  
24 1979 project on which you were the chief hydraulic  
25 engineer -- first of all, the report had two volumes, ¶

1 correct?  
2 A That's correct.  
3 Q And the plaintiff's document that you referred to  
4 yesterday, Plaintiff's Number 62, is only Volume Number  
5 1; is that correct?  
6 A You're going to have to refresh my memory on that. I  
7 can't say for sure.  
8 Q Well, here are the plaintiff's documents. If you refer  
9 to Number 62.  
10 A Volume 1, right.  
11 Q That's Volume 1, but it's only a part of Volume 1, isn't  
12 it?  
13 A There is a note in here talking about the plates. Says,  
14 "Attached maps and diagrams omitted due to the size and  
15 volume," so, granted, it's not -- doesn't include the  
16 maps.  
17 Q Do you know why the plaintiffs didn't put in all of the  
18 maps and diagrams?  
19 A I believe it's self-explanatory.  
20 Q And they didn't put Volume 2 in there at all, did they?  
21 A I don't believe it was in there.  
22 Q Now, what I've done is I've taken a portion -- first of  
23 all, can you identify No. 986 as a portion of Volume 2  
24 of the Army Corps study where you were the chief  
25 hydraulic engineer? ¶

1 A It's a portion.  
2 Q And specifically what it is, it's some of the hydraulic  
3 design information, and then it's plates 24 and 25,  
4 correct -- D24 and D25?  
5 A Yes, the early portions of hydraulic design information,  
6 and two water surface profile sheets.  
7 Q And that was prepared under your --  
8 A And there's also a plate D37, which is existing  
9 conditions of the hundred year flood.  
10 Q Right. And that was prepared under your auspices, was  
11 it not?  
12 A That's correct.

13 MR. SMART: Now I'd offer -- what's the number,  
14 sir?

15 THE COURT: Actually it will be renumbered. It

16 should be 984.  
17 THE CLERK: I made a mistake.  
18 MR. HAGENS: I'm sorry.  
19 THE COURT: 984.  
20 MR. SMART: Any objection, Carl?  
21 MR. HAGENS: I just want to ask the -- Your  
22 Honor, may I ask a question?  
23 THE COURT: Yes.  
24 MR. HAGENS: Does this conform with your copy of  
25 the -- the documents that he's given you, 984, does it ¶

1 conform with the pages you have of your General Design  
2 Memorandum with you?

3 THE WITNESS: Sure looks like them. I see no  
4 reason for them being different.

5 MR. HAGENS: Then we have no objections, Your  
6 Honor.

7 MR. ANDERSON: No objection, Your Honor.

8 THE COURT: 984 will enter.

9 (Whereupon, Defendant's  
10 Exhibit No. 984 was admitted  
11 into evidence.)

12 Q All right. Now -- it's got a sticker on it -- now it is  
13 correctly marked?

14 All right. Now, as part of this particular  
15 document, sir, did the Corps prepare a map, D37, that  
16 showed existing conditions for the hundred year flood  
17 plain?

18 A Yes.

19 Q Okay. And does that existing conditions hundred year  
20 flood plain include Clear Lake and the Nookachamps Basin?

21 A Yes.

22 Q So when you testified yesterday that the 1979 study  
23 didn't show existing conditions, that would have to be  
24 modified, at least to the extent of this D37; is that  
25 correct. ¶

1 MR. HAGENS: Well, I don't know -- I object to  
2 the mischaracterization of his testimony yesterday. I  
3 don't know that it mischaracterized the hundred --  
4 that's his interpretation of it, so I'll object to the  
5 form of the question.

6 MR. SMART: There was a lengthy discussion  
7 yesterday where Mr. Regan testified that the '79 study  
8 didn't study existing conditions, rather they studied  
9 what would happen if they built a project that was never  
10 built, and only showed what areas would be --

11 THE COURT: You may proceed.

12 Q And so D37 here, this map here, part of your report not  
13 included by the plaintiffs shows that this portion here,  
14 the Nookachamps, including Clear Lake, is all part of  
15 the existing conditions hundred year flood plain. Do I  
16 understand that correctly?

17 A Existing condition meaning as it sat in 1975 with the  
18 levees in place.  
19 Q Right.  
20 A That's the existing condition.  
21 Q Yes.  
22 A Yes.  
23 Q I think, as you earlier testified, you weren't sure  
24 whether the study was done in 1975 or sometime between  
25 '75 and '79. ¶

1 A It was done after the flood of '75.  
2 Q So after the flood of '75 we know from your own work  
3 here that this area is in the hundred year flood plain.  
4 MR. HAGENS: Objection, Your Honor. It's not the  
5 only area shown on Exhibit D 37 which he's using to show  
6 the flood plain. The City of Mount Vernon and  
7 Burlington and half the delta area is in the flood plain  
8 as well, Your Honor.  
9 THE COURT: Sustained.  
10 MR. SMART: I don't dispute that at all, Your  
11 Honor. I'm looking for my green map right now.  
12 THE CLERK: Exhibit 985 marked.  
13 Q Showing you Exhibit 985, and I think we're going to have  
14 to refer back to 512 in order to establish this one. Or  
15 maybe we can do it this way.  
16 You're familiar with the hundred year flood plain  
17 maps that were published in the Flood Plain Information  
18 Study which was Exhibit 512, are you not?  
19 A These appear to be the same ones that were in that  
20 exhibit.  
21 Q And the legend here just says it's a copy of that blown  
22 up and put on a board.  
23 A That's basically what it says, I believe.  
24 Q So this flood plain map was published in 1967, along  
25 with the Flood Plain Information Study, correct? ¶

1 A That's correct.  
2 Q And when it was published in that regard by the Army  
3 Corps of Engineers, it became a public document that  
4 could be referred to by anybody who was, for instance,  
5 considering purchasing property in this particular area  
6 and they'd know that they were in the flood plain,  
7 right?  
8 A I believe if they knew the existence of it, yes.  
9 Q If they took the time to find out.  
10 MR. HAGENS: Objection as to form. That's  
11 argumentative. Whether this document was -- even  
12 existed in '70 or '80 or '90 at some place in Skagit  
13 County where people could access it, that foundation has  
14 not been laid.  
15 MR. SMART: I don't need a foundation for where  
16 it was in 1970, '80, and '90, just to say it was in  
17 existence in --  
18 THE COURT: You may proceed.

19 Q So you agree, sir, that this is that flood plain map  
20 from the '67 study?  
21 A I believe it is.  
22 MR. SMART: I'll offer it, Your Honor.  
23 MR. HAGENS: Your Honor, may I ask the witness a  
24 couple questions about it?  
25 Do you know if this an accurate depiction of the ¶

1 flood plain at that particular point in time?

2 THE WITNESS: The map is -- the green and the  
3 red, I don't know where they came from. The map itself,  
4 the base map appears to be the same maps that were in  
5 the exhibit, whatever it was.

6 MR. HAGENS: What about this legend information,  
7 Skagit River Basin Summary Report?

8 THE WITNESS: That appears to be the -- come  
9 from the cover of that report. It reads the same as the  
10 Flood Plain Information Study cover.

11 MR. HAGENS: So you don't know what the colors  
12 --

13 THE WITNESS: I can read what the colors mean  
14 there, yes. Who put them on I don't know.

15 MR. HAGENS: Well, maybe if counsel will  
16 elucidate that information we won't have an objection.

17 MR. SMART: For Mr. Hagens' information, those  
18 are the colors in the original report.

19 MR. HAGENS: Are they? I don't know that. I  
20 guess I do now.

21 MR. SMART: I didn't change the colors one wit.

22 THE WITNESS: It's my understanding they were  
23 blue.

24 MR. SMART: No, they were green.

25 THE WITNESS: Were they green and red? ¶

1 MR. SMART: Yeah.

2 THE WITNESS: All the reports I looked at, they  
3 were -- right like what you see -- right in front of  
4 me.

5 MR. SMART: This is a 1967 report, not the  
6 General Design Memorandum.

7 THE WITNESS: I don't mean that, but the one you  
8 put in front of me was -- all the reports I ever saw  
9 were of that quality.

10 MR. SMART: Well, I didn't change the color,  
11 so --

12 THE WITNESS: Okay.

13 MR. SMART: Offer the exhibit, Your Honor.

14 THE COURT: It's been admitted.

15 Q Now, the flood plain that is shown by this green map in  
16 the area of the Nookachamps, which is also shown by D37  
17 on Exhibit 984, is essentially the same flood plain, is  
18 it not? Nookachamps Basin, Clear Lake?

19 A True, hundred year flood plain goes to the high ground  
20 in all the cases on the whole map, except at the base



21 and tide lands.  
22 Q You would agree, would you not, that anybody reading  
23 either the 1967 Flood Plain Information Study or the  
24 General Design Memorandum that you worked on in 1979  
25 could determine that a piece of property in the ¶

1 Nookachamps Basin was located in the -- the green says  
2 the fifty year flood plain, correct?  
3 A That's true.  
4 Q Now, turning --  
5 MR. SMART: Your Honor, I'm a little disappointed  
6 with the photocopy qualities, and I think we can work on  
7 that.  
8 THE COURT: All right.  
9 MR. SMART: To get one that's a little better,  
10 and what I'd suggest is to have the witness look at an  
11 original for the purpose of performing his testimony.  
12 THE COURT: All right.  
13 Q Showing you plate D25 of this document, can you identify  
14 for me where the Highway 9 Bridge is?  
15 A Shown by the yellow line here.  
16 Q Okay. And -- let me -- I'm going to give you this one  
17 for a second. Shown by this yellow line right here; is  
18 that correct?  
19 A Yeah.  
20 Q All right. What I'd like you to do, sir, if you would,  
21 please, is tell me what the --  
22 A I've got four of them in front of me right now.  
23 Q I'm going to give you back this one so you don't have  
24 too many of them.  
25 What was the hundred year flood flow determined ¶

1 by your department of the Corps of Engineers?  
2 A The flow?  
3 Q Yeah, at the --  
4 A The discharge.  
5 Q Yeah, the discharge at the Highway 9 Bridge in 1979.  
6 A Basically 230,000.  
7 Q Okay. And for the hundred year flood, what is the flood  
8 elevation level, according to your report in 1979, at  
9 the Highway 9 Bridge for a flow of 230,000, according to  
10 this chart?  
11 A About 47.  
12 Q Little over 46, isn't it?  
13 A I'll concede between 46 and 47.  
14 Q All right.  
15 A And this is not anymore accurate than that.  
16 Q What?  
17 A The drawing isn't anymore accurate than that. It looks  
18 like to me like it's in excess of 46.  
19 Q But 46 to 47?  
20 A Yeah.  
21 Q We earlier established that all these reports have a  
22 foot or so of zero variation, right?

23 A Yeah.  
24 Q Can you tell me, using the same documents, if you would,  
25 please, where the -- what the elevation for a hundred ¶  
1 year flood at the I-5 Bridge is.  
2 A Maybe 42.  
3 Q The I-5 Bridge?  
4 A Oh, wait a minute. Around 42.  
5 Q Are you sure you've got the hundred year flood, 230,000?  
6 A I believe it is. Oh, it wouldn't be 230,000 at that  
7 point. Am I reading this right? That's 40, 45. 35,  
8 40, 45. There's the I-5 Bridge.  
9 Q This is the 275,000, is it not? There's your hundred  
10 year flood right there?  
11 A Let me look at the large one.  
12 Q I think you've got the wrong line.  
13 A No. No. A hundred year flood profile -- oh, let's  
14 see. Existing conditions, you're right.  
15 Q Existing conditions, that's right?  
16 A I think I gave you the wrong one on the other one, too.  
17 Q No, you got that one right.  
18 A About 37, 37 and a half.  
19 Q 37? Okay.  
20 A Let me look at this other one now just to make I haven't  
21 done the same thing. Do you have that one that you put  
22 in front of me?  
23 Q Yeah. And I'm sure right. It was the existing  
24 conditions one that we were after.  
25 A Yeah. That's about 44. ¶  
1 Q For 230,000?  
2 A Right, existing condition. The one with the single  
3 dash. It's not this one. Let me go back to the legend.  
4 Q 44 then?  
5 A That's right.  
6 Q Now, showing you 866, it's to your deposition, sir. Can  
7 you tell me what that is?  
8 A Flood Insurance Study, Skagit County, Washington,  
9 Unincorporated Areas, Federal Emergency Management  
10 Agency, September 29, '89.  
11 Q That's just simply an update of the Flood Insurance  
12 Study that was performed in 1967 by the Army Corps; is  
13 that right?  
14 A 1967 did you say?  
15 Q Yeah.  
16 A No, I don't believe it is.  
17 Q Okay. Well, it's a --  
18 A I have no knowledge of how this document came. I did  
19 not do this document.  
20 Q I'm not saying you did the document. You're familiar  
21 with it, aren't you?  
22 A I'm familiar with the contents of a flood insurance  
23 report, yes.  
24 Q That's a document that you've studied and is published

25 by the Federal Emergency Management Authority that works ¶

1 in conjunction with the Army Corps. In fact, you  
2 started that study for FEMA at the Army Corps, did you  
3 not?

4 A But we did not finish it for the FEMA.  
5 Q But you started it early on?  
6 A We started it.  
7 Q And that's the final report from some projects that you  
8 were doing for FEMA when you left the Corps?  
9 A I believe this was done by an independent consultant.  
10 Seattle Corps of Engineers and FEMA could not come to  
11 agreement on the proper procedures for doing the Flood  
12 Insurance Study.  
13 Q What you're telling us, when you started out on it, that  
14 there was some problems that developed and it was  
15 finished up by a private consultant?  
16 A We didn't start on it. We started on discussing  
17 procedures for doing it.  
18 Q Okay.  
19 A We did some early-on studies, but when we got to a point  
20 we said, "Hey, we've got to go into these procedures,"  
21 FEMA said, "We can't afford you," and that's where it  
22 dropped.  
23 Q You're familiar with the study, are you not?  
24 A Say again?  
25 Q You're familiar with the study, are you not? ¶

1 A I'm familiar with this kind of a study.  
2 Q That study?  
3 A This study in particular I don't believe I've ever  
4 looked at.  
5 Q Oh, really?  
6 A I may, I may not have. I'd have to look at it.  
7 Q You didn't look at the 1989 Flood Insurance Study for  
8 any of your work on this particular project?  
9 A No, I haven't -- I did not review this one. Unless this  
10 is something different. I'll have to review this.  
11 Q Take a minute, if you would, sir, because it's my  
12 understanding that you --  
13 A It was --  
14 Q Were familiar with that report?  
15 A It was in an era that was quite confusing between the  
16 Corps and FEMA at that time, and this was not the only  
17 project. The Skagit wasn't the only project that I had  
18 anything to do with.  
19 Q I understand that, but I'm talking about in conjunction  
20 with your work on this case. That's a substantial  
21 report. That was the latest Flood Insurance Study from  
22 FEMA, is it not, that existed today, or that exists  
23 prior to the 1990 flood.  
24 A It obviously existed before the 1990 flood.  
25 Q It would have been the latest one. It was published in ¶

1 1989, correct?  
2 A I would guess it would be.  
3 Q Isn't that the kind of report that you would normally  
4 study if you were going to perform a historical analysis  
5 of the dikes and flooding problems on the Skagit?  
6 A Not necessarily.  
7 Q Is there some reason why you didn't consult it?  
8 A FEMA's procedures are more political, more regulatory  
9 procedures, and developed -- the procedures for  
10 developing flood plains are more aimed towards  
11 regulatory and flood insurance problems, not directing  
12 -- directly to the real problem that exists.  
13 Q Okay. You know that FEMA analyzed the hundred year  
14 flood levels in 1989.  
15 A I don't believe FEMA ever did. They may have had them  
16 done, but --  
17 Q And you're not familiar with what those are; is that  
18 correct? So I guess the best that you can tell us then  
19 is what the Army Corps reports show in 1967 and 1979; is  
20 that right?  
21 A That's right.  
22 Q I'll mark this witness's -- I'm marking 986, and show  
23 you that I correctly write down your numbers for what  
24 the reports showed there from 512 and 866.  
25 A I believe so. ¶

1 MR. SMART: Offer for illustrative purposes only,  
2 Your Honor.  
3 MR. HAGENS: May I see the exhibit?  
4 MR. SMART: Sure.  
5 MR. HAGENS: Your Honor, may I ask the witness a  
6 couple of questions?  
7 THE COURT: Yes.  
8 MR. HAGENS: You mentioned, Mr. Regan, that there  
9 was something you wanted to explain on the exhibit from  
10 which --  
11 MR. SMART: I object, Your Honor.  
12 MR. HAGENS: From which he derives one of the  
13 numbers on this exhibit he's offering.  
14 MR. SMART: Objection, Your Honor.  
15 THE COURT: I'll allow it. Go ahead.  
16 MR. HAGENS: What was explanation you wanted to  
17 give?  
18 THE WITNESS: Let me point out, he was  
19 mentioning that the water surfaces became the same  
20 downstream from -- downstream from Burlington,  
21 basically. There was a note on the map that says this  
22 is a location of a break in the overbank area for floods  
23 150,000 CFS at this point, which means, granted, sure,  
24 the water surface is going to be pulled down because  
25 they got tremendous amount of water going out and not as ¶

1 much water going downstream, so surely they would become  
2 much closer.

3 MR. SMART: Sure. That's what you assumed in  
4 your testimony yesterday, you said you assumed that they  
5 would break down below the bridge at 150,000 cubic feet  
6 per second.

7 THE WITNESS: Uh-huh.

8 THE COURT: Counsel, that's being offered  
9 basically as a summary --

10 MR. HAGENS: Of the two exhibits, as I understand  
11 it.

12 MR. SMART: Right.

13 THE COURT: -- of his testimony with respect to  
14 both those exhibits. Is that a fair way of  
15 characterizing it?

16 MR. SMART: For illustrative purposes.

17 MR. ANDERSON: No objection.

18 MR. HAGENS: For illustrative purposes no  
19 objection.

20 THE COURT: All right. That's 986. That will  
21 enter.

22 (Whereupon, Defendant's  
23 Exhibit No. 986 was admitted  
24 into evidence)

25 Q (By Mr. Smart) Showing you 594, sir. ¶

1 A That's not this one.

2 Q Being with the Corps, are you familiar with the  
3 procedures that are used --

4 THE COURT: Counsel, again, I'm sorry, the  
5 number?

6 MR. SMART: 594.

7 Q As a result of your being with the Corps, Mr. Regan, are  
8 you familiar with the procedures that were used by the  
9 Corps in initiating studies of the various flood plains  
10 in the State of Washington?

11 A I don't have a good understanding of it at that time.

12 Q Okay. In 1964 you were with the Army Corps of  
13 Engineers, were you not?

14 A I was with the Corps four years at that time.

15 Q And during the course of your historical study for the  
16 purposes of this case, did you familiarize yourself with  
17 how the Corps became involved in these studies and what  
18 the authorities of various other governmental agencies  
19 were, such as the State, are, the county, the diking  
20 districts, FEMA?

21 A No.

22 Q You didn't?

23 A No.

24 Q So you wouldn't be able to tell us then even how the  
25 Corps got involved in these projects you testified you'd ¶

1 been working on?

2 A In these early-on studies, the flood plain information  
3 studies, I can't testify actually how they got involved

4 in it. How they got involved in the General Design Memo  
5 study, yes, I can testify to that. You got to realize I  
6 started out as a beginning engineer. Back in 1964 I was  
7 a little more than a slide-rule pusher.

8 Q I understand everybody starts out somewhere, Mr. Regan,  
9 but the position you find yourself in here today and the  
10 position that counsel has placed you in as being an  
11 expert on the history of the Skagit River, its flood  
12 plain and the various relationships between governmental  
13 agencies, I'm just trying to figure out whether or not  
14 you have that expertise or performed a historical  
15 analysis to determine what the relationships were.

16 MR. HAGENS: Your Honor, I don't think we held  
17 him out as an expert on governmental relationships. I  
18 mean that's just something he's making up here, Your  
19 Honor.

20 MR. SMART: I'm not at all, Your Honor. I read  
21 earlier what he was going to testify to. He was going  
22 to testify as a historian on the development of -- of  
23 the dikes and the flood plain history. Everything.

24 MR. HAGENS: My objection, Your Honor, goes --

25 THE COURT: Well, I'll sustain the objection. I ¶

1 think that last portion is your personal  
2 characterization of what he's been called to do. I  
3 think, so far at least, his testimony repeatedly was he  
4 doesn't have that particular expertise with the  
5 intergovernmental relationships. Specifically, at least  
6 as to the time and context we're talking about now, he  
7 clearly has indicated he doesn't have any, so I'll  
8 sustain the objection.

9 Q Showing you Number 525, sir, can I ask you to review  
10 that. Just tell us what it is.

11 A It's a letter to governor, Honorable Albert E. Rosellini  
12 dated September, 1960.

13 Q Who's it from?

14 A Allen F. Clark, Junior, Brigadier General, U. S. Army,  
15 Division Engineer.

16 Q And is this a letter from the Corps then to Governor  
17 Rosellini in September of 1960 regarding the State Flood  
18 Control Act?

19 MR. ANDERSON: Your Honor, I object. He hasn't  
20 laid any foundation. The letter's not signed. He's  
21 laid no foundation that this witness has any knowledge  
22 of this letter, has seen it before.

23 THE COURT: Sustained.

24 MR. SMART: Your Honor, he's talking about  
25 authenticity. It's a core document. The authentication ¶

1 provision would be -- that's what he's talking about  
2 here. We don't need authentication. It's a historical  
3 document. I'm trying to find out what the Army Corps  
4 documents, the historical documents say with respect to  
5 the relationship between the Corps and the State.

6 MR. ANDERSON: Your Honor, the objection is not  
7 as to whether it's authentic or not, the objection is  
8 whether this witness has any foundation to testify as to  
9 the contents. The letter's clearly hearsay. It doesn't  
10 become admissible because we merely stipulated to  
11 authenticity.

12 MR. SMART: It's a historical document in 1960.  
13 I doubt we could find anybody who is alive today who  
14 could talk about what was happening back there.

15 THE COURT: Counsel, just a minute.

16 THE COURT: Ladies and gentlemen of the jury, I'm  
17 going to release you for a few moments.

18 Aaron, why don't you just let them have a break  
19 during this period of time, so if you'll come back in  
20 the jury room in 15 minutes and we'll let you know where  
21 we stand at that point.

22 Thank you.

23 (Whereupon, the following  
24 occurred out of the presence  
25 of the jury:)

1 THE COURT: Be seated, please.

2 All right, counsel. We'll take this -- actually,  
3 Mr. Regan, why don't you stay there. We may have an a  
4 couple of burning questions to pose to you while we try  
5 to resolve this.

6 My comments a few moments ago about the ancient  
7 documents are the historical documents. So we're all  
8 talking about the same thing, what I have ruled so far,  
9 so that we know -- let's just recapitulate here, recap,  
10 so we know what it is -- I get an idea what I've done  
11 here and we can go from here.

12 Seems to me there are two issues. One is, is a  
13 document, if it's objected to as hearsay, can it be  
14 admitted even if it is hearsay simply by virtue of the  
15 fact that it is an older document. That's what  
16 803(a)(16) is all about. That's one issue.

17 Now, the other issue is whether or not, simply  
18 because it is admissible on the basis of hearsay, or  
19 even over the hearsay objection, admissible because of  
20 the rule, can a particular witness be asked to talk  
21 about that document to amplify its meaning or  
22 demonstrate its meaning to the jury, can that witness  
23 even attest in and of his or her own personal knowledge  
24 whether or not it is the document that it purports to  
25 be, other than they simply read it. They can look at it ¶

1 and say it's dated 1967. That doesn't mean, in my  
2 opinion -- that's what I've ruled so far, that you can't  
3 then use that as a launching pad from which to  
4 completely expose that document to the jury by virtue of  
5 that witness's testimony.

6 Especially in the earlier situation that we had,

7 which is really all we've gotten to so far without  
8 setting aside the current objection that we have, the  
9 other issue was when the witness himself said that even  
10 though that document may come in as an ancient document  
11 exception, that he hadn't seen it, didn't remember if it  
12 was in the report or not. Simply because it's an  
13 ancient document doesn't mean that you can ask this  
14 witness to talk about it if he specifically says I've  
15 never seen it before. I just wanted to -- that's the  
16 background against which we're operating.

17 MR. SMART: I understand that, Your Honor, and,  
18 with all due respect, let me articulate our position,  
19 and that is this.

20 First of all, I think Your Honor agrees that the  
21 document would come into evidence by virtue of it being  
22 a historical document and we do not need to have  
23 somebody authenticate it in order for it to come into  
24 evidence. Now, the fact that this witness hasn't seen  
25 it before doesn't have anything to do with whether or

1 not he can -- he can read it, for instance, if it's  
2 relevant to the matters that are under discussion at the  
3 time. Many times people will be asked to talk about  
4 things that are --

5 THE COURT: Would you accept the proposition,  
6 though, that there are objections to that document that  
7 could be made, other than hearsay, which would still  
8 prevent its admission, even if it was a thousand years  
9 old?

10 MR. SMART: But what we're talking about now,  
11 we're talking about a hearsay objection.

12 THE COURT: That was one of the objections. The  
13 other objection was a separate objection to the fact  
14 that not only -- not only was that objection to hearsay,  
15 my understanding was that he carries that one step  
16 farther and says this particular witness has no basis  
17 upon which to do anything other than read it, and you  
18 were asking questions of this witness about its  
19 authenticity and it's validity, and -- I think you  
20 were. That's what I perceived was going on. In other  
21 words, had this witness somehow put his imprimatur on  
22 top of that thing by saying as an expert I relied on it,  
23 when he's never seen it.

24 MR. SMART: That's not correct, Your Honor. And,  
25 as has been indicated already, we can establish through

1 the testimony of this witness that he disagrees with a  
2 document, which he's already done. That's not an issue  
3 on admissibility as to whether or not he agrees or  
4 disagrees.

5 Very many times some of the most important  
6 evidence in a case will be developed because a witness  
7 disagrees with it, and that's what we're talking about.  
8 It's admissible. These historical documents from the



9 Army Corps are admissible to show the history of what  
10 occurred.

11 Now, if Mr. Regan, an expert promoted by the  
12 plaintiffs in this case, disagrees with the document, I  
13 think we're entitled to know that because it bears on  
14 what kind of a job he did, whether he's credible,  
15 whether or not he has included some sort of bias into  
16 his review of the historical record, whether he's  
17 weighed one thing more heavily than another. It's all  
18 important evidence in this case, and it's all important  
19 to our clients to be able to analyze the -- what Mr.  
20 Regan brings to bear with respect to his analysis of  
21 this case.

22 Your Honor was very liberal with Mr. Hagens when  
23 Mr. Hagens had the witness review numerous documents  
24 which Mr. Hagens described as historical yesterday, even  
25 though in the expert witness disclosure that we were ¶

1 given --

2 THE COURT: Let's not go into that. Let's not  
3 get into that issue. You and I disagreed on that.  
4 That's not relevant to this discussion.

5 But the difference is, I never -- I didn't at all  
6 ever hear Mr. Regan say yesterday in commenting to Mr.  
7 Hagens about these exhibits that he'd never seen the  
8 darn thing before.

9 MR. SMART: That's true, Your Honor, but if it's  
10 an admissible document because it's a historical  
11 document and he hasn't seen it, and part of his job was  
12 to research the history, which is clearly what he has  
13 been promoted for, as a historian of these matters, it's  
14 certainly relevant evidence that he says, gee, I missed  
15 it, or whatever. It might be that he didn't do a  
16 complete job, and we're entitled to show that.

17 THE COURT: I'm not sure we're that far off from  
18 each other on that particular point. I may have  
19 interpreted your question to have gone beyond that to  
20 some sort of a -- if you understand what I was saying a  
21 moment ago, about somehow some sort of  
22 super-authentication of a document or something. You  
23 know what I'm trying to say, and there are some  
24 foundational concerns that I would have about that.  
25 That's why I sustained it. ¶

1 MR. SMART: But the foundation, Your Honor, that  
2 they're talking about is a foundation related to  
3 admissibility.

4 All right, if it is a historical document  
5 relevant to the discussion that we're talking about,  
6 it's admissible on its own. Then we can use it to  
7 discuss with this witness whether or not he performed an  
8 investigation that included this.

9 THE COURT: But the rule only says, it only  
10 contemplates -- and the purpose of the rule is that it's

11 not to be excluded simply on the basis of hearsay.  
12 That's not to say that there aren't other bases for  
13 excluding a document that's over 20 years of age. It  
14 doesn't become automatically admissible for any  
15 purpose.

16 MR. SMART: No, no. I don't disagree with that.  
17 It's clearly relevant as to whose authority it was.  
18 We've already established that those matters are  
19 relevant to this inquiry, and if it's a historical  
20 document --

21 THE COURT: That's where we got to foundation.  
22 Because he's not objecting on the basis of hearsay, but  
23 he's saying that this particular witness has no --  
24 nothing that they could share properly with the jury  
25 about the document. ¶

1 MR. SMART: He doesn't need to have anything,  
2 Your Honor, to share with the jury about the document,  
3 if the purpose that we're offering it is to show he  
4 didn't pick it up. We can offer it. It's in evidence  
5 because it's relevant. It's relevant to the discussion,  
6 and if he didn't pick it up we can point that out.

7 THE COURT: I think that's where you and I had --  
8 I had misunderstood the direction of the offer.

9 Just a minute, Mr. Hagens. Reiterate your  
10 objection. We're dealing -- maybe I'm confused. We're  
11 dealing with two. You do have a more recent one, but I  
12 want to go back to the other one. We're going back  
13 first to the State's letter, the one you first objected  
14 to.

15 MR. ANDERSON: Okay. My objection to that was  
16 based on the hearsay. It was based on the fact that it  
17 contains legal conclusions, and it was based on the fact  
18 that this witness did not have any personal knowledge as  
19 to testify to the document for any contents of it.

20 THE COURT: Right. But you understand that the  
21 ancient documents exception takes care of the hearsay  
22 problem. That's the point. Even if the person who  
23 wrote it is available for trial, it says if you're over  
24 a certain age -- the document is over a certain age it's  
25 not inadmissible because of hearsay. ¶

1 MR. SMART: Let me tie it up a little more  
2 because I think it's important, and we might as well  
3 discuss it now.

4 Yesterday -- I found the portion of the  
5 transcript where Mr. Hagens was talking about the right  
6 to flood that we were arguing about this morning, and it  
7 says, question by Mr. Hagens, "Mr. Regan, in reviewing  
8 the document, did you come across any documents that  
9 reflected whether or not the Corps of Engineers, Skagit  
10 County or anybody else, had ever obtained or undertaken  
11 to acquire any right to flood the Nookachamps area?"

12 Answer: "Not to my knowledge."

13 Now, I jumped up and I said, "I'll move to  
14 strike, Your Honor. He didn't respond to the question."  
15 And then you said, "No, it was responsive. The  
16 question was did he uncover any documents that reflect  
17 the fact that any governmental agency had obtained a  
18 right to flood and he said in his review of the  
19 documents he didn't encounter such a document. That is  
20 the essence of the answer so that's fine. It will  
21 stand."

22 So my point, Your Honor, is this. If he's been  
23 put up to say that nobody has the right to flood because  
24 he performed a review of the documents, and if these  
25 documents specifically set forth the relationship ¶

1 between the governmental authorities and their rights,  
2 for instance, to maintain dikes on the Nookachamps and  
3 to perform flood plain information studies and an  
4 analysis of what the dikes do and don't do, whether  
5 they're matters of common sense or not, Mr. Hagens has  
6 already got us into that subject as to whether or not he  
7 has discovered the appropriate information, and I'm  
8 certainly entitled to point out other information which,  
9 if he looked harder, he could have found.

10 MR. HAGENS: Your Honor, may I be heard on this?

11 THE COURT: Uh-huh.

12 MR. HAGENS: First of all, on the question of  
13 using this document Number 25, I do think the Court's  
14 hit it on the head. There's a basic foundational  
15 requirement. The witness sees something, have some  
16 knowledge, before he be permitted to testify about it,  
17 and I think that's kind of like the first step to the  
18 admissibility of anything. He's got to have some  
19 knowledge, understanding, seen it.

20 Counsel can ask, and he should be entitled to  
21 ask, you mean you didn't find this document in your  
22 search. Did you look for these kinds of documents.  
23 Those are legitimate questions, but then to say from --  
24 you've never seen it or found it that he gets to get it  
25 in evidence. ¶

1 Basically it's a competency problem. He has no  
2 way of saying whether -- if it's old or not, he has no  
3 knowledge to share with us to shed -- or light to shed  
4 with respect to the exhibit. He's never seen it. It  
5 might shed light on how thorough his search was, but  
6 there's no way you can get the evidence in -- the thing  
7 into evidence just because it's old in itself, and  
8 that's because of the reasons that Mr. Anderson raises  
9 that there may be legal conclusions that say, although  
10 old, it gets through the hearsay rules. It's still  
11 objectionable because it has a legal conclusion in it.

12 It may have some prejudicial content in it.  
13 There's a whole host of other reasons why it may not be  
14 admissible, even though you can overcome the hearsay

15 rule.

16 I think if I understand the argument here, I  
17 really don't think there's as much dispute as I hear  
18 going on here.

19 MR. ANDERSON: Your Honor, if I might add, you  
20 asked me to address the letter earlier and I thought you  
21 were referring to the earlier letter. In specific  
22 reference to this letter --

23 THE COURT: Actually I was asking about the  
24 earlier letter.

25 MR. ANDERSON: In specific reference to Exhibit ¶

1 25, which I guess would be 525, the question that I  
2 heard counsel ask Mr. Regan after he had not established  
3 that he'd ever seen the letter before, well, this says  
4 under the State act or under -- this sets forth the  
5 State's authority to request it. And the letter, what  
6 it's asking, it's asking the witness to testify based on  
7 something that's said in the letter, his interpretation  
8 of it, when there's no foundation for that. He doesn't  
9 know what the authors referring to.

10 You know, you have counsel throwing out testimony  
11 and then asking the witness to agree with it based on a  
12 letter he's never seen before in his life, and I don't  
13 think that approach is appropriate.

14 MR. SMART: Your Honor, Mr. Hagens' objection is  
15 an authentication.

16 MR. HAGENS: No, I don't dispute the  
17 authentication. It has nothing to do with  
18 authentication. It has to do with knowledge and ability  
19 to testify about something he knows about.

20 MR. SMART: Wait a minute. If it's authentic and  
21 it's relevant and admissible, the mere fact that this  
22 witness doesn't know anything --

23 THE COURT: And I agree, and admissible.

24 MR. SMART: Yeah.

25 THE COURT: And otherwise admissible would ¶

1 probably be the best way to put it.

2 MR. SMART: But there are many things that a  
3 witness hasn't seen until the first time at trial. You  
4 know, like, for instance, you know, in a products  
5 liability case, the missing part or the defective part  
6 or the broken part, the expert might never have  
7 considered it. You can show him and say, hey, this is  
8 the part. We found it in such and such a place. What  
9 do you want -- you can certainly ask him. He's an  
10 expert. He's here to testify. He's already testified  
11 that there isn't any right by anybody to flood.

12 I'm entitled to explore fully what investigation  
13 he made with respect to the governmental agencies and  
14 their relationships and how that created the documents,  
15 the historical documents in this case that make up our  
16 hundred years of flood history, and even if he says,

17 geez, I don't know anything about that, that's important  
18 evidence in our case, Your Honor.

19 MR. HAGENS: Your Honor, he didn't testify about  
20 the right to flood. I asked him if he'd found any  
21 documents that reflected whether there had been an  
22 acquisition of a right to flood and he said no, he had  
23 not seen any such documents. Now he tries to stretch  
24 that, as he does on many occasions in this court,  
25 stretch that into I'm calling him as a legal expert on ¶

1 whether or not somebody has the right to flood or not.

2 MR. SMART: Mr. Hagens opened the door.

3 MR. HAGENS: Excuse me, I hadn't finished, Your  
4 Honor. Alls I'm pointing out, Your Honor, is that is a  
5 stretch of some magnitude that takes us into another  
6 universe, as far as I'm concerned. That's all I have to  
7 say.

8 MR. SMART: Your Honor, just for the purpose of  
9 refocusing on this on ancient documents, "Evidence that  
10 a document or data compilation, in any form, is in such  
11 condition as to create no suspicion concerning its  
12 authenticity, was in a place where it, if authentic,  
13 would likely be, and has been in existence 20 years or  
14 more at the time it's offered."

15 That's what we've got here. We've had these  
16 documents for years in this case and there's never been  
17 any question that the Army Corps didn't maintain proper  
18 documents or that the State Archives documents are  
19 improper. We asked the State to identify somebody who  
20 would know about these things, and you remember the  
21 debate on that. They refused to do it.

22 MR. ANDERSON: I don't agree with that last  
23 characterization, Your Honor. And the problem is not an  
24 authenticity problem, the problem is that Mr. Smart  
25 asked a question, and what he said, as best I can recall ¶

1 it at this point, is this letter sets forth the State's  
2 request under the authority of the state law to do  
3 something, and the letter doesn't say that. And the  
4 witness doesn't have the knowledge to testify that  
5 that's what the letter means.

6 MR. SMART: The other letter is the document, the  
7 other side of this document, Your Honor, where the  
8 specific request has been made by the Department of  
9 Conservation, and it's part of the report.

10 THE COURT: Seems to me that I'm --

11 MR. SMART: If I might hand up the letter that  
12 we're talking about so Your Honor can have it in mind.  
13 I think that might be helpful.

14 It's an official letter -- I represent -- and  
15 Your Honor, let me represent to the Court something that  
16 I make by way of an offer of proof. This document has  
17 already been authenticated and testified to by Greg  
18 Hastings, the Flood Control Engineer, saying that he

19 wrote it for Mr. Coe when he was flood control  
20 engineer. It's an exhibit in his deposition, and the  
21 idea that, you know, we shouldn't can able to use it as  
22 part of a report when it's -- when, you know, this  
23 witness is testifying from documents that are the other  
24 end of the pass, if you will, and the State has thrown  
25 to me it's -- I don't understand the position. There ¶

1 wouldn't be an ancient documents rule if it wasn't for  
2 their kind of purpose.

3 MR. ANDERSON: Your Honor, as I articulated  
4 earlier, my objection to that document is varied, but  
5 one of them is it contains a number of legal  
6 conclusions.

7 MR. SMART: But, Your Honor --

8 MR. ANDERSON: Which are hearsay from the  
9 witness. The witness -- you know, Mr. Hastings is  
10 available, and there may be some foundation or some  
11 basis to examine him as to what he was saying and what  
12 these mean, but to put these raw legal conclusions into  
13 the file, into the case, through the exhibit merely  
14 because it's an ancient document I don't think  
15 constitutes that.

16 There is a objection to the admissibility of that  
17 document and that objection is that it contains legal  
18 conclusions. That's entirely separate from the  
19 objection that I'm making as to this letter to Governor  
20 Rosellini, which was based on the question that Mr.  
21 Smart was asking the witness at the time, which was what  
22 does this provision mean essentially, except that Mr.  
23 Smart didn't even approach it in that fashion. What Mr.  
24 Smart did is said this is what I think it means, do you  
25 agree with me, and we've already established that the ¶

1 witness has no personal knowledge or foundation for that  
2 testimony.

3 MR. SMART: We can certainly get back to the form  
4 of the question if that's better. I think the more  
5 important thing is to establish the scope of the ancient  
6 documents rule.

7 What Mr. Anderson is essentially doing here is he  
8 is trying to reargue his motion in limine to say that  
9 the legal relationships and the way those legal  
10 relationships were viewed by the people who engaged in  
11 them back in historical time, the important times  
12 relating to the formation of these dikes, is irrelevant  
13 or should some way be kept out, and we had a motion in  
14 limine on that, in fact he's argued it twice, not only  
15 on the motion in limine but also when Mr. Hastings'  
16 declaration was before Your Honor at the summary  
17 judgment stage, and in both instances he lost that  
18 motion. And the reason he lost it is because it's a  
19 complicated scenario where the legal relationships  
20 between the parties and the people's understanding of

21 what those relationships are is very important to how  
22 these dikes got built and by whom.  
23 MR. ANDERSON: Your Honor, I don't think that  
24 appropriately characterizes what I'm attempting to do.  
25 I'm not attempting to keep out the fact -- and there may ¶

1 be witnesses and there may be evidence that comes into  
2 this case that establishes that. What I'm objecting to  
3 in the case of this letter dated August 28, 1961,  
4 Exhibit 512A, is the fact that it contains legal  
5 conclusions, it contains statements, and the witness is  
6 not here to testify as to those.

7 You know, if Mr. Smart wants to ask the question  
8 did the State request this to your knowledge, that may  
9 be appropriate. And if the document comes in with some  
10 notation, some portion of it comes in to indicate that  
11 the State requested it, that's one thing, but to have a  
12 whole bunch of legal conclusions come in is  
13 inappropriate. And that addresses 512A.

14 Now, I think we may have a form of question  
15 problem as to Exhibit 525.

16 MR. SMART: Just one final point, Your Honor, and  
17 then I'll sit down. I noted a 30(b)(6) deposition of  
18 the State witnesses in this case and Mr. Anderson's  
19 response at that time was there isn't anybody who's  
20 still alive that can talk about these things. That's  
21 exactly the reason why the ancient documents rule  
22 exists, and so for him to say now there may be witnesses  
23 that can come forward and testify on these things is  
24 completely the opposite what he represented before and  
25 completely the reason why he didn't produce anybody to ¶

1 testify about these documents during the deposition  
2 phase. What are we supposed to do, Your Honor?

3 MR. ANDERSON: Your Honor, that's not at all what  
4 I represented, and I'm surprised that counsel would  
5 stand here and make that representation. What I  
6 represented to Mr. Smart and what I've represented to  
7 this Court is that I produce the two employees that are  
8 still employed by the State who are most knowledgeable  
9 about this. As Mr. Smart knows, many of these people  
10 are still alive, they're just no longer employed by the  
11 State and so I don't have the obligation to produce  
12 them, and he has gone down and deposed Mr. Hastings, who  
13 is still alive, so for him to stand before the Court and  
14 make some kind of representation that I refused to  
15 produce anybody because everybody is dead and therefore  
16 these documents should come in is not supported by the  
17 record that he's put before the Court, and it's not  
18 going to be supported by the record as we go along.

19 THE COURT: We've gone from ancient documents to  
20 ancient witnesses and now we're -- I'm not sure what  
21 other old things we're going to uncover here before  
22 long, but my recollection of why I started this little

23 melee, maybe it started with age, so let's get back to  
24 -- I think Mr. Smart has prevailed, has made a good  
25 argument, and I've been reading through the materials ¶

1 here. I was putting the cart before the horse in terms  
2 of -- to some extent I believe in terms of foundational  
3 sorts of concerns and that type of thing.

4 A document becomes admissible, generally  
5 speaking, and looking again through the rule, when it  
6 can be qualified as a document that fits under the  
7 rules, so with that -- in that respect, Mr. Smart, for  
8 any purpose, it's in, and you can use it for that  
9 purpose, and if counsel requests a limiting instruction  
10 as to what purposes the document may be considered for,  
11 that's one thing, okay, but that doesn't make it  
12 unadmissible.

13 THE COURT: All right.

14 MR. SMART: Now, let me just flip this up on the  
15 screen because I think it's extremely important. There  
16 are other documents that are going to be -- now -- we're  
17 having a sun problem.

18 THE COURT: Can you imagine in this country  
19 having a sun problem?

20 MR. SMART: Can you see this?

21 THE COURT: Yes, I can.

22 MR. SMART: This document specifically sets forth  
23 the State authority for making the request to have the  
24 Army Corps do the Flood Plain Information Study, okay.  
25 Mr. Coe -- actually Mr. Hastings on behalf of Mr. Coe ¶

1 stated specifically that his understanding in 1961 when  
2 this letter was written was that the State legislature  
3 declared, and then he sets forth exactly the terms of  
4 the 1935 act, and then it says that this act authorized  
5 the supervisor to formulate plans for flood control and  
6 to cooperate and participate with the federal  
7 government, any state agencies and counties. And then  
8 it says that he's going to go on --

9 THE COURT: I know what eight says.

10 MR. SMART: All right. Goofed. So that's Mr.  
11 Coe's understanding of his authority at the time when he  
12 makes the request to the Army Corps of Engineers to  
13 perform the study.

14 THE COURT: And the hearsay exception rule with  
15 respect to ancient document says it be comes admissible  
16 even if the person who wrote it is available as a  
17 witness. That's your point, so it's in. It's in and  
18 it's in, it's in, it's in.

19 MR. SMART: Right, it's in, and then if Mr.  
20 Anderson in his case wants to disagree with it, then he  
21 can bring a witness to say no, it means something else.  
22 At least as far as this witness goes --

23 THE COURT: And this witness can obviously be  
24 cross-examined by Mr. Hagens and Mr. Anderson on the



25 point as to -- several points, whether they think the ¶

1 document is really worth anything or not, do they agree  
2 or disagree with it. The witness can say I don't think  
3 it's worth the paper it was written on, but it's  
4 admissible.

5 MR. SMART: That's what I'm saying, it's  
6 admissible.

7 THE COURT: I agree. Okay. I've just told Aaron  
8 to let the jury have ten more minutes, because I hate to  
9 -- you know --

10 MR. SMART: I was hoping to have about five  
11 myself.

12 THE COURT: Make it ten.

13 MR. SMART: Thank you.

14 (Recess was taken.)

15 THE COURT: Counsel.

16 MR. SMART: Thank you, Your Honor.

17 Offer 512A pursuant to the discussion that we had  
18 outside the presence of the of the jury.

19 MR. HAGENS: Mindful of the Court's ruling, we  
20 object, Your Honor.

21 MR. ANDERSON: Your Honor, I object on the basis  
22 previously stated, based on the legal conclusions  
23 contained therein.

24 THE COURT: 512A will be admitted.

25 (Whereupon, Defendant's ¶

1 into evidence.)

2

3 MR. SMART: Your Honor, might I suggest that we  
4 get 512A back together with 512, that way it will be  
5 easier --

6 MR. SMART: Do you have 512 there, sir?

7 THE COURT: All right.

8 Counsel, I want to make one comment to the jury  
9 regarding something completely unrelated to what we were  
10 discussing earlier.

11 Just by way of a reminder for all of us that a  
12 week from today the parties I should say are in the  
13 process of arranging all the logistics for what is  
14 called a jury view, and the jury, along with myself,  
15 counsel and Mr. Shields, who is the law clerk/bailiff  
16 for Department 5, will take a bus ride up to the  
17 Nookachamps area and you'll be allowed to view the  
18 area. I understand a very classy catered lunch will be  
19 provided and -- I'm lying. That's not my understanding  
20 at all, but those arrangements will be made and taken  
21 care of. You'll be given further instructions at that  
22 point in time. The -- perhaps the most important  
23 feature of which will be there will not be a question  
24 and answer type of format.

25 The jurors, under state law as it currently ¶

1 exists in Washington, are not allowed to ask questions  
2 of the attorneys. In fact, the attorneys themselves are  
3 directed not to make any comments about the case  
4 whatsoever. It's simply an opportunity for you to view  
5 the scene, to get some contextual background in your  
6 mind as to where these places are and how they're  
7 situated, that sort of thing. Any comments that will be  
8 made during the jury view will be made by the Court or  
9 at the Court's direction, and you'll be advised again  
10 before you go to the scene and again in final jury  
11 instructions in this case that the scene, the view of  
12 the scene is not evidence. The situation is obviously  
13 not the same as it was in November of 1990 and no one  
14 could replicate the scene to make it exactly as it was.  
15 It's not evidence. It's simply an opportunity for your  
16 to get a feel, if you will, for the lay of the land,  
17 literally, in this case as to where things are  
18 geographically and that sort of thing, so we'll fill you  
19 in on more details.

20 The important part is to remember that next  
21 Thursday morning we will all be leaving on a field trip  
22 up to the Nookachamps, so you can be thinking about that  
23 and plugging that in in anticipation of what may be  
24 happening next week with the case.

25 All right, counsel, anything else before we ¶

1 proceed?

2 MR. SMART: No.

3 THE COURT: All right. Go ahead.

4 CONTINUED CROSS EXAMINATION

5 BY MR. SMART:

6 Q Mr. Regan, will you turn to Exhibit 512A which now been  
7 reunited with Exhibit 512, which is the Flood Plain  
8 Information Study from 1967. Just to refresh the jury's  
9 recollection, this was the Flood Plain Information Study  
10 which was the first one?

11 A I believe it was the first one that the Seattle District  
12 did.

13 Q And 512A is a letter to the District Corps of Engineers  
14 from Mr. Earl Coe, the Director of the Department of  
15 Conservation; is that correct?

16 A Earl Coe, yes. C-o-e, yeah.

17 Q Yes, Coe. And this was the letter that was written to  
18 the District Engineer outlining the State's request on  
19 behalf of the governor for the Army Corps to perform  
20 this study; is that correct?

21 A It appears to be.

22 Q Turning to page two of the document --

23 MR. ANDERSON: Your Honor, I object as to the way  
24 that this is proceeding. This contains legal  
25 conclusions. He's clearly putting this in front of it. ¶

1 The witness has already testified that he's never seen  
2 this document, that he has no knowledge as to its

3 contents, and that he had previously testified yesterday  
4 that he has no knowledge as to the State laws regarding  
5 flood control, whether they apply to dike districts, the  
6 county or the State, and so what he's attempting to do  
7 now -- as I understood Your Honor's ruling, he could ask  
8 him if he'd seen the letter before or not and whether he  
9 -- and at that point have that question answered.

10 I don't think it's appropriate to ask the -- put  
11 this in front of the jury and then ask the witness if he  
12 agrees or disagrees with it when he's already testified  
13 he has no knowledge on this point.

14 MR. SMART: Your Honor, clearly this witness  
15 discussed yesterday his not finding any documents  
16 relating to the right to flood the Nookachamps area.  
17 Clearly this Flood Plain Information Study has important  
18 information concerning the relationships between the  
19 governmental entities which are outlined in this  
20 document, which is admitted and is a historical record  
21 in that regard. And if this is information that could  
22 have been discovered by this witness but wasn't, I  
23 intend to talk about it.

24 THE COURT: Counsel.

25 MR. HAGENS: Again, I renew my objection to ¶

1 mischaracterizing this witness as an expert with respect  
2 to relationships between governmental entities or he was  
3 called in any respect to give any legal opinions about  
4 rights to flood or anything.

5 THE COURT: I understand that. At this point in  
6 time he's simply asking the witness about a portion of a  
7 report which has already been admitted, and a certain  
8 portion has been admitted by the Court as a historical  
9 or ancient document pursuant to court rule, and I'll  
10 overrule the objection.

11 You may proceed.

12 Q Would you read -- the first full paragraph on Page two.

13 A "The state legislature declared, by its Act of Chapter  
14 163, Laws of 1935: It is the purpose of the state in  
15 exercise of its sovereign and police powers --

16 THE COURT: Sir, if you'd stop for a minute.  
17 I've noticed something, and it's probably because I'm  
18 not standing right over the machine but seems like  
19 almost everyone tends to chop off the left side of the  
20 document and leave space on there. It's tough to get it  
21 all on there. But that seems to be probably just  
22 because of the angle you have standing over it isn't  
23 quite the way it ends up being projected on the screen.

24 MR. SMART: I'll try and make sure I look at the  
25 screen. ¶

1 Does the jury are have any other concerns as to  
2 how the documents are presented?

3 UNIDENTIFIED JUROR: Just the glare off the  
4 lights.

5 THE COURT: Does that help at all or are these  
6 the lights above you creating that glare?  
7 A Are we ready?  
8 Q Yes, sir.  
9 A Continuing, "And in the interest of public welfare, to  
10 insure a state policy for control of floods to the  
11 extent practicable" --  
12 Q To "establish" a state policy, is it not?  
13 A "To establish a state policy," yeah, "and by  
14 economically feasible methods. This Act authorizes the  
15 supervisor to formulate plans for flood control and to  
16 cooperate and participate with the federal government,  
17 any state agency, and counties."  
18 Q And then would you read the following paragraph.  
19 A "In furtherance of its policy on flood control the state  
20 legislature by Chapter 159, Laws of 1935, declared: The  
21 prevention and alleviation of flood damages is a matter  
22 of public concern as affecting the health, safety, and  
23 general welfare of the state, and therefore the state  
24 assumes full regulatory control over all waters in the  
25 state, subject to federal control of navigation, ¶

1 necessary to accomplish the purpose of this chapter.  
2 This Act further provides that such control shall be  
3 exercised by the supervisor of flood control through  
4 regulatory orders, the designation of flood control  
5 zones, and the issuance of permits. The Act authorizes  
6 the supervisor to establish and promulgate rules and  
7 regulations governing its administration, and authorizes  
8 the supervisor to make a survey of the flood control  
9 needs of the State."

10 MR. ANDERSON: Your Honor, now, before we  
11 proceed, I would request a limiting instruction based on  
12 RCW 86.61.071.

13 THE COURT: Counsel.

14 MR. SMART: I don't think that matter can be  
15 taken up in the presence of the jury, if Your Honor  
16 correctly reflects, both the purpose of that statute and  
17 the Court's earlier rulings with respect to whether or  
18 not it even applied in this case.

19 THE COURT: All right. Counsel, I'll reserve  
20 that, your motion with respect to that. We'll address  
21 that. Remind me to make sure we take care of that.

22 MR. ANDERSON: Okay.

23 THE COURT: Thank you.

24 Q Now, sir, would you read about the first two sentences  
25 of page three. ¶

1 A Under Desired Objectives?

2 Q Right.

3 A "The prime objectives sought by application for a  
4 federal flood plain information study is to alleviate  
5 the reoccurrence of the disastrous damages caused by the  
6 1959 floods here in Washington. By our application we

7 hope to take full advantage of the resources of the  
8 Corps of Engineers in our undertaking and conducting a  
9 careful and comprehensive study of the flood needs of  
10 the State, the establishment of a state policy for flood  
11 control, and formulation of a comprehensive flood  
12 control plan for the State."  
13 Q Then would you read the last sentence of that paragraph,  
14 please.  
15 A This is where it starts "In order"?  
16 Q Yes.  
17 A "In order that we may carry out a reasonable regulatory  
18 control program, information regarding the nature and  
19 extent of flood damages, identification of areas subject  
20 to inundation, the magnitudes and frequencies of floods  
21 involved, and other general criteria for our guidance in  
22 the use of the flood plain areas is required."  
23 Q All right -- and now if you will turn to page six at the  
24 bottom, and read the first portion -- the first full  
25 sentence of that paragraph. ¶

1 A It's under "Assurances of Local Cooperation."  
2 "By this application it is hereby assured that  
3 (1) the Department of Conservation will publicize the  
4 information report in the community and area concerned,  
5 and make copies available for the use or inspection by  
6 reasonably interested parties and individuals."  
7 Q Thank you.  
8 Now, again, Exhibit 985, this flood plain map was  
9 a portion of the document 512, correct?  
10 A I believe so, yes.  
11 Q Is it your understanding then of the letter that you  
12 just read, which is a portion of the report that the  
13 Department of Conservation assured the Army Corps of  
14 Engineers that it would publicize this information to  
15 the community and the areas concerned and make copies of  
16 the report available?  
17 A That's what the letter says.  
18 Q Thank you.  
19 We went over partially before the break 525, is  
20 that a letter from Allen F. Clark, Brigadier General of  
21 the United States, Division Engineer to the Army Corps  
22 of Engineers, to Governor D. Rosellini, dated September  
23 12, 1960.  
24 A It's a copy, but it's not signed.  
25 Q Normally the Corps would not keep a signed copy, it ¶

1 would send it off, correct?  
2 A Normally -- this does not look like a normal Corps --  
3 the way it's written, looks like a Corps document.  
4 Normally this document would have a sign-off list on the  
5 side where whoever wrote it would sign it off, and his  
6 supervisor and so forth, on up to the general. It  
7 doesn't have that on here, so --  
8 Q You don't know why the State Archives would have a copy

9 that was unsigned?

10 A No, I don't.

11 MR. SMART: Your Honor, I'd move for admission  
12 525, straight out of the State Archives.

13 MR. HAGENS: Your Honor, we're not making  
14 authenticity objections, but we do object to the  
15 wholesale use of this document that can be put in front  
16 of a witness without him having some knowledge or  
17 understanding about it. There's no limit to what we  
18 could do in that regard, Your Honor.

19 MR. ANDERSON: Your Honor, I make the same  
20 objections as to the foundation for the witness to  
21 testify to this that have been made before. I also  
22 would request if the witness is allowed to testify to  
23 the contents of this, that the same limiting instruction  
24 I previously requested be given.

25 MR. SMART: I'm really only interested in the ¶

1 first part of paragraph two, Your Honor.

2 THE COURT: In order for the authentication to  
3 occur, you said Rule 901, the first threshold that needs  
4 to be covered is that the document is in such condition  
5 as to create no suspicion concerning its authenticity.  
6 The witness has indicated it doesn't appear to be to him  
7 to be the type of document kept by the Army Corps of  
8 Engineers. It doesn't have the signature pages. It's  
9 not signed.

10 MR. SMART: Came from the State Archives, Your  
11 Honor.

12 THE COURT: I understand that, but the rule  
13 requires that it be in such condition that it create no  
14 suspicion concerning its authenticity. So I would -- I  
15 don't know. I'm not sure that anyone has raised that  
16 specific objection. I think that's part of the one the  
17 State is raising.

18 MR. SMART: If the State is raising the  
19 authenticity --

20 MR. ANDERSON: No, I can short circuit that  
21 aspect of it. We're not raising an authenticity  
22 objection. Our objection is that the witness has  
23 already testified that he's never seen it. We don't  
24 believe he's competent to testify.

25 THE COURT: That would be the same objection you ¶

1 already had.

2 You may proceed.

3 MR. SMART: Offer 525 then, Your Honor.

4 THE COURT: It will be admitted.

5 (Whereupon, Defendant's  
6 Exhibit No. 525 was admitted  
7 into evidence)

8 Q Mr. Regan, would you read the first full sentence of  
9 the letter, please. Not the letter, of paragraph two.

10 A Pardon.  
11 Q First full sentence of paragraph two of the letter.  
12 Thank you.  
13 A "I was particularly pleased to receive your letter  
14 which, in addition to reflecting the high standards of  
15 leadership the State of Washington has demonstrated  
16 in flood control matters, represents the initial request  
17 this office has received for assistance under the  
18 provisions of Section 206."  
19 Q So that comports with your understanding that this was  
20 the first flood control information study requested  
21 under the program established by the Corps; is that  
22 right?  
23 A That's right.  
24 Q Showing you Exhibit 145, a document that's already been  
25 admitted into evidence, sir. Can you remind the jury ¶  
  
1 what that is?  
2 A This is a flood summary report, Nookachamps, Skagit and  
3 Snohomish River Basins, November, 1990 events.  
4 Q You testified from this document yesterday; is that  
5 correct?  
6 A I believe that was one of them, yes.  
7 Q That was one of the documents you relied in coming to  
8 your conclusions in this matter; is that right?  
9 A Yes.  
10 Q Would you turn to page eleven of the document, please.  
11 A I'm there.  
12 Q Now, sir, page starting midway in the page deals with  
13 the Skagit River floods of November 9th to 12th, 1990,  
14 correct?  
15 A That's correct.  
16 Q And at the bottom of the page there is a analysis by the  
17 Army Corps of what effect flood control regulation had  
18 on the flood, is that not correct?  
19 A It goes into some discussion on that, yes.  
20 Q And could you read then the discussion starting in  
21 subparagraph c?  
22 A "Flood control regulation. Flood control regulation by  
23 the U.S. Army Corps of Engineers (The Corps) of the  
24 Skagit and Baker River projects prevented major flood  
25 damage in the lower Skagit River Valley and Mount Vernon ¶  
  
1 areas. Seattle City Light (Ross Dam on the Skagit  
2 River) and Puget Sound Power and Light (Upper Baker Dam  
3 on the Baker River) effectively responded to the  
4 Corps's flood control regulation operations."  
5 Q If you could flip over to the next page, subparagraph  
6 d.  
7 A Which one?  
8 Q Subparagraph d at the top of the page.  
9 A D.  
10 Q D, yes, and tell us what the Corps said about flood  
11 control regulation and what effect it had on that

12 November 9th through 12th flood.  
13 A "Flood control regulation of Ross and Upper Baker are  
14 reduced flood levels by an estimated three feet at the  
15 Mount Vernon gauge. On Saturday, November 10th, the  
16 peak inflow to Ross was about 46,000 at 12:00 p.m. At  
17 Upper Baker the peak inflow was about 33,000 at 10:00  
18 a.m. the same day."

19 Do you want more?

20 Q The next sentence, please.

21 A "Releases from both projects were limited to 5,000 CFS  
22 or less until it was certain that Skagit River inflows  
23 and discharges were receding."

24 Q Okay. Now, let's take just a break so that you can  
25 explain what that means to the jury. ¶

1 Is it correct to say by that report the Army  
2 Corps estimated that the flood control operations on the  
3 Upper Baker Dam and Ross Dam during 1990 reduced the  
4 expected flood levels downstream at Mount Vernon by  
5 three feet?

6 A That's what it says.

7 Q Now, when you made your analysis to take out the dikes,  
8 you didn't take out the dams, did you?

9 A Of course not.

10 Q So in 1990 the dams saved the downriver areas an  
11 estimated three feet of flooding, according to the Army  
12 Corps of Engineers report; is that right?

13 A That's true. That's true.

14 Q Okay. Now, if you would turn over to the next -- page  
15 14, please. We have a similar report. And if you read  
16 paragraph 16 there for the jury, please.

17 A 16. "Skagit, November 21 through 26. Rain began to  
18 accumulate in the morning of November 21st and continued  
19 at a rate of about 0.1 to 0.2 of an inch per hour until  
20 noon on November 22nd. Only 0.3 inch was recorded at  
21 Marblemount during the next 24 hours. But then  
22 accumulations of 0.1 to 0.3 inch per hour were recorded  
23 for the next 24 hours."

24 Q Let me stop you there for a second. How much is 0.1 to  
25 0.3 of an inch per hour for that 24 hour period? ¶

1 How much rain was there during that 24 hour period?

2 A 24 times 0.1, 24 times 0.3, 2.4 inches.

3 Q. And then four times 0.3 would be almost --

4 A Three times that.

5 Q Seven inches?

6 A About seven inches, yeah.

7 Q In 24 hours?

8 A In 24 hours.

9 Q Now, would you read subparagraph b for us, please.

10 A "Mount Vernon. The Skagit River at Mount Vernon gauge  
11 began to rise by 7:00 a.m. November 22nd and rose past  
12 zero damage level by 6:00 p.m. the next day. It crossed  
13 the major damage flood stage about 24 hours later and



14 peaked at 37.40 feet to establish a new flood record on  
15 November 25th at noon for the period of record 1940 to  
16 1991. A steady recession brought the flow below major  
17 damage by 11:00 a.m. and below zero are damage by 5:00  
18 p.m. on November 26th.  
19 Q Okay. So how long was it, 19 -- 1940 to 1991 -- this  
20 was the record flood. That's a 51 year period?  
21 A For a period of record of the gauge at Mount Vernon.  
22 Q So it's the biggest flood ever on record for the gauge  
23 at Mount Vernon; is that correct?  
24 A As long as the gauge was in, yes, since 1940.  
25 Q And that's a 51-year period between 19 -- excuse me, a ¶

1 50-year period between 1940 and 1990, correct?

2 A Yeah.

3 Q Another way to say it, this is the biggest flood that's  
4 ever happened since that gauge was in in a period of 50  
5 years.

6 MR. HAGENS: That's repetitious, and I don't  
7 think he should be entitled to ask the same question.

8 THE COURT: Sustained.

9 Q Now, let's turn to the next page, page 15. Again there  
10 is discussion of what would have happened in this flood  
11 if there had not been the upriver storage from the Baker  
12 and Ross Dams, correct?

13 A Yeah.

14 Q And would you read subparagraph d, "Effects of Flood  
15 Control Regulation" for us?

16 A "The maximum inflow into Ross reservoir was calculated  
17 to be 36,000 CFS. The peak flow in the Baker, Upper  
18 Baker, was calculated to be 28,000 CFS. The regulated  
19 peaks of 146,000 CFS and 152,000 CFS at Concrete and  
20 Mount Vernon respectively would have been 182,000 and  
21 180,000 if left unchanged (as estimated by the National  
22 Weather Service Forecast Center Skagit Basin Model).  
23 This represents a theoretical reduction in stage of 3.5  
24 feet at Concrete and 4.5 feet at Mount Vernon."

25 Q Is the correct interpretation of that paragraph that the ¶

1 Army Corps determined that there was a four and a half  
2 foot reduction in flood levels at Mount Vernon as a  
3 result of the operation of the Baker and Ross Dams  
4 during the second 1990 flood?

5 A It's my opinion that that would not have happened, the  
6 levees would have failed considerably and who knows  
7 where the gauge would have been, how much reduction you  
8 would have had if the levees had stayed in and the  
9 curve, rating curve was the same as it is today. It's  
10 just extended on up, yes.

11 Q So what you're saying then is that this flood was of  
12 such great magnitude that if it hadn't been for the  
13 Baker and Ross Dams, the levees would have been blown  
14 out and everything would have flooded.

15 A That's my opinion.

16 Q We would have had this, right?  
17 A Or pretty close to it, yeah.  
18 Q And the report also indicates that if the water had been  
19 unregulated by the Baker and upriver storage dams, then  
20 it would have been probability 180 to 182,000 cubic feet  
21 per second, correct?  
22 A Yeah.  
23 Q Which would have made it -- if it was over 180,000 cubic  
24 feet per second, it would have made it the biggest flood  
25 in 84 years, correct? ¶

1 A I can't say that, because there's one there in 1921 and  
2 1909 that --  
3 Q Biggest flood since --  
4 A It may have been bigger at Mount Vernon than 180,000 or  
5 it may not have been, I don't know.  
6 Q So, anyway, it would have been the biggest flood since  
7 1921 for sure, right?  
8 A I believe you're probably correct, yes.  
9 Q That's a period of approximately 70 years?  
10 A Right.  
11 Q Now, we touched on this a minute ago, but it's my  
12 understanding that the dikes have often -- the dikes  
13 along the Skagit and various places have often been  
14 repaired under PL99; is that correct?  
15 A There's been some repair on PL99 on levees in places,  
16 yes.  
17 Q PL99 works by the Army Corps of Engineers doing the work  
18 and the specifications; is that correct?  
19 A Normally the work could be -- usually done by -- under  
20 the Corps auspices and, paid but the Corps doesn't have  
21 people out there doing it, they hire people to do it.  
22 Q Okay. So even if the Corps itself doesn't have people  
23 out there, they hire the work and they do the plans and  
24 specifications?  
25 A That's correct. ¶

1 Q And make sure that it gets down correctly?  
2 A That's true.  
3 Q Then they inspect it after that?  
4 A That's true. They inspect it to make sure that the work  
5 has been done correctly.  
6 Q Would you turn to Exhibit 904, please.  
7 A Which one?  
8 Q 904. Now, what is Exhibit 904, sir?  
9 A It's titled "Inspection Report, Flood Protection Work,  
10 Skagit -- Skagit River, Skagit County, Washington,"  
11 Conditions, 3 through 6, November, 1970.  
12 THE COURT: Counsel, can you wait just a moment?  
13 MR. HAGENS: Thank you, Your Honor.  
14 Q And would 905 and 906 also be examples of Army Corps of  
15 Engineers inspection reports of the flood protective  
16 works along the Skagit?  
17 A It has the -- 905 is. I can't attest to 906. The

18 signature on there is someone I don't know. Emergency  
19 Management Branch apparently -- Corps of Engineers  
20 Emergency Management Branch.

21 MR. SMART: I'll offer 904 and 905 as being  
22 examples of Army Corps inspections of the flood  
23 protective works after PL99 work.

24 THE COURT: Counsel?

25 MR. HAGENS: Mr. Regan, have you ever seen these ¶

1 exhibits before?

2 THE WITNESS: I've never seen these before, at  
3 least to my knowledge. Back in 1970, I can't say one  
4 way or another.

5 MR. HAGENS: Do you recall ever having seen  
6 these?

7 THE WITNESS: No, and this would not be  
8 something that I would have normally seen. This is  
9 totally out of my area in the Corps of Engineers.

10 MR. HAGENS: Then, Your Honor, for another  
11 reason, it's beyond the scope of his examination if  
12 nothing else. This business of just using any document  
13 that came to the Corps of Engineers to have this witness  
14 identify we object to.

15 MR. SMART: Again, Your Honor, they're historical  
16 documents. They should be admitted.

17 This witness testified he investigated the  
18 history. He testified on direct and cross as to PL99.  
19 I'm just seeking to have this admitted as an inspection  
20 report. That's what they are.

21 THE COURT: Is it your position that these are  
22 inspections that were pursuant to PL99 work?

23 MR. SMART: Yes. That's what he testified to.

24 THE COURT: Counsel?

25 MR. ANDERSON: No objection. ¶

1 THE COURT: They'll be admitted.

2 (Whereupon, Defendant's  
3 Exhibit No. 904 and 905 was  
4 admitted into evidence.)

5 Q Now, when the Army Corps inspects the work after repair  
6 by PL99, who does it send out to make the inspection?

7 A I can only speculate on that.

8 Q Well --

9 A Someone from Emergency Management.

10 Q Okay. Someone from Emergency Management. Then I take  
11 it that the inspections that you made in the 1970 to  
12 1975 -- excuse me, the 1975 to 1979 time frame when you  
13 did the General Design Memorandum were additional  
14 inspections done for another purpose, and that was the  
15 creation of the General Design Memorandum report itself,  
16 correct?

17 A That's true. I was acquainting myself with the levee  
18 system to do that work.

19 Q So then there would be two different arms of the Corps  
20 of Engineers in the 1970 through '79 time frame that  
21 would be inspecting these dikes. Did you call it the  
22 Department of Emergency Management?  
23 A This would have been basically in Operations Division.  
24 Q The Operations Division, okay, and then your division,  
25 which was the Hydraulic Engineering Division, right? ¶

1 A No, I was in Engineering Division. That was a  
2 subdivision to Engineering Division.

3 Q So the two divisions of the Army Corps that would be  
4 inspecting the dikes during this time would be the  
5 Department of Engineering and the Department of  
6 Operations, is that correctly stated?

7 A It was -- yes, as so stated.

8 Q Thank you.

9 Now, the head of the Department of Operations was  
10 a man named Vern Cook; is that correct?

11 A He was at one time. I can't say he was -- and I know he  
12 wasn't during the seventies.

13 Q Was he in charge later?

14 A Yes. He had been operations division chief at one time,  
15 later than the seventies, yes.

16 Q But there would have been an Army Corps officer who  
17 would have been in charge of inspections for the  
18 operations divisions prior to Mr. Cook, correct?

19 A Yes.

20 Q And how far back in time did the Army Corps have a  
21 Department of Operations that inspected these dikes on a  
22 regular basis?

23 A I can't go back before 1961. I don't know before 1961.

24 Q You don't know before 1961.

25 A Right. ¶

1 Q And I take it that your investigation then of the  
2 history of the Skagit River, its levees and its flood  
3 control devices, did not extend to determining who or  
4 when or how many or what entity from the Army Corps went  
5 and inspected these dikes.

6 A That's true.

7 Q Back beyond 1961.

8 A That's true.

9 Q Is that because Mr. Hagens didn't give you that  
10 assignment, or did you just determine not to do it  
11 yourself?

12 A I didn't believe it was pertinent.

13 Q I'd like you to turn to Number 910, which I think is in  
14 the same volume.

15 A Did you say 910?

16 Q Yes. And can you tell me what that document is, sir?

17 A This is on the Department of the Army, Seattle District  
18 Corps of Engineers letterhead, Subject: Skagit River,  
19 Washington, Public -- PL84-99, 1979 Levee  
20 Rehabilitation, Dike District 12, Job Number SKA-79-5.

21 Q And is this a document relating to the repair of Dike  
22 District 12's dike on January 29th of 1980, in other  
23 words after the 19 -- after the 1975 flood?  
24 A Yes, it is.  
25 Q And based on your review of this document, do you agree ¶

1 that the Dike District 12's dike was repaired by PL99  
2 money and that it was repaired after the 1975 flood?  
3 A A small portion of it was, yes.  
4 Q And in -- would that dike then have been inspected after  
5 the repair by the Army Corps personnel?  
6 A I would presume so.  
7 Q Okay. The document also indicates, does it not, that on  
8 page two, it also indicates pursuant to PL99 that the  
9 Army Corps has spent \$311,000 on levee repair in 18  
10 different locations on the Skagit River since 1947.

11 MR. HAGENS: Your Honor, I think it ought to be  
12 offered before we start --

13 MR. SMART: I'll offer it, Your Honor.

14 MR. HAGENS: No objection.

15 MR. ANDERSON: No objection, Your Honor.

16 THE COURT: That's Number 910?

17 MR. SMART: Yes, Your Honor.

18 THE COURT: It will be admitted.

19 (Whereupon, Defendant's  
20 Exhibit No. 910 was admitted  
21 into evidence.)

22 Q Did I correctly identify, sir, that the report  
23 indicates that the Army Corps has spent over \$300,000  
24 pursuant to Public Law 99 on the levees and bank repair  
25 at 18 locations on the Skagit River since 1947? ¶

1 A That's what it says, right, and that includes the entire  
2 Skagit River.

3 Q And that does not include money spent in emergency flood  
4 fighting activity, correct?

5 A That's correct.

6 Q And in every major flood the Army Corps did engage in  
7 flood fighting activities, along with others, did they  
8 not?

9 A I would say that's a true statement.

10 Q And, in fact, the Army Corps has a flood fighting manual  
11 that it uses to work with other agencies on the flood  
12 fights on rivers such as the Skagit, does it not?

13 A I believe they have a manual for all the major streams.

14 Q And I think we'll get to that later.

15 Would you turn to 646, please. Can you identify  
16 what 646 is for me, please, sir.

17 A It's a Corps of Engineers letter, Corps of Engineers  
18 letterhead, dated -- and I can't read, March, I think it  
19 was 1951, to the Department of Conservation and  
20 Development, Transportation Building, Olympia,  
21 Washington.

22 Q The attention is to whom, sir?  
23 A Mr. Lars Langloe.  
24 Q Okay. And apparently he was an employee with the  
25 Department of Conservation and Development; is that ¶

1 correct?  
2 A Apparently.  
3 Q And who signed the letter, sir?  
4 A A. J. D'Arezzo, Lieutenant Colonel, Corps of Engineers,  
5 Acting District Engineer.  
6 Q And the subject of the letter is, among other things,  
7 the preparation of plans and specifications for work  
8 repairing levees after the 1951 floods; is that correct?  
9 A It says that the -- basically the Corps would contribute  
10 \$50,000 to the cost of emergency repairs to the levees  
11 in the Skagit flood area where levees were damaged by  
12 severe floods of '51.  
13 MR. SMART: I'd offer 646, Your Honor.  
14 MR. HAGENS: No objection, Your Honor.  
15 MR. ANDERSON: No objection, Your Honor.  
16 THE COURT: Okay. 646 will enter.  
17 (Whereupon, Defendant's  
18 Exhibit No. 646 was admitted  
19 into evidence.)

20 Q And would you read for me, sir, the third full  
21 paragraph, which is an a short one down at the bottom of  
22 the page.  
23 A Right, says "The United States will prepare all plans  
24 and specification for the work, solicit bids, award  
25 contracts and supervise actual construction." ¶

1 Q And that was for the repair work after the big floods of  
2 1951; is that correct?  
3 A Say again.  
4 Q That was for the repair work after the big floods of  
5 1951, correct?  
6 MR. HAGENS: Your Honor, I think he ought to read  
7 the balance of it, too. He's read some of it. But he  
8 hasn't talked about the role of Skagit County.  
9 THE COURT: Okay. What remaining portion do you  
10 think needs, in fairness, to be read?  
11 MR. HAGENS: It is understood -- that the second  
12 paragraph, second sentence, starts out "It is  
13 understood, of course, that local interests, either the  
14 appropriate agency of Skagit County or the effected  
15 levee and diking districts, will provide all lands,  
16 easements and rights-of-way necessary for the work, and  
17 will hold the United States free from damages resulting  
18 from the reconstruction, and will maintain all the works  
19 after the completion."  
20 That portion, Your Honor.  
21 THE COURT: All right.  
22 MR. SMART: I think it's just been read, Your

23 Honor.  
24 MR. HAGENS: Yes, it has.  
25 THE COURT: Are you satisfied with that then, ¶

1 counsel?  
2 MR. HAGENS: Yes, I am.  
3 MR. SMART: Okay.

4 Q You don't know whether -- which levees along the river  
5 those were, Dike District 12 or Dike District 17 or Dike  
6 District 3 or whatever, do you?  
7 A Doesn't say in this letter. I have no personal  
8 knowledge of that.  
9 Q But this was four years prior to the major -- the last  
10 major change in Dike District 12's levee when they moved  
11 the levee closer to the river, correct?  
12 A That's correct. This letter is dated '51, and the big  
13 change in the levee in Diking District 12 upstream from  
14 Burlington was in '55.  
15 Q And so the Army Corps then would have inspected the  
16 dikes that were repaired along the Skagit within four  
17 years of that change, correct?  
18 A At the locations that were repaired. They didn't  
19 inspect the entire dike, they inspected the repair work  
20 that was done.  
21 Q I see. Let's look at 732. Sorry this is so cumbersome,  
22 but you guys create a lot of documents at the Army  
23 Corps.  
24 A What number did you say?  
25 Q 732, sir. ¶

1 732 is a February 4th, 1980 letter from Dike  
2 District 12 --  
3 A Excuse me. I got one page off. Okay.  
4 Q Letter dated February 4th, 1980, from Dike District 12  
5 to Colonel Morasaki, Department of the Army, Seattle  
6 District, Corps of Engineers?  
7 A That's correct.  
8 Q Related to PL99. It is related to the procedures by  
9 which the diking district must apply to sponsor a  
10 rehabilitation program; is that correct?  
11 A That's correct.  
12 Q And it also mentions conversation with Ernie Sabo?  
13 A That's correct.  
14 Q And Mr. Sabo is a man you worked with in the Army Corps,  
15 is he not?  
16 A He was an associate. He never worked for me.  
17 Q I said you worked with him.  
18 A He was in the Corps. In fact, he's still there.  
19 Q Okay.  
20 MR. SMART: Offer 732, Your Honor.  
21 MR. HAGENS: May I ask a question of the witness?  
22 THE COURT: Yes.  
23 MR. HAGENS: Have you seen this exhibit before?  
24 THE WITNESS: No, I haven't seen this exhibit

25

before. ¶

1 MR. HAGENS: Your Honor, this is not an ancient  
2 document. It's 1980, and I do think some foundation  
3 ought to be laid about this witness's knowledge of the  
4 exhibit.

5 Q Well, you understand that the subject matter referred to  
6 in the letter is just the standard procedure for  
7 applying for PL99 funds, and that is that the dike  
8 district has to make an application and agree to sponsor  
9 the program; isn't that right?

10 A That's right.

11 Q And that's simply the subject of the letter, is it not?

12 A That's basically it.

13 Q So it just addresses the procedures, and you agree that  
14 the way it's set forth in the letter by Mr. Walker is  
15 the way it worked, correct?

16 MR. HAGENS: Again, that's using the letter, the  
17 content of the letter, Your Honor. I think that's an  
18 improper question until it's been admitted, Your Honor.

19 MR. SMART: I'll offer it, Your Honor.

20 MR. HAGENS: I'll object, Your Honor. It's  
21 plainly hearsay.

22 MR. SMART: It's not hearsay.

23 MR. ANDERSON: No objection, Your Honor.

24 THE COURT: Counsel?

25 MR. SMART: It's not hearsay if he agrees with ¶

1 the procedure, and that's the reason for its being  
2 offered. It's not an authentication problem that Mr.  
3 Hagens is concerned about and that --

4 THE COURT: But are you offering the document for  
5 the truth of the matter asserted in the document?

6 MR. SMART: Just that he agrees with the  
7 procedure as to how the --

8 THE COURT: Well, I'll sustain the objection. He  
9 can testify as to what his understanding of that  
10 procedure would be.

11 MR. SMART: All right. I'll do it that way,  
12 Your Honor.

13 Q All right. Tell me again then or flush out, if you  
14 would, in detail what the procedure for a dike district  
15 to apply for PL99 funds would be, sir.

16 A I think any government agency, local government agency's  
17 the same thing, be it dike district, county or whatever,  
18 they've got to ask the Corps of Engineers for help, and  
19 they've got to agree to the provisions that the Corps  
20 will require, land easements and right-of way, hold the  
21 United States free and clear of all damages.

22 Q Okay. And I take it that in February of 1980 Dike  
23 District 12 asked the Army Corps are to have its dike  
24 repaired pursuant to PL99 as a result of 1979 high  
25 water; is that correct? ¶



1 MR. HAGENS: Again, he seems to be using the  
2 exhibit. If he has some independent recollection of  
3 that we have no objection to the question, but it  
4 doesn't seem to me he can ask it using the exhibit, Your  
5 Honor.

6 MR. SMART: He certainly testified, Your Honor,  
7 yesterday in response to Mr. Hagens questions that the  
8 dikes had been repaired under PL99. He talked about the  
9 various right to flood, right to control the dikes, a  
10 whole bunch of those issues and, of course, if he  
11 doesn't have any knowledge that Dike District 12 asked  
12 the Army Corps to repair its dike in February of 1980 he  
13 can certainly so testify.

14 A The only knowledge I have is this letter.

15 THE COURT: You may answer.

16 A I say the only knowledge I have is seeing this letter  
17 for the first time.

18 Q And is that because your investigation, sir, into the  
19 history of the Skagit River and its dikes and Diking  
20 District Number 12 and its relationship to the Corps and  
21 PL99 did not disclose the fact that Dike District 12  
22 made a request in 1980 to have its dike repaired  
23 pursuant to PL99?

24 A That's correct.

25 Q Did you investigate that at all as to how many times the ¶

1 dikes had been repaired by the Army Corps over the  
2 years?

3 A No. I didn't get in and look for every example. I knew  
4 they had been repaired here and there throughout the  
5 system by virtue of my employment.

6 Q Okay. Turn to 795, if you would, please, sir.

7 A Which one?

8 Q 795. Can you tell me what that document is, sir?

9 A This is a letter from the Department of the Army on  
10 Department of the Army letterhead, Seattle District  
11 Corps of Engineers, to Mr. Peter R. Walker, Secretary of  
12 the Skagit County Diking District 12.

13 Q Okay. And attached to that letter is an agreement  
14 between the United States of America and Skagit County  
15 Dike District Number 12; is that correct?

16 A Appears to be.

17 Q And that's for levee rehabilitation, apparently the same  
18 levee rehabilitation that was referred to in the earlier  
19 letter which you just saw for the first time.

20 A May or may not been, I don't know. I can't correlate  
21 one -- the two together, that's all.

22 Q Let me ask you about the agreement. Is this agreement  
23 that the dike district enters into between itself and  
24 the United States the typical form of agreement that any  
25 dike district would have to enter into at any time for ¶

1 securing PL99 funds? In other words, was there a  
2 standard form of agreement and is this one of them?

3 A This is a standard form. It's obvious it's been filled  
4 out by pen and by hand, yes.  
5 Q All right. And the form of agreement then would have  
6 been the same in 1980 as it was back as long as you can  
7 remember, which would be back to 1961, correct?  
8 A I couldn't say that. This is an area that are -- this  
9 is a real estate area I had nothing to do with.  
10 Q Well, yesterday you testified that the inspection -- you  
11 testified today that the inspection would only be of the  
12 amount of the dike that was repaired, correct?  
13 A That's true. That was what the -- this previous  
14 inspection reports we were talking about, they went out  
15 and inspected the portions of the levee that were  
16 repaired on PL99.  
17 Q And yesterday you indicated that the dike district would  
18 only have to agree to repair the portion of the dikes  
19 that had -- excuse me. Let me start over.  
20 Yesterday I think you testified that the dike  
21 district would only have to agree to maintain the  
22 portion of the dike that was actually repaired with  
23 federal funds. Do you remember that?  
24 A That's true.  
25 Q Would you turn to page two of the document, subparagraph ¶

1 d.  
2 MR. HAGENS: Which paragraph, counsel?  
3 MR. SMART: Subparagraph d.  
4 Q Read it to yourself, sir.  
5 A Do you want me to read it?  
6 MR. HAGENS: No.  
7 Q Read it to yourself.  
8 A I've read it.  
9 Q Does that not indicate that the agreement to maintain  
10 and operate the project after completion extends to all  
11 interrelated features?  
12 MR. HAGENS: Your Honor, this is improper use of  
13 an exhibit that has not been admitted in evidence.  
14 THE COURT: Sustained.  
15 MR. SMART: I'll offer the document, Your Honor.  
16 MR. HAGENS: We'd object without some further  
17 foundation about his knowledge of this particular  
18 exhibit.  
19 MR. SMART: Your Honor, he's testified that,  
20 first of all, that this is the form document used by the  
21 Army Corps. He testified yesterday and he testified  
22 today that the only agreement that a dike district has  
23 to make is to maintain a particular portion of a  
24 project, in other words, some narrow section that  
25 apparently gets repaired by PL99 money. This document ¶

1 specifically contradicts that and, in addition, what  
2 would the sense of that be, do you agree to repair --  
3 THE COURT: Mr. Hagens, anything else?  
4 MR. HAGENS: Yes, Your Honor. Again, the witness

5 has indicated he has no knowledge of how these actual  
6 deals were handled, and he said this is a real estate  
7 function and so, you know, we've been over this. He has  
8 no knowledge of this particular agreement. The  
9 foundation hasn't been laid.

10 MR. SMART: But Mr. Hagens' objection remains on  
11 a hearsay basis.

12 MR. HAGENS: There are also some other pages  
13 attached to this exhibit that -- there's multiple pages  
14 to this, in addition to the two or three that he's had  
15 the witness identify. I have no idea what those  
16 contain. So, yes, we would object at this point on the  
17 grounds stated.

18 MR. SMART: My point, Your Honor, is Mr. Hagens  
19 opened the door. He had the witness testify as to what  
20 the obligations were. Now we have the document for the  
21 repair of the dike districts, and he says it's -- the  
22 witness can't testify about it. What's sauce for the  
23 goose is sauce for the gander.

24 THE COURT: I don't know about that. But this  
25 particular document has been testified by the witness as ¶

1 something that's beyond his purview and expertise when  
2 he was with the department and doesn't otherwise qualify  
3 as some sort of an exception, so I'll sustain the  
4 objection.

5 Q Would it be correct to state then, Mr. Regan, that you  
6 really don't know and don't have anything to do with the  
7 operations division or the real estate division that  
8 controls what the agreements are between the United  
9 States and the diking districts?

10 A I had nothing to do with that.

11 Q So then you wouldn't know what the obligation would be  
12 to maintain and how far that would extend to the dike  
13 district?

14 A It was my understanding --

15 Q Well, the question is what you know.

16 A What I -- my understanding and what's on this paper are  
17 different.

18 Q Okay. So that if this document's correct, then your  
19 understanding is wrong, isn't it?

20 A That's correct.

21 Q And during this investigation that you performed into  
22 the history and relationships of the various  
23 governmental entities controlling these dikes, you never  
24 discovered any of these documents concerning the  
25 maintenance agreements that were signed by diking ¶

1 districts with the Army Corps.

2 A I never discovered any of these, no.

3 Q Did you look for any?

4 A I didn't look for any of these, no.

5 Q Would you turn to 786 for me, please, sir.

6 Can you identify what 786 is for me, sir?

7 A Maintenance and emergency repair flood control works,  
8 emergency flood control activities under PL99-84. Army  
9 Corps of Engineers, Seattle District.

10 Q Let me ask you a question. How long has PL99 been in  
11 effect?

12 A Quite some time. I can't give you a date.

13 Q It's been since the forties, hasn't it?

14 A I believe so, yes.

15 Q So, since the forties, when a dike district applies to  
16 the Army Corps for repair of the dikes, the dike  
17 district has to enter into agreement with the Army Corps  
18 to get that money, right?

19 MR. HAGENS: Objection. Who has to? Enter. I  
20 didn't hear.

21 MR. SMART: The dike district.

22 MR. HAGENS: I'll object to the lack of  
23 foundation as to who actually enters into the agreement,  
24 counsel.

25 Are you representing that only dike districts ¶

1 have entered into such maintenance agreements and the  
2 county never has? Is that your representation implicit  
3 in the question?

4 MR. SMART: Not at all. My question was when a  
5 dike district applies for money does it have to enter  
6 into agreement controlled by these regulations under  
7 PL99.

8 THE COURT: If you know you may answer.

9 A I believe that's correct.

10 Q And this document is a Army Corps document which is a  
11 set of standards for maintenance and emergency repair of  
12 flood control works; is that correct?

13 A I don't know if it's a standard. That's what it states,  
14 is maintenance and emergency rear pair of flood control  
15 works.

16 Q And take a look at the document if you would, sir,  
17 please. Don't it have design criteria in there for how  
18 the dikes are to be repaired?

19 A Doesn't really get into the repair, it gets into the  
20 flood fighting. All the sketches in the back show  
21 different ways of flood fighting. Doesn't really show  
22 if you had a big failure how you would go about  
23 repairing it.

24 Q In your search for documents related to the history of  
25 the dikes, their construction, repair, maintenance, did ¶

1 your come across this document?

2 A I've seen this document before.

3 Q And is this a document that's maintained by the Army  
4 Corps?

5 A It is.

6 MR. SMART: I'll offer 786, Your Honor.

7 MR. HAGENS: May I ask one or two questions about  
8 this?

9 THE COURT: Yes.  
10 MR. HAGENS: Mr. Regan, insofar as you're aware,  
11 the matters that you've been able to review here on the  
12 stand, does it look accurate and complete with the one  
13 that you saw?  
14 THE WITNESS: I couldn't hear you.  
15 MR. HAGENS: Insofar as you've been able to  
16 determine, is it complete, so far as you can tell?  
17 THE WITNESS: As far as I can tell. It's got a  
18 table of contents in it, and the table of contents takes  
19 you up to page ten, and page ten is in there.  
20 MR. HAGENS: You've seen this before?  
21 THE WITNESS: Yeah.  
22 MR. HAGENS: We have no objection.  
23 MR. ANDERSON: No objection, Your Honor.  
24 THE COURT: All right, 786 will enter.  
25 (Whereupon, Defendant's

1 into evidence.)

2  
3 Q Now, if you would turn, please, to page four of the  
4 document. Would you read that paragraph entitled  
5 "Maintenance and Readiness."?  
6 A "To obtain the maximum flood protection, it is essential  
7 that maintenance be provided so as to insure  
8 serviceability of structures and facilities at the time  
9 of the flood. Although flood fighting is generally  
10 restricted to certain seasons of the year, the majority  
11 of the maintenance work can be most effectively carried  
12 on if planned on an annual basis. The following should  
13 be carried on as routine maintenance."  
14 Q And then says filling holes, repair gaps, re-sodding  
15 areas, clearing the floodway, and immediately after each  
16 flood, the river side of the levee should be inspected  
17 for sloughing and necessary restoration made?  
18 A That's correct.  
19 Q Those are the instructions of the Army Corps for  
20 maintenance pursuant to PL99?  
21 A That's true.  
22 Q And the goal, in fact the instruction on the Army Corps,  
23 is to obtain the maximum flood protection, correct?  
24 MR. HAGENS: Objection.  
25 A No. ¶

1 THE COURT: Counsel?  
2 Q That the not the goal.  
3 MR. HAGENS: I think -- is the witness's  
4 interpretation of maximum flood protection? I don't  
5 understand what the question calls for.  
6 THE COURT: Rephrase the question.  
7 MR. SMART: My question, Your Honor, is simply  
8 whether or not it is the goal of the Corps to have these  
9 dikes repaired so that they provide maximum flood  
10 protection, and if he doesn't know he can certainly

11 answer.  
12 THE COURT: Sir.  
13 A The goal is to provide the maximum flood protection that  
14 the structure can provide. It doesn't mean -- make them  
15 bigger, it means maintain them to the -- within these  
16 guidelines to provide the maximum protection that it  
17 could provide.  
18 Q In other words, it's the goal of the Corps not to have  
19 the levee fail, right?  
20 A Not to have it fail by a blowout, correct.  
21 Q Right. So that when we have -- can I have the keyways  
22 and riprap exhibit.  
23 So then when we talk about projects such as this  
24 to put in a keyway or to have riprap added so that the  
25 levee doesn't erode, those projects which are designed ¶

1 specifically, as you said yesterday, to keep the levee  
2 from being undermined and failing are specifically  
3 projects that fit within the goal of the Corps to  
4 maintain the maximum flood protection and to insure  
5 serviceability. Wouldn't that be correct?

6 MR. HAGENS: Objection as to the form of the  
7 question. In fact, keyways and all the other matters  
8 that he's just mentioned are no way mentioned as a  
9 maintenance project in that particular exhibit, so it's  
10 a mischaracterization of the exhibit itself, Your  
11 Honor.

12 MR. SMART: We're not talking about maintenance  
13 or anything else, we're just talking about whether or  
14 not these types of projects would be ones that fit  
15 within the Corps' goal to insure maximum flood  
16 protection so the levee doesn't blow out.

17 THE COURT: You may answer.

18 A It wouldn't be a requirement, no.

19 Q I'm not saying it's a requirement, I'm saying it fits  
20 within their goal to provide maximum protection, doesn't  
21 it?

22 A Says here to obtain maximum flood protection, and goes  
23 on to speak a few more words, "The following work should  
24 be carried out on routine maintenance, fill holes,  
25 repair gaps, re-sod areas, clear floodway of growth, ¶

1 immediately after inspect." It doesn't talk about a  
2 keyway.

3 Q And if you had a dike that didn't have a keyway and it  
4 was in danger of failing, that wouldn't be something the  
5 Corps would want, does it?

6 MR. HAGENS: That calls for speculation on the  
7 part of the witness. I object to the form of the  
8 question.

9 MR. SMART: The witness has clearly testified as  
10 to what the Corps goals are about these maintenance and  
11 repair standards.

12 THE COURT: Going back to the other objection,

13 I'll sustain the initial -- the earlier objection. The  
14 witness has had a chance to read the requirements that  
15 are below maintenance and they don't specify any of  
16 those other areas, so what I'm saying, we're working off  
17 of this and trying to extrapolate. I'll sustain an  
18 objection as to that.

19 MR. SMART: Let me put this aside, because all my  
20 question was, didn't this fit within the correspondence  
21 goals to obtain maximum flood employee text.

22 THE COURT: I have no problem with that line of  
23 questioning.

24 Q Wouldn't it be true, sir, that repair operations  
25 designed to insure the integrity of the levee fit within ¶

1 the Army Corps' goal?

2 MR. HAGENS: Goals for what? Object.

3 MR. SMART: The integrity of the levee.

4 THE COURT: All right. I'll allow that question.

5 A I don't believe it would have been a requirement. It  
6 might be interpreted to fit within the goals, but I  
7 can't say that one way or another.

8 Q Is that because you don't know?

9 A I don't know.

10 Q So what when you testified yesterday concerning what the  
11 procedures of the Army Corps are with respect to  
12 repairing and maintaining levees and when you testified  
13 today concerning that subject, it's not with any  
14 knowledge even of what the Army Corps' goals are with  
15 respect to maintenance proposals; is that correct?

16 A Basically the goals are what is stated here.

17 Q So insure maximum flood protection and to insure the  
18 integrity of the dike?

19 A By doing the following work.

20 MR. HAGENS: I object.

21 Q And when you have inspected these dikes in 1979 and  
22 1975, you saw the riprap and repair projects, did you  
23 not?

24 A We saw some riprap.

25 Q And you have an Army Corps inspector even after you left ¶

1 the Corps that would inspect it on a yearly basis, would  
2 you not?

3 MR. HAGENS: Inspect what?

4 MR. SMART: The dike.

5 MR. HAGENS: The repair jobs or the dikes?

6 MR. SMART: The dike.

7 MR. HAGENS: I'll object to the form.

8 A I don't believe the Corps, on an annual basis, inspects  
9 the entire dike, no.

10 Q Do you know whether they do or not?

11 A The previous inspection report said they inspected  
12 between River Mile 5 and 5.2, and they talked about  
13 another inspection between some other little -- they're  
14 looking at certain areas.

15 Q Let get back to my question. Do you know or do you not  
16 know whether the Army Corps inspects the dikes on an  
17 annual basis?

18 MR. HAGENS: Objection. What portion?

19 MR. SMART: The dikes along the Skagit River.

20 MR. HAGENS: Lack of foundation.

21 THE COURT: In their entirety. Is that your  
22 question?

23 MR. SMART: Right.

24 A I firmly believe they don't inspect the entire dike.

25 Q The question, sir, is do you know? ¶

1 MR. HAGENS: He just answered the question, Your  
2 Honor. It's repetitious. He says he believes they do  
3 not.

4 THE COURT: Overruled. Overruled. You may  
5 answer.

6 Q The question is --

7 A During the time I was with the Corps that was not done.

8 Q Do you know whether they do it now?

9 A I don't know.

10 Q Thank you, sir.

11 THE COURT: All right, counsel. We'll take our  
12 evening recess then at this point.

13 Actually we're taking our weekend recess at this  
14 point. Tomorrow's Friday and we do not hear this case  
15 on Fridays, generally speaking. So, ladies and  
16 gentlemen, I'll ask you to be back in the jury room  
17 Monday morning -- be back in the jury room at 9:25  
18 Monday morning ready to proceed.

19 Again, the Court's admonition, please do not  
20 discuss this case among yourselves or with anyone else.

21 Especially over the longer breaks on weekends and  
22 holidays, it's very important that you not discuss this  
23 case, and should something begin to surface in the media  
24 as this case progresses, please do not read it, listen  
25 to anyone who is reading, talk to anyone who has read, ¶

1 radio, television, any other media sorts whatsoever.

2

3 And I'm assuming that since we planned a view for  
4 next week, that that's greatly reduced the temptation  
5 that I'm sure we all felt to rush up to the Nookachamps  
6 this weekend and take a look on our own as to what's  
7 going on, so, again, that sort of thing we do have to  
8 discuss, so if your coming and going to any destination  
9 over the weekend would somehow include going by the area  
10 that we talked about, now or at any time during the  
11 course of this trial, please do not stop and investigate  
12 and get out and look for high water marks or those sorts  
13 of things, none of that sort of thing, as tempting as it  
14 might be to do it.

15 And, again, the cornerstone of a fair trial in  
16 this case is going to be the fact that no one in the



17 jury has made up their mind about this case until  
18 they've heard all the evidence, or begun to make up  
19 their mind in some way by discussing it or beginning to  
20 have some sort of bent one way or the other about the  
21 case. We're a long way from hearing all there is to be  
22 said about this case, obviously.

23 And, with that, I hope you have a very pleasant  
24 weekend, and we'll see you Monday morning at 9:25 in the  
25 jury room. ¶

1 Thank you.

2 (Whereupon, the following  
3 occurred out of the presence  
4 of the jury:)

5 THE COURT: Be seated, please.

6 All right, counsel, any issues that need  
7 to be addressed before we --

8 MR. SMART: Nothing here, Your Honor.

9 MR. ANDERSON: Your Honor, I did raise the issue  
10 of the limiting instruction, and I apologize, I should  
11 have raised that before the jury returned.

12 THE COURT: And, again, give me the citation?

13 MR. ANDERSON: The citation's RCW 86.16.071, 71  
14 which provides that the State will incur no liability as  
15 a result of its exercise of the responsibilities, duties  
16 and authorities under RCW Chapter 86.16.

17 The document, 512A, the statutory provisions that  
18 were quoted to the jury from that are directly out of  
19 RCW 86.16 relate to the regulatory authorities and  
20 responsibilities of the State, and it's the State's  
21 position that that statute provides that there is no  
22 liability in the State's exercise of that, and to the  
23 extent that that evidence is introduced into trial and  
24 those statutory provisions are introduced in the trial,  
25 the jury should be instructed that the State is not ¶

1 subject to liability for exercising that authority.

2 An additional basis that the State would request  
3 the instruction on, Your Honor, is that the counsel's  
4 claim in this case is that they act as the State's  
5 agent, and we have been many miles down the road now and  
6 I still have seen no other claim, other than the county  
7 acts as the State's agent, and to the extent that that  
8 evidence doesn't require the county to do anything,  
9 there is nothing in that letter that required the county  
10 to maintain the dikes, nothing in that letter required  
11 the county to do anything, and so it's not relevant to  
12 any of the issues in this case as they relate to the  
13 county's claim against the State, so the jury should so  
14 be instructed that although it may be considered as to a  
15 defense of the county, it should not be considered as  
16 evidence that the State is liable or that the county  
17 acts as the State's agent.

18 MR. SMART: Your Honor, this is just a rehash of  
19 the argument on summary judgment with regard to  
20 immunity. The Court has already ruled on immunity. You  
21 will remember that there is a county immunity statute as  
22 well, and I think what Mr. Anderson is asking is that  
23 the Court instruct the jury that the State is immune,  
24 when the Court has already ruled that the State is not  
25 immune, and that the constitution trumps the immunity ¶

1 statute for want of a better thing. I don't think  
2 there's anything inherent in this argument more than  
3 that.

4 MR. ANDERSON: Your Honor, it's the State's --  
5 the State's position is clearly these are regulatory  
6 functions that we're talking about, and the State, as  
7 Mr. Smart, I am sure, is going to argue to the jury many  
8 times and is going to present much evidence, there are a  
9 lot of -- there's a variety of activities that the  
10 State's involved in in terms of this, but in specific  
11 respect to the regulatory activities, since 1935 the  
12 legislature, when they passed the statute for regulatory  
13 activities, has said that the State will not incur  
14 liability. The fact that the State regulates these  
15 activities does not establish a taking, doesn't  
16 establish ownership and is not intended to create  
17 liability on the part of the State.

18 THE COURT: Counsel, I would agree with -- I'm  
19 sorry, Mr. Hagens.

20 MR. HAGENS: No. I'm not in on this. It's one  
21 battle I'm trying to stay out of, Your Honor.

22 THE COURT: I think Mr. Smart's position is well  
23 taken. This is a reiteration of the essence, if you  
24 will, of the motion that the Court has already dealt  
25 with and ruled upon, and for the reasons stated with ¶

1 respect to the court's order in limine in this case,  
2 I'll deny the motion.

3 MR. ANDERSON: Just for clarification --

4 THE COURT: That's not saying at some point down  
5 the road at the end of the case the State is not going  
6 to be able to argue for instructions relative to your  
7 theory of the case. I'm not saying that we're just  
8 throwing your theory of the case out, I'm certainly  
9 saying at this point in time I don't believe that the  
10 interplay of this statute is relevant to the type of  
11 information that's being given to the jury at this point  
12 in time, so there will be no limiting instruction  
13 offered pursuant to that statute at this point in time.  
14 That's all I'm saying.

15 MR. ANDERSON: What about with regard to the  
16 relevance objection, Your Honor, with regard to the  
17 issue of relevancy, whether it's relevant to any of the  
18 claims that the county has against the State, because I  
19 think that's a separate contention by the State.

20 THE COURT: All right. I'm sorry, as to -- what  
21 is relevant?

22 MR. ANDERSON: Whether -- whether the State's  
23 entitled to a limiting instruction that this does not  
24 establish any requirement on the part of the county to  
25 act. While the jury may consider it as evidence or as ¶

1 to any defense the county may have, it is not evidence  
2 that the county acts as the State's agent.

3 MR. SMART: Well, Your Honor, I mean -- I think  
4 this is a matter -- Your Honor hit it on the head, it's  
5 a matter for instructions later on. It's not a matter  
6 for now. Every time a document comes into evidence, if  
7 the Court had to instruct what the possible  
8 ramifications on the various theories would be we'd  
9 never get done.

10 THE COURT: I agree. I agree, on the same  
11 basis. This is not -- this would not be the proper time  
12 to be instructing the jury on the relevance or the  
13 relationship in the evidence. Those are the functions,  
14 you know, solely of the trial court and the rulings that  
15 the trial court makes with respect to the admissibility  
16 of evidence covers that and, again, the State will be  
17 allowed at the end of the case to -- I'm sure they're  
18 going to be able to fashion instructons that would allow  
19 you to argue your theory of the case at that point.

20 All right, counsel, anything else?

21 MR. HAGENS: Yes, I did want that one citation.  
22 The citation about the useability of a pleading and I  
23 didn't -- the Court had it. I did not. The case you  
24 cited to the judge.

25 MR. MAJORS: I'll get it. ¶

1 MR. SMART: It's in our instructions, Carl.

2 MR. HAGENS: I'll get the cite. I didn't know if  
3 you had it or who had it.

4 THE COURT: So Monday morning then.

5 MR. ANDERSON: Monday morning it is.

6 THE COURT: Have a pleasant weekend.

7 THE COURT: Thank you.

8 (Court was adjourned.)

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